Butterworths Road Traffic Service

Bulletin Editor
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NEW LEGISLATION

Finance Act 2014

Sections 81–90, and 92 of the Finance Act 2014 make changes to vehicles excise and HGV road user levy rates, primarily in the form of a restructuring in consequence of the arrival of the latter. The changes of main significance are:

- VED rates for rigid goods vehicles with trailers when such trailers may weigh 4,000 kg or more and the vehicle 12,000 kg or more – Rates for these vehicles are to be determined by reference to the following new factors: the presence of road-friendly suspension on the vehicle; how many axles the vehicle has; the vehicle's HGV road user levy banding; the trailer's plated gross weight; and the total of that weight and the vehicle's revenue weight (s 82(3)).

- VED rates: use for exceptional loads, rigid goods vehicles and tractive units – Section 83(2) reduces the rate of VED for a vehicle used to carry or draw a trailer carrying an exceptional load; sub-ss (3) and (4) maintain the rates of VED for rigid goods vehicles weighing less than 12,000 kg and reduce the rates of VED for such vehicles weighing 12,000 kg or more including reducing the applicable rate for such vehicles weighing in excess of 44,000 kg; sub-ss (6) and (7) maintain the rates of VED for tractive units to which semi-trailers may be attached that weigh less than 12,000 kg, and reduce the rates of VED for such vehicles weighing 12,000 kg or more including reducing the applicable rate for such vehicles weighing in excess of 44,000 kg; sub-s (8) reduces the rate of VED for tractive units to which semi-trailers may be attached when these are used to transport goods between EU Member States where part of that transport is in the UK and those goods are substantially transported by rail from the railhead that is nearest to the point of origin; and sub-s (9) removes the rates of VED for certain

vehicles without road-friendly suspension which were introduced to Sch 1 of Vehicle Excise and Registration Act (VERA) through s 22 of Finance Act 2011.

- Extension of old vehicles exemption – Sections 84 and 85 maintain 30 years as the relevant age to gain exemption.
- Abolition of reduced VED rates for meeting reduced pollution requirements – Section 86 gives effect to Sch 18 which contains provisions abolishing the reduced rate of VED for vehicles satisfying reduced pollution requirements.
- Six-month licences and direct debits – Sections 87 and 88 deal with six-month licences for, respectively, tractive units with an annual rate of duty below £50 and vehicles subject to the HGV road user levy. Section 88 enables payment of VED by direct debit at a slight premium (5%) to the normal annual rate where the duty is paid by more than one instalment, but a six-month licence paid for in this way will cost 52.5%, not 55%, of the annual figure (or 50% if the vehicle is charged to the HGV road user levy).
- Going paperless – Section 91 gives effect to Sch 19, which amends VERA as a result of the intention to cease issuing paper vehicle licences, trade licences or nil licences. Some offences are amended; others are removed, e g forging, etc, a vehicle licence. Schedule 19 comes into force on 1 October, 2014.
- HGV road user levy rates – Section 92 amends Sch 1 to the HGV Road User Levy Act 2013.
- Disclosure of information by HMRC – Section 93 inserts new s 14A into the 2013 Act. This is concerned with disclosure of information to the Secretary of State or a person providing services to the Secretary in connection with the levy. Disclosure to any other person is an offence unless it is with HMRC consent or to any other person to whom it could have been disclosed in accordance with s 93(1).

Construction and Use

The Road Vehicles (Construction and Use) Amendment No 2) Regulations 2014, SI 2014/1862 amend the definition of 'the emissions publication' in Sch 7B to the principal regulations to refer to the 18th edition of the Department of Transport publication 'In Service Exhaust Emission Standards for Road Vehicles' (ISBN 978-0-9549352-8-3).

