Butterworths Road Traffic Service

Bulletin Editor
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NEW LEGISLATION

Fees

A number of fee-altering regulations have been made since the last bulletin.

SI 2014/2114 amends the Motor Vehicles (Tests) Regulations 1981. New fees are prescribed for vehicles in Class VI and Class VIA (public service vehicles). Fees for MOT tests conducted at designated premises are further reduced, while fees for tests conducted at premises provided by the DVSA are increased.

SI 2014/2115 amends the Goods Vehicles (Plating and Testing) Regulations 1988 to amend a number of fees. Again, where tests are conducted at testing stations provided by the Secretary of State there are increases, while tests carried out at other stations have become cheaper.

This pattern continues with SI 2014/2116, which further amends the Road Vehicles (Registration and Licensing) Regulations. The affected fees in this case are those payable for examinations to determine whether or not a vehicle is eligible for a reduced pollution certificate.

SI 2014/2117 amends The International Carriage of Dangerous Goods by Road (Fees) Regulations 1988, which prescribe the fees payable in connection with the issue of special certificates of approval for vehicles used to carry dangerous goods (ADR certificates). Again, fees rise where inspections take place at vehicle testing stations provided by the Secretary of State, and fall when carried out elsewhere.

SI 2014/2118 and SI 2014/2119 amend, respectively, The Public Service Vehicles (Operators' Licences) (Fees) Regulations 1995 and The Goods Vehicles (Licensing of Operators) (Fees) Regulations 1995. The rises in both cases are modest.

There are decreases rather than increases in fees made by SI 2014/2557, which amends The Passenger and Goods Vehicles (Recording Equipment) (Tachograph Card Fees) Regulations 2005.

SI 2014/2580 amends The Motor Vehicles (Driving Licences) Regulations 1999 to introduce lower fees, especially for online applications, for first licences and licence renewals. The reductions range from, for example in the case of a first licence, from 14% (paper application) to 32% (online).

Driving instruction

SI 2014/2216 amends The Motor Cars (Driving Instruction) Regulations 2005 to remove the option of the examiner playing the role of the pupil during the practical test of continued ability and fitness to give instruction. Following these changes approved driving instructors will be required to give instruction to a pupil during the test.

Certificates of professional competence

SI 2014/2264 amends The Vehicle Drivers (Certificates of Professional Competence) Regulations 2007 to implement the amendments made to Council Directive 2003/59/EC on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers by Council Directive 2013/22/EU adapting certain directives in the field of transport policy by reason of the accession of the Republic of Croatia. There are also amendments to amend the identity document requirements for persons attend an initial CPS test or a periodic training course. Finally, a review and appeals process is introduced for Northern Ireland.

Further amendments in consequence of paperless vehicle excise licences

The Vehicle Excise and Registration (Consequential Amendments) Regulations 2014, SI 2014/2358, make amendments to: The Road Vehicles (Registration and Licensing) Regulations; The Vehicle Excise Duty (Immobilisation, Removal and Disposal of Vehicles) Regulations 1997; and The Sale of Registration Marks Regulations 1995 to reflect the changes made by Sch 19 to the Finance Act 2014 to the Vehicle Excise and Registration Act 1994 are going paperless.

Amendments to the CPR

The Civil Procedure (Amendment No 6) Rules 2014, SI 2014/2044, make amendments to the Civil Procedure Rules 1998. The amendments include changes to rules 35.4, 45.19 and 45.29I relating to medical expert reports and recoverable costs for the same regarding certain injury claims for whiplash.

Further commencement of The Anti-social Behaviour, Crime and Policing Act 2014

The 6th and 7th commencement orders have been made, respectively SI 2014/2454 and SI 2014/2590. The most significant commencement for criminal law practitioners is that of Pt 2 (criminal behaviour orders). These supersede 'CRASBOs'.

CASES OF NOTE

Success fees

In *Bright v Motor Insurers' Bureau* [2014] EWHC 1557 (QB), [2014] RTR 24 the claimant entered a conditional fee agreement with her solicitors which provided a two-stage success fee. The case was settled five days before a liability hearing on acceptance of an offer of £1.6m plus periodical payments. The solicitors claimed a success fee of 75%, which the master reduced to 30%.

