

**CRIMINAL CHARGES BROUGHT IN CASES OF ROAD DEATH  
INCIDENTS IN THE EAST MIDLANDS: IMPLICATIONS FOR  
LAW REFORM**

**Thesis submitted for the degree of**

**Doctor of Philosophy**

**at the University of Leicester**

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**June 2004**

## **Abstract**

This thesis explores the way in which the criminal law deals with drivers who kill. Special offences exist to provide specific offence labels and punishment for drivers who cause death when driving dangerously or carelessly when under the influence of drink or drugs. However, the general homicide offence of manslaughter is also capable of providing an alternative offence label in cases involving the causing of death through gross negligence. A driver who kills might alternatively face the lesser charge of driving without due care and attention. Knowledge of the way in which these offences operate in practice in cases of road-death was previously sparse. This thesis involves an empirical study of police and Crown Prosecution Service files relating to road-deaths, in an endeavour to increase knowledge on such matters, and to inform proposals for law reform.

Over three hundred road-death files were accessed across the three counties of Leicestershire, Lincolnshire and Northamptonshire, in the East Midlands of England. This thesis explores the role of prosecutorial discretion in such cases, examines the difficulties faced by police and prosecutors investigating and prosecuting offences linked to road-death, and subsequently addresses the question of whether reform of the substantive law is desirable. Whilst the first six chapters deal with the practicalities of conducting the empirical research and presenting the results, the latter chapters engage in a more theoretical discussion of the importance of providing a clear and logical offence structure to this area of the law. This discussion draws on both the empirical findings of the current study and existing literature relating to the philosophy of the criminal law generally and to criminological and psychological explanations for breaches of traffic laws specifically. Ultimately, a new hierarchy of offences is proposed, requiring the abandonment of the current offences contained within the Road Traffic Act 1988.

# Table of Contents

<b>Abstract</b>	<b>ii</b>
<b>Table of Contents</b>	<b>iii</b>
<b>Acknowledgements</b>	<b>vii</b>
<b>List of Abbreviations</b>	<b>viii</b>
<b>Chapter 1 – Introduction</b>	<b>1</b>
<b>Chapter 2 – The Current Law</b>	<b>8</b>
<b>Offences reflecting the fact death has been caused</b>	<b>9</b>
Murder	9
Manslaughter	10
Causing Death by Dangerous Driving	17
Causing Death by Careless Driving Whilst Under the Influence of Drink or Drugs	21
Aggravated Vehicle-Taking	24
<b>General Driving Offences</b>	<b>27</b>
Careless Driving	27
Excess Speed	28
Other offences	29
Offences beyond the scope of this study	30
<b>Defences</b>	<b>30</b>
Duress of circumstances	30
Automatism	31
<b>Procedural issues</b>	<b>32</b>
Alternative verdicts	32
Time limitations	32
<b>Chapter 3 – The Empirical Study</b>	<b>33</b>
<b>Background: the Coventry Study</b>	<b>34</b>
<b>Aims and Objectives</b>	<b>37</b>

<b>Research Design</b>	<b>39</b>
Getting Permission and Finding a Sample	46
Accessing Files	50
Interviews	54
Data Analysis	55
<b>Chapter 4 – Prosecutorial Discretion in Road Death Incidents</b>	<b>58</b>
<b>The role of discretion</b>	<b>59</b>
<b>The Police</b>	<b>63</b>
Lincolnshire	63
Northamptonshire	65
Leicestershire	67
Police discretion	70
<b>The Crown Prosecution Service</b>	<b>78</b>
<b><i>Aids to Decision Making: The Code for Crown Prosecutors and Driving Offences Charging Standard</i></b>	<b>87</b>
The Code for Crown Prosecutors	87
The Driving Offences Charging Standard	92
<b>Chapter 5 – Empirical Findings: Charging Decisions</b>	<b>97</b>
<b>Cases involving lesser culpability due to the standard of driving</b>	<b>98</b>
NFA vs. Careless Driving	98
NFA vs. Speeding vs. Careless Driving	105
<b>Cases involving greater culpability due to the standard of driving</b>	<b>107</b>
CDDD vs. careless driving	107
Manslaughter vs. CDDD	120
<b>Cases involving drugs or alcohol</b>	<b>125</b>
<b>Cases involving TWOC</b>	<b>129</b>
<b>Cases where the danger came from something other than the standard of driving</b>	<b>131</b>
CDDD based on the condition of the vehicle	131

<b>Chapter 6 – Empirical Findings: Outcomes and Discussion</b>	<b>134</b>
<b>Prosecution Success Rates</b>	<b>135</b>
Cases resulting in conviction	135
Guilty Pleas	138
Unsuccessful Prosecutions	141
<b>Sentencing</b>	<b>147</b>
Sentences for CDDD	147
Sentences for Careless Driving	151
Sentences for other offences	154
<b>Appeals</b>	<b>154</b>
Appeals against conviction	154
Sentencing Appeals	156
<b>Discussion of Empirical Findings</b>	<b>157</b>
<b>Chapter 7 – The Role of the Criminal Law</b>	<b>161</b>
<b>Criminalization and Punishment</b>	<b>162</b>
Making Bad Driving Criminal	162
Aims of and Justification for Punishment	164
<b>The Problem: Perceiving Traffic Offences as “True Crime”</b>	<b>177</b>
<b>Achieving the Aims</b>	<b>185</b>
Identifying motoring offenders	186
Deterring and Educating Motoring Offenders	189
<b>Chapter 8 – Law Reform</b>	<b>195</b>
<b>The North Report</b>	<b>196</b>
Definition of Bad-Driving Offences	196
A separate offence of CDDD?	200
<b>Recent Proposals</b>	<b>206</b>
Definition of Bad-Driving Offences	206
Separate Causing Death Offences	209

<b>The Law in other Jurisdictions</b>	<b>212</b>
Australia	212
<b>A Suggestion</b>	<b>222</b>
<b>Chapter 9 – Conclusion</b>	<b>233</b>
<b>Bibliography</b>	<b>238</b>
Books and articles	238
Table of Cases	248
Table of Statutes	251
Australian Legislation	252
Websites	252
Newspaper Reports	252
Other Materials	253

## Acknowledgements

I would not have been able to complete this study without the financial help provided by the University of Leicester in awarding me an Open Scholarship, and by the Department of Law at the University of Leicester, which paid my fees for the last five months of the study. The empirical nature of this study required the cooperation and help of several individuals and organisations. Thanks go to police officers and civilian staff working for the three police forces involved in the study – Leicestershire, Lincolnshire and Northamptonshire. These include (but I am sure the list is not exhaustive): the Data Protection Officer from each force; staff from the Road Safety Partnership in Lincolnshire; staff from the Accident Enquiry Unit at Charles Street Police Station, Leicester; staff in the Central Accident Bureau at Mereway, Northampton. Great help was provided to me in the form both of administrative support and cooperation in interviews. Thank you also to Kenneth R. Williams Q.P.M., B.A., Chief Constable of Norfolk and Chair of the Road Policing Committee of the Association of Chief Police Officers, who supported my study by endorsing my research proposal at an early stage. I would also like to express gratitude to members of staff at the Crown Prosecution Service, both at headquarters and in each of the three areas, who located files and provided me with a room in which to read them. The contribution from Crown Prosecutors in interview was invaluable. The support of the Chief Crown Prosecutor from each area was particularly appreciated.

On a more personal note I would like to thank my aunt and uncle, Jenni and David, for their hospitality in providing me with a place to stay near to Lincoln when conducting my data collection. I would like to thank my parents for their support, and, in particular, my father, who very efficiently proof-read my final draft at very short notice. I would have found the whole process of writing this thesis a far more arduous one without the every-day support of my husband Matt, who demonstrated great patience. It was my supervisor at the University of Leicester, Professor C.M.V. Clarkson, though, whose contribution to the writing of this thesis was fundamental in achieving the end product. He showed great fortitude in reading draft after draft of chapters; a tedious task at a time when there were many other demands made of his time. It was not only his advice as to my writing that is appreciated, however. My self-esteem, and, as a result, my work, has benefited enormously from his encouragement. Other staff at the University also deserve my gratitude for their support. Elsewhere, Professor Barry Mitchell at Coventry University can be held responsible for being the first to suggest that I ought to embark upon a PhD. He helped in laying the groundwork for my ideas for this study, for which I am most grateful.

## List of Abbreviations

ACPO	Association of Chief Police Officers
AMCC	Australian Model Criminal Code
ASU	Administrative Support Unit
BAC	Blood/Alcohol Concentration
CAQDAS	Computer-Assisted Analysis of Qualitative Data
CCP	Chief Crown Prosecutor
CDCDUI	Causing Death by Careless Driving Under the Influence (of drink or drugs)
CDDD	Causing Death by Dangerous Driving
CDRD	Causing Death by Reckless Driving
CI	Collision Investigator
CID	Criminal Investigation Department
CIR	Collision Investigation Report
CJU	Criminal Justice Unit
CPS	Crown Prosecution Service
CSO	Community Service Order
D	the Defendant/Suspect
DDP	Director of Public Prosecutions
DETR	Department for the Environment, Transport and the Regions
GBH	Grievous Bodily Harm
HGV	Heavy Goods Vehicle
LPU	Local Policing Unit
NDIS	National Driver Improvement Scheme
NFA	No Further Action
NSW	New South Wales
OIC	Officer in the Case
PSV	Public Service Vehicle
RDI	Road Death Incident
RDIM	Road Death Investigation Manual



RTA	Road Traffic Act 1988
SCI	Senior Collision Investigator
SIO	Senior Investigating Officer
TRL	Transport Research Laboratory
TWOC	Taking Without Consent (offence under s.12 Theft Act 1968)
V	the deceased/victim
VE	Vehicle Examiner
WA	Western Australia
YOI	Young Offender Institution

## Chapter 1 – Introduction

Cars and other motor vehicles have now been around for over a century,<sup>1</sup> and there is no doubt that they have had an enormous impact on both society as a whole and the lives of individuals. As noted by Perkin, the automobile has “determined where we live and work, and so the shape and character of the human community”.<sup>2</sup> It has liberated individuals by enabling them to travel where they choose, thus producing freedom of choice as to where they live and work, as well as providing a valuable method of transport for commercial purposes. Yet in addition to numerous advantages created by its invention, the motor vehicle has brought with it disadvantages of equal significance.

Pollution and congestion are two such drawbacks, but perhaps the most damaging feature of motor vehicles is their ability to cause death and injury. The danger caused by motorised traffic was nothing new: before the invention of the car horse-drawn vehicles had been a cause of death on the roads.<sup>3</sup> But as the car became more popular and affordable and was able to achieve higher speeds, the death rate on the roads soared. In 1913, when there were 106,000 cars on the roads, the number of fatal road traffic accidents was 1,743.<sup>4</sup> By 1935, when mass-production and the increase in disposable income of the middle classes allowed more people to afford cars, there were 1,477,000 cars on the roads and 6,437 fatalities.<sup>5</sup> Improvements to roads and safety campaigns caused a drop in the fatality rate in the late 1930s until after the war, when cars became available to the masses and fatalities rose to 7,407 in 1973.<sup>6</sup>

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<sup>1</sup> The first motor car was imported into England in 1894: Perkin, H., *The Age of the Automobile*, London: Quartet Books, 1976, p.7.

<sup>2</sup> Ibid, p.129.

<sup>3</sup> Foreman-Peck, J., “Death on the Roads: Changing National Responses to Motor Accidents” in Barker, T. (ed.), *The Economic and Social Effects of the Spread of Motor Vehicles*, London: Macmillan, 1987, p.265.

<sup>4</sup> Emsley, C., “‘Mother, What *Did* Policemen Do When There Weren’t Any Motors?’ The Law, the Police and the Regulation of Motor Traffic in England, 1900–1939” (1993) 36(2) *The Historical Journal* 357 at 358–359.

<sup>5</sup> Ibid.

<sup>6</sup> Perkin, n.1 above, p.227.

Given the high cost of motor vehicles in terms of lives lost, not to mention the financial expense of traffic collisions,<sup>7</sup> Foreman-Peck describes the initial policy reaction as “strangely muted”.<sup>8</sup> This can be explained, he suggests, by the distribution of costs and benefits of the motor vehicle.<sup>9</sup> As with many new inventions that bring problems as well as benefits,<sup>10</sup> laws were passed to regulate the use of motor vehicles, with the aspiration to reduce death and injury. Such laws, along with engineering innovations, have gone some way to achieving such aims, with the current annual death rate being around 3,500.<sup>11</sup> It has been reported that other countries, such as the United States, wish to adopt similar laws to those in Britain, such as seatbelt laws, tougher drink-driving laws and the use of speed cameras, because Britain has the lowest death rate from driving in the developed world.<sup>12</sup> Yet death on the roads remains a problem, with a fifth of the deaths of children aged 5–19 years being due to traffic collisions.<sup>13</sup> In 1987 the Government set a target to reduce road casualties by one third by 2000.<sup>14</sup> Although this was achieved in relation to deaths, which fell by 39%, this reduction seems to have been achieved through improvements in vehicle design and medical treatment, rather than driver behaviour, since the number of collisions and slight injuries has not seen such a significant decrease.<sup>15</sup> The Government has recently therefore introduced a further initiative, setting new targets for casualty reductions to be achieved by 2010.<sup>16</sup>

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<sup>7</sup> The Government currently estimates the cost of collisions involving deaths or injuries at £3billion a year: Department for the Environment, Transport and the Regions, *Tomorrow's Roads – Safer for Everyone*, 2000, para.1.1.

<sup>8</sup> Foreman-Peck, n.3 above, p.269.

<sup>9</sup> Ibid.

<sup>10</sup> e.g. the railways and industrial machinery and, more recently, networked personal computers, which bring with them dangers posed by paedophiles and fraudsters.

<sup>11</sup> DETR, n.7 above. In 1999 there were 3,423 deaths on the roads, and in 2000 there were 3,409: Department for Transport, Local Government and the Regions, *Road Accidents Great Britain 2000: The Casualty Report*, London: The Stationery Office, 2001.

<sup>12</sup> *The Independent*, 28.11.03.

<sup>13</sup> *Road Accidents Great Britain 2000: The Casualty Report*.

<sup>14</sup> DETR, n.7 above, para.1.3.

<sup>15</sup> Ibid. Serious injuries reduced by 45%.

<sup>16</sup> Ibid, para.1.4.

This initiative recognises that part of the solution to the problem is to produce safer drivers, a recognition that underlies two of the ten main themes in the document *Tomorrow's Roads – Safer for Everyone*.<sup>17</sup> It identifies seat-belt legislation and changes in attitudes to drink-driving as having helped reduce deaths in the past, and notes that in the wider context tackling road crime such as speeding and dangerous driving is important not only to produce further reductions, but also as an important part of the wider crime-reduction agenda.<sup>18</sup> At the same time, the Government has recently conducted a review of the penalties for traffic offences,<sup>19</sup> as well as commissioning a report on the current law on dangerous driving.<sup>20</sup>

Despite such action, knowledge of the way in which the law on dangerous driving operates remains minimal. This thesis takes a closer look at the operation of the criminal law in dealing with drivers who kill. As will be explained in Chapter 3, the idea to conduct an empirical study of the criminal law in this area originated from a concern that cars not only lead to death from being driven carelessly or dangerously, but are also extremely effective weapons widely available to murderers and manslaughterers. The suspicion was that the very existence of an offence of causing death by dangerous driving conceals the number of cases of murder or manslaughter in which the weapon causing death is a motor vehicle.<sup>21</sup> The results of this study cast doubt on whether such a suspicion is well founded, but the findings raise further important issues in relation to motoring offences.

In order to provide the reader with the tools to understand the findings of the study, Chapter 2 provides a summary of the law in relation to the offences which are available in a case of road death. Those offences selected include offences reflecting the fact that a death has been caused, namely murder, manslaughter, causing death by dangerous driving, causing death by careless driving whilst under the influence of drink and drugs, and causing death by aggravated vehicle

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<sup>17</sup> Above, n.7.

<sup>18</sup> Ibid, para.1.10.

<sup>19</sup> Home Office, *Report on the Review of Road Traffic Penalties*, London, 2002.

<sup>20</sup> Pearce, L.M., Knowles, J., Davies, G.P., and Buttress, S., *Dangerous Driving and the Law*, Road Safety Research Report No.26, Transport Research Laboratory, 2002.

<sup>21</sup> See Cunningham, S., "The Reality of Vehicular Homicides: Convictions for Murder, Manslaughter and Causing Death by Dangerous Driving." [2001] CrimLR 679.

taking. Also included are offences which punish risk-taking on the roads, and which are designed to make the roads safer by deterring such risk-taking, such as careless driving and speeding. The significance of the inclusion of careless driving is primarily to illustrate the problem in defining different levels of risk-taking, and therefore criminality. It will be seen that what distinguishes careless driving from dangerous driving (and thereby from causing death by dangerous driving) is the degree by which a piece of driving falls below the standard expected of a competent and careful driver. This dividing line between the two offences is later shown to be problematic in the application of the current law. Also included are short explanations of some of the possible defences to a charge of dangerous or careless driving, and of some of the important procedural issues involved in prosecuting such cases.

Chapter 3 is similarly descriptive in nature, setting out the aims and objectives of the empirical study, justifying the chosen research design and explaining the method used in attempting to answer the questions forming the subject of the hypotheses. It starts by explaining the background of the current study, before detailing the process involved in organising and setting up the empirical research, which involved accessing police and Crown Prosecution Service (CPS) files for road death incidents in three counties. Of significance was the need to gain permission to access such files, which was a difficult project in itself. The current study was limited to researching the law in a limited geographical area, for reasons explained in that chapter. Three counties in the East Midlands, Lincolnshire, Leicestershire and Northamptonshire participated in the study,<sup>22</sup> and it should be noted that the results of the study can only purport to be representative of that area. The chapter ends by explaining how the data collected through such access was analysed in order to test the hypotheses.

Although Chapter 2 gives an outline of the law to be applied in cases of road death, such a description is not sufficient in explaining how different charges come to be brought in such cases. Chapter 4 explores the influence of discretion enjoyed by the police and Crown Prosecutors in charging decisions. How police officers exercise their discretion in the investigation of road deaths will influence the evidence available to both the police and the CPS in judging the appropriate disposal for each case. Senior police officers then have the discretion to decide to

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<sup>22</sup> Arguably, two counties which would fall within the “East Midlands” but which did not take part in the study are Derbyshire and Nottinghamshire.

take no further action, to charge a suspect or to seek CPS advice as to whether a suspect should be charged and, if so, with what offence. It will be seen that in relation to road death cases it is usual for the police to seek such advice before a charge is brought. However, the way in which such discretion is exercised differs between the counties involved in the study. If a file is forwarded to the CPS for advice, a Crown Prosecutor must decide whether to take no further action, or to charge a particular offence, depending on the evidence available in the case. Discretion exercised in relation to this last decision is guided by two important policy documents, the *Code for Crown Prosecutors* and the *Driving Offences Charging Standard*. The contents of these documents and the way in which they appear to have been used in the cases in the current study are discussed. It will be seen that, despite concern from some quarters that Crown Prosecutors are too quick to downgrade charges in cases of road death, the evidence is that this rarely occurs and that there is a large degree of agreement between the police and CPS as to the appropriate charge.

There are, however, particular difficulties faced by the CPS in exercising their discretion in charging decisions in cases of road death, which are identified and analysed in Chapter 5. This chapter provides a detailed discussion of the cases falling within the sample of the current study, and is structured according to different themes. The main difficulty faced by prosecutors is in dealing with borderline cases, with two thresholds being significant in the hierarchy of offences. The thresholds involve having to make a decision as to whether to charge careless driving or to take no further action, and whether to charge careless driving or causing death by dangerous driving. The test under law is to establish whether the driver fell below the standard of a competent and careful driver and, if so, the degree by which he failed to meet such a standard. If he<sup>23</sup> is judged by the Crown Prosecutor to have fallen far below that standard, and if the prosecutor is persuaded that there is a realistic prospect that the jury will agree with such a judgment and convict, then the offence of causing death by dangerous driving should be charged. The cases in the sample illustrate that there are difficulties in establishing whether a jury would agree that the defendant's driving fell far below

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<sup>23</sup> Defendants will be referred to in the masculine form throughout this thesis. The Road Traffic Act 1988 refers to defendants in the masculine and although a defendant could be a woman, statistically speaking this is less likely, given that only 13 of the 126 cases resulting in prosecution in the current study involved female drivers.

the required standard, with specific characteristics of cases, such as fatigue and speed, making such decisions particularly difficult.

Despite such difficulties, Chapter 6 shows that once the Crown Prosecutor has settled on a particular charge, such a decision is often endorsed by the outcome of the case at court. The conviction rate for offences charged in the current sample was fairly high, with specific figures provided in the chapter. A large part of this success in prosecutions seems to be the result of the guilty plea rate, and in the cases resulting in acquittal or conviction for a lesser offence than that charged the CPS is not criticised for its choice of charge. Chapter 6 also gives a taster of the sentences given in cases resulting in conviction, mainly as an indication of the judge's assessment of the seriousness of the cases. The chapter ends with a summary of the main findings of the empirical study, explaining their relevance. As well as the difficulties and inconsistencies in deciding whether a particular piece of driving should be classed as dangerous or careless, the question is raised as to whether some of the cases in the sample warranted a charge of manslaughter. Although none of the cases in the sample provided evidence of vehicles being used as weapons of offence it is argued that in some cases the standard of driving displayed by the offender was such as could be described as "grossly negligent" and could therefore have warranted a charge of manslaughter.

Given the problems faced by prosecutors in making charging decisions in cases of road death, the question is raised as to whether the law should and could be improved through reform. The question of reform is addressed in Chapter 8, but before any specific proposals are explored, Chapter 7 looks at the role of the criminal law in relation to driving offences. If the substantive law is to be improved it is necessary to establish what the criminalisation of bad driving is attempting to achieve in order to be able to suggest ways of achieving such objectives. The chapter explores the reasons for punishing bad drivers, in terms of both utilitarian and retributive aims of sentencing. It is argued that as endangerment offences, careless and dangerous driving seek to achieve utilitarian aims, whilst causing death by dangerous driving, as a result crime, is punished mainly for retributive reasons. This then raises two important questions: firstly, whether the law, in order to achieve retribution, is justified in punishing drivers who kill, given that dangerous drivers have no control over the result of their dangerous driving, and, secondly, whether the current law is providing the best opportunity for achieving utilitarian aims such as deterrence.

The conclusions to these questions are firstly, that a separate offence of causing death by dangerous driving is not warranted, given that drivers who are sufficiently blameworthy to warrant condemnation for the causing of death can be charged with manslaughter, and secondly, that the current offences of dangerous and careless driving fail to deter drivers because drivers do not identify with the tests laid down. Chapter 8 seeks to establish how the law could be changed in order to realise the ambitions of the criminal law in this area. The first part looks back to the Review of Road Traffic Law conducted by the North Committee in 1989, to establish the way in which the proposals that were subsequently enacted by the Road Traffic Act 1991 were reached. Although some of the reasoning employed by North was appropriate, the current study has shown that the change to the law in 1991 has failed to deal successfully with the shortcomings of the previous law.

The question of whether a separate offence of causing death by bad driving is warranted is also addressed by looking to the law of Australia. Here, different states have different laws, but the Model Criminal Code has no separate fatal offence, suggesting that killing with cars should be dealt with as manslaughter. This offers additional support for the proposal put forward in this thesis that the offence of causing death by dangerous driving is superfluous and should be abolished. A further suggestion is offered in relation to non-fatal driving offences. This involves doing away with the test of the “competent and careful driver”, which seems to be the source of most of the difficulties with the current law, and replacing it with different tests. The more serious of the two replacement offences, which could retain the label of “dangerous driving”, would involve proving that the defendant had intentionally violated a given traffic law, thereby creating a danger to other road users. The lesser offence, to be called “negligent driving”, would also require the creation of such a danger, but in an entirely inadvertent way. The idea for these proposals derives from a distinction drawn in the psychological literature between “violations” and “errors”, each requiring to be combated by different types of measures. Not only would these proposals better achieve the goal of reducing the number of bad drivers, and therefore deaths on the roads, it is argued, but they would also provide prosecutors, magistrates and juries with more easily applicable tests in assessing criminal liability.



## Chapter 2 – The Current Law

When a fatal road traffic collision occurs, the police will investigate the incident to establish exactly what happened and what were the main factors contributing to the collision. The police are conscious that one of the principal reasons for collisions is human error, and that although mechanical defects and factors such as road and weather conditions may also contribute, it is rare that collisions can actually be explained in terms of “accident” in the sense of a chance occurrence for which no-one is to blame. Thus, in investigating the collision, a principal question for the police is whether anyone can be said to be sufficiently blameworthy to bring criminal proceedings against them. It may be that the person most at blame died in the collision, or that although one or more driver can be said to have contributed to the collision their contribution was negligible and their culpability is insufficient to establish criminal liability. However, where the evidence shows that one or more parties is to blame for the collision, the police will need to give serious consideration to the question of whether criminal proceedings should be commenced.

In coming to their decision they may request the assistance of the Crown Prosecution Service (CPS),<sup>1</sup> and both the police and CPS will need to establish what is the appropriate charge, given the definition of offences available to them under the current law. This chapter provides an explanation of the current law and the offences relevant in cases of road death. There are several offences which reflect the fact that death has been caused, and these will be examined first. Within this category of cases lie two sub-categories of general homicide offences and driving offences relating to death. The general homicide offences are those of murder and manslaughter, which are common law offences. Three statutory driving offences relating to death exist: causing death by dangerous driving (CDDD), causing death by careless driving under the influence of drink or drugs (CDCDUI) and causing death by aggravated vehicle taking (aggravated TWOC). A second category of offences will then be discussed, which covers driving offences which criminalise risk-taking in the form of bad driving, but do not require that death, or even a collision, has resulted from such risk-taking. Reference will be made to statute and case law, as appropriate. A further source of

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<sup>1</sup> Under the Criminal Justice Act 2003 the procedure for charging will change, with the CPS playing a more prominent role in charging suspects. The role of the CPS will be discussed in more detail in Chapter 4.

guidance for the police and CPS as to whether a particular offence has been committed is the *Driving Offences Charging Standard*.<sup>2</sup>

## **Offences reflecting the fact death has been caused**

### *Murder*

Driving a vehicle at someone is an effective way of causing very serious harm or death. After all, a motor vehicle is a blunt instrument on a large scale, and is widely available as a weapon of assault. It is possible, therefore, that some cases of road death are in fact cases of murder.<sup>3</sup> This will normally arise where the defendant (D) has driven directly at the victim (V), who is a pedestrian. If proved, murder carries the mandatory penalty of life imprisonment. For murder to be established, it must firstly be proved that D caused V's death (the *actus reus* of homicide). It used to be the case that death must occur within a year and a day of D's act, but this is no longer the case following the enactment of the Law Reform (Year and a Day Rule) Act 1996. This change in the law reflects the fact that medical advances now enable, for example, those suffering from brain damage to be kept alive artificially on a ventilator. However, the rules relating to the collection of statistics on road traffic fatalities have failed to keep abreast of such changes. Unless death occurs within thirty days of a collision it will not be recorded as a fatal collision,<sup>4</sup> meaning that in some cases it would be possible for

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<sup>2</sup> The *Driving Offences Charging Standard* was produced in 1996 as a result of joint work between the police and CPS. It is currently under review, and its role and impact in decision-making will be discussed in Chapter 4.

<sup>3</sup> Spencer, writing in 1985, found that in fatal cases of motor vehicles being used as a weapon of offence, murder charges are not usually pressed where they could be, and explained this on the basis that the motor vehicle is linked in everyone's mind with accidental, not intentional death: Spencer, J.R., "Motor Vehicles as Weapons of Offence" [1985] CrimLR 29. It should be noted, however, that in 1985 the *mens rea* requirements for proving murder were less stringent than they are today. At that time, the case of *Hyam* [1975] AC 55 required that the defendant deliberately exposed another to serious risk, knowing that there was a high probability of death or grievous bodily harm. Following *Nedrick* [1986] 1 WLR 1025 and *Woollin* [1999] 1 AC 82 the prosecution must now prove that the defendant foresaw death or GBH as virtually certain.

<sup>4</sup> Broughton, J., *Survival Times Following Road Accidents*, Transport Research Laboratory: TRL Report 467, 2000. The figure of thirty days derives from the Geneva Convention, but Broughton concludes that it is an appropriate period of time for the purposes of classifying fatal road traffic collisions.

a driver to be guilty of a homicide offence in relation to a collision which for official purposes was not “fatal”.<sup>5</sup>

Secondly, the *mens rea* for murder requires that D either intended to kill, or to cause his victim grievous bodily harm (GBH). This may be possible to prove where D clearly drove his vehicle directly at his victim, a pedestrian, or continued to drive knowing that his vehicle would come into contact with his victim. It is rare that murder is charged in cases involving motor vehicles,<sup>6</sup> and when this does occur such cases often become high profile. An obvious example from recent years is that of Mark Woolley, who drove over a woman after stealing her handbag at Euston Station, London, and was convicted of murder.<sup>7</sup> Police officers appear to be particularly vulnerable, risking their lives in attempting to apprehend criminals who happen to be behind the wheel of a car. An example is that of PC Bryan Moore and PC Andrew Munn of Leicestershire Police, who were killed in 2002 when the van they had been attempting to stop failed to do so and collided with their stationary patrol car at 80mph.<sup>8</sup> Leayon Davi Dudley was charged with two counts of murder, and was convicted on one count but found guilty of manslaughter on the other.<sup>9</sup>

## *Manslaughter*

There are arguably two species of manslaughter which may be relevant in the case of a road death incident: constructive (or unlawful act) manslaughter and gross negligence manslaughter. Those found guilty of manslaughter are subject to a maximum sentence of life imprisonment.

### Constructive Manslaughter

Where a car is used as a weapon of offence to assault V, but D did not intend to kill or cause GBH to V, he will be guilty of “constructive” or “unlawful act” manslaughter. In order to prove constructive manslaughter, the prosecution must

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<sup>5</sup> The case of *Munro* [2001] 1 Cr App R (S) 14 illustrates this possibility. This was in fact a case of CDDD, rather than murder, but the principle is the same. Munro pleaded guilty to dangerous driving only to face a further charge of CDDD when her victim died a year and a month following the collision.

<sup>6</sup> See Chapter 3 below.

<sup>7</sup> *The Times*, 21.12.01.

<sup>8</sup> <http://newsvote.bbc.co.uk> 2.5.03

<sup>9</sup> <http://newsvote.bbc.co.uk> 21.5.03.

show that D committed an unlawful and dangerous act, which caused death. “Dangerous” means that all sober and reasonable people would inevitably recognise that the act would subject the other person to the risk of at least some harm, although this need not necessarily be serious harm.<sup>10</sup> Driving a car in the direction of another person clearly subjects that other person to a risk of harm. There is no requirement of *mens rea*, other than that required for the unlawful act itself (e.g. assault).<sup>11</sup> Thus, where it can be shown that D hit V with a motor vehicle, causing V’s death, and at the time he either intended to at least cause V to apprehend immediate unlawful force, or foresaw that V would do so,<sup>12</sup> he will be guilty of manslaughter.<sup>13</sup>

Where there is no evidence that D used his car as a weapon of offence, constructive manslaughter will not have been committed. Although dangerous driving is clearly, by its very nature, a dangerous and unlawful act, it cannot form the basis of a charge of constructive manslaughter. As long ago as 1937 it was held that driving dangerously does not constitute an unlawful act for the purposes of manslaughter, as driving itself is lawful and only made unlawful if done negligently.<sup>14</sup> Lord Atkin stated that:

*There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would ex necessitate commit manslaughter.*<sup>15</sup>

It could be argued, however, that the law in regulating drivers has changed to such a great extent in the past seventy years, that the reasoning in *Andrews* might no longer apply. *Andrews* was decided shortly after driving competency tests were

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<sup>10</sup> *Church* [1996] 1 QB 59.

<sup>11</sup> *Newbury and Jones* [1977] AC 500.

<sup>12</sup> The *mens rea* of common assault: *Venna* [1976] QB 421.

<sup>13</sup> An example is the case of *Attorney-General’s Reference No.64 of 2001* [2002] 1 Cr App R (S) 94, in which D pleaded guilty on the basis that he drove his van at V, intending to frighten her. He admitted that he caused V’s death by an unlawful and dangerous act which any reasonable person would have realised exposed the victim to the risk of some, albeit not serious, harm.

<sup>14</sup> *Andrews v DPP* [1937] AC 576.

<sup>15</sup> *Ibid*, at 585.

introduced,<sup>16</sup> and driving seems to have been viewed as a right rather than a privilege. Corbett notes that in the early days of the motor vehicle, only the elite could afford to engage in what was then an exciting pastime, and the dangers involved in this new-found pursuit may have been overlooked.<sup>17</sup> Writing in 1968, Elliott and Street argued that those who drive on public roads are exercising their public rights, not some withdrawable privileges.<sup>18</sup> This argument seems to have been based upon the fact that the generality of people are entitled to hold a licence to drive, if they are over a prescribed age, have no health problems which impair their driving, and have passed their test.<sup>19</sup> In addition to this, however, they note that unlike the days when cars were first introduced, by 1968 a large proportion of the population had come to rely on their own vehicles, meaning that public transport was no longer needed, falling into disuse and thereby causing people to be even more dependent on their own transport. They stated that: “[i]n this kind of milieu it is ingenuous to talk about the privilege of driving a car”.<sup>20</sup>

Thus, Lord Atkin’s statement in *Andrews* may derive from an attitude which still, to some extent, persists today, that driving offences are not real “crime”<sup>21</sup> and so cannot constitute an “unlawful act” for the purposes of manslaughter. It will be argued later in this thesis that driving offences should be equated with other, more traditional, crimes, which brings into question the reasoning behind Lord Atkin’s statement. It is arguable that driving is indeed a privilege, rather than a right, contrary to Street and Elliot’s viewpoint. If an individual gets behind the wheel of a car and sets off to drive, such an act is only lawful if certain conditions are met. The driver must not be under the influence of drink or drugs, must have a valid driving licence, must be insured to drive the vehicle in question, and the vehicle must be in a roadworthy condition. However, following *Andrews*, if any of these legal conditions are not met this is not an unlawful act for the purposes of manslaughter.

Constructive manslaughter has received much criticism over recent years, and it appears that the Government is committed to enacting the Law Commission’s

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<sup>16</sup> Motor Vehicles Regulations 1935.

<sup>17</sup> Corbett, C., *Car Crime*, Cullompton: Willan Publishing, 2003, p.30.

<sup>18</sup> Elliott, D.W., and Street, H., *Road Accidents*, Harmondsworth: Penguin, 1968, p.153.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> For more on this see Chapter 7 below.

proposals to reform the offence.<sup>22</sup> In the meantime, however, it could be argued that illegal acts of driving, which can also be said to be dangerous, should no less be considered a relevant basis of a manslaughter conviction than other unlawful and dangerous acts. An example might be the offence of driving other than in accordance with a driving licence,<sup>23</sup> which if committed by a driver with no experience of driving could easily cause a danger to other road users. Presently, however, it seems that the only unlawful act which can form the basis of a case of constructive manslaughter involving a motor vehicle is assault.

### Gross Negligence Manslaughter

When the case of *Andrews* was decided, Lord Atkin rightly noted that “the law of manslaughter has not changed by the introduction of motor vehicles on the road”.<sup>24</sup> Accordingly, the case of *Bateman*<sup>25</sup> setting out the law in relation to gross negligence manslaughter was held to apply in that case. Lord Hewitt CJ in *Bateman* laid down the following test for gross negligence: “in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment”.<sup>26</sup> Although it is still true today that the introduction of motor vehicles on the road has not changed the law of manslaughter, since *Andrews* was decided the criminal law has undergone various relevant changes. Significantly, a new statutory offence of causing death by reckless or dangerous driving was introduced in 1956.<sup>27</sup> Unrelated to this, the common law of manslaughter has undergone a number of changes.

The introduction of a specific offence dealing with drivers who kill has not replaced the possibility of a driver who kills from being guilty of “motor manslaughter”. “Motor manslaughter” is merely a term used to denote that a

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<sup>22</sup> Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals*, 2000.

<sup>23</sup> s.87(1) Road Traffic Act 1988.

<sup>24</sup> At 583.

<sup>25</sup> (1925) 19 Cr App R 8.

<sup>26</sup> *Ibid*, at 11–12.

<sup>27</sup> See below p.17.

particular case of involuntary manslaughter has been committed through the use of a motor vehicle. In *R. v. Governor of Holloway Prison, ex p. Jennings*<sup>28</sup> it was held that motor manslaughter had not been impliedly repealed by the Road Traffic Act 1956, and, following this, the case of *Seymour*<sup>29</sup> addressed the question of the necessary *mens rea* to be proved in such cases. It was held in this case that in cases of manslaughter, including motor manslaughter, the jury should be directed in terms of objective *Lawrence*<sup>30</sup> recklessness. Lord Roskill also stated that because this meant that the *mens rea* element of both the statutory offence<sup>31</sup> and common law manslaughter was the same,<sup>32</sup> a judge would not be able to direct a jury as to the difference between the two offences, and as a result he opined that alternative charges of causing death by reckless driving and manslaughter should not be brought.

This practice rule seems to have survived subsequent changes to the substantive law.<sup>33</sup> *Adomako*<sup>34</sup> reversed the decision in *Seymour* by replacing the test of objective recklessness with one of gross negligence. In *Prentice*<sup>35</sup> the Court of Appeal had held that the ingredients of involuntary manslaughter involved proving a breach of duty which had caused death, coupled with gross negligence. However, the court made motor manslaughter an exception to their ruling, based on the decision in *Seymour*, and suggested that for motor manslaughter the test of objective recklessness remained. The House of Lords subsequently were given the opportunity to clarify the law in *Adomako*. Lord Mackay approved of the cases of *Bateman* and *Andrews*, and gave his view that the law as stated in *Seymour* should no longer apply and that motor manslaughter should be dealt with in the same way as other forms of involuntary manslaughter. In doing so he set out three questions which must be answered in order to prove manslaughter by gross

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<sup>28</sup> [1983] 1 AC 624.

<sup>29</sup> [1983] 2 AC 493.

<sup>30</sup> [1982] AC 510.

<sup>31</sup> At the time of *Seymour* the offence of causing death by reckless driving applied. This was later replaced by the offence of causing death by dangerous driving.

<sup>32</sup> i.e. objective recklessness.

<sup>33</sup> Wallis, P.S., McCormack, K., and Swift, K., *Wilkinson's Road Traffic Offences*, London: Sweet & Maxwell, 21<sup>st</sup> ed., 2003, para.5.37.

<sup>34</sup> [1995] 1 AC 171.

<sup>35</sup> [1994] QB 302.

negligence.<sup>36</sup> First, the defendant must have breached a duty of care towards the victim who has died. Second, that breach must have caused the death of the victim. Third, the jury must consider whether that breach of duty should be characterised as gross negligence and therefore as a crime.

Lord Mackay noted that as a result of applying this test, cases of motor manslaughter might become rare.<sup>37</sup> In a case of manslaughter involving motor vehicles it can be argued that all drivers owe a duty of care to other road users, whether they are pedestrians, cyclists or other drivers, and thus the first part of the test will always be met. The second part of the test is a simple question of causation. It appears, then, that it is the final part of the test which led Lord Mackay to suggest that motor manslaughter would become rare. In such cases he opined that juries should be instructed to consider the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, having regard to the risk of death involved. This test is one which, as will be shown below, bares a strong resemblance to the test required to prove dangerous driving and CDDD. One of the ways in which the tests can be distinguished is that whilst the jury must have regard to the risk of death involved in a case of manslaughter, for CDDD the relevant risk is that of serious injury or damage to property. The position of the law is such that prosecutors will rarely choose to go to trial on a count of manslaughter in a case of road death, because of the existence of the statutory offence.<sup>38</sup>

Although rare, prosecutions for motor manslaughter do occasionally take place. From looking through the sentencing reports it is possible to get a flavour of the type of case that comes before the court on such a charge. Cases involving death caused by a motor vehicle which do not take place on a road or other public place will normally be charged as manslaughter,<sup>39</sup> such as the case of *Barker*.<sup>40</sup> It remains possible, however, for a death on a public road to lead to a conviction for gross negligence manslaughter, as in the case of *Attorney-General's Reference*

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<sup>36</sup> n.34 above, at 187.

<sup>37</sup> *Ibid.*

<sup>38</sup> Cunningham, S., "The Reality of Vehicular Homicides: Convictions for Murder, Manslaughter and Causing Death by Dangerous Driving" [2001] CrimLR 679.

<sup>39</sup> CDDD can only be committed on a road or other public place.

<sup>40</sup> [2003] 2 Cr App R (S) 22.



*No.14 of 2001*,<sup>41</sup> in which an offender with defective vision drove in darkness without spectacles and was involved in a fatal collision.

Death caused by a motor vehicle may lead to a manslaughter conviction for defendants other than drivers. Although prosecutions for corporate manslaughter remain rare, and convictions are even rarer, it is possible for employers of drivers who breach their duty of care to employees, resulting in death, to be held liable for manslaughter. In order for a company to be held criminally liable for manslaughter there must have been an individual who committed the *actus reus* of manslaughter through gross negligence, and was sufficiently high up within the corporate structure to be identified with the company itself. This is known as the identification doctrine. The difficulty is that the identification doctrine means that only very small companies are likely to be held liable.<sup>42</sup>

Even in cases involving a small company it is often the directors of the company, rather than the company itself as a legal person, who face prosecution. This is illustrated by the case of *Roy Bowles Transport*,<sup>43</sup> in which the two directors of a road haulage company, Steven Bowles and Julie Bowles, were successfully prosecuted for manslaughter. In this case it was not the company's employee, Andrew Cox, that died, but two third parties who were killed when Cox fell asleep at the wheel of his lorry on the M25 and caused a pile-up.<sup>44</sup> Cox, along with other drivers working for the company, had been working very long hours with the knowledge of the company's directors. The court found that the directors should have taken more care to monitor drivers' hours and ensure that driving regulations in relation to drivers' hours were obeyed by the company's employees.

In the case of *Crowe*<sup>45</sup> the co-owners of a farm were convicted of manslaughter after a sixteen-year-old student on a work placement at the farm was killed when the JCB he had been driving was hit by a passing lorry, causing the machine to

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<sup>41</sup> [2002] 1 Cr App R (S) 25.

<sup>42</sup> Wells, C., *Corporations and Criminal Responsibility*, Oxford: Oxford University Press, 2<sup>nd</sup> ed., 2001.

<sup>43</sup> Unreported. Information obtained from the Centre for Corporate Accountability's website: [www.corporateaccountability.org/manslaughter/cases/convictions.htm](http://www.corporateaccountability.org/manslaughter/cases/convictions.htm) June 2004.

<sup>44</sup> Cox was also convicted of CDDD.

<sup>45</sup> [2002] 2 Cr App R (S) 49.

roll on top of him. The deceased had received no training for driving the machine, despite warnings from the Health and Safety Executive that he should not be permitted to drive the vehicle until he had received such training.

It would appear that such convictions are likely to become more common in future, given that the Government intends to reform the law to provide for a specific offence of “corporate killing”.<sup>46</sup> This means that, hopefully, companies who employ drivers will take their responsibilities more seriously. Indeed, even public bodies such as police forces and fire brigades may need to review their safety practices in relation to driving.<sup>47</sup>

### *Causing Death by Dangerous Driving*

Until 1956, a death resulting from bad driving amounted to manslaughter. The law was changed in that year<sup>48</sup> because it was feared that many drivers who killed whilst driving badly escaped liability altogether, as juries were reluctant to convict them of manslaughter. This reluctance stemmed from a feeling that it could just as easily be the jurors themselves who were in the dock, and luck was between them and the label of “manslayer”. This mentality of “there but for the grace of God go I” was to be cured by creating a new offence, bearing a succinct description of what the offender had done. Thus the Road Traffic Act 1956 brought into being the offence of causing death by reckless or dangerous driving. However, although the new legislation may have been more acceptable to jurors, some academics were less than impressed.<sup>49</sup> Over the years, several bodies have suggested reform of the law,<sup>50</sup> and a number of statutes have made various alterations to the law, including the Criminal Law Act 1977. This statute abolished the offences of dangerous driving and causing death by dangerous driving, but preserved the offence of causing death by reckless driving.

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<sup>46</sup> Home Office, n.22 above.

<sup>47</sup> Ballard, D., “Corporate Killing – The Implications”, Paper presented at the National Blue Light Users Conference 2002. Available online at: [www.airso.co.uk/bluelight.html](http://www.airso.co.uk/bluelight.html) June 2004.

<sup>48</sup> Road Traffic Act 1956

<sup>49</sup> For example, see MacKenna, B., “Causing Death by Reckless or Dangerous Driving: a Suggestion” [1970] CrimLR 67.

<sup>50</sup> For example, both the James Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates’ Courts (*Report*, Cmnd 6323 (1975)), and the Criminal Law Revision Committee (*Working Paper on Offences Against the Person*, 1976) recommended that the offence be repealed.

Nevertheless, dissatisfaction with the law persisted due to difficulties in defining recklessness, particularly following the House of Lords' decision in *Seymour*. Lord Roskill stated that recklessness should carry the same meaning whether the charge was manslaughter or causing death by reckless driving. This apparently created an overlap between the two offences, Lord Roskill opining that manslaughter should only be charged in cases of death resulting from reckless driving when the risk of death (created by the defendant's driving) was "very high". This requirement was necessary if a higher maximum penalty of life imprisonment could be justified for manslaughter (the maximum penalty for the statutory offence then being five years' imprisonment).<sup>51</sup>

In 1988 the Road Traffic Law Review Committee under Peter North concluded that "the criminal justice system taken as a whole was not satisfactorily meeting public requirements as regards very bad driving".<sup>52</sup> The Committee favoured the retention of a causing death offence, but argued that such an offence should not overlap with the offence of manslaughter. It felt that since it was recommending a change in the basic driving offence from "reckless" to "very bad" driving, the overlap would be alleviated despite its proposal to retain a causing death offence.<sup>53</sup> This, it was claimed, would avoid the problem of the prosecution having to prove what was (or was not) going on in the driver's mind.<sup>54</sup> However, it stressed that where it was possible to prove recklessness, manslaughter should be charged as the more serious offence.

Some of the North Report's recommendations were put into practice by the Road Traffic Act 1991, amending the Road Traffic Act 1988 (hereafter RTA 1988),<sup>55</sup> and creating a new offence of CDDD. Section 1 of the RTA 1988 states that:

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<sup>51</sup> Since increased firstly to ten years by the Criminal Justice Act 1993, s67(1), and more recently to fourteen years by the Criminal Justice Act 2003, s.285(3).

<sup>52</sup> Department of Transport and Home Office, *Road Traffic Law Review Report* (North Report), London: HMSO, 1988, para.4.11.

<sup>53</sup> For a more in-depth discussion of the North Report, see Chapter 8 below.

<sup>54</sup> i.e. whether the defendant had considered the risk, and if he had, whether he had ruled it out or not.

<sup>55</sup> The Road Traffic Act 1988 had made no change to the offence of causing death by reckless driving.

*A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.*

According to section 2A of the Act, a person is to be regarded as driving dangerously 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.*

“Obvious” carries its ordinary meaning within the English language, and the Court of Appeal has suggested that judges should not attempt to define it further.<sup>56</sup> “Dangerous” refers to a danger of injury to any person or of serious damage to property.<sup>57</sup> Although this clarification is useful, it does not relieve the law of inconsistencies. A problem inevitably arises from what is meant by a “competent and careful” driver. The Association of Chief Police Officers (ACPO) and the Crown Prosecution Service (CPS) have attempted to give guidance to police officers and Crown prosecutors as to the meaning of such terms in their *Driving Offences Charging Standard*.<sup>58</sup> The Charging Standard does not have legal authority, however, and it is necessary to look to case law to determine how the requirements of the section have been interpreted.

In *Conteh*<sup>59</sup> the Court of Appeal emphasised that dangerous driving involves a high threshold and that the judge should direct the jury that mere breach of the Highway Code does not itself constitute the offence of dangerous driving, or CDDD.<sup>60</sup> In this case a conviction for CDDD was quashed, with the Court

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<sup>56</sup> *Marsh* [2002] EWCA Crim 137.

<sup>57</sup> s.2A(3).

<sup>58</sup> The role and content of the Charging Standard is discussed in detail in Chapter 4 below.

<sup>59</sup> [2003] EWCA Crim 962.

<sup>60</sup> Road Traffic Act 1988, s.38(7) states that “[a] failure on the part of a person to observe a provision of the Highway Code shall not itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings ... be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings”.

commenting that if V had not died it suspected that the prosecution would not have considered a charge of dangerous driving.

If a driver is suffering from any impairment or disability which he knows could result in creating an obvious and serious risk, this acts as evidence of dangerous driving,<sup>61</sup> and will not mitigate the defendant's position as it might do in relation to other criminal offences. The competent and careful driver test is an absolute one because if a driver does not comply with the standard he is more likely to be a risk to other road-users and so his position cannot be supported, irrespective of how much control he has over his own ability.

Driving is not only "dangerous" because of the manner in which the task is carried out; it may also be "dangerous" due to the dangerous condition of the vehicle which is being driven:

*s.2A(2) A person is also to be regarded as driving dangerously for the purposes of sections 1 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.*

This covers both the mechanical state of the vehicle and the way in which anything is attached to or carried on the vehicle.<sup>62</sup> This version of the offence of dangerous driving, and CDDD, may be committed through procurement. It would be possible for the owner of a vehicle who knew of a mechanical defect but employed another person to drive the vehicle to be guilty of CDDD where the mechanical defect led to a person's death, but only where the principal offender was also guilty of the offence.<sup>63</sup>

However the issue of dangerousness is established, it must be proved that it was D's dangerous driving which caused the death of V. According to the Court of Appeal in *Hennigan*<sup>64</sup> the driving need not be a substantial or major cause of death. All that is needed is that the dangerous driving is a cause, and something more than *de minimis*. If all the elements of the offence are proved, and D is

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<sup>61</sup> *Marison* [1996] CrimLR 909.

<sup>62</sup> s.2A(4).

<sup>63</sup> *Loukes* [1996] Cr App R 444. Here the court pointed out that dangerous driving, unlike reckless driving, requires no *mens rea*. Thus, whilst for other crimes a secondary party may be guilty of an offence despite the principal offender escaping liability due to lack of *mens rea*, this is not possible in cases of CDDD.

<sup>64</sup> (1971) 55 Cr App R 262.

convicted of CDDD, he will now be subject to a maximum penalty of fourteen years' imprisonment.<sup>65</sup> At the time of the cases in the current study, the maximum penalty was ten years' imprisonment, raised from five by the Criminal Justice Act 1993, s.67(1). The more recent increase in penalty to fourteen years' seems ill-timed, given that the change came shortly after the Court of Appeal adopted the advice of the Sentencing Advisory Panel in setting out guidelines for sentencing in such cases, based on the ten year maximum.<sup>66</sup> Such guidance was long-overdue, since prior to this the guidance for such cases came from *Boswell*,<sup>67</sup> a case of causing death by reckless driving for which the maximum sentence was five years' imprisonment.

### *Causing Death by Careless Driving Whilst Under the Influence of Drink or Drugs*

The offence of CDCDUI was introduced by the Road Traffic Act 1991, inserting s.3A into the RTA 1988. It was introduced because it was felt that the criminal justice system was failing to deal sufficiently seriously with drunk drivers who killed, and that such an offence would be of value in further marking out the dangers of drinking and driving.<sup>68</sup>

The offence is a constructive one, consisting of two elements: drink-driving and careless driving. Section 3A provides:

*3A(1) 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 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 the 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 cause fails to provide it,*

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<sup>65</sup> Criminal Justice Act 2003, s.285.

<sup>66</sup> *Cooksley and others* [2003] EWCA Crim 996.

<sup>67</sup> (1984) 79 Cr App R 277.

<sup>68</sup> North Report, n.52 above, para.6.20.

*he is guilty of an offence.*

Both elements must be proved. The offence of careless driving, making up the first element of CDCDUI, is discussed below. If the standard of D's driving is bad enough to amount to dangerous driving, a charge of CDDD may be brought instead of CDCDUI.<sup>69</sup> In relation to the other element of CDCDUI, although the offence can be proved in one of three ways, it will normally be proved through the second option, involving a positive test for alcohol in the breath, blood or urine of D. A breath test may be requested under s.6(2) of the Road Traffic Act 1988 following a collision, and it is usual for such a request to be made to all drivers involved in a collision, except where they are unable to complete the test due to injuries sustained in the collision.<sup>70</sup> If the test proves to be positive, the police officer will normally arrest D and a blood sample will be taken to provide further evidence that he was driving over the limit. This should normally be done at a hospital,<sup>71</sup> and where D is already receiving treatment in hospital due to injuries sustained in the collision the medical practitioner who is treating D must be informed, and may object on medical grounds.<sup>72</sup> At the time of the cases in the current sample it was necessary that D consented to the taking of a blood sample.<sup>73</sup> However, this caused problems in cases in which D was unconscious for some time following the collision, and thus unable to give his consent. The Police Reform Act 2002 has now inserted s.7A into the RTA 1988 allowing a police officer to request a medical practitioner to take a specimen of blood from a person where that person is medically incapable of giving such consent.<sup>74</sup>

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<sup>69</sup> The intentions of the North Review seem to have been that CDDD should be charged where it can be proved where alcohol is involved: see para.6.19 of the Report. An example of a case of CDDD where D was under the influence of drugs is *Gilmartin* [2001] 2 Cr App R (S) 45.

<sup>70</sup> Such injury would amount to "reasonable excuse" for not providing a sample under s.6(4).

<sup>71</sup> s.7(3).

<sup>72</sup> s.9.

<sup>73</sup> s.11(4).

<sup>74</sup> The sample should be kept until such time as D is able to give his consent, and it is an offence under s.7A not to give such consent. However, there is currently no provision corresponding to s.3A(1)(c) allowing for refusal to give such consent to form the basis of a charge of CDCDUI.

If D's specimen shows that the level of alcohol in his body was over the legal limit, then the drunkenness part of CDCDUI is easily proved. The prescribed limits are as follows:

35 microgrammes of alcohol in 100 millilitres of breath;

80 milligrammes of alcohol in 100 millilitres of blood;

107 milligrammes of alcohol in 100 millilitres of urine.<sup>75</sup>

If, however, it is impossible to obtain evidence that D was over the prescribed limit because D refuses to provide a relevant specimen, this in itself will be taken as proof of his being under the influence of alcohol under s.3A(c). Otherwise, were this not possible, anyone involved in a fatal collision whilst under the influence of alcohol could attempt to escape liability by simply refusing to cooperate with the police.

Where drugs rather than alcohol are involved, however, the task of the police and prosecution in providing evidence on which to base a charge of CDCDUI is more difficult. There are no statutory limits for the amount of drugs allowed to be present in one's body when driving, and if CDCDUI is alleged on the basis of drugs rather than drink, it will have to be proved under s.3A(a). The drugs in question could be either illegal or prescribed, and where any drugs are suspected to have influenced D it would be normal for a specimen of blood to be taken under s.7(3)(c) for analysis.<sup>76</sup> Any results showing the presence of a large quantity of drugs within the blood could be persuasive, but difficulties arise in relation to some drugs, particularly cannabis, which remains in the blood stream for lengthy periods after its intoxicating effect has worn off.

The prosecution must prove not only that D was under the influence of drugs at the time of the collision, but also that proper control of the vehicle was impaired by drugs.<sup>77</sup> In addition to any analysis of blood, eye-witness evidence from a police surgeon describing the physical state of D may be useful as evidence that D was under the influence of drink or drugs. Problems occur in relation to blood analysis for drink or drugs in cases in which such an analysis is not obtained for several hours following the collision. It may be that when the specimen is

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<sup>75</sup> s.11(2).

<sup>76</sup> A doctor must give his opinion that a possible cause for D's condition may be drugs.

<sup>77</sup> *Woodman* [1994] CrimLR 372.



obtained it shows the presence of drink or drugs but at a lower level than would have been present at the time of the collision, because the passing of time has led to a reduction in the proportion of drink or drugs in the blood. In such cases it is possible for expert witnesses to provide evidence of an estimated level of drink or drugs in the blood at the time of the collision by way of back-calculation.<sup>78</sup> Thus, in cases involving alcohol, even though D may not have been over the legal limit when he provided his specimen for analysis, it may still be possible to prove CDCDUI where some alcohol in the blood can be shown to have been present. In cases involving drugs, although D may seem unaffected at the time that he is apprehended, a back-calculation could provide evidence that he would have been impaired by drugs at the time of the collision.

The maximum sentence for CDCDUI at the time of the cases within the current study was ten years' imprisonment, but, as for CDDD, this has been raised to fourteen years by the Criminal Justice Act 2003, s.285.

### *Aggravated Vehicle-Taking*

Another constructive offence is causing death by aggravated vehicle-taking, an offence introduced in 1992. The Aggravated Vehicle-Taking Act 1992 inserted s.12A into the Theft Act 1968, and the offence can be likened to constructive manslaughter. Because, as noted above, driving offences cannot be relied upon as the unlawful and dangerous act needed to prove constructive manslaughter, it was felt that this new offence was needed to provide a higher penalty for joy-riders who cause death whilst seeking the thrill of driving stolen cars. This offence reflects the fact that ordinarily, driving offences are seen as being of inadequate seriousness to fall within the ambit of what is traditionally seen as crime, since often such offences are committed by otherwise law-abiding drivers.<sup>79</sup> Conversely, offences such as taking a vehicle without consent are committed by real "criminals" who may then go on to drive in such a way as to cause harm to others. Indeed, the very fact that an offender is driving a car not belonging to himself may encourage him to take risks in his driving, since he will not be concerned about damaging the vehicle, and he may feel under pressure to take risks in his driving if he becomes the subject of a police pursuit.

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<sup>78</sup> *Gumbley v. Cunningham; Gould v. Castle* [1987] 3 All ER 733.

<sup>79</sup> For a more in-depth discussion of this issue, see Chapter 7 below.

Such offenders fall into Steer and Carr-Hill's typology of "dishonest" offenders.<sup>80</sup> Steer and Carr-Hill categorised road traffic offences as either "dishonest" or "driving". At the time they were writing, the offence of vehicle-taking had not been invented, but it is assumed that because the offence involves calculated dishonesty and is not connected, *prima facie*, with the way in which a vehicle is driven, it would fall within the category of dishonest offences, along with driving without insurance or whilst disqualified.<sup>81</sup> Unlike "driving" offences, such as dangerous driving or drink-driving, which according to Steer and Carr-Hill are committed by "average motorists",<sup>82</sup> "dishonest" offences are committed by offenders who are often involved in other criminal activities and are seen as more blameworthy by members of the public, warranting greater condemnation.

The basic offence upon which aggravated TWOC is founded is that of taking a motor vehicle or other conveyance without authority (TWOC) under Theft Act 1968, s.12, which provides that:

*12 (1) a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in it.*

s. 12A specifically provides that:

*12A (1) a person is guilty of aggravated taking of a vehicle if –*

*(a) he commits an offence under section 12(1) above in relation to a mechanically propelled vehicle ; and*

*(b) it is proved that, at any time after the vehicle was unlawfully taken (whether by him or another) and before it was recovered, the vehicle was driven, or injury or damage was caused, in one or more of the circumstances set out in paragraphs (a) to (d) of subsection (2) below.*

*(2)The circumstances referred to in subsection (1)(b) above are –*

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<sup>80</sup> Steer, D.J., and Carr-Hill, R.A., "The Motoring Offender – Who is He?" [1967] CrimLR 214.

<sup>81</sup> This thesis is primarily concerned with "driving" offences creating a risk to other road users that has led to death. Aggravated TWOC, as a "dishonest" offence, is included for the purposes of establishing whether CDDD is charged when it can be proved in cases involving a stolen vehicle, or whether the prosecution tends to rely on aggravated TWOC which is arguably more easily proved.

<sup>82</sup> Steer and Carr-Hill, n.80 above, at 223.

- (a) that the vehicle was driven dangerously on a road or other public place;*
- (b) that, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person;*
- (c) that, owing to the driving of the vehicle, an accident occurred by which damage was caused to any property, other than the vehicle;*
- (d) that damage was caused to the vehicle.*

The penalty is provided by subsection (4), which in itself creates a separate offence of causing death by aggravated TWOC:<sup>83</sup>

*(4) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or, if it is proved that, in circumstances falling within subsection (2)(b) above, the accident caused the death of the person concerned, five years.*

Since the cases in this study the penalty for causing death has been subjected to an increase by the Criminal Justice Act 2003, s.285(1), and the maximum is now fourteen years' imprisonment.<sup>84</sup> This suggests that the offence is deemed as serious as CDDD and CDCDUI, despite the fact that D need not be culpable in relation to the way he drove. For the longer sentence to apply, care must be taken in drafting the indictment to specify that death has been caused as a result of aggravated TWOC.<sup>85</sup> It should be noted that this offence can be committed by passengers as well as drivers, if such a passenger knows that the vehicle has been taken without the owner's consent. It extends constructive liability even further than CDCDUI, in that all that is required is that a vehicle which has been taken without the owner's consent is involved in a fatal collision, and there is no need to prove that the standard of driving fell below that of a competent and careful driver.<sup>86</sup> Thus, where D has not only taken a car without the owner's consent and caused death, but has subsequently driven it in such a way that it falls within the meaning of "dangerous", he may be prosecuted for offences providing for a

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<sup>83</sup> *Sherwood and Button* (1995) 16 Cr App R (S) 513.

<sup>84</sup> See *Marsh* n.86 below.

<sup>85</sup> *Sherwood and Button*, n.83 above.