Commencement Order – new fines levels

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 10) Order 2014, SI 2014/1291 brought into force s 85(3), (5)–(13) and (15)–(17), and ss 86 and 87, which deal, respectively, with: removal of limit on certain fines; power to increase other fines on conviction; and power to amend the standard scale of fines. These are enabling powers. It is

understood that levels 1–5 of the standard scale will be increased substantially (fourfold). The removal on the limit on certain fines will impact particularly on the allocation of health and safety prosecutions by making summary trial and sentencing possible even for serious cases. Consequently, the second set of amendments to the Criminal Practice Directions 2013 adds Annex 3 (cases involving large fines in magistrates' courts).

Criminal Procedure Rules 2014

The Criminal Procedure Rules 2014, SI 2014/1610 come into force on 6 October 2014. Of particular note to road traffic practitioners:

- Part 4 is amended so that it governs the service of documents under s 12 of the Road Traffic Offenders Act 1988 (proof of identity of driver of the vehicle).
- Part 33 (expert evidence) is amended to include new rules in respect of an expert witness's duty to the court and establishing the reliability of expert evidence.
- Part 37 (trial and sentence in a magistrates' court) is amended to insert new procedures where proceedings become void under s 14 of the Magistrates' Court Act 1980 (MCA 1980) (proceedings invalid where the accused did not know of them), and where a conviction or other order is set aside under s 142 of the MCA 1980. The latter now requires that notice be given to the other party and, where a party proposes that a conviction be set aside, it imposes the same requirements as where there is an application to withdraw a guilty plea.

CASES OF NOTE

Damages – applicable law

In *Wall v Mutuelle De Poitiers Assurances* [2014] EWCA Civ 138, [2014] RTR 17 the claimant, who resided in England, was severely injured in a collision with another vehicle while riding his motorcycle on holiday in France. On his return, he commenced proceedings against the other driver's insurer. Liability was admitted so the only issue was the assessment of damages. The claimant sought to rely on a number of expert reports. The defendant contended that a single expert ought to be instructed in line with the general practice and procedure in the French courts. The question thus arose, did English or French law apply to such case management? It was held that this was a question of evidence and procedure within the meaning of art 1(3) of Regulation 864/2007. Accordingly, English law was to be applied.

In the subsequent appeal, the principal argument advanced on behalf of the defendant was that the Regulation sought to discourage 'forum shopping' by requiring certainty and uniformity of outcome. The counter argument was that such uniformity was in reality unattainable and that the Regulation did not touch evidence or procedure at all.

The Court of Appeal (Civil Division) (Longmore, Jackson and Christopher Clarke LJJ) held as follows.

The phrase 'evidence and procedure' in art 1(3) of Rome II should be given its normal meaning.

> '12. It cannot be the case that the Regulation envisages that the law of the place where the damage occurs should govern the way in which evidence of fact or opinion is to be given to the court which has to determine the case. An English court is ill-equipped to receive expert evidence given in the French manner. First, our rules of disclosure will not be the same as they are in every foreign country. It would be very odd if the rules of disclosure were not matters of "evidence and procedure"; but on the assumption that they are, how do they apply to a French-style single expert report? Not only would a French expert not regard himself as bound by any English rule; neither would he be able, in any sensible way, to take advantage of the English rules if he wished to do so.' (per Longmore LJ)

The court should follow normal English procedure in determining the extent of the claimant's injuries and the amount of his financial losses, in so far as those categories of loss were recoverable under French law.

While that disposed of the issue in the appeal, the Court turned to the distinction between 'mode of assessment' and 'basis of assessment' of damages. What was the relevance of French law to the latter? It was stated (obiter) that the 'law applicable' in art 15(c) of Rome II, given the context of a convention intended to have international effect, could include guidelines or formulae used by judges in the calculation of non-pecuniary losses. Accordingly, it would be appropriate to permit evidence of such heads and figures as were normally adopted by the French courts to be put before the English court. An English judge should know what French law prescribed as the relevant starting points and apply them to the same extent as a French judge would (it was agreed that French law allowed a margin of discretion in this regard).

