



The Road Safety Act 2006: Causing death by careless driving Do good headlines make good law?

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'Widow calls for change in law after lorry driver is fined £275 for killing cyclist'¹.

The story that unfolds underneath this headline is a familiar one: a lorry driver makes a momentary mistake on the road and tragically kills a young cyclist. He is prosecuted for careless driving, as his mistake was not deemed anything more serious, and punished with the maximum penalty, a fine. The victim's widow is appalled, saying:

'it just doesn't seem right that someone can do this and cause all this devastation and just be given a fine and a few points on his license'².

The Road Safety Act 2006 is the government's reaction to the coverage rightly given to such complaints. The Act, which is already in force, creates a new offence of Causing Death by Careless Driving and aims to stiffen the penalties for those blamed for road traffic fatalities. This article, worried that a good headline does not always make for good law, wonders whether this new offence is consistent with fundamental principles of criminal responsibility.

Before examining the Act in detail, it is important to understand the law that it sought to change. Under the previous law, an accidental death on the road could result in three possible charges:

- gross negligence manslaughter,
- causing death by dangerous driving or
- careless driving.

Criticism was not directed at sentences imposed for gross-negligence manslaughter, for which the maximum sentence is life-imprisonment, or for causing death by dangerous driving, for which the maximum is 14 years³.

1 *The Times*, 9th July 2008.

2 *Ibid.*

3 Criminal Justice Act 2003, s. 285(3).

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However, such sentences were only available in cases that involved either 'gross' negligence or 'dangerous' driving, driving which falls *far below* that expected of a competent and careful driver⁴. In the very frequent cases that involved only 'careless' driving, that simply *below* the standard of the careful and competent driver⁵, the maximum available penalty, even where death resulted, was a community order⁶ and/or a maximum fine of £2,500⁷.

The Road Safety Act 2006 increases significantly the available penalty, where death results from careless driving. The new offence, introduced by section 20, is triable either-way and punishable by up to five years imprisonment⁸. The test as to what constitutes careless driving remains the same, although it is given a statutory footing⁹. The government has stated that the new offence, and the tough sentence available for it, will

'ensure that the fatal consequences of careless driving are properly taken into account'¹⁰.

Unsurprisingly, these reforms have been well-received both by relatives of deceased¹¹ and road safety lobbies¹². Less so by criminal lawyers, who have two main criticisms of the new offence.

Firstly, so the argument goes, isn't it wrong to create a criminal offence, punishable by a significant sentence of imprisonment, which is made out if negligent conduct is proved?¹³ Criminal punishment is the most severe sanction imposed by society, and so fairness demands that it is only applied to those who *choose to commit or choose to risk committing* criminal offences¹⁴. As a careless driver is judged only according to whether his conduct reached the required standard, his state of mind is irrelevant. He may, therefore, neither have chosen either to drive poorly or to risk doing so.

4 Road Traffic Act 1988, s. 2A. For a charge of dangerous driving to be made out, it must also have been obvious to a competent and careful driver that driving in such a way would be dangerous.

5 Careless driving is defined as driving either "without due care and attention, or without reasonable consideration for other persons using the road or place", Road Traffic Act 1988, s. 3. Driving without due care and attention" has been interpreted as driving "below the standard of a reasonable and prudent driver", DPP v Cox (1993) 157 JP 1044, Clarke J at p. 1047. Driving without "reasonable consideration" is very rarely charged, but means conduct causing inconvenience to other road users.

6 Where the offence is sufficiently serious under the Criminal Justice Act 2003, s. 148.

7 A level 4 fine, Road Traffic Offenders Act 1988, Schedule 2, Part 1. The Road Safety Act 2006, s. 23 will raise this to level 5.