<sup>86</sup> *Marsh* [1997] 1 Cr App R 67.

higher penalty, namely CDDD<sup>87</sup> or, if his driving can be described as grossly negligent, manslaughter.<sup>88</sup>

## General Driving Offences

Whilst the above offences are available only in cases involving fatalities, the following offences operate whether or not a collision has been caused. Indeed, their *raison d'être* is to enhance road safety and hopefully thereby reduce the number of fatalities caused on the roads. They remain relevant to the current study, however, since offenders whose liability falls short of dangerous driving, and who were sober at the time of the collision, driving their own vehicle or one for which consent had been given to drive, may nevertheless be liable for a lesser offence.<sup>89</sup>

### *Careless Driving*

“Careless driving” is the shorthand term for the offence of driving without due care and attention. Often it also refers to the offence of driving without reasonable consideration for other road users, or inconsiderate driving. Both offences are provided for in s.3 Road Traffic Act 1988. These are summary offences punishable by a fine at level 4, penalty points and possible disqualification. An alternative to prosecution, the National Driver Improvement Scheme (NDIS) may be offered in non-serious cases<sup>90</sup> at the police’s discretion. Section 3 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.*

As for dangerous driving and CDDD, the test is entirely objective. In many cases a piece of driving may be said to be both driving without due care and

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<sup>87</sup> e.g. *Adams* [2002] 1 Cr App R (S) 87. However, now that the Criminal Justice Act 2003 has equalised the penalty for CDDD and aggravated TWOC, it may be that more cases of the latter offence will be charged.

<sup>88</sup> The first defendant in *Sherwood and Button*, n.83 above, pleaded guilty to manslaughter.

<sup>89</sup> It is also possible that in a case involving a fatality the non-fatal offence of dangerous driving, rather than CDDD, might be appropriate. This would occur where evidence showed that the chain of causation between the dangerous driving and death had been broken. Dangerous driving is not discussed under a separate heading here, however, since the elements of the offence have been dealt with under the heading for CDDD.

<sup>90</sup> The NDIS is not available in cases involving fatalities.

attention and inconsiderate driving, but in most cases the offence will be made out on the basis that D drove without due care and attention, since driving without reasonable consideration for other persons using the road necessitates that other persons were using the road at the time. That stated, in cases involving fatalities there were clearly other persons using the road. There seems to be some disagreement here as to whether D must actually cause inconvenience to others, or whether it is sufficient that D was inconsiderate in his actions. Smith argues that careless driving is a conduct crime, not a result crime, and so does not require proof of inconvenience to other road users.<sup>91</sup> He does not specify whether his analysis applies to both limbs of the offence (i.e. inconsiderate driving as well as careless driving) but, in the case of *Dilks v. Bowman Shaw*<sup>92</sup>, he appears to be proved wrong in relation to the limb requiring inconsiderate driving, since D was acquitted in that case because the other road users involved gave evidence that they had not been inconvenienced by his manoeuvre.

Whichever version of the offence is alleged the test is the same: “was the defendant exercising the degree of care and attention that a reasonable and prudent driver would in the circumstances?”<sup>93</sup> The level of expertise enjoyed by D himself is irrelevant to the question,<sup>94</sup> whether he is a learner driver or a police officer who has received advanced driver training.

The criminal law borrows the doctrine of *res ipsa loquitur* (the facts speak for themselves) from civil law for careless driving. So, for example, where D crosses a central white line in the absence of an explanation this is in itself careless driving.<sup>95</sup> If the defendant can put forward a viable explanation for such an act then the prosecution must disprove it.

### *Excess Speed*

Offences of driving with excess speed are found in sections 81, 86, 88 and 89 Road Traffic Regulations Act 1984. Not only do different speed limits apply on different classes of road, but also to different classes of vehicle. Although the

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<sup>91</sup> Smith, J.C., *Smith and Hogan: Criminal Law*, London: Butterworths, 10<sup>th</sup> ed., 2002, p.502.

<sup>92</sup> [1981] RTR 4.

<sup>93</sup> *Simpson v. Peat* [1952] 2 QB 24.

<sup>94</sup> *McCrone v. Riding* [1938] 1 All ER 157.

<sup>95</sup> *Bensley v. Smith* [1972] CrimLR 239.

speed limit for a car on a motorway is 70mph, the speed limit for HGVs<sup>96</sup> on a motorway is 60mph. On single carriageway roads where the speed limit for cars is 60mph, the limit for HGVs is only 40mph and for other goods vehicles<sup>97</sup> and buses (including minibuses) and coaches is 50mph. Speeding offences are dealt with by way of endorsing D's licence with 3–6 penalty points.

### *Other offences*

There are various other offences designed to promote safety on the roads which may have been committed in the case of a road traffic fatality. However, in many cases such offences will not be contributory to the event of death, since, if they were, it is likely that more serious charges as described above would be contemplated. The offences discussed here may have been committed by a driver involved in a fatal collision, and although deemed not to be contributory to death, may result in prosecution. It will often be the case that, but for the occurrence of a collision, such offences would not have come to the attention of the police.

The first offence is “using” a vehicle in a dangerous condition, under s.40A RTA 1988. This applies not only to the driver himself who uses the vehicle, but to those who cause or permit such use, such as the vehicle's owner or driver's employer.<sup>98</sup> “Dangerous” here means that such use involves a danger of injury to any person. It should be noted that in many cases CDDD would be preferred to this offence, since “dangerous driving” includes driving a vehicle which is in a dangerous condition.<sup>99</sup> Other, more specific offences of using a vehicle with a particular defect (e.g. defective tyres or brakes) are contained within the Motor Vehicles (Construction and Use) Regulations 1986.

Special regulations apply to drivers of goods vehicles or other commercial vehicles. These include regulations limiting the number of hours for which such drivers are permitted to drive without a break, and regulations to ensure that vehicles are fitted with tachograph recorders which record the speed of the vehicle throughout its journey and can be used not only to check whether the vehicle has

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<sup>96</sup> Goods vehicles exceeding 7.5 tonnes laden weight.

<sup>97</sup> Not exceeding 7.5 tonnes laden weight.

<sup>98</sup> *Hallett Silberman v. Cheshire CC* [1993] RTR 32.

<sup>99</sup> Provided that a causal link between death and the dangerous condition of the vehicle can be proved.

exceeded the speed limit for that class of vehicle, but also to establish the hours which the driver has driven.<sup>100</sup>

### *Offences beyond the scope of this study*

This study is concerned with offences which contribute to the occurrence of a fatal collision and relate to the way in which a vehicle was driven. There are, of course, other offences which may have been committed by D in driving at the time of the collision, such as driving whilst disqualified, driving other than in accordance with a driving licence, driving without insurance and using a vehicle without an MOT certificate. These offences, which were categorised by Steer and Carr-Hill as “dishonest” offences rather than “driving” offences,<sup>101</sup> do not increase the culpability of D in terms of responsibility for the death of V, although it may be that some such offenders are more likely to commit “driving” offences because, for example, they have come under police suspicion and are being pursued.<sup>102</sup>

## **Defences**

Two general defences would appear to be relevant to the driving offences discussed in this chapter: duress of circumstances (often referred to in case law as “necessity”) and automatism.

### *Duress of circumstances*

This is a fairly new defence which has developed through case law mainly in relation to driving offences. The defence was first recognised in the case of *Willer*<sup>103</sup> as a possible defence to reckless driving. It was followed in another case of reckless driving,<sup>104</sup> and also applied to driving when disqualified.<sup>105</sup> It was later

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<sup>100</sup> The law relating to tachographs is covered by both European and domestic law. Most of it is contained within EEC Regulations 3820/85 and 3821/85 and Part VI (ss.95–103) Transport Act 1968.

<sup>101</sup> Steer and Carr-Hill, n.80 above.

<sup>102</sup> On the other hand, however, it would be in a dishonest offender’s best interests to drive carefully in order to avoid such attention.

<sup>103</sup> (1986) 83 Cr App R 225.

<sup>104</sup> *Conway* [1989] QB 290.

<sup>105</sup> *Martin* [1989] 1 All ER 652.

confirmed that the defence would extend to the offence of careless driving.<sup>106</sup> For the defence to be applicable, D must have driven through fear of death or serious injury,<sup>107</sup> and he must not have continued to drive in such a way as results in an offence once the threat has passed.<sup>108</sup>

### *Automatism*

If D's physical movement in driving a vehicle can be said to be involuntary, with D retaining no control over his actions, he may be able to plead the defence of automatism. The classic example of such a case is that of a driver who is attacked by a swarm of bees, and in trying to fight them off loses control of his car.<sup>109</sup>

A more likely cause of involuntary action when driving is the effect of an hypoglycaemic attack caused by diabetes. However, for such a defence to be successful in cases involving driving offences, D must not be at fault in inducing such automatism.<sup>110</sup> Thus in *Davies*,<sup>111</sup> although D lost control of his vehicle as a result of a hypoglycaemic attack, D was unable to plead automatism successfully because it was said that he was at fault in not eating properly and failing to maintain his sugar levels, and that the collision could have been avoided if he had stopped driving when he first experienced the symptoms. Indeed, in the case of *Marison*,<sup>112</sup> where D drove knowing that there was a strong likelihood that he may suffer a hypoglycaemic attack, it was held that this was not a case of automatism because D had committed the offence of dangerous driving before the attack took place, since he had driven when an hypoglycaemic attack was

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<sup>106</sup> *DPP v. Harris* [1995] 1 Cr App R 170; *Backshall* 1 Cr App R 35. Although Herring argues that in the latter case the defence of self-defence would have been more appropriate: Herring, J., "Mondeo Man, Road Rage and the Defence of Necessity" [1999] CLJ 268. Self-defence would be a possible defence to a driving offence: see *Renouf* [1986] 1 WLR 522.

<sup>107</sup> It is sufficient to show that D reasonably perceived such a threat; he does not have to prove that the threat was real: *Cairns* [1999] 2 Cr App R 137.

<sup>108</sup> *DPP v. Jones* [1990] RTR 34; *DPP v. Tomkinson* [2001] RTR 583.

<sup>109</sup> *Hill v. Baxter* [1958] 1 QB 277.

<sup>110</sup> Although D may not be at fault in inducing his automatism, and thus may have a defence to dangerous or careless driving, he may nevertheless remain liable for the offence of driving whilst unfit under s.4(1) RTA 1988 where the unfitness to drive is a direct consequence of an insulin injection: *Woodman*, n.77 above.

<sup>111</sup> [2002] 1 Cr App R (S) 136.

<sup>112</sup> n.61 above.



reasonably foreseeable. The trial judge drew an analogy here between cases in which dangerous driving can be proved on the basis that the vehicle was in a dangerous condition, under s.2A(2) RTA 1988, and cases in which the driver himself could be said to be in a dangerous state. Similarly, sleep cannot be relied upon as the basis of an automatism plea if D continues to drive when feeling sleepy, and subsequently falls asleep at the wheel of his vehicle, since his failure to stop constitutes the fault necessary to convict him of careless or dangerous driving.<sup>113</sup>

## **Procedural issues**

### *Alternative verdicts*

The general provisions of s.6(3) Criminal Law Act 1967 apply in relation to alternative verdicts, but more specifically, s.24 Road Traffic Offenders Act 1988 provides a table setting out the alternative verdicts on charges under the RTA 1988. The possible alternative verdicts in relation to offences relevant to this study are as follows. Where CDDD is charged, the alternative offences are dangerous driving and careless driving. Where CDCDUI is charged, the alternative offences are careless driving, driving when unfit,<sup>114</sup> driving with excess alcohol<sup>115</sup> and failing to provide a specimen.<sup>116</sup>

### *Time limitations*

For summary offences, including careless driving, an information must be laid within six calendar months of the date of the commission of the offence.<sup>117</sup> This is important, and the police and CPS must ensure that their investigations progress sufficiently to be able to make a decision as to charge within this time limit or risk losing the ability to charge the offence of careless driving. There are, however, no time limits involved in charging the indictable offences discussed above under the heading “Offences reflecting the fact death has been caused”.

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<sup>113</sup> *Kay v. Butterworth* (1945) 173 LT 191.

<sup>114</sup> s.4(1).

<sup>115</sup> s.5(1)(a).

<sup>116</sup> s.7(6).

<sup>117</sup> Magistrates’ Court Act 1980, s.127.

## Chapter 3 – The Empirical Study

Chapter 2 has explained the law as it appears in the books. Case law can provide some idea of how the law is interpreted by the courts, but what is evident from a mere description of the law is that when a fatality is caused by driving, there are a number of offences which can be charged, depending on the circumstances of the case and the evidence available to the prosecution. There are arguably three main offences which may be considered relevant to such a death,<sup>1</sup> two of which reflect that a death has occurred and one which does not: manslaughter, CDDD and careless driving respectively. Other cases may involve further characteristics which increase the choice of charges available: drink or drugs could lead to a charge of CDCDUI; if the vehicle driven by D was taken without the owners consent, aggravated TWOC may be available. What is not clear from the law in its black-letter form is how choices are made between these alternative charges.

Although the current law was enacted following an in-depth review of road traffic offences,<sup>2</sup> and has received far more deliberation than other areas of the criminal law which are perhaps equally deserving of reform, there are indications that those involved in the making and applying of the law remain dissatisfied. In adopting the Law Commission's proposals on the law relating to involuntary manslaughter, the Government revealed that it had commissioned a major research project to establish the extent to which the criminal justice system has given proper effect to the changes Parliament had intended in the enactment of the Road Traffic Act 1991, and that the Government would consider whether any further change to the law was needed once the conclusions of this research were known.<sup>3</sup> The project was conducted by the Transport Research Laboratory, who reported their findings in January 2002.<sup>4</sup> By then this current project was well under way, but in the early stages of the project all that was known was that the Government was not convinced that the current law was operating as it should,

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<sup>1</sup> Assuming that there is no evidence of an intent to kill or cause grievous bodily harm necessary to prove murder.

<sup>2</sup> Department of Transport and Home Office, *Road Traffic Law Review Report* (North Report), London: HMSO, 1988.

<sup>3</sup> Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals*, May 2000, para.2.14.

<sup>4</sup> Pearce, L.M., Knowles, J., Davies, G.P., and Buttress, S., *Dangerous Driving and the Law*, Road Safety Research Report No.26, Transport Research Laboratory, 2002.

and was open to further reform. As will be seen, the question of reform has since received further consideration, but at the outset of the current study various issues were identified as providing scope for debate.

This chapter will start by explaining the background to the current study, how the questions which this study hopes to answer were thrown up during previous research, what the aims and objectives of the current study are and the method used in carrying out the empirical work. In doing so it will justify the method used in conducting the empirical study, as well as outline the practical processes involved in carrying it out. There are issues that influenced the choice of method, which will be explained, and the mechanics of the research described.

### **Background: the Coventry Study**

The researcher had previously worked on a qualitative study of homicide at Coventry University. The study sought to uncover what factors influence the outcome of homicide cases at court, through the examination of Crown Prosecution Service (CPS) files and interviews with prosecution and defence lawyers and police officers. One of the main objectives was to establish what distinguishes murder from manslaughter. In selecting the sample from the Home Office's Homicide Index all the cases within the relevant time period and geographical location in which the method of killing was described as "struck by a motor vehicle" were chosen. It was found that very few such cases existed,<sup>5</sup> and none of them resulted in a conviction for murder, although murder was the offence charged by police. This result was perhaps somewhat surprising, given the evidence available to the court, and the researchers felt that the issue deserved further investigation. They thus requested from the Home Office the names of all files for murder and manslaughter where the method was recorded as "struck by a motor vehicle" on the Homicide Index from as far back as the computerised records were available (only to 1995).

This produced a list of twenty-four cases, the files for which were accessed and analysed. There were in fact only nineteen<sup>6</sup> different cases which fell within the

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<sup>5</sup> Originally only four such cases were included in the sample.

<sup>6</sup> Of the original list of twenty-four defendants, one was only ever charged with CDDD, not manslaughter as was recorded on the Homicide Index, one defendant caused his victim to be run over by a lorry but was not the driver of the lorry, and three co-defendants were guilty of murder in a case in which the method of killing was actually "blunt instrument" rather than being struck by a motor vehicle.

sphere of the study across the whole of England and Wales for the years 1995–8 inclusive. In order for a case to appear on the Homicide Index either the police or the CPS must have charged it as either murder or manslaughter. Therefore other cases of “vehicular homicide” in which a death was caused by the victim being struck by a motor vehicle would not appear on the Index if only CDDD or some offence other than murder or manslaughter was charged. The results of the analysis of these files were published in an article in the Criminal Law Review.<sup>7</sup>

The article concluded that:

*The results of the study suggest that in cases of vehicular homicide CDDD is often charged in addition to murder in order to provide a charge to which the CPS can have recourse in the event that the jury fails to find the necessary intent for murder. This occurs where ordinarily, if the weapon used had not been a motor vehicle, manslaughter would have been the verdict returned. Because of the existence of the offence of CDDD the jury are not offered the opportunity to convict of manslaughter even though the latter offence might best represent the defendant’s culpability.*<sup>8</sup>

It was found that cases of vehicular homicide originally charged as murder or manslaughter could be divided into two categories: those in which the charge, usually of murder, was based on evidence that a car had been used as a weapon of assault, and those in which there was a charge of (gross negligence) manslaughter based on death caused by very bad driving. It was argued that those falling within the first category should not result in convictions for CDDD, since such homicides should be treated in the same way as any other in which a lethal weapon is used to assault another person. Despite this, four of the thirteen cases in which murder was the offence charged by police resulted in convictions for CDDD. Of the six cases falling within the second category all but one case resulted in a conviction for CDDD.

This last finding suggests that manslaughter has more or less ceased to exist in its form of “motor manslaughter”, having been replaced by the offence of CDDD. As noted in the previous chapter, the case of *Jennings*<sup>9</sup> confirmed that “motor

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<sup>7</sup> Cunningham, S., “The Reality of Vehicular Homicide: Convictions for Murder, Manslaughter and Causing Death by Dangerous Driving” [2001] CrimLR 679.

<sup>8</sup> Ibid, at p.691.

<sup>9</sup> *R. v. Governor of Holloway Prison, ex p. Jennings* [1983] 1 AC 624.

manslaughter” was not impliedly repealed by the Road Traffic Act 1956, and the Charging Standard recognises this fact,<sup>10</sup> although it goes on to state that it will rarely be an appropriate charge.<sup>11</sup> In three of the cases in the Coventry sample in which manslaughter was originally charged by the police, the CPS followed this advice and reduced the charge to CDDD, and in two cases they added a charge of CDDD to the indictment alongside manslaughter, as advised by paragraph 14.4 of the Standard.<sup>12</sup> These cases involved driving which could be described as being of the very worst kind, and arguably met the requirements of the offence of manslaughter with ease. What was unusual about these cases, however, was that the police had treated them as manslaughter (rather than CDDD) so that in most cases the CPS inherited a case where the charge had been made and were then in the position of reviewing this decision. In all but one case it was the police who introduced the possibility of the case resulting in a conviction for manslaughter. In only one case did the CPS, in reviewing the case, decide that a charge of CDDD should be raised to one of manslaughter.

What this suggested was that there might be many cases which technically could satisfy the requirements of a manslaughter charge, but in which the police failed to consider this to be a possibility. If there were other serious cases of vehicular homicide which were never charged as manslaughter, despite this possibility, they would not appear on the Homicide Index and thus would not be included within the sample. It was also suggested by police officers interviewed that cases where cars had been used as weapons of assault to kill were not charged as murder, and again did not appear on the Index, because either the traffic officer dealing with the case failed to recognise the evidence pointing to this possibility, or he did so but was unable to persuade a member of CID to take on the case.

Thus, the main impetus behind the current study was a concern that cases of vehicular homicide which could in law amount to murder or manslaughter were in fact only being charged as CDDD, meaning that the very existence of CDDD prevents justice from being done in such cases. This suspicion was to some extent supported by research conducted by a police research unit, which found that

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<sup>10</sup> Crown Prosecution Service, *Driving Offences Charging Standard*, 1996, para.11.1.

<sup>11</sup> *Ibid*, para.11.5.

<sup>12</sup> Although in most cases the Crown subsequently had to make a choice between the two charges in accordance with *Seymour*.

collision investigators tend automatically to regard fatalities as accidents.<sup>13</sup> This led to the Association of Chief Police Officers (ACPO) producing a Road Death Investigation Manual in 2001 to encourage officers to investigate the potential of murder or manslaughter in such cases. It is, however, impossible to find the full extent to which cases of murder and manslaughter are being dealt with as mere road traffic cases by reference to the official statistics alone. It is only through knowledge of the circumstances of each individual case that one can discern the possibility of a case falling within this category.

A further concern was that some commentators had suggested that cases in which a death had resulted from dangerous driving were being charged as dangerous driving rather than CDDD.<sup>14</sup> Generally there is no reason why this should occur, since if a piece of driving can be proved to be “dangerous” in the legal sense of the word, and a fatality resulted from a collision which came about through such driving, then all the elements of CDDD are made out.<sup>15</sup> Again, however, it would be impossible to discern from official statistics whether such an assertion about the offences charged in road death cases is true, since there are no statistics recording the fact that conviction for dangerous driving relates to a case in which a death was caused. Only through knowledge of individual cases could such information be uncovered.

## **Aims and Objectives**

The empirical study has broadly two aims. The first is quantitative in nature, in discovering how often different charges are brought in cases of road traffic fatalities. How many cases result in charges of CDDD, or manslaughter, or careless driving, or CDCDUI? In cases where there are multiple options with regard to offences to be charged, for example if there is a choice between CDDD and manslaughter or CDDD and CDCDUI or CDDD and careless driving, which

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<sup>13</sup> Reported in *The Times*, 17.01.00.

<sup>14</sup> See, for example, Clarkson, C.M.V., *Understanding Criminal Law*, London: Sweet and Maxwell, 3<sup>rd</sup> ed., 2001, p.211.

<sup>15</sup> There are two scenarios in which a charge of dangerous driving might be appropriate in a fatal case. The first is where it cannot be said that D’s driving caused death, for example, where medical treatment was so bad that it amounted to a *novus actus interveniens*, breaking the chain of causation (although such cases are very rare). The second is where it is decided that D should not be prosecuted for CDDD for public interest reasons, because the deceased is a relative of D. Here dangerous driving would be an appropriate charge if danger was caused to other road-users.

option is chosen? However, the answers to these questions, on their own, are merely descriptive and fairly uninteresting. The second aim of the research involves a qualitative analysis in seeking to find explanations for the choices made by decision-makers within the criminal justice system. What factors may influence the decision as to charge and what difficulties, if any, do decision-makers encounter in making that decision? Ultimately, the objective is to discover how the law operates in practice and whether it does so in the way in which it was designed. The findings may assist in considering what changes, if any, ought to be made to the structure of homicide and motoring offences.<sup>16</sup>

In doing so, some specific hypotheses present themselves for exploration:

1. the possibility that in some cases where a motor vehicle is used as a weapon of assault causing the death of another person, the police fail to investigate the case as a potential murder or manslaughter;<sup>17</sup>
2. there is very little difference in the requirements to prove CDDD as opposed to gross negligence manslaughter in cases where a death is caused by very bad driving. According to cases such as *Jennings*<sup>18</sup> and *Adomoko*<sup>19</sup> manslaughter should be reserved for the very worst cases. How bad must driving be in order for manslaughter to be considered as a possible charge? Is manslaughter ever considered a possibility, and if so, what makes prosecutors choose CDDD over manslaughter?
3. Is there any truth in the suggestion that dangerous driving is charged in cases where the appropriate charge is CDDD?

As the research progressed a fourth issue presented itself, namely:

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<sup>16</sup> Although it would be misguided to assume that the law is currently deficient and should be improved or to take for granted that any change to the law will alter reality: Sanders, A., "Criminal Justice: The Development of Criminal Justice Research in Britain" in Thomas, P. (ed.), *Socio-Legal Studies*, Aldershot: Dartmouth, 1997, p.186.

<sup>17</sup> Spencer suggested that those who use motor vehicles as weapons of offences are treated leniently by the police. He highlighted the cases such as *Owens* (1981) 3 Cr App R (S) 311, in which D escaped trial for murder by pleading guilty to causing death by reckless driving: Spencer, J.R., "Motor Vehicles as Weapons of Offence" [1985] CrimLR 29.

<sup>18</sup> n.9 above.

<sup>19</sup> [1995] 1 AC 171.

4. How effective is the distinction drawn by statute between the offences of careless driving and dangerous driving? To what extent do prosecutors experience difficulty in applying the tests of “driving falling below the standard of a competent, reasonable and prudent driver”<sup>20</sup> and “driving falling far below the standard of a competent and careful driver”?<sup>21</sup>

## Research Design

It could be argued that the most effective way of exploring the difficulties faced by police and prosecutors in making charging decisions would be to carry out field-research, using observation as the primary method in gathering data. It might be possible to shadow police collision investigators in their daily routines, to attend the scene of any fatal collisions occurring within a certain time period and to track the cases as they moved through the criminal justice system, being witness to any decisions made along the way. This could be supported by interviews with police officers and Crown Prosecutors.

This method would, however, encounter major operational difficulties, and it is doubtful that it would advance beyond the planning stage. Such a study would necessitate the agreement of the police and CPS to allow access to their personnel for a considerable period of time. The “gatekeepers” to research (the Chief Constable of any police force and the Chief Crown Prosecutor of each CPS area) would no doubt be reluctant to allow such access. Constraints on resources mean that such personnel have little time to be chaperoning researchers, and other policy issues would prevent such agreement.<sup>22</sup> In fact, one police force which was particularly reluctant to become involved in the research only allowed access to their files once it was reassured that interviews with officers would not be required.

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<sup>20</sup> The test for careless driving – see Chapter 2 above.

<sup>21</sup> The test for dangerous driving: s.2A Road Traffic Act 1988.

<sup>22</sup> Buchanan et al., in discussing access to organisations, note that access will not be granted where it is felt by the “gatekeepers” that normal operations are likely to be disrupted and where sensitive information is likely to be disclosed. They therefore advocate that researchers take an opportunistic approach to fieldwork in organisations, and suggest that they may have to choose what is possible over what is desirable: Buchanan, D., Boddy, D., and McCalman, J., “Getting In, Getting On, Getting Out and Getting Back” in Bryman, A. (ed.), *Doing Research in Organisations*, London: Routledge, 1988.



Despite this, a few interviews were later conducted,<sup>23</sup> but the researcher was disinclined to alienate those gatekeepers who had been generous enough to allow access to files and did not want to risk losing the privileges she had managed to secure by insisting that more widespread interviews were necessary. These problems with access were not, however, the only limitation involved in using interviews or observation as a primary method of data collection. Even if unlimited access to personnel were granted, it would only be realistically possible to observe a limited number of people, meaning that the number of cases falling within the sample would be small. This being so, it would be difficult to guarantee representativeness and to generalise the findings. There would be a danger of individual bias from the researcher generalising from necessarily limited interviews and random participant observation. As noted by Bryman, research which relies on participant observation “seem to be more liable to the charge of having looked at a single locale and therefore of creating findings of unknown generality”.<sup>24</sup> Added to this, Hawkins notes that it is difficult to use participant observation when the research subjects are essentially involved in tasks of administration where work tends to be less visible,<sup>25</sup> which is undoubtedly true of prosecutors making decisions as to charge based on documentary evidence.

Moreover, unlike other important empirical studies into the criminal justice system that have gone before,<sup>26</sup> this study does not seek to analyse the practices and culture of policing itself.<sup>27</sup> Rather, and quite unusually, this study seeks to discover the way the law is applied by both the police and the CPS in one limited area. This does indeed involve low visibility decision-making and, undoubtedly, the way in which the law is applied cannot be separated completely from the context in which decision-making takes place, but the emphasis here is on the

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<sup>23</sup> A total of eight interviews were conducted: three with representatives from the CPS and five with representatives from the police. See below, p.54.

<sup>24</sup> Bryman, A., *Quantity and Quality in Social Research*, London: Routledge, 1988, p.88.

<sup>25</sup> Hawkins, K., *Law as Last Resort*, Oxford: Oxford University Press, 2002, p.448.

<sup>26</sup> e.g. McConville, M., Sanders, A., and Leng, R., *Case for the Prosecution*, London: Routledge, 1991.

<sup>27</sup> Reiner points out that the wish to penetrate the low visibility of everyday police work is why participant observation has been the main technique adopted by researchers wishing to carry out such analyses: Reiner, R., “Police Research” in King, R., and Wincup, E., *Doing Research on Crime and Justice*, Oxford: Oxford University Press, 2000, p.219.

evidential factors influencing such decision-making.<sup>28</sup> Extra-legal factors such as the organisation and culture of decision-makers have not been ignored, and some consideration is given to them in the next chapter.

Due to the aims of the study, and given the disadvantages of using observation as the primary method of data collection, it was decided that the most effective method of achieving those aims would be to analyse secondary data, in the form of police and CPS reports.<sup>29</sup> The idea was to observe decision-makers through indirect access to their decision-making, and to infer past-behaviour from its traces, operating what Scott has described as a “mediate” relationship between the observer and the observed.<sup>30</sup> The type of secondary data chosen to be studied was dictated by the need to identify cases relevant to the study and to obtain sufficient information relating to decision-making in such cases.

The Home Office collects statistics on offences relating to motor vehicles in England and Wales, whilst it also records details of homicides charged as murder

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<sup>28</sup> Hawkins opines that, in the context of decision-making in regulatory agencies, the substantive law and changes in legal procedure are not the primary determinants of a decision to prosecute: Hawkins, n.25 above, p.415. If this were true of decision-making in relation to criminal charges in cases of road death incidents the current study would undoubtedly fail to achieve its objectives. In so far as driving offences can be likened to the type of regulatory offences studied by Hawkins, in that they aim to regulate the dangerous activity of driving and thus maximise the safety of others, Hawkins’s arguments may well be applicable (especially since there are now alternatives to prosecution available to the police such as the National Driver Improvement Scheme in cases of careless driving which could be seen as a form of enforcement without prosecution comparable with enforcement by the Health and Safety Executive). However, because this study is concerned with fatalities, prosecution will normally be required in the public interest and so the main issue to be addressed by prosecutors is the level of offence which can be proved according to the substantive law. In assessing such decision-making it was not assumed that decision outcomes are produced in a mechanical way when certain criteria are present, but as Hawkins suggests (at p.31), the research looks to see how decisions are made as “interpretive practices”.

<sup>29</sup> At the same time that this research commenced HM CPS Inspectorate also commenced a review of CPS decision-making road traffic fatality cases. Unlike this researcher, the Inspectorate was able to interview CPS staff, since it had no problems in gaining access. In addition to such interviews it also collected data from CPS files. However, the sample for the review was considerable smaller than for the present study. A total of only 164 files across ten CPS Areas were examined: HM Crown Prosecution Service Inspectorate, *Review of the Advice, Conduct and Prosecution by the Crown Prosecution Service of Road Traffic Offences Involving Fatalities in England and Wales*, 2002, paras 1.12–1.22.

<sup>30</sup> Scott, J., *A Matter of Record*, Cambridge: Polity Press, 1990, p.3.

or manslaughter on the Homicide Index. However, the latter does not include cases of CDDD, whilst the former does not identify cases involving a fatality, unless this is obvious from the charge (CDDD or CDCDUI). There is no way of identifying how many cases, for example, of careless driving relate to a case involving a fatality. Information provided by the CPS also suggested that it was not possible to identify such cases through any central database, and that identifying cases which involved a fatality necessitated accessing the files relating to road death incidents (RDIs) held by the police.<sup>31</sup>

The police file relating to a RDI includes all the evidence collected by the police on which their decision as to the disposal of the case is made, and which is then presented to the CPS and the court in cases where the decision is to prosecute. This includes an Accident Report Booklet, setting out such information as the parties involved in the collision, any injuries to people or damage to vehicles and other property, the location and road layout of the collision, and a description of what appears, from initial assessment at the scene, to have occurred.<sup>32</sup> This booklet is completed at the scene by the investigating officer, who also collects witness statements. As well as these, the file will also include any interviews conducted with those involved in the collision. A full Accident/Collision Investigation Report written by the collision investigator and vehicle examiner provides information about the physical evidence discovered at the scene, the mechanical condition of the vehicles involved, a plan of the scene and accompanying photographs, and the conclusions reached by the collision investigator as to how the collision occurred. All of the above evidence is also summarised in a report written by the investigating officer for his superiors, including a suggestion as to the appropriate action to be taken. If CPS advice is sought as to what action to take, a letter of advice from the CPS will normally appear on the police file.<sup>33</sup> Other correspondence, including memos between

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<sup>31</sup> This is confirmed by HM CPS Inspectorate in its report on the prosecution of road traffic offences involving fatalities. The CPS does not maintain an offence-based record of cases and it is therefore unable to identify relevant cases easily. The Inspectorate therefore often had to use police and coroner's records to identify cases: CPS Inspectorate Report, n.29 above, para.1.18.

<sup>32</sup> This assessment may later be shown to be correct or, conversely, the collision investigation report may show that the initial assessment was incorrect.

<sup>33</sup> HM CPS Inspectorate were impressed with the general high standard of the presentation of advice given to the police by the CPS in road traffic fatality cases, the

police officers or between the CPS and the police, may also appear on the file. Hawkins notes that it is this last group of non-official documents which are often the most useful to a researcher.<sup>34</sup>

Thus police files on fatal collisions contain a wealth of information that can be used in examining the issues identified as relevant to this study. Scott provides a simple set of criteria to assess the quality of evidence available for analysis,<sup>35</sup> and the police files appear to meet all of those criteria. They are as follows:

1. Authenticity – the evidence in the police files is clearly genuine and of unquestionable origin, since it has been used in legal proceedings.
2. Credibility – the evidence available on the file (such as eye-witness statements) may involve error and distortion, but the evidence taken in its entirety provides a picture of the evidence available to the decision-maker at the time of the decision as to the disposal of the case, and includes statements of opinion from those decision-makers relating to the credibility of individual pieces of evidence.
3. Representativeness – one police file relating to one RDI may not be typical of its kind, but the method of sampling (see below) ensured that sufficient cases were selected to provide for representativeness.
4. Meaning – because the evidence on the police files is provided for legal proceedings,<sup>36</sup> it is both clear and comprehensible.

Unlike research carried out by Brookman, who relied on police covering reports of murder files, which she recognised as portraying evidence in a way which will be biased towards the officer's views of events as formulated through the investigative process itself,<sup>37</sup> this research makes use of complete RDI files, allowing the researcher to build-up a view of the evidence available and enabling the police view of the evidence to be compared with an independent assessment

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majority of which was well reasoned and comprehensive: CPS Inspectorate Report, n.29 above, para.4.11.

<sup>34</sup> Hawkins, n.25 above at pp.457–458.

<sup>35</sup> Scott, n.30 above, p.6.

<sup>36</sup> Even in cases in which a decision is made not to bring criminal charges, the police file will be required by the coroner when conducting the inquest.

<sup>37</sup> Brookman, F., “Accessing and Analysing Police Murder Files” in Wincup, E., Noakes, L., and Brookman, F., *Qualitative Research in Criminology*, Cardiff: Brookfield, 1999, p.54.

by the researcher. The summary provided by the investigating officer can then be assessed and used to establish the weight placed by decision-makers on the different pieces of available evidence.

The police file will also normally record the outcome of any case, but in most cases it will not include much information about how the case progressed once it has been adopted by the CPS. For this reason it was felt that it would be desirable to obtain access to CPS files relating to the cases in the sample identified through access to police files. These contain more information with regards to the preparation of the case for court.<sup>38</sup> However, given that the relevant files could only be identified through providing the CPS with a defendant's name and case number, it was necessary to carry out examination of the police files before moving on to examine CPS files.

The advantages of this method of research are that data from a large sample of cases could be collected, without the need to cause too much inconvenience to the police or CPS. It would provide the researcher with information as to what offence was charged in cases where she would have gained an understanding of the evidence available to the decision-maker when deciding which charge was appropriate, and to a certain extent would provide her with some indication as to what influenced such decision-making. There are obvious disadvantages, however. These might be that the files do not give a complete picture of the investigation and prosecution. Although they will (or should) include any evidence to which the police had access, there might be no mention of informal discussions taking place between the police and the CPS, which might affect the final decision as to charge. However, although not perfect, on balance this type of method was the only feasible option available to the researcher to achieve the aims of the study.

Other disadvantages identified as attaching to the analysis of existing records include the validity or correctness of information contained within the record.<sup>39</sup> Arguably, however, this problem is avoided in relation to the current study, in that the information recorded within the file is that which was available to the

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<sup>38</sup> It should be noted, however, that HM CPS Inspectorate has raised issues about the standard of file management in cases of fatal road traffic collisions: CPS Inspectorate Report, n.29 above, para.2.7.

<sup>39</sup> Pope, C., Lovell, R., and Brandl, S., *Voices from the Field: Readings in Criminal Justice Research*, London: Thomson Publishing, 2001, p.8.

decision-makers in reaching their decision. It constitutes the same information upon which a charging decision was made, and so its validity is secure. As pointed out by Scott, official documents are not impartial and autonomous intellectual accounts; rather they are integral elements of policy and administration.<sup>40</sup> As a result, the interpretation of a text cannot be separated from the questions of its production and its effects.<sup>41</sup> In order to validate the sources of information available in this study it was necessary to relate them to the intention of the authors (police officers, collision investigators and Crown Prosecutors) and to relate the text to its audience (senior police officers, Crown Prosecutors and, sometimes, prosecuting counsel).

It is true, however, that in relation to the outcome of the case, such a record may not provide the full picture, since evidence existing within the file may have been challenged in court or witnesses may not have come up to proof. This is something which may limit the conclusions which can be drawn as to the reasons behind the outcome of a case, particularly in the case of acquittals. The effect of these problems is, however, minimised by the fact that the majority of cases resulted in a plea of guilty, so that evidence was rarely tested in court.<sup>42</sup> Moreover, the main focus of this study is on the factors influencing the decision as to whether or not a driver should be charged with an offence, and if so what. To a large extent these can be discovered through analysis of the information contained within the files.

In cases resulting in prosecution the following information was available to assist in addressing the research questions. The evidence available to the decision-maker provides an initial indication of the issues involved in a particular case. Conclusions and recommendations recorded by police officers indicate the importance allocated to each issue in their decision-making. The CPS letter of advice provides an indication of whether or not the CPS agreed with the police's interpretation of the case and the relevant issues. Access to CPS files further provides indications of the issues identified as problematic in the preparation of

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<sup>40</sup> Scott, n.30 above, p.84.

<sup>41</sup> Ibid, p.35.

<sup>42</sup> The exact figure of guilty pleas is not known, as the information was not always available on file. In the CPS Inspectorates' review, 30 of the 42 cases where CDDD was charged were dealt with by way of guilty plea. In all cases where CDCDUI or aggravated TWOC were charged, D pleaded guilty. In 39 of the 47 cases of careless driving, D pleaded guilty: CPS Inspectorate Report, n.29 above, para.5.42.

the case. Finally, the court's decision as to the defendant's guilt provides an indication of the strength of the prosecution case. In cases where no prosecution was brought, different information about the decision not to proceed would be available, depending upon what stage of the process that decision was made. At a minimum, each file included the evidence collected by the police and the conclusion reached by the officer investigating the case.

In order to have a complete understanding of the decision-making process when dealing with offences leading to a fatality on the roads, it was necessary to gain access to files relating to all RDIs in a certain location over a specific period of time, whether or not a criminal prosecution ensued subsequently. This would enable the researcher to examine not only how a choice is made between different charges available to the prosecution (e.g. CDDD versus careless driving), but also to establish where the line is drawn between criminal liability and no criminal liability, whether because there was insufficient evidence to prove that an offence had been committed or because there were public interest factors which influenced the decision. It would also prevent any bias affecting the selection of the sample.

### *Getting Permission and Finding a Sample*

It would be a mistake to confine the investigations to a single locale, since in doing so the study would be vulnerable to criticisms that it is unknown the extent to which the findings are representative of decision-making across the country. On the other hand, it would be impossible, with the limited resources of a PhD student, to conduct the study across the whole of England and Wales. It was decided, therefore, to limit the study to one area of the Midlands, and that a realistic number of counties to study would be three. It remains true, however, that it is questionable whether the results from the three counties can be said to represent more than decision-making within those counties, or whether they can be generalised to the entire country. Given the possible factors affecting decision-making within the counties, this study does not purport to provide results which would necessarily apply to other areas of the country, but it nevertheless, because of the sampling technique, can confidently present findings which are wholly representative of the counties involved during the time period examined.

In order to gain access to CPS and police files it was necessary to approach each of the counties separately. Firstly, authorisation was gained from CPS Headquarters to access CPS files, but this access was also dependent on the

agreement of the Chief Crown Prosecutor (CCP) from each area. The difficulty then was in ensuring that the police force in the same area also agreed to access to their files. This involved writing to the Chief Constable of each force in the counties to which access had been granted to CPS files. Some CPS areas and police forces were more willing to grant access than others, and several rejections were received before corresponding police forces and CPS areas in three counties proved willing to allow access to their files. This is not surprising. It has already been noted that social science researchers have difficulty in accessing organisations in order to conduct research,<sup>43</sup> and more specifically Brown notes that researchers whom he describes as “outside outsiders” – academics or others who are not employed or commissioned by the police or other governmental bodies – face great barriers in gaining formal access to the police for research purposes.<sup>44</sup> Thus, the decision as to which counties would be selected for analysis was to a large extent out of the researcher’s hands. Those counties approached were determined by their location and distance from Leicester, since it was desirable to limit any necessary expenditure in time and money on travelling. Focus was therefore placed on counties within the East Midlands, and after several knock-backs, agreement was eventually obtained from Leicestershire, Lincolnshire and Northamptonshire.

To obtain such agreement it was necessary to agree to certain undertakings, which are normal when trying to access what Scott describes as “closed” and “restricted” access documents.<sup>45</sup> These undertakings included a research undertaking with the CPS, providing conditions of access to CPS files and a declaration under the Official Secrets Act. In addition, an undertaking of confidentiality was agreed with each police force, where data protection became an issue.

## **Data Protection**

The main difficulty in gaining access to police files was the enactment of the Data Protection Act 1998. This statute regulates the disclosure of information relating to individuals, including that held by the police as a result of their

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<sup>43</sup> See p.39 above.

<sup>44</sup> Brown, J., “Police Research: Some Critical Issues” in Leishman, F., Loveday, B., and Savage, S., *Core Issues in Policing*, London: Longman, 1996, cited in Reiner, n.26 above, p.222.

<sup>45</sup> Scott, n.30 above, p.14.



investigations. Some of the forces approached for this study expressed concern about their obligations under the Act, as it raises questions about the legality of the disclosure of police files. The police forces themselves seem to have received little guidance from the Home Office as to what their obligations are under the Act.<sup>46</sup> With the help of the Data Protection Officer at the University of Leicester it was established that any police force would need to be able to justify the disclosure of their files under both Schedules II and III of the Act. Under Schedule II disclosure could be justified under paragraph 6(1) which allows processing where:

*The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.*

It was suggested that the police might have a legitimate interest in research into road traffic collisions and that obviously the researcher as the third party has such an interest. None of the offenders were to be identified when writing up the findings and a strict policy of anonymity was applied.

Under Schedule III the Secretary of State has powers to make orders permitting the processing of personal data under certain circumstances (paragraph 10). The Secretary of State has made such an order (Statutory Instrument 2000 No.417: The Data Protection (Processing of Sensitive Personal Data) Order 2000). Under paragraph 9 of this Order sensitive personal data may be processed where:

*The processing –*

*a) is in the substantial public interest,*

*b) is necessary for research purposes (which expression shall have the same*

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<sup>46</sup> The operation of the Data Protection Act has been problematic for the police not just in terms of allowing access to researchers, but in other ways. This issue has recently been raised in relation to the Soham murders, for which Ian Huntley was convicted. Huntley obtained employment at a school despite having been the subject of various allegations of sex offences. The police forces involved claimed that they had felt unable to hold information of past alleged crimes for the purposes of employment vetting because of their obligations under the Data Protection Act. In 2002 ACPO produced a code of practice on data protection, but it appears that there is still some inconsistency in the way the Act is interpreted: *The Guardian*, 18.12.03.

*meaning as in section 33 of the Act);*

*c) does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and*

*d) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person.*

This project satisfies condition (b), and condition (d) has been satisfied by ensuring anonymity. Condition (c) does not apply. However, whether the research would satisfy condition (a) is a matter of opinion. Arguably, it is always in the public interest to carry out research which sets out to discover something about the criminal justice system and make it more open.

These arguments were accepted by ACPO, who agreed to endorse the research. ACPO is an advisory body which holds no authority as such over Chief Constables, but endorsement from the Chair of the ACPO Road Policing Committee was clearly instrumental in persuading Chief Constables to allow access to police files. This agreement was dependent upon the researcher signing Data Processing Agreements with each of the forces involved in the research, which govern what may be disclosed in the reporting of the findings.

## **The Sample**

Once it was known which counties were involved in the study it was possible to get an idea of how many files would be available in each county, depending upon the death rate on that county's roads. It appeared that a reasonable number of cases to study in which a prosecution had been brought would be 100. This would provide a range of cases involving different circumstances, and would ensure that any conclusions reached concerning the operation of the law in relation to any particular issue would be drawn from a number of cases, thereby avoiding suggestions of bias. In order to reach the target sample of 100 prosecuted cases it was estimated that access to files from two years would be required.<sup>47</sup> In order to remain consistent, cases from the same two years were selected in each county. This would avoid bias created by seasonal or annual fluctuations in collision rates. The files in question are not kept by the authorities indefinitely. The police keep their files for three years and the CPS for only two. This, coupled

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<sup>47</sup> 316 files were accessed in total, of which 126 resulted in prosecutions.

with the fact that the Data Processing Agreements prevent access to files where a prosecution is pending, meant that there was a limited window of opportunity to access the files. In order to read files which had been completed but not yet destroyed it was necessary to calculate the most opportune time-frame from which to select the sample. The result was that the years 1999 and 2000 were chosen to be the source of the cases. If most cases reach trial within a year then the files should have been closed by 2001, the year in which the data gathering commenced. It was necessary, therefore, to embark upon the task of examining the files immediately, as the files from 1999 would be due for destruction in 2002.

As stated above, in order to ensure representativeness of the sample it was decided that files relating to all RDI cases within the relevant time period should be examined. However, in order to avoid time wastage some files could be excluded from the sample. These related to cases in which either there was a single vehicle involved in the collision, the driver of which was the only fatality, or there were multiple vehicles involved but all of the drivers died. The criminal charges relevant to this study would not be available in any case in which there was no surviving driver.

### *Accessing Files*

The arrangements for the identification of police files falling within the selected sample and the practicalities of accessing the files differed between counties. Although the three counties involved in the study are all within the East Midlands, their road networks are varied. Leicestershire can be likened to Northamptonshire in that they are both mainly rural with several large towns and the M1 and other motorways running through them. However, Northamptonshire does not have a city within its borders, whereas Leicestershire has Leicester (although Northampton is the biggest town in England). Lincolnshire, on the other hand, has not got the road infrastructure of the other two counties, as it has no motorways running through it. Motorways are recognised as being safer than other trunk roads (A roads),<sup>48</sup> which might explain why Lincolnshire has one of

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<sup>48</sup> In 1995 in Leicestershire, 4 of the 78 road traffic fatalities occurred on a motorway, 11 occurred on a trunk road, 20 occurred on a principal road (A class roads, other than trunk roads), and 43 occurred on “other” roads: Leicestershire County Council, *Road Accidents in Leicestershire: The Casualty Report 1995*, p.18.

the highest death rates on the roads in Europe.<sup>49</sup> This, in turn, has led to the authorities in Lincolnshire exploring alternative strategies in road safety and policing. The need to reduce the number of deaths on the road might have an influence on decision-making with regards to criminal proceedings, and was borne in mind when analysing the files.

## **Lincolnshire**

Data gathering commenced in Lincolnshire. During 1999 there were 104 fatalities on the roads of Lincolnshire and this figure dropped to 70 in 2000.<sup>50</sup> Lincolnshire has a Road Safety Partnership between Lincolnshire County Council, Lincolnshire Police and Lincolnshire Health. The Partnership is housed in an office in Lincoln where both council employees and police officers (including the force's collision investigators) and civilian police staff are based. This was useful in that the researcher was able to visit the offices and meet a Data Analyst who, having understood the requirements of the sample, was able to use a computer programme to select the relevant cases from 1999 and 2000. Reliance has thus been placed on the use of this computer programme to extract the relevant cases and it has been assumed that it included all of the necessary cases. Once a list of cases had been compiled in this way the Partnership was then able to request the files from the regional offices, of which there were three. Lincolnshire files were very well organised, and all but two of the files from the years 1999–2000 were viewed,<sup>51</sup> which amounted to 111 files.

## **Leicestershire**

The files in Leicestershire were all kept centrally at Charles Street Police Station, Leicester, within the Abstracts Section, which forms part of the Accident Enquiry Unit. The files made available to the researcher in Leicestershire were of a different nature to those accessed in Lincolnshire and Northamptonshire.<sup>52</sup> In the latter two counties the full and original police file was made available to be

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<sup>49</sup> During the time of the cases in the sample Lincolnshire had 16 deaths per 100,000 residents whereas the British average was only 6. The only countries that had a higher average were Greece and Portugal. (Source: <http://www.staying-alive.com> Feb 2001).

<sup>50</sup> Source: <http://www.lincs.police.uk/depts/traffic/msu1.shtml> June 2004.

<sup>51</sup> Files in all counties may have been unavailable either because criminal proceedings were still pending, a civil case was in process or the files could not be found.

<sup>52</sup> This was not apparent until the actual data collection was in process.

viewed. In Leicestershire, however, the files viewed were those maintained for the purposes of providing information to the victims of RDIs.<sup>53</sup> To a large extent the contents of the files replicated that of those in the other counties, but there were some differences. Documentation detailing the injuries to the deceased, for example, was often covered over or deleted in order to protect the sensitivities of anyone reading the file. It is thought that in most cases this has not limited the information available for the purposes of the current research, but it might be possible that there were gaps in the information provided.

A list of the relevant cases was obtained from the County Council via e-mail. However, it was soon found that the initial list was not complete, in that the officer at the Department of Planning and Transportation initially omitted to include cases where the surviving driver was uninjured (injuries were recorded as fatal, serious or slight). Once this was discovered, a complete list of cases from the two years was provided, and it was found that only four of the total 122 cases fell outside the scope of the study (all single vehicle collisions). One of the files could not be viewed, as it was an ongoing “crime” file, meaning that CID were investigating the case, which had not yet been closed. However, two further cases were found which were not on the Council’s list because they did not occur on a road.<sup>54</sup> Thus, a total of 119 files was examined in Leicestershire. Because these files did not appear to be as complete as the files in the other counties, greater reliance was placed on the CPS files in Leicestershire.

## **Northamptonshire**

Again, in Northamptonshire the files are kept centrally at the Central Accident Bureau, within the Operations Department, Mereway, Northampton. The relevant cases could be identified by referring to a book within which all the details relating to RDIs are recorded by hand. A total of 86 files was viewed in Northamptonshire, where there were 61 fatal road traffic collisions in 1999,

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<sup>53</sup> Relatives of victims may request to view a file once any criminal proceedings have been completed. They may want to do so due to a need to explain their loved one’s death, or in order to provide evidence for civil proceedings.

<sup>54</sup> The Council’s database is used to assist in making decisions with regards to improving road safety and thus these cases would not be relevant to them. However, because these cases occurred in a public place (a park and waste-ground) they would come within the definition of CDDD if dangerous driving could be proved.

falling to 50 in 2000.<sup>55</sup> One further file was relevant to the study but access to it was denied due to a private prosecution which had been commenced by the parents of the deceased, following a decision by the CPS not to charge the offending driver. The police files were very well organised. However, in some cases the result of any prosecution was not readily available as the CPS does not always update the police and return the main file as quickly as it might. This meant that it was sometimes necessary to access CPS files before the outcome of a case could be recorded. There was one case recorded in the book which was omitted from the sample. This was a collision which technically took place within Northamptonshire, but because of its location close to the border with Oxfordshire (part of Thames Valley Police) was dealt with entirely by another police force. Northamptonshire Police had no involvement in this case whatsoever and were not informed of the details of the case.

Once the police files had been examined, it was possible to provide the CPS in each area with a list of cases for which the corresponding files were needed. The CPS retain files for two years following any final decision concerning the case, or for as long as any sentence is served. Examination of police files took a year, after which the researcher moved on to access CPS files. If a case of careless driving had been decided in 1999, and access was requested in 2002, unfortunately the file may already have been destroyed. The researcher had endeavoured to avoid these problems in creating a sample, but was unable to do so completely. This illustrates a major difficulty with engaging in empirical research involving access to CPS files. The researcher is reliant on the survival of documents and, as noted by Scott,<sup>56</sup> documents can disappear through accidental misfiling or deliberate hiding.<sup>57</sup>

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<sup>55</sup> Northamptonshire is therefore the county with the lowest road traffic fatality rate in the study. Note here also the difference in the number of cases falling outside the scope of the study, in contrast to those from Leicestershire. Whereas in Leicestershire there were only 3 cases in which there was no surviving driver, in Northamptonshire there were 23 such cases. It is unclear why there should be such a divergence in these figures. The researcher has relied upon police records to establish these figures and has not checked the original files, so is unable to say for sure whether any mistakes have been made in police record-keeping.

<sup>56</sup> Scott, n.30 above, p.26.

<sup>57</sup> Although it is not suggested here that files were deliberately withheld from the researcher.

As will be seen in the next chapter, Leicestershire prosecuted far more cases than the other two counties. Of the 49 case files requested for examination from CPS Leicestershire, eighteen were actually provided for access. Of the remainder, most cases were those in which careless driving had been charged, meaning that the files may have already been destroyed by the time it was possible to request them. However, all but two of the case files relating to charges of CDDD were viewed. In Northamptonshire, fourteen of the 33 files requested were provided for analysis. In Lincolnshire it was possible to access ten of the 39 files requested. The remainder had either been destroyed or could not be located.

### *Interviews*

In addition to the analysis of case files, open-ended, semi-structured interviews were conducted with representatives of each police force and CPS area involved. As noted above, more extensive use of interviews was not possible due to the resource constraints placed on the police and CPS. It must be made clear, therefore, that the main purpose of these interviews was to inform the researcher in relation to the mechanics involved in the investigation and prosecution of cases involving RDIs. One representative from each of the three CPS areas was interviewed, and one representative from both Lincolnshire and Northamptonshire Police forces were interviewed. Due to the fact that Leicestershire Police had recently restructured its decision-making procedure in relation to RDI cases, it was beneficial to interview three individuals to establish what changes had been made in that county. Interviews with police officers focused on the organisation of road death investigations within the force, the resources available to them and the chains of communication through which a file travels before being closed. Interviews with Crown Prosecutors focused on the way in which cases are allocated, reviewed and prosecuted, relationships with the police and area policy as to providing advice. This information was necessary in order to understand the context in which decision-making in individual cases takes place, and to be able to recognise any gaps in the information provided in any particular file.

Interviewees were also asked to give their opinion on the law, the need for reform and the usefulness of the *Driving Offences Charging Standard*. However, this data cannot be deemed to be wholly representative, since only a small number of police officers and CPS lawyers were interviewed and their opinions might not necessarily be typical of others in the same position. Those interviewed were selected not by the researcher, but by the agencies involved, who chose the relevant individuals because of their experience working on cases of RDIs.

Although the opinions provided in such interviews do not directly contribute to the results of this study, they were useful in providing the researcher with some indication of the views of those involved in the operation of the law.

In addition to gleaned opinions on the law, interview data was sometimes used as a device to expand upon documentary data. The documentary data was, in the most part, complete and therefore reliable, but when gaps were found in the information provided about a case on the file, it was often possible to fill those gaps. This was facilitated through brief conversations with the personnel present in the offices where the files were examined, or at the interviews where these happened to be conducted with individuals who had worked on the particular cases.

### *Data Analysis*

As noted above, the first aim of the study is quantitative and descriptive, in that it seeks to provide information about the frequency with which different charges are brought in cases of RDIs. This information was easily extracted from the files, and is readily presentable in numeric form. However, as also noted, this aim is secondary to the qualitative one of providing explanations for the choices made by police and prosecutors in their decision-making, and assessing the effectiveness of the operation of the law. The achievement of this second aim involved a more complex analysis of the cases, comparing cases sharing some of the same circumstances or factors.

At the initial stages of the project, when the police and CPS files were examined, notes were taken to replicate the evidence available in each case. This was felt to be necessary in order to avoid failing at an early stage to identify factors which may have been relevant to the decision-making, and to allow for the revisiting of issues at a later stage. Once the initial data collection was completed, the notes for each case were re-read and summaries drafted to provide a way of identifying quickly any particular factor as being present in any one case. The full notes for each case were retained for further reference, however. Each case has been allocated a number in order to ensure anonymity. A prefix of LEIC for Leicestershire, NORTH for Northamptonshire and LINC for Lincolnshire is followed by a three-figure number, indicating no more than the order in which the files happen to have been read.

The results of the case analysis are presented in Chapters 5 and 6 below, where it will be seen that various factors common to a number of cases are the focus of



discussion. These factors were not selected in advance of the analysis, however, but presented themselves as the analysis progressed. Having read each of the files in person, the researcher was able to build up an impression of the cases, which was tested through a more logical analysis of the data. The starting point was to categorise the cases according to their final disposal. Thus cases where no charge was brought were grouped together, and the reasons for the decision to take no further action examined. These cases could broadly be sub-categorised into those in which there was no evidence of an offence having been committed by a surviving driver, those where there was sufficient evidence to support a criminal charge, but the decision was made not to go ahead with the charge due to public interest considerations, and those in which there had been some consideration as to whether there was sufficient evidence to charge an offence, usually careless driving. This latter sub-categorisation could then be compared with cases which did result in a charge of careless driving.

Other factors were considered as being a possible influence on the decision as to charge. Cases involving excess speed, fatigue and inattention were divided into subcategories, and the class of victim (pedestrian/motorcyclist/pedal cyclist) was also used to develop a typology. This system of analysis continued to operate, working through the hierarchy of seriousness. Cases charged as careless driving where CDDD was considered by decision-makers as a possible charge were compared with cases in which CDDD was charged, although there was some discussion over whether the evidence was strong enough to support the charge. At the top end of the hierarchy, cases in which manslaughter may have been a possible charge were considered. Cases involving drink or drugs were analysed in a separate category, as were cases in which a charge of CDDD was based upon the dangerous condition of the vehicle.

There are several computer packages available to provide Computer-Assisted Analysis of Qualitative Data (CAQDAS). The advantage of these programmes is that they are effective in supporting the code-and-retrieve operations of grounded theorizing.<sup>58</sup> They allow a speedy analysis of large volumes of data, and permit the counting of phenomena and searching for deviant cases.<sup>59</sup> However, because

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<sup>58</sup> Seale, C., "Using Computers to Analyse Qualitative Data" in Silverman, D., *Doing Qualitative Research*, London: Sage, 1999, p.163.

<sup>59</sup> Ibid, p.155.

of the relatively small number of cases involved within the sample, the quantity of information was manageable without the need for such computer assistance.

Furthermore, the main disadvantage of CAQDAS, as recognised by Seale, is that data must be entered in a word-processing package and that “this task, along with reading and codifying large volumes of data, remains one of the major time-consuming elements of qualitative data analysis which computers do not remove”.<sup>60</sup> Thus, the use of CAQDAS in this study was not helpful, since it would take longer to enter the data on to a computer than it would to analyse it manually. The time-saving element of CAQDAS occurs at the later stage of data searching and retrieval, and once the initial codifying of data had taken place there was little need for such searching and retrieval.

Although no sophisticated statistical analysis of the sample has been completed, information about the number of cases sharing particular factors is provided in later chapters. Silverman notes that “simple counting techniques can offer a means to survey the whole corpus of data ordinarily lost in intensive, qualitative research. Instead of taking the researcher’s word for it, the reader has a chance to gain a sense of the flavour of the data as a whole. In turn, the researcher is able to test and to revise his generalisations, removing nagging doubts about the accuracy of his impressions about his data”.<sup>61</sup> Thus, rather than merely providing a few illustrations to support the arguments, this thesis attempts to provide a broad impression of the cases and factors involved.

Before presenting this analysis of the cases in terms of the operation of the substantive law, Chapter 4 examines the issue of discretion in investigative and prosecutorial decision-making, and provides an explanation of the mechanics of the investigation and prosecution of RDI cases in each of the three counties involved in the study.

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<sup>60</sup> Ibid, p.162.

<sup>61</sup> Silverman, D., *Qualitative Methodology and Sociology*, Aldershot: Gower, 1985, p.140.

## Chapter 4 – Prosecutorial Discretion in Road Death Incidents

The objective of this study is to examine the way in which the offences available to the prosecution in cases of road death incidents (RDIs) operate in practice and as such its emphasis is on the substantive law. However, given that achieving this objective entails the discovery of what charges are brought in cases of RDIs and the reasons for this, it is clear that the inquiry must focus on the decisions made by those with the authority to determine whether any criminal charges should be brought as a result of the RDI, and, if so, what those charges should be. Although it is true that the final outcome of a case may depend not only upon the offence for which the defendant is tried but also on the decision-making of his peers (either a jury or a bench of magistrates, depending upon the charge), the decisions made at earlier stages of the process, before the case reaches court, can be argued to be the most important, not least due to the high rate of guilty pleas in such cases.

As noted by the CPS Inspectorate: “the selection of charge is possibly more significant when dealing with road traffic fatality cases than with most other criminal cases because of the wide divergence between penalties available in respect of offences of causing death by dangerous driving and in summary offences of careless driving.”<sup>1</sup> It is the “low visibility” decisions which are made at the beginning to mid-way stages of the criminal justice process which dictate how the law operates in practice. As Fionda points out: “[s]uch is the unique, central and pivotal position of the prosecutor in the structure of the criminal justice process that practice at that stage can have wide-reaching, reverberating effects on the decision-making practice of all other agencies throughout the process, both at the initial stages (that is, the police) and at the ‘back door’ of the system (that is, the courts, the probation service and the prison service)”.<sup>2</sup> However, what should also be noted is that the effects are reciprocal. Not only does the exercise of discretion by the prosecutor affect decisions taken by the police and courts, but decisions taken by the police, and future decisions likely to be taken by the courts, will affect the way in which the prosecutor exercises her discretion in any particular case. Both the police and CPS exercise considerable discretion in determining the way in which a suspect is dealt with. Their decisions are “low visibility” because they are made privately and although the parties involved

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<sup>1</sup> HMCPS Inspectorate, Report on the Thematic Review of the Advice, Conduct and Prosecution by the Crown Prosecution Service of Road Traffic Offences Involving Fatalities in England and Wales, 2002, para.5.11.

<sup>2</sup> Fionda, J., *Public Prosecutors and Discretion: A Comparative Study*, Oxford: Clarendon Press, 1995.

will be informed of such decisions they will not be made aware of the reasoning behind the decision-making and no official statistics are collected providing information about the number of cases in which the police or CPS decide that charges are inappropriate.

