**Driving offences: promoting consistency for victims in “victimless” crimes of endangerment**

On 16th July 2019 the Department for Transport (DfT) announced a two-year long review into roads policing and traffic enforcement to highlight best practice and identify gaps in service. The road safety minister stated that “we have strong laws in place to ensure people are kept safe on our roads at all times. But roads policing is a key deterrent in stopping drivers breaking the law and risking their and other people’s lives.”[[1]](#footnote-1) The authors are largely in agreement with this statement but, as we found through our recent research into the enforcement of driving offences, enforcement is inconsistent and variable, both in the resources allocated to enforcement and in the way in which the present law is interpreted and enforced. We will set out some of the most important findings in this article. Some of the initiatives we examined have been recognised by the DfT in its Road Safety Action Plan, published a few days after the review was announced.[[2]](#footnote-2)

Although serious offences exist to punish drivers who cause harm on the roads,[[3]](#footnote-3) it is questionable whether those result crimes in themselves can have a deterrent effect on drivers[[4]](#footnote-4) and they are unlikely to have much in the way of a road safety benefit. As noted by the All Party Parliamentary Cycling Group:

Typically, the discussion of the legal system resolves [sic] principally on what happens in the gravest of cases: where death or serious injury has resulted. For each injury crash, however, hundreds of near misses have occurred, and thousands more conflicts between road users are likely to have taken place. If we are to try to stop the incidents that cause harm and injury from occurring, the justice system needs to focus on preventing danger throughout the system.[[5]](#footnote-5)

The APPG recommended that the Ministry of Justice should examine in more detail how offences are being used.[[6]](#footnote-6) Of particular interest are the offences of careless driving and dangerous driving. Anecdotal evidence[[7]](#footnote-7) had suggested that such offences are rarely prosecuted in the absence of a collision resulting in injury or damage to property, despite such harms not being a required element of the offence. There is also the issue of overlap between these general driving offences and more specific offences such as using a handheld phone or speeding, which in addition to amounting to offences in their own right can also provide evidence to support a charge of careless or even dangerous driving.[[8]](#footnote-8) These offences are predicated not on the existence of an identifiable victim but, rather, on the creation of a second-order harm in the form of a risk to any other road-user who might be in the vicinity of the offending driver. Vulnerable road users, such as pedestrians and cyclists, might be particularly conscious of the existence of such risks when they occur but, without any first-order harm being caused as the result of a collision, such victims of second-order harm are treated as no more than witnesses by the criminal justice system. We use the results of our study to argue that the existence or otherwise of such victims influences the way in which a case is dealt with, but that the system should do more to ensure consistency and recognise such victims in order to communicate the wrongfulness in driving offences. The wrong is in the causing of second-order harm in the sense of increasing the risk of a collision, which might end in injury, but the focus should be on the standard of driving rather than on the specific harm that materialised. We start by considering some of the theoretical underpinnings of our research, before explaining the project itself, and then focusing on our findings relating to the use of third-party footage as evidence of offending behaviour, and on current difficulties in enforcement practice and decision-making. In essence, we find that initiatives such as Operation Snap can go some way to mitigate the effect of the reduction in the number of operational police officers available to enforce traffic offences, but that more resource is needed to ensure that third-party reporting leads to consistent and effective enforcement.

# The theoretical underpinnings of endangerment offences

The project explored the importance of driving offences in reducing harm on the roads, through an examination of current practice relating to the enforcement of the mainstream endangerment offences: dangerous driving;[[9]](#footnote-9) careless driving;[[10]](#footnote-10) and using a mobile telephone whilst driving.[[11]](#footnote-11) What these three offences have in common is that they do not require any result to have been caused by the offending behaviour of the defendant. In relation to both careless and dangerous driving the test is objective, insofar as D’s driving is assessed against the standard of a competent and careful driver. Where the driving falls below that standard, the driving is careless; where it falls *far* below that standard, it is dangerous. Neither offence requires any particular result to have occurred, although dangerous driving does require that a competent and careful driver would realise that the driving was dangerous, in the sense that it created a *risk* of injury or of serious damage to property.

In one sense they are “victimless” crimes, in that it is not necessary for a complainant to have suffered any identifiable harm as a result of the offence. On the other hand, they are offences that have the potential to cause considerable harm and result in death, depending on circumstances and factors that may be outside the control of the offender.[[12]](#footnote-12) Given that these offences may result in “near misses” or even collisions resulting in anything from minor damage to property to injuries to the person,[[13]](#footnote-13) in reality they are often not “victimless”. In essence, the current offences exist as endangerment offences to punish causing the second-order harm of risking harm to others. At a theoretical level, Finkelstien has defended the criminalisation of endangerment offences through her Risk Harm Thesis, arguing that: ”a person who inflicts a risk of harm on another damages that interest, thus lowering the victim's baseline welfare”.[[14]](#footnote-14) It is worth noting that Finkelstein does not conceive of such offences as “victimless”:

if the risk of harm is itself a harm, then we can punish risky behavior without having to regard such behavior as an instance of the controversial category of "victimless crimes." And, … there are already legal doctrines that might be best explained in terms of exposure to risk, such as attempts and reckless driving.[[15]](#footnote-15)

It is not clear from Finkelstein’s thesis how remote a risk could be and yet remain a second-order harm. This, it is argued, is the difficulty in measuring an appropriate response to endangerment offences such as careless driving. Where a cyclist experiences a near-miss as the result of a “close-pass” they are clearly the victim, their baseline welfare having been lowered. But careless driving does not require an individual to have been affected by driving that falls below the required standard. If D drives on an empty road at a standard below that of a competent and careful driver, the offence of careless driving is nevertheless committed; the question will be whether it is in the public interest to prosecute.

There is obviously one difference in committing an offence on an empty road and doing so in the proximity of other road users, and that is the influence of luck. Arguments surrounding moral luck are particularly applicable in the realm of road traffic offences, and are brought sharply into focus in the discussion of death by driving offences.[[16]](#footnote-16) Whilst the question of whether “results matter” has been examined in considerable depth in the context of constructive offences such as unlawful act manslaughter,[[17]](#footnote-17) the issues are perhaps magnified in driving cases because, unlike other offences that may cause death, such as assault, there is no subjective *mens rea* requirement at all in relation to driving offences, which are crimes of negligence or strict liability. In such cases, the extent to which D has made D’s own luck arguably has less purchase, since the risk-taking need not be deliberate. Whether a collision occurs, and whether it is fatal, is certainly not dependent on *pure* luck, but neither can we say that *moral* luck applies in the same way as if D had consciously taken a risk. This, in fact, ought to reduce the impact that results have on criminal responsibility in this context: a D who drivers below or far below the standard of a competent and careful driver has not necessarily made the conscious choice to do so. That does not by any means make D blameless, but given the risk is created at the point the required standard is departed from, it is that departure that we should focus on in terms of responsibility. Whether a harm is caused, whether that be of a first-order (death or injury) or second-order (risk of injury) nature, the only way to attempt to prevent such harm is through focusing on behaviour, rather than results. It might be argued that where there is no identifiable victim of second-order harm (e.g. driving on an empty road) that ought to be treated differently to where there is a potential victim to be harmed, which explains the risk requirement for dangerous driving. But given that there is no such requirement for careless driving, there is an argument to be made that where a second-order harm is caused in the form of risk-creation, this should be recognised. At present it makes no difference in law whether or not there was a specific victim whose safety was threatened.