8 The new offence will be inserted as Road Traffic Act 1988, s. 2B.

9 Road Safety Act 2006, s. 30, inserting Road Traffic Act 1988, s. 3ZA.

10 Home Office, "Review of Road Traffic Offences involving Bad Driving", A Consultation Paper, 20th October 2005. Para. 1.19

11 New Law For Tragic Jamie, 12", Daily Mirror, 1st November 2005. "Justice for Jamie", a campaign for tougher penalties for road deaths that resulted from the death of Jamie Mason, 12, submitted a petition of 32,902 signatures to the Home Office backing plans for the new offences.

12 Home Office, "Road Traffic Bill 2005, Summary of Responses to the Consultation Exercise", page. 30, "Road Safety Organisations".

13 See, for example, JUSTICE, "We are strongly opposed to the creation of an imprisonable homicide offence where the standard of culpability is so low", Response to Home Office Consultation Paper 'Review of Road Traffic Offences involving Bad Driving, May 2005.

14 See Law Commission, Legislating the Criminal Code, Involuntary Manslaughter, 4th March 1996. Part IV, "The Moral Basis of Criminal Liability for Unintentionally Causing Death", para. 4.5. Ashworth, Principles of Criminal Law, Third Edition, Oxford, 2.2 "The Principle of Individual Autonomy".

Secondly, doesn't the new offence make the sanction imposed for careless driving depend heavily on luck?¹⁵ The maximum penalty for careless driving where death does not result is a fine. Where careless driving causes death, the penalty increases to five years' imprisonment. And yet, isn't luck all that determines whether or not a particular act of careless driving has fatal consequences. Should the severity of a criminal sanction really be determined by chance?

Both of these criticisms require some qualification. Negligent or careless behaviour is frequently not inadvertent: it can result from a choice not to take the care required to reach the standard of the careful and competent person¹⁶. In such cases, it is difficult to argue in principle that criminal liability should not follow.

In fact, in road traffic cases, the choice not to take the required care is arguably particularly culpable as the risks involved are so obviously great: 30,720 people were killed or seriously injured on the road in 2007¹⁷. A boy racer, for example, knows that in driving too fast down a country lane, he is not taking the care required of the careful and competent driver. Should he really escape criminal liability just because he was so confident in his own driving ability that he did not believe there was any risk of accident whatsoever (and so did not choose to take that risk)?

Furthermore, all sanctions in criminal law are partially determined by the consequences that result from prohibited conduct, even if whether or not those consequences actually occur is determined by chance. This explains, for example, the differing punishments imposed for common assault (maximum six months imprisonment) and actual bodily harm (max. five years imprisonment)¹⁸, notwithstanding that the conduct involved might be the same act (a punch to the face) with the same intention (contemplating a risk of harm). Perhaps it is better to say simply that the primary indicator of the seriousness of an offence should be the defendant's state of mind, with the harm caused by his actions a valid, but secondary, consideration¹⁹.

The authors, although both road traffic defence practitioners, believe that the defects of the new offence might be remedied were sufficient flexibility allowed in sentence. Where careless driving is entirely inadvertent, resulting from a human error that occurred despite as much care as possible being taken to avoid it, punishments should be nominal and disqualification discretionary. The mandatory disqualification required by the Act, and the community order recommended by the Sentencing Guidelines Council (see Appendix 1), are too great a punishment.

In cases in which it is clear that the driver chose not to drive to the standard of the careful and competent driver, the punishment should primarily reflect the extent of his deliberate failure to reach the required standard. This justifies careless driving that is almost dangerous being punished most severely, a principle the Sentencing Guidelines Council have adopted.

15 Including those as esteemed as Lord Hailsham, Hansard HL Deb, vol 191, col 183, 15 February 1955.

16 See Ashworth, Principles of Criminal Law, Third Edition, Oxford, 5.3(e) "The Varieties of Fault", Negligence, and, Law Commission, Legislating the Criminal Code, Involuntary Manslaughter, para. 4.12.