The details of exactly who decides what differ slightly from one county to another, but the essence of the task remains the same. This chapter examines the differences in the administrative organisation of the roles of individuals within the police and CPS in each of the three counties studied and explores the way in which discretion is exercised both specifically in the area of traffic offences and generally within the field of criminal justice.

## **The role of discretion**

Much has been written on the subject of the exercise and control of discretion in the US, but there is less British literature on the subject generally. In England and Wales considerable academic attention was given to the question of prosecutorial discretion at the time of the creation of the CPS in the mid-1980s and this continued for a short while as the CPS became established.<sup>3</sup> In relation to police discretion much of the literature explores the exercise of discretion in responding to crime on the street: the decision to stop and search or to arrest. Such literature is of limited use in this instance, given that the task of the police in dealing with RDIs differs greatly from that in dealing with other crime such as violent disturbances or property offences. In most cases RDIs do not involve any “detection” work in the sense of finding a suspect for a crime which has been reported, nor does it (normally) involve the need to remove violent suspects from a volatile situation. Whether an arrest is made will depend upon whether the officer considers that an arrestable offence has been committed<sup>4</sup> and it will only be in the most serious cases that a suspect is arrested at the scene and taken into custody. Thus in cases of RDIs police discretion comes into operation later in the investigation process once the investigation has progressed to such a stage that a clearer view of what happened has been constructed. In addition, the reasoning behind the exercise of discretion will differ from such exercise in other

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<sup>3</sup> See, for example: Mansfield, G., and Peay, J., *The Director of Public Prosecutions: Principles and Practices for the Crown Prosecutor*, London: Tavistock, 1987; Hall Williams, J.E., *The Role of the Prosecutor*, Aldershot: Avebury, 1988; Bennion, F., “The Crown Prosecution Service” [1986] CrimLR 3; Sanders, A., “An Independent Crown Prosecution Service?” [1986] CrimLR 16; Sanders, A., “Constructing the Case for the Prosecution” (1987) 14(2) J Law and Soc 229.

<sup>4</sup> i.e. whether it is obvious that D drove dangerously or has committed some other offence such as drink-driving (which is simple enough to determine with an on-the-spot breathalyser test) or TWOC.

cases. Because a death has been caused there will be little question of whether an offence should be charged if it can be proved, unless the issue of public interest is brought into question due to the relationship between D and the deceased (V). This will be explained in more detail below. The point to be made here, however, is that although literature on police discretion may be relevant in some respects, it does not apply to the operation of discretion in RDIs as it would elsewhere.

Perhaps more pertinent than research on traditional violent crime is the research carried out by Hawkins in relation to decision-making in regulatory agencies. Agencies such as the Health and Safety Executive, who enforce laws and regulations designed to promote safety at work, often overlook prosecutable infringements where such rule-breaking is not seen to be serious enough to warrant prosecution, but where an accident, especially a fatal accident, results from such rule-breaking the question of whether to prosecute will more likely be answered in the affirmative.<sup>5</sup> But what needs to be appreciated, Hawkins argues, is that such decision-making is not the work of individual legal actors working autonomously and independently of others, but is something done serially in the context of other decisions.<sup>6</sup> Similarly, in cases of RDIs, it is a series of individuals who make decisions about the disposal of a case, being influenced by the decisions of others and their own past experiences.

Individuals, whether they be Crown Prosecutors or police officers, are not machines. Although it may be desirable to guarantee uniformity and predictability in the way in which the law operates, such a goal is unattainable. No two cases will be identical as to the facts and the circumstances in which the crime was committed. Discretion is needed in order to allow criminal justice practitioners to deal with cases fairly. If laws were enforced without discretion this would also cause problems for the courts and prison systems, which would become overburdened with the number of cases they would have to deal with.<sup>7</sup> Fionda explains that two principles affect the operation of discretion to different degrees in different jurisdictions. The legality principle excludes all discretion from the early stages of the process and dictates that prosecutions should go ahead where there is sufficient evidence of guilt. The expediency principle, on the other hand, promotes discretion at the early stages of the process and allows the prosecutor to divert the accused from the courts. Fionda opines that in an ideal world, where resources were unlimited, the legality principle would be

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<sup>5</sup> Hawkins, K., *Law as Last Resort*, Oxford: Oxford University Press, 2002, p.342.

<sup>6</sup> Ibid, at p.32.

<sup>7</sup> Ohlin, L.E., "Surveying Discretion by Criminal Justice Decision Makers" in Ohlin, L.E., and Remington, F.J., *Discretion in Criminal Justice: The Tension Between Individualization and Uniformity*, Albany: State University of New York Press, 1993.

the most attractive but, given that this is impossible, in reality a combination of the legality and the expediency principle is desirable, with the balance between the two principles differing between countries.<sup>8</sup> In England and Wales the police and CPS necessarily operate as a filter to allow only the cases which warrant prosecution to get as far as the courts. The issue is in determining how cases are filtered. Davis recognised that discretion is an indispensable tool for the individualisation of justice, but warned that as with any tool it must be used carefully: “like an axe it can be a weapon for mayhem or murder”.<sup>9</sup> If discretion is not controlled the danger is that a great deal of injustice will result from its use.

Mansfield and Peay, in exploring the role of the prosecutor in preparation for the establishment of the CPS, identified a series of tasks in which the prosecutor engages.<sup>10</sup> First, the prosecutor must decide whether a particular act or omission by D might reasonably be said to fall within the ambit of the criminal law. This question is not as straightforward as it may at first appear, given that laws are framed in general terms. Second, the prosecutor must decide whether to prosecute or whether an alternative to prosecution such as a caution or NFA may be more appropriate. Third, the prosecutor must make a case to persuade the court that all the technical elements of a case are present, in order for the case to get past the half-time stage and avoid the judge ruling that there is no case to answer. Fourth, the prosecutor must be able to present the case in such a way as to be comprehensible and capable of being persuasive beyond all reasonable doubt to the magistrates or jurors. Lastly, the prosecutor must present the case in accordance with the rules of evidence. Thus prosecutorial responsibility falls broadly into two parts: the decision *whether* to prosecute and *how* to prosecute.<sup>11</sup> In making these decisions they found that any disagreements between prosecutors and police stemmed not from their interpretation of the law itself, but from divergent moral or social views about whether and how the law should be applied.<sup>12</sup> Similarly in Scotland, Moody and Tombs found that procurators fiscal operate not so much according to their knowledge of the law but through the application of social rules.<sup>13</sup> Of course, these two studies did not relate to

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<sup>8</sup> Fionda, n.2 above, pp.9–10.

<sup>9</sup> Davis, K.C., *Discretionary Justice: A Preliminary Inquiry*, Louisiana State University Press, 1969, p.25.

<sup>10</sup> Mansfield and Peay, n.3 above, p.1.

<sup>11</sup> *Ibid*, p.2.

<sup>12</sup> *Ibid*, p.84.

<sup>13</sup> Moody, S., and Tombs, J., *Prosecution in the Public Interest*, Edinburgh: Scottish Academic Press, 1982.

the CPS but, in a study commissioned by the CPS itself, Baldwin has since found that despite guidance given to Crown Prosecutors designed to promote consistency in decision making “[p]rosecution decision-making emerged from this study as a human and individual process, in which the personal attitudes and approach of the reviewing lawyer are of great significance”.<sup>14</sup>

Although CPS discretion is important, the CPS will only be able to exercise such discretion if the police exercise their own discretion in such a way as to involve the CPS in the process. Traffic policing in general is perhaps one area of policing which involves the highest degree of unsupervised discretion, limiting the role of the CPS in such cases. When officers witness a traffic violation which does not lead to a collision they have the choice to impose a fixed penalty ticket, report the offender for prosecution, or merely give a verbal warning, the motivation for their chosen action depending largely on the attitude of the offender.<sup>15</sup> In contrast to the decision in other cases, the question for the police and CPS in cases of RDIs is not whether an alternative to prosecution is more appropriate. In some cases of careless driving not involving fatalities the police may decide to give D a verbal warning or offer the offender the chance to attend a driver improvement course rather than face prosecution,<sup>16</sup> but at present such a course of action is not open in cases where fatalities are involved.<sup>17</sup> Thus the question for the police and CPS is whether an offence has been committed and, if so, whether it amounts to careless or dangerous driving, or possibly gross negligence. This question is one which is first considered by the police, who may make the decision that no offence has been committed and decide to take NFA. If they consider that an offence has been committed, they may make the decision to charge D themselves. Whether the police seek the advice of the CPS before deciding how to deal with a case differs from force to force. It is thus necessary to examine not only what discretion the police enjoy generally in RDI cases, but also to explain how each force involved in the study exercises that discretion specifically.

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<sup>14</sup> Baldwin, J., “Understanding Judge Ordered and Directed Acquittals in the Crown Court” [1997] CrimLR 536 at 554.

<sup>15</sup> Southgate, P., and Mirrlees-Black, C., *Traffic Policing in Changing Times*, Home Office Research Study No.124, London: HMSO, 1991, at p.36.

<sup>16</sup> See Chapter 8 for further details.

<sup>17</sup> Involvement in the National Driver Improvement Scheme is only offered to offenders where no serious injury resulted from their careless driving: Burgess, C., and Webley, P., “Evaluating the Effectiveness of the United Kingdom’s National Driver Improvement Scheme”, unpublished article available at: <http://www.ex.ac.uk/~cnwburge/pages/ndis03.html> December 2000.

## The Police

In whichever county an RDI occurs the police will follow a fairly uniform procedure in the initial stages of the investigation. First on the scene will most likely be officers from the Local Policing Unit (LPU). Either the control room or an officer first at the scene will request the attendance of a traffic officer once it becomes clear that the collision involves serious injuries. Those at the scene will nominate an officer in the case (OIC, sometimes called the reporting officer), who becomes responsible for the case and records various details of the incident. The OIC must build a file by collecting evidence such as witness statements for the purposes of both the coroner and any court proceedings that may result from the investigation. A Sergeant will always attend the scene of an RDI and will become the scene manager or Senior Investigating Officer (SIO). A collision investigator (CI) will attend the scene whenever the collision is seen to be potentially fatal. However, the identification of the CI and the consequent structure of decision-making differs slightly from county to county. The information given below was provided through interviews with representatives from each of the forces and was supported through examination of the files themselves.

### *Lincolnshire*

In Lincolnshire an officer of the rank of Inspector will attend the scene of every RDI. The Criminal Investigation Department (CID) will become involved in a case where premeditation or deliberation at the time of the RDI is obvious, for example where the RDI immediately followed a dispute. In such cases where murder or manslaughter is suspected the immediate requirement is for a Scene of Crime Officer to attend the scene. It is for CID to decide whether it wishes to take on the case or not. It was said that CID is usually reluctant to do so as they tend to view such cases as merely road traffic accidents. Lincolnshire CID is not invited to investigate cases where CDDD is suspected.

Lincolnshire has four CIs and one senior CI, who are all police officers who have received specialist training<sup>18</sup> and regard themselves as experts in their field. They do not carry out any duties other than the investigation of collisions. They are able to carry out in-depth examinations of the scene immediately following a collision, and are equipped with special vehicles which provide all the necessary tools for the task. Given that there are on average 80 fatal collisions a year in Lincolnshire, this amounts to 20 investigations per CI, meaning that they gain a great deal of experience. Lincolnshire Police see this as being an advantage over other forces in which there are

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<sup>18</sup> All are trained to City and Guilds Advanced Level in accident investigation.



more numerous CIs who remain active as traffic officers with the task of investigating collisions simply added to their duties. CIs are seen as independent officers of the court whose aim is not to prosecute at all costs but to reconstruct the incident to the best of their abilities and provide evidence from which the OIC can form a conclusion as to the cause of the collision.

In addition to the CIs there are four vehicle examiners (VEs) who are not police officers but civilian support staff. They will normally attend the scene in order to inspect the vehicles involved in the collision to determine the condition of the vehicles. Once the vehicles have been removed from the scene to a garage they will continue their inspection, carrying out a thorough examination to determine whether the condition of the vehicles contributed to the collision in any way. Damage to the vehicles is also used to help reconstruct the incident. Where public service vehicles (PSVs) or heavy goods vehicles (HGVs) are involved the Vehicle Inspectorate must be informed. They may carry out their own examination of the vehicles but Lincolnshire Police state that in most cases the Inspectorate are happy to rely on the police VE's examination, which is in fact more detailed than that carried out by the Inspectorate.

Once the CI and VE have completed their investigation they will prepare a collision investigation report (CIR), which will be received by the OIC. The CIR should take an objective view of the witness statements and test them against the physical evidence to help determine whether they are likely to be reliable or not. At this stage the OIC may decide to interview D. Prior to this a verbal explanation will have been taken from D at the scene but he will not normally be interviewed at the outset of the investigation. The OIC will conduct the interview, often in the presence of his Sergeant and a CI or VE, whose presence is useful in exploring any technical aspects of the case.

At the conclusion of the investigation the OIC will prepare a report which concludes with a recommendation concerning the disposal of the case. This he submits to his Sergeant along with the evidence that has been collected. The Sergeant should read through the OIC's report to ensure that it provides a true reflection of the evidence in the file. The Sergeant will test the evidence and review it, and if the evidence stands up to the test, he will normally agree with the OIC's recommendation.<sup>19</sup> It is not uncommon for a case conference to be held involving the OIC, CI, VE and CPS in cases where there may be grey areas such as procedural or

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<sup>19</sup> There were no cases in the current sample in which an OIC and his Sergeant disagreed as to charge in Lincolnshire.

technical issues.<sup>20</sup> The file is then normally sent to the Inspector who again reviews the evidence to determine if he is in agreement with the OIC's recommendation.<sup>21</sup>

In Lincolnshire it is normal procedure to send a copy of the file to the CPS to obtain advice (known as an advice file). Once the file is complete three copies of it are made: one is retained by the police, one goes to the coroner and the third is sent to the CPS. This procedure is often followed even in cases in which the OIC recommends NFA, unless it is unquestionable that V was the driver at fault. It is the manager of the force's Criminal Justice Support (known in other forces as the Administrative Support Unit), a civilian, who makes the final decision as to charge, based on CPS advice. His decision will follow the recommendation of the Inspector, and is little more than a "rubber-stamp" required in order that the paperwork can be completed and the prosecution process set in motion.

### *Northamptonshire*

Like Lincolnshire, Northamptonshire has a team of dedicated CIs. There are eight CIs who work in a shift system of four shifts with two CIs on duty at any one time. These officers carry out normal traffic duties, but will attend the scene of any collision which appears to be fatal or potentially fatal. In addition to this there is also a Senior Collision Investigator (SCI), who reviews all CIRs and checks that all the scientific calculations are correct. There are two VEs who, as is the case in Lincolnshire, are civilians. In cases involving HGVs and PSVs they carry out their own report in addition to that carried out by the Vehicle Inspectorate. The reasoning behind this is that the VEs are seen to be more experienced at giving evidence in the coroner's court.

In 1998 Northamptonshire introduced their own Road Death Investigation Manual entitled *Investigating Road Deaths*. This sets out the roles of the various officers who deal with RDIs and is seen by the force as an example of best practice. The manual's aims are to provide a framework for the police investigation into road death and to ensure:

- *That our approach into road death is thorough, professional, and open minded in its approach,*

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<sup>20</sup> In complex cases where it becomes apparent that the case is not straightforward, the police may contact the CPS to involve them in the investigation before the file is complete. This enables the CPS to advise the police on what evidence will be necessary to secure a conviction.

<sup>21</sup> There was only one case in the current sample in which it was clear that the Inspector disagreed with the OIC as to charge. In LINC044 the OIC recommended NFA but D was prosecuted for speeding.

- *That there is consistency of approach,*
- *That all officers involved with the investigation have a clear understanding of their role, and how that fits into the overall framework.*<sup>22</sup>

It goes on to state that “Investigators should be cognisant of the potential for road death and serious injury to be the result of negligence, or even malicious acts on the part of the person(s) involved. In addition to offences under road traffic legislation, other serious criminal offences can come to light.”<sup>23</sup>

Once it is established that an RDI has occurred, a Sergeant will attend the scene and assess the situation to determine if the death is suspicious or non-suspicious. If the death is suspicious the Sergeant will liaise with the Duty Inspector in order to involve CID. CID may also be invited to investigate the case if it is a “non-stop” (D committed the offence of failing to stop) and in some cases of CDDD, for example if there are multiple deaths. If the death is non-suspicious the Sergeant will assume the role of SIO. It is his responsibility to appoint the OIC, CI and Family Liaison Officers. The Road Policing Unit Inspector may also attend the scene in some cases, for example, if there is a non-stop or a major incident requiring closure of the M1. The manual makes it clear that the SIO is responsible for the quality of the investigation throughout. It also stresses that the police need to secure evidence as soon as possible and to this end suggests several possible procedures to encourage the collection of witness evidence. The OIC has the responsibility of collating and assembling evidence and of preparing the file which he submits to the SIO. In doing so he must maintain the RDI record. This contains a check list, general log, statement of progress, investigation policy, actions required and record of family contact.<sup>24</sup> Unlike Lincolnshire and Leicestershire, from examination of the files, the practice in Northamptonshire seems to be to include statements from close relatives of V giving V’s background and recent movements prior to his death. This is something normally done in cases of suspicious death and indicates that the OIC has carried out investigations to rule out the possibility of foul play.

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<sup>22</sup> Northamptonshire Police, *Investigating Road Death*, 1998, obtained from Northamptonshire Police Traffic Operations.

<sup>23</sup> Ibid.

<sup>24</sup> The efficiency and thoroughness with which this record is completed varies between officers. It was suggested that new, younger, officers are better at completing paperwork than older, longer-serving officers, who in the past did not have to deal with so much paperwork.

The SIO decides who should carry out any interviews with D, but the manual advises that plans of the scene and photographs should be obtained in advance of any interview to assist in questioning and suggests that attendance of the CI should be considered. The manual provides a guideline timeframe for the investigation which should be adhered to where practicable. This suggests that the CIR should be completed within 24 days and that an advice file should be sent to the CPS within 32 days (if applicable). The role of the OIC in Northamptonshire appears to differ from that in Lincolnshire slightly in that when he prepares the final report the OIC will merely repeat the conclusions of the CI, who will have taken into consideration all of the available evidence, and the OIC will not be expected to put forward his own recommendations. The SIO reviews the file and sends it to the Administrative Support Unit (ASU). The decision as to whether CPS advice should be obtained will be made by the ASU manager, often in conjunction with the Inspector.

### *Leicestershire*

The organisation of RDI investigations in Leicestershire differs somewhat from the other two counties. Unlike Northamptonshire and Lincolnshire, the VEs are traffic officers, rather than civilians. There are a total of 12 CIs<sup>25</sup> and 12 VEs, although this includes nine officers who act as both CIs and VEs. Six<sup>26</sup> of these nine officers make up the Collision Investigation Unit, which deals only with fatal and serious collisions. The remainder are operational officers on regular patrol.<sup>27</sup> Although Lincolnshire feel it is an advantage to have only four CIs as they each have the opportunity to develop a vast experience of RDIs, in Leicestershire it is seen as preferable to have a high number of CIs, each working on fewer RDIs. Although they may not have the same level of experience, it ensures that they have more time to deal with each separate case in sufficient depth without being pressurised by their workload. In addition to this there are eight SCIs who hold a City and Guilds qualification and have experience as a CI. Their role is the same as that of the SCI in Northamptonshire: to check any calculations in the CIR. This is seen by the police to be a very important role since without an SCI any evidence provided by the CI will be accepted as being correct by his superiors, who are not trained in collision investigation, and by CPS lawyers. If any mistakes are made these might not be discovered, without the supervision of a

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<sup>25</sup> Eleven at the time of the cases in the sample.

<sup>26</sup> Five at the time of the cases in the sample.

<sup>27</sup> There are three permanent members of the Collision Investigation Unit. The remaining nine non-permanent CIs rotate annually in groups of three as members of the Unit. The six CIs who are not part of the Unit at any one time may take on investigations of RDIs, but due to their other commitments may only take on one collision at a time.

SCI, until the evidence is challenged in court, possibly endangering the success of a case.

The scene is always attended by a Sergeant, who becomes the scene manager, as in Northamptonshire. He allocates the roles and, where possible, will avoid appointing the same officer as CI and OIC. In cases involving a PSV or HGV, at the time of the cases in the sample, Leicestershire Police relied on the examination carried out by the Vehicle Inspectorate rather than requiring the VE to carry out a further examination. The implication of this is that vehicle investigations carried out in Leicestershire involved less detail than those done in the other two counties. This may be due to limited resources, which at present do not allow Leicestershire to train and employ dedicated VEs. Because the VEs in Leicestershire are currently traffic officers they do not have dedicated vehicles for use in vehicle examination, although it was stated that they have all the necessary equipment they need. In the other two counties VEs are equipped with specialised vans containing tools necessary for the task of stripping down vehicles to determine mechanical defects or causes of damage. VEs in Leicestershire, on the other hand, have only the tool-box in their patrol cars to assist them, and any tools available at the garage where the examination takes place. Leicestershire Police see this as no problem, as they say that they have all that they need. However, the other counties saw their dedicated VEs and vans as a great asset to them in carrying out investigations. There has been some discussion as to whether civilian VEs should be introduced in future in Leicestershire. On the one hand, they may be cheaper to employ than police officers. On the other hand, some concern was expressed that less control could be exercised over the employment of civilians, who enjoy different rights under employment law to police officers. The concern is that if they under-performed they could not be disciplined as easily as police officers.

CID are involved in “non-stop” cases, some cases of multiple deaths or where attempting to pervert the course of justice is suspected.<sup>28</sup> It is normal in Leicestershire to interview D immediately after the RDI and to carry out a second interview once the CIR is complete. This does not differ so much from the other two counties, where a “verbal explanation” is taken from D at the scene.

The exact nature of the involvement of the CPS in cases in Leicestershire was difficult to establish, and in trying to clarify the situation different versions of the

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<sup>28</sup> It is also now the case that consultation will normally take place with CID in any cases where CDDD is suspected. CID will normally allow the traffic department to continue with the case, since the latter have more experience in such matters. However, CID may provide help in interviewing witnesses in cases involving multiple deaths such as the collision on the M1 on 11.06.03 involving army vehicles.

process were described by different individuals within the process. The difficulty was that very few of the police files in Leicestershire contained a letter from the CPS to the police documenting the advice supplied from the former to the latter. This may be due to the method used in recording and storing files, in that the files made available for the study were those accessible to victims' relatives. Thus it was not possible to glean from the files themselves what level of cooperation existed between the police and CPS. In attempting to clarify the situation conflicting explanations were provided. It was claimed that officers are encouraged to contact the CPS by telephone at an early stage in cases where an offence is suspected in order to provide the police with direction in their investigation. This has the advantage of providing "on the spot" advice, thereby saving time, and written advice would follow. The CPS is always involved in cases of CDDD and cases involving issues of public interest, but not necessarily in cases where only careless driving is suspected. A service level agreement exists between the CPS and police to the effect that files in RDI cases where any offence is suspected may go to the CPS for written advice. The police in Leicestershire therefore retain more discretion in their gate-keeping role than, for example, Lincolnshire. A Sergeant within the Traffic Department expressed a feeling of unease at his own power to decide to take NFA in RDI cases, and feels that the advantage of gaining CPS advice in such cases is that it can be seen that checks are made of police discretion. He feels that he would be less open to criticism if he could support his decisions with confirmation from the CPS.

At the time of the cases in the sample an Inspector based at the Administration of Justice Department (another name for ASU) had the responsibility of ensuring that prosecutions took place where appropriate. He made the ultimate decision concerning what action should be taken in RDI cases. However, since then the process has changed more than once. A report was produced by the Inspector formerly responsible for the prosecution of RDI cases, which in turn led to a meeting in December of 2001 between representatives of various sections of the force, including the ASU and Headquarters Traffic, at which changes were agreed. The old process resulted in inconsistencies in the way cases were dealt with between areas within Leicestershire. It was desirable that cases be dealt with in a uniform manner, following a similar procedure to all crime files. For a time the Traffic Department sent completed files in cases requiring CPS advice to a File Preparation Unit. In cases involving summary offences (careless driving) a file was sent from the Traffic Department to the ASU for a summons to be issued. The introduction of Criminal Justice Units (CJUs), as recommended in the Glidewell Report,<sup>29</sup> led to further

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<sup>29</sup> See below p.81.

changes within the system. The ASU has been split between the CJU and the CPS building, so that case management can be coordinated. All files where prosecutions are to be brought are now sent to the CJU, where they are either dealt with by the ASU if they involve summary offences, or are sent to the CPS building if they involve indictable offences.

### *Police discretion*

It should be recognised that the involvement of the coroner's court in RDIs necessitates that such cases be dealt with differently to non-fatal collisions.<sup>30</sup> The coroner is not concerned with the attribution of blame or finding of fault; her role is inquisitorial rather than accusatorial and she must come to a conclusion on the cause of death and determine whether it came about through unlawful killing<sup>31</sup> or accident. According to Matthews the value of the coroner's inquiries are:

- (1) determining the medical cause of death, thus providing accurate statistical information on causes of death;*
- (2) advancing medical knowledge;*
- (3) investigating deaths to allay rumours or suspicion, and thereby to ensure no foul play or wrongdoing slips through the net;*
- (4) making recommendations to avoid future fatalities;*
- (5) checking on the death registration system;*
- (6) enabling relatives to find out how the deceased died, which can assist in the grieving process.*<sup>32</sup>

The coroner will rely heavily on evidence collected by the police; officers involved in the investigation of RDIs will have this in mind when carrying out the investigation. Even if they decide that NFA is appropriate as far as criminal liability is concerned, they will still need to provide a detailed file for the coroner. Whereas in cases of non-fatal collisions any investigation will be for the purpose of establishing

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<sup>30</sup> Wilcox, A.F., *The Decision to Prosecute*, London: Butterworths, 1972, p.97.

<sup>31</sup> There seems to be some disagreement over whether unlawful killing, meaning homicide, includes CDDD as well as murder, manslaughter and infanticide: Matthews, P., "Involuntary Manslaughter: A View from the Coroner's Court", (1996) 60(2) J Crim L 189–200, at 193. In practice the question is rarely a problem for the coroner, since in cases where criminal proceedings are instituted the inquest is postponed and in most cases never resumed as the criminal proceedings will have dealt with the circumstances of the death.

<sup>32</sup> Matthews, n.31 above at 191.

criminal liability only, in a fatal case the necessity of an inquest will guarantee that it is thoroughly investigated.

It can be argued, then, that because of the coroner the discretion of the police is limited to some extent. Indeed, one officer expressed an element of conflict between his role as criminal investigator and coroner's officer, since the purpose of collecting evidence is different for each role. Additionally, the rules of evidence are also different, in that they are less strict in coroners' courts. He pointed out that the quality of evidence submitted to the coroner is far higher than that required, since the police are also investigating the possibility of a criminal offence having been committed. So, the police do retain a considerable amount of discretion concerning how they utilise the evidence they collect.

McConville, Sanders and Leng, in their eminent publication *The Case for the Prosecution*,<sup>33</sup> portray the police as having more power than any other individual or institution in the criminal justice system, with the CPS subordinate to the police. Although McConville et al.'s study excluded all cases of Road Traffic Act arrests, some of their findings may well be true of traffic cases. However, it is evident from the above that RDI cases do not fall foul of many of the criticisms directed at the police in the study. The most significant finding of McConville et al. is probably the idea that the police are "definers of reality", whose construction of cases involves selecting and creating the facts on which they rely to establish the liability of their suspect. There is far less possibility of, or desire for, such case construction in cases of RDI. There is little doubt that it does occur in some limited respects. For example, there was evidence that the police sometimes use what McConville et al. refer to as "legal closure" questions in interviews.<sup>34</sup> However, an important characteristic of RDI cases is that the main facts on which the police rely are scientific facts collected by expert CIs, who see themselves as neutral expert witnesses who will support prosecution only when they see such prosecution as warranted. Eye-witness evidence remains important in RDI cases, but where this is contradictory the police will test it against the CI's evidence to determine whose version of the "truth" best fits the facts.

Although the evidence of the CI is often conclusive and reliable, there are cases in which the CI is unable to determine from the evidence available at the scene what the exact cause of the collision was. In other cases defence expert witnesses may disagree with the seemingly irrefutable evidence of the CI. In such cases it will normally be

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<sup>33</sup> McConville, M., Sanders, A., and Leng, R., *The Case for the Prosecution*, 1991, London: Routledge.

<sup>34</sup> See p.110 below.



left to the CPS to determine whether the case is strong enough to go to court. That said, such instances are relatively rare. Much can be determined from the presence of tyre marks at the scene, damage to the vehicles and the position of debris along the road. Unlike the evidence in other types of crimes, such evidence tells a story where motive and opportunity are irrelevant to the construction of a case.

In case LEIC005 there was some consideration of the role of CI. An advice file was sent to the CPS, who advised that prosecution for CDDD should go ahead. However, the prosecutor was concerned that there might be difficulty in proving causation and thus asked for clarification of a particular point in the CIR. It was a case in which D had overtaken a vehicle on the approach to a bend. According to an independent eyewitness D had only just managed to regain his correct side of the carriageway when a car, driven by V, passed him coming in the opposite direction and immediately lost control, veering across the road into a car behind D. There was no impact between D's and V's cars and the CI found very little physical evidence on the road. The prosecutor asked the CI to clarify evidence of coarse steering, what effect this would have had, and what, in his opinion, led to such manner of driving. The question was whether D's driving was a possible cause to which V was reacting.

In response (a memo was sent from the CI to his Chief Inspector) the CI suggested that the Crown Prosecutor had not appreciated the CI's role in the investigation of collisions. He saw his loyalty as being to the court, as an independent witness, rather than to his "instructing solicitor".<sup>35</sup> He stated that his role was to reconstruct an accident and to show the behaviour of the vehicles and people involved prior to, during and after the collision from physical evidence at the scene which is impartial and independent of evidence from witnesses. It was not, in his view, for him to comment on the eyewitness evidence. He seems to have been concerned about his ability to comment on such matters because of cases in which CIs have been openly criticised by trial judges. He referred, in particular, to the civil case of *Liddel v. Middleton*,<sup>36</sup> in which an expert witness concluded that the defendant in the case was grossly negligent in failing to observe the plaintiff (a pedestrian crossing the road ahead of him at night) and that had he done so and taken appropriate action the collision would never have occurred. Smith, L.J. criticised the expert witness's

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<sup>35</sup> It is true that an expert's duty is to assist the court in resolving issues, and that this duty takes priority over any duty to the client: see Dennis, I.H., *The Law of Evidence*, London: Sweet and Maxwell, 2<sup>nd</sup> ed., 2002, p.711, citing *Stanton v. Callaghan* [1998] 4 All ER 961. This seemingly hostile language used by the CI in relation to the Crown Prosecutor in LEIC005 may reflect the historical fact that Leicestershire did not have a prosecuting department prior to the establishment of the CPS – see p.79 below.

<sup>36</sup> [1996] PIQR P36.

evidence, referring to the Civil Evidence Act 1972<sup>37</sup> and stating that an expert is only qualified to give evidence on a relevant matter, if his knowledge and expertise relate to a matter which is outside the knowledge and experience of a layman.

The point made in this case was that expert witnesses must provide evidence deduced from their scientific expertise and not from their consideration of eyewitness evidence. An expert is not entitled to give his opinion as to how a defendant should have acted or whether a party was negligent. This is because it breaches the “ultimate issue” rule. The “ultimate issue” rule exists to ensure that questions of fact arising in a trial should be left to the fact-finders (the jury or magistrates in a criminal trial), and that an expert does not give his opinion on the ultimate issue which is for the court to decide. However, the fact that *Liddel v. Middleton* was a civil case is probably relevant. Although Smith, L.J. stated that in personal injury cases involving road traffic collisions it is the exception rather than the rule that expert witnesses are required,<sup>38</sup> this is clearly not true of criminal prosecutions involving RDIs, in which the CIR is crucial to the prosecution of a case.<sup>39</sup> In criminal cases it has been accepted that an expert may give his opinion on the ultimate issue, provided that he is qualified to give such an opinion, the jury are directed that they are not obliged to accept it, and the witness does not “overstep the line which separates his province from that of the jury”.<sup>40</sup> Furthermore, the questions asked by the prosecutor in case LEIC005 seem to have been asked on the basis that the CI would have knowledge of the cause and effect of coarse steering outside the knowledge of the layman, and in this sense did not risk breaching the rule laid down in *Liddel v. Middleton* as the CI feared.

Case LEIC005 brings into question somewhat the role of the CI in providing evidence in that many of the CIRs in other cases in the sample did in fact, to a greater or lesser degree, give an opinion concerning who was at fault. It is unclear whether this difference in approach is due to the organisation and training of CIs in the different counties. In particular in Northamptonshire, for example, the CI is expected to recommend what action, if any, should be taken against D, and the OIC will merely

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<sup>37</sup> s.3 Civil Evidence Act 1972 reads: “(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.... (3) In this section ‘relevant matter’ includes an issue in the proceedings in question”.

<sup>38</sup> n.36 above, at p.43.

<sup>39</sup> Pearce, L.M., Knowles, J., Davies, G.P., and Buttress, S., *Dangerous Driving and the Law*, Road Safety Research Report No.26, Transport Research Laboratory, 2002, p.31.

<sup>40</sup> Dennis, n.35 above, p.713, citing *Stockwell* (1993) 97 Cr App R 260.

adopt this recommendation. Such an approach is not accepted in Leicestershire, where the CI is seen to be entirely separate from the rest of the investigation.

In only a minority of cases does the question arise as to whether the suspect was actually driving at the time of the RDI. This occurred in only seven cases in the current sample. Six were cases of “non-stops”, although in five of these D admitted he was the driver within twenty-four hours of the collision. In the sixth case (LEIC117) the police were unable to provide enough evidence to charge their suspect. The seventh involved a motorbike rider (D) and his pillion passenger (V). D initially claimed that he was the passenger and that V had been driving. He eventually changed his story after forensic evidence showed that material caught on the front of the machine matched clothing he was wearing. Thus, in only one case in the sample did a denial that D was driving the vehicle involved in the RDI seriously affect the prosecution’s case (LEIC117).

Perhaps the first stage at which the police use their discretion in investigating RDIs is in their decision to ask a CI to attend the scene. In most cases this decision is made automatically, as it will be clear that the collision is fatal or potentially fatal. There were eleven cases in which the officers attending the scene failed immediately to request the attendance of a CI, and in many of these V was elderly. In each case V’s injuries did not appear to be life-threatening at the scene, and V did not die until at least a few days after each collision. The longest period of time between a collision and V’s death was almost two months (LEIC118). Prosecutions were brought in two of these cases. In the remaining nine cases it was concluded that D was not to blame for the collision. In LEIC075 D was convicted of careless driving, and the fact that the CI was not at the scene at the outset was not mentioned as problematic. In NORTH055 the ASU manager commented in submitting the file to the CPS for advice that problems arose in the case due to the lack of quality evidence because the CI did not attend the scene from the outset, but the CPS lawyer nonetheless advised that D should be prosecuted for careless driving. The case was dismissed, but it is not clear whether or not this can be attributed to the lesser quality of the CIR, since there was also very little eyewitness evidence, but it may have been a contributing factor. Force policy therefore limits the exercise of discretion by dictating that CIs should always attend the scene of obviously potential RDIs.

Potentially, the second way in which the police exercise their discretion in cases of RDIs is in arresting D at the scene. This rarely happens, and in fact only occurred in ten cases in the current sample. In some cases the police cannot arrest D at the scene because D has fled the scene or because he is injured and requires hospitalisation. There were six cases in which D was arrested within twenty-four hours of the

collision rather than at the scene for either of these reasons. In a further eleven cases D was arrested at a later stage, usually once the CIR had been completed and most of the evidence obtained. It is not always seen to be necessary to arrest D at the scene, since in most cases not doing so will not lead to loss of evidence and since the police will have D's name and address they will be able to locate him once they have built up an objective picture of what occurred and can question him on his view of events. D will be arrested at the scene if CDDD is suspected and D is a foreigner (e.g. an HGV driver from Europe)<sup>41</sup> or in what appears to be a particularly serious case. D will obviously be arrested if his breath test is positive, or he refuses to provide a sample.<sup>42</sup> All drivers at the scene of an RDI will undergo a breath test to determine whether they have consumed too much alcohol to be able to drive legally, unless they are unable to do so due to their injuries. If the test is positive they will be arrested and taken to the police station and will normally have a blood sample taken from them for analysis. If they are unable to provide a specimen of breath for medical reasons the police may choose to obtain a blood sample whilst D is in hospital.

The police may decide to interview D, whether or not he has been arrested. If careless driving is suspected D cannot be arrested but an interview will help the police determine whether they should take NFA or seek CPS advice. In such cases D may be asked to attend the station or the OIC may interview D at home. As indicated above, the formal interview tends to be one of the last actions taken in an investigation, after which the OIC will complete his report and decide on his recommendation. The OIC enjoys a great deal of discretion here; his recommendation will not necessarily be adopted by his superiors but it was found that in only 2.5% of cases did the Sergeant or Inspector reviewing a report disagree with the OIC's recommendation. This recommendation was sometimes termed in language which was very non-committal, suggesting that an offence might have been committed but that the CPS would need to provide advice on the matter, whilst in other cases it was quite forceful, concluding that an offence had or had not been committed. However, where the case fell into the latter category it remained possible that the file would go to the CPS before a decision was taken on further action. The extent to which this occurred differed between

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<sup>41</sup> As was the case in LINC019. In LINC107 D, an immigrant from Iraq, was arrested under s.25 Police and Criminal Evidence Act 1984, as the police were concerned that they might find it difficult to serve him with a summons. D lived in the West Midlands and had been driving a minibus containing suspected illegal immigrants, many of whom fled the scene.

<sup>42</sup> As in NORTH013.

forces, with Lincolnshire normally seeking advice as a matter of course and Leicestershire retaining discretion as to whether to seek advice.<sup>43</sup>

**Table 1 – Number of cases leading to prosecution where CPS advice was obtained by county.**

	Advice obtained	Advice not obtained	Don't know
Lincs	34	3	1
Leics	19	6	25
Northants	32	0	2

**Table 2 – Number of cases not leading to any prosecutions where CPS advice was obtained by county.**

	Advice obtained	Advice not obtained
Lincs	26	46
Leics <sup>44</sup>	10	59
Northants	22	30

The number of cases in which there was evidence on the file that it had been sent to the CPS for advice in each county can be seen in Tables 1 and 2. CPS advice followed the recommendation of the police as to charge in all but twelve cases. The police will normally follow the CPS advice and even if they do not agree with the

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<sup>43</sup> Since the cases in the sample were investigated the procedure for deciding on charges has changed in Leicestershire. It used to be the position that in cases where only careless driving was suspected the Inspector would decide whether to prosecute or not. Now all cases where an offence is suspected will be sent to the CPS for advice, bringing Leicestershire in line with Lincolnshire procedure. It would be interesting to discover whether this change has had an impact on the number of cases prosecuted in Leicestershire, but without completing a similar study to the current one with a new sample it would be difficult to establish whether this is the case. The CPS Inspectorate found that the majority of files in relation to RDI cases are submitted to the CPS for pre-charge advice because of their sensitivity. See HMCPS Inspectorate, n.1 above, para.4.1. Further changes to charging procedures are likely to come about following the enactment of the Criminal Justice Act 2003, s.29 of which establishes a new method of instituting criminal proceedings by which a “public prosecutor” will issue a “written charge”.

<sup>44</sup> It is not possible to be certain about the number of cases in each of the categories for Leicestershire. The figures given are based on notes on the file. It may be that the figure for the number of files in which CPS advice was obtained is in fact higher or lower than that reported here. There were several files in which it was recommended that the file go to the CPS, although there was no letter of advice on file. In these cases it is assumed that the file did in fact go to the CPS for advice.

CPS that no charge should be made it is unusual for them to go against such advice. To do so would be a waste of time given that the CPS would only drop the case at a later stage. This can be illustrated by case LINC098 in which, despite CPS advice that the police should take NFA, the police felt sufficiently strong to issue summons for careless driving nonetheless. The case was never tried, and although there was no further entry on the file it is likely that the CPS stood by their original advice and discontinued the case. In other cases where there was strong opposition to CPS advice from the police (often from the CI) a case conference was held between the relevant officers and Crown Prosecutor to try to resolve the issues. In case LEIC089 the CPS initially advised that no charge should be made. The CI disagreed, and managed to persuade the CPS lawyer to reconsider and D was charged with CDCDUI. Much to V's relatives' disappointment the prosecution offered no evidence at trial, finding it unable to prove that D was over the limit at the time of the collision, and the judge ordered an acquittal. The CCP later admitted that the prosecution should not have proceeded with the CDCDUI charge, although careless driving would have been an appropriate alternative.<sup>45</sup>

Before the role of the CPS is explored in more detail it should be noted that since the cases in this sample were investigated a new *Road Death Investigation Manual* (RDIM) has been introduced by ACPO. The aim of the manual is to standardise the way in which the police investigate RDIs and serious injury collisions.<sup>46</sup> It is based on, and is complementary to, the *Murder Investigation Manual*, which was published in 2000. According to the RDIM: "[t]his manual consolidates many good practices already adopted by police forces and investigative agencies throughout the United Kingdom and provides a definitive document to assist all those involved in the investigation of a road death. It is a dynamic document and will be amended as and when necessary".<sup>47</sup>

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<sup>45</sup> If this case had continued to a full trial it would have been open to the jury to acquit D of CDCDUI but convict him of careless driving, this being a lesser included offence. It is unclear what the legal position is in cases where the judge directs or orders an acquittal but there is a lesser offence of which D is guilty. It is possible for the case to revert to the magistrates' court for trial but it appears that this did not occur in this case because the six month time limit in which summons for careless driving must be issued had passed. However, if the information for the CDCDUI charge was laid within six months it is arguable that a prosecution for careless driving could have been brought on the basis of this information.

<sup>46</sup> ACPO, *Road Death Investigation Manual*, Bramshill: National Operations Faculty, 2001, p.13.

<sup>47</sup> Ibid.

The RDIM was published towards the end of 2001 and distributed to all forces. The impact of the manual cannot be estimated. In some forces it may instigate major change in the way RDIs are investigated, whilst in others the impact will be minimal. In Leicestershire, for example, the police must produce a road death protocol representing a condensed version of the RDIM, which is something entirely new to the force. Difficulties have been experienced in agreeing a final draft of this document, due to difficulties with resources. Whilst the RDIM requires a certain number of officers to be involved in cases of RDIs, in particular requiring that separate Family Liaison Officers should be allocated to each V in cases of multiple fatalities, it was expressed that Leicestershire feel that such a commitment is difficult to achieve due to limited numbers of officers who may be on duty at the time of an RDI.

In Northamptonshire, on the other hand, it is expected that the RDIM will have little impact on the way in which RDIs are investigated because the force already has its own manual, the contents of which overlap considerably with that of the ACPO document (although the latter is much more detailed). However, it was suggested that the greatest change would come through the fact that the RDIM will be in the public domain, meaning that the potential will exist for much greater scrutiny of police practices. Although many of the police decisions will remain “low visibility” and discretion will be maintained, the exercise of discretion should be controlled by following the advice provided in the manual, with some forces noticing more of a change than others.

## **The Crown Prosecution Service**

The CPS was created following the enactment of the Prosecution of Offences Act 1985 on the recommendation of the Royal Commission on Criminal Procedure (Philips Commission), which reported in 1981.<sup>48</sup> Prior to this it was part of the police’s function to prosecute their own cases, but the Philips Commission reported that it was concerned about the number of weak cases going to trial and resulting in acquittals and the inconsistency of prosecution policy, and so recommended that responsibility for prosecutions should be taken out of the hands of the police and passed to a new prosecuting service. The police retained the authority to make the initial decision to prosecute, but the idea was to separate the functions of investigation and prosecution of offences. The CPS may alter or drop the charges decided by the police, and may advise the police prior to charge if invited to do so.

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<sup>48</sup> Report of the Royal Commission on Criminal Procedure, Cmnd 8092, London: HMSO, 1981.

Initially the new CPS encountered some difficulties in exercising its function. There were tensions between the CPS and the police, who were not entirely comfortable with the new system, and the CPS itself faced the problem of understaffing. Fionda describes the relationship between the police and CPS as follows: “the Crown Prosecutor is forced into a marital alliance with the police which requires a high degree of cooperation and mutual assistance in order jointly to perform the prosecution function smoothly and efficiently.”<sup>49</sup> There was evidence of a certain degree of continuing antagonism between the police and CPS in a small number of files examined in the current study.<sup>50</sup>

The degree to which the CPS was initially accepted by the police depended in part upon the way in which the police had previously prosecuted cases. Whilst Lincolnshire and Northamptonshire had County Prosecuting Departments prior to the creation of the CPS, Leicestershire had relied upon instructing private solicitors’ firms to act on their behalf, and in minor cases police officers even prosecuted their own cases in the absence of lawyers.<sup>51</sup> As a result, one problem was that it was difficult to recruit lawyers for the new CPS.<sup>52</sup> Once lawyers were recruited there was then the problem of establishing a workable relationship with the police in a climate of some resentment. Many within the police were unhappy about the responsibility for prosecuting cases being removed from them on the basis that they were not doing a good enough job, since it was felt that some of the criticisms directed at the police were unfounded.<sup>53</sup> Fionda describes the police as suffering from a case of “sour grapes”.<sup>54</sup> However, this phenomenon is not confined to the new CPS. In America, Jacoby recognised that the police and prosecutor often work together in an

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<sup>49</sup> Fionda, J., “The Crown Prosecution Service and the Police: A Loveless Marriage?” (1994) 110 LQR 376 at 376.

<sup>50</sup> For example, see discussion of case LEIC005, p.73 above.

<sup>51</sup> One officer commented that in prosecuting his own cases he ensured that the quality of his files was very high as he did not want to make a fool of himself in court, and that since officers no longer feel this pressure, because the CPS now bear the brunt of the court’s displeasure in poor quality cases, the police may not feel as much pressure to ensure a high quality of evidence. However, other officers commented that they might have been more likely to prosecute a case which was weak as there was nothing to lose in going to court and there was nothing stopping them from doing so. The latter view seems to have been the dominant one according to the findings of the Philips Commission.

<sup>52</sup> Hetherington, T., *Prosecution and the Public Interest*, London: Waterlow, 1989, p.99.

<sup>53</sup> See, for example, West, R., “Police Superintendents and the Prosecution of Offences” in Benyon, J., and Bourn, C. (eds.), *The Police: Powers, Procedures and Proprieties*, Oxford: Pergamon Press, 1986.

<sup>54</sup> Fionda, n.2 above, p.30.



atmosphere of resignation rather than trust and cooperation because of the different interests, responsibilities and goals of the two roles.<sup>55</sup> One CPS lawyer interviewed for this study made comments reflecting an appreciation of the need for the two parties to communicate in order to understand each others' roles as otherwise, as Jacoby points out: "[w]hen these role changes cannot be perceived or understood by either the police or the prosecutor, or when the differences in each agency's goals are not recognised, the development of uncertainty or distrust in the relationship is not surprising."<sup>56</sup> What is promising, however, is that comments were made by the CPS to the effect that the relationship between the police and CPS with regards to RDI cases is markedly better than that in other areas of the law and has improved since the introduction of the CPS. This may be due to the better quality of files received by the CPS in RDI cases.<sup>57</sup>

The CPS, given its wide discretion, may make unpopular decisions with regards to whether or not to prosecute in a particular case. The fact that a decision is unpopular from the point of view of the police or the public does not necessarily mean that the decision is wrong. Where, however, a decision is made following an incorrect application of the evidential test (or possibly the public interest test) under the Code for Crown Prosecutors,<sup>58</sup> it is possible for the decision to be challenged by way of judicial review.<sup>59</sup> It might also be possible that decisions made ignoring or acting contrary to the *Driving Offences Charging Standard* could constitute grounds for judicial review.<sup>60</sup> However, it remains difficult to challenge prosecutorial decisions not to prosecute, since it is rare for a case to fall neatly into one of the categories described in the Charging Standard, and the need to place weight on different factors

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<sup>55</sup> Jacoby, J.E., *The American Prosecutor: A Search for Identity*, Lexington, Massachusetts: Lexington Books, 1980, pp.110–111.

<sup>56</sup> Ibid, p.112.

<sup>57</sup> Crisp and Moxon found that the adequacy of information on files provided in motoring cases was greater than that for non-motoring cases: Crisp, D., and Moxon, D., *Case Screening by the Crown Prosecution Service: How and Why Cases Are Terminated*, Home Office Research Study No.137, London: Home Office, 1994.

<sup>58</sup> See below, p.87.

<sup>59</sup> See Burton, M., "Reviewing Crown Prosecution Service Decisions Not to Prosecute" [2001] CrimLR 372, in which the case of *R. v. DPP, ex p. Manning* [2000] 3 WLR 463 is reviewed.

<sup>60</sup> Assuming that the Charging Standard can be described as a "prosecution policy" it would appear to meet all the criteria suggested by Hilson as being necessary before a prosecutorial decision made contrary to it could be successfully reviewed, namely that it is a policy which is open and contains detailed provisions. See Hilson, C., "Discretion to Prosecute and Judicial Review" [1993] CrimLR 738.

for and against prosecution when applying the Code tests means that it would be difficult to prove that a decision was *Wednesbury*<sup>61</sup> unreasonable or made for an improper purpose or in bad faith. Thus decisions not to prosecute rarely face any challenge beyond a letter of complaint from a victim's family. When prosecutorial discretion is wrongly exercised in favour of prosecution, on the other hand, the court's ability to stay the prosecution for abuse of process or direct an acquittal can act as a control to inhibit a prosecutor's decision to continue with a case which does not meet the necessary criteria.

Since it was created in 1986 the CPS has undergone several reviews, the most recent being headed by Sir Iain Glidewell, reporting in 1998.<sup>62</sup> The Glidewell Report's recommendations were far-reaching, involving re-organisation of the Service to become more decentralised, as well as making recommendations concerning particular issues it was asked to examine in its terms of reference, such as the discontinuance of cases and downgrading of charges. Many of these recommendations have been put into practice. For example, Glidewell reported that one of the negative changes brought about by the creation of the CPS was that prosecution staff were no longer in close proximity to the police Divisional Office as many County Prosecuting solicitors had been, and therefore not in direct contact with the OIC. This problem was exacerbated by the introduction of ASUs in police stations, which distanced the OIC from the CPS even further. The introduction of ASUs was originally seen as a positive move, taking paperwork away from OICs to allow them more time for other police work. However, the Glidewell Report found the service given by ASUs to the CPS in many places to be less than satisfactory<sup>63</sup> and thus recommended the amalgamation of some of the functions of the CPS Branch with the police ASU to create a single integrated unit called a "Criminal Justice Unit" (CJU) where files would be prepared. Changes in Leicestershire occurred towards the end of 2002 aimed at implementing this recommendation. ASU and CPS staff are now housed together at the CPS Branch headquarters, although problems with space mean that there has been some overflow and some staff are housed elsewhere.<sup>64</sup> Similarly, in Northamptonshire there is a CJU co-located at a central police station, whilst a new Trials Unit is based at the CPS building. In Lincolnshire CJUs have been created in

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<sup>61</sup> *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 KB 223.

<sup>62</sup> Glidewell, Sir I., *The Review of the Crown Prosecution Service: A Report*, Cm 3960, 1998.

<sup>63</sup> *Ibid.*, p.64, para.16.

<sup>64</sup> Case preparation is carried out in the CPS building, where most CPS staff are based. The CCP and a few other CPS staff have moved to an office in the LPU.

name only, since problems with accommodation have meant that they cannot yet be co-located.

Glidewell was specifically asked to look at the occurrence of downgrading of charges by the CPS. Downgrading occurs either when the CPS decide to alter the charge made by the police, substituting a less serious charge, or when the CPS decide to accept a guilty plea to a lesser charge. Glidewell reported that, although the CPS deny that downgrading occurs due to considerations of cost, factors such as the certainty of a conviction resulting from a guilty plea and the saving of time and effort may influence decisions to downgrade charges.<sup>65</sup> The difficulty in researching this phenomenon is that there are no published statistics dealing with downgrading. There is concern that it occurs most frequently in relation to violent offences against the person<sup>66</sup> and public order offences, but the Review's attention was also drawn to the possibility of it occurring in RDI cases.<sup>67</sup> Because of the lack of statistics available Glidewell recommended that the CPS Inspectorate should examine the justification for downgrading and that if current research is not sufficient, further research should be commissioned into the reasons for downgrading charges in these three classes of cases.<sup>68</sup>

The Glidewell Review received a number of letters from or on behalf of relatives of victims of RDIs complaining about separate incidents of downgrading and the Review does not seem to have received any further information on the subject, but nevertheless considered that a change in practice or even the law may be required once further research has been carried out.<sup>69</sup> The current study found that the concern about downgrading of charges in cases of RDIs in the three counties studied appears

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<sup>65</sup> Glidewell, n.62 above, p.85, para.46. This is confirmed to some extent by the TRL in their report, n.39 above, in which it was reported that a few prosecutors interviewed admitted to financial constraints putting some pressure on them to accept pleas to reduced charges in motoring cases (p.34).

<sup>66</sup> Phillips and Brown found that assault charges were those most often varied: Phillips, C., and Brown, D., *Entry Into the Criminal Justice System: A Survey of Police Arrests and Their Outcomes*, Home Office Research Study No.185, London: Home Office, 1998, p.177.

<sup>67</sup> See Glidewell Report p.84, para.45. Interestingly these three classes of case are the subject of charging standards introduced to assist the charging decision by the police and CPS. The Glidewell Report was in favour of such standards, but had some reservations about some of the wording of the standards, specifically mentioning problems in relation to charges under the Offences Against the Person Act 1861. See Glidewell Report p.83, para.43. The *Driving Offences Charging Standard* is discussed below.

<sup>68</sup> Recommendation 9, Glidewell Report, n.62 above.

<sup>69</sup> Glidewell Report, n.62 above, p.84, para.45.

to be unfounded. In not one case did the CPS reduce a charge entered by the police and, as far as could be determined, the Crown accepted a plea of guilty to a lesser offence on a charge of CDDD or CDCDUI in only one case.<sup>70</sup> In LEIC080 D was charged with CDDD and aggravated TWOC. He pleaded not guilty to the former but guilty to the latter, and this plea was accepted.

This absence of downgrading is probably due to the fact that in most cases the police do not decide to charge or to issue summons until they have received CPS advice. Any eventual charge is one agreed to by both the police and CPS and it is therefore unlikely that the CPS will subsequently alter the charge, although it is possible that where they acknowledge that evidence of CDDD is weak (albeit strong enough to satisfy the necessary test for prosecution) they might decide to accept a plea to a lesser offence. This might occur part way through a trial when it becomes clear that, for example, the evidence of eyewitnesses does not “come up to proof”. In RDI cases, then, because the CPS is usually consulted before charges are brought, it can be correctly described as a “decision-maker” rather than as a mere “decision-reverser” as it has been labelled by Sanders.<sup>71</sup>

Another problem related to the need to ensure early selection of the correct charge was not discussed in the Glidewell Report. The TRL reported that the police perceive that incorrect charging is sometimes undertaken by the CPS, who appear to the police to be overcautious in their decision-making.<sup>72</sup> The prosecutors, on the other hand, argued that they were not overcautious but charged careless driving rather than dangerous driving where there was insufficient evidence to prove the latter. In the current sample there was quite a high degree of agreement between the police and CPS as to the appropriate charge,<sup>73</sup> but, perhaps surprisingly, there was the odd case in which rather than downgrading a charge the CPS had taken the opposite decision and increased the charge.

This appears to have occurred in two cases in Northamptonshire (NORTH005 and NORTH023). In both cases the initial decision was to charge D with careless driving.

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<sup>70</sup> However, in addition to this, in one case of CDDD a plea to careless driving was accepted following a trial ending in a hung jury (NORTH005).

<sup>71</sup> See, for example, Sanders, A., “Prosecutions Systems” in McConville, M., and Wilson, G., *The Handbook of the Criminal Justice Process*, Oxford: Oxford University Press, 2002.

<sup>72</sup> TRL report, n.39 above, at p.34.

<sup>73</sup> As mentioned above, there were only twelve cases in which the CPS advice did not correspond with the recommendation of the police. This represents less than 4% of the cases in the entire sample, and just more than 8% of the number of files known to have been sent to the CPS for advice.

In case NORTH005 D was told by the police that he would only be reported for careless driving but the CPS subsequently advised that he should be charged with CDDD. At trial the jury could not reach a verdict and the CPS decided to accept a guilty plea to careless driving rather than risk an acquittal at a second trial. This was clearly a borderline case. In NORTH023 the CPS initially advised the police to commence proceedings for careless driving.<sup>74</sup> Subsequently the case was brought to the attention of the CCP by the family of V, and the CCP reviewed the case, going to great lengths to ensure that his decision was reasoned, including visiting the scene. He decided that CDDD was the more appropriate charge. Following committal to the Crown Court on the more serious charge the defence made a submission of abuse of process to the judge, which was upheld. The prosecution for CDDD was stayed and D pleaded guilty to careless driving.

The two cases are comparable in that in both cases D was initially under the impression that he would only face trial for the lesser of two quite different offences. In NORTH005 D attempted to argue that an abuse of process had taken place, and the CPS recognised in advance that such an argument might be put forward, but in that case it failed. Yet in NORTH023 it succeeded. It was perhaps fortunate that the argument did not succeed in the former case in that the High Court has expressed the view that the police have no authority and no right to tell D that he would not be prosecuted for any offence and that any prosecution proceeded with after the police had done so was capable of being an abuse of process.<sup>75</sup> Fionda notes that the decision in *Dean* has placed a large question mark over whether the CPS operates with any meaningful independence from the police.<sup>76</sup> The *Code for Crown Prosecutors* states that review of a case is a continuing process and that the CPS can alter the charges in order to take into account any change in circumstances, although they should discuss any changes with the police first.<sup>77</sup> It also states that although the CPS should not renege on a decision not to prosecute once it has been communicated to D, special reasons, including a fresh look at the evidence showing that the original decision was clearly wrong, can lead to a change in decision.<sup>78</sup> This seems to have been what occurred in NORTH023, the difference being that D was never told that he would not

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<sup>74</sup> This decision was made by a Senior Crown Prosecutor.

<sup>75</sup> *R. v. Croydon Justices, ex p. Dean* [1993] QB 769.

<sup>76</sup> Fionda, n.2 above, at p.60.

<sup>77</sup> *Code for Crown Prosecutors*, 3<sup>rd</sup> ed., 1994 (although a fourth edition of the Code was published in 2000 the relevant case was decided when the 3<sup>rd</sup> edition was in operation), para.3.2.

<sup>78</sup> *Ibid*, para.10.

be prosecuted, only that he would be prosecuted for a lesser offence. The judge seems to have decided that this was an abuse of process mainly because of the role that V's family took in triggering the review of the case which could be seen as influencing the decision. Had the CCP reviewed the case without being prompted to do so by V's family then the argument may not have succeeded.<sup>79</sup>

Consequent to NORTH023 a meeting took place between the CCP, Chief Constable and local MP to discuss concerns that had arisen as a result of the handling of the case. As a result, the procedure for giving advice in cases of RDI in Northamptonshire was revised. The CCP subsequently handled all RDI cases personally in order to guarantee consistent advice as to the appropriate level of charge before proceedings are commenced and to minimise delay in furnishing such advice. Early in 2003 the CCP felt unable to continue giving RDI cases his personal attention and has delegated the role to the Head of the Trials Unit, who now provides advice to the police under the supervision of the CCP. In Leicestershire the decision to charge in RDI cases was made at the time of this study by the Unit Head or a member of his team under his supervision. In Lincolnshire RDI files are usually allocated to more senior prosecutors, with two lawyers in particular dealing with the large majority of such cases.

Following the Glidewell Report the CPS Inspectorate has conducted a thorough inspection of the CPS in relation to its prosecutions in RDI cases. As in the current study, it did not find a problem with downgrading of charges because of the early involvement of the CPS in charging decisions. It found that the standard of case management was higher overall in many respects than that which it had found when examining cases generally in its inspections, and concluded that there was a high standard of decision-making overall.<sup>80</sup> However, it also found that the decision-making in a small number of cases needed to be improved. These were cases in which careless driving was selected for prosecution, as opposed to CDDD. The findings of the Inspectorate were clearly considerably less critical than might have been expected, given comments made in previous publications.<sup>81</sup> Most of the recommendations made

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<sup>79</sup> The CPS Inspectorate, in its Report (n.1 above, para.5.62), mention a case in which the decision to charge only careless driving was challenged by V's family and following advice from independent counsel D faced trial for CDDD and was convicted. There is no mention of an abuse of process argument being raised.

<sup>80</sup> CPS Inspectorate, n.1 above.

<sup>81</sup> i.e. the Glidewell Report, n.62 above and the TRL Report, n.39 above.

by the Inspectorate relate to the timeliness with which cases are dealt<sup>82</sup> and the CPS's role in liaising with victims' families.

One recommendation was that CCPs nominate one or more lawyers to become specialist prosecutors trained to oversee cases of RDIs.<sup>83</sup> The Inspectorate did not intend that this specialist should deal with every case personally, but that she should be available to be consulted by those to whom the file is allocated. In Northamptonshire the procedure currently in place therefore goes above and beyond the recommendations of the Inspectorate. One disadvantage of this is that other CPS lawyers within the area will not increase their experience of such cases, although the CPP has started to disseminate his experience by nominating the Head of the Trials Unit to take up the role. In Leicestershire an experienced lawyer has been nominated as a specialist. In Lincolnshire prosecutors have been asked to volunteer for the role, and it is probable that the two lawyers who normally deal with RDI cases will be nominated. The "specialist training" recommended by the Inspectorate commenced with a national seminar organised by CPS headquarters in May 2004, and more are planned for the future.

A further recommendation was that the *Driving Offences Charging Standard*, a document agreed nationally to assist the CPS and police in their selection of the appropriate charge and to encourage consistency in decision-making, be amended. The way in which prosecutorial discretion is structured and controlled by the existence of this document and of the *Code for Crown Prosecutors* will now be examined.

