

ROAD JUSTICE AND THE LEGAL FRAMEWORK
Westminster Hall debate, 20th November 2018, 9.30am
A briefing from Cycling UK

Introduction

Cycling UK was founded in 1878 and has 65,000 members and supporters. Our central mission is to make cycling a safe, accessible, enjoyable and 'normal' activity for people of all ages and abilities. Formerly known as CTC or the Cyclists' Touring Club, our interests cover cycling both for day-to-day transport and for leisure, which can deliver health, economic, environmental, safety and quality of life benefits, both for individuals and society. We represent the interests of current and would-be cyclists on public policy matters, as well as running practical projects to enable people of all ages, backgrounds and abilities to discover the benefits and joys of cycling.

Cycling UK, along with road crash victims' charities Brake and RoadPeace, is calling for the Government to review road traffic offences and penalties to ensure that the law delivers just and safe outcomes for all road users. We invite MPs to support this call, so as to strengthen the role of the justice system in deterring irresponsible road use and removing unsafe drivers from the roads, thereby supporting the Government's ambition "*To make cycling and walking the natural choices for shorter journeys*".

Road traffic offences and penalties: the need for a review

Road traffic law is uniquely problematic. It is all too easy for someone who is not an inherently 'dangerous' person to drive in a manner that nonetheless causes obvious and foreseeable danger. This doubtless explains the apparent reluctance of some jurors to convict other drivers of offences they can easily imagine they too could have committed: "There but for the grace of God go I."

Consequently, the framework of 'dangerous' and 'careless' driving offences is weak, unclear and very inconsistently applied. Too often, convicted drivers receive only community sentences and/or short driving bans for serious offences. They may well then be free to drive again within weeks or months. This not only causes added distress to seriously injured or bereaved road crash victims, it also reinforces the idea that road danger is something to be tolerated, rather than eliminated.

In February 2017, Abdul Sujac seriously injured a pedestrian outside East London's Westfield Shopping Centre, but received just 9 points on his licence after pleading guilty to 'careless' driving. He then sent his friends a bragging WhatsApp video saying "*Nine points ain't stopping me from driving*". Nine months later he was swerving in and out of traffic, driving at 68mph on a 30mph south London street, when he killed a 19 year old woman who crossed the road in front of him. Other videos found on his phone included one captioned "ABDUL ripping the road 146mph", suggesting that he revelled in driving dangerously and illegally on a regular basis. Failure to treat his first offence as 'dangerous' driving allowed him to keep his licence, with fatal consequences.

'Dangerous' and 'careless' driving: the need for clarity and consistency

In a recent Cycling UK report, 'Failure to see what's there to be seen', we analysed local media reports of many recent cases where cyclists have been killed when drivers failed to see them. They encompassed the full range of possible outcomes: from a 4-year custodial sentence for a driver who pleaded guilty to causing death by dangerous driving; through a large number of cases where the driving was dismissed as merely 'careless' (either by prosecutors or the courts), resulting in light sentences and short driving bans; to those where no action was taken at all.

One of many cases exemplifying the lack of clarity over the distinction between 'careless' and 'dangerous' driving is that of Ayasha Penfold. She hit cyclist John Durey head-on, having failed to see him as she overtook two vehicles on the A2070 in Kent, even though prosecutors said he would have been in view for at least 45 seconds before the collision. Although she pleaded guilty to causing his death by 'careless' driving, the CPS pressed for the higher charge. Yet two juries were both unable to agree whether her driving was 'dangerous'. CPS therefore dropped the 'dangerous' prosecution. She received a 12 month community order and an 18 month driving ban.

At present, the distinction between ‘careless’ and ‘dangerous’ driving or riding depends largely on whether a court believes the accused person’s actions fell ‘below’ or ‘far below’ what would be expected of a ‘competent and careful driver’ or cyclist. However these terms are highly subjective, allowing for hugely varied interpretations by individual magistrates and jurors – as shown by the cases cited in Cycling UK’s ‘Failure to see’ report, and many others.

The distinction is also supposed to relate to whether the defendant’s actions objectively caused “danger” that should have been “obvious to a competent and careful driver”. Yet prosecutors and the courts evidently continue to act as if the defendant’s state of mind (‘mens rea’) was still relevant, despite the removal of ‘reckless’ driving from the legal framework via the Road Traffic Act 1991.