Duff identifies the wrong in endangering others as that of creating an unreasonable or unjustified risk of harm which “manifests our lack of proper concern for the interests of those we endanger”.[[18]](#footnote-18) However, he also identifies succinctly the problem with the current construction of such offences:

The drawback is that, unless we can rely on some quite specific shared understandings of what counts as an unreasonable risk, and of what kinds of care people should take, in a range of contexts, the standards that courts have to apply will not be the polity’s shared standards, but the individual standards of each court and its members – which generates the familiar defects of uncertainty in the law’s content, and unpredictability and inconsistency in its application.[[19]](#footnote-19)

Duff distinguishes between *implicit* and *explicit* endangerment offences.[[20]](#footnote-20) Whilst dangerous driving is an explicit endangerment offence, in that it sets out in the offence the danger that is created by the offending behaviour, careless driving does not fit neatly into this taxonomy, as there is no similar requirement for the lesser offence.[[21]](#footnote-21) Neither is it designed in the same way as the offence of use of a mobile phone whilst driving, for example, which similarly exists as an example of an implicit endangerment offence to prevent the risks involved in distracted driving but does so by instructing drivers to follow a rule (do not use a handheld phone whilst driving).[[22]](#footnote-22) This is on the basis that drivers are prone to misjudge their ability to drive according to the required standards and cannot be trusted to decide for themselves, when conducting certain inherently risky activities whilst driving, what is acceptable (see also drink driving).[[23]](#footnote-23) It is this point that provides the public interest in prosecuting cases whether or not a particular victim has had their baseline welfare lowered by the particular offence: there is a need for all drivers to drive to the Highway Code at all times, whether or not failing to do so risks physical harm to others on a particular occasion. That said, the public interest will always be stronger in prosecuting cases where a particular victim has suffered an identifiable second-order harm.

It is against this background explanation for the existence of offences that we assess the success or otherwise of their enforcement. We provide these theoretical underpinnings as a justification for why such offences require robust enforcement, irrespective of the result of the offending in any particular case. Ours was a qualitative study, which aimed to assess the effectiveness of enforcement in terms of consistency in decision-making and successful employment of the offences available to attempt to change driver behaviour, either through prosecution, the issuing of FPNs or offering an educational course. It was beyond the scope of the project to assess whether such attempts have the desired effect, although one force involved in the study has claimed that one of its initiatives, Op Close Pass, has been successful in reducing KSI[[24]](#footnote-24) figures for cyclists by 20 per cent.[[25]](#footnote-25)

# The scope of the project, its aims, theoretical underpinnings and methods

The research consisted of two strands: strand 1 accessed empirical data (case files on the prosecution of the offences, interviews with police officers, and examples of best practice in roads policing) from three police forces; strand 2 gathered data from vulnerable road users (cyclists) on their perceptions of police enforcement activity. One of the aims of the project was to explore and understand differential investigation and prosecution practices in the forces studied and associated Crown Prosecution Service (CPS) areas. We sought to provide a measure of the nature of cases deemed to warrant a legal response, what that response was, and of the evidence required to proceed with a case to court. We also examined cases that were deemed not suitable for prosecution, whether this was based on evidential or public interest factors. Although we did not always uncover the reasons behind decisions in individual cases, we were able to build up a picture of the nature of cases resulting in different disposals, to identify some good practice and also inconsistencies in approach. This article will focus on the first strand of the research.

We analysed 301 cases in total from three police force areas, [[26]](#footnote-26) 232 relating to allegations of careless and dangerous driving, and the remainder relating to use of a mobile phone whilst driving.[[27]](#footnote-27) Our aim was to explore the nature of these cases, the classification of the offence, and the evidence collected. We also conducted 24 semi-structured interviews with police officers and police staff, focusing on the enforcement of these offences and any innovative methods used in education and enforcement.[[28]](#footnote-28) Our full findings, along with an executive summary, can be accessed online.[[29]](#footnote-29)

Although this article focuses on the results of Strand 1 of the project, the results of strand 2 are also pertinent, particularly in light of the theoretical underpinnings of the offences set out above. The project’s second strand, involving focus groups with cyclists, demonstrated that vulnerable road users often do feel themselves victims of these offences, with a vested interest in how such offending is dealt with by the police and courts. However, the offences do not exist to provide retribution for breaches of the law but, rather, to deter risk taking and reduce the risk of harm on the roads.[[30]](#footnote-30) As such, the evidence needed to prove such offences does not involve the need for complainants to give evidence that harm was caused but, as will be seen, in reality results do matter and cases do often turn on the actions of other road users in seeking to bring miscreants to justice. Historically, one explanation for the lack of prosecution in cases where a risk has been created but not materialised in the causing of a collision, may have been the evidential difficulties of proving that an offence has been committed in the absence of what is legally termed an “accident”. In recent years a number of technological advancements have been made which may assist in providing the evidence required to prove that a driver has driven below, or *far* below the standard of a competent and careful driver. For example, there is a growing number of cyclists who use helmet/bike-mounted cameras to capture instances of near-misses on the roads. Similarly, the number of drivers of motor vehicles using dash-cams has increased to 27% according to one survey.[[31]](#footnote-31) Footage can be submitted to many police forces as evidence of offending behaviour. We start by examining this way in which members of the pubic are able to influence the enforcement of offences through third-party reporting, before we consider how the existence or otherwise of identifiable victims of offending behaviour can be crucial in determining the outcome of a case.

# A neighbourhood watch of the roads?

Our project findings show that there are broadly three different sources of allegations of the offences under investigation: road traffic collision (RTC); police witnessed; and third-party allegations. Third-party allegations are unlikely to be progressed through the criminal justice system in the absence of supporting evidence, usually in the form of footage submitted to the police by the third-party. What may be of particular interest to the DfT’s review on enforcement of driving offences, is the success or otherwise of forces using an online portal to allow offending behaviour to be reported by members of the public, supported by video footage. This was first introduced by Operation Snap in Wales,[[32]](#footnote-32) but has since been rolled out to other forces within England. Each of the three force areas involved in this project accepted evidence of driving offences in this way. There were 26 allegations that came from this source within our sample of 232 cases. It is, therefore, difficult to claim representativeness of this group of cases, given the smaller sample size, so we will concentrate on the quality of the individual cases and comments from officers in interviews.