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<sup>82</sup> This is particularly important in cases where careless driving is suspected as an information must be laid within six months of the incident. In LINC106 the CPS was unable to prosecute D due to the magistrates ruling that the time limit had been passed. This was not in fact the case, but in this case and several others the time limit was nearing its expiry before summons were issued. In LINC037 the police issued a summons for careless driving without first obtaining CPS advice. The probable reason for this was that the time limit was due to expire before the CPS was sent the file, and so this action was taken to ensure that prosecution could go ahead if the CPS advised it. Once the CPS had reviewed the file the summons was withdrawn. Again, in LINC051 the police did not send the file to the CPS for advice until after the six month time-limit had expired. The CPS eventually advised NFA, but the Inspector took the OIC to task for the delay in completing the file, because if the CPS had found sufficient evidence to prosecute the prosecution would have been barred.

<sup>83</sup> CPS Inspectorate Report, n.1 above, para.3.24.

## **Aids to Decision Making: The *Code for Crown Prosecutors* and *Driving Offences Charging Standard***

The CPS clearly exercises a considerable amount of discretion in providing advice to the police as to what offence to charge and in deciding whether to continue with any prosecution commenced by the police. As noted by the CPS Inspectorate, the consequences of the charging decision in cases of RDIs are perhaps of greater importance to both D and V's family than in any other area of the law, because of the different penalties and mode of trial attached to careless driving and to CDDD.<sup>84</sup> Two documents exist to give guidance to the CPS in reaching its decisions. The first is the *Code for Crown Prosecutors*, which the Director of Public Prosecutions is required to issue under section 10 of the Prosecution of Offences Act 1985. This document provides guidance on the general principles to be applied in exercising prosecutorial discretion and should be adhered to in all cases. It is currently in its fourth edition, published in 2000, but it is the third edition, published in 1994, which is relevant to most of the cases in this sample and as such it is the earlier edition which is referred to unless otherwise stated. The second document is the *Driving Offences Charging Standard* agreed between the police and CPS. It provides guidance to help police and prosecutors when deciding what offence to charge as the result of a driving incident. It applies to all cases of careless driving and dangerous driving, as well as fatal cases.

### ***The Code for Crown Prosecutors***

The Code is used by CPS lawyers when reviewing cases to ensure that the correct charge has been selected. Charges selected by Crown Prosecutors should reflect the seriousness of the offending, give the court adequate sentencing powers and enable the case to be presented in a clear and simple way, but this means that "Crown Prosecutors may not always continue with the most serious charge where there is a choice".<sup>85</sup> Cases are reviewed once the file is sent to them by the police, in most cases after a charge has been made. Although in many cases of RDIs the CPS will already have seen the file when providing advice, a review must still take place once the decision to charge has been made, since it is a continuing process. The Code is therefore referred to by CPS lawyers when providing advice to the police, as the tests within it will have to be satisfied before a charge can go ahead.

There are two stages in the decision to prosecute: the evidential test and the public interest test. The evidential test requires that there is enough evidence to provide a

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<sup>84</sup> Ibid, para.5.34.

<sup>85</sup> Code, para.7.1.



“realistic prospect of conviction”<sup>86</sup> against D on the charge.<sup>87</sup> It is an objective test which means that “a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.”<sup>88</sup> This was previously known as the 51% rule, but the Explanatory Memorandum accompanying the Code makes it clear that the test should not be referred to in terms of percentages as weighing evidence is not a precise science.<sup>89</sup> The 2000 version of the Code has attempted to clarify this test by emphasising that the evidential test for Crown Prosecutors is a separate test from the one that the courts themselves apply which involves a stricter test.<sup>90</sup> Mansfield and Peay describe the test as “both a subjective test which the prosecutor attempts to apply in an objective manner and an objective test applied, inevitably, on a subjective basis”.<sup>91</sup>

Hoyano et al. found that prosecutors took disparate views as to the meaning of the reasonable prospects test.<sup>92</sup> A difficulty in applying the test is that the prosecutor must predict what is likely to take place at court. In determining whether the case meets the test the CPS must consider what the defence case is likely to be and how this will affect the prosecution case<sup>93</sup> and whether the evidence on which it seeks to base its case is reliable.<sup>94</sup> However, it should not be considered how a particular tribunal might view the case.<sup>95</sup> This has been questioned by both Ashworth and Fionda<sup>96</sup> and Hoyano et al.,<sup>97</sup> who feel it may be difficult and even problematic for prosecutors not to be influenced by their knowledge of local attitudes. Crown Prosecutors are also warned in the Explanatory Memorandum that they must guard against the temptation

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<sup>86</sup> In the past the police used the “prima facie” test, clearly not requiring such strong evidence as the “reasonable prospects” test.

<sup>87</sup> *Code for Crown Prosecutors*, 1994, para.5.1.

<sup>88</sup> *Ibid*, para.5.2.

<sup>89</sup> *An Explanatory Memorandum for use in Connection with the Code for Crown Prosecutors*, CPS, June 1996, para.4.14.

<sup>90</sup> *Code for Crown Prosecutors*, 4<sup>th</sup> ed., 2000, para.5.2.

<sup>91</sup> Mansfield and Peay, n.3 above, p.11.

<sup>92</sup> Hoyano, A., Hoyano, L., Davis, G., and Goldie, S., “A Study of the Impact of the Revised Code for Crown Prosecutors” [1997] *CrimLR* 556 at 559.

<sup>93</sup> *Code*, para.5.1.

<sup>94</sup> *Ibid*, para.5.3.

<sup>95</sup> *Explanatory Memorandum*, para.4.13.

<sup>96</sup> Ashworth, A., and Fionda, J., “The New Code for Crown Prosecutors: Prosecution, Accountability and the Public Interest” [1994] *CrimLR* 894.

<sup>97</sup> n.92 above.

to confuse cases which are evidentially complex or difficult with those cases which are weak.<sup>98</sup> In the majority of cases in which the CPS advised the police to take NFA the reason was that the case did not meet the evidential test. The question for the CPS was whether D's standard of driving could be proved to be careless, i.e. to have fallen below the standard of a reasonable, competent and prudent driver. In considering this question the Charging Standard, discussed below, can be used in order to provide examples of careless driving.

The second test is the public interest test. This test will only be considered once the evidential test has been met. The Code states that in a case of any seriousness "a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed."<sup>99</sup> Cases of RDIs are clearly serious, in the sense that the result of any bad driving that can be proven is death.

Paragraph 6.4 provides a non-exhaustive list of factors in favour of prosecution. Most of them would not apply in an RDI case given that if careless driving or CDDD are being considered the case clearly does not involve issues relating to violent crime or intentional conduct. Two of the factors might be relevant, however. The first is that a prosecution is likely to be needed if a conviction is likely to result in a significant sentence.<sup>100</sup> This would apply only in cases of CDDD or CDCDUI, where the maximum sentence was<sup>101</sup> ten years' imprisonment, and would not be relevant in cases of careless driving, where any sentence would not be described as "significant". The second is that a prosecution is likely to be needed if "there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct."<sup>102</sup> This might apply in a case of careless driving in which it is clear from interviews with D that although his driving could be described as careless he does not recognise this to be the case and will continue to take risks in the future without some intervention on the part of the authorities. This might occur in cases of elderly drivers whose driving skill has diminished with age but are reluctant to admit it. A prosecution might be avoided, however, if D can be persuaded to

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<sup>98</sup> Explanatory Memorandum, para.4.18.

<sup>99</sup> Code, para.6.2.

<sup>100</sup> Code, para.6.4a.

<sup>101</sup> At the time of the survey.

<sup>102</sup> Code, 1994, para.6.4m.

surrender his licence without the need for prosecution. In LEIC019 D was not prosecuted for public interest reasons, as his wife had died in the collision. The Inspector had been concerned that if they did not prosecute D they would be unable to withdraw his driving licence, and D was unwilling to surrender it voluntarily. It was thought, however, unlikely that D would be able to drive again due to his injuries. In LEIC106 it appears that the police decided to proceed with a prosecution for careless driving only after D stated that she was reluctant to surrender her licence. In this case the OIC thought it would not be in the public interest to prosecute D due to mitigating factors and the state of D's health. A summons was issued nonetheless, but before the case came to trial D died (of a condition unrelated to the collision).

Paragraph 6.5 of the Code provides a list of public interest factors against prosecution. The first is that a prosecution is less likely to be needed if the court is likely to impose a very small or nominal penalty.<sup>103</sup> Although the penalty for careless driving is quite small the fact that a death has been caused may well mean that D will receive a sentence at the higher end of the magistrates' powers.<sup>104</sup> The second, which states that a prosecution is less likely in cases where the offence was committed as a result of a genuine mistake,<sup>105</sup> clearly does not apply to cases of bad driving in the same way as it would apply to offences requiring *mens rea*. Any mistake made by D in his driving will form the very basis of the prosecution. The only other factor of potential relevance in RDI cases is that relating to D's age. The Code states that a prosecution is less likely to be needed if "the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill-health, unless the offence is serious or there is a real possibility that it may be repeated".<sup>106</sup> Again, the fact that drivers must meet an objective standard means that any problem caused by ill-health will operate in favour of prosecution rather than against, since D should not be driving if his ill-health prevents him from doing so safely.

Ashworth and Fionda note that although the Code provides this list of public interest factors to assist decision-making, a great deal of discretion is left to decision-makers in each case.<sup>107</sup> This is largely because the Code gives no indication as to how

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<sup>103</sup> Code, para.6.5a.

<sup>104</sup> The case of *Simmonds* (1999) RTR 257 suggests that the court is now able to take the consequences of a piece of careless driving into consideration when sentencing. This has since been confirmed in *King* [2001] CrimLR 493, but it should be noted that some of the cases in the sample were decided before *Simmonds* was reported.

<sup>105</sup> Code, para.6.5b.

<sup>106</sup> Code, para.6.5f.

<sup>107</sup> Ashworth and Fionda, n.96 above, at 898.

it should be decided what weight should be given to multiple, perhaps conflicting, factors. The Code itself advises that “Crown Prosecutors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment”.<sup>108</sup> This is supported by the Explanatory Memorandum, which states that it is not a question of weighing individual factors for and against and seeing which side of the scales is numerically heavier, and points out that one factor alone may outweigh numerous other factors which lean in the opposite direction.<sup>109</sup> LEIC051 provides an example of the many factors a prosecutor may have to weigh against each other in deciding whether prosecution would be in the public interest. Factors listed against prosecution were that: V’s parents wished D not to be prosecuted; the minor nature of the charge;<sup>110</sup> the fact that V was a close friend of D; the fact that D had sustained serious injury. Factors listed in favour of prosecution were that: death was caused; there was significant damage to property; the fact that D drove without insurance, an offence which is prevalent and can lead to serious consequences. It was concluded that the wrong message would be sent to society if D was not prosecuted, and that it was in the public interest to charge D with careless driving.

Ashworth and Fionda conclude, in relation to the public interest test, that “[o]nce a non-minor case has passed the threshold of evidential sufficiency, there appears to be a presumption in favour of prosecution.”<sup>111</sup> This appears to be borne out by the cases in the current sample. In most cases any reference to the public interest in the letter of advice to the police stated that a prosecution was clearly in the public interest. An explanation of this was rarely given, but where one was provided it might state no more than that the resulting death meant that prosecution was clearly in the public interest. For example, in LINC041, having concluded that the evidential test for CDDD had been passed, the letter of advice stated that, given the high profile of deaths on Lincolnshire roads, it was in the public interest to proceed with the charge. In only nine instances was NFA taken due to public interest factors where the evidential test had seemingly been passed.<sup>112</sup> Interestingly, in six of the seven cases which occurred in Leicestershire it appears to have been the police rather than the

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<sup>108</sup> Code, para.6.6.

<sup>109</sup> Explanatory Memorandum, para.4.41.

<sup>110</sup> This case is discussed in the following chapter at p.125. D was probably under the influence of drink and/or drugs, which would have warranted the more serious charge of CDCDUI, but a blood sample was not obtained from D for analysis due to his hospitalisation.

<sup>111</sup> Ashworth and Fionda, n.96 above, at 899.

<sup>112</sup> This equates to 9.5% of all cases not prosecuted and compares to 31% of cases generally which are discontinued for public interest reasons: Fionda, n.2 above, at p.29.

CPS who concluded that the cases should not be prosecuted for public interest reasons, and CPS advice was not seen to be warranted. In the seventh case (LEIC012) it seems that a summons was issued for careless driving, but it is probable that the case was discontinued for public interest reasons.<sup>113</sup> In the remaining two cases, which occurred in Lincolnshire, the police obtained CPS advice on the matter. In all but one case the decision not to prosecute was due to the relationship between V and D.<sup>114</sup> This is something mentioned specifically in the *Driving Offences Charging Standard*.

The letters of advice from the CPS to the police mentioned one or other of the Code tests (or both) in 40% of the cases prosecuted where CPS advice was obtained. Hoyano et al. conclude that “the Code tests are not susceptible to precise gradations and so prosecutors rely to a large extent on experience, both their own and that of their colleagues.”<sup>115</sup> They opine that if changes in decision-making were required, specific directives would be more effective in achieving those changes than any further changes made to the Code. It can be seen that in relation to motoring offences, as well as public order offences and assaults, the CPS do indeed have further, more detailed directives in the form of Charging Standards,<sup>116</sup> which will now be discussed.

### *The Driving Offences Charging Standard*

The aim of the guidelines provided in the *Driving Offences Charging Standard* (hereafter the Charging Standard) is to produce more consistent decisions in cases of motoring offences, particularly those causing serious injury or death.<sup>117</sup> The DPP, in welcoming the Standard, stated that it would: “help police and Crown Prosecutors

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<sup>113</sup> There were no further entries on the file to confirm this. There was clearly sufficient evidence to proceed with the prosecution, as D had failed to give way at cross-roads and emerged into the path of traffic. It seems probable that it was decided that the public interest did not require prosecution, given that D was elderly and V was a close friend.

<sup>114</sup> In LINC082 D, an HGV driver, was guilty of speeding. However, given that his excess speed was not contributory to the collision and D had suffered a traumatic experience it was felt not to be in the public interest to prosecute.

<sup>115</sup> Hoyano et al., n.92 above at p.564.

<sup>116</sup> More recently the CPS has introduced a “Legal Guidance” website, which is described as an electronic manual providing prosecutors with guidance on a wider variety of criminal offences and procedural issues. See:  
<http://www.cps.gov.uk/home/LegalGuidance/index.htm> February 2004.

<sup>117</sup> Although the document was intended to be used by the police as well as the CPS it is unclear the extent to which the police refer to it when preparing files and making recommendations. One officer stated that he rarely consulted it, but would do so where public interest issues arose. From the files, there was mention of the Charging Standard by the police in only four cases, all of which occurred in Lincolnshire.

when identifying appropriate charges to operate to a clear, shared understanding of the legal requirements which must be met and what has to be proved before a prosecution can proceed on each possible charge. This will be particularly helpful where there is a choice of which charge or charges should be brought.”<sup>118</sup> The Standard stresses that it exists to complement the general principles in the *Code for Crown Prosecutors* and does not replace the tests therein, and repeats some of the principles to be found within the Code. Although Ashworth states that there was some controversy over the introduction of charging standards generally in that some suspected that they were used as a way to save public expenditure by categorising offences as summary offences,<sup>119</sup> such allegations surely relate to the *Offences Against the Person Charging Standard* rather than the *Driving Offences Charging Standard*. Crown Prosecutors expressed the view that the Standard can be very helpful in aiding their decision-making, but stressed that it exists as guidance only.

Before setting out its guidance in relation to the different specific offences the Standard makes some general comments about driving offences. Of particular interest is the statement that what is not relevant to the decision as to whether an act of driving is careless or dangerous is: “the injury or death of one or more persons involved in a road traffic accident, except where Parliament has made specific provision for the death to be reflected in the charge. Importantly, injury or death does not, in itself, turn an accident into careless driving or turn careless driving into dangerous driving.”<sup>120</sup> In trying to distinguish between careless and dangerous driving, having pointed out that there is no clear-cut dividing line between the two offences, it states that “[s]omething more than momentary inattention (which may have minimal or serious results) is generally careless driving. Substantial/gross/total inattention (which may have minimal or serious results) is generally dangerous driving, even though it may take place over a period of a few seconds. The factual examples set out in this standard are merely indicative of the sort of behaviour which may merit prosecution under either section 2 or section 3 RTA 1988.”<sup>121</sup>

The specific examples given in relation to each offence will not be discussed here, although they will be referred to when and as they arise in the next chapter discussing decisions to charge in specific cases. However, there is one further general principle referred to in the Standard. This relates to “nearest and dearest” cases. The

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<sup>118</sup> Barbara Mills QC, quoted in a CPS Press Release (002/96) dated 7 March 1996.

<sup>119</sup> Ashworth, A., *The Criminal Process*, Oxford: Oxford University Press, 1998, p.195.

<sup>120</sup> *Driving Offences Charging Standard*, para.4.2.

<sup>121</sup> *Ibid*, para.4.3.

relationship needed for a case to fall within the category of “nearest and dearest” cases is not defined, but it is stated that the closer the relationship between V and D, the more likely it will be that it will fall within the category to which the guidance provided by the Standard applies.<sup>122</sup> The issue is whether the public interest requires D to be prosecuted when it is in fact someone close to him that was killed and he will therefore suffer greatly regardless of public prosecution. This depends, according to the Standard, on whether there is evidence to suggest an aggravating feature which imperils other road users or that the accused is a continuing danger to other road users.<sup>123</sup> If so, then the proper course is to prosecute. Also, in cases where D drove in a way which showed serious disregard for the safety of his “nearest and dearest” or other road users, proceedings for CDDD should be considered.<sup>124</sup> In all other cases the proper course is not to prosecute.

The issue of “nearest and dearest” will normally arise where V was a close relative of D and a passenger in the car driven by D. Of the cases prosecuted in the current sample, only one case involved close relatives. In NORTH015 two of D’s passengers, who were members of his family, died. The Crown Prosecutor suggested that had there been no other victims of the collision, a prosecution for careless driving would not have been warranted for public interest reasons. However, the driver of another car with which D collided was seriously injured, and so it was concluded that the public interest did require prosecution.<sup>125</sup> Other cases in which prosecutions went ahead involved varying degrees of acquaintance, with several cases involving friends and colleagues. Of the cases in which prosecutions were not brought due to public interest reasons, the relationships involved ranged from parents, spouses and siblings to non-blood relations and, in one or two cases, friends.<sup>126</sup> In LEIC019 criminal

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<sup>122</sup> Ibid, para.13.2.

<sup>123</sup> Ibid, paras.13.3 and 13.7.

<sup>124</sup> Ibid, para.13.4.

<sup>125</sup> It is unclear in this case why CDDD was not considered as a possible charge. D was seen by witnesses driving erratically and speeding on the approach to the collision scene, which occurred in an area of road-works on the M1 subject to a contraflow. It is possible that because a prosecution took place due to injuries to the other driver, CDDD was not considered as an option because such a charge would have involved punishing D for the deaths of his relatives, which was not in the public interest. It would be possible, however, to charge D with dangerous driving in such a case.

<sup>126</sup> In LEIC012 it appears that charges were withdrawn for public interest reasons (see n.112 above). In LEIC055 D lost control on a bend and collided with a telephone junction box. The CI concluded that she had been travelling at a speed too fast for the prevailing conditions (the road was wet). The OIC suggested a prosecution for careless driving, and although his Inspector agreed that there was a case for careless driving, he concluded that

proceedings were considered against two Ds. D1, whose wife died in the collision, was seen to be more to blame for the collision than D2. As a result, although a charge of careless driving against D2 was seen to be evidentially appropriate, no prosecutions were brought on the basis that if D1 was not to be punished due to the “nearest and dearest” policy, it would be unfair to punish D2.

There were other public interest reasons for not prosecuting cases within the sample. In LINC099 a prosecution for breach of the Construction and Use Regulations applying to agricultural vehicles was not brought on the basis that D and V had been members of the same close-knit community (although they were not close friends), and it was felt that a prosecution would serve only to split the community. In LINC035 V, a refuse collector, was killed when he fell from a refuse lorry and was trapped under its rear wheels as he attempted to travel on the outside of the vehicle, against his employer’s instructions. His contribution to his own demise was seen to be such that D, his colleague driving the vehicle, should not face criminal charges, even though it was agreed that he had an obligation to ensure that V was not riding on the lorry. A charge of dangerous driving, rather than CDDD, was considered, but the CPS concluded that it was not in the public interest to prosecute D, who was extremely upset and remorseful.

As mentioned above, the Standard is a document available to both police and CPS in their decision-making tasks. In cases in which the CPS provided advice to the police on whether a charge was appropriate and, if so, what that charge should be, there was evidence that the Crown Prosecutor had consulted the Standard in 17 cases.<sup>127</sup> This evidence takes the form of either making express reference to the Standard or couching the advice in such a way as to replicate terms used within the Standard. It is, of course, impossible to know in how many further cases Crown Prosecutors referred to the Standard when making their decision, because of the limitations of the research method used here.

One final point to make is that the recent CPS Inspectorate report recommended that the Standard be reviewed.<sup>128</sup> It has not been updated since it was introduced in 1996 and is now not in line with the law. For example, recent sentencing guidelines for RDI cases issued by the Sentencing Advisory Panel<sup>129</sup> and adopted by the Court of

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it would not be appropriate to proceed due to the relationship between D and V (school-friends).

<sup>127</sup> All but one of these were cases leading to prosecution.

<sup>128</sup> CPS Inspectorate Report, n.1 above, para.5.80.

<sup>129</sup> Sentencing Advisory Panel, February 2003.



Appeal<sup>130</sup> provide that in cases of CDDD fatigue will be an aggravating factor in sentencing. The Standard gives fatigue or “nodding off” as an example of conduct supporting an allegation of only careless driving,<sup>131</sup> and is therefore incompatible with the later Court of Appeal decision. At the time of writing the CPS was in the process of drafting a new version of the Standard, which will hopefully deal with these criticisms. A concern was also expressed to the CPS Inspectorate that although the Standard could be a useful tool different prosecutors were applying it in different ways, leading to inconsistent decision-making, particularly between CPS Areas.<sup>132</sup> The Inspectorate found some support for this concern and the following chapter will consider, amongst other things, whether there is evidence of such inconsistency in decision-making in the counties of Lincolnshire, Leicestershire and Northamptonshire. In doing so, consideration will be given to the way in which some of the issues discussed in this chapter arise in cases of RDIs.

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<sup>130</sup> *Cooksley and others* [2003] EWCA Crim 996.

<sup>131</sup> *Driving Offences Charging Standard*, para.5.6.

<sup>132</sup> CPS Inspectorate Report, n.1 above, para.5.84.

## Chapter 5 – Empirical Findings: Charging Decisions

The previous chapter explored the organisational structure of decision-making in RDI cases and the way in which discretion is, or should be, controlled by policy. What should be borne in mind in consideration of what follows is that the sensitivity involved in RDI cases unavoidably makes the task of decision-making an extremely difficult one. CPS lawyers expressed that these are some of the hardest decisions they will ever have to make as lawyers, and far from being taken lightly they can keep the decision-maker awake at night. Hoyano *et al.* point out that in cases involving fatalities there are conflicting considerations when applying the evidential and public interest tests as set out in the *Code for Crown Prosecutors*.<sup>1</sup> The fact that the media and public are aware that a death has been caused may raise the public interest in seeing a prosecution go ahead, but the prosecutor may be of the opinion that there is insufficient evidence to provide a realistic prospect of conviction.

This chapter extends the discussion to consider how decision-making discretion is exercised in particular cases in the application of specific legislation and what difficulties are faced by prosecutors in their task.<sup>2</sup> The legislation has been explained in Chapter 2, which set out the offences relevant to the current study. The CPS Inspectorate found that the main issue to be dealt with by prosecutors in cases of RDIs is whether the driving was careless or dangerous.<sup>3</sup> Of the 316 cases falling within the current sample, 126 resulted in prosecutions for the relevant offences. The first section will consider cases in which the task of the decision-maker was to determine whether the conduct of one of the surviving drivers displayed sufficient culpability to constitute an offence of careless driving. The chapter will progress to consider cases where D was more obviously blameworthy but the issue was whether the line between careless and dangerous

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<sup>1</sup> Hoyano *et al.* “A Study of the Impact of the Revised Code for Crown Prosecutors” [1997] Crim LR 556 at 562.

<sup>2</sup> This study differs in its approach to that taken by the CPS Inspectorate in its report: HM Crown Prosecution Service Inspectorate, *Review of the Advice, Conduct and Prosecution by the Crown Prosecution Service of Road Traffic Offences Involving Fatalities in England and Wales*, 2002. The Inspectorate set out to identify cases in which it considered the charging decision to be wrong in principle (para.5.4). Of the 99 prosecuted cases examined by the Inspectorate, it disagreed with 7 decisions (para.5.55). This study does not carry out such an assessment, but identifies cases in which it would have been possible to come to a different decision.

<sup>3</sup> Ibid, para.5.33.

driving had been crossed. Once the most serious examples of risk-taking have been considered, the discussion then turns to cases involving specific characteristics such as the involvement of drink or drugs or the creation of risks, not by the standard of driving, but by the driving of a vehicle in a dangerous condition.

## **Cases involving lesser culpability due to the standard of driving**

Careless driving requires that D's driving fell below the standard of the reasonable, prudent and competent driver. Seventy-nine of the cases within the sample led to a prosecution for this offence. No cases were based on the offence of inconsiderate driving,<sup>4</sup> although consideration was given to such an offence in three cases<sup>5</sup> where NFA was ultimately taken.

It is not clear who the "reasonable, prudent and competent" driver is and what he would do in every imaginable situation, and so the question as to whether the standard has been met or not is not at all clear-cut. Thus, cases which appeared to be borderline between criminal liability and no criminal liability are initially considered, before the so called "grey area" between the offences of careless driving and CDDD is explored.

### ***NFA vs. Careless Driving***

Of the cases studied, 190 resulted in no prosecution. In 94 of these cases the lack of prosecution can easily be explained on the basis that it was a driver who died who had caused the collision and no survivors could be blamed. This often occurred when the driver who died had, for example, lost control of his car or motorcycle whilst attempting to negotiate a bend and crossed into the path of an oncoming vehicle, the driver of which had little or no opportunity to avoid a collision.

When two or more vehicles collide the police will investigate the cause of the collision to establish which of the drivers was at fault. It may be the fault of V, or of D, of both, or, very occasionally, of neither. The police point out that collisions

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<sup>4</sup> Both careless driving and inconsiderate driving are offences under s.3 Road Traffic Act 1988.

<sup>5</sup> NORTH084, LEIC094 and LINC098. In LINC098 the police did in fact start proceedings against the advice of the CPS, but it seems that the case was later discontinued. Interestingly, both LINC098 and LEIC094 involved vehicles colliding with pedal cyclists.

are rarely the result of true “accident” in that they can usually be explained by either human error or the presence of a mechanical defect. In a very small number of cases, however, neither party is to blame and the cause of the collision is attributed to some outside influence. In LINC015 fault was not attributed to either of two drivers who met on a narrow lane travelling in opposite directions. Having managed to pass each other V lost control of his car, although a possible contributory factor may have been an under-inflated tyre. In LEIC100 the police concluded that the collision was the result of “accident”, the primary contributor being the strong wind which suddenly blew V’s motorcycle off-course and into the path of an oncoming vehicle.

Motorcyclists are a particularly vulnerable class of road-user. In the USA it has been found that motorcyclists are more than twenty times more likely to be fatally injured, per mile travelled, than drivers of other vehicles.<sup>6</sup> In this country the statistics give a “casualty rate”<sup>7</sup> for motorcyclists of 647 and 581 in 1999 and 2000 respectively,<sup>8</sup> as opposed to 55 and 54 in the same years for car users.<sup>9</sup> Thirty-five of the cases where no prosecutions were brought involved the death of a motorcyclist. In fourteen of these cases V was seen to be at fault, having lost control of his machine on a bend. Such cases are usually easy to reconstruct, leaving the police with little doubt about blame. However, other types of cases are more difficult to judge. Mannering and Grodsky<sup>10</sup> identify five reasons for motorcyclists’ high collision involvement, four of which place the blame with V and one of which places the blame with other road-users. Those which identify V as the cause are that, firstly, operating a motorcycle is a complex task in which any impairment will more readily increase collision risk. Secondly, motorcyclists are not properly trained in the intricacies of motorcycle operation. Thirdly, motorcycling by its very nature may attract personalities who are thrill-seeking,

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<sup>6</sup> Mannering, F.L., and Grodsky, L.L., “Statistical Analysis of Motorcyclists’ Perceived Accident Risk” (1995) 27(1) *Accid. Anal. and Prev.*, 21 at 21. Similar statistics are provided by Rutter in Rutter, D., “Social Psychological Aspects of Motorcycling Safety” in Mitchell, M. (ed.), *The Aftermath of Road Accidents*, London: Routledge, 1997.

<sup>7</sup> Per 100 million vehicle kilometres.

<sup>8</sup> Department of Transport, Local Government and the Regions, *Road Accidents Great Britain: The Casualty Report 2000*, London: The Stationery Office, 2001, Table 1e.

<sup>9</sup> *Ibid*, Table 1c.

<sup>10</sup> n.6 above.

meaning that they will also be more likely to be involved in collisions. Fourthly, many motorcycles offer substantially better performance than cars, such as the ability to accelerate very quickly. Thus, these four factors suggest that irrespective of how other road-users drive, motorcyclists are more collision prone.

However, the fifth factor in motorcycle accidents is particularly problematic. Mannering and Grodsky point out that drivers tend to pay less attention to motorcyclists and have conditioned themselves to look only for other automobiles as possible collision dangers. This is probably a significant factor in many of the cases in which motorcyclists were killed in which the decision as to whether to prosecute D was more difficult. In particular, cases involving cars turning across the path of motorcycles were problematic. There were several cases in which V had been riding along a main road, overtaking a line of traffic, when D turned right across his path, having been at the head of the line which V was overtaking. Other cases involved D turning across the path of V who was travelling in the opposite direction.

In such cases it was often difficult for the police to allocate blame, in that invariably there was a suggestion that V had been riding at excessive speed, and it was difficult to judge the degree to which D was to blame in failing to see the motorcycle before carrying out his manoeuvre or in misjudging V's speed. In such cases the police may have to rely on D's comments in interview concerning what observation he conducted before and during his manoeuvre. Eye-witness statements as to the timing of V's and D's manoeuvres are also important. The problem is that in these cases some degree of blame can usually be apportioned to both parties. The question is whether D's fault is sufficient to warrant criminal proceedings. A driver should check his mirrors and blind-spot before performing a right turn, and should ensure that he is not being overtaken. Equally, though, any road-user should not overtake when approaching a junction. Thus, proving careless driving in such circumstances may be difficult. In LINC038 the Crown Prosecutor concluded that it was impossible to say that D was at fault as there were no eye-witnesses to suggest that D had failed to indicate or failed to give sufficient warning when he turned right across V's path.

Pedal cyclists are also vulnerable. However, they are unlikely to contribute to a collision in the same way as motorcyclists. In contrast to motorcyclists they are slow moving, and as such other road-users should have more time to react to their presence. Cyclists themselves are usually aware of their vulnerability and will take suitable precautions in any manoeuvres they carry out. There were nine cases

in which although a cyclist was killed no prosecutions were brought. In two cases the police concluded that where V and D were travelling in the same direction, V had pulled right into D's path, leaving him no time to react.

However, in LEIC094 the police concluded that D was at fault and there was sufficient evidence to prefer a charge of inconsiderate driving. V had been struck by D's wing mirror as D overtook V in his van. The CI found that V had been positioned close to a white line separating the nearside lane from a bus-stop, suggesting that D had given V insufficient room. However, although it seems that the CPS initially agreed with the police that a prosecution should be brought, in that they sent a fax to the police querying where a summons should be issued, it appears that at some later stage the decision was made not to prosecute. Unfortunately there was no further CPS correspondence on the file explaining this decision, but the case is clearly one which caused difficulties for the decision-makers.

Similarly, in LEIC030 the police considered that careless driving should be prosecuted but no charges were brought, where D appears to have failed to see a cyclist prior to the collision. In LINC098 the police disagreed so strongly with the CPS view that there was insufficient evidence to provide a realistic prospect of conviction for inconsiderate driving that a summons was issued against CPS advice. Again, nothing further appears on the file with regards to the prosecution, so it is assumed the case was discontinued by the CPS. Not all cases in which there is equivocal evidence as to the location of V and what happened lead to NFA, though. In LEIC022 V was caught with his pedal cycle in the wheels of an HGV. There was conflicting eye-witness evidence about where V was in relation to the HGV when he was struck and the vehicles were moved before the CI arrived at the scene, meaning he was unable to place them exactly. Despite this, a prosecution for careless driving went ahead and was successful. Another successful case of careless driving (LINC036) involved D failing to give a pedal cyclist sufficient room when attempting to overtake.

When pedestrians are killed on the road different issues must be addressed. Pedestrians will not normally be in the road unless they are attempting to cross it, and so when a pedestrian is killed it raises suspicions about D's level of attention, and even the possibility of a deliberate act of violence on the part of D. In most cases involving motor vehicles where murder or manslaughter is considered the

appropriate charge, the victim is a pedestrian rather than the occupant of a car.<sup>11</sup> However, in the current sample there were 51 cases involving pedestrians in which no prosecution was brought. This might be surprising, given that drivers owe a duty to take particular care when pedestrians are likely to be present. There are various reasons for these types of collisions which explain the lack of prosecutions, however.

Alcohol can be dangerous not only when consumed by drivers, but also when consumed by pedestrians. National statistics show that for the 332 pedestrians killed in 1999 with a known blood/alcohol concentration (BAC), 39% were above the legal limit to drive (80mg/100ml) and 24% were above 200mg/100ml.<sup>12</sup> For the 316 pedestrians killed in 2000 with a known BAC, the figures were 35% and 22% respectively.<sup>13</sup> In twelve of the cases involving pedestrians in the current study, V was found to have a high level of alcohol in the blood. In these cases the collision took place in darkness, often when V was attempting to walk home late at night on a country road, perhaps attempting to thumb a lift from traffic as it passed and ignorant of the fact that he could not be seen by drivers until the last moment.

More worryingly, each of the three counties featured a case in which a young man, walking home at night whilst drunk, had laid down in the middle of the road in order, it seems, to rest. These cases caused particular problems for the police, who were faced with the need to explain V's presence in the road with no eye-witness testimony to assist. This was aggravated in LEIC117 by the fact that D did not stop at the scene and the police were ultimately unable to establish for certain the identity of D. In both LEIC117 and LINC037 further complications were involved due to evidence that V had been party to an altercation earlier that day. In the case of LEIC117 this fight occurred immediately prior to V being left in the road, although the police concluded that he had not been knocked unconscious and the other party was not responsible for V's presence in the road.

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<sup>11</sup> See Cunningham, S., "The Reality of Vehicular Homicide: Convictions for Murder, Manslaughter and Causing Death by Dangerous Driving" [2001] Crim LR 679.

<sup>12</sup> Transport Research Laboratory, *Blood Alcohol Levels in Road Accident Fatalities for 1999 in Great Britain*, Leaflet No. LF2084, October 2001.

<sup>13</sup> Transport Research Laboratory, *Blood Alcohol Levels in Road Accident Fatalities for 2000 in Great Britain*, Leaflet No. LF2086, October 2002.

In LINC037 V had been involved in a fight at a pub earlier in the day. As he was walking home with his friends, the other party to the fight followed in his car in order to get revenge. However, this third party claims that due to the number of people present he had returned home and not spoken to V again. He was arrested for perverting the course of justice, initially denying that he had driven his car because he was unfit to do so through drink. V was run over some time later that night. His friends had left him to go their separate ways and he was run over by a car which had been following an ambulance. The ambulance was able to swerve to avoid V, but the car behind was travelling too close and D's view was restricted by the ambulance. A summons for careless driving was issued against D before CPS advice was obtained, but was later withdrawn. The important question for the police was whether they could establish if V had any injuries prior to being run over by D. The pathologist found V's injuries to be consistent with being run over by D and so the police accepted that on this occasion no further suspects were involved. This case raised suspicions about the possibility of a more serious criminal offence of perhaps murder or manslaughter having been committed, because of the strange circumstances in which V came to be lying in the road. The police investigated this possibility rather than assuming that it was merely a case of a road traffic collision.

In another six cases the pedestrians who were killed had been suffering from some kind of mental illness. In some cases it was strongly suspected that V, in effect, took his or her own life by presenting themselves in the path of motor vehicles. In these cases, and others involving pedestrians who appear to have stepped into the paths of vehicles without looking, the police are often able to use various calculations, along with eye-witness testimony, to establish the time it took D to react to the presence of V in the road. In cases where D appears to have reacted fairly promptly, a criminal prosecution will normally be ruled out. In one case, however, the police and CPS disagreed as to whether D's driving fell below the standard of a reasonable, prudent and competent driver. In LEIC076 D could not account for not seeing V sooner. V had stepped off the kerb on D's nearside in daylight. Both the OIC and Inspector agreed that D should be prosecuted for careless driving, but the CPS disagreed. Unfortunately the CPS letter of advice did not appear on the file so it is unknown what the exact reasoning behind their decision was. It may be that none of the witnesses appear to have apportioned blame to D, as V stepped off the kerb into D's path. There were several cases with similar facts to this in which the police decided to take NFA, but what appears to



distinguish them from this case is that V was highly visible and the CI calculated D's speed as being 36mph in a 30mph limit.

There were thirteen cases in which D collided with a pedestrian, who was attempting to cross the road, and was convicted of careless driving. The degree of fault on the part of D varied, but in all cases it was agreed by the police and CPS that D failed to react with sufficient promptness to the presence of V. Three cases involved excess speed, with the degree of excess ranging from 5mph over the limit to 20mph over. One case (LINC106) involved D being dazzled by the sun. D was driving in a busy town centre and failed to see V, who had walked out from behind a bus. A major cause, according to the CI, was the low sun. Where drivers are dazzled by either the sun or the lights of other vehicles they are expected to adjust their speed accordingly in order to be able to stop in the distance they can see to be clear. When they fail to do so and this results in a collision they may face prosecution for careless driving.<sup>14</sup> This occurred in a further four cases, two involving pedal cyclists and two involving stationary vehicles. In all cases there was little doubt that D should have taken action to limit the effect of being dazzled.

Occasionally the police may be unable to establish what the cause of a collision was and yet a prosecution against D is brought. This occurs when the police are able to reconstruct the collision in terms of the location of the vehicles and the way in which they collided, but cannot provide a reason for this. In such cases paragraph 5.5 of the Charging Standard states that a charge of careless driving may be appropriate. The basis of the prosecution's case is that in the absence of any other explanation it is inevitable that D must have been driving below the standard expected of a reasonable, prudent and competent driver, since otherwise the collision would not have occurred. This seems to have been the basis of the prosecution case in six of the cases in the sample. In two of these (LINC009 and LINC084) there does seem to have been an explanation in that it is probable that D lost control due to attempting to negotiate a bend too fast. In LINC084 the Crown Prosecutor made express reference to paragraph 5.5,

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<sup>14</sup> *Wilkinson* suggests that if a collision occurs within one or two seconds of D being dazzled he is not guilty of careless driving, but if the collision occurs more than two seconds after the loss of vision began and D has not done anything to reduce speed or stop he should be found guilty of careless driving at least: Wallis, P.S., McCormack, K., and Swift, K., *Wilkinson's Road Traffic Offences*, Sweet & Maxwell, 21<sup>st</sup> ed., 2003, para.5.71.

although in the other cases there was no such reference. Other cases involved D crossing into the path of an oncoming vehicle for some unexplained reason, and in all cases the prosecution was successful.

### *NFA vs. Speeding vs. Careless Driving*

In addition to the 79 cases in which careless driving was charged, three cases resulted in prosecutions for speeding (LINC044, LEIC074 and NORTH057). All three Ds were HGV drivers whose speed could be determined from examination of the vehicle's tachograph, which records the hours driven by the HGV and the speed at which it is driven. It should be remembered that goods vehicles are subject to speed limits which differ to those which apply to cars and motorcycles.<sup>15</sup> In LINC044 D had exceeded his speed limit by 20mph and, although he would not have been able to avoid a collision if travelling at a slower speed, the Crown Prosecutor pointed out that his speed would have increased the severity of the impact and was so significantly over the limit that the offence should be marked. In LEIC074 and NORTH057 it was felt that the main responsibility for the collision lay either with V or with another driver, but in both cases D had been driving at 56mph when his vehicle was restricted to a 40mph limit.

These three cases are comparable in that they involve HGVs which have exceeded the speed limit to similar degrees and this was not a cause of the collision. However, the approach taken by those investigating and prosecuting the cases differed. In LINC044 the OIC and his Sergeant recommended NFA against D, whereas the Inspector suggested that D should be prosecuted and the CPS agreed. Similarly in NORTH057 the OIC made no recommendation in relation to the prosecution of D, whilst the CPS advised that D should be prosecuted. In Case LEIC074, however, the OIC suggested that careless driving might be prosecuted, but his Inspector disagreed and prosecuted D for speeding only.

The Charging Standard only refers to excess speed in relation to dangerous driving, where it suggests that "speed which is highly inappropriate for the prevailing road or traffic conditions" is an example of driving which may support an allegation of dangerous driving.<sup>16</sup> However, it is also pointed out in the Charging Standard that under s.38(7) RTA 1988 a failure to observe a provision

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<sup>15</sup> See Chapter 2 above, p.28.

<sup>16</sup> Charging Standard, para.7.7.

of the Highway Code may constitute evidence of careless or dangerous driving.<sup>17</sup> Clearly, exceeding the speed limit is acting in breach of Rule 103 of the Highway Code. Exceeding the speed limit does not automatically constitute careless driving, but equally it is clear that driving at a speed within the speed limit does not exclude a possibility of careless or even dangerous driving having been committed due to excessive speed for the prevailing road or traffic conditions. Indeed, in several cases in which careless driving was charged speed played a major part in proving the offence. There were thirteen cases resulting in prosecutions for careless driving in which excessive speed was the main contributory factor to the collision, according to the CI. In four of these cases D was not driving in excess of the speed limit, but at a speed which was inappropriate for the prevailing conditions. In another eight cases of careless driving speed was a contributory factor, but other factors were seen as the main reason for the collision.

However, there were further cases in which NFA was taken in which there was proof that D had exceeded the speed limit. Again, all of these involved HGV drivers. In two cases (NORTH016 and NORTH024) D was found to have exceeded his speed limit by 10mph but the police decided to take NFA. In both of these cases V, whilst travelling in the opposite direction to D, had crossed the carriageway into the path of D. D's speed was not seen to be contributory to the collision. In NORTH021 D was again exceeding his speed limit but this was not seen to be a contributory factor as V, who was suffering from depression, walked into D's path. In another five cases (LINC026, LINC025, LINC082, NORTH002 and NORTH060) D had exceeded the speed limit by 10-17mph and the file was sent to the CPS for advice. In NORTH060 V was a pedestrian who was drunk and walking on a dark road, wearing dark clothing and trying to thumb a lift. D was travelling at 12mph above his 40mph limit and did not see V at any stage but heard a bang as he collided with V. The CI was unable to say whether D would have seen V had he been travelling at a slower speed and the CPS concluded there was insufficient evidence to provide a realistic prospect of conviction. In both NORTH002 and LINC025 V attempted to overtake when it was unsafe to do so, and collided with D's HGV travelling in the opposite direction. D's speed was not seen as contributory.

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<sup>17</sup> Charging Standard, para.5.3.

It can be seen from cases LINC026 and LINC082 that the different counties had different policies regarding seeking CPS advice at the time of the sample. The facts of these two Lincolnshire cases were very similar to cases NORTH016 and NORTH024 but, unlike Northamptonshire Police, Lincolnshire Police decided to leave the final decision as to any action to be taken to the CPS. In both counties, however, the ultimate decision was the same. What is unclear is how these cases can be distinguished from those three cases mentioned above in which it was decided that although D's speed did not contribute to the collision, he should be punished for speeding.

### **Cases involving greater culpability due to the standard of driving**

The cases dealt with in the foregoing section ending in prosecution should, by their nature, have resulted in a prosecution for the offence charged whether or not a fatality had resulted. The fact that a death is caused does not increase the severity of the offence itself, although it may be seen as an aggravating feature in sentencing. If a decision-maker considers that the level of D's driving was perhaps worse than something which fell below the standard of the reasonable, prudent and competent driver he must consider whether it was bad enough to have fallen far below the standard of a competent and careful driver. If this is the case D will have to face a charge that not only identifies him as a bad driver but also as a killer. Thus, the decision has huge consequences and is not made any easier by the statutory definitions of the offences, which as some of those interviewed mentioned, leaves a "grey area" encompassing the lower end of dangerous driving and the upper end of careless driving.

#### ***CDDD vs. careless driving***

This "grey area" seems to be problematic in cases involving particular features, namely fatigue and excess speed. As mentioned above, if a driver drives at a speed which is highly inappropriate for the prevailing conditions this may support a charge of dangerous driving, and thus CDDD where a fatality results. However, the TRL, in their report on *Dangerous Driving and the Law*, found that there is a lack of consistency in the way in which speed is taken as an indication of dangerous driving.<sup>18</sup> This appears to be borne out to a certain extent by the cases

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<sup>18</sup> Pearce, L.M., Knowles, J., Davies, G.P., and Buttress, S., *Dangerous Driving and the Law*, Road Safety Research Report No.26, Transport Research Laboratory, 2002, para.4.4.2.

in the current sample. There were twenty-one cases in which excess speed for the conditions was a factor where there was a prosecution for careless driving, and eight where the charge was CDDD.

Five cases resulting in prosecutions for careless driving involved speeds well above the speed limit and are perhaps examples of cases at the more serious end of the scale of “carelessness”. In NORTH018 witnesses described D as travelling at a speed of up to 100mph on a dual-carriageway. The CI was unfortunately unable to calculate D’s speed, and D claimed he did not go above 80mph. The collision occurred when D came around a bend and was faced with a car which had emerged from a side-road and was attempting to cross the carriageway to turn right onto the opposite carriageway. The driver of this car hesitated when D came into view, not sure as to whether he should continue across to get out of D’s way, or stay where he was and let D pass in front of him. He chose to continue across, as D moved into the nearside lane to pass behind him. D managed to pass the car but subsequently lost control, veered across the central reservation and collided with V’s car, which was travelling in the opposite direction. Both D and the other driver were prosecuted for careless driving. The OIC was of the opinion that of the two, D was more to blame for the collision, as he believed that he had been “showing-off” and did not think that the other driver warranted prosecution.<sup>19</sup> However, he stated that CDDD was not considered as a possible charge against D as a conviction could not be secured on the basis of excessive speed alone.

LEIC029 and NORTH067 were cases in which D lost control of his car on a bend whilst driving in excess of the speed limit. In the latter case the CI calculated D’s speed to be 75mph in a 60mph limit in wet conditions. The critical speed for the bend was 54mph. Again, it was concluded (by the CPS) that there was insufficient evidence to prosecute D for CDDD.<sup>20</sup> Another two cases (LEIC014 and LEIC097) involved speeds of 44mph and 45mph in a 30mph limit. LEIC097 was probably the more serious of the two cases in that D was driving in the dark, without any illumination on his dashboard, meaning that he was unable to read the speedometer. He collided with an eight-year-old girl who was attempting to cross the road from his offside, and failed to brake until after the collision. The OIC suggested prosecuting D for careless driving and the CPS agreed that a case for

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<sup>19</sup> The Magistrates who heard the case obviously agreed, ruling that there was no case to answer. D, on the other hand, pleaded guilty to careless driving.

<sup>20</sup> D was found guilty of careless driving (it is unclear whether he pleaded guilty or not).

careless driving was made out.<sup>21</sup> It may be that CDDD was given some consideration when the case was reviewed, as there were notes on the file referring to the distinction between careless and dangerous driving, but it appears that it was not deemed serious enough to warrant such a charge. This is clearly an example of a case falling within the “grey area” and can be compared to a similar case (LINC108 below) in which a prosecution for CDDD was successful.

All those cases resulting in prosecutions for CDDD which were based on excessive speed involved speeds which were in excess of the speed limit (as well as being inappropriate for the prevailing conditions). However, most of the cases also involved some other factor which contributed to the collision. Fatigue or inattention combined with speed is obviously a risky combination. There were perhaps three cases in which the main contributory factor in proving CDDD was excess speed.

LINC006 involved what might be described as “boy-racers”. A group of young people were travelling in a convoy of cars. Witnesses estimated that D was driving at speeds of 70–85mph on a single carriageway road, before he attempted to overtake and lost control of his car, which left the road and came to rest in a field. V was D’s passenger and friend. This case was not one falling within the “grey area” between CDDD and careless driving, but was seen as a relatively clear example of CDDD.<sup>22</sup> Another case in which speed was the main cause of danger and yet there was little doubt about the correct charge was NORTH037. D, who was disqualified from driving and did not hold a licence to drive HGVs, took his employers’ tractor unit without the latter’s consent. He approached a roundabout on a section of dual carriageway at 50mph in bad weather and failed to negotiate the roundabout, resulting in his passenger being killed when he was ejected from the vehicle and collided with a lamp-post.<sup>23</sup>

There was one case (LINC108) involving speed, however, which did fall within the “grey area”. This can be seen by the fact that the Crown Prosecutor advised that careless driving should be charged in addition to CDDD to cover the eventuality that the judge would not allow the case to go to the jury. This was one in which there were no eye-witnesses who saw the collision between D’s car and

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<sup>21</sup> D pleaded guilty to careless driving.

<sup>22</sup> D pleaded guilty to CDDD.

<sup>23</sup> D pleaded guilty to CDDD and not guilty to aggravated TWOC.

a schoolgirl pedestrian. The CI calculated D's speed to be 43mph in a 30mph limit. V was struck as she crossed the road but had almost reached the opposite kerb. The Sergeant, in suggesting a charge of CDDD, referred to paragraph 7.7 of the Charging Standard, which gives excessive speed as an example of driving supporting an allegation of dangerous driving. What may have been an important factor in influencing the decision as to charge, however, was the fact that in interview D had expressly admitted that in his view his driving "fell far below what would be considered as a competent and careful driver".<sup>24</sup>

There was a certain technique used by some police officers in interviewing suspects of careless driving and CDDD. This was to ask D to describe his standard of driving for himself, and to ask D if he thought that his driving fell below the standard expected of careful and competent driver, and even whether it fell far below the standard. In a few cases in Lincolnshire it was obvious that officers were wording their questions with the guidelines provided by the Charging Standard in mind. If D had a solicitor present at the interview he may have been advised not to answer the question, although some solicitors allowed their clients to fall into the trap. Those without solicitors may not have realised the significance of their admission in agreeing that their driving was dangerous or that it did not meet the standard of a careful and competent driver. In actual fact, D's admission that, in his view, his driving fell far below the standard of a competent and careful driver should not necessarily lead to the conclusion that his driving did fall below that standard, since the test is an objective one. However, a jury might be influenced by hearing such an admission.

About a third of suspects subjected to this questioning technique made such an admission.<sup>25</sup> Others were adamant that they had done nothing wrong, and some were not confident about their answer. For example, in LINC041 D stated that he must be a competent driver, otherwise he would not have passed his test.<sup>26</sup> However, even where an admission of dangerous driving was made this did not always guarantee that CDDD would be charged. In NORTH 025 D approached an area of road-works on the M1 at 56mph in his HGV. He failed to react to the queue of traffic ahead of him and ploughed into the vehicles, causing two deaths.

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<sup>24</sup> However, D pleaded not guilty to CDDD at trial. He was convicted of CDDD by a majority of 10-2.

<sup>25</sup> 7 out of 24 defendants questioned in this way admitted driving dangerously.

<sup>26</sup> D pleaded not guilty to CDDD and was convicted.

In interview the police asked D whether he thought these actions, and the fact that D was not in a position to stop, were dangerous. D agreed that it was (it appears his solicitor did not advise him against answering this question), but nevertheless the Crown Prosecutor concluded that there was insufficient evidence to charge CDDD, presumably on the basis that although D thought his driving was dangerous it would not meet the objective test in court.<sup>27</sup>

This last case was one of several in which an HGV driver's inattention, possibly due to fatigue, led to him failing to stop when faced with stationary or slow moving vehicles ahead of him. There were eleven such cases in the sample, seven of which led to a prosecution for CDDD and four for careless driving. The difficulty with these types of cases is that it is clear that D was not paying sufficient attention to his driving, but it is almost impossible to establish the degree of his inattention. The Charging Standard lists "fatigue/nodding off" as conduct which would support a charge of careless driving.<sup>28</sup> More generally, however, the Charging Standard states that acts caused by more than momentary inattention will normally lead to a charge of careless driving,<sup>29</sup> whilst failure to pay proper attention, amounting to something significantly more than a momentary lapse, will support an allegation of dangerous driving<sup>30</sup> (and thus CDDD). The distinction, then, between the degrees of inattention comes with the insertion of the word "significantly" which is required for dangerous driving. This suggests that a competent and careful driver will occasionally suffer moments of inattention, but no more than that. The longer the duration of the inattention, the further below the standard of the competent and careful driver D will have fallen. With no witnesses to account for D's behaviour behind the wheel in the moments leading up to a collision, such a distinction is extremely difficult to judge or prove.

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<sup>27</sup> D was convicted of careless driving.

<sup>28</sup> Charging Standard, para.5.6. Note that HM CPS Inspectorate questioned whether this guidance in the Charging Standard should be amended, since in one of its cases where fatigue was a factor it found that CDDD should have been charged instead of careless driving, and felt that the Charging Standard had been misapplied: CPS Inspectorate Report, n.2 above, para.5.66.

<sup>29</sup> Charging Standard, para.5.7.

<sup>30</sup> Charging Standard, para.7.7.



NORTH023 was an important case for Northamptonshire CPS.<sup>31</sup> It was the case which acted as a catalyst in bringing about the change in the way in which advice is provided in cases of RDIs. As a result of this case the Chief Crown Prosecutor (CCP) subsequently took responsibility for all RDI advice files. A car had broken down on a dual-carriageway. The owner of the car left his wife and two daughters in the car parked in lane-one, and went to get assistance. D was driving his HGV along the dual-carriageway and failed to see the stationary car ahead of him until it was too late. He collided with the rear of the car, killing the two girls sitting in the rear of the car. The CI calculated that the car would have been visible to D for 21-26 seconds, given that D was travelling at 56mph, according to his tachograph chart. D did not brake until immediately prior to or upon impact. D had failed to take sufficient weekly breaks from his driving. In interview D could not account for his failing to see the car and said he did not remember feeling tired or fatigued. Initially, the prosecutor who provided advice on the case, a Senior Crown Prosecutor, advised that there was no evidence of fatigue, or that D was driving erratically or had fallen asleep, and so recommended that D be prosecuted for careless driving.

The CCP came to review the case as a result of Vs' family expressing concern about this decision. The review was in depth, with the CCP attending the location of the RDI to get a true understanding of the road layout. In his view, an estimate of 25 seconds' inattention during which the car was visible to D clearly amounted to something significantly more than momentary inattention, and he decided to charge CDDD.<sup>32</sup> For him, this was not a case falling within the "grey area" between careless driving and dangerous driving, which brings into question how other prosecutors could decide that it was the former. Indeed, it must be questioned whether the decision made in NORTH025, discussed above, would have been different had it been made by a different prosecutor.

A case which took place shortly after the CCP took over prosecution decisions in Northamptonshire bears almost identical facts to NORTH023. In NORTH051 V was a passenger in his father's car, which had stopped in lane-one of a dual carriageway behind his mother's car, which had broken down. Again, D failed to see the stationary cars and collided with them. Again, the CI calculated that the

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<sup>31</sup> See p.84 above.

<sup>32</sup> This was the case in which prosecution for CDDD was stayed for abuse of process. It was reverted to the Magistrates' Court, where D pleaded guilty to careless driving.

cars would have been visible to D for 25 seconds. In this case the CCP again conducted a thorough review of the case, referring to various paragraphs of the Charging Standards, and noting that case law on sentencing indicates that dangerous driving can be a “one off”, for example, briefly dozing at the wheel. He then applied this law to the facts and concluded that both of the tests in the *Code for Crown Prosecutors* were met for a prosecution of CDDD, despite the notorious problem of juries adopting a mentality of “there but for the grace of God go I”. This case is a good example of thorough decision-making, carried out in an objective fashion whilst considering all the relevant factors. In this case, the jury appeared not to be sympathetic to D, and convicted him of CDDD by a unanimous verdict.

Other cases involved HGV drivers failing to notice that the traffic ahead of them on a motorway had become stationary or very slow-moving due to queues at junctions. In one such case, LEIC049, the judge, in sentencing D for three counts of CDDD to which D had pleaded guilty, took into account the special nature of the driving responsibilities of HGV drivers as aggravating factors. Because of the size and weight of HGVs, they pose a greater risk to other road users than do cars. HGV drivers are subject to legislation limiting the number of hours they can drive without resting in order to try to reduce the risk of such drivers becoming victims of fatigue and failing to exercise the degree of attention necessary when driving such dangerous vehicles. They are also subjected to lower speed limits in order to limit the danger they pose to other road users. LEIC063 is an example of what can occur if both of these regulations are not complied with.

In LEIC063 D was an HGV driver who had breached the drivers’ hours regulations by writing his brother’s name on some of his tachograph charts in order to be able to drive more often than he should. He had been driving at 64mph on a motorway in sleet and rain when he collided with the rear of a queue of traffic. The prosecution was able to rely on a combination of excessive speed and fatigue to secure a conviction for CDDD. Again, this was a case which did not fall within the “grey area”.

Drivers are sometimes frustrated by the special speed limits for HGVs, as D admitted in LINC073. This was a case in which prosecution counsel was of the view that D’s driving did fall within the “grey area” between careless and dangerous driving. D had been driving his HGV at 12mph in excess of its 40mph speed limit and failed to notice that a car ahead was stationary in the middle of the road waiting to turn right. He ran into the back of the car, shunting it into the path

of a van travelling in the opposite direction. D admitted suffering a lapse of concentration, but when asked if he thought it was more than a momentary lapse his response was: “how long is a piece of string?”. The Crown Prosecutor advised that there was a *prima facie* case of CDDD<sup>33</sup> and huge public interest to prosecute, but recognised that the jury might return a verdict of not guilty. She advised that careless driving be charged in addition to CDDD. Counsel seems to have been of the opinion that the case fell within the “grey area” on the basis of D’s speed, although following conviction for CDDD by a jury the judge came to the conclusion that D must have fallen asleep.

As noted above, the driver of an HGV who falls asleep poses a particularly grave danger due to the size of his vehicle. However, car drivers who fall asleep or are fatigued also create risks. There were three cases (LINC059, NORTH062 and NORTH029) in which D was a car driver who had suffered from fatigue,<sup>34</sup> and all three resulted in prosecutions for careless driving. All three Ds had been on their return journey, having driven considerable distances earlier in the day. NORTH062 was perhaps the worst example of driving when tired. D had taken a car belonging to a third party (he believed he had the owners consent, although he did not) and drove from Corby, in Northamptonshire, to Paignton, in Devon, arriving shortly after 3am. After a short break he set off for the return journey, the collision occurring not far from his destination at 7am. He said he stopped a few times at service stations, but admitted that he dozed off at the time of the collision. D said that he had felt tired but because he was so close to home he did not want to stop again. The collision occurred when D’s car drifted onto the opposite side of the road; D awoke and lost control of the car in avoiding the oncoming traffic. D was arrested six days following the RDI on suspicion of CDDD, but the CPS advised that there was not a realistic prospect of conviction for CDDD.<sup>35</sup> This was based on a judgment that D was only asleep momentarily and that he had taken some breaks. The decision also appears to have been influenced by D’s explanation of his driving that he was used to driving long hours with little sleep

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<sup>33</sup> As discussed in Chapter 4 above, the *Code for Crown Prosecutors* requires not just a *prima facie* case but that there is a realistic prospect of conviction.

<sup>34</sup> In other cases where it was concluded that V was at fault there was a suspicion that V had fallen asleep at the wheel. Where a car driver causes a collision due to his fatigue he is less likely to survive than an HGV driver who does the same, which perhaps explains why there were fewer cases in which a car driver was prosecuted because of such driving.

<sup>35</sup> D was convicted of careless driving (it is unknown how he pleaded).

when working in the army. Quite how this affects his standard of driving as compared to that of a competent and careful driver is unclear. The test is an objective one and any specific reason for D's conduct should not be relevant.

What these cases seem to suggest is that HGV drivers who suffer from fatigue may be more likely to face charges of CDDD than car drivers. This cannot be explained solely on the basis that HGV drivers have particular responsibilities given the nature of their work. It seems that evidential problems are probably the root of the issue. From examining a tachograph chart the police can establish not only the speed at which D was driving, but also the pattern of his driving leading up to the RDI and can determine at what point, if any, D reacted to the presence of a hazard immediately prior to the collision. When dealing with car drivers, however, the police have no such evidence and must rely on D's account of his driving, any eye-witness evidence, and the presence of any tyre marks on the road surface.

However, even when tachograph evidence is available it appears that the police or CPS have difficulty in deciding the appropriate charge in cases involving inattention. The cases of CDDD discussed above occurring in Northamptonshire were based on D having had the hazard in his view for 25 seconds and failing to react. In LEIC034 D drove into the back of a minibus which was stationary at temporary traffic lights due to road-works. D had driven in the opposite direction earlier that day and so was aware of the presence of road-works. However, he could remember nothing of his journey since leaving the motorway, a minute prior to the collision. His tachograph chart showed that he had been exceeding his 40mph speed limit and that he had not braked at all before impact. The CI found that the road-works would have been visible to D for 15 seconds. Sleep specialists Horne and Reyner suggest that where an object is visible for 7-10 seconds, but D does not react to its presence, this implies prolonged inattention rather than momentary distraction.<sup>36</sup> Despite this, and a recommendation from the OIC that D be charged with CDDD, D was prosecuted for careless driving only, to which he pleaded guilty. Unfortunately, there was no explanation of this on the file, but there was correspondence between the CPS and V's family, who took the view that the case had not received the attention it ought to have done due to V's racial origin. The CPS responded to these criticisms by stating that the evidence did not

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<sup>36</sup> Horne, J., and Reyner, L., "Sleep Related Vehicle Accidents: A Review" (1999) 56(5) *Occupational and Environmental Medicine*, 289-294.

support a charge of CDDD and the decision as to charge was based entirely and exclusively on the degree of lapse and standard of D's driving.