Cycling UK believes the definitions of ‘dangerous’ and ‘careless’ offences need to be revised or replaced, in a way that clarifies whether the distinction is supposed to relate to the level of danger caused by the defendant’s actions (an ‘objective’ test, as is now supposed to be the case) or their state of mind (a ‘subjective’ test, as was used before 1991). For instance:

- An ‘objective’ test could be clarified by retaining ‘dangerous driving’ but defining it as that which had caused danger that should have been “obvious to a competent driver paying due care and attention” (i.e. without depending on whether the defendant’s actions fell “below” or “far below” the standard expected of such a driver). The lower-tier offence should be renamed as “unsafe” or “negligent” driving, to clarify that the distinction has nothing to do with the driver’s state of mind.
- Alternatively, a ‘subjective’ test could be reintroduced by restoring the offence of ‘reckless’ driving (in place of ‘dangerous’ driving), while avoiding the pitfalls associated with that offence (prior to its removal in 1991) by clarifying that a ‘reckless’ state of mind can be inferred from the manner of the driving (i.e. driving that looks reckless can be assumed to indicate a reckless state of mind), unless the driver can produce a satisfactory alternative explanation.

Effective sanctions: the importance of driving bans

Either way, the associated penalties framework should be overhauled to make greater use of driving bans as a sentencing option. Far from seeking increased custodial sentencing, Cycling UK believes that driving bans should be more widely used for offenders who are not obviously ‘dangerous’ people, with custodial sentences reserved primarily for those whose offences were more obviously reckless, or for repeat offenders (notably those who have flouted past driving bans).

Hence we are very concerned that the number of driving bans imposed by the English and Welsh courts has declined by 60% in 11 years: from 155,484 in 2005 to just 62,822 in 2016. It was reported in June 2017 that over 10,000 drivers in Britain were still allowed to drive despite having more than 12 points on their licence. It is increasingly common for drivers to evade bans even when convicted for offences involving death and/or where bans are supposed to be obligatory.

The point is exemplified by the case of Christopher Gard, who killed cyclist Lee Martin by driving into him while texting at the wheel of his van. Gard was convicted of causing Martin’s death by dangerous driving. It then emerged that had avoided disqualification following all 6 of his previous convictions for using a mobile phone while driving, as well as on two other occasions when he had been sent instead on driver retraining courses.

The legal system is clearly failing to provide public protection, let alone an effective deterrent.

‘Hit and run’ offences

Mark Tuffs drove his box van into the back of retired cyclist Colin Taylor, causing his death in November 2016. Tuffs drove off but was later traced by the police. He told them that he had been unaware of having hit Mr Taylor, claiming that the damage to his van had occurred earlier that day and that it had impaired his vision. The judge rejected his account, saying, “Having denied responsibility throughout the investigation, he ultimately pleaded guilty [to causing death by careless driving] at the beginning of the trial”, even though he continued to say he “hadn’t realised he had struck Mr Taylor,” adding, “This account was disbelieved”. Yet he still imposed only a 36 week prison term, a 16 month driving ban and a £140 victim surcharge.

Even more lenient sentences were imposed on Michael O'Shea and Andrew Edwards, who killed cyclists Brian Tozer and Michael Isherwood respectively. Both received non-custodial sentences and short driving bans for causing death by 'careless' driving and leaving the scene – even though the judge agreed that Tozer's life could have been saved if O'Shea had reported it.

Around 12% of road collision injuries in Britain involve drivers failing to stop or report the incident. Yet the maximum penalty for these offences is just 6 months. This may be reasonable in less serious cases (e.g. scraping or denting someone else's parked car), but much longer sentences are needed where drivers are evidently seeking to evade justice where serious or fatal injury has occurred, or where it should have been obvious that this was likely to have occurred.

'Car dooring' offences

Cyclist Sam Harding was killed in August 2012 when driver Kenan Aydogdu opened his car door in Sam's path, knocking him under a bus. Aydogdu had darkened his car windows with plastic tinting film, reducing their transparency to 17% of normal levels. The CPS, concerned at the inadequate £1000 maximum penalty for opening a car door and the lack of suitable alternative charges, attempted to prosecute him for manslaughter but were unsuccessful. He received just a £200 fine.

This and several other cases of fatal car dooring cases – including those of cyclists Sam Boulton and Robert Hamilton (in which the drivers received fines of £955 and £30 respectively) – clearly indicate the need for tougher penalties. Between 2011 and 2015, 3,108 people (including 2,009 cyclists) were recorded as being injured by a "vehicle door [being] opened or closed negligently". Eight of these resulted in fatalities, 5 of them being cyclists.

The Government's reviews of motoring offences

In 2014, the Ministry of Justice promised a comprehensive review of road traffic offences and sentencing, largely in response to Cycling UK's Road Justice campaign and similar campaigns by road crash victims' groups RoadPeace and Brake. However, after substantial delays, the scope of this review was later reduced to just the following proposals:

- Increasing the maximum penalty for 'causing death by dangerous driving', or for 'causing death by careless driving while under the influence of drink or drugs', from 14 years to lifetime imprisonment.
- Introducing a new sentence of 'causing serious injury by careless driving'.