Third-party allegations are, like Traffic Offence Reports submitted by officers who have either witnessed bad driving or attended the scene of a RTC, considered by Traffic Processing Units (TPU or Traffic Process Office or Traffic Process Management Unit) for decisions to be made as to any appropriate enforcement action. The set-up of TPUs differs from force to force, with variations in the number of police officers compared to civilian staff, as well as the employment of Police Led Prosecutors (PLP) to present cases in the magistrates’ court.[[33]](#footnote-33) Whatever the set-up, it is worth noting that the use of online reporting has resulted in an increase in workload, without any corresponding increase in resources. In Force A, for example, submissions had increased fourfold, and the TPU team is having to process these cases alongside their existing workload resulting from RTCs, without an increase in staff numbers. The TPU manager admitted that his team was struggling to keep up with the workload. It can be argued that consistency in decision-making is likely to deteriorate where capacity is stretched in this way and our report argues for appropriate resources to be allocated for this purpose.

Those who submit footage to portals (submitters) are sometimes “victims” of the offence evidenced, such as cyclists who have been “close-passed”, or they might be fully independent witnesses, often car-drivers who have caught something on camera without themselves having been endangered, but want to see the offender brought to justice.[[34]](#footnote-34) In an ideal world submitters, whether victims or witnesses, would be informed of the outcome of “their” case. Informing submitters of the outcome does not happen in most forces, as the TPU staff simply do not have the capacity to communicate results to the public. There is also the concern that staff should not be getting into debates with members of the public as to what the appropriate outcome is. As complainants are not, in law, considered to be “victims”,[[35]](#footnote-35) there is no obligation upon the police to update them on any decisions made. However, we were told that in one of the forces with the highest number of TPU staff available, submitters are informed of the outcome, and it appears that this has not proved problematic. This arguably keeps the public engaged: if they feel their contribution is valued they are more likely to continue to do what one officer described as their “civic duty” and submit footage of offences. On the other hand, if prosecution is deemed inappropriate due to lack of evidence that an offence has been committed, it makes sense to feed this back to the member of the public so that they are encouraged to submit only in cases where positive action can be taken, and reduce the number of offences resulting in no further action (NFA). Given that TPU staff are under resourced, it is suggested that forces might be able to adopt an automated process by which a decision as to outcome triggers an automated email to the submitter. If it is clear that the address from which this email is sent is not monitored this should prevent the police getting into discussions as to whether the outcome was appropriate. Further investment in an IT management system would provide an obvious benefit here.

As one officer described it, the use of a portal or Op Snap can allow for a kind of “Neighbourhood Watch of the roads”, communicating to offending drivers the idea that despite the lack of marked police cars on the roads, they are far from immune from prosecution because any other vehicle could be fitted with a camera to record evidence to be used in a prosecution:

it’s targeting people to say, that driver behind you, that driver in front of you, could have dashcam. If they have dashcam, they’re going to record you. … [W]e need to influence the drivers to realise that four million drivers out there have the potential of catching them. … So, if they get the message that I want to get out, that is, there’s four million special police officers, a Neighbourhood Watch of the roads – there are people out there that are going to report you. Hopefully, we can get their driver behaviour back to where it should be, where the fear of being caught is keeping people safe on the road. ‘Cause that’s all we’re trying to do, is reduce road death and serious injuries. [Inspector]

Here the officer is making a clear link between the use of a portal and the role of roads policing in reducing harm on the roads. It has the additional benefit of engaging in the process those who self-identify as victims, having suffered a second-order harm, even if they are not officially considered to be victims. For these benefits to be effective, though, decision-making as to whether an offence should be pursued needs to be consistent in order to avoid a postcode lottery of justice. Consistency is also important in ensuring that those who are able to submit footage continue to do so, as this will assist in promoting public confidence in the process.

# Enforcement and police decision-making

The police and CPS exercise a great deal of discretion when making decisions in relation to allegations of offending behaviour on the roads. This is for various reasons, including the range of disposals available for these offences (prosecution; fixed penalty notice [FPN]; driver improvement course; warning; NFA). Decision-making is discretionary both in the sense of determining whether an offence has been committed and, if so, how that offence should be categorised (e.g. careless driving versus dangerous driving) and, if there is evidence of careless driving, what disposal is appropriate.

When an allegation of bad driving, either through a TOR or a third-party submission, is being considered by officers and TPU staff exercising discretion, there is evidence that some (but not all) police forces try to encourage the consistent exercise of discretion through various means, such as drafting a decision-making rationale for determining disposal in a case of careless driving. An example of this can be seen in Force C, where all third-party footage would be triaged by one individual police officer, ensuring consistency of approach in determining whether an offence had been committed, before the TPU staff would then determine the disposal based on the decision-making rationale written by the officer:

You have to make the decision-making rationale for it. …-. So it says, education over prosecution, let’s start low, offer them a course. If they’re not eligible for a course, then offer them a fixed penalty. If they’re not eligible for a fixed penalty, go to summons.

Here we see the discretion for disposal being structured, and the discretion for deciding whether an offence of careless driving was committed is controlled by the fact that it is one individual making that decision. The problem in other forces, is that there may be several staff-members, some civilians rather than officers, exercising that initial triaging discretion, both in relation to third-party allegations and TORs submitted following a RTC. In those forces, consistency of decision-making was not always demonstrated, both in relation to determining what offence had been committed, and in the disposal selected. From interviews with staff in Wales,[[36]](#footnote-36) that also appears to have been a teething-problem with Op Snap, in that there was no training of back-office staff as to how to interpret the evidence presented in the submitted video footage, and different approaches have been taken within the different Welsh forces. Those working in the same office may well call upon their colleagues for second opinions to try to increase the degree to which decisions are made consistently, but the danger is that it could well be that one case might be dealt with differently depending upon the location in which the bad driving occurred. This is partly explained by the fact that different CPS offices have different requirements for bringing charges, which filters down to the police decision-makers. It might be seen as less important to guarantee consistency of decision-making if crimes were truly “victimless” but, given that many instances of bad driving are not victimless, there are reasons to at least encourage, if not guarantee, consistency.

In our analysis of TOR data we found evidence that the risk of inconsistent decision making had materialised in the forces participating in the project, despite measures being put in place to try to structure decision-making. The ways in which the police attempt to structure their decision-making differs between forces. In some forces, but not all, the reporting officer is asked to select at the end of the TOR form whether or not the offence committed appears to have been deliberate or unintentional. For example, a TOR from February 2017 in Force A had two alternate boxes for an officer to select:

Evidence suggests lack of awareness of the law pertaining to the offence he/she committed, that does not have wider consequences (ie collision)

or

Evidence suggests by an Act/Omission their mischief was intentional/deliberate (ie the driver knew their actions amounted to an offence)

Similarly, TORs in Force C required officers to select whether the offence was deliberate *or* a “lapse in concentration (unintentional act)”.

Interviews suggested that the main purpose for these choices was to assist in assessing the appropriate disposal in a case. The tests for careless and dangerous driving are objective and do not require proof of D’s state of mind. There is no need, for example, to prove that D was aware of their offending for the purposes of proving dangerous driving. However, we have found that a prosecution for dangerous driving is far more likely where the offending involves an intentional act (see below). That is not, however, the purported reason for these tick-boxes appearing on the TOR. Rather, the reported rationale is to determine the appropriate educational course for D to attend if such a course is deemed appropriate.[[37]](#footnote-37) It should be noted that whichever course is deemed to be appropriate (driver awareness; driver education; driver improvement) the effect is the same, in that they are all offered as an alternative to prosecution and where completed, D will avoid prosecution for the offence. The data we had did not specify which particular course had been offered to D; only whether a course had been accepted as an alternative to prosecution.