17 <http://news.bbc.co.uk/1/hi/uk/7475893.stm>

18 Offences against the Person Act 1861, s. 47.

19 As the Sentencing Guidelines Council state, "The harm must always be judged in the light of culpability...the culpability of the offender in the particular circumstances of an individual case should be the initial factor in determining seriousness, Sentencing Guidelines Council, Overarching Principles, Seriousness, Guideline 5.

To increase the flexibility given to the sentencing court, the government should consider abolishing the offences of causing death by careless or dangerous driving, but increasing the maximum penalty for careless driving to three years. This would make clear to sentencing tribunals that the appropriate sanction is primarily determined by the fault involved, with the harm caused a relevant but secondary consideration. It would also allow rectify the anomaly by which causing death by dangerous driving or careless driving is punished disproportionately more severely than that causing even the most serious injuries, such as paraplegia.

Such a change would not prevent cases of deliberately careless driving that caused death receiving the highest sentences. But it would provide the flexibility to allow the persistent and deliberately careless driver, who has simply been lucky enough to avoid injuring other road users, to be more severely punished than the unfortunate driver who makes one unintended but fatal error following a lifetime of exemplary driving. That might not necessarily please the papers, but it certainly would the criminal lawyers.

Starting Points and Sentencing Range for Causing Death by Careless or Inconsiderate Driving

Sentencing Guidelines Council, Definitive Guideline for driving offences resulting in death

Nature of Offence	Starting Point	Sentencing Range
Careless or inconsiderate driving falling not far short of dangerous driving	15 months custody	36 weeks – 3 years custody
Other cases of careless or inconsiderate driving	36 weeks custody	Community order (HIGH) – 2 years custody
Careless or inconsiderate driving arising from momentary inattention with no aggravating factors	Community order (MEDIUM)	Community order (LOW) – Community order (HIGH)

A real aberration: Causing death by driving when unlicensed, disqualified or uninsured

Causing death by careless driving is not the only new offence created by the Road Safety Act 2006. Section 21 of the Act creates the offence of Causing Death by Driving when Unlicensed, Disqualified or Uninsured, inserted into Road Traffic Act 1988 as section 3ZB. The offence has a maximum sentence of 2 years imprisonment and will frequently attract custodial sentences.²⁰ It is wide in scope: it applies to any case where 'but for' the defendant unlawfully driving (i.e. being present on the road whilst unlicensed, disqualified or uninsured), a fatal accident would not have occurred.

This new offence is deeply concerning. It completely ignores the concept of 'legal causation'; a fundamental prerequisite of criminal liability²¹. Legal causation refers to the determination of which 'but for' causes of an event can be said to be, in moral terms, to blame for causing that event to occur. To determine what is a legal cause, we ask such questions as, 'how remote was the act from the consequence that occurred?' or 'was another act really to blame for what happened?'. It is only if a particular act is both a 'but for' cause and a legal cause that it is deserving of punishment.

As the definition of causing death by driving when unlicensed, disqualified or uninsured requires only 'but for' causation, it contains no requirement of legal causation. It encompasses many drivers who, whilst undoubtedly deserving of sanction for driving unlawfully, should not be punished for causing a road traffic fatality. For example, the offence applies to a disqualified driver who drove perfectly acceptably but was involved in a fatal accident due either to bad luck or the fault of someone else²².

The government should abolish the offence of causing death by driving when unlicensed, disqualified or uninsured as soon as possible. In cases where an unlawful driver causes death by dangerous or careless driving, that he was unlicensed, disqualified or uninsured will be a significant aggravating feature in sentence. It should be no more than that.

²⁰ Sentencing Guidelines Council, Definitive Sentencing Guideline – Causing death by driving, p. 17.

²¹ See Ferguson, Legislative Comment, Road Traffic Law Reform, S.L.T. 27. Ferguson calls legal causation a "fundamental criminal law principle", p. 30.

²² To take the government's own example: "the offence could bite on a [disqualified] driver who was driving very carefully, but a child ran out into the road and was killed", Response to Consultation, p. 8.