(See also *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] RTR 20 which concerned a claim brought under the Fatal Accidents Act 1976 arising from a fatal accident in Germany. The defendant disputed the court's jurisdiction, contending no action could be brought, directly or indirectly under the 1976 Act, since the applicable law was German law. English law would have been more favourable to the claimant than German law. The death pre-dated Rome II so the issue fell to be determined by private international law. This distinguished between matters of procedure and substance. The present case was held to fall into the latter category; thus, German law was the applicable law. The 1976 Act did not override private international law. It did not have express or implied extra territorial effect.)

Tachograph exemption – Reg 561/2006 – derogation for vehicle used for road maintenance

In *A. Karuse AS v Politsei- ja Piirivalveamet* C-222/12, [2014] RTR 18 the Court of Justice of the European Union considered the breadth of the derogation for:

> 'art 13(1)(h) vehicles used in connection with … road maintenance and control …'

The case concerned a tipper lorry which was registered as a 'maintenance' vehicle and was carrying a load of gravel to a road maintenance works site and was stopped when it was 42 km from the company's head office and 10 km from the road maintenance works site. The vehicle did not have a tachograph and the driver was consequently fined. The owner of the vehicle appealed, which resulted in this reference as to whether the use in question could fall within the above derogation.

It was held that the derogations from the requirement to be equipped with a tachograph were not be construed more broadly than was necessary to achieve the aims of the regulation. The mere transport of gravel intended for use in road maintenance was not covered by the derogation. However, where the vehicle was also used to spread the gravel, if it travelled only for a short period of time and over a limited distance it could be exempted from the obligation to be equipped with a tachograph.

Location within the EU was a relevant consideration (the present case arose from Estonia):

> '43 In that (road safety) context, it is necessary to take into account the fact that road maintenance activities include a wide variety of different works, such as, in particular, the repair of damage to the roads, de-icing or clearing snow. Characteristics of those works are, inter alia, planning difficulties, which vary as a function of the events behind the damage caused to the public roads, and the need for them to be carried out rapidly. In addition, the frequency of those works depends largely on the meteorological conditions and the distances to be travelled by the vehicles used between the different road maintenance works sites, which factors can vary in different regions of the European Union. That is the case for the greater distances between the built-up areas in the Member States which have a low population density such as, in particular, the Member States in the north of the European Union, as opposed to certain regions in the Member States of central Europe.'

It was for the national court to assess whether the journey of the claimant's vehicle met the requirements of limited distance and short period of time to avoid undermining the objectives pursued by the Regulation. Article 13(1)(h) was capable of including vehicles transporting material to a road maintenance works site, provided that the transport was wholly and exclusively connected with those works and constituted an ancillary activity to them.

Criminal procedure – wasted costs

In *R* (*on the application of Singh*) *v Ealing Magistrates Court* [2014] EWHC 1443 (Admin), [2014] All ER (D) 174 (May) the claimant was charged with possession of a controlled drug and driving while unfit through drugs. He was bailed to attend the defendant court on 17 May. The claimant attended together with a legal representative for whom he was paying himself. The hearing was entirely abortive, since no prosecution papers were available. The

claimant applied for costs against the prosecution, pursuant to s 19 of the Prosecution of Offences Act 1985. On 23 May, the claimant was convicted of possession of a controlled drug on his guilty plea. The judge found that the 17 May hearing had been wasted, but refused his application under s 19 of the Act because it was not possible to identify 'the party whose fault it was'.

The Divisional Court (Beatson LJ and Bean J) quashed the decision. For the purposes of s 19 of the Act, no distinction could be drawn between the Crown Prosecution Service and the police. The 'party' on the other side from the defendant in such a case was the Crown. 'Improper' did not necessarily connote some grave impropriety. It was intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly. If the act giving rise to the application consisted of someone on the prosecution side not conducting the case properly and it caused the defendant to incur additional costs, the discretion arose. A single mistake was enough to trigger the court's discretion to make an order. However, s 19(1) of the Act conferred a discretion and the court was not bound to make an order in every case of a mistake causing costs to be incurred. If there was a satisfactory explanation for the mistake, the court might decide that it would not be just to make any order.