We were able see how this operates in practice. We had cases in which an educational course was offered where officers had witnessed an offence and ticked the ‘deliberate’ box, but others where a FPN was issued. In CWDCFP6 a FPN was issued, despite the reporting officer making the plea to ‘please prosecute’ next to the ‘deliberate’ box having been ticked. This was a case in which the officer was driving a marked police car attending a RTC on the motorway. He was driving in lane 3, with lights and sirens operating, at 120 MPH. He reported that: “Offender ahead stopped dead in lane 3. I had to use full emergency brakes stopping from 110mph coming to rest 1m from rear bumper of offender. This was a serious risk to life and I feared a serious collision only just avoided”. It may well be that the appropriate outcome was reached in this case. The officer was clearly affected by the near-miss in this case, contributed to by the fact that he was driving at speed to attend an emergency. He may have felt the victim of an offence, but it may have been that the offending driver simply panicked and rather than deliberately endangering the officer, had failed to respond appropriately. It is right that a decision should be made in a case such as this by an objective decision-maker. It does though, along with other cases, raise questions about the utility of a box assessing the deliberate nature of the offending.

Conversely, there were cases where the “unaware” box was ticked and the initial suggestion from officers assessing submitted footage of close passes was that an educational course was appropriate. There was clear evidence of careless driving, with the driver in each case passing very close to a cyclist, as caught on the cyclist’s camera. However, in both of these cases (AWDC7 and AWDC20) D was prosecuted in court for careless driving, perhaps because D was not eligible for a course or had declined the offer.[[38]](#footnote-38) In the first of these, no evidence was offered in court and the case was dismissed. It is not known the reason for this. In the second, D was found guilty in his absence and was fined £220 and given 3 penalty points.

In other cases, it can be questioned whether the correct box was selected. This can be seen both in terms of driving being categorised as “unaware”, when the evidence suggests it was deliberate, and vice versa. An example of the former type of case is AWDC4 in which officers witnessed D driving the wrong way around a roundabout in order to avoid traffic. It is difficult to understand why the “lack of awareness” box was ticked in this case, given that the facts described would appear to require a conscious decision rather than lapse of attention.[[39]](#footnote-39) An educational course was offered and accepted in this case. On the other hand, an example of the latter type of case is AWDC18. This was a RTC case in which the victim, a young girl, emerged into the road from behind an ice-cream van in a residential street. Despite noting that the collision could have been avoided if D had been paying proper attention, the reporting officer ticked the “deliberate” box. One wonders whether this was done in order to encourage prosecution in this case, which was arguably appropriate given the existence of an identifiable victim and harm caused (it is unclear how extensive the victim’s injuries were). D was prosecuted for careless driving, found guilty in his absence, fined £440 and given 6 penalty points. It is submitted that the real difference in these two cases was not whether D’s act was deliberate or not but, rather, whether there was an identifiable victim of the offending. Whilst driving the wrong way round a roundabout had the potential to put other road-users at risk ,the fact that (luckily) nobody was hurt may have been what encouraged a box to be ticked to treat the offence more lightly whereas, in the second case, the fact that a young girl had suffered injury may have influenced the officer in selecting the box that would encourage the offence to be taken more seriously. Although this is conjecture, and these endangerment offences do not require a victim to have been harmed, where one is harmed it is human nature to judge the offending behaviour differently. It might also be pertinent for the arguments raised in this paper that in the first example, although the driving created a risk of harm, it does not appear that any particular potential victim of such harm was identified. Had it resulted in a near miss this again might have led to it being treated differently.

There are other cases in which the “deliberate” box was ticked and D was prosecuted for careless driving in circumstances where the degree of deliberation involved might have given rise to suggestions that a prosecution for dangerous driving was appropriate. An example is AWDC17 in which D was witnessed by officers driving onto the opposite footpath in order to overtake traffic. Given that the officer described this as placing both pedestrians and drivers in danger, one might expect a charge of dangerous driving to be made out. He was sentenced at the top end of what is possible for careless driving, given that he was disqualified from driving for six months. Similarly, in AWDC6 the combination of factors involved in D deliberately breaching a number of different rules of the road could arguably have given rise to a charge of dangerous driving. An officer in an unmarked car was overtaken by D driving in excess of speed limit (60+ in 30 limit) in heavy rain. D also ran a red light before stopping for the officer. D’s driving was recorded on in-car video but the officer described the driving as falling below, rather than far below, the standard of a competent and careful driver, and D was told that he would be reported for careless driving. He was found guilty in his absence at court, fined £440 and given 6 penalty points. In these cases it is argued that the lack of an identified victim may have influenced the charge selected.

In one of the forces investigated, it was also the case that the third-party member of the public was asked to tick a box when submitting evidence in support of their allegation as to what they felt the appropriate disposal should be. It is doubtful whether asking this question is particularly helpful, given that it is for the police or CPS to decide first whether there is sufficient evidence that an offence has been committed and, second, if it is in the public interest to prosecute.[[40]](#footnote-40) It can be argued that the submitter is acting on behalf of the public in submitting the allegation and their view might be representative of the public interest. The submitter may well have been a victim of second-order harm and has a particular interest in the case. However, this is a decision that ought to be made objectively and should not be influenced by whether a particular individual is understanding of the fact that in some cases an educational course might be the more appropriate disposal than prosecution. This explains why in the majority of cases in our sample the final outcome did not correspond with the option ticked by the submitter regarding their view as to appropriate disposal. Allowing for the views of the submitter to influence the decision would be likely to increase the inconsistency in decision-making, and it is in all victims’ interests to promote consistency. As with all criminal offences, the Code for Crown Prosecutors must be applied to assist with consistency, but there are particular issues with driving offences which cause some difficulties for the police in seeing cases progress to successful prosecution.

# Interpreting the law and applying the Full Code Test

Where the police feel there is sufficient evidence to warrant a charge of dangerous rather than careless driving, they should, under the statutory charging scheme, prepare an advice file and seek a decision from the CPS as to the appropriate charge. In interviews with police officers in the three force areas we consistently received the same responses in relation to our questions regarding CPS involvement in cases. Whatever the reality of such cases, the *perception* on the part of officers (and TPU staff) is clear, and it is also clear that this perception impacts on the way in which cases are dealt with by the police. Preparing an advice file and involving the CPS requires more work on the part of the police, with no guarantee that the additional resource allocation will result in a charge for anything other than careless driving. Consequently, it was suggested by officers in each of the forces that they may sometimes choose to prosecute for careless driving rather than involve the CPS. The time spent on trying to argue for dangerous driving to be charged is felt to be wasted given that, after some back and forth, the final decision from the CPS is often to summons the driver for careless driving, despite the police being convinced that they have secured sufficient evidence for dangerous driving.