Cycling UK supported the first proposal but voiced concern that the new offence of 'causing serious injury by careless driving' could prove counter-productive, as happened when 'causing death by careless driving' came into effect in 2008. Prosecutions for 'causing death by dangerous driving' fell over the next 5 years by 46%, and convictions by 51%, as it was rapidly overtaken by the lesser new charge – even though the definitions of 'careless' and 'dangerous' driving remained unchanged. We fear the proposed introduction of 'causing serious injury by careless driving' would again 'lower the bar' between 'dangerous' and 'careless' driving, with yet more woefully inadequate sentences. In any case, neither proposal would address the flaws evident in huge numbers of cases every year, where seriously injured or bereaved road crash victims face additional distress due to the many failings of road traffic law.

The Government's review of cycling offences

In summer 2017, the case of cyclist Charlie Alliston garnered significant media attention. Alliston had ridden his bike, which illegally lacked a front brake, into pedestrian Kim Briggs. Her death caused a dilemma for the CPS, given the lack of an offence of causing death by either 'dangerous' or 'careless' cycling. Instead they prosecuted him for manslaughter and, as an alternative, for the offence of 'wanton and furious riding'. He was acquitted of the former but convicted for the latter, receiving an 18 month custodial sentence.

The offence of 'wanton and furious riding', like those of 'grievous bodily harm' and 'actual bodily harm', comes from the Offences Against the Person Act 1861. Unlike causing death by dangerous driving, it carries a maximum sentence of 2 years. Prompted by calls from Kim Briggs's widower Matthew for a more 'modern' offence, the Government recently consulted on possible new cycling offences of causing death or serious injury by 'dangerous' or 'careless' cycling.

Cycling UK has made it clear that we would have no objection in principle to proposals for new offences and penalties for cycling offences involving death or serious injury, if considered as part of the wider review we were promised in 2014. We agree that all road users need to act responsibly, and that the legal system should respond to dangerous and irresponsible behaviour in a broadly consistent manner.

However, we see no justification whatsoever for bringing forward new cycling offences independently of that wider review, in response to one case of an admittedly awful cycling offence, given the justice system's serious and persistent failings in cases of irresponsible driving. Community sentences and short driving bans are common in such cases, even where fatal or life-changing injuries have occurred.

Worse still, the current consultation proposals are essentially to create new cycling offences using the existing definitions of 'careless' and 'dangerous' driving. As noted earlier, these definitions, and their associated sentences, are sorely lacking in clarity and very inconsistently applied. If Parliament were merely to create new cycling offences based on those same flawed definitions, it would miss a crucial opportunity to address these far larger and more common problems. Instead, the very same issues would merely be replicated in a tiny number of additional cases where the defendant was a cyclist.

Recommendations

Cycling UK calls on the Government to launch a wide-ranging review of road traffic offences and penalties, as promised in 2014. We suggest this could be carried out by the Law Commission, and should include:

- Clarifying the definitions of 'dangerous' and 'careless' offences, or replacing them entirely, making it clear whether the distinction is supposed to relate to the level of danger caused by the defendant's actions (an 'objective' test) or their state of mind (a 'subjective' test).
- Reviewing the accompanying maximum sentences, making greater use of driving bans for offences where 'danger' has been caused by someone who is not obviously a 'dangerous' person, while retaining custody as a sentencing option for more obviously 'reckless' behaviour and/or for repeat offenders (including those who flout driving bans), in the interests of public protection.
- Remove the ability of convicted drivers to routinely avoid driving bans by claiming that these would cause 'exceptional hardship'.
- Increasing the current 6-month maximum penalty for 'hit-and-run' offences (i.e. failure to stop following a collision, or to report it afterwards), in cases where the driver knew or should have known that the collision could have resulted in death or serious injury.
- Increasing the £1,000 maximum penalties for 'car-dooring' offences, in cases which have caused death or serious injury.
- Ensuring that any revisions to cycling offences and penalties reflect key differences between driving and cycling, e.g. that: (a) people of all ages (including children) are rightly allowed to cycle without having to pass a test, hence any definition of irresponsible cycling will need to reflect the age and experience of the rider; (b) the lack of a requirement to pass a test is because cycling imposes far lower risks on other road users, even when carried out irresponsibly; and (c) jurors will typically have less experience to draw on when determining what constitutes irresponsible behaviour among cyclists than among drivers.

For further information, see Cycling UK's booklet ['Cycle safety: make it simple'](#) (which summarises our [full response](#) to the Government's recent [consultation on its cycling and walking safety review](#)), our report ["Failure to see what's there to be seen"](#) and our overview briefing on ['Traffic law and enforcement'](#).

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