The claimant's subsequent appeal failed. The fixed percentage success fee increases in CPR r 45.16 did not apply because of the high value of the claim. The matter came down, therefore, to what was reasonable, which was to be judged by reference to the facts and circumstances as they reasonably appeared to the solicitor at the time when the agreement was entered into. If an early trigger for a higher second stage fee was chosen it had to be justified by the higher risk of non-recovery of his fees at an earlier stage than if the second stage was only reached at or shortly before trial. The material factor for determining reasonableness was not, however, the trigger point of the second stage, but whether the fee was set at a level that was reasonable in the light of the risk of non-recovery of costs anticipated at the date of the agreement. Since the injuries in the present case were caused by a motorist reversing at speed it was difficult to see how liability could have been avoided, leaving only the possibility of contributory negligence and the complications flowing from a Pt 36 offer, and the master had approached the matter appropriately.

Uninsured drivers – EU compatibility of MIB exclusion of liability where vehicle being used in furtherance of crime

In *Delaney Secretary of State for Transport* [2014] EWHC 1785 (QB), [2014] RTR 25 the claimant was a passenger in a car being driven negligently and was severely injured when the car collided head-on with another vehicle. Cannabis was found on both the claimant and the driver. The driver's insurer obtained an order entitling it to avoid the policy of insurance under s 152(2) of the Road Traffic Act 1988 on the ground that it had been obtained by the non-disclosure of material facts, which included habitual cannabis use. In county court proceedings brought by the claimant in accordance with art 75 of the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1999, it was held that the claim failed, by virtue of cl

6(1)(e)(iii) of the agreement, since the claimant knew or ought to have known that the vehicle was being used in the course or furtherance of a crime. The claimant then brought a claim for damages against the Secretary of State, contending that this exception was incompatible with art 1(4) of Directive 84/5 (the accident predated Directive 2009/103).

Mr Justice Jay upheld the claim. Directive 84/5 required Member States to provide a system that ensured complete protection for victims of road traffic accidents, and the MIB had to pay compensation in circumstances where the insurer, 'for whatever reasons', which included the avoiding of the insurance policy for misrepresentation or non-disclosure, owed no liability in respect of the victim's claim. Exclusion clauses relating to the conduct of the victim or the insured's failures could be relied upon only to the extent expressly mandated by the Directive. Therefore, the 'crime' exception in cl 6(1)(e)(iii) was inconsistent with the Directive because it did not fall within any of the excepted categories permitted by arts 1(4) and 2(1). Clause 6(1)(e)(iii) could not be envisaged as some sort of sub-set of cl 6(1)(e)(ii). 'The average person, without special knowledge, would not necessarily be aware that a vehicle being driven in the course of a criminal joint enterprise is not insured (at para 69 of the judgment)'.

Interference with a motor vehicle

In *R v Maxwell* [2014] EWCA Crim 417, [2014] RTR 27 the defendant was one of three men being driven in a taxi. One of them grabbed the driver from behind and held him by his neck, which resulted in a collision with two parked cars. The defendant was charged with causing danger to road users by interfering with a motor vehicle, contrary to s 22A(1)(b) of the Road Traffic Act 1988. The driver testified that it had been the other rear seat passenger who had grabbed him round the neck and held him while the defendant grabbed the steering wheel and the man in the front seat tried to change the gears. The judge, who had not been made aware of the decision in *R v Meeking* [2012] EWCA Crim 641, [2013] RTR 4, [2012] 1 WLR 3349, directed the jury that if they were sure that the defendant had interfered with the taxi driver or his ability to drive the taxi normally and safely, such as by putting one or more arms around him, touching or trying to operate one or more controls, then he would be guilty of the offence.

This was held on appeal to be a misdirection. The offence required some interference with a mechanical part of the vehicle, as opposed to interference with the driver. The jury had not been directed that it was essential for them to conclude so they were sure that the defendant had taken hold of the steering wheel, but had been told that they were entitled to convict if they were sure that the defendant had interfered with the driver. The verdict was, accordingly, unsafe.

Failing to provide information as to the identity of the driver

In *Krishevsky v DPP* [2014] EWHC 1755 (Admin), (2014) 178 JP 369 the defendant was convicted of failing to respond to a notice to owner issued

under s 172 of the RTA 1988. His defence was that he had never received the original request. From their findings of fact, it appeared that the justices had concluded that the defendant had rebutted the presumption of service of the statutory request, but had become aware of it following the receipt of a reminder, to which he had not responded.

The conviction was quashed. The case of *Whiteside v DPP* (2012) 176 JP 103 was distinguishable because, in the present case, the defendant had rebutted the presumption of service of the original notice, which is a pre-requisite to a conviction. The result was no offence could have been committed and it was unnecessary to consider the defences under s 172(7) since they were predicated upon proper service of the notice. The Court added that the circumstances of the case were peculiar and the defendant was 'extremely lucky' (per Moses LJ). Evidence that a defendant did not receive the notice will be unlikely to rebut the presumption of service unless he goes further in explaining why receipt has not occurred by, for example, addressing the question of the delivery of post to his address.