The complaints from police that the CPS often downgrade dangerous driving to careless driving, even in seemingly clear-cut cases, is borne out by the data from the case files to a certain extent. Where the line should be drawn between careless and dangerous driving is not always clear: did the driving merely fall below the standard of a competent and careful driver or did it fall far below that standard? We found that certain cases were more likely to succeed as allegations of dangerous driving than others. The vast majority of cases of dangerous driving in our sample (42/54) came to light because the offence was witnessed by an on-duty police officer. This occurred in the course of a police pursuit, where a suspect had come to the attention of the police due to suspicious activity, bad driving, or ANPR trigger, and the driver failed to stop for the police, who gave pursuit. In a little over half of these (25/42) cases the police had in-car video that recorded the pursuit and provided evidence in support of a charge of dangerous driving. In interviews with officers it was agreed that such footage is ideal to prove a case of dangerous driving, but in its absence the witness testimony of an officer, or preferably two officers, would suffice to support prosecution. The weight given to the words of an officer, given the officer’s credibility is perceived to be far higher than that of a member of the public, results in prosecutions which would not proceed if a member of the public reported the offence without further evidence or independent witnesses.[[41]](#footnote-41)

Witness testimony from officers who are clear that dangerous driving has been committed does not, however, guarantee that such a charge will be pursued. An example of a case being downgraded by the CPS from dangerous driving to careless driving was a case witnessed by the police without the support of video footage. The two police officers were able to give detailed commentary of the pursuit and it is unknown why the CPS advised a charge of careless driving rather than dangerous driving, but it provides a good case study for discussing the threshold for proving dangerous driving and careless driving. In CWDCP9 the police officers’ witness statements described how, once they had attempted to speak to the occupants of a suspicious car, D had made off, driving in excess of the speed limit (70mph in 40mph limit, 80mph in a 60mph limit, and “’easily in excess of 100mph” on a dual carriageway). One of the officers graded the Dynamic Risk Assessment as Medium and described how D drove on the wrong side of road, showing little regard for members of public, and nearly lost control resulting in a near miss with a truck parked on the offside. The officers were also careful to make a statement assessing the standard of D’s driving in relation to the offence definition, stating that D's driving “fell far below that of a competent and careful driver and not only did he put his own life in danger but he also subjected his passengers to danger, the general public and myself and colleagues”. This was a common feature of cases prosecuted as dangerous driving witnessed by the police but, in this case, the CPS chose not to prosecute for that offence. There was unfortunately no explanation of this on the file, and so we are unable to say whether the lack of footage was influential here.

What we can say, however, is that what is described by the officers in the case appears fairly typical of what is required for a charge of dangerous driving to be brought. Many of the cases in the sample resulting in a charge of dangerous driving involved more than a few minutes of bad driving over several miles, including driving at excess speed, perhaps running red lights and driving on the wrong side of the road or across pavements; what one officer described as a “protracted” course of bad driving. On the other hand, another officer also stated that a dangerous driving charge could be supported on the basis of one particular manoeuvre, such as running a red light in a residential area at 70mph, and on the basis of as little as a minute’s footage in evidence: “Dangerous is dangerous, regardless of how long it may continue for.” What appears to be crucial is the presence of a number of aggravating factors combining to demonstrate driving that is unusual in falling far below the required standard but also occurring in circumstances where it is clear that individuals in the vicinity were put at risk of harm.

This approach has most recently been adopted by one of the forces in our study, which has launched Operation Zig Zag.[[42]](#footnote-42) Op Zig Zag involves the deployment of officers to vulnerable locations, marked by the existence of zig zags on the road surface, such as crossings outside schools. An officer will be located by the roadside at these locations, equipped with a body-cam or helmet-cam, to capture instances of speeding and/or distracted driving (use of a mobile phone) at peak hours when vulnerable road users are most likely to be put at risk. Rather than prosecuting for simple excess speed, the outcome will depend on what threshold is crossed. The disposals in a 30mph limit, for example, are as follow:

* 35–41mph – S3RTA1988 standard disposal (i.e. offer of educational course where appropriate)
* 41 49mph – S3RTA1988 court disposal only
* 50 mph + - S2RTA1988 prosecution

Most of these cases will be dealt with in PLP courts,[[43]](#footnote-43) but guidance has been drawn up for the CPS as to how to prosecute such cases as dangerous driving. At the magistrates’ court for careless driving, PLPs will argue for a minimum of 7 points and up to disqualification in the worst cases. The first day at court prosecuting such offences occurred in April 2019, during which 27 cases of careless driving were alleged. Of these, 24 pleaded guilty; 22 of these were given 7 or 8 points and an average fine of £385, and two were adjourned for disqualification. The further three who pleaded not guilty are going forward to trial, although the officer expects a change of plea in due course. Another three cases were being prosecuted as dangerous driving and, since then, further prosecutions have been commenced.

Operation Zig Zag is, arguably, an example of using driving offences for the very purpose for which they were designed. None of these prosecutions are reliant on a particular victim giving evidence but, rather, focus instead on the standard of D’s driving, as evidenced through police officers at the scene. It is made possible because of the communication between police and CPS in this force area, where discussions have been had about the way in which PLPs can be utilised to relieve some of the pressure placed on the CPS, and ensure consistency is maximised. Elsewhere, it appears that the move away from co-locating CPS in police stations and the introduction of CPS Direct has made communications between police and CPS difficult and ineffective. It was also suggested that CPS lawyers lack expertise in this area, particularly given the increased use of agency lawyers to prosecute driving offences, leading to greater inconsistency in prosecutorial decision-making. Police are not confident that any lawyer reviewing an advice file will have had experience of the legal questions raised in the case:

We don’t have the luxury of having individuals that, you know, it’s just the luck of the draw as to who might pick it up…. We go through different phases. [A]t one point, we had a prosecutor that we could go to who had an interest in traffic law, and was very useful. She’s since moved on, and we’ve got nobody else. But we’ve also found that, you know, traffic is one of those areas that people sometimes think they know the answer and don’t necessarily, and it’s easy-. We’ve had cases discontinued because we didn’t serve a NIP within 14 days for a collision, when you don’t need to under the Road Traffic Act. So, it’s things like that, and I think not everybody’s that interested in traffic and irrespective of how serious it is, I think if we’re sending something to court it’s because we’ve exhausted other avenues and it needs to go to court, whereas the CPS, my feeling is once it gets to court, actually, it’s a traffic matter, and crime stuff takes preference over that. [TPU manager]

Problems with lack of expertise and a failure to invest time and effort in traffic cases has led to frustration amongst officers and TPU managers across all three forces, as expressed in interviews. One officer stated that his force had made the decision not to pursue any cases of dangerous driving alleged via third-party footage through the online portal, complaining that after querying whether the NIP had been issued correctly the CPS would in most cases respond by telling the police to deal with the case as a “high-end careless”.