The recent sentencing guidelines on CDDD suggested by the Sentencing Advisory Panel and adopted by the Court of Appeal in *Cooksley and others*<sup>37</sup> list "driving when knowingly deprived of adequate sleep or rest" as an aggravating feature in sentencing. It appears that the courts have changed their view of the seriousness of driving while fatigued in recent years. In *Boswell*<sup>38</sup> the Court of Appeal considered "dozing at the wheel" to be a mitigating factor, but by the time of the case of *Attorney General's Reference No.26 of 1999*<sup>39</sup> it had become recognised that such drivers are to blame for continuing to drive when the appropriate action would be to stop and take a rest. At one stage some fatigued drivers attempted to rely on automatism in defending allegations of CDDD. Some experts claimed that repetitive visual stimuli experienced by drivers on long straight roads, such as motorways, led to them falling into a state of "driving without awareness", which equated to automatism. This claim was tested by the Court of Appeal,<sup>40</sup> who concluded that such a state does not constitute automatism, since D retains some control over his driving. Horne, however, rejects the theory of "driving without awareness" altogether, and is often called by the Crown to give expert evidence in cases of driver fatigue. One such case was that resulting from the Selby rail crash in February 2001, which has brought the issue of sleep-related collisions to the attention of the public, with much media attention surrounding the trial and sentencing of Gary Hart. The Department of Transport launched a campaign in August 2002 encouraging drivers to take regular breaks and warning of the dangers of falling asleep at the wheel.

The prevalence of sleep-related collisions has been researched by Horne and Reyner, who reported that 16–23% of collisions were sleep-related, with the higher percentage relating to motorways.<sup>41</sup> The authors recommended at the time that public awareness needed to be drawn to the dangers of driving while sleepy. Rule 80 of the Highway Code now provides drivers with advice about tiredness

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<sup>37</sup> [2003] EWCA Crim 996.

<sup>38</sup> (1984) 79 Cr App R 277.

<sup>39</sup> [2000] 1 Cr App R (S) 394.

<sup>40</sup> *Attorney-General's Reference (No.2 of 1992)* (1993) 97 Cr App R 429.

<sup>41</sup> Horne, J.A., and Reyner, L.A., "Sleep Related Vehicle Accidents" (1995) 310 BMJ 565.

and driving, incorporating Horne and Reyner's conclusion that the only way to counter sleepiness is to stop and nap, or alternatively drink coffee or energy drinks.<sup>42</sup> A finding of Horne and Reyner, particularly relevant to the issue of proving CDDD on the basis of D falling asleep at the wheel, is that although drivers are normally aware of the precursory feeling of sleepiness at the time, they may not remember this, or the fact of falling asleep itself, after the collision.<sup>43</sup>

Cases involving sleep are thus difficult to identify and distinguish from cases involving mere inattention. One further case from the sample involving inattention warrants discussion. In LEIC114 D collided with V as she was crossing the road at a pelican crossing which displayed a red light to traffic. He was breathalysed and found to be just under the legal drink-drive limit. In interview D said that he did not remember seeing the traffic lights, nor did he remember negotiating the roundabout just prior to the collision scene. It was a route that he took on a daily basis and when asked if he was tired he said that yes, he was tired, as tired as he normally was after a day's work. He did not remember anything other than V hitting his windscreen. D accepted that he was at fault for the collision, but denied that he drove dangerously, stating that he drove in the same way as he always did. The Crown Prosecutor concluded that D's attention may only have been distracted for a few seconds and so there was insufficient evidence to charge CDDD.<sup>44</sup> He stated that he had come to the decision with some reluctance, but feared that a prosecution for CDDD would eventually falter at the Crown Court.

What is concerning about this case is that it occurred in a residential built-up area with a speed limit of 30mph. As noted by Horne and Reyner, urban roads provide relatively stimulating driving conditions, meaning that sleep-related collisions are rare.<sup>45</sup> It may be that D in LEIC114 suffered from inattention, rather than falling asleep, but to have failed to see either the red lights of the pelican crossing or the pedestrian in his path suggests that his driving fell far below the standard of the competent and careful driver. It is true that the Charging Standard gives disregard for traffic lights as an example of dangerous driving if such

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<sup>42</sup> Horne, J., and Reyner, L., "Sleep-related Vehicle Accidents: Some Guides for Road Safety Policies", (2001) Transportation Research Part F, 4, 63–74.

<sup>43</sup> Ibid, at p.68.

<sup>44</sup> D pleaded guilty to careless driving.

<sup>45</sup> Horne and Reyner, n.42 above, p.63.

disregard appears to be deliberate,<sup>46</sup> and there is no suggestion that that was the case here, but there is no requirement in the statute that an act be deliberate in order that dangerous driving is proved.

It is unclear whether the Charging Standard is the source of the misconstruction of the current legislation by some who believe that certain acts must be proved to be deliberate or intentional before a case of dangerous driving or CDDD is made out. It is clear from the TRL Report, however, that such a belief exists amongst those involved in the criminal justice system. In interviews with police, magistrates, justices' clerks and prosecutors the TRL recount that "it was frequently implied that a major difference between Dangerous Driving and Careless Driving rested on whether the behaviour had been deliberate, not in the sense that the driver set out to deliberately cause harm, but that the manoeuvre was carried out with the intention of driving in that particular way."<sup>47</sup>

The findings of the current study seem to suggest that this view is not widely held by the police and CPS in the East Midlands. However, it did appear to exist amongst a minority. One officer interviewed did make reference to such a distinction. In many cases in the sample it is difficult to see how the "deliberate act" distinction could operate. If a driver overtakes on the approach to a blind bend, is his act still "deliberate" even if he was of the view that he had sufficient time to regain his correct side of the road before reaching the bend? If D drives whilst feeling sleepy, rather than stopping for a rest, can this act not be described as "deliberate"? The Crown Prosecutor providing advice in LINC111 referred to the fact that D had not been driving badly deliberately, and so CDDD was not the appropriate charge. In this case D's HGV had been blown into the opposite side of the road and into an HGV driven by V in the opposite direction. D said he had difficulty controlling the lorry and had to compensate for the wind, which was recorded as reaching speeds of 56mph on the day in question. Earlier in his journey he had seen another lorry that had been blown over. This, one could argue, should have provided him with a warning that it was unsafe to continue in his unladen vehicle. Yet he deliberately, in the sense that he had control over his actions, continued his journey. This appears to have been a borderline case, in that

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<sup>46</sup> Charging Standard, para.7.7.

<sup>47</sup> TRL Report, n.18 above, p.36.

although the OIC had suggested a charge of careless driving, his Sergeant suggested that a charge of CDDD should be considered.<sup>48</sup>

In LEIC104 D was convicted of CDDD, having caused two deaths when he attempted to turn his HGV around on a single carriageway road in thick fog. The HGV was almost invisible, meaning that V collided with the trailer of the truck when it was across the carriageway. D maintained throughout interview that it was not a dangerous manoeuvre, on the basis that if the collision had not occurred he would have “got round quite comfortably”. He quite obviously embarked upon the manoeuvre deliberately, but it was not his intention, in the sense of either wanting the result or of foreseeing the result as a virtual certainty, to create a risk to other road users. The risk appears to have been created through his complete disregard for other road-users, but it was a risk he had not recognised.<sup>49</sup> This is an example of the reasons why the North Review was insistent on the creation of a new, completely objective, offence of bad driving.<sup>50</sup> That goal seems to have been unsuccessful if some now interpret dangerous driving as requiring a deliberate act on the part of D.

There was one further type of case in which the police and CPS failed to agree on the correct charge. Two cases in Northamptonshire involved refuse lorries knocking down pedestrians when reversing in the street. The first (NORTH036) occurred in October 1999, when D failed to see V crossing the road behind his truck and she became trapped under the rear wheels of the vehicle. Following a case conference held between the CPS and police, the CPS concluded that there was insufficient evidence to provide a realistic prospect of conviction for careless driving. As a result of this case the council amended its Working Practice for refuse collectors, providing more detailed advice in relation to reversing. Despite this action, a second RDI (NORTH078) occurred in September 2000, when an elderly pedestrian, who had been walking behind the refuse lorry in the same direction in which it was reversing, was again knocked down and trapped under the rear wheels. In this case the CPS decided that there was sufficient evidence of careless driving, but not of CDDD. The Crown Prosecutor retained this view,

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<sup>48</sup> D was charged with careless driving and pleaded guilty.

<sup>49</sup> D eventually pleaded guilty to two counts of CDDD.

<sup>50</sup> Department of Transport and Home Office, *Road Traffic Law Review Report*, London: HMSO, 1988, Chapter 5.



even after meeting with the CI who considered D's act to be dangerous and wished to challenge the decision.

Both cases involved a lack of observation on the part of D. The vehicles were equipped with devices to reduce the danger they posed to other road users, with a monitor in the cab displaying a picture from a CCTV camera attached to the rear of the vehicle and a warning alarm which sounded when the vehicle was in reverse. In NORTH036, however, the alarm was defective and D had failed to check that it was working. Perhaps more importantly, in both cases D ignored the advice provided in the council's Working Practice that another crew member should stand at the rear of the vehicle to assist D when reversing. In both cases, even without a crew member to guide him, the CI concluded that D would have had a view of V in his mirrors and CCTV monitor. In NORTH078 D was unaware that the former RDI had occurred. The facts of the two cases were extremely similar, and yet a prosecution was brought in the latter but not the former. The one aggravating feature of the second case was, perhaps, that D was reversing for some considerable distance along the road. However, in both cases the ultimate decision made by the CPS as to charge represents a step down from the CI's view of D's guilt in terms of the hierarchy of motoring offences.

### *Manslaughter vs. CDDD*

Arguably, any of the cases in which CDDD was charged could equally have led to prosecutions for manslaughter. This is based on the argument that there is very little to distinguish between the tests for gross negligence manslaughter and CDDD. Apart from manslaughter applying to driving on private property as well as public roads, the main difference between the offences is that manslaughter requires a risk of death, rather than a risk of injury or damage to property. This suggests that the test for manslaughter is slightly higher, leaving a choice for prosecutors between manslaughter and CDDD in the most serious cases. However, the Charging Standard advises that manslaughter will rarely be appropriate,<sup>51</sup> and should be considered in cases where the vehicle was used as a weapon of attack<sup>52</sup> or where the driving occurred other than on a road or other public place.<sup>53</sup>

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<sup>51</sup> Charging Standard, paragraph 11.5.

<sup>52</sup> Charging Standard, paragraph 11.6.

<sup>53</sup> Charging Standard, paragraph 11.7.

All of the cases in this sample occurred either on a road or public place. In fact, all but two cases occurred on a road. LEIC119 took place on wasteland where travellers were residing and LEIC120 involved D riding a motorcycle through a public park. In the former case the CI concluded there was no evidence of careless driving, whilst in the latter after case CDDD was charged. Despite occurring in a public place, however, LEIC120 appears to be a prime candidate for a manslaughter charge. D was riding a stolen motorcycle through a park in darkness with no lights. D initially denied being the driver, claiming that V was driving whilst he was riding as pillion passenger, later admitting that the positions were reversed. D had no licence, no insurance, neither he nor V were wearing helmets and D said that he may have been under the influence of cannabis and had also had some beer. D collided with a bollard positioned in the middle of the path, causing both V and D to fall from the machine. D admitted that what he did was dangerous and pleaded guilty to CDDD. The degree of blameworthiness displayed by D in this case does, however, suggest that a jury would not have been unwilling to convict him manslaughter. The attitude of “there but for the grace of God go I” clearly would not feature in such a case.

There were no cases in the sample which were interpreted as involving a vehicle being used as a weapon of assault. LEIC080 was a case in which there may have been a strong element of intimidatory and aggressive driving, but no evidence that D had gone as far as using his car as a weapon of attack. The case involved two cars which came into conflict initially when, according to the occupants of the second car, D had pulled in front of the second car at traffic lights. Some verbal abuse seems to have been exchanged between the occupants of the cars, and gestures were made. At a second set of traffic lights this continued, and it appears that D decided to chase after the other car. He was seen to overtake other vehicles on the inside, and one of his passengers claimed he was travelling at 70mph (the speed limit for the road was 50mph). As D caught up with the other car he caught a glancing blow against the concrete central reservation, lost control, and collided with the fence on the nearside of the road. V was a passenger in D’s car. D had taken his father’s car without consent, and at court the prosecution accepted a guilty plea to aggravated TWOC.<sup>54</sup>

Other cases, however, involved such a high degree of risk-taking that manslaughter may not have been an inappropriate charge. One of those was

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<sup>54</sup> See below for further discussion, p.130.

LEIC032, a case involving fatigue on the part of an HGV driver, who ploughed into the rear of a queue of traffic, killing two other drivers. What sets this case apart from similar cases is that D had been told by both his GP and a specialist doctor not to drive. He had recently been diagnosed with obstructive sleep-apnoea, a condition which causes sufferers involuntarily and unconsciously to wake themselves up at regular intervals during the night when they stop breathing, leading to them feeling extremely tired during the day. D had been offered treatment for the condition, but had declined, it seems, because he wanted to continue work until his HGV driver's licence expired the following month. He had even experienced a near miss in the previous month when he had fallen asleep and left the road, coming to rest in a field. Thus, in this case, D took a conscious risk to continue driving, despite the warnings he had received, putting his own life and those of others at risk. D denied that he had thought, "I'm ill, I'm going to work regardless," and said that he viewed what had happened as an accident. However, he was charged with CDDD, based on the fact that his doctors had told him not to drive, and he pleaded guilty. It appears that manslaughter was never considered as an appropriate charge, in this case or any others in the sample.

It is not only drivers who might create a risk of death on the road, however. Drivers' employers and other corporations have responsibilities which could lead to prosecutions for corporate manslaughter, as discussed in Chapter 2. In three cases companies were charged with criminal offences. LEIC025 resulted in D's employers being prosecuted for using a vehicle with no seatbelts fitted and where a seatbelt fastening was not maintained.<sup>55</sup> In NORTH050 V's employer was convicted of using a vehicle in a dangerous condition.<sup>56</sup> Although in each case the employer's liability was established for allowing a vehicle to be driven in a dangerous condition, that liability did not extend as far as liability for death.

NORTH058 was slightly different in that it was not D's employers who were at fault. There were in fact two companies and one individual prosecuted in this case. In this case the driver at fault had died, but a contributory factor to his death was that the road-signs marking the presence of road-works at the scene of the collision were not sufficiently illuminated. The three defendants, who were contractors responsible for undertaking the road-works, were prosecuted for offences under the New Road and Street Works Act 1991. Only one company was

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<sup>55</sup> Under s.42 Road Traffic Act 1988.

<sup>56</sup> Under s.41 Road Traffic Act 1988.

convicted, however. Again, consideration could have been given to whether manslaughter by gross negligence had been committed in this case.

One case in which it appears that serious consideration was given to a charge of manslaughter was NORTH001. In this case V was an HGV driver who regularly drove in contravention of drivers' hours legislation. He fell asleep at the wheel, colliding with the rear of a crane travelling slowly in lane-one of the M1. V's employer was arrested (for attempting to pervert the course of justice) and interviewed. He claimed that he had not put pressure on V to exceed his hours, and had in fact reprimanded him on each occasion that he discovered V had done so. Police searched V's employer's house and found tachograph charts that had been missing from his place of work showing infringements of drivers' hours regulations. V's wife claimed that his employer had contacted her to ask her to lie about the length of time V had been driving his truck and to meet in order to get their stories straight. V's employer denied this. V's wife also said that V felt under pressure to work long hours as he was concerned that if he did not he would be replaced, and if he missed a delivery he would not get paid. A meeting took place between the Sergeant and a Crown Prosecutor, but no prosecutions were brought. A similar case occurred in Northamptonshire in 2002. At the time of writing the directors of a haulage company had been charged with several offences, including three counts of manslaughter. This suggests that it is the individuals who run the company, rather than the company itself, who will stand trial.

There is one final possibility of a manslaughter charge. *Wilkinson's Road Traffic Offences* suggests that manslaughter might possibly be committed by a hit-and-run driver.<sup>57</sup> It is unclear what species of manslaughter this suggestion covers. It is true that s.170 RTA 1988 imposes a duty on all motorists to stop after an accident and Wilkinson's submits that one of the purposes behind this provision is the saving of life. It goes on to say "[i]f therefore a motorist, knowing serious injury and the risk of death if not medically attended, fails to stop or fails to report the accident and as a result of that failure the person whom he has hit with his motor vehicle dies, it could be argued that his deliberate or reckless failure to comply with the positive duty placed upon him by s.170 might be sufficient to

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<sup>57</sup>Wallis, P., and Halnan, H.H.J., *Wilkinson's Road Traffic Offences*, London: Sweet & Maxwell, 19<sup>th</sup> ed., 1999, para.5.65 and *Wilkinson's* 21<sup>st</sup> ed. (current edition), n.14 above, para.5.40.

warrant a charge of manslaughter even if there is no evidence of the manner of the defendant's driving."<sup>58</sup> The wording of this suggestion implies that the species of manslaughter committed is subjective reckless manslaughter, requiring proof that D foresaw the risk of serious harm or death being caused through lack of medical help but decided to take that risk by not stopping.

There were seven "non-stop" cases in the current sample. In four of the cases this type of manslaughter could not have been proved, since the accident occurred at a location where there were other people present, meaning that D could assume that medical help would be summoned. In LEIC117 such a charge might have been possible, if a suspect had been apprehended. In another two cases, LEIC116 and NORTH032, where suspects were apprehended and charged with careless driving, failing to stop and failing to report, and aggravated TWOC, failing to stop, failing to report and other "dishonest" offences respectively, manslaughter might have been a possible charge if what is suggested in Wilkinson's is correct. NORTH032, discussed below, involved D leaving his pillion passenger, V, at the scene of the collision in the early hours of the morning, rather than summoning an ambulance. He admitted that he knew he should have called for an ambulance but stated that he was afraid that the police would catch him and in any case he heard sirens shortly afterwards, presuming that V was getting help.

In LEIC116, V was found at the side of a dual carriageway near to his parked car, where he had stopped to change a wheel. D, an HGV driver, failed to stop after hitting V and his car. D said that he had not seen V, but had assumed that the car would have been occupied. He pulled into a lay-by further down the road but was too frightened to go back to the scene and failed to report the incident to the police. The difficulty with this suggested form of manslaughter is causation. In many cases it may be difficult to prove that D's failure to call for help caused the death of V, and in some cases such causation could be ruled out if it was found that V died instantaneously on impact (as was the case in LEIC116). It would be illogical to hold one driver who did not stop after a collision resulting in life-threatening injuries responsible for manslaughter where death resulted, but not do the same in a case where D stopping could not have helped V, who was already dead.

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<sup>58</sup> Ibid.

This same problem of causation would apply if the suggestion in Wilkinson's was based on constructive manslaughter. Failing to stop is an unlawful act, and may be dangerous in the sense that an omission to summon medical help could result in further harm to V. However, in the case of *Lowe*<sup>59</sup> the Court of Appeal held that an omission in the form of child neglect under s.1(1) of the Children and Young Persons Act 1933 did not constitute an unlawful and dangerous act for the purposes of manslaughter. Smith argues that if an omission is truly wilful, rather than merely negligent, in the form of a deliberate omission to summon medical aid, it should not be distinguished from a positive act for the purposes of manslaughter.<sup>60</sup> There is no case law on the subject of such an omission by motorists, and so the position has yet to be tested. However, it seems unlikely that such a case would succeed. A third alternative is that the suggestion in Wilkinson's is based on gross negligence manslaughter. D clearly owes V a duty of care, and in failing to summon help he fails to discharge that duty, but again the issue of causation might be problematic.

## Cases involving drugs or alcohol

Ten of the cases resulting in prosecutions involved alcohol and one (NORTH069) involved the drug ecstasy, or MDMA. Although a specific offence of CDCDUI exists to cover instances in which a driver kills when drink-driving carelessly, this offence was charged in only seven of these eleven cases, and in one of these cases (NORTH082) it was charged alongside CDDD. CDDD was charged on its own in a further two cases (LINC024 and NORTH041), and in another two cases only careless driving was charged. (LEIC051 and LEIC114).

The reason why D was only charged with careless driving and not CDCDUI in LEIC051 appears to have been that although D was believed to have been drunk and under the influence of drugs when he lost control of his car, colliding with a house and killing his passenger, he was seriously injured in the collision and the police were unable to test him for drink or drugs. However, there was no discussion of CDCDUI on the file and a prosecution very nearly did not take place due to D's mental state and the fact that he was not able to be interviewed for several months following the RDI. The recent change to the law introduced by s.56 Police Reform Act 2002, which inserts a new s.7A into the RTA 1988 and

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<sup>59</sup> [1973] QB 702.

<sup>60</sup> Smith, J.C., *Smith and Hogan Criminal Law*, 10<sup>th</sup> ed., London: Butterworths, 2002, p.383.

allows the police to obtain a specimen of blood from a suspect who is incapable of consenting, may mean that future cases are treated differently to LEIC051. However, one of the officers interviewed pointed to a lacuna in the new legislation. The blood specimen may be taken without D's consent but it should be kept and only tested if D later gives his consent. Although failure to give consent is an offence under s.7A(6) of the Act, there is no additional provision similar to s.3A(1)(c) which would allow a prosecution for CDCDUI to be based on a refusal to give consent to perform a laboratory test.

LEIC114 was a case mentioned above in which D was breathalysed at the police station following the RDI, where his breath alcohol measured 31microgrammes/100ml (the legal limit is 35microgrammes). D declined to provide a specimen of blood, from which it might have been possible to back-calculate is BAC at the time of the collision.

The Charging Standard advises that in cases involving drink or drugs, CDDD should be charged if it can be proved.<sup>61</sup> It also states that where a case is borderline between dangerous and careless driving, CDCDUI should be charged, provided that all the elements of the offence can be proved.<sup>62</sup> This is because the prospects of conviction are supposedly greater but the court's sentencing power is equal. The two cases in which CDDD was charged, rather than CDCDUI, were cases which would probably have resulted in such a charge in the absence of any alcohol. Both were cases of dangerous overtaking, and although in NORTH041 D's defence was that the back-calculation of his breath alcohol level was inaccurate, the fact that his driving was so objectively dangerous is probably what ultimately led him to plead guilty to CDDD. In LINC024 D had a BAC of 118mg/100ml (where the legal limit is 80mg) which was back-calculated, and he also pleaded guilty to CDDD.

NORTH082 was a particularly serious case, in which CDDD, CDCDUI and aggravated TWOC were all charged. An additional charge which the case might have warranted is that of manslaughter, given the high level of blameworthiness on the part of D. CDCDUI was included in the indictment because although the CPS felt that the case for CDDD was strong, they wanted to provide an alternative

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<sup>61</sup> Charging Standard, para.10.3.

<sup>62</sup> Ibid.

verdict in case the jury failed to convict of CDDD.<sup>63</sup> The Charging Standard advises that where cases are borderline, a choice should be made between CDDD and CDCDUI as otherwise the prosecution is likely to be put to election.<sup>64</sup> This case was arguably far from borderline, with a total of eight aggravating features identified by the CPS. However, the Crown Prosecutor was concerned that although he felt strongly that the case ought to go to trial on the charge of CDDD, because of the identical maximum sentences for CDDD and CDCDUI the Crown might face difficulties in seeking permission from the judge to continue on such a charge if D offered a guilty plea to CDCDUI. Counsel confirmed that a plea to CDCDUI was not acceptable as the case clearly did not fall within the “grey area”. In this case the views of V’s family were also sought, with V’s father being adamant that CDDD should be charged (V’s father was a solicitor and so had knowledge of the legal requirements).

In this case D’s parents were away on holiday and had hidden the keys to the car in their bedroom, which they had locked. They did this because D had in the past taken the car without their consent and they wanted to prevent him from doing it again, particularly because he only held a provisional driver’s licence. However, D managed to gain entrance to the room through the loft-space and, after spending much of the afternoon drinking, took the car for a drive with some friends. Two of D’s passengers died, but the surviving passenger, who appears to have been a reluctant passenger, provided evidence of D’s driving. This witness had asked D to slow down, but D ignored his pleas, reaching speeds of up to 100mph on a single carriageway road. D lost control of the car on a bend and collided with a tree. D’s BAC was 82mg/100ml, and although the CI was unable to calculate D’s speed with any accuracy, he was of the opinion that it was well in excess of 80mph. D eventually pleaded guilty to both two counts of CDDD and two counts of CDCDUI. He pleaded not guilty to aggravated TWOC, which was to remain on file.

Other cases in which CDCDUI was charged involved much less serious examples of bad driving. In some of these cases, for example NORTH049, a case

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<sup>63</sup> This implies that, no matter how strong evidence of CDDD is, there will always be some concern on the part of the CPS that the jury will fail to convict. It suggests that they fear that the mentality of “there but for the grace of God go I”, which in the past led to juries being reluctant to convict drivers of manslaughter, has transferred to the offence of CDDD.

<sup>64</sup> Charging Standard, para.10.3.



of CDCDUI was made out on the basis that without any further explanation for D's vehicle having crossed the centre-line or left the road he must have been driving without due care and attention, and his BAC was clearly above the legal limit. However, prosecutors did sometimes face difficulties in proving such charges. LEIC089<sup>65</sup> highlights the need for prosecutors to be sure that they select the correct charge. The initial advice from the CPS was to issue summons for excess alcohol only. The CI asked the CPS to reconsider this advice, and the CPS recommended a prosecution for CDCDUI. However, when the case came to trial the prosecution realised that they were not able to prove that D was over the limit at the time of the collision, as the forensic-scientist was only able to provide a back-calculation which estimated D's blood alcohol level at between 76mg/100ml –133mg/100ml. If the correct measurement was at the bottom end of this scale, D was not guilty. This case resulted in a judge-ordered acquittal, with the CPS apologising to V's family for their mistake. The correct charge would have been careless driving.

Where drugs are involved it may not be such a clear-cut case as where alcohol is involved. Where alcohol is involved it is fairly straightforward to establish D's liability, if it is possible to take a blood sample soon after the collision. The prosecution may use such evidence to show that the amount of drink taken was such as would adversely affect a driver, or, alternatively, that the driver was in fact adversely affected.<sup>66</sup> It is well known that different levels of alcohol in the blood have different effects on driving ability. However, in NORTH069 the drug which it was alleged D had taken was MDMA<sup>67</sup> (ecstasy). D and some friends had spent the previous day and much of the night at a festival where drug-taking was commonplace. D denied having taken any drugs, but analysis of his blood detected the presence of MDMA. D's passenger died when his car drifted off the road when driving on a dual carriageway. The CPS charged CDCDUI and D was convicted, and his conviction was upheld on appeal. The issue in this case was whether the prosecution had proved that the RDI resulted from D's drug intake, with the defence arguing that it was possible that D had fallen asleep naturally and that there was no evidence of a link between his impairment and the drugs. This argument failed, with prosecution experts arguing that drowsiness is one of the

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<sup>65</sup> Discussed in Chapter 4, at p.77.

<sup>66</sup> *Millington* [1996] RTR 80.

<sup>67</sup> Methylenedioxymethylamphetamine.

symptoms experienced by those who take MDMA as the drug wears off. Given that less is known about the effects of MDMA on driving, however, the task of the prosecution in this case was more difficult than it would have been had D consumed alcohol.

Finally, there was one case (NORTH013) involving alcohol in which D refused to provide a specimen of breath. The police and CPS were able to use this refusal as a basis for proving CDCDUI under s.3A(1)(c) RTA 1988. In this case the officers attending the scene formed the impression that D had been drinking and the police surgeon later agreed that he smelt alcohol on D's breath. D refused to carry out a breath test but eventually admitted to drinking four bottles of lager in the pub that afternoon. Without the provision of s.3A(1)(c), however, it would have been very difficult to prove CDCDUI.

## **Cases involving TWOC**

There were seven cases in which the car D was driving had been taken without the owner's consent. In such cases the prosecution's choice as to charge depends not only on D's standard of driving, since a third option of charging the offence of causing death by aggravated vehicle taking is available. In two cases (NORTH082 and NORTH049) the case was further complicated by D's consumption of alcohol, and CDCDUI was charged in addition to offences reflecting that TWOC had been committed. NORTH082 is discussed above, in which CDDD, CDCDUI and aggravated TWOC were all charged. It is not clear, however, why in NORTH049, in addition to CDCDUI, simple TWOC was charged rather than aggravated TWOC. In this case the letter of advice from the CPS recommended charging CDCDUI rather than aggravated TWOC because the former offence could be made out and was more serious, leading to a higher penalty. Some time later, however, it was deemed appropriate to charge TWOC in addition to this. It is not clear why this charge did not take the aggravated form, as it did in NORTH082.<sup>68</sup>

LEIC092 and NORTH062 resulted in charges of careless driving only. In LEIC092 D took his brother's car without his consent, but the brother did not wish the issue of the TWOC to be taken any further. In NORTH062, although the car was in fact taken without the owner's consent, D believed that the owner had

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<sup>68</sup> NORTH082 took place after the CCP had taken over the prosecution of such cases, whereas NORTH049 occurred before the new system was put in place.

given his consent to drive the car and so D was afforded a defence under s.12(6) Theft Act 1968. The issue in this case was not that of whether aggravated TWOC was the appropriate charge, but whether CDDD might have been proved due to D having driven whilst fatigued.<sup>69</sup>

In two cases, NORTH037 and LEIC080, CDDD was charged alongside aggravated TWOC. In LEIC080<sup>70</sup> the owner of the car was D's father, but unlike D's brother in LEIC092, he was not against D being prosecuted for vehicle-taking. This was the one case in which a plea to a lesser offence was accepted by the prosecution. Although the Crown Prosecutor was of the opinion that a charge of CDDD was made out, counsel appears to have been less confident, and a plea to aggravated TWOC was accepted. It is unclear the extent to which the CPS was involved in the decision to accept the plea, but earlier correspondence between the CPS and counsel showed counsel's reluctance to continue with the more serious charge. In NORTH037<sup>71</sup> a trial on the two charges did not go ahead because D pleaded guilty to CDDD.

NORTH032 was the only case in which aggravated TWOC was charged in the absence of any other driving offences (although other "dishonest" offences were charged). Two motorcycles were stolen from business premises and later that night one was found, along with V, in a residential street. Eventually D was arrested and admitted driving the motorcycle at the scene (although he claimed he had bought it earlier that evening), and said that V had been his pillion passenger. He said that V was drunk and had been swinging her hips in such a way to cause him to lose control of the machine. The CI was of the opinion that the motorbike had been ridden along the footpath prior to the collision, and suspected that the other motorbike had also been present at the scene and may have contributed to the collision, although there was no evidence to prove this. The Crown Prosecutor advised that there was insufficient evidence to prove either careless or dangerous driving. A note on the file referred to the existence of an overlap between the offences of handling stolen goods and aggravated TWOC, but stated that in this case the latter offence was "better". The case was complicated by the fact that many of the witnesses to D and V's behaviour that night were seen to be unreliable, and there were no independent witnesses to the collision.

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<sup>69</sup> See above, p.114.

<sup>70</sup> See above, p.121.

<sup>71</sup> See above, p.109.

## **Cases where the danger came from something other than the standard of driving**

In most cases a collision will have been caused by the manner in which D drove, or by the acts of V. However, in some cases it is not the act of driving itself which is the cause of death but some other outside influence such as the condition of the vehicle or some obstruction in the carriageway. In the former instance dangerous driving, and thus CDDD, can be charged under s.2A(2) RTA 1988, if it would be obvious to a competent and careful driver that driving the vehicle in that state would be dangerous.

### ***CDDD based on the condition of the vehicle***

This was charged in just two cases (LINC085 and LINC094). In LINC085 D was attempting to carry out a U-turn when V, who was approaching him from behind on his motorcycle, tried to overtake D and collided with his car. It was found that D's rear offside indicator did not work, and the repeater indicator on the side of the car was fitted with a blue lens which would have rendered it almost invisible. Thus, although D claimed that he had indicated before he commenced the turn, such indication was ineffective and D had failed to see V. D pleaded guilty to CDDD.

In LINC094 the prosecution for CDDD was unsuccessful. D had been driving a tractor with a particularly wide drill attached to the rear of the vehicle. He had been accompanied by his employer earlier on his journey in order to warn other road users of the vehicle's presence, but when they reached the field which was their destination the gate was locked and D's employer left him in order to enter the field via a different gate and let him in. D continued on to the next gate, which was on the other side of a bend. On the bend D had pulled the tractor over so that it was partly on the road and partly on the verge, although the verge was wide enough to accommodate the whole width of the vehicle. V drove around the bend from the opposite direction, braked and skidded into the tractor. The view around the bend was severely restricted, meaning that the tractor was not visible until V was very close to it.

The charge of CDDD was made on the basis that the drill attached to the tractor was so wide that it was dangerous to drive the tractor in that condition, without the safety measures of being accompanied by another vehicle and the displaying of markers, as required by the Motor Vehicles (Authorisation of Special Types) Order 1976. This was aggravated by the fact that D did not pull off

the road as he could have done on the bend. At trial D was acquitted of CDDD but convicted of careless driving. The CPS advised that D's employer was not guilty of aiding and abetting, counselling or procuring CDDD, as his contribution to the collision was one of omission rather than commission. The decision may be justified on the basis that there was no specific agreement that D would continue to the next gate without being accompanied by his employer, although this seems to have been assumed.<sup>72</sup> Another case in which CDDD could have been alleged was LINC099, where the Construction and Use Regulations had been breached. However, this was a case in which it was felt that it was not in the public interest to prosecute the driver of the tractor, who turned across the path of a motorcyclist, because both V and D came from a small close-knit community.

Other cases involved vehicles which were in a dangerous condition and yet CDDD was not charged. In LEIC067 a set of steps fell from a mechanical digger onto the road. As the driver of the digger (D) was reversing back along the verge to retrieve them, V collided with the steps and lost control of his car, colliding with a vehicle travelling in the opposite direction. It was found that the bolts which fixed the steps to the vehicle had not been fitted correctly and one had been missing for some time, and the Vehicle Inspectorate concluded that there were problems with the vehicle's maintenance arrangements. D was arrested at the scene for CDDD based on the condition of the vehicle, but there was no further mention of this offence in subsequent documentation. D faced a prosecution for using a motor vehicle likely to cause injury,<sup>73</sup> but the case was discontinued. D's employer was convicted of the same offence. It may have been felt that CDDD was not made out because D could not have been expected to have been aware of the defect. The case of *Loukes*<sup>74</sup> suggests that where a principal offender has not committed dangerous driving due to a lack of *mens rea*, a secondary party in the form of D's employer, who was responsible for the maintenance of vehicles and may have had more knowledge about the condition of the vehicle, cannot be said to have procured dangerous driving.

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<sup>72</sup> Even if D's employer had instructed him to drive on to the next gate he could not be convicted of procuring CDDD if D was found not guilty of that offence: *Loukes* [1996] Cr App R 444.

<sup>73</sup> Under s.40A RTA 1988.

<sup>74</sup> [1996] RTR 164.

In another two cases offences of “using” were charged. These are mentioned in the discussion of corporate manslaughter above.<sup>75</sup> In neither case was the condition of the vehicle deemed such that it could form the basis of an allegation of CDDD. In NORTH050 CDDD would not have been a possible charge, unless it was alleged that V’s employer had aided and abetted the offence. In this case V lost control of his car because the trailer which he was towing, loaded with another car, was too heavy to be towed by a car. The vehicle became unstable because the recommended towing weight was exceeded by 59%. V was transporting the car for his employer, who had provided him with the trailer and should have been aware that it was not suitable for that purpose. No training had been given to V about loading or towing a trailer. In LEIC025 it was the lack of functioning seatbelts which put V at risk, and this was not enough to make the condition of the vehicle itself dangerous. Another case in which the condition of a vehicle caused V’s death was NORTH009. In this case the back wheel of a scooter came off and the pillion passenger died. The CPS considered CDDD as a possible charge but concluded that it was not apparent to anyone that a vital component was missing from the wheel until it was dismantled. This case illustrates that cases in which a prosecution is to be based on the dangerous condition of a vehicle differ from cases based on the standard of driving. The question for the prosecution is not a choice between CDDD and careless driving, but between CDDD and NFA, unless one of the specific “using” offences is to be charged.

This chapter has analysed the decision-making of police and prosecutors in deciding whether to charge drivers involved in RDIs with a criminal offence. The following chapter addresses the question of how successful such decisions are seen to be, through an examination of the outcomes of cases in which a decision to proceed with a criminal charge was taken. The focus is shifted away from professionals within the criminal justice system and towards the decision-making of D’s peers in the form of a bench of magistrates or a jury.

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<sup>75</sup> At p.121.

## Chapter 6 – Empirical Findings: Outcomes and Discussion

In order to examine how the law operates in practice, it is necessary to have some knowledge of the outcome of cases in order that the way in which the courts interpret the law can be seen. Those making the decisions as to what offences should be charged in any particular case must interpret the law themselves, and apply the law to the facts that are known, as was discussed in the last chapter. However, as mentioned in Chapter 4, the test for the Crown Prosecutor in deciding whether to charge a particular offence, and the test applied by the magistrates or jury in determining guilt, are not the same. The former requires that there is a realistic prospect of conviction, whilst the latter requires the decision-maker to be satisfied beyond reasonable doubt that D committed the offence charged. That being the case, one would not expect to find a 100% success rate for prosecutions.

This chapter begins by providing information on the success rates of the cases in the sample, in terms of convictions secured by way of both trial and guilty pleas, before looking at why convictions were not secured in other cases. The results of such cases are not only important in discovering how the law is interpreted by the courts; they may also be significant in the way they influence future decision-making by the police and Crown Prosecutors. If a prosecutor is faced with a case which displays similar facts to another case dealt with in the area in recent times, the prosecutor will no doubt take into consideration the decision of the court in the earlier case in determining whether there is a realistic prospect of conviction in any subsequent cases.

The sentences given in the cases which ended in conviction will then be discussed. A conviction in itself labels D as a criminal, warranting public denunciation, but the sentence he receives will reflect the degree of denunciation the court feels ought to be attached to his crime. This may be useful in reflecting the nature of the case in terms of blameworthiness. One would expect those cases resulting in a light sentence to fall at the lower end of the scale in terms of blameworthiness. In a few cases the sentence imposed was appealed, and such appeals, as well as any appeals against conviction, will then be examined. Finally, the chapter concludes with a discussion of the empirical findings, summarising them and bringing together the main points discovered.

## Prosecution Success Rates

If the decision-makers who determine charge agree with the decision-makers who determine guilt as to what the law is, how it should be interpreted, and what conduct falls within the definition of what offence, one would expect to see a high success rate in terms of convictions. However, this view might be too simplistic. Crown Prosecutors cannot be criticised for proceeding with some prosecutions which finally result in acquittal, since the legal system is an adversarial one which requires arguments to be tested in court. Without such tests, the law would remain stagnant. Furthermore, not all cases fit neatly within one interpretation of the facts or can be likened to cases which have gone before. It would be wrong for the CPS to decide not to prosecute in all cases in which they were unsure about how the court would interpret the case. If the *Code for Crown Prosecutors* is followed, some cases meeting the evidential and public interest requirements will nevertheless result in acquittal.

### *Cases resulting in conviction*

In most of the cases that went to the Crown Court for trial the outcome of the case was recorded, along with the plea entered by D. However, for cases of careless driving the outcome was not always so apparent. The result was usually recorded, but D's plea was not always known. There were a very small number of cases in which there was nothing recorded on the files after a summons was issued, and in such cases it is assumed that the case was either discontinued, or that it ended in acquittal, but it is unknown which. Unfortunately, this lack of information makes analysis of cases of careless driving somewhat problematic, and less can be concluded from such information compared to CDDD cases.

Table 1 provides information concerning the outcome of cases where CDDD was charged. As can be seen, 24 of the 29 cases (83%) resulted in conviction for CDDD, whilst five did not (see below). Eleven cases went to trial by jury, with just over half of these (55%) resulting in conviction.<sup>1</sup> Of these six jury verdicts, two were unanimous, two were majority verdicts of 10–2 and in two cases it was unknown if the verdict was unanimous or not. One majority verdict (LINC108) and one case where the number of jurors in favour of conviction was unknown (LINC073) were cases discussed in the previous chapter as falling within the “grey area” between careless and dangerous driving.

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<sup>1</sup> Cases: LINC041, LINC073, LINC108, LEIC005, LEIC063, NORTH051.



**Table 1 – Prosecutions for CDDD.**

County	No. of prosecutions	No. of convictions following trial	No. of guilty pleas to CDDD	No. of acquittals <sup>2</sup>
Lincs	12	3	8	1
Leics	11	2	6	3
Northants	6	1	4	1
<b>Total</b>	29	6	18	5

National statistics are available which provide the number of proceedings for trial, acquittals and findings of guilt for CDDD and other motoring offences. The statistics for 1999 and 2000 show that of the 623 proceedings for trial, 400 (64%) resulted in conviction.<sup>3</sup> Unfortunately, the statistics do not provide details of plea,<sup>4</sup> but it can be seen that the counties in the present study had a much higher success rate for cases of CDDD than the national average (83% against 64%).<sup>5</sup>

Table 2 gives the results of prosecutions for careless driving. Unfortunately in many cases D's plea was unknown, although from D's attitude in interview in a large number of these cases it is suspected that D pleaded guilty where convicted.<sup>6</sup>

Thus, a total of 65 Ds were convicted of careless driving. Only 11 cases resulted in either dismissal or a ruling of no case to answer.<sup>7</sup> If the two Ds that

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<sup>2</sup> This includes full acquittals, acquittals for CDDD resulting in conviction for a different offence and cases in which a plea was accepted to a different offence. For details on this see below, pp.141–145.

<sup>3</sup> Home Office, *Offences Relating to Motor Vehicles England and Wales 1999: Supplementary Tables, 2000* and *Offences Relating to Motor Vehicles England and Wales 2000: Supplementary Tables, 2001*, Table 7.

<sup>4</sup> In HM CPS Inspectorate's review of road traffic fatality cases, 30 of the 42 defendants charged with CDDD pleaded guilty (71%): HM Crown Prosecution Service Inspectorate, *Review of the Advice, Conduct and Prosecution by the Crown Prosecution Service of Road Traffic Offences Involving Fatalities in England and Wales, 2002*, para.5.42.

<sup>5</sup> However, HM CPS Inspectorate found a similarly high success rate for CDDD, with 36 of the 42 cases in which CDDD was charged resulting in a conviction for that offence (ibid).

<sup>6</sup> HM CPS Inspectorate found that 39 of the 47 defendants charged with careless driving in its sample pleaded guilty (ibid).

died before their cases got to court<sup>8</sup> are eliminated from the statistics, this means that there was a success rate of 83% for careless driving prosecutions. From looking at the official statistics for all prosecutions of careless driving for England and Wales over the same period (1999 and 2000), it can be seen that this conviction rate is representative of the national average of 81%.<sup>9</sup>

**Table 2 – Prosecutions for Careless Driving**

County	No. of prosecutions	No. of convictions (plea unknown)	No. of guilty pleas	No. of known not guilty pleas resulting in conviction	No. of cases dismissed <sup>10</sup>	Outcome unknown	D died.
Lincs	24	13	7	1	1	2	0
Leics	34	16	12	1	3	1	1
Northants	20	13	2	0	4	0	1
<b>Total</b>	78	42	21	2	8	3	2

Prosecutions for CDCDUI resulted in a success rate of 86%. There were seven cases in which the offence was charged, either on its own or with other offences, and in five of these D pleaded guilty. In two cases D pleaded not guilty (NORTH069 and LEIC089). In NORTH069, the case involving the drug MDMA discussed in the previous chapter,<sup>11</sup> D was convicted by a majority of 11–1. LEIC089 resulted in a judge-ordered acquittal. Again, the cases in the East

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<sup>7</sup> This is assuming that all four cases where the outcome was unknown resulted in acquittal. It may be that these cases were in fact discontinued. If this is the case, it would have the effect of increasing the success rate for prosecutions to 86.5%.

<sup>8</sup> In both cases D's death was unconnected with the collision.

<sup>9</sup> Figures take from *Offences Relating to Motor Vehicles, Supplementary Tables*, n.3 above, Table 1.

<sup>10</sup> This includes both cases where magistrates ruled there was no case to answer and cases resulting in acquittal.

<sup>11</sup> At p.128.

Midlands seem to have been more successful than the national average, with 79% of CDCDUI cases across England and Wales resulting in conviction.<sup>12</sup>

No cases of aggravated TWOC went to trial by jury in the current sample. Nationally, there were very few cases of causing death by aggravated TWOC, with only six cases in 1999.<sup>13</sup> Surprisingly, this figure more than quadrupled the following year, with 25 cases in 2000.<sup>14</sup> Of these cases, a combined figure gives a success rate of 61.5%.<sup>15</sup>

### *Guilty Pleas*

The number of guilty pleas entered on charges of CDDD and careless driving can be found in Tables 1 and 2. If the figures for CDDD are compared with statistics for all cases dealt with at the Crown Court in the Midland and Oxford Circuit<sup>16</sup> for the relevant years (1999 and 2000), it can be seen that the figures are very similar.<sup>17</sup> As such, CDDD seems to be a “typical” offence, to which roughly two-thirds of offenders will plead guilty. The percentage of Ds pleading guilty to CDDD in this sample was 62%. The average across the Midland Circuit for all types of offence was 66.9% in 1999<sup>18</sup> and 66.5% in 2000.<sup>19</sup> However, it can be seen from the Judicial Statistics that the guilty plea rate in the Midland and Oxford Circuit is higher than the national average,<sup>20</sup> and it would be interesting to

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<sup>12</sup> *Offences Relating to Motor Vehicles, Supplementary Tables*, n.3 above, Table 7. In HM CPS Inspectorate’s review there were only three cases of CDCDUI, and all three resulted in guilty pleas: n.4 above, para.5.42.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> In HM CPS Inspectorate’s sample there were 4 cases of aggravated TWOC, all dealt with by way of guilty plea: CPS Inspectorate Report, n.12 above, para.5.42.

<sup>16</sup> Lincoln, Leicester and Northampton Crown Courts are all within the Midland Circuit.

<sup>17</sup> The Judicial Statistics provide statistics on the number of guilty pleas entered at the Crown Court for each Crown Court Circuit and nationally, but do not provide a breakdown of these figures to provide statistics on the individual courts or different offences. Whilst the Criminal Statistics provide conviction rates for different offences, they do not give an indication of the number of cases dealt with through a plea of guilty.

<sup>18</sup> Lord Chancellor’s Department, *Judicial Statistics Annual Report 1999*, Cm 4786, 2000, Table 6.8.

<sup>19</sup> Lord Chancellor’s Department, *Judicial Statistics Annual Report 2000*, Cm 5223, 2001, Table 6.8.

<sup>20</sup> The national average guilty plea rate was 58.8% in 1999 and 58.2% in 2000.

see whether the guilty plea rate for CDDD changed from region to region in keeping with the figure for all offences. The question is whether CDDD is an offence to which offenders are more likely to plead guilty than other offences. Unfortunately this cannot be determined from the published statistics.

Not all Ds who pleaded guilty to CDDD did so at the first opportunity. There were at least six “cracked trials”, in which D pleaded not guilty at the plea and directions hearing, but changed his plea before his trial commenced. The obvious advantage of pleading guilty is that it will be seen as a mitigating factor in sentencing, but much of the benefit of any sentencing discount may be lost if the plea is not timely. In cases of CDDD, cracked trials may occur due to the delay in D obtaining the report of a defence expert.

Unlike other classes of offence, the issue in all of the cases of CDDD was not whether or not D was the perpetrator of a known crime for which the police sought to apprehend a suspect. D will normally admit that he drove the vehicle involved in the collision, but may dispute whether the way in which he drove fell far below the standard of a competent and careful driver. In preparing his defence he may call upon the services of an independent expert in collision reconstruction in the hope that such an expert will be able to challenge the evidence of the police CI. However, if the defence expert agrees with the CI, D is left with little in the form of a defence. He may therefore change his plea from not guilty to guilty in order to secure at least some sentencing discount.

The phenomenon of defendants pleading guilty whilst maintaining their innocence<sup>21</sup> does not occur in the same way in cases of CDDD as in other criminal cases. The question for the jury is different to that in relation to many other offences, where if the *actus reus* has been proved the jury need to determine whether D had the necessary *mens rea*. In doing so they are attempting to get to the “truth”, whereas in cases of CDDD the “truth” is not something which is out there to be proved, since whether it is “true” that D fell far below the standard of a competent and careful driver depends on a subjective assessment of the facts. The difficulty for D in deciding whether or not to plead guilty is that the test for dangerous driving is not an absolute, in that it is open to interpretation. In pleading guilty D is admitting that he agrees that his standard of driving fell far below that of a competent and careful driver. Alternatively, he thinks it likely that

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<sup>21</sup> See, for example, Baldwin, J., and McConville, M., *Negotiated Justice*, London: Martin Robertson, 1977, Chapter 4.

the twelve competent and careful drivers on the jury will think his driving fell far below the requisite standard and does not want to risk missing out on a sentencing discount.

There were four cases in which aggravated TWOC appeared on the indictment. In NORTH032 no other driving offences were charged, and D pleaded guilty. In NORTH037 D pleaded guilty to CDDD but not guilty to aggravated TWOC, and the plea, unsurprisingly, was accepted. Similarly, in NORTH082 D pleaded guilty to CDDD and CDCDUI but not guilty to aggravated TWOC, and again it was felt unnecessary to go to trial on what was at the time, in terms of sentencing, a less serious charge. In LEIC080, however, the Crown accepted a guilty plea to aggravated TWOC, where CDDD was the most serious offence charged. In this case counsel seemed reluctant to go to trial on the CDDD count, and despite representations from the Crown Prosecutor arguing that the case for CDDD was quite strong, the issue was never put to the jury and the plea to the TWOC charge was accepted. The acceptability of the plea was explained in court, but unfortunately no details were included in the file. D received six months' detention and was disqualified for twelve months.

There was one further case in which the Crown accepted a plea to a lesser charge. In NORTH005 D was charged with CDDD and the case went to trial. This case was unusual in more than one respect. Firstly, it is the only case in the sample in which it is known that D was kept on remand before trial. This appears to be highly unusual in RDI cases, as usually there are no strong reasons why D should not be released on bail. Unfortunately, the reasons why bail was not deemed suitable in this case are unknown. A further surprise is that D was initially told that he would be prosecuted for careless driving, meaning that D was not in custody at the time that the decision as to charge was made. It is unknown whether D was involved in any other criminal activity which may have caused him to be remanded in custody.

The case was one which clearly fell within the "grey area" between dangerous and careless driving. This is marked by the inability of the decision-makers at all stages of the criminal justice process to agree on the appropriate offence. The OIC suggested D had committed only careless driving, whilst the Crown Prosecutor was of the opinion that although there was not a strong case for CDDD there was a *prima facie* case and a realistic prospect of conviction. At trial the jury sent the judge two questions during their deliberations, but ultimately were unable to reach an agreement as to guilt, with the trial resulting in a hung jury.

D was an HGV driver who had been called to assist a colleague who had become stuck on the verge of a single-carriageway road. D located his colleague but found that he needed to turn his vehicle around in order to be facing the right direction to pull the other truck onto the road. D pulled into a lay-by on the left-hand side of the road and decided to carry out a three-point turn. As he was in the latter stages of completing the turn V collided with the side of his vehicle. It was dark at the time of the collision, and the CI concluded that D was very unwise to undertake the manoeuvre and should have instead continued to the next roundabout, a short distance up the road, and turned there. The defence expert was of the opinion that the risk D presented to oncoming drivers keeping a proper look out was one of inconvenience, suggesting that V was at fault for perhaps driving at a speed in excess of which he was able to stop in the distance he could see to be clear. The questions asked by the jury demonstrate the difficulty they seem to have had with the objective test required for dangerous driving. The first question was whether it was illegal to carry out a three-point-turn on that road and the second was whether blocking the road is an offence. These questions clearly cast doubt over the claim that the test for dangerous driving, of whether D fell far below the standard of a competent and careful driver, is one that can be applied objectively and is easily understood.

In this case it will never be known whether D's driving did fall far below the standard of a competent and careful driver. At least three of the jurors clearly felt it did not. Rather than risk wasting more time and money on a second trial the Crown chose, understandably, to accept a guilty plea to careless driving.

### *Unsuccessful Prosecutions*

#### **CDDD**

Of the five cases in which CDDD was charged but not convicted we have seen that two resulted in a guilty plea being accepted to a lesser offence. There were two cases in which D was acquitted of CDDD but convicted of careless driving. The first of these was LINC094, discussed in the previous chapter under the heading of cases of CDDD based on the condition of the vehicle.<sup>22</sup> The second was similar in that the cause of the collision also related to the size of the vehicle. In LEIC054 D was an HGV driver who failed to realise that his vehicle was too tall to clear a bridge (D's trailer was 4.8m high and the bridge was only 4.6m

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<sup>22</sup> At p.131.

high). D claimed that he had completely forgotten about the height of his trailer, which was taller than those he usually drove, and so the warning signs which he passed on the approach to the bridge did not register the problem with him. He did not give the height of his trailer any thought, and collided with the top of the bridge, causing him to lose control and veer into the path of V, who was travelling in the opposite direction. In interview D stressed that he had no intention of driving dangerously, but that it was just a case of forgetfulness. Unfortunately, the warning system which would have reminded D of the height of his vehicle and warned him of the danger was faulty and failed to operate.

This was clearly a case in which the jury again had difficulty in applying the objective test of dangerousness to the facts of the case. It is obvious that a competent and careful driver would not attempt to drive his vehicle under a bridge which was too low to allow him to pass. However, it is inevitable in this case that the jury took into consideration D's state of mind when he attempted to do so. Had a similar case been heard prior to the current law on dangerous driving, when the relevant offence would have been reckless driving, D would have been guilty. He created an obvious risk of harm to others by attempting to drive under the bridge, and by his own admission gave no thought to the existence of that risk. The aim of the North Review in broadening the range of conduct which ss.1 and 2 of the Road Traffic Act cover<sup>23</sup> has therefore not been achieved in every case.

However, perhaps this case is an example of one in which D's state of mind *should* be taken into account. In applying the objective test of a competent and careful driver to D, should D be attributed with the actual knowledge<sup>24</sup> that his vehicle was too tall for the bridge? If the test is truly objective then one could argue that he should be attributed with such knowledge, since the competent and careful driver would have checked the height of his vehicle. The law requires that in applying the objective test the jury take into account those circumstances of which D could be expected to be aware and those shown to be within his

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<sup>23</sup> See the North Report, Chapter 5. Para. 5.15 states: "we would want a newly defined offence to include everything covered by the reckless driving offence as presently defined".

<sup>24</sup> This term is taken from Duff, R.A., *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law*, Oxford: Basil Blackwell, 1990. Using Duff's definition of "practical indifference" D in LEIC054 can be seen to have had the latent knowledge that he should not attempt to drive under the bridge, since if he had thought about it he would have known the height of his vehicle, but was not applying this knowledge at the time and so it had not become "actual".

knowledge. D is expected to know the height of his vehicle, and he admitted that in fact he did have knowledge of it but failed to consider it at the relevant time. But in this case it could be argued that we should judge D's blameworthiness in accordance with what he was actually thinking during his journey.

Ashworth mentions a similar case that occurred in Wales, in which the driver of a double-decker bus drove into a low bridge, killing six schoolchildren.<sup>25</sup> This case occurred before the enactment of the Road Traffic Act 1991,<sup>26</sup> and so reckless, rather than dangerous, driving would have applied, but Ashworth submits that the driver's level of culpability was low and that careless driving was the correct offence. He does not question whether the driver's forgetfulness was such that, in Duff's terms, he could be described as "practically indifferent" and therefore reckless. That is not to say, however, that Duff would label either D or the driver in Ashworth's example as practically indifferent. He would only do so if the reason why the defendant in each case did not think of the risk was that he did not care about it.<sup>27</sup> What the cases illustrate, though, is that despite efforts to ensure that the current law is able to label offenders according to their blameworthiness in terms of carelessness and dangerousness, cases may still arise where D's blameworthiness is possibly reduced by his subjective state of mind. The question in this case seems to be whether D should be punished for his forgetfulness, and whether advertently taking a risk by driving a vehicle which D is conscious is too high for a bridge, for example because he wants to take a short-cut and to avoid the bridge would lengthen his journey, can be said to entail the same blameworthiness as D in LEIC054, who honestly failed to realise the risk.<sup>28</sup> It could be argued that D should have realised the risk, since he was driving a large vehicle and such risks are obvious, but whether this would amount to dangerous or careless driving is open to debate.

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<sup>25</sup> Ashworth, A., "Taking the Consequences" in Shute, S., Gardner, J., and Horder, J., *Action and Value in the Criminal Law* Oxford: Clarendon Press, 1993, at p.119.

<sup>26</sup> The case is also mentioned in Smith and Hogan. It occurred in 1982 and was reported in *The Times*, 7/10/82, 2/11/82 and 13/1/83: Smith, J.C., *Smith and Hogan: Criminal Law Cases and Materials*, London: Butterworths, 7<sup>th</sup> ed., 1999, p.123.

<sup>27</sup> Duff, n.24 above, at p.166.

<sup>28</sup> Smith notes that the defendant in the Welsh double-decker case is clearly reckless in the *Caldwell* sense, in that he gave no thought to the possibility of a risk, but questions whether he is of the same culpability as a driver who consciously takes a risk: see n.26 above. The same arguments can be applied to LEIC054.



The final unsuccessful case of CDDD was one which resulted in absolute acquittal. LEIC068 involved a diabetic who was suffering a hypoglycaemic attack when he collided with V's bicycle. Several witnesses catalogued D's erratic driving over a considerable distance, during which time D collided with a bollard in the centre of the road but also successfully negotiated several traffic-light-controlled junctions. At the immediate scene of the RDI he was seen to swerve from side to side, mount the nearside footpath and strike V. He continued on to the next roundabout where witnesses managed to remove him from his vehicle. Unfortunately there were no notes on the file relating to D's trial and acquittal, but it is clear from the evidence and pre-trial notes that D sought to rely on his diabetes as a defence. Other diabetics have also succeeded in pleading automatism as a defence to CDDD.<sup>29</sup> In this case, however, the result might be seen as surprising. The police investigation made much of the fact that D had failed to keep appointments with his doctor and test his blood-sugar levels regularly, suggesting that he neglected his condition.<sup>30</sup> In interview D denied that this was the case, on the basis that he would not take risks because he did not like suffering from hypoglycaemia, but implying that he knew better than the doctors.

D, a courier driver, admitted that earlier on the day of the RDI he had felt unwell and had stopped to have some chocolate and a sugary drink, but after five to ten minutes felt fine and so continued driving. He had no further memory of his journey until he was stopped following the collision. The police seem to have suspected that D had been impaired by his condition on previous occasions resulting in collisions, and had continued to drive because his work necessitated it, but D denied this. Based on his acquittal, it appears that the jury took the view that he could not be blamed for driving in a state of automatism, brought on by taking too little food following insulin. It is not known the extent to which the prosecution attempted to rely on the argument that he was at fault in not keeping his appointments with his doctor in order to ensure that he was getting the correct treatment for his condition. Without knowing how the evidence was portrayed at trial, in particular the contribution of any experts on the subject of diabetes, it may be injudicious to condemn the jury's decision in this case as perverse.

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<sup>29</sup> e.g. Richard Turpin, as reported in the *Independent*, 4.7.02.

<sup>30</sup> Automatism is not available as a defence in cases where D can be said to have induced the condition, see Chapter 2 above, p.31. Here, one argument open to the prosecution may have been that D should not be acquitted on the basis of automatism because he was at fault for failing to ensure that his condition was properly regulated.

Another of the cases in the sample involved the possible defence of automatism. In LINC103 D suffered a heart attack whilst driving, causing his foot to involuntarily press down on the accelerator. His car mounted the pavement in a busy shopping street and collided with pedestrians and a shop front. In this case the CPS advised the police to take NFA as D had sought medical help for symptoms of a heart problem, but had been misdiagnosed by his doctor. He was not to blame for the incident as he had done all he could be expected to have done.

### **Careless driving**

Of the eight cases known not to end in conviction, one case (LINC106) was unsuccessful on the basis that a summons for careless driving was issued outside the six-month time limit. This was not in fact the case as the summons was issued with almost a month to spare, and the police were advised by another court that they were within their rights to issue the summons again. However, the CPS was reluctant to do so because D had been formerly discharged and feared that he might raise an abuse of process argument and so the case was never tried. This was a case in which D had struck a pedestrian when D was blinded by the sun.

Of the remaining seven cases, two resulted in a ruling of no case to answer. In LEIC045 the reasons given for the ruling by the bench were that the CI's evidence was based on estimates and presumptions and that none of the eye-witnesses had actually seen the collision between D's car and the pedestrian. It may be that in this case some of the witnesses were unable to attend trial, and it seems that although the CI was keen for the prosecution to go ahead, the OIC was less clear about apportioning blame and the witnesses did not blame D for the collision. This was clearly a borderline case which, in the absence of unequivocal evidence, failed to become the subject of deliberations as to guilt. NORTH018 involved two defendants, the second of whom was convicted of careless driving. It was clear from the evidence that the second defendant was almost entirely to blame for the incident, and the OIC had been of the opinion that the first defendant should not have been prosecuted. It appears that although the CPS agreed that the second defendant should take most of the blame, the first defendant also played a part in the case. The magistrates clearly disagreed.

In the five cases that resulted in dismissal following a full hearing the CPS could not be criticized for their decision to prosecute. The results of some of the cases were more surprising than others. In LEIC069 D was a newly qualified

driver who lost control of her car on the M1 after she collided with the nearside kerb, and veered across the carriageway into traffic. D's passenger and the passenger of the car with which she collided died. D had been driving on the hard-shoulder in a contra-flow due to road-works. In interview, however, she stated that she was not aware of the presence of road-works, and claimed that the fact that she had been singing along to the radio would have made no difference to her driving.

Two of the cases (LEIC085 and NORTH055) involved D colliding with a pedestrian at night. In LEIC085 the magistrates gave reasons for their dismissal, attributing it to the evidence of V's son, who had been present at the scene, but gave, in their view, over-emotional and exaggerated evidence. A second eye-witness had been confused in giving his evidence, but the bench felt that D had been honest in his testimony. In NORTH055 it may have been a discrepancy over the colour of V's coat (and thus its degree of visibility) which led to the case being dismissed. V's husband stated that V's coat was white, whilst D claimed that it was dark. Surprisingly, the police were unable to corroborate either view by talking to ambulance and hospital staff.