The power to award wasted costs is not to be used, however, as a sanction against the Crown for bringing a prosecution. In *R* (*on the application of Director of Public Prosecutions*) *v Sheffield Crown Court* [2014] EWHC 2014 (Admin), [2014] All ER (D) 167 (Jun) a driver (G) was prosecuted for causing death by careless driving and acquitted. The judge was of the view that the failure to prosecute other drivers involved in the collision was an improper act or omission and he awarded wasted costs being G's defence costs from the date of the decision not to prosecute the other drivers. The decision was quashed by the Divisional Court (Lord Thomas CJ, Elias LJ and Mitting J). Only rarely was a decision to prosecution amenable to challenge and wasted costs was not the appropriate avenue of challenge.

Criminal procedure – abuse of process

The jurisdiction to stay proceedings as an abuse of process is exceptional and there must be a firm basis for its exercise, either bad faith or inability to hold a fair trial. The power to stay should not be used to punish prosecution inefficiency where a fair trial was still possible, Courts have a duty to investigate carefully any claims of prejudice or unfairness arising from non-compliance with disclosure duties: see *DPP v Gowing* [2013] EWHC 4614 (Admin), (2014) 178 JP 181.

Criminal procedure – no power to permit evidence to be given by telephone

In *R v Hampson* [2012] EWCA Crim 1807, [2014] 1 Cr App R 4 the defendant was charged with causing death by dangerous driving. There were two witnesses called to give evidence about the defendant's driving immediately prior to the incident; one of whom, W, had work commitments on an oil rig, and could not be present at the trial. A video conference could not be

arranged. Because W was a wholly independent witness and it was not the type of case where it was necessary for the jury to assess his demeanour, the judge held that W could give his evidence from the oil rig by telephone, which he duly did. The defendant was convicted. The Court of Appeal (Sir John Thomas P, Mr Justice Collins and Mr Justice Singh) quashed the conviction. The power of the courts in criminal cases to receive evidence other than by a person being present to give oral evidence was regulated by statute. There was no power, even by consent, for a judge to permit evidence to be given by telephone. In light of the importance of W's evidence, the defendant's conviction was not safe.

Criminal procedure – 'victim' surcharge

It was held in *R v Wayne Bailey* (*and other cases*) [2013] EWCA Crim 1551, [2014] 1 Cr App R (S) 59 (Lord Justice Leveson, Mrs Justice Sharp and HH Judge Bevan QC) that where a defendant is sentenced for breach of an order made for an offence committed prior to the commencement (on 1 October 2012)of the Criminal Justice Act 2003 (Surcharge) Order 2012, the surcharge prescribed by that Order does not apply even though the breach occurred after its commencement. The court is still 'dealing' with the original offence. The Court further held that offences taken into consideration should be ignored when considering the offences dealt with for the purpose of imposing a victim surcharge.

Sentencing – causing death by dangerous driving – racing involving intermittent dangerous driving

In *R v Paul* [2013] EWCA Crim 2034, [2014] 2 Cr App R (S) 7 the appellant (27) pleaded guilty, on the second day of trial, to causing death by dangerous driving. (He had previously pleaded guilty to driving while disqualified in relation to the same incident.) He owned an Audi R8 motorcar and his friend, the deceased, owned an Audi TT motorcar. On the night in question, both had spent time at a pub, leaving in their vehicles (with passengers) at 23.45. At a set of traffic lights on an inner ring road, there was a challenge or agreement to race. The two vehicles raced each other on a dual-carriageway with a speed limit of 40 mph, over a distance of about a quarter of a mile, with extremely high speeds being reached (the deceased in excess of 80 mph, the appellant in excess of 100 mph). Thereafter, on a single carriageway A-road in a residential area with a speed limit of 30 mph, there was some further driving at extremely high speed, and a manoeuvre or manoeuvres by the appellant that caused oncoming vehicles to take evasive action, but the average speed for both vehicles, from the point the racing started to the point of the collision (a distance of two miles) was 45 mph. Immediately prior to the fatal accident the deceased had stopped racing and the appellant was seeking to encourage him to continue. He approached the deceased's vehicle from the rear and drove very close to its bumper, flashing his lights repeatedly, and eventually overtook the deceased at speed. Shortly thereafter the deceased, driving at about 45 mph, lost control of his vehicle, crashing into a wall and then a lamppost. He was pronounced dead at the scene. The appellant fled the scene, attending a police station three days after the