The frustrations expressed make reference to a number of issues. First, there appears to be a dissonance between police and CPS as to what is required to prove dangerous driving, and where the line should be drawn between that and careless driving. It should be noted that the way in which the offence of dangerous driving was drafted in 1991, when the law was changed, was to ensure that it is an objective test. The previous offence of reckless driving had caused problems in terms of proof, and the North Report was keen to ensure that the offence be drafted in a way which takes no account of what was in the mind of the driver.[[44]](#footnote-44) It appears that in practice, however, the driver’s perceived state of mind is taken into account when assessing the gravity of the offence. When asked how the police differentiate between dangerous and careless driving, several interviewees responded along the lines that where there was an intentional or deliberate element to the risk taking, this would be judged as dangerous driving, whereas lack of attention or concentration is classed as careless driving.

As discussed above, some forces use a tick box on the TOR to indicate whether the reporting officer judges the risk taking to deliberate or inadvertent, but we found that the box ticked did not always accord with our view of the evidence. While we are of the view that this distinction is unhelpful, we recognise that some guidance for officers is needed. Despite some claims that driving offences involve “black and white” offending, one officer when asked how he makes the distinction between careless and dangerous driving recognised the greyness of the offence definitions:

[W]hether they fall below that of a careful and competent driver, or far below … that’s open to interpretation, isn’t it? Because you could sit ten officers around a table and show them a piece of footage and I wouldn’t like to say what the split would be, but there would be [some] sort of disagreement I’m sure if it was bordering below or far below. So, if it’s that obvious that it’s far below, then I would deal with the dangerous driving side of things; and if it’s not, then I would just deal with it as a, as a due care or careless.

Of particular interest in the context of considering whether driving offences are victimless crimes, was the suggestion in interview with police that results can influence the level of charge brought:

[T]here doesn’t need to be a collision, and certainly that’s not a major rationale in our decision making, but it might be an aggravating factor, if no-one’s been seriously injured, the fact that it’s caused a collision might be an aggravating factor to decide whether we go careless or dangerous.

It is worth reinforcing at this point that, despite our findings that the endangerment offences of careless and dangerous driving are prosecuted in the absence of direct harm having been caused, the result of risk-taking does influence legal decision-making. Further, whether a piece of driving meets the threshold for careless or dangerous driving may depend upon what the outcome was. Having conducted previous research examining prosecutorial decision-making in relation to fatal collisions,[[45]](#footnote-45) one of the authors was conscious that had a fatal collision occurred in some of the cases in the current sample, the offence level prosecuted might have been different. This was confirmed, unprompted, at a workshop conducted with police officers previously interviewed for the project, where participants agreed that the threshold for dangerous driving tends to be higher in cases of dangerous driving in the absence of a fatality, compared to causing death by dangerous driving. This can be explained in part by the application of the public interest test. There is an argument to be made that in the absence of serious harm, the public interest test will fail. Under the Code for Crown Prosecutors, a number of factors need to be taken into account when deciding whether it is in the public interest to prosecute, *inter alia*:

1. How serious is the offence committed?
2. What is the level of culpability of the suspect?
3. What are the circumstances of and the harm caused to the victim?
4. Is prosecution a proportionate response?[[46]](#footnote-46)

These pose a potential problem in relation to endangerment offences, particularly driving offences, in that society does not necessarily see such offences as serious; no harm, or minor harm, may have been caused, and the culpability of the suspect may be seen to be low since these are offences of negligence and strict liability. However, arguably the focus should be on the harm *risked* rather than caused, given that a fatal collision might have been caused, and the resulting harm is beyond the control of the suspect. As noted by the CPS in its legal guidance, although many driving offences may be minor in nature, “the prosecution of traffic offences is vital to the enforcement and promotion of road safety and the protection of the public”.[[47]](#footnote-47) Those who deal with both cases where a fatality arises, and those where luckily no serious injuries are caused, are more likely to see this connection and understand the public interest in prosecuting bad driving, whatever the outcome in terms of harm caused. If the same prosecutors dealt with all driving offences, including those arising out of fatal collisions, it might be that more consistency would be applied across each level of offending in interpreting the legal requirements for careless and dangerous driving.

The issue that cases turn on the individual standards of each court and its members, an issue identified by Duff,[[48]](#footnote-48) can be seen in our project’s findings, and reflected in interviews with police. The police’s complaint that the CPS tend to downgrade dangerous to careless driving can in turn be explained by the fact that prosecutorial decision-making will be influenced by the realities of what happens in court, given that a prosecution should not be brought in the absence of a realistic prospect of conviction. One police decision-maker was clear that a pragmatic approach was taken:

I think the problem you can have sometimes is that,… not everyone’s a perfect driver. And I think a magistrate will feel greater ease at acquitting someone when there’s been no road traffic collision. … I think sort of you get a bit of people’s justice, sometimes, where they kind of go, ooh, we’ll just let that one pass, particularly if it’s a defendant who comes across very well in court. You know, well-presented, well-spoken, … I mean, it’s easier to turn a blind eye to those kind of offences ‘cause there’s no real negative outcome. …. I think some of them take the view: coming to court is punishment enough; we don’t need to stick the boot in, so to speak. Whereas, you can’t do that when there’s been a clear road traffic collision, or someone’s been punched, or robbed, or something like that. … It’s the culpability, I think. You know, where someone’s potentially swerved too close to a cyclist, I think … they probably adopt the view, we, anyone could’ve done that, you know, it was just a moment of lapse of concentration. Do we need to convict here? I think some magistrates struggle with the criminality in those sort of cases.

Such findings are not new,[[49]](#footnote-49) and indeed accord with what psychologists term the theory of defensive attribution, according to which responsibility is more likely to be assigned in cases where more serious harm is caused.[[50]](#footnote-50) There was agreement amongst police officers that prosecutions are more likely to be successful in cases resulting in RTCs, suggesting better use of court time. The suggestion was that magistrates engage more with cases where the prosecution can place a victim in the witness box, and sentences tend to be higher in RTC cases because the presence of a victim who has been injured humanises the experience. Thus, the existence or otherwise of a victim affects the application of both the evidential test (is there a realistic prospect of conviction), as well as the public interest test.

On the other hand, there were other interviewees and general agreement amongst officers that such attitudes from magistrates should be challenged and cases brought forward wherever there is clear evidence of careless driving, whether or not the risk created thereby materialised.[[51]](#footnote-51) Those whose role involves dealing with collisions perhaps have a greater appreciation of the fact that in many cases, whether an example of bad driving results in a near miss, a minor collision or a fatal collision may be a matter of circumstance and luck,[[52]](#footnote-52) beyond the control of the offending driver. If emphasis is placed on the quality of the driving, it may be difficult for magistrates to dismiss a charge supported by clear evidence, whether or not a collision occurred. The focus for determining liability under current law should not be the existence or otherwise of a victim who has suffered first-order harm as the result of a collision. The focus is on the defendant’s standard of driving.