In NORTH057 it appears that D's defence was that his car had underperformed and he may have experienced a mechanical problem. He had pulled out of a lay-by in front of an HGV, and miscalculated his ability to pull away because the car "juddered". The vehicle examiner found that the car had a severe engine misfire rendering the acceleration sluggish and jerky. The CPS recognised that D would raise this defence in advance, but continued on the basis that D should not have pulled out knowing the way in which his car was likely to perform.

The final case, NORTH068, was one in which it seems that V overreacted to the presence of D who was attempting to overtake a cyclist on the approach to a bend. V was riding his motorbike in the opposite direction and it seems he dropped his machine on purpose, probably to minimise any impact (although unsuccessful). Had V remained in control of his machine a collision would not have occurred, but it was felt that D was to blame for his choice of location in overtaking the bicycle. It is unclear whether at court D sought to rely on a suggestion that V was travelling too fast for the bend, but the CI was of the opinion that the evidence did not support this view. However, the case was dismissed.

In another three cases the outcome of the prosecution is unknown, but it is likely that at least one case (LINC098) was discontinued by the CPS. This is a case in which the police disagreed with the CPS advice not to prosecute and issued a summons for inconsiderate driving against that advice. In LEIC012 it was possible that the case was discontinued on the basis that, despite D being clearly to blame for the collision, it was not in the public interest to pursue the case as D was 73-years-old and V, his passenger, was his friend. Unfortunately there were no entries on the file explaining the outcome. Finally, in LINC101 the outcome is completely unknown and no reasons for discontinuance or dismissal present themselves. This was a case in which D failed to see that a car ahead was stationary, waiting to turn right. She collided with the rear of the car and shunted it into the path of an oncoming car. As in LINC106<sup>31</sup> D had been blinded by the sun, and the prosecution case was that D should have adjusted her driving in accordance with her impaired view. There does not appear to be any reason why such a case was unsuccessful, but the information on the file was incomplete, and it was not possible to discover the reason through interviews with relevant personnel.

## **Sentencing**

### *Sentences for CDDD*

Of the twenty-four cases resulting in findings of guilt, three resulted in a Community Service Order (CSO), one resulted in a conditional discharge, two resulted in suspended sentences and the remaining eighteen cases resulted in immediate custody. The Court of Appeal<sup>32</sup> has recently introduced new sentencing guidelines on the advice of the Sentencing Advisory Panel, but at the time of the cases in this sample guidelines were to be found in the Court of Appeal case of *Boswell*<sup>33</sup>, which was reviewed in *Attorney-General's References (Nos. 14 and 24 of 1993)*<sup>34</sup> to take account of the new offence of CDDD and the increased ten-year maximum sentence. In the latter case it was stated that the examples of aggravating and mitigating circumstances given in *Boswell* still stand, but that in the most serious cases of drivers racing or driving with reckless

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<sup>31</sup> Above, p.145.

<sup>32</sup> *Cooksley and others* [2003] EWCA Crim 996.

<sup>33</sup> (1984) 79 Cr App R 277.

<sup>34</sup> (1994) 15 Cr App R (S) 640.

disregard for the safety of others after taking alcohol, they should lose their liberty for upwards of five years.

The highest sentences in the current sample were in fact three sentences of five years' imprisonment (LINC024, LEIC032 and NORTH082). The sentence in NORTH082 can be seen as somewhat lenient, considering that five aggravating features were present. D had driven having consumed alcohol (for which he was convicted of two additional counts of CDCDUI but received no separate penalty), he had driven at a grossly excessive speed and was showing off, he had ignored the warnings of one of his passengers, had committed other offences at the same time, such as driving other than in accordance with his licence, which was only provisional, and, finally, two people were killed. In mitigation, D had pleaded guilty and had killed two of his friends. The level of his remorse is unclear. However, the case can be likened to that of *Corkhill*<sup>35</sup> where, although it was seen to be a bad case (although not as bad as NORTH082 in that D had not consumed alcohol), the defendant was only nineteen years old and had pleaded guilty. His sentence was reduced from seven to five years' imprisonment on appeal, and the Court of Appeal, in issuing the recent guidelines, expressed the view that this was consistent with their suggested starting point of six years in cases of extremely high levels of culpability, for example where three or more aggravating features are present.<sup>36</sup>

LINC024 also involved alcohol consumption, excessive speed and multiple deaths. LEIC032 was the case in which D had been told not to drive by his doctors because he suffered from sleep apnoea, but ignored their advice. Although he was sentenced to five years' imprisonment, this was reduced to four on appeal. Under the present guidelines the case would probably fall within the level of "higher culpability", for which the starting point is indeed four to five years. The aggravating features were that D had driven when knowingly suffering from a medical condition which significantly impaired his driving skills, he drove when knowingly deprived of adequate sleep, two people were killed, and although he may not have had any previous motoring convictions, he had lost control of his vehicle only a month before due to his condition. In mitigation he pleaded guilty, showed remorse and was of good character.

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<sup>35</sup> [2002] Cr App R (S) 60.

<sup>36</sup> *Cooksley*, n.32 above.

At the other end of the scale, a conditional discharge was ordered in LINC100. This was a fairly clear case of CDDD, with D overtaking a car on the approach to a blind bend and colliding head on with V's motorcycle travelling in the opposite direction. D pleaded not guilty, and showed no remorse whatsoever, blaming the collision on V. The judge stated that there were no aggravating features, and several mitigating features. It seems that his sentence resulted from consideration being taken of the views of V's family, who saw no purpose to be gained in sending D to prison. They only requested that D be prevented from driving again. These wishes were met, with D being disqualified for ten years (D was 77 years old).

In a similar case, where D again overtook another car on the approach to a bend and collided with V riding his motorcycle in the opposite direction, D received a CSO for 200 hours (LINC041). Again, D pleaded not guilty, but in mitigation he was inexperienced and had not been aware that he was approaching the bend, and there was no hazard sign warning him of its presence. The sentencing judge commented that there were no aggravating features in this case. He concluded that although in the vast majority of cases a non-custodial sentence cannot be justified, there must be the exceptional case at the very lowest level of dangerous driving, where a CSO is justified, and that this was such a case. He acknowledged that this might cause distress to V's family, but stressed that the law was not "an instrument of vengeance". However, the case was referred to the Attorney General as constituting an unduly lenient sentence, but the Attorney-General decided not to refer the case to the Court of Appeal.

The other two cases resulting in CSOs were also seen to be examples of CDDD at the lower end of the seriousness scale. LINC108 was the case in which D, who was driving at 43mph in a 30mph limit, collided with a schoolgirl who was crossing the road. In LINC012 D, an HGV driver, failed to see a tractor unit ahead of him waiting to turn right and swerved across the carriageway to avoid it, into the path of oncoming cars. D pleaded guilty before a jury was sworn.

In the two cases in which D's sentence of imprisonment was suspended (LINC073 and NORTH030) consideration was again given to the views of V's family when sentence was passed. LINC073 was another case involving an HGV driver failing to notice a vehicle ahead which was waiting to turn right. V's father was not determined to see D in prison, and although the CPS sought counsel's advice on whether they should seek leave to appeal against the sentence as unduly lenient, counsel advised against such action. D's eighteen-month sentence was

suspended for two years and he was also disqualified for two years. In NORTH030 V's father requested that D not receive a custodial sentence as D had been a friend and neighbour of V and he felt that a custodial sentence would affect everyone involved in a detrimental way. D's sentence of six months' imprisonment was suspended for two years, he was fined £1000 and disqualified for two years.

In the case of *Roche*<sup>37</sup> the Court of Appeal had stated that in exceptional cases it could reduce a sentence as an act of mercy where V's relatives expressed the view that D's punishment aggravated their distress. It would appear that those exceptional circumstances existed in NORTH030, but it is doubtful that V's family's views should have been taken into consideration in LINC073. In *O'Brien*<sup>38</sup> the Court of Appeal again stressed that the views of the victim on sentence were not relevant considerations for the sentencer, whether the victim sought leniency or severity, save in exceptional circumstances. It is not clear the extent to which the judge was influenced by the views of V's parents in LINC073. The judge said that he was sentencing on the basis that D had fallen asleep and was concerned about D's not guilty plea. He was of the opinion that the offence was so serious that it must be marked by a prison sentence. The difficult question, as he saw it, was whether the marking of the conviction with a prison sentence was enough, or whether D must serve that prison sentence in order that the judge could fulfil his obligations to justice as well as the wishes of the various people involved. The judge found that there were exceptional circumstances which permitted him to suspend the sentence and commented that there was nothing to be gained by destroying D's family as well as that of V.

All those found guilty of CDDD must be disqualified from driving for a period of at least two years,<sup>39</sup> in addition to any other punishment. Before D has his licence reinstated he must pass an extended driving test.<sup>40</sup> The Sentencing

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<sup>37</sup> [1999] 2 Cr App R (S) 105.

<sup>38</sup> [2001] 1 Cr App R (S) 22.

<sup>39</sup> Road Traffic Act 1988, s.34(4).

<sup>40</sup> Road Traffic Offenders Act 1988, s.36. In *Lauder*, The Times, November 5, 1998, it was recognised that this requirement was not very well known and was frequently overlooked. It was stated that it was hoped that the courts would, in future, ensure that such orders were made. It is unclear whether the courts in the current sample of cases did make such an order in every case of CDDD, since it might not have been recorded on the file in every case.

Advisory Panel notes that the main purpose of disqualification is “forward looking and preventive rather than backward looking and punitive”.<sup>41</sup> The Panel advised that the risk presented by D is reflected in the culpability which attaches to his driving, so that matters relevant to fixing the length of disqualification are the same as those listed as aggravating features for the offence itself. In the worst cases D may be disqualified for life. The longest period of disqualification in the current sample was ten years, in LINC100, discussed above.<sup>42</sup> In LINC107 D was disqualified for eight years. This was a case in which D had attempted to overtake an HGV in his minibus, but had failed to complete the manoeuvre before colliding with V’s car, travelling in the opposite direction. D refused to accept responsibility for the collision right up until trial, when he eventually pleaded guilty. He was sentenced to four years’ imprisonment. The lengthy period of his disqualification may have reflected the fact that he did not have a British driving licence, as he was an asylum seeker, and was not aware of many of the rules of the road in this country.

If the same factors are taken into consideration when deciding the length of disqualification as in sentencing, one might expect the length of disqualification to be proportionate to the period of imprisonment in most cases, with longer periods of imprisonment being linked to longer periods of disqualification. This was not always the case. For example, in LINC033 D was sentenced to only nine months’ imprisonment but was disqualified for five years. In this case the CCP asked the advice of CPS headquarters as to whether the case should be referred to the Attorney-General as an unduly lenient sentence. The response was that the sentence bordered on being unduly lenient but it was not thought so bad so as to be referred. One would also expect the length of disqualification to exceed the term of imprisonment. This was not always the case however. In NORTH041 D was sentenced to three-and-a-half years’ imprisonment and was disqualified for just three years. He had been drinking and had overtaken a car and then an HGV in the face of a car travelling in the opposite direction.

### *Sentences for Careless Driving*

Those found guilty of careless driving cannot receive a sentence of imprisonment. They will be fined and will either have their licence endorsed with

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<sup>41</sup> Sentencing Advisory Panel, *Advice to the Court of Appeal: Causing Death by Dangerous Driving*, 2003, para.42.

<sup>42</sup> At p.149.



3–9 penalty points, or may be disqualified. The fine is a level-four fine, which has a maximum of £2,500. The Magistrates' Association produce sentencing guidelines to assist magistrates in their sentencing task.<sup>43</sup> The guidelines suggest that the starting point for a fine in a case of careless driving is point B, which relates to one week's net income for D, meaning his take home pay. The Supplementary Guidelines stress that s.18 Criminal Justice Act 1991 requires courts to take account of D's financial circumstances before fixing the amount of the fine. Thus, fines for careless driving will depend upon the level of D's income as much as his culpability. A piece of bad driving at the higher end of carelessness committed by someone on income support may result in a lower fine than a piece of bad driving at the lower end of the scale of seriousness committed by someone with a good wage. However, the sentencing guidelines do list examples of mitigating and aggravating factors, and advise that a discount of up to one third may be given for timely guilty pleas.

In the current sample the highest fines were for £1,200, and the lowest for £50. Just over half of the cases resulting in a conviction for careless driving led to disqualification (37 of 65), whilst in 30 cases D was not disqualified but his licence was endorsed with between four and nine points. This level of disqualification is much higher than the national average for offences of careless driving, perhaps reflecting the fact that the offenders were seen to create a risk to other road users because that risk had materialised in the death of V. In 1999 1,418 disqualifications were imposed for careless driving, whilst 41,873 offenders had their licence endorsed without disqualification.<sup>44</sup> The figures for 2000 were 1,450 and 36,519 respectively.<sup>45</sup> The longest period of disqualification in the current sample was for two years, which was imposed in five cases.

The sentencing guidelines mention that where a case resulted in death, this is capable of being aggravation. The case law on this subject now supports this, but this has not always been the case. In *Krawec*<sup>46</sup> Lord Lane stated: "[i]n our judgement, the unforeseen and unexpected results of the carelessness are not in themselves relevant to penalty. The primary considerations are the quality of the

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<sup>43</sup> *Magistrates Court Sentencing Guidelines*, available from the Magistrates' Association, issued September 2000, amended June 2001.

<sup>44</sup> *Offences Relating to Motor Vehicles, Supplementary Tables 1999*, n.3 above, Table 13.

<sup>45</sup> *Offences Relating to Motor Vehicles, Supplementary Tables 2000*, n.3 above, Table 13.

<sup>46</sup> [1985] RTR 1.

driving, the extent to which the appellant on the particular occasion fell below the standard of the reasonably competent driver, in other words, the degree of carelessness and culpability. The unforeseen consequences may sometimes be relevant to those considerations.” However, in *Simmonds*<sup>47</sup> it was recognised that the statutory regime for traffic offences had changed since *Krawec*, and that since the current regime envisages the causing of death as a factor leading to an enhanced statutory sentencing bracket, and multiple deaths are seen to be an aggravating feature in cases of CDDD, it would be anomalous to disregard the fact that death had occurred as a result of careless driving. The Court of Appeal held that whether courts should take consequences into account is a question of choice and policy, and that although *Krawec* was valid in its context and its time, it is not helpful to sentencing in the different context today. Thus, a sentencer is entitled to take into account that the offence led to death.

This approach was confirmed in *King*,<sup>48</sup> where it was said that the sentencer must “make it his primary task to assess culpability, but should not close his eyes to the fact that death has resulted, especially multiple death, where, as here, that was all too readily foreseeable as the consequence of the admitted lack of care in this case.” In *King* a fine of £2,250 was reduced to £1,500, and a disqualification for three years was reduced to two. It should be noted that the case was one falling within the higher bracket of seriousness for offences of careless driving, with the facts being very similar to a number of cases in the current sample. D drove his HGV into a queue of traffic having failed to see it because, he claimed, he was looking down at his tachograph to calculate when he needed to stop driving. Similar cases in the current sample, where D either fell asleep or could not account for his failure to notice the stationary traffic, resulted in a combination of prosecutions for CDDD and careless driving. Of those resulting in conviction for careless driving, sentences were passed of: a £300 fine plus disqualification for eighteen months (LEIC034); a £250 fine plus nine points on D’s licence (NORTH003); a fine of £500 and disqualification for eighteen months (NORTH025); and in one case where a conviction for careless driving was substituted for one of CDDD, the penalty was just six points<sup>49</sup> (NORTH051).

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<sup>47</sup> [1999] 2 Cr App R 18.

<sup>48</sup> [2001] 2 Cr App R (S) 114.

<sup>49</sup> Although it may be that D had served some of his sentence for CDDD and it was thought unnecessary to punish him any further. His three-year disqualification was quashed in addition to his twelve-month prison sentence.

## *Sentences for other offences*

The Court of Appeal has confirmed that sentencing in cases of CDCDUI should be approached in the same way as cases of CDDD, and the same four guideline categories for CDDD apply.<sup>50</sup> For the six cases resulting in a conviction for CDCDUI sentences ranged from two years' detention in a YOI (NORTH069) to six years' imprisonment (NORTH049). However, in NORTH082, where D pleaded guilty to both CDDD and CDCDUI, he was given no separate penalty for CDCDUI.

Causing death by aggravated TWOC carries a maximum sentence of five years' imprisonment. The case of *Sherwood and Button*<sup>51</sup> highlights the fact that prosecutors must be careful in drafting the indictment in such cases. Unless the indictment specifically alleges the offence of *causing death by* aggravated vehicle taking, the court may not pass a sentence in excess of two years' imprisonment. The two cases in the current sample resulting in a conviction for aggravated TWOC resulted in detention in a YOI for six months (LEIC080) and two years' imprisonment (NORTH032). The exact wording of the relevant counts on the indictment in either case is unknown, since this information was not noted at the time that the data was collected.<sup>52</sup>

The three offences where only speeding was prosecuted resulted in fines of £90–£150 and 4–5 penalty points.

## **Appeals**

### *Appeals against conviction*

It may be that appeals against conviction were made in some cases in which it was not possible to view the CPS file, and so the actual number of appeals may be higher than that recorded. In fact, only two known appeals took place in the current sample. In NORTH069 D's appeal was dismissed, where it was claimed that no connection between D's drug taking and his fatigue had been proved. The

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<sup>50</sup> *Cooksley*, n.32 above.

<sup>51</sup> (1995) 16 Cr App R (S) 513.

<sup>52</sup> In hindsight it would have been advantageous to note such information. This is an example of the difficulties faced by researchers in identifying the relevant information to be collected in empirical studies in advance.

Court of Appeal did not accept this argument.<sup>53</sup> In NORTH051 D's appeal was allowed and his conviction for CDDD quashed.

The grounds of appeal were that the judge had failed to give a good character direction to the jury and did not refer to D's evidence during his summing-up. The trial was extremely short, with the facts agreed between the prosecution and defence. The only witness to be called at trial was the CI. The only task for the jury was to decide whether, on the agreed facts, D's driving fell far below the standard expected of a competent and careful driver and that it would be obvious to a competent and careful driver that driving in that way would be dangerous. In summing up, the judge referred to this statutory definition of dangerous driving, and quoted from D and other witnesses. The jury unanimously decided that the statutory definition of dangerous driving was met in this case.

However, the Court of Appeal<sup>54</sup> decided that D had been entitled to a good character direction, and reference to the fact that he had a faultless driving record, and was entitled to have the judge remind the jury of his evidence in detail. The Court noted that whether D's driving was dangerous or careless is a question of degree which must be judged by the jury and that "the context in which that judgment falls to be made must include proper directions as to such matters as character". The Court of Appeal concluded that if the summing-up by the judge had been properly constructed through the inclusion of a good character reference, the jury might have convicted of careless driving only. It is submitted here that D's character should play no role in the jury's deliberations in cases of dangerous or careless driving, as the nature of the offences are entirely different to many other offences where a good character direction is required. In the case of *Vye*<sup>55</sup> it was said that evidence of good character serves two purposes. Firstly, it supports D's credibility. Since D's credibility was not in question in NORTH051 a good character direction was not needed for this purpose.

Secondly, good character is evidence of propensity which is inconsistent with guilt, on the basis that a person with good character is less likely to commit any offence than a person with bad character. However, surely if the test for

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<sup>53</sup> See discussion in previous chapter at p.128.

<sup>54</sup> It is not possible to provide the citation for this case, since in doing so the anonymity of the case would be undermined and in doing so the research undertakings entered into by the researcher with the police and CPS would be breached.

<sup>55</sup> [1993] 1 WLR 471

dangerous driving is purely objective, subjective references to D's driving on past occasions will not help the jury and may only confuse the issue. The issue is not of the type usually debated in court, namely whether or not D has committed a particular *actus reus* with a specific *mens rea*. A good character direction may be needed in cases of dangerous driving, but only where the facts are not agreed, for example if D denies being the driver of the vehicle involved.<sup>56</sup> If the facts of the case are agreed, the jury has all the information it needs to decide guilt in such a case. There is no question of D having lied or tried to cover up the truth, and the fact that he may never have driven other than in a competent and careful way in the past is only relevant in sentencing if the jury conclude that, as an issue of fact, D fell far below the required standard on *this* occasion. As the law now stands, however, no distinction is drawn between types of criminal offence in the requirement to issue a good character direction.

### *Sentencing Appeals*

Again, there may have been cases in which an appeal against sentence was successful where it was not noted on the police file, and since not all CPS files were accessed the occurrence of appeals against sentence may be under-reported in this sample. There were two cases in which D appealed against his sentence for CDDD (LEIC049 and LEIC032). In LEIC049 a sentence of three years' imprisonment was reduced to two years, where D's counsel argued that the sentencing judge had paid undue regard to the fact of three fatalities and had increased the sentence beyond what was appropriate because of his view that D was fortunate not to have caused more deaths when he ploughed into a queue of traffic on the M6. It was also argued that the judge failed to have due regard to mitigating factors in that the case involved inattention rather than deliberate disregard for road safety. The similar case of *Buckingham*<sup>57</sup> was referred to, where a sentence of three years was reduced to eighteen months on appeal. However, the Court of Appeal in LEIC049, in reducing the sentence to two years, distinguished the case on the basis that in *Buckingham* only one person was killed.

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<sup>56</sup> As was the case in *Harrison* [2002] EWCA Crim 2309, where an appeal against conviction for dangerous driving was allowed on the basis that defence counsel had inadvertently failed to ask for a good character direction where D was eligible to receive one for purposes of both credibility and propensity.

<sup>57</sup> [2001] 1 Cr App R (S) 62.

LEIC032 was the case, discussed above,<sup>58</sup> in which D's sentence of five years was reduced to four years on appeal.

There was also an appeal against sentence in one case of careless driving. In LEIC087 D's period of disqualification for twelve months was reduced to three months. This was a case in which D had collided with a pedestrian as she crossed the road close to a junction controlled by traffic lights. This seems to have been a case at the lower end of seriousness in that many of the eye-witnesses showed empathy towards D. The grounds of appeal were that the disqualification was wrong in principle. It seems that in responding, the Crown sought to rely on the case of *Simmonds*, in which the Court of Appeal reversed the tide of cases following *Krawec*, by ruling that a court was entitled to bear in mind the fact that death had occurred as a result of careless driving. It appears in this case that despite *Simmonds*, in which a disqualification for twelve months was upheld, it was decided by the court in LEIC087 that too much weight had been placed on the outcome of D's carelessness, and the disqualification was accordingly shortened.

There was one case (LINC041) in which the sentence was referred to the Attorney-General as unduly lenient. Cases of CDDD and CDCDUI are among those most frequently referred by the Attorney-General to the Court of Appeal on the basis that the sentence was unduly lenient, according to research conducted by Shute.<sup>59</sup> Although this may be true, the Attorney-General decided not to refer LINC041 to the Court of Appeal. This was the case, discussed above,<sup>60</sup> in which a CSO for 200 hours and a disqualification for four years were imposed where D was convicted of CDDD.

## Discussion of Empirical Findings

The objectives of the empirical study were to discover how the law relating to criminal liability resulting from RDIs operates in practice, what difficulties are faced by police and prosecutors in deciding what, if any, offence to charge, and what factors tend to influence that decision. A subsidiary question was whether cases of murder or manslaughter, where the weapon used was a motor vehicle,

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<sup>58</sup> At p.148.

<sup>59</sup> Shute, S., "Who Passes Unduly Lenient Sentences? How Were They Listed? A Survey of Attorney-General Reference Cases, 1989–1997" [1999] CrimLR 603.

<sup>60</sup> At p.149.

were being treated as fatal collisions and nothing more by the police and CPS. There was no evidence in the current sample of this occurring.<sup>61</sup> In those cases where it was not initially clear at the outset of the case how V came to be in the road, the police explored the possibility that V was the victim of more than bad driving, but in none of the cases did they find this to be the case. This would suggest that if a car was used as a weapon of attack, the police would investigate the case as murder. However, it was mentioned by some traffic officers interviewed that it sometimes remains difficult to persuade CID to take seriously the possibility of murder by motor vehicle. Although there were no cases of this in the current sample, it can be seen that motor murders and manslaughter do occur. For example, the case of Timothy Harris<sup>62</sup> resulted in a conviction for manslaughter, where D drove over V unintentionally, having knocked V to the ground with his fists moments before. This was a case investigated by Leicestershire police.

Although there were no cases of cars being used as weapons of assault, it was suggested in the previous chapter that some of the worst cases in the sample could have warranted charges of manslaughter. This was never considered by the CPS, raising the question as to just how bad a piece of driving which caused death would have to be before manslaughter was considered as a possible charge. It would appear that the advice in the Charging Standard is followed very closely, in that cases will only be considered as manslaughter where the statutory offence cannot be charged due to the death occurring on private property.<sup>63</sup> It appears that as long as the statutory offence exists, “motor manslaughter” will be virtually non-existent. Whether this is desirable will be discussed in subsequent chapters.

In relation to the offences of CDDD and careless driving, HMCPS Inspectorate has found that decision-making in such cases is “capable of improvement”.<sup>64</sup> At

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<sup>61</sup> Similarly, HM CPS Inspectorate did not find any cases where manslaughter would have been the appropriate charge: CPS Inspectorate Report, n.4 above, para.5.32. It would appear that the criteria applied by the Inspectorate in deciding when manslaughter would be the appropriate charge involved the questions of whether the vehicle had been used as a weapon of offence or whether CDDD was unavailable as a charge due to the death occurring on private property. It appears that it was not considered whether any other bad cases of CDDD could have been prosecuted as gross negligence manslaughter.

<sup>62</sup> *Attorney-General's Reference (No.16 of 1999)* [2000] 1 Cr App R (S) 524.

<sup>63</sup> Charging Standard, para.11.7.

<sup>64</sup> CPS Inspectorate Report, n.4 above, para.5.69.

the time of writing the motoring offences examined here were under review by the Government. This suggests that a question mark hangs over the suitability of the current offences, and whether reform of the law is needed. The TRL's report on *Dangerous Driving and the Law*<sup>65</sup> suggested that certain problems exist with the current offences which, although designed to be objective, require subjective analysis in determining guilt. There were cases in the current sample which confirmed that some prosecutors do have difficulty in judging the culpability of drivers who kill. Questions surround the issue of what is expected of the competent and careful driver, particularly in terms of drivers who drive when tired and of the degree to which excess speed is seen as "dangerous", "careless", or merely speeding.

On the other hand, there were no cases in which the offence of dangerous driving was charged instead of CDDD.<sup>66</sup> Another positive finding was that despite suspicions that plea-bargaining takes place in RDI cases,<sup>67</sup> the current evidence disputes such allegations.<sup>68</sup> This would suggest that once the CPS have decided on the appropriate charge they stand by their decision and are not tempted to accept a plea to a lesser offence through fear that the allegation will not stand up in court. One explanation for this is that in cases which are borderline, the lesser of the two offences is charged so that downgrading is not possible. This appears to have occurred in cases involving car drivers who were fatigued, who were invariably charged with careless driving. They can be contrasted with cases of fatigued HGV drivers, who, because more evidence was available from examination of their tachographs, were more likely to be charged with CDDD. As for cases which were borderline between careless driving and no liability, there were several cases involving motorcyclists or pedal cyclists who were killed where there was some suggestion of carelessness on the part of D but which ended in NFA. Because the police usually gain CPS advice before charging D,

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<sup>65</sup> Pearce, L.M., Knowles, J., Davies, G.P., and Buttress, S., *Dangerous Driving and the Law*, Road Safety Research Report No.26, Transport Research Laboratory, 2002.

<sup>66</sup> Some academics had suggested that dangerous driving is sometimes charged in cases of fatalities, e.g. Clarkson, C.M.V., *Understanding Criminal Law*, London: Sweet & Maxwell, 3<sup>rd</sup> ed., 2001, p.211.

<sup>67</sup> See, for example, Glidewell, I., *The Review of the Crown Prosecution Service: A Report*, Cm3960, 1998.

<sup>68</sup> LEIC080 is the only case in which the prosecution dropped a charge of CDDD in return for a guilty plea to a lesser offence: see above, p.130.



prosecutors will not find themselves faced with a charge with which they do not agree when they come to review the file.<sup>69</sup> Most cases in which the prosecutor did take a risk in charging the more serious of two offences, or charging careless driving rather than advising NFA, did in fact end in conviction, suggesting that prosecutors can afford to be a little less cautious in their decision-making than they are at present.

Now that it has been established what are the nature of the difficulties faced by prosecutors in their charging decisions in cases of RDIs, consideration can be given to how the law could be reformed to rectify these problems. However, any change to the law should not only result in more consistent decisions as to guilt, it should also take into account what the criminal law is endeavouring to achieve in punishing bad drivers who kill. The next chapter thus explores the role of the criminal law.

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<sup>69</sup> One notable exception was LINC098, p.147 above.

## Chapter 7 – The Role of the Criminal Law

The empirical study has revealed some difficulties and inconsistencies with the way in which the requirements of the current available offences in cases of RDIs are interpreted. Such inconsistencies may be undesirable, in that they may result in the criminal justice process failing to achieve the intended aims and objectives of this particular area of law. The recent report by the TRL for the Department of Transport<sup>1</sup> similarly found some confusion amongst prosecutors as to the elements of the offence of dangerous driving. This report suggested various changes to the law,<sup>2</sup> in particular proposing the creation of a new intermediate offence of “Negligent Driving”, more serious than careless driving but less serious than dangerous driving. However, what the report failed to do, and what is proposed to be done here, is to explore the aims and objectives which the criminal law should be striving to achieve in punishing those who drive badly and put others’ lives at risk. Without consideration of such issues it is ineffective to attempt any improvement of the law.

The starting point is to examine what it is that society is trying to achieve in criminalizing bad driving, what are some of the aims of punishment in the criminal law generally, and which of those aims are sought to be achieved in punishing bad drivers in particular. One aspect of punishment, as will be seen, is retribution. What is unclear, however, is the extent to which any harm caused by bad drivers should affect the amount of punishment they deserve. It will be seen that the treatment of drivers by the criminal law is dichotomous. The role of the law in criminalizing bad drivers generally seems to be quite different to the role it takes in criminalizing bad drivers who kill. The harm caused by drivers is currently central to their criminalization, and whilst CDDD is widely accepted as a criminal offence, this is not true of the lesser offence of careless driving. The second part of this chapter examines the role of “result crimes” and the problem that traffic offences, as a form of “conduct crime”, fail to be identified by members of the public as “true” crime. Finally, the last section will draw upon psychological and criminological theory in trying to suggest ways in which the aims of the criminal law can be achieved in relation to traffic offences.

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<sup>1</sup> Pearce, L.M., Knowles, J., Davies, G.P., and Buttress, S., *Dangerous Driving and the Law*, Road Safety Research Report No.26, Transport Research Laboratory, 2002.

<sup>2</sup> See Cunningham, S., “Dangerous Driving a Decade On” [2002] CrimLR 945, and Chapter 8 below.

## **Criminalization and Punishment**

In criminalizing conduct, the law seeks to protect society and its members from harm. The meaning of “harm” is the source of much deliberation, and in relation to the offences relevant to the current study the concept of harm requires further assessment. Criminal law can be distinguished from civil law in that those breaching the criminal law face punishment, whereas although breach of the civil law may lead to sanctions, these do not involve censuring the individual for his failure to meet the requirements of the law. A crime is committed not against the individual victim who may have suffered harm, but against the State. It is the State, therefore, that accepts responsibility for prosecuting and punishing those who have breached the criminal law. In establishing in advance who ought to be punished, the State must decide what conduct merits criminalization and therefore punishment. But unless punishing those guilty of conduct deemed to be criminal is likely to achieve something, it seems pointless to embark upon the process of criminalization.

### ***Making Bad Driving Criminal***

According to Hart, the aim of criminal legislation is to denounce certain types of conduct as something not to be practised.<sup>3</sup> The reason why society wishes to denounce certain types of conduct is that it is wrong or harmful. If it is accepted that the aim of the criminal law is to prevent harm to others, it is necessary to establish what is meant by “harm”. It is uncontroversial to include physical injury and death within the meaning of harm, and essentially it is this type of harm which the offences of careless and dangerous driving seek to prevent. However, traffic offences are often seen as controversial, as shown in the next section. Essentially, this is because, although they seek to prevent physical harm, they lack the characteristics of paradigmatic crime. There are two essential elements to paradigmatic crime: harm and blame.<sup>4</sup> Taking the requirements of some traffic offences at face value, it can be argued that they represent a double departure from this paradigm.<sup>5</sup>

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<sup>3</sup> Hart, H.L.A., “Prolegomenon to the Principles of Punishment” in *Punishment and Responsibility*, Oxford: Clarendon Press, 1968, p.8.

<sup>4</sup> Clarkson, C.M.V., *Understanding Criminal Law*, London: Sweet and Maxwell, 3<sup>rd</sup> ed., 2001, p.4.

<sup>5</sup> *ibid*, p.127.

Firstly, the offences of careless and dangerous driving do not require that physical harm has been caused before criminal liability can be established. They are what are known as endangerment offences, which exist to punish those who take risks, whether or not such risks result in physical harm. Risk-taking is a wrong in itself because of the possibility that it can result in harm, and can be seen as a kind of second-order harm.<sup>6</sup>

Secondly, unlike paradigmatic crime such as violent crimes, traffic offences do not require the blame of the defendant to be proved in terms of subjective *mens rea*. It is sufficient that an objective test of blameworthiness be proven. Both careless driving and dangerous driving require that the defendant drove in a negligent manner, with the distinction between the two offences lying in the degree of negligence involved. However, this view of the blameworthiness element of such offences has not always been accepted, with some opining that they are in fact crimes of strict liability. In *Lawrence* Lord Diplock seemed to suggest that careless driving was an offence of strict liability.<sup>7</sup> He described careless driving 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.”<sup>8</sup> Smith concedes that careless driving is absolute in one sense, in that if D’s driving falls short of the standard of driving expected from a reasonably prudent driver it is no defence for him to show that it was impossible for him to do any better.<sup>9</sup> However, he asserts that careless driving is in fact a crime of negligence, since unlike other crimes of strict liability D will not be liable if he took reasonable care.<sup>10</sup> The same is clearly true of dangerous driving and CDDD.

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<sup>6</sup> Gross, H., *A Theory of Criminal Justice*, New York: Oxford University Press, 1979, p.125.

<sup>7</sup> Dangerous driving did not exist at the time of *Lawrence*, but if Lord Diplock’s arguments were correct they would arguably apply equally to the current offence of dangerous driving, which is constructed in a similar way to careless driving.

<sup>8</sup> *Lawrence* [1981] 1 All ER 974 at 981.

<sup>9</sup> Smith, J.C., *Smith and Hogan: Criminal Law*, London: Butterworths, 10<sup>th</sup> ed., 2002, p.502.

<sup>10</sup> *Ibid.*

The difficulty is that some have argued that punishment for negligence cannot be justified,<sup>11</sup> and that only conduct which is committed with the actor's awareness of the risk of harm should be criminalized. According to this point of view, negligence is not a form of *mens rea*, since it involves no cognitive element of knowledge or foresight. However, Hart argues that negligence can be included within the meaning of *mens rea* and that there is no reason why criminal liability should not be founded on such a state of mind.<sup>12</sup> In some situations, those who fail to think about the outcome of their actions may be just as blameworthy as those who foresee an outcome before taking a risk, provided that those who fail to think had the ability to have thought and to have acted differently. In relation to driving offences, only those who have the capacity to meet the standard of the competent and careful driver are entitled to drive, so that if they fail to meet the standard there should be no bar to their responsibility. Thus although traffic offences fail to incorporate the paradigmatic form of blameworthiness (subjective *mens rea*), there should be no objection to their criminalization in requiring an element of objective fault.

CDDD, on the other hand, is not a double departure from the paradigm. It can be seen as a partial departure in that although it requires the same fault element as dangerous driving, and therefore fails to live up to the paradigmatic view of "blame", it does meet the requirement of harm in its paradigmatic sense. This may be one of the reasons why CDDD is more readily accepted by some as a "true" crime, but, as will now be discussed, it is questionable whether the additional punishment levied on dangerous drivers who kill is either justified or achieves any additional aims of the criminal law.

### *Aims of and Justification for Punishment*

If the aim of criminal legislation is to denounce conduct, then it could be argued that upon criminal conviction no further action on the part of the State against the convict is required, since labelling him as a wrongdoer may be sufficient to communicate society's censure against him. Thus, Hart argues that punishment requires justification over and above this.<sup>13</sup> Justification for

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<sup>11</sup> For example, Williams, G., *Criminal Law, The General Part*, London: Stevens, 2<sup>nd</sup> ed., 1961, pp.122–3.

<sup>12</sup> Hart, H.L.A., "Negligence, Mens Rea and Criminal Responsibility" in *Punishment and Responsibility*, Oxford: Clarendon Press, 1968.

<sup>13</sup> Hart, n.3 above.

punishment is often divided into two types: utilitarian, or reductivist, and retributive. There is no consensus as to how much weight, if any, should be given to each type of justification, with much disagreement amongst those contributing to the debate. Hart argues that there is one general justifying aim of punishment, which is that it leads to beneficial consequences, but that retribution plays a part in helping to establish how much punishment is justified in any one case.<sup>14</sup> Others, such as Moore, argue that the only reason why punishment is justified is that offenders deserve it, and there is no need to find other benefits of punishment.<sup>15</sup>

### **Utilitarian Justifications**

Williams states that the reason for punishing negligence (of which careless driving and dangerous driving are examples) is the utilitarian one, that we hope thereby to improve people's standards of behaviour (in this case their driving).<sup>16</sup> This was recognised at a Law Society conference in 1964 at which it was said that "the vast mass of traffic offences were temporary lapses of ordinary men and women and the aim therefore was not so much retribution as making them more careful drivers."<sup>17</sup>

Punishment can be designed to improve behaviour in a number of ways. Firstly, the threat of punishment may deter all drivers from driving badly (general deterrence). Secondly, having been convicted of an offence and suffered the consequences, a driver could be deterred from re-offending in the future (specific or individual deterrence). Some have argued that deterrence fails to operate in relation to driving offences, since if a driver is not deterred from taking a risk by the immediate threat of physical harm to himself or damage to his property, he will not be deterred by any other consequences which could ultimately result. Schulhofer notes that: "[w]ith respect to reckless or negligent conduct, the motivation to desist is probably very strong in any event; the actor, to the extent that he is aware of the danger at all, will still wish to avoid tort liability for injury

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<sup>14</sup> Ibid.

<sup>15</sup> Moore, M., "The Moral Worth of Retribution" in von Hirsch, A., and Asworth, A. (eds.), *Principled Sentencing*, London: Hart, 2<sup>nd</sup> ed., 1998.

<sup>16</sup> Williams, G., *Textbook of Criminal Law*, London: Stevens, 2<sup>nd</sup> ed., 1983, p.91.

<sup>17</sup> Quoted in Hood, R., *Sentencing the Motoring Offender*, London: Heinemann, 1972, at p.97, fn2.

to others, not to mention the possibility of injury to himself.”<sup>18</sup> Williams argues that although this is true, driving offences can add to the pressure to make bad drivers change their habits and in the last resort, to give up driving.<sup>19</sup> In an earlier work, he more persuasively argued that “just as it is possible for punishment to cause a person to exercise greater control over his acts in view of the known dangers, so it is possible for punishment to bring about greater foresight, by causing the subject to stop and think before committing himself to a course of conduct.”<sup>20</sup>

For a prospective offender to be deterred from committing himself to a particular course of conduct, he must be able to identify that course of conduct as one that the law seeks to prevent. He must know the nature of driving which is criminalized, and must recognise that his own driving may fall within that definition. One possible problem of achieving the aim of deterrence in relation to careless and dangerous driving is that prospective offenders do not necessarily identify their own actions with those prohibited by statute. This issue will be returned to later.

It can be argued that all forms of punishment available to sentencers in cases involving traffic offences offer some deterrence. In fact, Ashworth points out that in some cases it is the process of prosecution, not just the resulting sentence, which is the punishment.<sup>21</sup> The cost of having to pay a fine may deter careless drivers, but perhaps a more effective deterrent is the threat of losing one’s licence as a result of immediate disqualification or points which accumulate and can eventually lead to disqualification.<sup>22</sup> Imprisonment is not a sentence available in

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<sup>18</sup> Sculhofer, S.J., “Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law” (1974) 122 Univ. of Penn. Law Rev. 1497 at 1521.

<sup>19</sup> Williams, n.16 above, p.93.

<sup>20</sup> Williams, n.11 above, p.123.

<sup>21</sup> Ashworth, A. *Sentencing and Criminal Justice*, London: Butterworths, 3<sup>rd</sup> ed., 2000, p.67.

<sup>22</sup> Walker states that motorists are more anxious to avoid disqualification than fines: Walker, N., *Why Punish?*, Oxford: Oxford University Press, 1991, p.18. Mirrlees-Black notes that disqualification will only work as a deterrent if potential offenders are aware of the penalty. She found that many of the first-time offenders she interviewed had not known that they could be disqualified for their offence. This affects the law’s ability to achieve general deterrence. However, most of those offenders interviewed claimed that their experience of disqualification would deter them from future offending, meaning that disqualification seems to be a success in terms of individual deterrence: Mirrlees-Black, C. *Disqualification from Driving: An*

cases of careless driving, but may result from a conviction for dangerous driving, and will be the normal result of a conviction for CDDD.<sup>23</sup> The maximum sentence available is considerably higher for the latter than the former, however. This cannot be justified on the basis of deterrence. As noted above, if the possibility of killing oneself or others does not deter a dangerous driver, it is unlikely that possible criminal penalties will. What one is attempting to deter is risk-taking. However, the possibility of apprehension leading to criminal penalties adds a further dimension to the equation involved in the taking of risks and the effectiveness of deterrence. This requires further explanation.

If there were no criminal penalties for driving badly, drivers would only have to assess whether to accept a risk of causing harm to themselves or others. In a world where bad driving *is* a criminal offence leading to penalties, a driver will carry out this assessment but will assess the further risk of whether he is likely to be penalised for his bad driving. For the offences of careless and dangerous driving the assessment of each risk must be carried out separately, since prosecution is not dependant upon occasioning a collision. However, a driver may be ignorant about the *actual* probability of either of these risks materialising. For the offence of CDDD, for which a driver faces a maximum of fourteen years' imprisonment,<sup>24</sup> he must first assess the risk of causing death. If he discounts the risk of causing death, he will also discount the risk of being punished for doing so. Schulhofer expressed it thus: "it would seem that the deterrent effect of a penalty imposed only for causing harm would tend to diminish as the risk of harm (in terms of circumstances of which the actor should be aware) diminishes and as the extent to which the actor actually adverts to this risk diminishes.... [T]his tendency to diminish as the degree of risk and the degree of the actor's advertence to the risk diminishes will presumably be reinforced by the natural tendency of many people to discount such contingencies."<sup>25</sup>

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*Effective Penalty?* Research and Planning Unit Paper 74, London: Home Office, 1993. Harland and Lester also found that, when interviewed, the penalty most frequently mentioned by offenders was disqualification. Half of offenders said they thought they would be deterred by disqualification and a quarter thought they would be deterred by a fine: Harland, D.G., and Lester, J., *Does Retesting Deter Dangerous Driving?* TRL Report 252, 1997.

<sup>23</sup> *Cooksley and others* [2003] EWCA Crim 996.

<sup>24</sup> Increased from ten by the Criminal Justice Act 2003.

<sup>25</sup> Schulhofer, n.18 above, p.1541.



Schulhofer concludes that penalties applicable only in the event of a fatality (such as the ten years' imprisonment penalty for CDDD) seem to add nothing to the deterrence achieved by penalties applicable to the underlying offence (in this case dangerous driving).<sup>26</sup> Thus, whilst drivers may be deterred from driving dangerously, they will not be deterred from causing death thereby. And for drivers to be deterred from driving dangerously they must believe that the threat of unpleasant consequences (whether they be physical harm or criminal punishment) is strong enough to persuade them not to take the risk. It is unknown what the success rate in apprehending dangerous drivers is. However, the assumption must be that it is low. Anecdotal evidence given to the TRL suggests that prosecutions in the absence of a collision are rare.<sup>27</sup> Thus, unless a driver suspects that there is more than a minimal risk that he will cause a collision, or that there may be police presence in the area to witness his dangerous driving, it is unlikely that he will be deterred from taking the risk.

Adams notes that objective measures of risk are elusive.<sup>28</sup> He argues that because of the phenomenon of "risk compensation", laws may be ineffective in promoting road safety.<sup>29</sup> One example he provides is that of the seat-belt law introduced in England in 1983. He doubts the actual effectiveness of the law in preventing road deaths, arguing that although seat-belts may be effective in saving lives in the event of a collision, the very existence of the law may have contributed to drivers taking more risks so that they are now more likely to have a collision. He argues that the added sense of security provided by belts encourages more heedless driving, so that although the driver himself may be safer in the event of a collision, other road users, particularly pedestrians, are put at greater

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<sup>26</sup> Ibid, p.1544.

<sup>27</sup> TRL Report, n.1 above, p.33.

<sup>28</sup> Adams, J., *Risk*, London: UCL Press, 1995.

<sup>29</sup> Adams' view can be contrasted with that of Foreman-Peck, who notes that a "rational theory of accidents" has been argued to underlie driving behaviour, and that the rational driver chooses his speed and collision chances according to his valuation of the costs he incurs in the event of a collision, his assessment of the likelihood of a collision, and other costs and benefits of speed. This is similar to Adam's 'risk compensation' theory but, unlike Adams, Foreman-Peck argues that the justification for the regulation of driving stems from systematic errors in such assessments made by drivers: Foreman-Peck, J., "Death on the Roads: Changing National Responses to Motor Accidents" in Barker, T. (ed.), *The Economic and Social Effects of the Spread of Motor Vehicles*, London: Macmillan, 1987, p.268.

risk.<sup>30</sup> Risk compensation also operates in relation to engineering improvements introduced to improve the safety of roads and vehicles. If drivers feel that the environment in which they are driving is safer, this produces a behavioural response in the driver who himself creates more risks in his driving.<sup>31</sup> The lesson here seems to be that drivers will always accept a certain degree of risk that their driving will cause a collision. Perhaps it would be beneficial, therefore, to focus their minds on the risk of being apprehended for their bad driving. This would require a higher level of enforcement to deter drivers from offending.

To summarise, motorists can only be deterred from driving dangerously, not from causing death, since they have no control over the outcome of their actions. As far as individual deterrence is concerned, most drivers convicted of CDDD will be deterred from continuing to drive dangerously, not so much by the penalty they receive, but by the very fact that they have caused the death of another human being.<sup>32</sup> Those that in the past have driven dangerously under the illusion that “accidents” only happen to other people will have learnt the reason for the existence of endangerment offences and will have been educated through their own experience what the outcome of risk-taking may be. Compare this to drivers who drive dangerously but, fortunately, for whatever reason, manage to avoid having a collision. Some such drivers may be deterred from taking further risks because the “close-call” has shaken them up. However, many drivers will have their behaviour reinforced every time they take risks without incurring harmful consequences.

Returning to the ways in which punishment can reduce offending, a second way in which punishment aims to bring about a change in behaviour is through incapacitation. The difficulty with this utilitarian justification for punishment is that the effects only last as long as the sentence. Unlike deterrence, or rehabilitation, which aim to alter permanently an offender’s behaviour,

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<sup>30</sup> Adams, n.28 above, p.121.

<sup>31</sup> Ibid, p.141.

<sup>32</sup> This was a point made in the TRL report, above, n.1, at p.96. Research into the deterrence of joyriding (which often involves dangerous driving) in Australia indicates that young people see the possible death of either an innocent bystander or a friend as being a more important deterrent to joyriding than the possibility of being sent to a detention centre: see McDonagh, E., Wortley, R., and Homel, R., “Perceptions of Physical, Psychological, Social and Legal Deterrents to Joyriding”, (2002) *Crime Prevention and Community Safety: An International Journal* 4(1), 11–25.

incapacitation can only aim for a temporary change. Disqualification is one way of incapacitating bad drivers. However, unfortunately it is not always an effective penalty because some drivers continue to drive even though disqualified. Corbett and Simon carried out a survey in which 27% of respondents disqualified from driving admitted that they had driven whilst disqualified.<sup>33</sup> Imprisonment also provides a way of incapacitating offenders. It would be difficult, however, to justify the imprisonment of bad drivers on the basis of incapacitation alone. Disqualification (with perhaps greater enforcement against disqualified driving) and perhaps the obligatory surrender of an offender's vehicle would achieve incapacitation without violating the frugality principle.<sup>34</sup>

A third utilitarian justification for punishment is rehabilitation. This is often rejected as a valid justification on the basis that efforts to rehabilitate criminals have failed. However, in relation to bad drivers the prospects for successfully improving a driver's behaviour are greater. The North Review recognised that this is an aim that before 1988 had rarely figured in the punishment of motoring offenders.<sup>35</sup> It attempted to rectify this position by recommending the introduction of some remedial measures. Offenders convicted of CDDD, (motor) manslaughter or dangerous driving, are now ordered to take an extended re-test after disqualification. Those guilty of drink-driving may also be subjected to the High Risk Offender Scheme, which requires that certain types of drink-drivers must undergo a satisfactory medical examination before their licences are reinstated.

Although one of the aims of this might be to help rehabilitate offenders, other non-obligatory methods seem to be more effective in reforming motorists. Drink-driver rehabilitation courses are available in some areas of England and Wales and have experienced a degree of success.<sup>36</sup> The National Driver Improvement

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<sup>33</sup> Corbett, C., and Simon, F., "Unlawful Driving Behaviour: A Criminological Perspective", TRL Contractor Report 301, Transport Research Laboratory, 1992, p.50.

<sup>34</sup> The frugality principle can be attributed to Bentham, who argued that since punishment is undesirable for its own sake, it can be justified only by necessity and should be no greater than is required to achieve its goal. See Bentham, J., "The Principles of Penal Law", reproduced in part in von Hirsch, A., and Ashworth, A. (eds), *Principled Sentencing*, Oxford: Hart, 2<sup>nd</sup> ed., 1998.

<sup>35</sup> Department of Transport and Home Office, *Road Traffic Law Review Report* (North Report), London: HMSO, 1988, para. 10.9.

<sup>36</sup> Davies, G.P., Broughton, J., Clayton, A., and Tunbridge, R., *The High Risk Offender Scheme for Drink-drivers*, TRL Report 394, Transport Research Laboratory 1999, p.19.

Scheme (NDIS) was also founded after recommendations made by the North Report. The NDIS is used as an alternative to prosecution in cases of careless driving not involving serious injury where the offender accepts the offer. This involves both classroom discussions on the causes of collisions and practical driving exercises, the aim of which is to highlight and eliminate any dangerous or inappropriate elements of driving style.<sup>37</sup> Such schemes,<sup>38</sup> as an alternative to prosecution, may be successful in preventing further offences without employing the criminal law itself, other than as a trigger to identify suitable candidates for the scheme. As such, it implies that utilitarian aims of the law take priority over retribution in relation to careless driving.

### **Retributivist Justifications**

Having examined how the utilitarian goals of punishment can apply to traffic offences, the discussion now turns to consider retribution as a justification for punishment. The meaning of retribution has perhaps altered over time. Schulhofer distinguishes retribution from retaliation or vengeance.<sup>39</sup> Retribution can be seen as a theory of punishment based on moral blameworthiness, according to which offenders should be punished proportionately to their offence. The difficulty is in determining what factors ought to influence an offender's moral blameworthiness. More precisely, there is disagreement over whether the result of an offender's actions affects his moral blameworthiness, or whether his moral blameworthiness depends solely on his state of mind. This question is central to the issue of whether an offence of CDDD is justified in punishing more severely a dangerous driver who has caused death than one who has not. Schulhofer argues that the culpability of an offender guilty of negligence must stem from his having taken a forbidden risk, and any result of his risk-taking should not affect his penalty.<sup>40</sup>

The modern form of the retributivist account of punishment is just deserts theory, pioneered by von Hirsch. Unlike Schulhofer, von Hirsch attaches considerable importance to the occurrence of harm in determining criminal

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<sup>37</sup> Burgess, C., and Webley, P., "Evaluating the Effectiveness of the United Kingdom's National Driver Improvement Scheme", unpublished article available at: <http://www.ex.ac.uk/~cnwburge/pages/ndis03.html> December 2000.

<sup>38</sup> It seems that a similar scheme is set to be introduced for speeding offenders: *Leicester Mercury*, 17.3.04.

<sup>39</sup> Schulhofer, n.18 above.

<sup>40</sup> *Ibid*, p.1517.

liability. Von Hirsch and Jareborg have developed what they have called a “Living-Standard Analysis” to aid the assessment of how much punishment someone deserves for their offence.<sup>41</sup> This is an attempt to develop criteria for judging the seriousness of an offence. They argue that seriousness of crime has two dimensions: harm and culpability,<sup>42</sup> and of these it is the former which is addressed by the Living-Standard Analysis. It grades different harms in seriousness according to the level at which it affects the victim’s living-standard, with the most serious level of harm threatening subsistence.<sup>43</sup> Applying this to the offences of careless and dangerous driving, it can be seen that this highest level of living-standard may be threatened by conduct prohibited by the offences, since they are designed to reduce injuries and fatalities on the road. In the case of CDDD it is clear that subsistence is destroyed and therefore the conduct has the highest harm-rating.

Since both dangerous driving and CDDD affect the same level of living-standard, it might be thought that offenders deserve the same amount of punishment for each offence. However, once the harm-rating has been established, that rating must be applied to a harm-scale which further assists in the assessment of desert. At this stage in the analysis the authors argue that discounts need to be made for risked or threatened harm.<sup>44</sup> Thus whilst CDDD would remain at the top end of the harm-scale, dangerous driving would fall in a lower harm category because the risk of death is fairly remote.<sup>45</sup>

There is no explanation as to why a discount should be given in cases where the harm is only risked and not caused. The authors set out to develop criteria for determining desert that “are more illuminating than simple intuition”.<sup>46</sup> It is clear that killing someone by driving dangerously is more harmful than merely creating a risk of killing by driving dangerously. Apart from anything else, in the former case an individual becomes the victim of the dangerous driving, whereas in the latter case no victims, apart from other road users and society generally, are

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<sup>41</sup> von Hirsch, A., and Jareborg, N. “Gauging Criminal Harm: A Living-Standard Analysis”(1991) 11 OJLS 1.

<sup>42</sup> Ibid, at p.2.

<sup>43</sup> Ibid, at p.17.

<sup>44</sup> Ibid, at p.30.

<sup>45</sup> Ibid. The authors use the example of drink-driving rather than dangerous driving.

<sup>46</sup> Ibid, p.3.

directly affected. But this does not explain why a driver who kills deserves more punishment than one who does not. This is because whether or not a driver kills depends on chance.

When Lord Hailsham,<sup>47</sup> and later Sir Brian MacKenna,<sup>48</sup> described CDDD as “illogical” it was because of the central role that luck plays in the offence. As noted by Willett in relation to non-fatal traffic offences: “it is often a matter of chance whether the damage done is great or not. It is ... frequently the skill of other drivers or the alertness of the police that prevents more serious consequences.”<sup>49</sup> Added to this are the improvements in medical care and technology, which mean that collisions which in the past could have been fatal no longer lead to death if the victim is fortunate enough to receive the necessary care.<sup>50</sup>

There is a substantial literature on the subject of how luck should influence criminal liability. On the one hand, Ashworth argues that the role of the criminal law is to express censure and that the law “should censure people for wrongs, not misfortunes”.<sup>51</sup> It can be argued that the wrong in the offence of CDDD is driving dangerously and that the misfortune is to have caused death. Thus if we are to punish according to the wrong of the offender what is important is the degree to which he was at fault. In this instance fault can be measured by the degree of risk taken by the offender, and Ashworth argues we should take into account the magnitude of the harm risked (in this case death) and the probability of its occurrence. One can argue that at one end of the scale if drivers drive according to the Highway Code the risk of death is minimized as far as possible, whereas if they drive dangerously death is far more likely. If the harm of death does occur this may provide evidence which assists in assessing the level of probability, but Ashworth argues that resulting harm does not alter the intrinsic seriousness of the

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<sup>47</sup> Lord Hailsham, *Hansard*, H.L., Vol.191, col. 83.

<sup>48</sup> MacKenna, B., “Causing Death by Reckless or Dangerous Driving: a Suggestion” [1970] CrimLR 67.

<sup>49</sup> Willett, T.C., *Drivers After Sentence*, London: Heinemann, 1973, p.71.

<sup>50</sup> For a discussion of factors influencing fatality rates see: Noland, R.B., and Quddus, M.A., “Improvements in medical care and technology reductions in traffic related fatalities in Great Britain”, (2004) 36(1) Accident Analysis and Prevention 103–113.

<sup>51</sup> Ashworth, A., “Taking the Consequences” in Shute, S., Gardner, J., and Horder, J., *Action and Value in the Criminal Law*, Oxford: Clarendon Press, 1993, p.120.

risk-taking.<sup>52</sup> Similarly, Schulhofer argues that to allow fate to affect the moral quality of an act in retributive terms is perverse.<sup>53</sup>

On the other hand, there are those who argue that any harm caused by a defendant who has broken the law should be attributed to him in allocating responsibility. Horder argues that defendants who direct their efforts towards harming someone should be liable for the harm caused, even where that harm is greater than the harm intended or foreseen, because they “deserve” their bad luck.<sup>54</sup> Their luck is not “pure”. It is unclear whether Horder would also apply this argument to CDDD, since this is not a crime which depends on D directing his efforts towards harming someone. He might argue, however, that D has nonetheless changed his normative position by engaging in the criminal activity of dangerous driving and so can similarly be said to have “made his own luck”. Horder’s alternative view might be that although the death in CDDD is “pure” (bad) luck there is still the possibility that D can be held responsible for it, since the purity of the luck is tainted by the foreseeable outcome of death.<sup>55</sup>

However, Horder recognizes that the question of the “moral distance” between the harm done, and the harm that was foreseen or foreseeable, should be central to the justification for the nature of criminal liability.<sup>56</sup> Thus, where the moral distance between the foreseen or foreseeable form of harm and the harm actually done is great, conviction for an offence reflecting the harm done is not justified. The example he gives is of the harm foreseen or foreseeable being actual bodily harm but the harm actually done being killing. Here he suggests that manslaughter would not be justified.<sup>57</sup> The same argument could be applied to cases of CDDD. For dangerous driving to be proven there must be a risk of injury to any person or damage to property; serious injury or death need not be foreseen or foreseeable. It can be argued, in accordance with Horder’s views, that where D engages in violent conduct, luck legitimately plays a role in extending D’s liability to cover

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<sup>52</sup> Ibid, at p.123. It is here that Ashworth’s view parts company with that of von Hirsch and Jareborg’s Living-Standard Analysis.

<sup>53</sup> Schulhofer, n.18 above, at p.1516.

<sup>54</sup> Horder, J., “A Critique of the Correspondence Principle” [1995] CrimLR 759.

<sup>55</sup> Ibid, at p.764. He suggests that this is a justification for punishment of manslaughter by gross negligence.

<sup>56</sup> Ibid, at p.769.

<sup>57</sup> Ibid.

harm of the same form but more serious than that which was foreseen or foreseeable. Here luck goes the last mile in a journey of violence upon which D has embarked (e.g. in cases of constructive manslaughter). However, in relation to CDDD, luck has to make the whole journey on its own. There is no *mens rea* requirement in relation to physical harm falling short of death, and so there is no starting point from which liability can be extended.

Some might argue, though, that contrary to the above discussion, drivers who drive dangerously should suffer the consequences of their actions because they have altered their normative position by engaging in criminal activity. However, if offenders “make their own luck” and should therefore suffer their bad luck by being convicted of a result crime, does this also mean that they should benefit from their good luck? Take the example of a driver who overtakes another vehicle whilst approaching a blind bend, such that he is unable to determine whether there are any vehicles approaching from the opposite direction and thus whether he is able to carry out the manoeuvre safely or not. If he is unable to do so and collides with another vehicle, killing its occupants, it can be argued that it was not luck that caused the deaths but the dangerous manoeuvre of the offender. This is reasonable, but the theory must work both ways. If the offender does not kill because luckily the road was clear, or because although he causes a collision, luckily the airbags in the other car prevent fatal injuries being inflicted, how can we say that he has made his good luck? Should he not be punished to the same extent as the “unlucky” driver?

Honoré agrees that “[a]ny principle which can justify responsibility for bad luck must be fair. If it is to be fair, it must entail that when we bear the risk of bad luck we also benefit if our luck is good. Allocation according to luck must cut both ways.”<sup>58</sup> However, he argues that the law can be seen to be fair because it uses the lottery of life to allocate responsibility, and over the course of a lifetime we stand to win more than we lose. It is unclear why Honoré should submit that we are likely to win more often than we lose. What is more problematic, however, is the theory’s failure to apply any of the justifications for punishment thus far mentioned. Honoré argues that in everyday life we credit or discredit actors according to the result of their actions, and not according to what they deserve in terms of the effort they have made. But he claims that what justifies the allocation of responsibility under his theory is that although an actor cannot be sure in

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<sup>58</sup> Honoré, A.M., “Responsibility and Luck” (1988) 104 LQR 530 at 539.



advance what the outcome of his action will be, he has chosen to act in the knowledge that he will be credited or debited with whatever the outcome turns out to be.<sup>59</sup>

It might be argued that dangerous drivers who do not kill should benefit from their good luck by receiving less punishment than dangerous drivers who, through bad luck, cause death. Again, though, the argument for different levels of liability depending on the occurrence or otherwise of harm seems to be based on nothing more than intuition. If an offender changes his normative position at the point when he takes an unjustified risk in his driving, it is at this point that his liability should be established. After this point he has no control over whether his luck turns out to be “good” or “bad”; he cannot control the outcome of his risk-taking and therefore cannot “make” his luck either good or bad.<sup>60</sup> Liability should be established at the point when luck becomes the determining factor in causing or avoiding harm, meaning that the punishment for a dangerous driver who kills and one who does not should be the same. To explain the allocation of responsibility on the basis of a lottery,<sup>61</sup> as does Honoré, is implicitly to encourage risk-taking, particularly among gamblers.

If we are to punish offenders according to just deserts, surely they only deserve punishment for that over which they have control? This brings us back to the question of what modern desert theorists see as being the benefit of punishment. The advantage of one desert-based conception of punishment is that it relies on the emphasis of the communicative features of punishment.<sup>62</sup> Although desert theorists reject utilitarian justifications for punishment, they also recognise that if

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<sup>59</sup> Ibid, at p.545.