accident. By the time his vehicle was discovered in a lay by, it had been cleaned and had new tyres fitted. The judge imposed a sentence of nine years' imprisonment and disqualified the appellant for ten years.

The Court of Appeal (Treacy LJ, Swift and Green JJ) allowed the appeal. The primary factor for the court in deciding the appropriate starting point was the culpability of the driver. A central feature should be an evaluation of the quality of the driving involved and the degree of danger it foreseeably created. Level 1 in the guidelines (in which the case was conceded to fall) covered 'a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others', and Level 1 offences might be characterised by 'a prolonged, persistent and deliberate course of very bad driving'. The starting point for a Level 1 offence was eight years. Clearly this was a case of a continuation of earlier dangerous driving, but the dangerous elements of the driving were committed on an intermittent basis during the two-mile journey rather than representing a continuous course of dangerous driving. In those circumstances, it was not easy to draw the boundary line between Level 1 and Level 2 dangerous driving. Because of the intermittent nature of dangerous driving and the distance over which it took place, the case fell on the boundary between Level 1 and Level 2, rather than squarely in Level 1. The aggravating features were the previous conviction for excess alcohol, driving while disqualified (for the former offence) and without insurance, and the failure to stop after the accident. As to mitigation, this was an appellant who had not previously had a custodial sentence and who had, apart from his involvement with motorcars on two occasions, led a stable life. The other available mitigation was the late guilty plea, for which the judge had generously given 10% credit. A sentence of eight years' imprisonment was substituted (the disqualification period remained undisturbed).

Sentencing – causing death by careless driving – foreign driver driving on the wrong side of the road

In *R v Fleury* [2013] EWCA Crim 2273, [2014] 2 Cr App R (S) 14 the appellant was convicted of causing death by careless driving. He was French and lived in France. He drove to England to see his girlfriend. At the time of the fatal collision he had been awake for 16 hours and had been driving or travelling for about six hours, with a short period of sleep on the shuttle as he came through the Channel Tunnel. At 23.30, his car collided head-on with another vehicle, the driver of which died at the scene. Neither car was speeding. The expert evidence for the prosecution was that the appellant had been driving on the wrong side of the road. The defence case was that the appellant had been on the correct side of the road, that he had missed his turning and made a U-turn, but had then gone back to the correct side of the road. He was acquitted of the alternative count of causing death by dangerous driving. In passing sentence, the judge said that he was sure that the appellant was tired, and that he had driven on the wrong side of the road for a significant distance, and that it was not a case of a momentary swerve. The appellant was sentenced to 18 months' imprisonment.

The Court of Appeal (Lloyd Jones LJ, Irwin and Green JJ) allowed the appeal. The judge's analysis was not inconsistent with the jury's verdict. On the other hand, the evidence as to the length of time that the appellant had been awake and driving was not a satisfactory basis for concluding that he was particularly weary. This was a bad case of careless driving and was close to dangerous driving. However, the guidelines make it clear that the levels of seriousness of this offence must take into account the culpability of the offender. The overwhelming likelihood was that the appellant performed a U-turn in the dark in England and then, for a few moments, forgot that he was no longer driving in France and drove down the right-hand side of the road. For a British driver that would have been a catastrophic and highly culpable act, but for someone used to driving in France, the culpability must be taken to be a good deal lower. For that reason, the starting point of two years was too high, and should have been 12 months' imprisonment. With a 25% reduction for mitigating factors (positive good character, genuine remorse, that the deceased had not been wearing a seat belt at the time), a sentence of nine months' imprisonment would be substituted.