The second-order harm in the form of a risk to other road-users gives those other road-users a stake in the process and means that they can be categorised as victims.[[53]](#footnote-53) However, the question of whether the offence has been committed should remain focused on D’s standard of driving as even without an identifiable victim who was exposed to the risk of collision there may be other second-order harms caused. Finkelstein’s Risk Harm Thesis could be extended to defend the criminalisation of instances of bad driving other than those in which a particular individual can be identified as having suffered a lowering of their baseline welfare. Take the example of a close-pass of a cyclist. The cyclist themselves will be the victim of a second-order harm, but the harm does not stop there. Individuals who may witness the close-pass and be deterred from cycling on the streets also have their baseline welfare lowered (they do not gain the physical benefits of cycling), even though they were not at risk of direct harm on that occasion. What, also, of other members of society who have not witnessed this close-pass but feel that the roads are too unsafe to cycle on in general, given the cumulative effect of witnessing lots of bad driving? What of members of society as a whole who, even if they themselves are not discouraged from cycling, suffer a lowering of their baseline welfare due to the levels of pollutants in the air caused by those who choose to travel by motor vehicle, given the risks involved in cycling? We found in Strand 2 of our research that lack of enforcement activity in some forces resulted in risk management becoming largely the responsibility of the cyclist. We noted how it was problematic to place responsibility for risk management at the feet of the vulnerable road user: it downplays the responsibility of other road users for reducing risk and harm; it leads to “victim blaming”; it makes cycling more burdensome; and risks reducing cycling participation rates.

It is acknowledged that there are dangers in extending the concept of second-order harm too far. If we are to justify the imposition of criminal punishment under the harm principle it is easiest to justify driving offences on the basis of a concept of second-order harm limited to the prevention of risk of injury or death as the result of RTCs. That being the case, there is a need for decision-makers within the criminal justice system to highlight the link between the risk being penalised, and the harm that might have occurred. This is far easier to do in cases in which a victim of second-order harm is available to give evidence, but prosecutions should not be limited to such instances. The difficulty in highlighting the risk posed by careless driving and use of a mobile phone whilst driving, in comparison to dangerous driving, is that neither offence makes the connection in the way they are drafted between the harm risked and the penalty imposed for the offence. As a result, the communicative function of the criminal law is arguably not being used to its full potential.

# Conclusion

There have been repeated calls over recent years from victims’ groups and road safety lobbyists to clarify the laws relating to driving offences. Our project provides some confirmation of the suggestion that there are difficulties with the way in which the current law is interpreted and applied. It might be suggested that the law should be changed to reflect what occurs in practice in distinguishing between deliberate and inadvertent risk-taking, particularly given that this in fact reflects the distinction that psychologists specialising in driver behaviour make between violations and errors.[[54]](#footnote-54) Changing the law in this way to have two offences penalising deliberate risk-taking on the one hand, and inadvertent risk-taking on the other, would not solve the difficulties we found and is not something we propose. With the exception of the use of a mobile phone offence, we agree that the laws in place are “strong” and capable of improving road safety, provided effective enforcement takes place.

Rather, our suggestion is that the process, and those involved in the process should, as far as is possible, acknowledge the existence of victims of driving offences where they exist. Such victims are not currently recognised as victims of crime,[[55]](#footnote-55) and so are not beneficiaries of the Code of Practice for Victims of Crime.[[56]](#footnote-56) It would be difficult to reclassify careless driving as a crime in this way, given the subsequent obligations this would create for recording such offending, and that is not what is proposed. Neither do we propose creating new offences of “causing X” by driving, which we have seen proliferate over recent years. What we do recommend, is that consistency of approach in enforcing such offences be maximised through the sharing of notable practice, particularly in relation to the acceptance of third-party footage, in order to enhance the communicative function of the law and avoid post-code justice. One police force in our study was particularly skilled at identifying ways in which the present law can be used as a tool to deal with risky driving, as seen through its initiatives such as Op Zig Zag. The police ought to be encouraged to utilise the offences in existence to allow drivers to be punished for their wrongdoing, whether or not a particular harm has been caused by it. In cases where harm *has* been caused, then the victim should be acknowledged by the police, CPS and courts. Not through a change in the Victim’s Code, but an informal agreement to engage with victims where they exist by keeping them updated of the progress in their case and allowing them the opportunity to see justice done. Currently it appears that the law is failing in its task in relation to endangerment offences *because* they are seen as victimless crimes. If we are able to highlight cases where victims do exist, there may be greater acceptance amongst those subject to and tasked with enforcing the law that there are readily identifiable required standards of driving (as set out in the driving test required to be passed to obtain a licence) which must be complied with in order to minimise the risk of harm to others.