<sup>60</sup> Arguably this problem is ubiquitous to all crimes in that once D has done what is required to act, he has no further control over the outcome of his actions (e.g. the victim may move out of the way of a missile thrown by D). However, as noted above, unlike other offences based on constructive liability, in cases of CDDD, D’s efforts are not directed towards harming the victim in any way.

<sup>61</sup> This approach appears to be rejected by some working in other areas of the criminal law dealing with risk-taking, such as the regulation work undertaken by the Health and Safety Executive. Hawkins reports that although some inspectors put forward the view that much rule-breaking is not deemed serious enough to warrant prosecution unless an accident has occurred, others assessed the gravity of a breach on the basis of its potential, rather than actual, consequences: Hawkins, K., *Law as Last Resort*, Oxford: Oxford University Press, 2002, pp.342, 362 and 365.

<sup>62</sup> von Hirsch, A., “Proportionate Sentences: A Desert Perspective” in von Hirsch and Ashworth, n.34 above, p.169.

punishment had no usefulness in preventing crime there would be no need for it, since society would devise other methods of expressing censure.<sup>63</sup> It is arguably this which is central to the reason behind the punishment of bad driving. In punishing a driver who has taken risks (whether advertently or inadvertently) the law is not just trying to deter future offending by the offender or by others through the threat of imprisonment, disqualification or fines; it is expressing censure. When the law expresses censure it does so in the hope of modifying future conduct.<sup>64</sup> Duff claims that the aim is not merely to bring about a change in attitudes and conduct, but to persuade an offender to modify his future conduct by encouraging him to recognise that the conduct which is criminalized is wrongful.<sup>65</sup> In doing so, the law also sends the message to others that such conduct is wrong. There remain, however, some obstacles to achieving these goals.

### **The Problem: Perceiving Traffic Offences as “True Crime”**

The previous section explored some of the possible reasons for criminalizing and punishing bad driving, although no conclusion as such was reached as to whether a utilitarian or retributive stance should be taken. Some have argued, however, that it is not a question of a choice between the two, and indeed that punishment must be justified both on grounds of retribution and crime reduction by taking a “dualist” approach.<sup>66</sup> Furthermore, the two justifying factors, “harm-reducing” and “culpability-retributing”, need not be integrated, but can be pursued simultaneously.<sup>67</sup> The difficulty is that unless drivers recognise that the law is justified in punishing those who drive badly, the law will fail in its aim and any censure it attempts to express will fall upon deaf ears. Attitudes towards traffic offences are often that they are not “true” crimes and that any punishment awarded as a result of offending behaviour is unwarranted. The exception to this general problem, though, comes in relation to the offence of CDDD where the

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<sup>63</sup> Ibid, p.171.

<sup>64</sup> Duff, R.A., “Desert and Penance” in von Hirsch and Ashworth, n.34 above.

<sup>65</sup> Ibid, p.162.

<sup>66</sup> Wood, D., “Retribution, Crime Reduction and the Justification of Punishment” (2002) 22(2) OJLS 301.

<sup>67</sup> Ibid, p.320.

public seem all too ready to penalise drivers who kill, displaying a divergence of views towards crime which is quite illogical.<sup>68</sup>

There is widespread feeling that motoring offences such as speeding and careless driving are not “real” crimes,<sup>69</sup> but rather “social conventions”.<sup>70</sup> This view is even shared by those involved in enforcing the laws and punishing the offenders, such as traffic police officers and magistrates.<sup>71</sup> This is extremely problematic. If the public and those enforcing offences do not view such offences as being truly criminal, how can the criminal law achieve its objectives in relation to them? As noted by Elliott and Street, official proscription of conduct is not enough on its own for the citizen to regard it as criminal.<sup>72</sup>

The difficulty is that where no harm is caused as a result of bad driving or speeding, people seem reluctant to classify the conduct as criminal, whereas where harm is caused they quite readily identify that a crime has been committed because the harm is evident. On the one hand, CDDD can be seen as an aggravated form of dangerous driving and therefore a traffic offence. On the other hand, because a death has been caused, it can be classified as a homicide offence

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<sup>68</sup> See, for example, two campaigns run by *The Sun* newspaper in 2004. For some time it campaigned against the use of speed cameras, complaining that they victimise drivers and can only be justified if used in accident “black-spots”. On the other hand, it launched its “Campaign for Justice” which argues that tougher sentences are needed for drivers who kill, who should face a single offence of manslaughter, whatever the level of their driving, it seems. See *The Sun*, 16.4.04, page 17 of which launched this campaign, whilst on page 2 there is a complaint about the use of speed cameras which were to replace speed humps. The editors seem blind to the contradiction between their two campaigns. They seem not to categorise speeding as a criminal offence and are of the opinion speeding drivers should not be penalised, whilst at the same time arguing that speeding drivers who kill should face punishment for manslaughter.

<sup>69</sup> See, for example Corbett, C., and Simon, F., “Police and Public Perceptions of the Seriousness of Traffic Offences”, (1991) 31(2) *Brit. J. Criminol.* 153 at 154, and Macmillan, J., *Deviant Drivers*, Westmead: Saxon House, 1975, pp.6–15.

<sup>70</sup> Burgess, C., “Why do people drive the way they do?”, conference paper given at the National Blue Light Users Conference 29.8.02 available on the web at: <http://www.ex.ac.uk/~cnwburge/pages/airso/Birmingham02.htm> February 2003.

<sup>71</sup> Corbett, C., Simon, F., and O’Connell, M., “The Deterrence of High Speed Driving: a Criminological Perspective”, TRL Report 296, Transport Research Laboratory, 1998; Moody, S., and Tombs, J., *Prosecution in the Public Interest*, Edinburgh: Scottish Academic Press, 1982, p.62.

<sup>72</sup> Elliott, D. W., and Street, H., *Road Accidents*, Harmondsworth: Penguin, 1968, p.137.

alongside manslaughter.<sup>73</sup> This hybrid nature of CDDD means that unlike other traffic offences it is more likely to be viewed by members of the public as a “true” crime.

However, this view does not depend upon the label given to an offence, rather it seems to be determined by the fact that physical harm has been caused irrespective of the extent to which the driver departed from a safe standard of driving. Prior to the North Report, Brook carried out a survey of attitudes to road traffic law.<sup>74</sup> He found that when he asked a representative sample of the public to rank eight traffic and non-traffic offences in order of seriousness, injuring a pedestrian whilst driving carelessly was ranked the most serious of the eight offences, while driving after drinking too much was placed second. The non-traffic offences of burglary, vandalising and shoplifting were placed in third, fifth and seventh place respectively. Speeding (driving at 50mph in a 30mph limit) was seen as the least serious of the eight offences, and driving whilst disqualified and driving through a red light were placed fourth and sixth. One reason for this mix of rankings of seriousness amongst traffic offences possibly relates to the extent to which the respondents themselves were likely to have committed each of the offences. Although the respondents may have driven carelessly in the past (with or without realising it), no doubt very few of them had ever caused injury as a result. Similarly, they are unlikely to have committed burglary, criminal damage or to have shoplifted. On the other hand, it has been found that a high percentage of drivers break the speed limit. In a study of drivers carried out by Corbett and Simon 88% admitted exceeding the 30mph speed limit by up to 10mph.<sup>75</sup> As many as 16.8% admitted to driving over 50mph in a 30 mph area.<sup>76</sup>

Corbett and Simon divided drivers into four groups with different opinions as to what types of traffic breaches constitute a “crime”. The first group thought a

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<sup>73</sup> Traffic offences and homicide offences can be seen to be different families of offences. Gardner takes up the idea of families of offences, but he places CDDD outside the family of homicide offences because his criterion of a family is action-based rather than harm-based: Gardner, J., “On the General Part of the Criminal Law” in Duff, A. (ed.), *Philosophy and the Criminal Law*, Cambridge: Cambridge University Press, 1998, pp.247-248.

<sup>74</sup> Brook, L., *Attitudes to Road Traffic Law*, Transport and Road Research Laboratory CR 59, 1987.

<sup>75</sup> Corbett, and Simon, n.33 above, p.15.

<sup>76</sup> Ibid.

breach of any traffic rule was a crime, although no information is given as to how many interviewees fell within this group. The second group thought that breaches with the potential to cause harm were crimes. The third group required harm to have been caused before they categorised an act as a crime. Finally, the fourth group did not perceive any traffic offence as a crime, supporting this view by the fact that any harm caused by such offences is not intended.<sup>77</sup>

Evidently, public opinion with regards to drivers who kill is by no means consistent. Brook's findings are particularly surprising in that often, although it may be true that most members of the public have never injured or killed whilst driving carelessly, they may harbour a feeling of "there but for the grace of God go I". This was the very reason for the creation of a separate offence of CDDD in 1956. However, it should also be recognised that public opinion is constantly changing. There has been little recent research into the public's view of motor manslaughter and CDDD in this country, but in Victoria, Australia, a public attitude survey was conducted in 1991 in order to inform reform of the law in this area.<sup>78</sup> Respondents were given three scenarios and asked whether the appropriate charge in each would be manslaughter or some lesser offence.

The first scenario was of a drunk-driver knocking down and killing a pedestrian on a pedestrian crossing. 89.9% of respondents responded that the appropriate charge was manslaughter. In the second scenario a person who is running late for work overtakes near the crest of a hill, without thinking and ignoring the double white lines, and kills the driver of an oncoming car. In this case 68.1% thought that the driver should be charged with manslaughter, whilst 28.5% thought that a lesser charge would be appropriate. The final scenario was a non-vehicular homicide involving a person who jokingly points a gun at another person without first checking to see if it is loaded. By accident, the gun goes off and the other person is killed. 56.1% of respondents thought that manslaughter should be charged. The Law Reform Commission who commissioned this research used the results to suggest that the community of Victoria was willing to equate very bad driving causing death with manslaughter, casting doubt on the popular argument often used to counter such suggestions. Whether the cultural situation is sufficiently similar in Victoria to that in England and Wales to be able

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<sup>77</sup> Ibid, p.39.

<sup>78</sup> Law Reform Commission of Victoria Report No. 45, *Death Caused by Dangerous Driving*, 1992, Appendix 3.

to use this as evidence of a universal change in public opinion is impossible to say. However, it does suggest that without testing public opinion we cannot presume that it would continue to provide a reason for a separate offence of CDDD. These arguments will be returned to in the next chapter.

How can this divergence in opinions about traffic offences and their acceptance as “true” crime be explained? Wells notes that a similar attitude is displayed towards offences regulating other activities, such as health and safety legislation in the workplace.<sup>79</sup> She explains that “what appears to lie behind the ‘true’ crime/‘quasi’ crime distinction is an unarticulated argument that, if an activity was not traditionally a matter for the criminal law, then it cannot achieve the status of a ‘true’ crime”.<sup>80</sup> Corbett echoes this argument and takes it one step further. Not only is traffic crime a fairly recent invention, its historical background further explains why it has failed to achieve the status of “true” crime. Her argument is that the car began as a luxury and novelty for the rich. When traffic laws were deemed necessary they were introduced with only minimal sanctions because the lawmakers were among the car-owning minority who dealt sympathetically with others amongst their class indulging in new-found driving pleasures.<sup>81</sup> There was, according to Emsley, a pervading attitude that ‘ordinary’ drivers did not commit motoring offences because they were by definition respectable members of society.<sup>82</sup> This attitude was possibly perpetuated by the benefits accrued by the elite in supporting the car-manufacturing industry in this country, and the desire not to discourage the use of cars through harsh penalties for bad driving.<sup>83</sup> Added to this was the fact that most of the victims of motor vehicles were pedestrians and pedal cyclists from the working classes.<sup>84</sup> At that time many collisions were attributed to human error, but this meant error by the victim rather than the driver, whilst other causes were

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<sup>79</sup> Wells, C., *Corporations and Criminal Responsibility*, Oxford: Oxford University Press, 2<sup>nd</sup> ed., 2001.

<sup>80</sup> Ibid, p.7.

<sup>81</sup> Corbett, C., *Car Crime*, Cullompton: Willan Publishing, 2003, p.30.

<sup>82</sup> Emsley, C., “‘Mother, What *Did* Policemen Do When There Weren’t Any Motors?’ The Law, the Police and the Regulation of Motor Traffic in England, 1900–1939” (1993) 36(2) *The Historical Journal* 357 at 369.

<sup>83</sup> Corbett, n.81 above, p.30.

<sup>84</sup> Perkin, H., *The Age of the Automobile*, London: Quartet Books, 1976, p.138.

seen to be bad roads and acts of God.<sup>85</sup> Now that driving is no longer reserved for the elite but is engaged in by the majority of the electorate, most of whom break some of the traffic rules, Corbett argues that there are political reasons for not “criminalizing the majority”.<sup>86</sup>

However, although it seems that there are cultural reasons for playing down the criminality of driving offences in the form of endangerment offences, there seems to be an emergence of a more punitive stance against drivers who do cause harm. Walster found that people attributed more responsibility for an accident as the severity of the consequence increased, and explained this on the basis that people feel threatened by chance happenings over which they have no control and so seek to attribute responsibility to someone in order to protect themselves from acknowledging that the accident could happen to anyone.<sup>87</sup> As discussed in the previous section, whether or not a driver kills when he chooses to engage in risk-taking is a question of chance, but this fact is something which many fail to recognise. It may be that Walster’s “defensive attribution hypothesis” is one reason for this.

Another explanation for this could be the idea of the uniqueness of homicide. Fletcher recognises that homicide is different from other crimes because the focal point of criminal liability is not the act, nor the intent, but the fact of death.<sup>88</sup> Death is the central point from which the question of criminal liability must be determined, and what must be decided is which persons ought to be held accountable for the death. Fletcher notes that in the past, a distinction was drawn between blaming and tainting those who had caused death. Only those who can be fairly blamed for causing death ought to be punished. The difficulty in the modern age is that the law fails to provide for the tainting of those who cause death but cannot be blamed, because scholars, since the late eighteenth century, have seen tainting practices as “relics of a pre-rational past”.<sup>89</sup> Although scholars may see such practices as irrational, those who have suffered the loss of a relative may

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<sup>85</sup> Ibid, p.139.

<sup>86</sup> Corbett, n.81 above, p.33.

<sup>87</sup> Walster, E., “Assignment for Responsibility for an Accident” (1966), 3, 1 Journal of Personality and Social Psychology 73–79 cited in Lloyd-Bostock, S., “The Ordinary Man, and the Psychology of Attributing Causes and Responsibility” (1979) 42 MLR 143 at 155.

<sup>88</sup> Fletcher, *Rethinking Criminal Law*, Boston: Little Brown & Company, 1978, p.341.

<sup>89</sup> Ibid, p.347.

experience an emotional need to have the death recognised through official channels. Now that tainting practices no longer exist to satisfy that need, they begin to look elsewhere, including the criminal justice system, to have their needs met.

The uniqueness of homicide is still recognised by the existence of the coroner's court and the need to hold an inquest. Here too, it seems that victims' relatives fail to have their emotional needs met. Unlike a criminal prosecution, the inquest is an inquisitorial process which seeks to establish the facts surrounding the death and does not seek in any way to apportion blame. The conclusions<sup>90</sup> open to the coroner or coroner's jury in a case of road death are those of accident/misadventure, unlawful killing<sup>91</sup> or an open verdict. In most cases the conclusion will be one of accident or misadventure, which according to Matthews are interchangeable terms, with no distinction between the two being observed in practice.<sup>92</sup> He notes, however, that it is sometimes suggested that: "'accident' connotes something over which there is no human control, or an unintended act, while 'misadventure' indicates some deliberate (but lawful) human act which had unexpectedly taken a turn that leads to death. Thus misadventure, apparently involving the taking of a risk, is seen as morally more blameworthy than accident".<sup>93</sup> Victims' families may well feel a sense of injustice, then, in a case in which they feel that some blame lies with a surviving driver but the coroner's conclusion is one of accident.

Howarth notes that bereaved relatives can be bewildered by the conclusion of the inquest because there is a common expectation that "something" will result from the inquest in the form of an explanation of *social cause* and an assignation of *blame*, as a way of making sense of their loss.<sup>94</sup> Even more incomprehensible is

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<sup>90</sup> The word "verdict" is used by the layman to refer to the answer on the form of inquisition which relates to the "conclusion" of the coroner. "Conclusion" rather than "verdict" is the correct term in the legal sense: Matthews, P., *Jervis on the Office and Duties of Coroners*, London: Sweet and Maxwell, 12<sup>th</sup> ed., 2002, para.13-03.

<sup>91</sup> "Unlawful killing" should be returned as a verdict only in cases where the road death is likely to amount to murder or manslaughter, rather than CDDD or CDCDUI – see text to n.96 below.

<sup>92</sup> Matthews, n.90 above, at para.13-26.

<sup>93</sup> Ibid.

<sup>94</sup> Howarth, G., "Death on the Road: The Role of the English Coroner's Court in the Social Construction of an Accident" in Mitchell, M. (ed), *The Aftermath of Road Accidents*, London: Routledge, 1997, p.151



the fact that the conclusion of unlawful killing is intended to be a purely neutral conclusion as to fact,<sup>95</sup> and does not equate to a finding of guilt. Matthews also submits that a conclusion of unlawful killing is not appropriate in cases of CDDD or CDCDUI, and is confined to the offences of murder, manslaughter and infanticide.<sup>96</sup> In practice, however, this question should rarely be raised, since in a case where CDDD or CDCDUI is charged, the coroner must adjourn the inquest until after the conclusion of criminal proceedings.<sup>97</sup> In most cases the inquest will never be resumed.<sup>98</sup> What might be seen as problematic is that in a case where CDDD or CDCDUI is charged and the defendant pleads guilty, the relatives may miss the opportunity to have their questions about the death answered if the coroner chooses not to resume the inquest.

Thus it is to some extent understandable that relatives of victims, and organisations such as RoadPeace representing such relatives, look to the criminal law to introduce new offences reflecting the fact that death has been caused by bad driving. However, in an age when we no longer engage in tainting practices, it is hardly appropriate for the criminal law to become the vehicle by which relatives' needs are met. It is true that the role of victims in the criminal justice system has become enhanced in recent years with the introduction, for example, of Victim Statements under the Victim's Charter 1996,<sup>99</sup> but for punishment to be justified it must focus on the blameworthiness of the offender, rather than on the expectations of those unfortunate enough to have suffered a loss. It would therefore be unjustified to introduce, as has been suggested, a new offence of causing death by careless driving,<sup>100</sup> since, as stated by Woods: "[t]he overall wrongfulness of the defendant's conduct... must be sufficient to warrant punishment (and not just, say, compensation). For both the retributivist and the dualist, if retributive justice is rejected – if, say, retribution is seen to be little more than revenge, or carrying, if not moral import, little positive import,

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<sup>95</sup> Matthews, n.90 above, para.13-31.

<sup>96</sup> Ibid, para.13-34.

<sup>97</sup> Ibid, para.10-53.

<sup>98</sup> Ibid, para.10-55.

<sup>99</sup> See, for example, Zedner, L., "Victims" in Maguire, M., Morgan, R., and Reiner, R., *The Oxford Handbook of Criminology*, 3<sup>rd</sup> ed., Oxford: Oxford University Press, 2002.

<sup>100</sup> This was contemplated in the TRL report, n.1 above. Although the conclusion was that such an offence should not be introduced, it was suggested that the question should be included in a public consultation exercise.

insufficient to warrant implementation by the state – then criminalization is simply not justified.”<sup>101</sup> It is the need to communicate censure for bad driving which risks injury and death in the hope of reducing such harm which must remain the focus of the criminal law.

## **Achieving the Aims**

If it is agreed that a dualist approach to the criminalization of conduct should be taken,<sup>102</sup> and that punishment must seek both to reduce offending behaviour and satisfy retributivist considerations, then it can be seen that the current law fails in its task at various levels. The first problem is that the law is failing in its primary task of educating the public through censure because traffic offences are not seen as “true” crime. To take von Hirsch’s concept of the preventive function of the criminal sanction, which is that it supplies a prudential reason that supplements the normative reason not to engage in the proscribed conduct,<sup>103</sup> it can be seen that currently drivers have the prudential disincentive not to drive badly, but do not recognise the normative reason, since they do not accept the sanction’s message that bad driving is reprehensible.

In relation to the question of retribution and desert theory, it was argued above that drivers who kill deserve no more punishment than bad drivers who do not. To express this in another way which may be seen as more punitive, bad drivers who do not kill deserve no less punishment than those who do kill. In relation to the question of deterrence, the problem is that under the current law deterrence only works once the harm has been caused and that is too late. Motorists may well be deterred by the current penalties available for dangerous driving, if they believe it likely that their dangerous driving will be detected and prosecuted. However, two obstacles to the achievement of such deterrence present themselves. Firstly, unless death or serious injury results from a piece of bad driving it is unlikely that it will be detected. Secondly, there is some disagreement amongst those involved in the prosecution of cases as to what behaviour amounts to dangerous and careless driving. The implication is that the standard of the “competent and careful driver” is not readily identified, either by the police, lawyers and the courts, or by members of the driving public. If potential offenders are ignorant as to the

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<sup>101</sup> Wood, n.66 above, p.320.

<sup>102</sup> Ibid.

<sup>103</sup> von Hirsch, A., *Censure and Sanctions*, Oxford: Clarendon Press, 1993, p.13.

meaning of the offence, how can they be deterred from committing it? Before considering this issue in more detail it is advisable to discover who it is that commits traffic offences in order to establish who it is that is in need of deterrence.

### *Identifying motoring offenders*

Back in 1964 Willett attempted to divide motoring offenders into two categories: abnormal offenders, who could be seen as deviant in all walks of life, and normal offenders, who were otherwise law-abiding but committed traffic offences because they did not consider them to be crimes.<sup>104</sup> Previously it had been thought that traffic offenders were otherwise law-abiding citizens, and so some found it surprising that about 23% of the offenders in Willett's sample had convictions for non-motoring offences.<sup>105</sup> However, Steer and Carr-Hill questioned this finding, arguing that most motoring offenders were in fact "respectable citizens".<sup>106</sup> They took a different approach in analysing Willett's statistics to show that "normal" motoring offenders commit "driving" offences such as CDDD and drink-driving, whilst "abnormal" motoring offenders commit "dishonest" offences such as driving whilst disqualified or without insurance.<sup>107</sup>

The present empirical study was unable to record the criminal histories of the drivers involved in the cases for data protection reasons,<sup>108</sup> and so is unable to confirm if this is still true today. However, a recent Home Office study provides some insight into the nature of motoring offenders.<sup>109</sup> One of three methodologies used in this study was to analyse the Home Office Offenders Index to compare those convicted of serious traffic offences (drink-driving, driving whilst disqualified and dangerous driving, including CDDD) with other groups of

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<sup>104</sup> Willett, T.C., *Criminal on the Road*, London: Tavistock Publications, 1964.

<sup>105</sup> Ibid, p.299.

<sup>106</sup> Steer, D.J., and Carr-Hill, R.A., "The Motoring Offender – Who is He?" [1967] CrimLR 214.

<sup>107</sup> The focus of this study is on driving, rather than dishonest, offences.

<sup>108</sup> The researcher was prohibited from recording suspects' personal data, including their criminal histories, by agreements with the police allowing access to police files. Arguably there was no need for the police to place such limitations on the information which could be recorded, since these agreements also included an undertaking to ensure suspect anonymity.

<sup>109</sup> Rose, G., *The Criminal Histories of Serious Traffic Offenders*, Home Office Research Study No. 206, 2000.

offenders. It was found that females were involved far less in serious traffic offending than they were in other kinds of offending.<sup>110</sup> As for the age of offenders, disqualified and dangerous drivers fell within a similar age group to mainstream offenders, whilst drink-drivers were significantly older.<sup>111</sup>

The study also examined the nature of multiple convictions and found that 15% of disqualified drivers and dangerous drivers were also convicted of a mainstream offence at the court appearance in question.<sup>112</sup> Previous convictions, most frequently for mainstream offences, were most common in disqualified drivers (78%), least common in drink-drivers (40%), whilst 52% of dangerous drivers had previous convictions.<sup>113</sup> The study also subdivided dangerous drivers into those with previous convictions for car theft and those with other previous convictions. This showed that car theft was an important factor in indicating the relative criminality of dangerous drivers, the implication being that those convicted of dangerous driving may be a mixture of Steer and Carr-Hill's "driving offenders" and "dishonest offenders".<sup>114</sup>

The main conclusion of the report was that traffic police officers play an important role in apprehending mainstream criminals through enforcing traffic offences. More relevant to the current study is the finding that: "[t]he evidence shows that serious traffic offenders cannot be thought of as otherwise law-abiding members of the public."<sup>115</sup> However, it should be noted that the methodology relied on a conviction having been obtained. It may well be that more mainstream offenders who happen to commit driving offences are detected and prosecuted than otherwise law-abiding members of the public who commit driving offences. The attention of the police may be more readily drawn to the driver of a stolen car who, as a result, is likely to drive in a dangerous manner in trying to evade police arrest. This could result in a disproportionate number of mainstream criminals being convicted of serious motoring offences compared to other members of the public who do not figure in the conviction statistics because they are not apprehended.

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<sup>110</sup> Ibid, p.13.

<sup>111</sup> Ibid, p.16.

<sup>112</sup> Ibid, p.29.

<sup>113</sup> Ibid, p.36.

<sup>114</sup> Ibid, p.48.

<sup>115</sup> Ibid, p.68.

Corbett and Simon were aware of the problems of using convictions as the basis of a sample to measure unlawful driving behaviour.<sup>116</sup> They chose to rely on self-report data to measure levels of offending, although this in itself has obvious weaknesses, given that it relies on respondents admitting their involvement in crime. However, this was recognised by the authors, who thought it probable that the respondents underreported their more serious offences.<sup>117</sup> In addition to this, Corbett and Simon's sample was unrepresentative in that those involved in accidents and young drivers were overrepresented. Despite this, the authors argue that the study goes some way towards describing drivers' patterns of behaviour and their reasons for such behaviour.<sup>118</sup> Respondents were asked to admit whether they "sometimes" committed any of twenty-five unlawful actions and were allocated offending scores according to their responses. It was found that:

- Offending score decreased with age, and within each age group males had higher scores than females.
- There was no relationship between offending score and socio-economic status.
- There was a positive correlation between offending score and mileage driven in the last year.
- Respondents with less than 10 years' driving experience had higher offending scores than those with 10 years' or more (this would be largely correlated with the age relationship).
- Drivers living in large cities had higher scores than those living in small towns or villages, but offending score was unrelated to the types of roads (motorways, built-up areas, rural) on which the respondent had done most driving in the last year.
- Offending score was slightly related to the type of vehicle normally driven (motorcyclists were not included in the sample). Those who drove sports cars had the highest scores, whilst those who drove small saloons had the lowest.<sup>119</sup>

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<sup>116</sup> Corbett and Simon, n.33 above, p.2.

<sup>117</sup> Ibid, p.12.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid, p.19.

## *Deterring and Educating Motoring Offenders*

Given that it is probably true that many serious traffic offenders are otherwise law-abiding people, it would seem that perhaps one of the best ways in which to improve compliance with the law would be to encourage a change in attitude towards motoring offences in order to bring them within the realm of “real” crimes. This was something advocated by both Willett<sup>120</sup> and Macmillan,<sup>121</sup> and it is true that since these authors’ publications a huge shift has occurred in public attitudes towards the offence of drink-driving. Little change has occurred in attitudes towards other offences such as careless driving and speeding, however. A change may be forthcoming in relation to speeding, encouraged by greater enforcement and advertising campaigns. This is important, given that prosecutions for CDDD quite often rely on evidence of excess speed to support the charge.<sup>122</sup> Research carried out by criminologists and psychologists may be useful in discovering why offences such as speeding are committed and thus provide some suggestions as to how the law could be amended to encourage drivers to desist from such behaviour.

Corbett and Simon found that the main reason for the commission of traffic offences was that offenders weighed up considerations of safety in the immediate circumstances and decided for themselves whether or not to engage in an unlawful manoeuvre, rather than letting the law decide.<sup>123</sup> The motivation for committing offences differed slightly between low-level offenders and high-level offenders. Low-level offenders were more likely to say that their offending was inadvertent, whilst high-level offenders gave reasons of convenience or laziness to explain their offending. Young men were more likely to say that they broke the rules for fun.<sup>124</sup> What Corbett and Simon’s study seems to confirm, however, is that those who abide by the rules of the road do so because to break the rules is wrong and might lead to an accident, whilst those who choose to break the rules do so in the belief that they are in control and discount the risk of having an accident. Corbett, Simon and O’Connell have confirmed this in a follow-up study

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<sup>120</sup> Willett, n.49 above.

<sup>121</sup> Macmillan, n.69 above.

<sup>122</sup> See Chapter 5 above.

<sup>123</sup> Corbett and Simon, n.33 above, p.75.

<sup>124</sup> Ibid.

of high-speed drivers.<sup>125</sup> They found that as long as a speeding driver feels in control he feels that his accident risk is no higher than if he were driving within the limit.<sup>126</sup> The key to the problem of inducing attitude change among drivers, they conclude, is the perception of control.<sup>127</sup> McKenna has found that the reason why people underestimate their personal probability of encountering negative events, such as traffic collisions, is due to the illusion of control,<sup>128</sup> supporting Corbett *et al.*'s conclusion.

Corbett and Simon's finding<sup>129</sup> that drivers tend to have their own personal code of driving standards quite separate from the rules imposed on them by statute and the Highway Code casts doubt on the possible effectiveness of the current test for the offences of dangerous and careless driving which require an offender's driving to be measured against that of the "competent and careful" or "ordinary and prudent" driver. If the ordinary driver drives according to his own code which is individual to him, can such a test succeed? This was certainly brought into question by the recent TRL study, which suggested that although the current test is an objective one, applying it in accordance with the Charging Standard involves subjective judgement, since respondents did not agree on the level of inattention indicated by different activities carried out whilst driving.<sup>130</sup> Manstead *et al.* found that those who commit traffic violations overestimated the number of other drivers who also committed such violations, whilst those that did not commit such violations underestimated how many others did commit such violations.<sup>131</sup> If the competent and careful driver is interpreted to mean the ordinary or average driver this raises problems, since the average driver may not be particularly careful, and

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<sup>125</sup> Corbett, Simon and O'Connell, n.71 above.

<sup>126</sup> Ibid, p.48.

<sup>127</sup> Ibid.

<sup>128</sup> McKenna, F.P., "It Won't Happen to Me: Unrealistic Optimism or Illusion of Control?" (1993) 84 *British Journal of Psychology*, 39–50.

<sup>129</sup> This finding was not in fact new. Dix and Layzell found a similar explanation for offending behaviour: Dix, M.C., and Layzell, A.D., *Road Users and the Police*, London: Croom Helm, 1983, p.29.

<sup>130</sup> TRL Report, n.1 above, p.35.

<sup>131</sup> Manstead, A., Parker, D., Stradling, S., Reason, J., and Baxter, J., "Perceived Consensus in Estimates of the Prevalence of Driving Errors and Violations", (1992) 22(7) *Journal of Applied Social Psychology* 509.

how careful he is will depend on the attitude of the individual making the judgement.

Another potential hindrance to the successful application of the current test is that most drivers view themselves as being of above average capability.<sup>132</sup> Reason *et al.* report that those who believe themselves to be better drivers commit more violations than those who self-appraise more modestly.<sup>133</sup> They conclude that: “Drivers who violate may see themselves as skilful enough to take risks (or, perhaps, to behave in ways which would be risky only for ‘less skilful’ drivers). Alternatively, drivers who violate may come to think of themselves as good drivers because they get away with what they do.”<sup>134</sup> So if drivers have a tendency to view themselves as expert drivers, whose skilfulness is above that of the “competent and careful” or average driver, they are likely to commit the offence of dangerous or careless driving without acknowledging that they do so, because they do not see the offence as applicable to themselves. This ties in with Corbett’s findings that drivers develop their own code of practice outside the law. These offenders may be difficult to deter by means of educative deterrence because they set themselves apart from the rest of the motoring public. Although they might recognise that most drivers should abide by the rules of the road in order to limit the number of collisions caused, they see themselves as justified in flouting traffic law because their greater skill will ensure that they are able to avoid collisions.<sup>135</sup>

Such mindsets can be likened to drink-drivers who have been difficult to deter from such driving in the past. Although it is now the case that drink-driving is one of the few traffic offences which is viewed as a “true” crime, the change in public attitudes to the offence was gradual. Writing in 1985, Riley argued that those who were not deterred from drink-driving needed educating on the effects of alcohol in

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<sup>132</sup> Svenson, O., “Are We All Less Risky and More Skilful Than Our Fellow Drivers?”, (1981) 47 *Acta Psychologica* 143–148. See also Willett (1973, n.49 above) at p.42.

<sup>133</sup> Reason, J., Manstead, A., Stradling, S., Baxter, J., and Campbell, K., “Errors and violations on the roads: a real distinction?”, (1990) 33(10/11) *Ergonomics* 1315–1332 at 1325.

<sup>134</sup> *Ibid*, p.1330.

<sup>135</sup> Corbett *et al.*’s study found that high-speed offenders who had in the past been involved in collisions blamed the other party involved. Their responses were often contradictory and they failed to recognise that stopping times are reduced at higher speeds, no matter how much attention drivers pay to their driving in compensation for driving at higher speeds. Corbett, Simon and O’Connell, n.71 above.



order to improve their compliance with the law.<sup>136</sup> He found that a large proportion of those who chose to drink and drive did so because they were ignorant about how much alcohol would take them over the legal limit. This was aggravated by drinkers deciding for themselves whether they felt capable of driving or not, unaware that alcohol in fact promotes feelings of self-confidence and therefore ability to drive. Almost twenty years later, however, it is commonly recognised that drink-driving is not only a criminal offence, but that it is totally unacceptable behaviour. The question is, what can we learn about attitudes to drink-driving that could be used to encourage attitude change in relation to other dangerous driving behaviour?

When drink-driving was first introduced as an offence it was common occurrence that drivers would drive after drinking, and it was not seen as “wrong”. Bottoms uses drink-driving as an example of the law being capable of moulding morality.<sup>137</sup> Whilst most crimes involve acts which are considered to be impermissible by society, some prohibitions “may on occasion not reflect positive morality at all, but rather may be imposed by those in power in the hope of securing obedience through deterrent calculation”.<sup>138</sup> He continues that sometimes “the fact of the prohibition, and citizens’ evolving response to it, can influence the development of a new strand of positive morality. Something very like this seems to have occurred in relation to drinking and driving: in Britain there is now substantially greater moral disapproval of such behaviour than was the case thirty or so years ago when it was first made a criminal offence.”<sup>139</sup>

Bottoms provides a schema of mechanisms underpinning legally compliant behaviour. He identifies four main forms of compliance: instrumental or prudential compliance, constraint-based compliance, normative compliance and compliance based on habit or routine. Of these four mechanisms, he sees normative compliance as pivotal. The suggestion here is that normative compliance is probably the most effective way of reducing the number of traffic offenders, since, as argued above, what is needed is a change in attitude towards

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<sup>136</sup> Riley, D., “Drinking Drivers: The Limits to Deterrence”, (1985) 24(4) *The Howard Journal* 241–256.

<sup>137</sup> Bottoms, A., “Morality, Crime, Compliance and Public Policy” in Bottoms, A., and Tonry, M. (eds), *Ideology, Crime and Criminal Justice*, Cullompton: Willan Publishing, 2002.

<sup>138</sup> *Ibid*, p.25.

<sup>139</sup> *Ibid*.

the law. It is thus useful to examine more closely how normative compliance can be promoted.

Bottoms identifies three subtypes of normative compliance. Firstly, normative compliance will be achieved through acceptance of or belief in a social norm. The examples he gives are the norms against assaulting others or taking their property without their consent. In relation to traffic offences it can be argued that the relevant norm is the norm against endangering the lives of others.<sup>140</sup> Although such a norm is probably accepted by members of the public, the problem is that they do not necessarily associate what they see to be fairly minor traffic offences with the endangerment of others. As identified by Riley,<sup>141</sup> education of the public was necessary before many drivers accepted that drink-driving was indeed dangerous. Bottom's second subtype of normative compliance is what he terms "attachment leading to compliance". This involves the offender forming a relationship to a particular person, group or institution which hold non-criminal values. This is perhaps something over which the authorities have no control, the difficulty being that young drivers perceive less pressure from their peers to avoid committing driving violations than do older drivers.<sup>142</sup> The third subtype is legitimacy. This relies on the potential offender recognising the power of the authority imposing the prohibition. This might be one of the indicators of the reason behind the non-compliance with traffic offences. Although the offences are created through statute, as for other criminal offences, the way they are enforced may differ throughout the country.<sup>143</sup> In particular, in relation to speed limits, it is the local authorities who determine what the speed limit on a particular stretch of road should be. Under-enforcement of speed limits arguably brings traffic regulations and laws into disrepute.<sup>144</sup> A further problem is that if those enforcing speed limits fail to abide by them,<sup>145</sup> this will also undermine the legitimacy of the offence.

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<sup>140</sup> It is important that others' lives are endangered. Drivers may feel entitled as a question of autonomy to take risks if it is only their own life they see as being endangered.

<sup>141</sup> n.136 above.

<sup>142</sup> Parker, D., Manstead, A., Stradling, S., and Reason, J., "Determinants of Intention to Commit Driving Violations", (1992) 24(2) *Accid. Anal. and Prev.* 117–131.

<sup>143</sup> Dix and Layzell, n.129 above.

<sup>144</sup> *Ibid.* at p.17.

<sup>145</sup> See n.71 above.

In conclusion, a change in public attitude towards traffic offences is needed in order to achieve normative compliance with the law. A combination of normative compliance and instrumental compliance will be most effective, the latter taking place in the form of deterrents such as imprisonment, penalty points, disqualification and fines. In order to improve normative compliance, however, the public need to be better educated about the dangers in driving in certain ways and about the law itself.<sup>146</sup> Compliance can be encouraged by emphasising the moral justification of traffic law.<sup>147</sup> The current offences of dangerous and careless driving do little to communicate exactly how a life has been endangered or what behaviour is prohibited, which suggests that these offences require reform. The next chapter will investigate this issue of law reform and the possibility of couching the offences in a different form, perhaps borrowing the terms used by psychologists in their studies of driving behaviour of “lapses”, “errors” and “violations”.

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<sup>146</sup> For details of publicity campaigns which were arguably instrumental in bringing about the change in attitude towards drink-driving see Light, R., *Criminalizing the Drink-Driver*, Aldershot: Dartmouth, 1994, pp.123–5. Dix and Layzell (n.129 above) argued for better education about the average or maximum penalties available for traffic offences. This now occurs through the Highway Code, which now contains a table giving the maximum penalty for various offences.

<sup>147</sup> Burgess, n.70 above.

## Chapter 8 – Law Reform

The previous chapter identified the aims the criminal law is seeking to achieve in criminalising bad driving, and explored some of the obstacles to achieving these aims. The criminal law is not the only or necessarily the primary tool to be used in encouraging safer driving. “Enforcement” is but one of the three “Es” traditionally used to promote road safety.<sup>1</sup> Education must complement the law, and as such it is difficult to establish the effectiveness of the law in achieving its aims, as it cannot be considered in isolation from other measures which may, or may not, contribute to a decline in casualty rates.<sup>2</sup> However, what has been shown is that the current law, in its definition of the bad-driving offences of careless and dangerous driving, fails to communicate to the public what it is that constitutes driving of a criminal nature.

The issue of law reform comprises two broad questions.<sup>3</sup> Firstly, if the law relating to motoring offences generally is to achieve its aims, how should the offences relating to bad driving be defined? When dangerous driving was first introduced as an offence by the Road Transport Act 1930, it was a matter for contention whether the offence could be sufficiently defined,<sup>4</sup> and this problem

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<sup>1</sup> Corbett, C., *Car Crime*, Cullompton: Willan Publishing, 2003, pp.20–24. The three Es are: Engineering, (law) Enforcement and Education.

<sup>2</sup> There have been attempts to try to quantify the contribution different factors make to reducing casualty rates on the roads. Leicestershire County Council estimates that 55% of casualty savings are made through national legislation emanating from central government, 35% are made through accident investigation and prevention, and 10% are made through education, training and publicity: *Road Accidents in Leicestershire: The Casualty Report 1995*, p.3. No explanation, however, is provided as to how these figures were reached.

<sup>3</sup> The focus here is on the substantive law. The issue of enforcement is a separate one, which also needs addressing, although there is not room to do so here. Sentencing is another important issue. The Government has now increased the maximum sentence of CDDD, CDCDUI and aggravated TWOC to fourteen years’ imprisonment (s.285 Criminal Justice Act 2003). It had also recommended increasing the maximum sentence available for dangerous driving from two to five years in its *Report on the Review of Road Traffic Penalties* (2002). However, this recommendation has not been enacted, although if the offence is now tried summarily the maximum sentence will be 51 weeks’ imprisonment rather than six months (s.281 CJA 2003). These changes have widened the gap in sentencing for CDDD and dangerous driving, increasing the impact that the chance occurrence of death has on sentencing, with a difference of twelve years between the two maximum sentences.

<sup>4</sup> Emsley, C., “‘Mother, What *Did* Policemen Do When There Weren’t Any Motors?’ The Law, the Police and the Regulation of Motor Traffic in England, 1900–1939” (1993)

has never been resolved. Secondly, once this has been established, should we maintain an offence of causing death by bad driving, separate from the more general homicide offence of manslaughter? Although these questions could be dealt with independently of one another, the answer to the latter may be partially dependent on the answer to the former, and vice versa. The chapter begins with an analysis of the North Report, upon which the current law is based. Although the proposals put forward in the North Report leading to the enactment of the current law may not have succeeded in achieving their aims, it is useful to revisit the issues with which the North Review grappled, as such issues no doubt remain relevant to any further change in the law. More recent proposals from other bodies, specifically the Law Commission, the Transport Research Laboratory and the Government, will be explored before the discussion turns to the law in other jurisdictions, namely Australia, to see how the issues have been tackled there. Finally, this chapter concludes with a suggestion for future law reform, informed by the current empirical study as well as some of the psychological research discussed in the previous chapter and the discussion of the current chapter.

## **The North Report**

In Chapter 2 of its Report the North Review attempted to identify the benefits of traffic law and to explain why it is seen as separate to the rest of the criminal law. Additionally, some general principles were listed as underlying the work of the Review.<sup>5</sup> However, when the Review came to consider specific issues in its terms of reference, it appears that problems limited to the operation of the current law, rather than these general principles, influenced the proposals made.

### ***Definition of Bad-Driving Offences***

It was concluded that the structure of bad-driving offences should remain the same, namely that there should be two general bad-driving offences of different seriousness. Suggestions rejected by the Review include the idea of having one broad offence of bad driving, leaving it to the discretion of the judge to sentence according to the seriousness of an individual case. This was rejected on the basis that it could lead to more inconsistency in sentencing and for the pragmatic reason

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36(2) The Historical Journal 357, at 377, citing *Hansard*, 10<sup>th</sup> Feb 1930, cols 1282 and 1292.

<sup>5</sup> Department of Transport and Home Office, *Road Traffic Law Review Report* (North Report), London: HMSO, 1988, para. 2.49.

that it would necessitate trial by jury for every case.<sup>6</sup> At the other extreme it was suggested that a detailed list of specific offences, similar to the rules of the Highway Code and laws of some states in the United States, be introduced. It was recognised that such offences might be easier to prove, but the problem as the Review saw it was that such offences would not obviate the need for general bad-driving offences.<sup>7</sup>

The Review also rejected the idea of maintaining a very serious offence, such as reckless driving, which required D's state of mind to be proved, along with a lesser offence, such as careless driving, and introducing a third intermediate offence. This was rejected on the basis that since it is difficult to define boundaries, such boundaries should be kept to a minimum.<sup>8</sup>

Once the Review had decided to maintain the structure of the law with two general bad-driving offences, it faced the task of deciding what those offences should be and how they should be defined. Some suggested that the old offence of dangerous driving, in force prior to the Road Traffic Act 1977, should be reinstated. The Review rejected this on the basis that the old law required the courts merely to look at the nature of the dangerousness of the driving irrespective of whether the conduct of D could be considered blameworthy.<sup>9</sup>

Conversely, the main problem with the offence of reckless driving was identified as being that to prove recklessness it was necessary to establish what had gone through D's mind at the time of the offence and this was often too difficult.<sup>10</sup> This was required by the test for recklessness laid down in the case of *Lawrence*,<sup>11</sup> but although it applied in England and Wales, a different approach was taken in Scotland. Since there was much less dissatisfaction with the law in Scotland the Review used the test in the leading case of *Allen v. Patterson*<sup>12</sup> as a source of inspiration for its proposal. This is where the test of falling "far below

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<sup>6</sup> Ibid, para.4.15–4.16.

<sup>7</sup> Ibid, para.4.19.

<sup>8</sup> Ibid, para.5.4.

<sup>9</sup> Ibid, para.5.3.

<sup>10</sup> Another problem was that defendants could argue in their defence that they fell within the lacuna created by the test of objective recklessness, namely that they had identified a risk but ruled it out: North Report, para.5.8(c).

<sup>11</sup> [1982] AC 510.

<sup>12</sup> [1980] RTR 97.

the standard of driving expected of the competent and careful driver” finds its origins. It was felt that the new offence should include everything covered by reckless driving and also some cases which at that time came within the category of careless driving.<sup>13</sup> It envisaged such examples as driving excessively fast for the prevailing road conditions and driving in an aggressive and intimidatory fashion as being promoted from careless driving to the new offence.<sup>14</sup> However, as was seen in Chapters 5 and 6 above, such cases are not now always prosecuted as dangerous driving, rather than careless driving.

In preferring the definition of bad driving derived from Scottish law the Review rejected proposals previously put forward by other bodies. The Criminal Law Revision Committee’s idea of an offence of “driving in such a way as to show complete disregard for the life and safety of other persons”<sup>15</sup> was rejected on the basis that the test would be too subjective because of the inclusion of the word “disregard”.<sup>16</sup> A proposal which the Review considered contained more merits was that of the Law Commission in its suggestion of an offence of “driving with criminal negligence”,<sup>17</sup> using the definition of “criminal negligence”<sup>18</sup> in its draft Criminal Code. In defining criminal negligence as conduct which “is a very serious deviation from the standard of care to be expected of a reasonable person” the proposal was seen as having the advantages of being a purely objective test, not being linked to any particular circumstances or results and of indicating what conduct falls within the offence in relation to the general standard.<sup>19</sup> However, the proposal was rejected on the basis that, firstly, the requirement of a “serious deviation” might result in some examples of bad driving not being included in the offence and, secondly, it was not clear whether it would include cases involving

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<sup>13</sup> North Report, para.5.15.

<sup>14</sup> Ibid.

<sup>15</sup> Criminal Law Revision Committee, *Fourteenth Report on Offences Against the Person*, Cmnd 7844, 1980, para.146.

<sup>16</sup> North Report, para.5.17.

<sup>17</sup> Law Commission, *Report on the Draft Criminal Code*, Law Com. No. 143, 1985, para.8.24.

<sup>18</sup> Clause 11(b).

<sup>19</sup> North Report, para.5.19.

risk of damage to property as well as to the person and dangers from the state of the vehicle rather than the way in which the vehicle was driven.<sup>20</sup>

Thus the Review's proposal for an offence of "very bad driving" was that the new definition should be objective, asking the question "was the driving really bad?", that it should convey the idea of a serious fall from an accepted norm of behaviour in using the phrase from Scottish law of falling "far below the standard of driving expected of the competent and careful driver", and that it should necessitate consideration of the quality of driving in relation to the particular circumstances in which it occurred, i.e. "how would the competent and careful driver have behaved in these circumstances?"<sup>21</sup> Because the law had operated successfully in Scotland no consideration seems to have been given to the question of who the competent and careful driver is and whether he is recognisable to ordinary members of the driving public. In settling on the definition the Review failed to answer its own criticisms of the other proposals it had considered. If it was concerned that the Law Commission's inclusion of the term "serious deviation" might exclude from the offence such conduct which it thought ought to be included, why did it think that the same problem would not occur with its own suggestion of a requirement that the driving fell "far below" a particular standard? Both proposals imply that there is an agreed, accepted and identifiable standard of driving, but find it difficult to define how far removed from such a standard an offence of very bad driving would have to be. Furthermore, it is questionable that there is an agreed, accepted and identifiable standard of driving. Although all drivers must pass a driving test, which necessitates that they are capable of driving at a certain standard, it is not at all clear that the standard achieved in such a test is that to be equated with the "careful and competent" driver.

In its discussion of the lesser offence of careless driving some limited further consideration was given to the question of the "competent and careful" driver. The Review recognised that it was difficult to define cases which should fall within the definition of "carelessness" at the bottom end of the scale of seriousness, but passed the buck on this issue by advising that ACPO issue guidelines on what is or is not minor carelessness.<sup>22</sup> What it did state, however,

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<sup>20</sup> Ibid, para. 5.20.

<sup>21</sup> Ibid, para. 5.22 (i)-(iii).

<sup>22</sup> Ibid, para.5.35.



was that “even the most competent and careful driver is unlikely to be perfectly vigilant for every moment of every journey however desirable it may be that they should....They may be momentarily distracted or may make occasional errors of judgement. Such occasional lapses need not invariably result in criminal charges even if, unfortunately, they result in an accident.”<sup>23</sup> It will be suggested below that more could be made of such points in the substantive law itself, in order to better convey the requirements of the offence to those who might commit it.

One last point to be made in relation to the Review’s discussion of careless driving is that it identified a problem which still exists today. It was said that the issues relating to the offence are confused by the shorthand term used of “careless driving”.<sup>24</sup> This conveys the message that the offence only requires “carelessness” and that anyone guilty of it was only “careless”. The root of the problem is that members of the public see the use of the word as downgrading the conduct of offenders, through their understanding of the word “carelessness” in everyday language. This was something highlighted by several of the victims’ families in the cases in the current study. The effect of the law could probably be much improved through a change in the way the offence is described by abandoning the shorthand term and, even if a new definition is not introduced, by referring to the offence using its full requirement of “driving without due care and attention”.<sup>25</sup>

### *A separate offence of CDDD?*

As explained in Chapter 2, the offence of CDDD was created because of reluctance on the part of juries to convict of manslaughter motorists who killed whilst driving in a grossly negligent manner. The North Review was unable to establish the degree to which the fear of juries failing to convict of manslaughter was justified in 1988<sup>26</sup> and there remains little evidence on this today. In Victoria research has revealed that this fear may be unfounded,<sup>27</sup> and there have been

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid, para.5.31.

<sup>25</sup> Such a change would clearly not require new legislation but could be achieved through an agreement from ACPO and the CPS that the term “careless driving” would not be used in any documentation or dealings with the public. ACPO has attempted a similar measure in relation to the word “accident”, replacing it with the word “collision”.

<sup>26</sup> North Report, para. 6.13.

<sup>27</sup> Law Reform Commission of Victoria Report No. 45, *Death Caused by Dangerous Driving*, 1992. See p.180 above for a discussion.

suggestions that the same is true in this country.<sup>28</sup> In its consultation exercise the Review received conflicting views on whether a separate offence of CDDD should be retained, with the main issue being whether it is appropriate in law to concentrate on the results of bad driving when such results may be fortuitous.<sup>29</sup>

Surprisingly, one of the first points made by the Review was that if the law was changed to introduce its proposed objective test of very bad driving then, because of the less subjective nature of the test, the case for penalising the causing of death could be seen to be even weaker than it was in relation to CDRD.<sup>30</sup> Despite this, however, it concluded that, based on two main factors, a causing-death offence should be retained. The first factor was that bad driving as a criminal activity would be downgraded by the repeal of such an offence and some cases of very bad driving would not be dealt with with sufficient seriousness.<sup>31</sup> This ignored the point that the existence of the offence could be seen as downgrading cases where there is *no* death or injury.<sup>32</sup> The second was that not all offences require that a result be intended before punishment is justified and that there was strong public acceptance that where death results from a culpable act that consequence should lead to a more serious charge.<sup>33</sup> The Review recognised that it was rejecting the more logical arguments against retention of such an offence in favour of reliance on public expectations of the law, but seemed not to be overly concerned by this.

It is true that there are several areas of the criminal law in which logic is overpowered by practical concerns.<sup>34</sup> However, it was public opinion, rather than deterrence, which appears to have swayed the North Review's finding on this subject. Public opinion was interpreted as requiring drivers who kill to be labelled

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<sup>28</sup> See, for example, Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Report No.237, 1996, para.5.66 and Mitchell, B., "Further Evidence of The Relationship Between Legal and Public Opinion on the Law of Homicide" [2000] CrimLR 814 at 824.

<sup>29</sup> North Report, para.6.4. The arguments relating to what role luck should play in affecting the punishment of conduct are explored in Chapter 7 above.

<sup>30</sup> Ibid, para.6.8.

<sup>31</sup> Ibid, para. 6.9.

<sup>32</sup> As made at para. 6.5.

<sup>33</sup> North Report, para. 6.9.

<sup>34</sup> See, for example, Lord Hutton's speech on the need for practical matters to be considered in questions of accessorial liability in *Powell; English* [1999] 1 AC 1.

in a way which reflects the serious result of bad driving. The principle of fair labelling requires that offences are subdivided and labelled so as to represent fairly the nature and magnitude of law breaking.<sup>35</sup> Many of the arguments put forward to the North Review in support of a causing death offence could now be countered by the fact that manslaughter is an offence available in cases where death is caused as a result of gross negligence on the road.

Some argue that a separate offence of CDDD is required for such purposes. For example, Clarkson<sup>36</sup> argues that drivers who kill should be treated differently to other killers because driving is such a widespread activity that we identify with their actions more than with those of, for example, expert surgeons displaying gross negligence. Their wrong is “situationally relevant”<sup>37</sup> to ourselves. This has echoes of the reasoning behind the introduction of the offence in the first place and the mentality of “there but for the grace of God go I”. Having a method of killing more readily at one’s disposal and realising that one could also cause death if one does not pay attention when driving, however, does not justify retaining a separate offence to cover such eventualities. It merely perpetuates an undesirable attitude towards driving (we would not fear the results of our dangerous driving if we did not drive dangerously). Whilst “accidents will happen”, it is very rare that road traffic collisions cannot be explained by either human error, to a lesser or greater degree, or else a mechanical defect or some other outside influence. This was something reiterated in several of the reports read as part of the empirical study. It is the reason why the police are attempting to do away with the word “accident” in their documentation and replace it with words such as “collision” or “road death incident”.

A further issue to raise in relation to the idea of “situational relevance” is that even if the public can, to some extent, identify with those drivers who cause a collision due to a momentary lapse of attention (which would certainly not lead to liability for CDDD), the same may not be true of identifying with HGV drivers, who having breached the rules on drivers’ hours subsequently fall asleep at the

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<sup>35</sup> Ashworth, A., *Principles of Criminal Law*, Oxford: Oxford University Press, 4<sup>th</sup> ed., 2003, p.90.

<sup>36</sup> Clarkson, C.M.V., “Context and Culpability in Involuntary Manslaughter: Principle or Instinct?” in Ashworth, A., and Mitchell, B., *Rethinking English Homicide Law*, Oxford: Oxford University Press, 2001.

<sup>37</sup> A term first coined by Lloyd-Bostock: Lloyd-Bostock, S., “The Ordinary Man, and the Psychology of Attributing Causes and Responsibility” [1979] 42 MRL 143 at 156.

wheel and plough into the rear of a queue of traffic on the motorway, causing multiple deaths.<sup>38</sup> Can we really draw a line between professionals, such as surgeons, with whom the public are not expected to identify, and professional drivers, who may operate machinery quite alien to members of the public who hold licences to drive cars?

Fletcher<sup>39</sup> suggests that in assessing the acceptability of risk-taking which leads to death the social value of an activity is an important factor in addition to gravity of risk and the actor's awareness of the risk being run. He argues that some risks can be offset by counterbalancing benefits, for example carrying out a dangerous operation to save a life. At present, doctors who perform dangerous surgery and do so with gross negligence, killing their patient, may be liable to be convicted of manslaughter. To contrast this with a driver who drives negligently and causes a fatal collision shows that we do not apply theories consistently, as such drivers are liable to be convicted of CDDD, an offence which carries less stigma than manslaughter. Yet which is the most socially valuable of these two activities? It would be difficult to argue that driving is considerably more socially valuable so as to deserve a separate offence, whereas surgery does not. This is implicit in the fact that dangerous driving in itself is an unlawful activity, whereas negligently performing surgery is no crime at all, unless the doctor causes death with gross negligence. Distinguishing between activities by saying that the average man on the street carries out one (driving) and not the other (surgery, which is only carried out legally in the course of employment) is to make an immaterial differentiation. Such activities of social value which lead to death should be treated consistently and, if it is necessary to make them criminal offences, should all lead to the same level of criminal liability if carried out with the same degree of negligence.

The arguments put forward by contributors to the North Report that if society does feel the need to punish offenders according to the consequences of their act, this is possible through the charge of manslaughter, with no need for a separate causing death offence, were, however, rejected. This was on the basis that if the new definition of very bad driving was introduced there would no longer be a

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<sup>38</sup> The judge in case LEIC049 referred to the special nature of the driving responsibilities of HGV driver in sentencing D, an HGV driver who collided with the rear of a queue of vehicles on a motorway, killing three people.

<sup>39</sup> Fletcher, G., *Rethinking Criminal Law*, Boston: Little Brown & Company, 1978, p.260.

complete overlap between manslaughter and the causing death offence.<sup>40</sup> It was envisaged that where the necessary requirements for manslaughter could be proved it should be charged, but where only “very bad driving” could be proved, CDDD should be charged.<sup>41</sup> Whilst this distinction may have existed for a period between the enactment of the Road Traffic Act 1991 and the case of *Adomako*, the situation has now reverted to an overlap between manslaughter and CDDD, negating any force the Review’s arguments may have had.

Whilst the Review was happy to pander to public demand for a causing death by very bad driving offence, it did not extend this sentiment to gratify a call for a new offence of causing death by careless driving. In this instance logic and justice overcame the argument to reflect the public outrage to death caused by bad driving. It agreed with the suggestion that although a crime based on consequences might be justified where the level of culpability was high (i.e. D drove “very badly”) it would not be justified in cases of carelessness.<sup>42</sup> Similarly, the Review rejected the idea of a new offence based on the causing of injury falling short of death, on the basis that society places special emphasis on the wrong of causing death which justifies retention of a causing death offence, but this does not extend to other injuries.

In its proposals relating to the new offence of CDCDUI the Review again looked to public opinion as the rationalization of its recommendation. The justification for introducing a new offence of causing death by drink-driving was that there was public revulsion that innocent lives could be lost due to drink-driving. It also suggested that “the availability of such a specific offence would be of real value in further marking out the dangers to the community of drinking and driving”.<sup>43</sup> However, the argument is not convincing. People are all too aware of the number of victims of drink-driving, and here, as in cases of dangerous driving, it is only drink-driving that can be deterred, not the fortuitous consequences of such conduct. As was seen in Chapter 7 above, such an offence will be ineffective in dealing with drivers who, despite evidence to the contrary, are convinced that they are capable of maintaining full control of their vehicles after a few drinks and

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<sup>40</sup> North Report, para. 6.12.

<sup>41</sup> Ibid, para. 6.13.

<sup>42</sup> Ibid, para. 6.16.

<sup>43</sup> Ibid, para. 6.20.

discount the possibility that such action will lead to a collision and possible death.<sup>44</sup>

The North Review started out with good intentions to consider the effectiveness of its proposals,<sup>45</sup> but these seem to have become distorted to such an extent that what actually became the guiding force was unsophisticated public opinion. Although public opinion is important in creating new laws, in that it may be difficult to enforce a law with which the public does not agree, and the Government may be tempted to pass laws to win the loyalty of voters, commentators have opined that it should not be the determining factor in law-making policy. Writing several years before the North Report, Alldridge stated that “it is not a principle of English jurisprudence that offences ought to be named palliatively so as to increase the conviction rate, nor is it just that one who kills with a car should be exposed to a lower maximum penalty than one who, no more culpably, kills otherwise.”<sup>46</sup> Writing in 1994, Wasik seems to suggest that logical arguments put forward by academics trump views held by members of the public. In relation to the Law Commission’s proposals to reform the law of manslaughter put forward in its Consultation Paper,<sup>47</sup> and the question of the extent to which the law should take account of public opinion, he stated that: “there is now a significant academic literature addressing the underlying issues of culpability and harm in criminal law, so that policymakers need no longer resort to hunches about public opinion”.<sup>48</sup>

Part of the problem in determining criminal justice policy on the basis of public opinion is that it is very difficult, as Wasik suggests, to have more than a “hunch” about what opinion, in relation to specific issues, the public actually holds. The North Review did no more than carry out a consultation exercise, the

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<sup>44</sup> More punishment for drink-drivers who kill may be justified in terms of desert, however. The doctrine of prior fault operates to explain their culpability, in that although their culpability at the time of the collision may only have been that of careless driving, they were blameworthy when they set out to drive, knowing that they had drunk alcohol.

<sup>45</sup> North Report, para. 2.26.

<sup>46</sup> Alldridge, P., “Manslaughter and Causing Death by Driving Recklessly” (1980) 144 *Justice of the Peace* 569 at 571.

<sup>47</sup> Law Com. Consultation Paper No.135, *Involuntary Manslaughter*, 1994.

<sup>48</sup> Wasik, M., “Form and Function in the Law of Involuntary Manslaughter” [1994] *CrimLR* 883 at 893.

respondents to which can hardly represent the public at large, and from that felt able to conclude what public opinion “seemed” to be. Whilst it is correct for elected politicians to take into account public opinion in formulating policy on criminal justice matters, including the punishment of drivers who kill, there is substantial literature, particularly in relation to sentencing, questioning the actual practice. Roberts and Hough point out that little effort is invested in exploring the nature of public attitudes to punishment, or in informing or consulting the public in a rational manner.<sup>49</sup> Stalans notes that people’s inner attitudes can only be assessed through sophisticated surveys, but that simple opinion surveys only test surface attitudes.<sup>50</sup> Not only is it difficult to assess the nature of public opinion, there are also problems in relying upon it when much of the public are ignorant about criminal justice issues, and tend to be informed mainly by the media, who are selective in their reporting on such issues and fail to put news items in context and perspective.<sup>51</sup> And whilst many would accept that the law should take into account the view of “well-informed” and “right-thinking” members of the public,<sup>52</sup> ordinary people who make up most of the population are sometimes neither of these things.<sup>53</sup> As noted by Spencer, public opinion usually fails to grasp the subtlety of the argument that punishment should relate to blameworthiness, and that blameworthiness depends on what a person did, not on the chance of what happened afterwards.<sup>54</sup>

## Recent Proposals

### *Definition of Bad-Driving Offences*

Ten years after the proposals in the North Report were enacted, the Transport Research Laboratory (TRL) was asked by the Government to evaluate the impact

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<sup>49</sup> Roberts, J.V., and Hough, M., *Changing Attitudes to Punishment*, Cullompton: Willan, 2002, p.1.