Sentencing – dangerous driving

In *R v Ward* [2013] EWCA Crim 2667, [2014] 1 Cr App R (S) 74 the appellant drove too fast while drunk and lost control of his car, rolling over onto a grass verge. One of his passengers (a young girl) suffered a broken collarbone, and the other (his partner) was knocked unconscious. The appellant was also knocked unconscious and suffered a punctured lung and damage to his arm. His blood alcohol level at the time of the accident was calculated to be 206 mg of alcohol in 100 ml of blood. Following his discharge from hospital, the appellant was interviewed then bailed to attend a police station, but failed to attend. More than a year later he was arrested for criminal damage and threatening behaviour and the failure to surrender then came to light. He then failed to attend a plea and case management hearing, telling the court and his solicitors that he had insufficient funds to get to court. He was arrested over the weekend and brought to court the following week. He pleaded guilty to dangerous driving, and asked for all matters to be dealt with on that day. He was sentenced to 21 months' imprisonment for dangerous driving (and consecutive sentences of four months and two months for threatening behaviour and criminal damage, with no separate penalty for failure to surrender to custody). He appealed on the basis he should have received a greater discount for his guilty plea.

The Court of Appeal (Lord Justice Fulford LJ, Cox and Slade JJ) dismissed the appeal. This was a very serious case of dangerous driving, and the judge was fully entitled to regard the offence as one meriting a starting point of the maximum sentence of two years. The Sentencing Guidelines Council's guideline on reduction in sentence for a guilty plea recommended a reduction of 25% for a guilty plea after a trial date is set. The judge was entitled to take into account the failures of the appellant to comply with the criminal justice processes in giving a lesser reduction. While it was submitted that the appellant effectively pleaded guilty at what would have been a hearing to fix a trial date, the guideline was based on the usual procedural timetable and the

appellant effectively torpedoed that timetable by his own actions in failing to answer to bail and to surrender to custody when required to do so. He should not benefit from the recommended reduction when by his actions he had delayed the criminal justice process for over a year. There was nothing wrong with the discount given for the plea, effectively one-half of the ordinarily recommended discount of 25%.

In *R v Wilson* [2013] EWCA Crim 1745, [2014] 1 Cr App R (S) 79, however the Court of Appeal (Fulford LJ, Burnett and Hickinbottom JJ) held that the sentencing judge had adopted too high a starting point on the following facts. The appellant (aged 21) pleaded guilty to dangerous driving. He fought with the victim's brother at a gathering in private premises. The victim and her brother left the premises and walked up the road. The appellant got into his car and drove towards the victim and her brother, who were now in the company of others. Some members of the group were able to jump out of the way, but the victim was thrown onto the bonnet. She hit the windscreen then fell to the ground. The appellant left the scene. The victim was knocked unconscious and needed stitches for a laceration to her thigh. She also suffered bruising and grazing. The appellant pleaded guilty on re-arraignment on the basis that he drove the car towards the group in an attempt to scare the victim's brother, but did not intend to injure anyone. The judge was of the view that it was difficult to conceive of many more serious offences of dangerous driving. Sentenced to 16 months' imprisonment, and disqualified from driving for 12 months, with an extended re-test requirement.

While this was a bad piece of driving, and an immediate custodial sentence, absent any exceptional features, was inevitable, there have been many worse cases of dangerous driving. Furthermore, the appellant was able to rely on some significant mitigation, particularly his relatively minor criminal record and his youth. Therefore, the correct starting point was 12 months' imprisonment, to be reduced by 25% for the late plea. Nine months' imprisonment was substituted.

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