1. <https://www.gov.uk/government/news/roads-policing-review-to-improve-safety>. [↑](#footnote-ref-1)
2. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817695/road-safety-statement-2019.pdf> . [↑](#footnote-ref-2)
3. Such as causing death or serious injury by dangerous driving. [↑](#footnote-ref-3)
4. See S. Cunningham, “Punishing Drivers who Kill: Putting Road Safety First?” (2007) 27 *Legal Studies* 288–311. [↑](#footnote-ref-4)
5. APPG Cycling, *Cycling and the Justice System*, May 2017, pp.15-16, available at: <https://allpartycycling.org/inquiries/justice/> p.9. [↑](#footnote-ref-5)
6. *Ibid*, recommendation 11. [↑](#footnote-ref-6)
7. Informal conversations with traffic officers. See also: Pearce, L.M., Knowles, J., Davies, G.P. and Buttress, S. (2002), *Dangerous Driving and the Law*, Road Safety Research Report No.26 (Crowthorne: Transport Research Laboratory), p.33. [↑](#footnote-ref-7)
8. (See CPS Legal Guidance: <https://www.cps.gov.uk/legal-guidance/road-traffic-charging>) This has recently been confirmed by the High Court in *DPP v Barreto* [2019] EWHC 2044 (Admin) at [35]. [↑](#footnote-ref-8)
9. Road Traffic Act 1988, s.2. [↑](#footnote-ref-9)
10. Road Traffic Act 1988, s.3. [↑](#footnote-ref-10)
11. Road Vehicles (Construction and Use) Regulations 1986/1078, Reg.110. [↑](#footnote-ref-11)
12. Causing death by dangerous driving and causing death by careless driving exist as constructive offences far more serious than their endangerment counterparts. For a discussion of how these offences have been used in the past, see S. Kyd Cunningham, “Has law reform policy been driven in the right direction? How the new causing death by driving offences are operating in practice” [2013] *Criminal Law Review* 711-728 [↑](#footnote-ref-12)
13. Causing serious injury by dangerous driving, and by disqualified driving, are offences under s.1A and s.3ZD Road Traffic Act 1988. There currently exists no offence of causing serious injury by careless driving. [↑](#footnote-ref-13)
14. C. Finkelsten, “Is Risk Harm?” (2003) 151 *University of Pennsylvania Law Review* 963–1001 at 966. [↑](#footnote-ref-14)
15. *Ibid,* at 1000. [↑](#footnote-ref-15)
16. See, for example, S. Cunningham, “Punishing drivers who kill: putting road safety first?” (2008) 27 Legal Studies 288-411. [↑](#footnote-ref-16)
17. See, for example, Horder ‘A Critique of the Correspondence Principle’ [1995] Crim LR 759. [↑](#footnote-ref-17)
18. Duff, R.A., ‘Criminalizing Endangerment’ in Duff, R.A. and Green, S.P. (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005, Oxford University Press), p.53. [↑](#footnote-ref-18)
19. Ibid, p.60. [↑](#footnote-ref-19)
20. Duff, above n.18, p.50. [↑](#footnote-ref-20)
21. Although, if the s.3 offence is prosecuted on the basis of inconsiderate rather than careless driving, it must be shown that another road user was inconvenienced by D’s driving. [↑](#footnote-ref-21)
22. There is considerable overlap between the two offences, and our project was particularly interested in how choices are made between the use of one offence over another. Given that the fixed penalty for use of a mobile phone is now considerably higher than that for careless driving, officers interviewed reported that it tends to be preferred on that basis, in most cases. Enforcement practice may well change though, given that the case of *DPP v Barreto* (above n.8) has confirmed that the law is not as simple as it might appear at first glance, and that for the offence to be proved it requires not only that a mobile phone was handheld at the time of driving but, also, that it was being used for interactive communication. [↑](#footnote-ref-22)
23. Duff, n.18, p.61. [↑](#footnote-ref-23)
24. Killed or seriously injured is the metric used by the Department for Transport in its annual report on road casualties. [↑](#footnote-ref-24)
25. <https://west-midlands.police.uk/news/serious-cycle-smashes-down-fifth-close-pass-first-year> [↑](#footnote-ref-25)
26. These have been anonymised for the purpose of this publication, and will be referred to as Force A, Force B and Force C. [↑](#footnote-ref-26)
27. This article will focus on the findings relating to careless and dangerous driving. Although we found clear problems with the use of a mobile phone offence as acknowledged by the High Court in *DPP v Barreto* (above n.8), this will be discussed elsewhere. [↑](#footnote-ref-27)
28. We had planned to incorporate interviews with CPS lawyers within our research, in order to provide a balanced view of the issues from different perspectives. This proved impossible in practice, given that the CPS declined to support our research and we were in the event able to interview only one Crown prosecutor who we cannot claim to be representative. That one lawyer is to some degree self-selected; in agreeing to be interviewed they have gone outside the norm. [↑](#footnote-ref-28)
29. [↑](#footnote-ref-29)
30. Cunningham, above n.4. [↑](#footnote-ref-30)
31. <https://www.which.co.uk/news/2018/06/one-in-four-motorists-now-use-a-dash-cam/> [↑](#footnote-ref-31)
32. As acknowledged in the DfT’s Road Safety Action Plan, above n.2, at p.24. [↑](#footnote-ref-32)
33. In Forces A and C, the PLPs were legally qualified, whereas in Force B, the prosecution role was bolted on to the responsibilities of the TPU decision-makers. Some were former police officers, and one had a law degree, and at the time of interviews a qualified solicitor was due to take up post. [↑](#footnote-ref-33)
34. It should be noted that dash-cam evidence is also available in some cases where an RTC has occurred, but this will come to the attention of the TPU through a TOR rather than online reporting. [↑](#footnote-ref-34)
35. This is certainly true of careless driving, which is not a notifiable offence, unless it causes physical harm. Individuals are considered to be victims under the Victims’ Code if they have suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF>. Careless driving does not fall into this particular definition of “criminal offence”, and second-order harms are not covered by the definition of “harm”. The Offence Classification Index does list causing death and serious injury by driving offences as crimes for the purposes of recorded crime. Dangerous driving is also a “miscellaneous crime against society”, but careless driving is not included: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/796318/count-offence-classification-index-apr-2019.pdf> [↑](#footnote-ref-35)
36. These were conducted in addition to the interviews with officers in the three English forces. [↑](#footnote-ref-36)
37. See <https://www.ndors.org.uk/courses/>. E.g. the What’s Driving Us Course: “is for those drivers where the evidence suggests by an act or omission their mischief was intentional or deliberate i.e. the driver knew their actions amounted to an offence”. [↑](#footnote-ref-37)
38. We were unable to determine the specific reason in these cases. It may have been decided that a course was not appropriate or other reasons. [↑](#footnote-ref-38)
39. One explanation might have been that D was visiting from another country, and had forgotten to drive on the left side of the road. There was no mention of this on the TOR. [↑](#footnote-ref-39)
40. Crown Prosecution Service, *Full Code Test*, Part 4 of the *Code for Crown Prosecutors*: <https://www.cps.gov.uk/publication/code-crown-prosecutors> [↑](#footnote-ref-40)
41. For further comment on the credibility of the police as witnesses, see D. McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillan, 1981) and M. McConville, A. Sanders and R. Leng, *The Case for the Prosecution* (Routledge, 1991). An example of this occurring in our sample can be seen in case CDDP3. See Report, n.29 above. [↑](#footnote-ref-41)
42. As explained in the DfT’s Road Safety Action Plan, above n.2, at p.53. [↑](#footnote-ref-42)
43. This refers to proceedings that take place in the magistrates’ court with the police prosecuting in the absence of the CPS. Some forces, including this force, employ in-house lawyers for this purpose, whilst others rely on legally unqualified police staff or police officers to prosecute cases. This is possible under s.3 of the Prosecution of Offences Act 1985, which provides that the DPP take over the conduct of all criminal proceedings, other than specified proceedings. A list of specified offences can be found here: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/317934/Full_list_of_specified_offences.pdf> [↑](#footnote-ref-43)
44. Department of Transport and Home Office, *Road Traffic Law Review Report* (*North Report*), (London: HMSO, 1988). [↑](#footnote-ref-44)
45. [↑](#footnote-ref-45)
46. Code for Crown Prosecutors, para. 4.14, available at <https://www.cps.gov.uk/publication/code-crown-prosecutors>. [↑](#footnote-ref-46)
47. <https://www.cps.gov.uk/legal-guidance/road-traffic-summary-offences>. [↑](#footnote-ref-47)
48. See text to n.19. [↑](#footnote-ref-48)
49. See, for example, C. Corbett, and F. Simon, “Police and Public Perceptions of the Seriousness of Traffic Offences”, (1991) 31(2) Brit J Criminol.153, and J. Macmillan, *Deviant Drivers*, (Westmead 1975). [↑](#footnote-ref-49)
50. E. Walster, “Assignment of Responsibility for an Accident” (1966) 3 Journal of Personality and Social Psychology 73. Walster’s findings have since been brought into question, however. For a discussion, see J. McEwan, *The Verdict of the Court: Passing Judgment in Law and Psychology* (Hart 2003), 32-36. [↑](#footnote-ref-50)
51. According to the Code for Crown Prosecutors, the evidential test requires a realistic prospect of conviction. This is “based on the prosecutor’s objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.” The Code for Crown Prosecutors (2018), para.4.7: <https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf> [↑](#footnote-ref-51)
52. See text to n.16 above. [↑](#footnote-ref-52)
53. In a theoretical, rather than legal, sense; see n.35 above. [↑](#footnote-ref-53)
54. See Cunningham, above n.4. [↑](#footnote-ref-54)
55. See above, n.35. [↑](#footnote-ref-55)
56. Ministry of Justice, *Code of Practice for Victims of Crime* (2015), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF> [↑](#footnote-ref-56)