<sup>50</sup> Stalans, L.J., “Measuring Attitudes to Sentencing” in Roberts and Hough, *ibid*.

<sup>51</sup> Ashworth, A. and Hough, M., “Sentencing and the Climate of Opinion” [1996] CrimLR 776 at 779.

<sup>52</sup> In the case of *Broady* (1988) 10 Cr App R. (S) 495 it was remarked that the courts have a duty to pass judgment “in a way which is generally acceptable amongst right-thinking, well-informed persons”. Similar language was used in *Cox* (1993) 14 Cr App R (S) 479.

<sup>53</sup> Shute, S., “The Place of Public Opinion in Sentencing Law” [1998] CrimLR 465.

<sup>54</sup> Spencer, J. R., “Road Traffic Law: A Review of the North Report” [1988] CrimLR 707 at 714.

of the Road Traffic Act 1991 on the prosecution of dangerous drivers. It found several problems with the operation of the law in practice and suggested some reforms to try to improve the law.<sup>55</sup> The first of these suggestions was that an intermediary offence of “negligent driving” should be introduced in the hierarchy of general traffic offences. This would fall between the two current offences, being more serious than careless driving but less serious than dangerous driving. No definition of “negligent driving” was proposed, but the suggestion was made on the basis that in practice dangerous driving seems to require the prosecution to prove that D intentionally violated the law, meaning that those guilty of “serious negligence” fall by default into the category of careless drivers, along with those whose driving is only just bad enough to warrant criminalisation.<sup>56</sup>

If the problem with the current law is that the test for dangerousness is misinterpreted as requiring that D deliberately drove badly, then that problem will not be rectified by adding a third, intermediary offence to cater for offenders whom it was intended should fall within the definition of dangerous driving but do not do so due to the way the law is interpreted. It would achieve nothing other than, perhaps, gaining more convictions for an offence categorised as more serious than careless driving. According to the TRL, the North Report’s aim to avoid the need to prove D’s state of mind has failed because those that make the decisions within the criminal justice process inevitably look at the state of mind of D because it makes no sense not to.<sup>57</sup> If the TRL’s suggestion was accepted, it would in effect result in pushing “dangerous driving” higher up the scale of seriousness, accepting that it requires D’s state of mind to be proven, so that it would almost equate to the old offence of reckless driving. As seen above, the North Report explicitly rejected the idea of retaining reckless driving and introducing a third, intermediate offence on the basis that if boundaries are difficult to define they should be kept to a minimum.<sup>58</sup> However, according to the TRL Report, North has failed in its attempt to provide a purely objective test of bad driving. The only reason the TRL seem to put forward for this is that

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<sup>55</sup> For a critical assessment of the report see Cunningham, S., “Dangerous Driving a Decade On” [2002] CrimLR 945.

<sup>56</sup> Pearce, L.M., Knowles, J., Davies, G.P., and Buttress, S., *Dangerous Driving and the Law*, Road Safety Research Report No.26, 2002, Transport Research Laboratory, p.93.

<sup>57</sup> Ibid, p.86.

<sup>58</sup> n.8 above.



decision-makers feel (morally) obliged to differentiate between intentional and unintentional acts. The test fails at the stage of the charging decision, not at court.

It may be true that we do unavoidably place more blame on someone who does an act intentionally rather than by mistake. But the TRL's suggestion of introducing a third offence *below* dangerous driving seems to fly in the face of all that the North Review was striving to achieve. Surely, if it is decided that it is both unavoidable and desirable that offenders who take risks consciously are punished differently to those who do so unconsciously, the logical response would be to introduce a more serious offence, akin to the old reckless driving, *above* dangerous driving in the scale of seriousness. If this was done the purely objective test for dangerous driving could be maintained and would allow decision-makers to apply it in the way it was designed.

In proposing the offence of "negligent driving" the TRL failed to consider what this would achieve in terms of deterring bad driving. Since this offence, as well as the current offences of dangerous driving and careless driving, would fall within the category of endangerment offences, it is particularly important that it communicate to the public the type of conduct which it wishes to penalise, and therefore prevent. The current offences were designed in such a way so as to represent a hierarchy, with the boundary between the two falling where a driver not only drives below the standard of a competent and careful driver but falls far below that standard. What the results of the current study suggest is that the main problem with this test is in recognising the "competent and careful" driver. However, the TRL's report did not address this issue in any detail. It rejected one suggestion put forward that the law could be improved by redefining the test as relating to a standard which falls below/far below "the law".<sup>59</sup> The TRL rejected this on the basis that whether "the law" means the Highway Code or traffic regulations generally, difficulties would be caused "in excluding some undesirable behaviours from the definition of the offence, whilst including behaviour which is not, in some circumstances, serious enough to warrant prosecution".<sup>60</sup> However, no further explanation was given as to why such problems would be insurmountable and such a suggestion warrants further

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<sup>59</sup> TRL Report, n.56 above, p.91. No further clarification was given as to what was meant by this suggestion.

<sup>60</sup> Ibid.

consideration,<sup>61</sup> since it has the benefit of providing a concrete boundary below which drivers should not fall, and thereby perhaps offers more in terms of deterrence.

Prior to the TRL Report it seems that many assumed that the law in relation to bad-driving offences was working satisfactorily. Indeed, the Law Commission even modelled its proposed offence of “killing by gross carelessness” on the test of “dangerousness” in road traffic offences.<sup>62</sup> Reporting in 1996, the Law Commission stated that it had “not been able to discover any criticism of the way in which the ‘dangerousness’ test in the Road Traffic Act 1991 operates in practice”, and thought that it was advantageous in avoiding the need to rely on concepts such as “negligence”.<sup>63</sup> Whilst it is not within the scope of the current research to consider the Law Commission’s proposals on involuntary manslaughter, the Law Commission, as part of its task, did look briefly at the issue of whether CDDD should be retained in the event that its proposals were enacted.

### *Separate Causing Death Offences*

In its report on Involuntary Manslaughter,<sup>64</sup> the Law Commission proposed that involuntary manslaughter should be abolished and replaced with two offences of “reckless killing” and “killing by gross carelessness”. Although it was thought that killing by gross carelessness should cover every case in which death was caused by culpable inadvertence, the Law Commission was not initially sure

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<sup>61</sup> See below.

<sup>62</sup> Law Com. No.237, n.28 above, para.5.25. It would be interesting to see whether the TRL’s findings about the failure of the dangerousness test in practice results in the Law Commission re-evaluating this proposal. However, whilst the test may not work for dangerous driving, which is an offence relating to a specific activity, it may be as good as it is possible to achieve in providing a test which relates to a variety of activities which can cause death. The objectives of the offences are again different – whilst dangerous driving seeks to deter certain conduct because it may lead to harm, killing by gross carelessness is a result crime which is only backward-looking, seeking to allocate punishment because it is deserved. It does not have the same deterrent objectives and it would therefore matter little that the test failed to identify precisely what conduct it was seeking to prevent. It is unlikely that the same problems found to exist with the test for dangerous driving would apply since the offence of reckless killing would be available for cases where the defendant did indeed foresee a risk of death.

<sup>63</sup> Ibid.

<sup>64</sup> Law Com, No.237, n.28 above.

whether causing death by bad driving should be an exception to this general rule.<sup>65</sup> Three options were identified following consultation. First, it was suggested that killing by gross carelessness should not be made available in cases of road deaths, so that only CDDD would be available in cases where death was caused by bad driving, but reckless killing would be available where subjective recklessness could be proved.<sup>66</sup> Interestingly, the CPS was in favour of this option. The Law Commission reported that the CPS had “described the continued existence of the concept of gross negligence manslaughter in road traffic cases as ‘an irritant’, because it is not clear when manslaughter should be charged rather than the statutory offence, and prosecutors come under pressure from the public to charge what is perceived as the more serious offence.”<sup>67</sup>

The second option was to abolish CDDD so that causing death by bad driving would fall within the general homicide offence. This suggestion was made on the basis that juries might be more willing to convict drivers of manslaughter than they were prior to 1956.<sup>68</sup> The final option, which was preferred by the Law Commission, was to retain a separate offence of CDDD but also to make killing by gross carelessness available as a charge for cases where “some technical impediment to proceeding on a charge of causing death by dangerous driving, for example where it is not certain whether the accused was actually driving, or whether he was driving on a public road” arose.<sup>69</sup>

Thus, although the Law Commission proposed a change in the law of involuntary manslaughter, it thought that the *status quo* in relation to CDDD should be retained.<sup>70</sup> In Part IV of its Report the Law Commission had examined “The Moral Basis of Criminal Liability for Unintentionally Causing Death”, including some of the theoretical arguments on the subject of “moral luck”

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<sup>65</sup> Ibid, para.5.38.

<sup>66</sup> Ibid, para.5.64.

<sup>67</sup> Ibid, para.5.65.

<sup>68</sup> Ibid, para.5.66.

<sup>69</sup> Ibid, para.5.69.

<sup>70</sup> Although the Government has accepted the Law Commission’s proposals in principle, it stated that it had deferred detailed consideration of the question of whether it agrees with this point specifically until the TRL’s report had been concluded (*Reforming the Law on Involuntary Manslaughter: The Government’s Proposals*, Home Office, 2000, para.2.14). Since then John Halliday has carried out a further review of the law but the Home Office have failed to publish anything further.

examined here in the last chapter. It was not persuaded by the arguments put forward that just because judgments based on outcome-allocation *do* occur in everyday life, they *ought* to do so, and concluded that it is illogical and unfair to compound the effect of luck by giving it legal significance.<sup>71</sup> It agreed that it is wrong to blame someone for the causing of death which is unforeseeable, but that as long as a defendant has the capacity to advert to a risk he should be punished for the outcome of that risk-taking if the outcome is death.<sup>72</sup> Therefore, when it came to the question of whether a separate offence of CDDD was needed, the question was not whether it was right to punish drivers for the outcome of death which might be purely fortuitous (it had already decided that it is right to do so generally), but rather whether a separate label of CDDD was warranted. The proposed maximum sentence for killing by gross carelessness is the same as the maximum penalty for CDDD at the time of the proposal (ten years), so in terms of a hierarchy of homicide offences this would put the two offences on an equal footing.<sup>73</sup> Unfortunately, the Law Commission seems to have given very little thought to why a separate offence is needed, other than to reject in a rather off-hand manner the suggestion that juries might now be more willing to convict drivers of a general homicide offence.<sup>74</sup>

The TRL's report seems to assume that it is right to retain a causing death offence. The main issue facing it was whether we should in fact increase, rather than decrease, the role luck plays in determining criminal liability in driving offences. In considering this question it again failed to consider what aims it might be seeking to achieve in changing the law. It placed weight on questionnaire respondents' views on the acceptability of possible reforms rather than how effective they would or would not be in achieving the aims of the criminal law. Police, magistrates, judges and CPS lawyers were asked about the acceptability of three possible offences: "causing death by careless driving" (as an addition to CDDD), "causing death by driving" (covering all bad driving – dangerous driving and careless driving - and replacing CDDD) and "bad driving"

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<sup>71</sup> Law Com. No.237, para.4.33.

<sup>72</sup> Ibid, para.4.43.

<sup>73</sup> Given that the maximum penalty for CDDD has now been increased to fourteen years, it is unclear whether the Law Commission's suggested penalty would be increased accordingly.

<sup>74</sup> Ibid, para.5.68.

(replacing all general offences as well as the causing death offences).<sup>75</sup> The way in which it assessed the desirability of such possibilities was not by establishing their benefits but by asking respondents to judge, in negative terms, whether they could be justified.

In addition to these possible offences the TRL recommended that CDDD should be extended to include the causation of serious injury.<sup>76</sup> There is some logic in this, in that if we are to take account of the results of bad driving which may be fortuitous, it is consistent to argue that causing serious injury should be punished as well as causing death. However, this would form a departure from tradition which allows for the punishment of culpable inadvertence causing death, but not serious injury.<sup>77</sup> The TRL proposed an even greater departure from this by suggesting that if its proposal for an offence of “negligent driving” was accepted, there should also be an offence of causing death/serious injury by negligent driving.<sup>78</sup>

The TRL’s findings and suggestions led to a further review by John Halliday, who reported his findings to the Government at the end of 2003. Although a consultation paper was planned, this has not yet been published, and at the time of writing it is unknown what further action the Government is likely to take in this regard.

## **The Law in other Jurisdictions**

Much can be learnt from how other countries attempt to use the criminal law to deter bad driving and express censure for the creation and materialisation of risks. It would be impossible to study the law on bad driving and vehicular homicide in all jurisdictions, so the discussion has been limited to one country.

### ***Australia***

Australia operates under a federal system, with separate states legislating for criminal offences. As a member of the British Commonwealth it has inherited much of its procedures and principles from English law and, as such, offers a good example for comparative analysis of the law. It shares the same language

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<sup>75</sup> TRL Report, n.56 above, p.89.

<sup>76</sup> Ibid, p.98.

<sup>77</sup> Law Com. No.237, para.4.24.

<sup>78</sup> TRL Report, n.56 above, p.98.

and in many respects can be seen as culturally similar to England, although there are some obvious differences between the countries which might limit the extent to which comparisons can be made.

### **New South Wales (NSW)**

The history of a causing death offence in Australia is similar to that in England, with NSW introducing a new offence of causing death by driving six years in advance of the English reform. The reasoning behind the introduction of the offence of Culpable Driving Causing Death was the same as that in England – juries were notoriously reluctant to convict drivers of the “felonious” offence of manslaughter.<sup>79</sup> However, the amendment to the Crimes Act 1900 in 1951 also introduced the offence of culpable driving causing grievous bodily harm. The maximum sentence for causing death was five years’ imprisonment, whilst for causing GBH it was three years’ imprisonment. Culpable driving was committed when either D had driven when under the influence of drink or drugs, or when he had driven at a speed or in a manner dangerous to the public.

In 1994 the law was amended to change the title of the offence to “dangerous driving occasioning death” and to increase the maximum penalty to ten years’ imprisonment. In addition to this, s.52A(2) Crimes Act 1900 introduced a new aggravated form of the offence, with a maximum sentence of 14 years’ imprisonment. There are four ways in which the offence is aggravated. These are:

*(a) the prescribed concentration of alcohol was present in the accused’s blood, or*

*(b) the accused was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 kilometres per hour, the speed limit (if any) applicable to that length of road, or*

*(c) the accused was driving the vehicle to escape pursuit by a police officer, or*

*(d) the accused’s ability to drive was very substantially impaired by the fact that the accused was under the influence of a drug (other than intoxicating liquor) or a combination of drugs (whether or not intoxicating liquor was part of that combination).<sup>80</sup>*

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<sup>79</sup> Ash, D., and Potas, I., “Driving Causing Death: Section 52A of the Crimes Act 1900” in Spears, D., (ed.), *Sentencing Trends: An Analysis of New South Wales Sentencing Statistics*, No.15, 1997, Judicial Commission of New South Wales.

<sup>80</sup> Crimes Act 1900 (NSW), s.52A(7).

The non-aggravated form of the offence can be seen as an offence of strict liability. D is guilty unless there is reasonable excuse for the dangerous manner<sup>81</sup> in which the car was driven and it is not necessary to prove a gross departure from ordinary standards of care.<sup>82</sup>

Supplementary to this, various offences can be found in the Road Transport (Safety and Traffic Management) Act 1999. Section 42(1) of that Act makes it an offence to drive negligently, with negligent driving occasioning death resulting in a maximum sentence of 18 months' imprisonment, and negligent driving occasioning GBH attracting a maximum of 12 months' imprisonment. If no harm is caused, the maximum penalty is ten penalty units. Under s.42(2) it is an offence to drive furiously, recklessly or at a speed or in a manner dangerous to the public. The maximum penalty is nine months' imprisonment for a first offence. It would appear that all of these offences carry an objective test of culpability. If an accused was aware of the risk of personal injury or damage to property he was creating he may be guilty of "menacing driving" under s.43 of the 1999 Act. This can be committed either intentionally or recklessly (where D "ought to have known that the other person might be menaced"). The maximum penalties for these offences in the case of a first offence are 18 months' and 12 months' imprisonment respectively.

## **Victoria**

The law on death caused by dangerous driving underwent review in Victoria in 1992,<sup>83</sup> although the proposals suggested by the Law Reform Commission of Victoria have not led to a change in the law. At the time of the Victorian Commission's Report the offence of Culpable Driving Causing Death (CDCD) carried a maximum sentence of seven years' imprisonment, although this has since been increased to twenty years' imprisonment.<sup>84</sup> The substance of the offence remains the same, however. "Culpable driving" can be established in one of three ways, if D drove:

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<sup>81</sup> This presumably means that it creates a risk of injury or death.

<sup>82</sup> Australian Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Model Criminal Code*, 1998, p.163.

<sup>83</sup> Law Reform Commission of Victoria Report No.45, n.27 above.

<sup>84</sup> Crimes Act 1958, s.318(1).

*(a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or*

*(b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case; or*

*(c) whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle; or*

*(d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.*<sup>85</sup>

The concern of the Commission was that the negligence head of CDCD overlapped substantially with the offence of manslaughter, which could be committed through gross negligence applying a similar test to that in *Adomako*.<sup>86</sup> There was even some concern that the last two heads overlapped with constructive manslaughter, notwithstanding the ruling in *Andrews v. DPP*,<sup>87</sup> with legal counsel and members of the judiciary advising the Commission that they thought that the unlawful and dangerous act doctrine of manslaughter would apply if the fatality had been caused by the driver being under the influence of drink or drugs.<sup>88</sup>

In its discussion paper the Commission proposed that CDCD should be abolished, and that cases falling within its definition be charged as manslaughter. However, it also proposed the creation of a new offence of dangerous driving causing death or very serious injury to cover cases where a driver's culpability fell below that required for manslaughter. The first argument put forward as the basis of this proposition was that a driver who causes death because he is reckless, grossly negligent, or does an unlawful and dangerous act, deserves to be charged

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<sup>85</sup> Crimes Act 1958, s.318(2).

<sup>86</sup> See *Nydam* [1971] VR 430. Gross negligence manslaughter is proved if the circumstances of the death involved "such a great falling short of the standard of care which a reasonable person would have exercised and ... such a high risk of death or grievous bodily harm that the doing of the act merited criminal punishment".

<sup>87</sup> That "driving" is a lawful act and therefore "dangerous driving" cannot constitute an "unlawful act" for the purposes of manslaughter. The question of whether this same reasoning can be applied to "driving under the influence of drink or drugs" has never been given serious consideration in England.

<sup>88</sup> Law Commission of Victoria Report, n.27 above, p.6.



with manslaughter. He should not be charged with a lesser offence simply because a motor vehicle was used. As in this country, it is not possible to charge CDCD alongside manslaughter, which means that drivers in Victoria are rarely charged with manslaughter.<sup>89</sup>

Secondly, it was thought that it could no longer be assumed that juries would be reluctant to convict drivers of manslaughter where the facts supported such a charge. This was confirmed by a public opinion survey, the results of which the Commission interpreted as meaning that the community *is* willing to equate certain forms of unsafe driving causing death with manslaughter.<sup>90</sup> It went on to state that: “in fact, the community appears to take a more punitive view of people who are grossly negligent in the use of motor vehicles than those who are grossly negligent in the handling of firearms.”<sup>91</sup> The Commission did recognise, however, that it is difficult to equate responses given in public opinion surveys with verdicts likely to be returned by juries at criminal trials, but pointed out that the only way of being sure is to implement change and monitor jury response.<sup>92</sup>

It was put to the Commission that CDCD should be retained because death caused by driving is different to death caused by other means. This argument is similar to that of Clarkson that causing death by driving is “situationally relevant” to members of the general public.<sup>93</sup> The Commission rejected this argument, being of the view that it is irrelevant whether the activity in question is widespread or not if the requirements of manslaughter are met. It recognised that it might be a relevant factor if it did make juries less likely to convict in driving cases, but pointed to its public opinion survey to negate such concerns.<sup>94</sup>

In relation to its suggestion of a new offence of dangerous driving causing death/serious injury, the Commission concluded in its final Report that such a new offence should cover death only. The Commission’s proposals in fact equate to those of the North Report in Britain. The offence of CDCD should be abolished (as the North Report had proposed that CDRD be abolished), because of its

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<sup>89</sup> Ibid, p.9.

<sup>90</sup> See Chapter 7 above, p.178.

<sup>91</sup> Ibid, p.10.

<sup>92</sup> Ibid.

<sup>93</sup> See p.176 above.

<sup>94</sup> Law Commission of Victoria Report, n.27 above, p.11.

overlap with manslaughter, with a new offence of CDDD (called dangerous driving causing death in Victoria) being introduced below manslaughter.<sup>95</sup> Indeed, the Commission's proposed definition of its causing death offence almost reproduces that of the North Report.<sup>96</sup> It was thought that such an offence was required for three reasons.<sup>97</sup> Firstly, it would recognise the seriousness of harm done when a person is killed as the result of unsafe driving which does not amount to manslaughter. Secondly, it would indicate to the community in the clearest possible terms that people must exercise a proper standard of care when involved in the inherently dangerous activity of driving a motor vehicle. Thirdly, it would provide an appropriate alternative offence in cases where juries were unwilling to convict of manslaughter. Some respondents pointed out to the Commission that such an offence singles drivers out for special treatment and this runs counter to the Commission's argument that the law should not distinguish between drivers and non-drivers where the offence committed is of the same type.<sup>98</sup> The Commission's response to this was to suggest that the criminal law should perhaps introduce liability based on substantial, not just gross, negligence, and not just for drivers.<sup>99</sup> However, it appears that pragmatic arguments were the real reason behind the suggestion, with the Commission pointing to the number of people killed on the roads and the need to have a safety net in place just in case, contrary to their suspicions, juries were reluctant to convict drivers of manslaughter.<sup>100</sup>

Of particular interest in the Commission's report was its consideration of the role of general endangerment offences in relation to driving. Victoria is one of three Australian states in which a general offence of reckless endangerment exists

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<sup>95</sup> But note that in Victoria the relevant species of manslaughter was gross negligence manslaughter, whereas in England gross negligence manslaughter was only reintroduced following *Adomako*.

<sup>96</sup> "A person commits the offence of dangerous driving causing death if he or she causes the death of another person by driving a motor vehicle in a manner that falls substantially below the level of care that a competent and careful driver would take in the circumstances." Law Commission of Victoria Report, n.27 above p.16.

<sup>97</sup> Law Commission of Victoria Report, n.27 above, p.15.

<sup>98</sup> *Ibid*, p.18.

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid*, p.19.

to penalise risk-taking.<sup>101</sup> In addition to this, there is an “instrument specific” offence under s.64 Road Safety Act 1986 of dangerous driving: “A person must not drive a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case.”<sup>102</sup> There is obviously considerable overlap between the reckless endangerment offence and that of dangerous driving. The main distinction between the offences is that the general offence requires foresight of the danger of death,<sup>103</sup> whilst the test for the specific offence is objective. The Commission reported that current practice was that where a driver takes an unjustifiable risk when driving, he should be dealt with under the Crimes Act offences of recklessly endangering life or recklessly endangering a person.<sup>104</sup> The Commission’s proposals set out to ensure that dangerous driving would be available in cases where only an objective risk had been taken.

### **Western Australia (WA)**

In 1970 the Law Reform Committee of Western Australia examined the law relating to deaths caused by bad driving. As in England and other Australian states, it was the experience in WA that juries were reluctant to convict drivers of manslaughter. However, although a separate offence of negligent driving causing death was introduced by s.291A of the Criminal Code a full decade before a similar offence was created in England (1945), prosecutors continued to prefer charges of manslaughter in cases of RDIs. The Chief Crown Prosecutor justified this policy on the basis that the degree of negligence required to establish guilt of either offence was the same, and so the Crown left it to the jury to decide, having regard to the seriousness of the offence, under which of these sections they would convict.<sup>105</sup>

The s.291A offence was an attempt to introduce an “intermediate offence” to deal with the problem of juries’ reluctance to convict drivers of manslaughter.

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<sup>101</sup> ss22–23 Crimes Act 1958. For a discussion of the offences see Lanham, D., “Danger Down Under” [1999] CrimLR 960.

<sup>102</sup> At the time of the Commission’s report the section also included the word “reckless” but this has since been removed on the Commission’s recommendation.

<sup>103</sup> Lanham, n.101 above, at 963.

<sup>104</sup> Law Commission of Victoria Report, n.27 above, p.23.

<sup>105</sup> Western Australia Law Reform Committee, *Report on Manslaughter or Dangerous Driving Causing Death*, Project No.17, 1970, para.3.

However, this attempt failed when the courts interpreted the degree of negligence necessary to establish the offence as being the same as that necessary for manslaughter under *Bateman*.<sup>106</sup> Manslaughter continued to be charged in cases of RDIs up until 1970, despite the fact that in most cases such a charge was unsuccessful and D was convicted under s.291A. It appears that there was no equivalent requirement of a “reasonable prospect of conviction” for WA prosecutors. This led to the judiciary complaining that the only difference between the offences of which they could inform juries was the difference in maximum sentence.<sup>107</sup> Thus the WA Law Reform Committee found itself facing a similar problem to that of the North Review some twenty years later. However, unlike in England, where *Seymour* prohibited the charging of both manslaughter and CDRD, the prosecution continued to charge manslaughter in such cases. The Law Reform Committee considered introducing such a prohibition into WA law, but preferred to leave the law as it was.

However, the law in WA has since been altered, with s.59 Road Traffic Act 1974 providing for the offence of dangerous driving causing death or GBH, with a maximum sentence of 20 years’ imprisonment in a case causing death. Dangerous driving is itself an offence under s.61 of the Act, and is defined as: “Every person who drives a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits an offence”. A maximum penalty of 6 months’ imprisonment is available for any second or subsequent conviction. Wilfully driving in a manner that is inherently dangerous is an offence under s.60, and is punishable by imprisonment for six months on the first offence, rising to twelve months for the third or subsequent offence. From looking at the crime statistics in WA it appears that the causing death offence is now charged rather than manslaughter.<sup>108</sup>

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<sup>106</sup> (1925) 19 Cr App R 8. WA Law Reform Committee Report, para.6.

<sup>107</sup> Above, n.105, para.14.

<sup>108</sup> In 2000/01 there were 9 reported cases of manslaughter (this includes all species of manslaughter) and 32 reported cases of driving causing death: Western Australia Police Service, *Annual Reported Crime Statistics 2000/01*. In 1999/00 the figures were 9 cases of manslaughter and 35 cases of driving causing death: Western Australia Police Service, *Annual Reported Crime Statistics 1999/00*. These statistics seem to show that RDIs are now reported as dangerous driving causing death, rather than manslaughter, since the figures for the former offence are fairly high in comparison to those for manslaughter. The statistics also show that in 1999 there were 188 “fatal crashes” (this is the term used by WA Police), with 184 in 2000 and 151 in 2001: Western Australia Police Service, *Fatal Traffic Crashes and Fatalities 2001*. It

## Australian Model Criminal Code (AMCC)

Other states have similar legislation, although each state differs in its terminology and the degree to which it punishes harm. The Northern Territory is the only state not to have created a special offence of vehicular homicide. In an attempt to harmonise the criminal law in Australia, a Model Criminal Code has been drawn up in the hope that it will be adopted across the Australian jurisdictions, although it will have no legislative force in its own right.<sup>109</sup> Like the English Law Commission, the AMCC Officers Committee has recommended that an AMCC should replace constructive and gross negligence manslaughter with two new offences. These it has termed “manslaughter”, which would require a person to cause death whilst intending to cause, or being reckless as to causing, some harm,<sup>110</sup> and “dangerous conduct causing death”, which would require a person to be negligent about causing death by his conduct.<sup>111</sup> Both offences would carry a maximum penalty of twenty-five years’ imprisonment. Although the word “negligent” is used, the Committee state that the definition given to “negligence” is similar to that given to gross negligence under the common law.<sup>112</sup> As such, the offence of “dangerous conduct causing death” would both replace and encompass gross negligence manslaughter. The Committee recognised that juries have in the past been reluctant to convict of manslaughter on proof of negligence, as in cases of motor manslaughter, and opined that “[a] distinct offence of dangerous conduct causing death better expresses the degree of condemnation juries are likely to be prepared to impose for criminally negligent conduct on the roads and in the workplace.”<sup>113</sup>

Unlike the English Law Commission the Committee saw no need for a separate offence of bad driving causing death, since a jury can be expected to convict a driver who has driven negligently and caused death of dangerous conduct causing death, and manslaughter will be available where a car is used as a

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would appear, then, that roughly a sixth of RDIs in WA result in prosecutions for a causing death by driving offence. These statistics are available at [www.police.wa.gov.au](http://www.police.wa.gov.au) June 2004.

<sup>109</sup> Lanham, n.101 above, at 961.

<sup>110</sup> AMCC, 5.5.10.

<sup>111</sup> AMCC, 5.5.11.

<sup>112</sup> AMCC Officers Committee, n.82 above, p.153.

<sup>113</sup> Ibid, p.155.

weapon of offence.<sup>114</sup> It argued that there are two reasons for having a separate offence of vehicular homicide. The first is for purely cosmetic reasons where, as in Victoria, an offence with the same requirements as manslaughter is given a more palatable label with a lower penalty. The new label of “dangerous conduct causing death” avoids the need for a further separate vehicular offence for this reason.<sup>115</sup> The second is that such an offence “which required proof of something less than criminal negligence might be advocated for its salutary educative effect on drivers”.<sup>116</sup> The Committee considered carefully whether such a reason was strong enough to warrant a separate offence. It noted that the main problem with such an offence is the “shifting and uncertain nature of the fault requirements”.<sup>117</sup>

The Committee suggested that there are only two possibilities for a fault requirement for an offence of vehicular homicide. The first would be to have a special standard for motorists who kill, as for the English offence of CDDD, whilst alternatively the offence could be one of complete strict liability, as in NSW.<sup>118</sup> The Australian Committee rejected the possibility of introducing a new vehicular homicide offence requiring either strict liability or a lesser form of negligence than that required for “dangerous conduct causing death”. This was because, it argued, the former would lead to relatively blameless defendants being convicted for an offence of unlawful homicide carrying very low penalties, and this would be a cause for concern.<sup>119</sup> The latter, on the other hand, would require that “a standard of care be struck somewhere between mere carelessness and criminal negligence”. It was of the opinion that such a notion “is open to criticism for its incoherent failure to articulate the proposed standard”.<sup>120</sup> These arguments

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<sup>114</sup> Ibid, p.165. Note also that the AMCC does not contain any separate offence akin to CDCDUI. In cases of road death involving intoxication the question of negligence is to be decided by judging D against the standard of a reasonable person who is not intoxicated. (Discussion Paper, p.173.)

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Although the English offence does not require *mens rea*, it does require that D’s driving fell far below that of a competent and careful driver. No gross departure from ordinary standards of care is required for the NSW offence. All that is needed is that danger was caused to others.

<sup>119</sup> AMCC Officers Committee, n.82 above, p.171.

<sup>120</sup> Ibid, p.169.

would apply equally to the TRL's suggestion for a new offence of "negligent driving".

## **A Suggestion**

The arguments put forward by the Australian Committee against the need or justification for a separate vehicular homicide offence are very persuasive and there seems no reason why they should not apply equally to the law in this country. In Chapter 7 the arguments relating to the role luck should play in determining criminal liability were explored, and the conclusion reached was that drivers should be punished for that over which they have control (their driving) rather than the fortuitous consequences thereof. In this chapter the arguments relating to fair labelling have also been examined, with the conclusion that there is no good reason why drivers who kill and whose driving meets the test of gross negligence should not be liable for manslaughter. The suggestion here, then, is that CDDD be abolished and reliance placed on manslaughter in punishing drivers who kill and warrant being labelled as killers. This argument would be strengthened if the Law Commission's proposals for an offence of "killing by gross carelessness"<sup>121</sup> were introduced, since it would deal with the problem of any reluctance still felt by juries to convict drivers (and others guilty of gross negligence) of "manslaughter". Those drivers who caused death but were deemed not to be grossly negligent would face punishment for their risk-taking. However, since the current offence of "dangerous driving" fails to communicate to the public the exact requirements of the law, it is beneficial to consider redefining the non-fatal motoring offences which seek to limit endangerment on our roads.

It has been argued that the failure of the current law stems from the use of the concept of the "competent and careful" driver against which D's behaviour must be judged. There is difficulty in determining who the competent and careful driver is, and if individuals are to use themselves as benchmarks for the standard expected of the competent and careful driver this poses obvious problems in terms of both deterrence, since if all drivers consider themselves competent and careful they do not consider that they are committing a crime, and enforcement, since magistrates and members of a jury may not agree on what is expected of the competent and careful driver. Since the aim of the criminal law in this area is to

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<sup>121</sup> Given the objections to the use of the word "carelessness" under current road traffic law, however, it might be advisable that the Law Commission's proposed offence be re-labelled "killing by gross negligence".

prevent the taking of risks, and consequently the causing of harm, the law should concentrate drivers' minds on driving safely and in accordance with the Highway Code. As suggested to the North Review, it might be possible to enact a list of separate offences similar to infringements of the Highway Code but, as the North Report concluded, this would not obviate the need for general driving offences.<sup>122</sup>

The TRL Report argued that in practice the current law operates by distinguishing between those who deliberately take risks and those whose risk-taking is not deliberate. This is not an actual requirement of the law, which should be applied in a completely objective manner, and the current study does not support the finding that this is how the law is applied. However, it may be true that, to a certain extent, we *do* judge those who take deliberate risks differently from those who do not.<sup>123</sup> One way in which "motoring offences" can be distinguished from "criminal offences" is that serious criminal offences usually require at least foresight of a risk of harm. As has been seen, motoring offences are able to depart from this tradition because of their categorisation as endangerment offences. However, this should not prevent us punishing drivers according to their level of wrongdoing. Whether the taking of a risk is deliberate or not may not influence the degree of risk taken, and so it could be argued that the wrongdoing is the same whether the risk taken is deliberate or not. But most would agree that deliberately putting others' lives at risk is more blameworthy than doing so inadvertently.

Additionally, it can be argued that deliberate risk-taking should be dealt with separately from inadvertent risk-taking because of how such a differentiation might increase the law's ability to deter risk-taking. This is supported by psychological research which has distinguished between violations, which can be defined as the deliberate infringement of some regulated or socially accepted code of behaviour, and errors, which include unintended infringements.<sup>124</sup> According to

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<sup>122</sup> See n.7 above.

<sup>123</sup> Hawkins found that deliberation was a factor in favour of prosecuting in cases of breaches of Health and Safety legislation, and that even though such offences are usually of strict liability evidence of deliberate breaches are taken more seriously: Hawkins, K., *Law as Last Resort*, Oxford: Oxford University Press, 2002, p.344.

<sup>124</sup> Parker, D., Reason, J., Manstead, A., and Stradling, S., "Driving Errors, Driving Violations and Accident Involvement", (1995) 38(5) *Ergonomics*, 1036–1048 at 1036. See also: Reason, J., Manstead, A., Stradling, S., Baxter, J., and Campbell, K., "Errors and Violations on the Roads: a Real Distinction?" (1990) 33 (10/11) *Ergonomics*



Parker *et al.*: “[e]rrors and violations differ both in their psychological mechanisms and in the kinds of remedial actions necessary to combat them. Errors arise as the result of information-processing problems; violations have a large motivational component. Errors may be understood in relation to the cognitive function of the individual. Violations, however, are a social phenomenon and can only be understood in a broader organisational or societal context. Errors can be minimised by retraining, redesign of the human-machine interface, memory aids, better information and the like. Violations should probably be dealt with by attempting to change attitudes, beliefs and norms, and by improving overall safety culture.”<sup>125</sup> Both violations and errors are potentially dangerous (in the sense of creating a risk of harm to others), but what distinguishes them is the psychological processes which lead to their commission. Examples of violations include speeding, lane discipline and close-following. Examples of errors include failing to notice pedestrians crossing and not checking the rear-view mirror before executing a manoeuvre. Errors can be distinguished from lapses, which involve absent-mindedness and are not dangerous, such as leaving a roundabout at the wrong exit.<sup>126</sup>

This grading could be used as the basis of a new structure of bad-driving offences. Lapses would not be criminalized, since they pose no threat to the safety of road-users. Errors could replace the current offence of “careless driving”, with extended use of the NDIS to deal with offenders. Violations would roughly cover what is currently “dangerous driving” and would lead to higher penalties than both errors and the current offence of dangerous driving. This would be justified by the subjective fault requirement needed to prove the offence, which brings it within the realm of other “criminal” offences, and by the need to change attitudes through individual, general and educative deterrence. Whilst Parker *et al.* found no evidence for a systematic association between reported error-proneness and collision involvement, they established a clear link between the self-reported tendency to commit violations and collision involvement.<sup>127</sup> Thus deterring violations should also reduce the number of collisions on our roads. Whether or not a particular violation leads to a collision should not, however, affect the

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1315–1332; Parker, D., Manstead, A., Stradling, S. and Senior, V., *The Development of Remedial Strategies for Driving Violations*, TRL Report 300, 1998.

<sup>125</sup> Parker *et al.* 1995, n.124 above, p.1036.

<sup>126</sup> Ibid, p.1037.

<sup>127</sup> Ibid, at 1044–1045.

criminal liability of the violator, since his wrongdoing is unchanged by the (non-) event of a collision.

This suggestion is not without problems. Victims' families may continue to feel that the criminal law is failing to achieve the goal of retribution in cases where only an error has been committed and resulted in death. However, such opinions misunderstand the role of the criminal law in these cases. Retribution, in the sense of vengeance or retaliation, is not a valid objective of the criminal law in relation to those who have committed errors, since the offence is purely forward-looking, taking the form of a conduct crime rather than a result crime. Retribution in its modern form requires an offender to be punished according to his desert, and a driver who commits an error and kills deserves no more punishment than one who commits an error but fortunately does not kill.

A second criticism of the suggestion might be that it will re-create the problems experienced in relation to the offence of reckless driving. As seen above, the arguments put to the North Review were that reckless driving was difficult to prove because of the subjective element of the recklessness test, in determining whether D had considered the risk or not. Since violations, by their definition, require an element of intentionality, this again creates problems for the prosecution in proving D's state of mind. However, it can be argued that proving intent in this instance is no more difficult than proving *mens rea* in relation to other criminal offences. The criminal law has recently shifted even further towards a subjectivist stance with cases such as *Gemmel*<sup>128</sup> in which it was held that subjective *Cunningham*<sup>129</sup> recklessness should apply in cases of criminal damage. In giving his judgement, Lord Bingham pointed out that in contested cases where the *mens rea* is denied, the tribunal of fact is able to infer intention "from all the circumstances and probabilities and evidence of what the defendant did and said at the time".<sup>130</sup> In a large number of the cases in the current sample D was quite open about what he was thinking in the moments preceding the collision. In only a minority of cases would a subjective test cause problems where D refused to answer questions in interview. The Law Commission has recognised that in some cases the task of the jury in finding intention or

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<sup>128</sup> [2003] UKHL 50.

<sup>129</sup> [1957] 2 QB 396.

<sup>130</sup> n.126 above, at para.39.

recklessness to cause harm is easier than applying the current test for dangerousness of falling far below a certain standard.<sup>131</sup>

Furthermore, what distinguishes this suggested offence from previous motoring offences is that the intention which must be proved relates not to the creation of a risk, but to the violation of a pre-existing traffic rule. Spencer put forward a similar suggestion to the North Committee at the time of the Review in 1988.<sup>132</sup> He was unhappy with the Review's suggestion for creating a new offence of "very bad driving" (which later became "dangerous driving") because he predicted that the courts would have difficulty in defining it, and it was too vague.<sup>133</sup> He noted that: "[e]xperience amply shows us that it is unworkable to have a vague offence of bad driving, with a *mens rea* requirement that forces the prosecution to prove that the driver realised his behaviour actually created a risk for other road users. But if the offence were defined at a low level of abstraction, so that it included driving in any one of a number of ways which are generally recognised as being unacceptably dangerous, a *mens rea* requirement would surely not be unworkable at all."<sup>134</sup>

It would be difficult to prove that D foresaw a risk of death or injury to others as a result of his bad driving, but this is not what is required. All that is required is that D deliberately did the act which amounted to the contravention of a rule.<sup>135</sup> Although D need not have foreseen the risk, what he would be punished for is in fact the taking of a risk, since the rules of the Highway Code exist in order to prevent risk-taking. It is thus justified to punish drivers for the intentional violation of a rule which creates a real danger to others, since in doing so it is their risk-taking which is being punished, and some risk-taking unavoidably leads

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<sup>131</sup> Law Com. No.237, n.28 above, para.5.33.

<sup>132</sup> Spencer, J.R., "Road Traffic Law: A Review of the North Report" [1988] CrimLR 707 at 713.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Spencer's suggestion was that an offence be "drafted in general terms, but incorporating a partial definition expressly putting a number of recurrent cases within the general clause for the avoidance of future doubt: racing another vehicle, overtaking on a blind corner, driving when seriously under the influence of drink or drugs, driving a vehicle with seriously defective steering or brakes, etc." Ibid. The suggestion here is that in order to avoid a statutory provision for an exhaustive list of rules which could form the basis of the new offence, it would be simpler for it to refer separately to the rules in the Highway Code, which could be updated.

to harm. It is, however, unpredictable which risks will result in harm. This type of offence construction is preferable to one which relies only upon the objective question of risk-taking or of falling below a certain standard of driving, because Ds see themselves as sufficiently skilful to commit an action which is objectively risky because they believe they have ruled out, or at least minimised, the risk through their skill. If Ds are instead told that they **MUST NOT** violate a traffic rule on pain of criminalization, the fact that they do not recognise that their action has created an objective risk does not matter – they should be deterred nevertheless.

Some care would be needed in drafting this law, however, in order to include within the meaning of “violation” all those acts which warrant punishment. For example, in the case of dangerous overtaking one would want to avoid D using as a defence the argument that he did not see the solid white line in the centre of the road, or honestly thought that he had sufficient room to complete the manoeuvre without creating a risk to others. In order to include such conduct in the definition of the offence, it would have to be clear that all that was required was that D intended to overtake a vehicle at the particular place where it was prohibited and, objectively speaking, it was dangerous to do so.

Thus in addition to a subjective *mens rea* element to the offence, an additional test would be that the violation was objectively dangerous. This would equate to the secondary test under the current law that it would be obvious to a competent and careful driver that driving in that way would be dangerous. However, it is suggested that there is no need for a reference to the “competent and careful driver” and that it would suffice to require that the driving created a risk of harm to others. This would avoid the problem that all cases of intentional speeding, for example, would constitute a violation. Only in cases where speeding created a risk of harm to others would the more serious offence be committed, whilst the offence of “excess speed” would remain to penalise all those who exceeded the speed limit. This leads to a further possible problem, however. Several of the files in the current project related to instances in which D had driven at a speed which was inappropriate for the conditions, but did not necessarily exceed the speed limit. The new law would have to make it clear that contravention of the rules set down in the Highway Code concerning driving at safe speeds (Rules 104 and 105) would constitute a violation.

For the new law to succeed, the Highway Code would have to be re-written. Currently, some of the rules within the Highway Code are also statutory

requirements, and are identified as such by the words “MUST”/“MUST NOT”. Others are merely advisory, but some are clearly intended as orders. For example, rules 138–140 could not form the basis of the new law as they provide only advice on how to overtake. Rule 141 sets out the law on when overtaking is prohibited.<sup>136</sup> Rules 142 and 143, however, tell drivers when they should not overtake, but do not constitute offences in themselves.<sup>137</sup> It might be desirable that these be given status to allow them to form the basis of the new offence.

It would also be necessary for the law to include instances of dangerous driving which under the current law are committed when D drives a vehicle in a dangerous condition. Annex 6 of the Highway Code sets out some of the requirements for maintaining vehicles, and Rule 74 sets out requirements for vehicle towing and loading. Other regulations exist which, if violated, could cause danger to others and thus fall within the suggested offence.<sup>138</sup> In addition, drink-driving leading to the creation of risks would be covered by the offence, allowing for the abolition of the offence of CDCDUI<sup>139</sup> although, as with speeding, drink-driving itself would continue to cover all cases of driving under the influence of alcohol or drugs, allowing the police to step in to prevent harm before any risks are taken.

Given the seriousness of the offence, in terms of the risk of harm created (and perhaps caused) in its commission, and the blameworthiness of an offender in intending to violate the law, the offence would warrant a fairly high maximum prison sentence, in addition to a mandatory term of disqualification from driving. It is difficult to set the upper limit of such a penalty, but it would warrant a sentence exceeding the current two-year maximum for dangerous driving.<sup>140</sup> As for giving the offence a label, “dangerous driving” could be retained, given that

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<sup>136</sup> e.g. you must not cross a solid white line.

<sup>137</sup> e.g. do not overtake on the approach to a hill or bend.

<sup>138</sup> e.g. Road Vehicles (Construction and Use) Regulations 1986.

<sup>139</sup> It would also be possible to introduce an aggravated form of the offence if it was thought that some conduct was so dangerous and blameworthy to warrant a higher maximum penalty, as is the case in some Australian states (see above).

<sup>140</sup> The Government recommended raising the maximum sentence for dangerous driving to five years’ imprisonment (n.3 above). Although this recommendation has not yet been adopted, it might be a sufficient maximum penalty for the proposed offence, on the basis that cases of very bad driving resulting in death would be charged as gross negligence manslaughter, subject to a maximum of life imprisonment.

the violation must cause danger to others. “Negligent driving” might be a suitable label for the offence of committing a driving “error”.

Negligent driving would also require a risk of death or harm to others to have been created,<sup>141</sup> but no subjective state of mind would need to be proved. It would exist to encourage drivers to take care in their driving and to remain alert and pay attention at all times. One difficulty which might arise is that, as with careless and dangerous driving, a case of negligent driving may not come to the attention of the police in the absence of a collision. There seems little that can be done about this. However, it should be reiterated that as an endangerment offence, the police should not shy away from prosecuting in cases where no harm has actually been caused, if sufficient evidence exists. Disqualification would serve as a deterrent in such cases, but, as noted by Parker *et al.*, the main purpose of the law should be to retrain and educate offenders who commit errors. In most cases, then, a term of disqualification, the length of which would depend upon the degree of risk taken, would be combined with compulsory attendance on the NDIS. Only once the NDIS had been attended would the offender be able to recover his licence.<sup>142</sup>

This suggestion may be controversial, in that it introduces a new way of constructing liability for motoring offences.<sup>143</sup> It is hoped, however, that the

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<sup>141</sup> Or possibly a risk of damage to property. However, since the harm which the offence is truly trying to reduce is that of physical injury and death, and since damage to property will in most cases also involve a risk of physical injury, it is submitted that there is no need to include an alternative of a risk to property. This would also focus attention of possible offenders on the fact that driving badly is wrong because it creates a risk of harm to others.

<sup>142</sup> Note that this would require a procedural change in the law – currently the NDIS can only be used as an *alternative* to prosecution, rather than as part of sentencing.

<sup>143</sup> However, as seen above, the suggestion is not entirely new, with Spencer making a similar suggestion when the law was last reviewed (above, n.130). A comparable suggestion has also been put forward in relation to corporate liability. Glazebrook rejects the Government’s proposal of an offence of “Corporate Killing” and instead recommends introducing new offences of “causing death by breaching a safety regulation” and “causing injury by breaching a safety regulation”: Glazebrook, P.R. “A Better Way of Convicting Businesses of Avoidable Deaths and Injuries?” (2002) 61 CLJ 405. Glazebrook sees the advantages of his suggestion as being that they would describe clearly the nature and seriousness of the wrongdoing, would be properly classed as “real” crimes and would avoid arguments about whether or not an offence had been committed (the proposed offence of Corporate Killing is based on CDDD and Glazebrook is concerned about the possible debates on the question of whether conduct has fallen “far below” the required standard). Glazebrook provides a schedule of offences upon which prosecutions for the offences would be based (at p.420 – interestingly, he includes ss.40A *et seq.* Road Traffic Act 1988). Although

suggested offences would achieve the goals of the criminal law in focusing offenders' attention on what exactly they should not do, having the knock-on effect of reducing the amount of risk-taking on the roads. The rules in the Highway Code and other regulations exist to discourage the creation of risk. If a change in the law along the lines suggested here took place, the status of the Highway Code would change considerably. At present an infringement of the Highway Code is not an offence in itself, although it could provide evidence to support a charge of careless or dangerous driving. This would obviously change under the proposal. As a result, the suggested law would require further educative efforts to be made alongside enforcement of the law. Drivers who may not have referred to the Highway Code since passing their tests would have to become re-acquainted with its contents in order to avoid committing an offence.<sup>144</sup> The benefit of this, however, would far outweigh the inconvenience caused. Those who currently take risks inadvertently would hopefully become more aware of their actions, reducing the number of errors they committed. Those who commit violations would be discouraged from doing so by the penalties that they could face, and, in time, it is hoped that this would lead to a change in attitudes towards the law, as occurred with drink-driving.

Would it work in practice? If one were to apply the proposals to some of the problematic cases within the current study, would the problems be lessened? Taking a case involving excess speed as an example, NORTH018 was a case in which witnesses described D as travelling at speeds of up to 100mph. D lost control on a dual-carriageway when he had to swerve to avoid a car which was crossing the dual-carriageway, and collided with a car travelling in the opposite direction. D admitted to exceeding the speed limit (although claimed he did not go above 80mph) and clearly created a danger to other road users. The prosecution should therefore be capable of proving him guilty of the proposed dangerous driving offence (D in this case was in fact only prosecuted for careless driving).

More problematic, however, would be cases involving driver fatigue and inattention. Rule 80 of the Highway Code advises drivers not to undertake a long

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this proposal is different to that put forward here, in that the offences suggested are result crimes rather than endangerment offences, requiring that a risk has materialised, the rationale behind them is the same.

<sup>144</sup> It might be economically beneficial to distribute new copies of the Highway Code to all drivers registered with the DVLA free of charge. Drivers would then have no excuse not to know the rules and if the law succeeded in reducing risk-taking, less public money would need to be spent in dealing with road deaths.

journey (longer than an hour) if they feel tired. It is difficult to imagine, however, how such advice could form the basis of a prosecution for the proposed dangerous driving offence. Some of the cases in the current study, which quite clearly should have fallen within the current offence of dangerous driving, might cause more difficulties under the proposed offence. In cases such as NORTH023 and NORTH051 involving HGV drivers who failed to see stationary vehicles ahead of them which were visible for periods of at least 20 seconds, the Ds clearly warranted conviction for dangerous driving. However, applying the proposed offence might be even more difficult than the current law, since the Ds did not intend to violate any traffic law. In some cases where drivers' hours regulations have been breached, this could form the basis of the proposed offence, but in cases where D is merely tired or loses his concentration, or is a car driver, it is difficult to see how the prosecution could construct a case against him based only on his failure to see something in his path.

Would it then be necessary, or even possible, to create a separate offence of driving when fatigued? Corbett notes that under the current law drivers may feel that the act of driving when tired cannot be serious because it is not unlawful.<sup>145</sup> She questions what (if any) controls should be placed by legislators on fatigued driving,<sup>146</sup> but is unable to answer the question herself. It is indeed difficult to provide a solution to this problem. A rule requiring a driver to have a certain amount of sleep within a certain time period prior to setting out on a journey would be unworkable. So too would a rule prohibiting anyone who felt "tired" from getting behind the wheel of a car, since the issue is far too subjective to form the basis of a prosecution. However, it would clearly be desirable to bring drivers such as Hart, the driver in the Selby rail crash,<sup>147</sup> and some of the defendants in the current sample, within the realms of the proposed serious offence. Further consideration would be needed as to how this could be achieved.

It is hoped that in time this suggested offence structure would bring enhanced respect for the law of traffic offences. Those guilty of the more serious crime would merit the stigma attached to the label of "criminal", with the requirement of intention to violate the law bringing the offence closer to the paradigmatic nature

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<sup>145</sup> Corbett, n.1 above, pp.93–94.

<sup>146</sup> Ibid, at p.97.

<sup>147</sup> Hart was convicted of ten counts of CDDD and sentenced to five years' imprisonment: *The Times*, 12.01.02.



of crime. For those who committed errors and were guilty of negligent driving, their re-education as part of their sentence would hopefully reinforce the justification for their punishment by illustrating to them the necessity to adhere to the rules of the road and the risks involved in breaching them. Overall, contempt for traffic offences would hopefully lessen, risk-taking on the roads would reduce, and the number of people killed would decrease. The law would not of course eliminate offending altogether, but it would perhaps mean that otherwise law-abiding citizens would desist from offending, leaving offenders who engage in all forms of criminal conduct to become the main perpetrators of traffic crime. An additional and important benefit would be that police and prosecutors would find a real distinction between the two offence levels, solving many of the problems faced by decision-makers in the current study.

## Chapter 9 – Conclusion

Laws regulating the use of motor vehicles and the way in which they are driven are necessary in order to promote road-safety. Historically, however, it has proved difficult to find acceptable and workable definitions for general offences criminalising bad driving. The invention of cars has also had a profound effect upon the law of homicide, by bringing a dangerous implement into the everyday use of a large part of the population. Arguably, without the causing of death by motor vehicles, the *mens rea* of recklessness would never have been imported into the law of manslaughter,<sup>1</sup> and there would have been no need for new homicide offences created by statute.

Around 3,500 people die on Britain's roads every year, but it has always been difficult to establish the degree to which drivers are held liable for such deaths. By looking at individual cases it has been possible to get an idea of the number of RDIs leading to criminal charges where the fact that death has been caused is not indicated in the offence label, namely careless driving. More importantly, the research design has facilitated the exploration of the nature of cases falling within the different offence categories, and the identification of issues and problems faced by prosecutors in exercising their discretion in deciding whether to charge a driver involved in a RDI and, if so, with what offence.

The current law creates a gulf in sentencing between the two principal offences available in RDI cases. This arguably makes a difficult decision for prosecutors even harder, since they are conscious of the significance of the charging decision in terms of final disposal. The file analysis has shown that, in the three counties studied at least,<sup>2</sup> the current law presents difficulties for Crown Prosecutors in exercising their discretion, which sometimes leads to inconsistencies in decision-making. Such inconsistencies are not only present in the decision to prosecute, but also in the decision of the jury as to whether to convict a defendant of CDDD, or to find him guilty of the lesser offence of careless driving. The definition of

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<sup>1</sup> *Seymour* [1983] 2 AC 493 and *Reid* [1992] 1 WLR 793 were both cases of motor manslaughter which applied the test for *mens rea* required for reckless driving to the offence of manslaughter.

<sup>2</sup> It should be noted that all three counties employed slightly different organisational structures to their investigation and prosecution of RDI cases. Whilst it cannot be claimed that the three counties involved in this study are entirely representative of the whole country, it is interesting that the findings from these counties are fairly similar, with each experiencing comparable difficulties.

dangerous driving as an offence has long been problematic, but unfortunately it would seem that the most recent formulation adopted from the North Report has failed to provide an adequate solution.

Many of the findings of the current study are positive, however. A previous study had raised concerns about prosecutorial decisions in cases of motor-manslaughter and even murder, with cases which should arguably have led to conviction for manslaughter resulting in conviction for CDDD.<sup>3</sup> The findings of the current study do not suggest that offences of murder and manslaughter are being dealt with as CDDD in the counties involved. The nature of the cases falling within the sample were, however, such that no prosecution for murder or constructive manslaughter would have been appropriate, so it is difficult to be conclusive about police and CPS treatment of such cases.<sup>4</sup> There is strong evidence, though, that few cases of CDDD are downgraded to lesser offences such as careless driving. In the majority of cases the police and CPS are in agreement about the appropriate charge, which means there are few (almost no) cases in the East Midlands in which the CPS find it appropriate to alter the charge or to accept a guilty plea to careless driving on a more serious charge. Similarly, there were no cases charged as dangerous driving, rather than CDDD.

Existing literature shows that the public and offenders' attitudes to driving offences is often to view them as "quasi" crime falling short of "true" crime, meaning that the potential for deterring drivers from committing offences is reduced. The argument has been that a change in public attitudes is needed in order to improve compliance with the law and prevent excessive risk-taking. There is arguably, however, one advantage of traffic law currently being classed as "quasi-criminal". This is that whereas in dealing with more traditional criminal offences the police tend to work within a "cop culture" which influences the way they exercise their discretion in making decisions, this appears not to occur in RDI cases. Officers seem to develop an objective view of the evidence before

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<sup>3</sup> Cunningham, S., "The Reality of Vehicular Homicides: Convictions for Murder, Manslaughter and Causing Death by Dangerous Driving" [2001] CrimLR 679.

<sup>4</sup> Since the cases in this sample, HM CPS Inspectorate has recommended that the CPS Director, Policy, record all RDI cases prosecuted as manslaughter so that prosecutors can learn from the outcomes of those cases, because information is needed to ensure that future guidance in such cases is soundly based: HM Crown Prosecution Service Inspectorate, *Review of the Advice, Conduct and Prosecution by the Crown Prosecution Service of Road Traffic Offences Involving Fatalities in England and Wales*, 2002, para 5.29.

making their decisions, rather than trying to fit the evidence around their own perception of events. Whilst it is desirable to encourage the public and the police to take traffic crime more seriously, this should be achieved without losing the impartial approach currently in operation.

This thesis has argued that a specific offence of vehicular homicide, currently called Causing Death by Dangerous Driving, is neither desirable nor warranted. On the one hand, there is no justification for labelling those who kill with vehicles differently to those who use any other method to kill, provided they display sufficient blameworthiness to secure a conviction for manslaughter. On the other hand, those who drive badly and cause death but do not meet the requirement for a manslaughter charge are arguably no more blameworthy than bad drivers who are fortunate enough to avoid causing fatal collisions. Whilst the author advocates the use of manslaughter charges where the test in *Adomako*<sup>5</sup> or the proposed test for “killing by gross carelessness”<sup>6</sup> is met, she is concerned by recent calls for the harsher treatment of drivers whose blameworthiness does not equate with gross negligence.<sup>7</sup> Public opinion seems to have experienced a massive shift in relation to killing with cars. Fifty years ago a new offence was introduced because juries were reluctant to convict drivers of manslaughter because of a fear that “there but for the grace of God go I”. There are suggestions in the media that a sector of the public have now moved to the opposite extreme, forgetting that undoubtedly all drivers occasionally let their standard of driving fall, and demanding that any act of careless driving leading to death should receive a substantial prison sentence.

Chapter 7 examined the role of the criminal law in punishing bad drivers. Whilst it is probably the case that criminal offences, in general, seek to achieve both utilitarian and retributive aims of sentencing, the justification and aims of punishing bad drivers appear to differ, according to whether they have killed or not. Non-fatal offences aim to achieve utilitarian objectives, with fatal offences

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<sup>5</sup> [1995] 1 AC 171.

<sup>6</sup> Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Report No.237, 1996; Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals*, London: Home Office, 2000.

<sup>7</sup> An offence of causing death by careless driving appears to remain under consideration following the TRL's report: Pearce, L.M., Knowles, J., Davies, G.P., and Buttress, S., *Dangerous Driving and the Law*, Road Safety Research Report No.26, Transport Research Laboratory, 2002. The media have gone one step further, with the *Sun* newspaper suggesting that drivers who kill having committed any offence should be charged with manslaughter: *The Sun*, 16.4.04.

being explained in terms of retribution. The argument is that retribution is only appropriate if D can be blamed for the outcome of his actions and, given that drivers have no control over the outcome of their bad driving, it is the taking of risks, rather than the outcome of such risk-taking, for which they can legitimately be blamed. Additionally, drivers can only be deterred from taking risks, not from causing the result of such risk-taking, which is beyond their control.

If the suggestion that CDDD be abolished were adopted, this would leave the non-fatal offence of dangerous driving with a lot of work to do in punishing bad drivers. With the gravity of the offence increased to incorporate fatal cases, an increase in the sentence for the offence would be required. More significantly, a redefinition of the offence is found to be warranted by the current study. If the law is to succeed in deterring bad driving and reducing the number of deaths on the roads, it must communicate to drivers what driving is sufficiently bad to fall within the scope of the offence, whilst at the same time portraying itself as a true “crime” so that the public may come to change its attitude and accept that it is justified to use the criminal law as a tool to such ends. There is a need to eliminate the paradoxical view that killing with cars is truly criminal, whilst indulging in driving that risks, but does not cause, death, is not.

The suggestion is to reintroduce a form of *mens rea* to the offence, by requiring that D must have intended to violate a traffic rule and thereby created a danger to others, before he can be convicted of the more serious of two offences. This would have two advantages over the current law. First, it would dispense with the supposedly objective test of whether D fell far below the standard of the competent and careful driver, which is a test that in practice has been shown to apply subjectively. In doing so, it would avoid the problem of D failing to class his own behaviour as dangerous, since he would be informed of the exact behaviour falling within the definition of the offence by the contents of the Highway Code or some such similar document setting out road traffic law. Similarly, prosecutors would have little problem in applying the law in particular cases, making their exercise of discretion in charging decisions less troublesome. Second, the requirement of an intentional violation would import into the law a sense of legitimacy in punishing bad driving comparatively harshly.

This new offence, coupled with a lesser offence of negligent driving, would hopefully bring new respect to the law and increase the opportunity for the law to achieve its goals. Whilst those guilty of the more serious offence would warrant a fairly stringent penalty to facilitate both individual and general deterrence, with

disqualification presenting itself as the obvious mechanism, those guilty of the lesser offence would be dealt with by educational means, in order to help prevent the offender committing errors in his driving in the future. In a climate where we are becoming increasingly reliant on the car as a personalised method of transport it is imperative that increased car-usage does not lead to increased fatalities. It is hoped that the criminal law can, despite its past record, impress upon drivers the need not only to desist from violating traffic laws, but also to take as much care as possible when driving.

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