Sentencing causing death by careless driving while under the influence of alcohol

In *R v Creathorne* [2014] EWCA Crim 500, [2014] 2 Cr App R (S) 48 the appellant and his friend had been drinking in a pub. At around 21.00, the manager considered that they had been drinking excessively and asked a member of his security staff to eject them. The appellant drove away with V as his passenger. The appellant lost control of the motor vehicle while exiting a bend. This resulted in a collision with a tree, causing V's death and life threatening injuries for the appellant. Back-calculation showed that the appellant had been over twice the legal limit at the time of driving. He was not interviewed for approximately three months and claimed that he suffered from amnesia on account of the injuries sustained during the collision.

The appellant originally entered a not guilty plea at the hearing to set a trial date. At that stage, his legal advisers did not have a copy of the collision report, information about the state of the tyres on the appellant's motor vehicle or the toxicology evidence. Nevertheless, the judge considered that information then available to the appellant and to his legal advisors was sufficient to enable the appellant to make the decision to enter a guilty plea. On that basis, the judge gave only a 25 per cent discount against the sentence that he imposed for the causing death offence, which was seven years' imprisonment.

The appeal was allowed in part. While the right starting point – nine years and four months – was entirely appropriate, the discount for pleading guilty should have been greater. The proposition that the appellant was suffering from amnesia at the time of the hearing had not been challenged. Accordingly, his ability to form a considered decision as to whether or not to plead guilty depended upon the ability of his legal advisers to review sufficient evidence to be able to proffer sensible advice, and the evidence then available was clearly incomplete. In a case such as this legal advisers should ordinarily

be entitled to see all of the material evidence before advising on plea. The precise nature of the material evidence would inevitably vary from case to case. The judge had not analysed what evidence had been available to the appellant's legal advisers. He had simply said that there was 'some evidence' without assessing its sufficiency and materiality to enable proper advice on plea to be given. The appellant was therefore entitled to the full one-third reduction for pleading guilty on the basis that his plea had been tendered at the first reasonable opportunity. The sentence was thus reduced to six years and ten weeks' imprisonment.

Causing death by careless driving – sufficiency of evidence to convict

In *R v Greenhalgh* [2014] All ER (D) 82 (Oct,) the defendant was driving a flat-bed lorry when he struck and killed an 89-year-old pedestrian, T. T had been crossing the road at the time. At trial, the principal issue was where T had been when the defendant had first noticed him. At the close of the prosecution case, the defence made a submission of no case to answer. The defence relied upon a joint expert report, which it was submitted demonstrated a real possibility that, even if the defendant had seen T before he had set off across the road, an assumption which the defence were prepared to make, he could not have reasonably avoided the collision. The judge rejected that submission. The defendant did not give evidence at trial but he had provided full replies when questioned in police interview. In respect of the police interview, the judge directed the jury, among other things, that those replies were simply assertions made on the occasion when he had been questioned by police. The replies had not been subjected to proper examination and scrutiny in court and in that sense were not evidence. Consideration was also given to tachograph evidence which showed the defendant's speed to be 38 mph 100–120 m before the point of collision, but that he had slowed down in approaching the site of the collision.

The defendant was convicted of causing death by careless driving and given a community order with an unpaid work requirement of 300 hours, a curfew of three months and was disqualified from driving for 18 months. The defendant appealed against conviction and sentence.

It was held that the case had been properly left to the jury. It had not been enough for the defence to make concessions on the defendant's behalf and then to set up in argument one route by which it might have been open to the jury to acquit. The question for the judge at closing had been whether there was evidence upon which the jury could properly convict. It had been properly open to the jury to conclude that, contrary to the defence's concession, the defendant had seen T in time to avoid a collision.

It was not accepted that the jury should have received a direction regarding the fact that the defendant had been travelling at 38 mph. There had been no objection made when the evidence was introduced and it had clearly formed part of the background to the collision. The jury had been made aware of the

tachograph evidence, namely that in approaching the site of the collision, the defendant had slowed down, evidence on which the jury had been properly directed.

The police interview had contained both admissions and assertions. Assertions in mixed statements were admissible in evidence. Juries were regularly directed that, while admissible, it might not have the same effect as evidence given under oath in court. The judge's direction in the present case had not been strictly accurate. However, in the circumstances, even if the judge had given a strictly accurate direction, it could not be seen how the defendant's position could have in any way been improved.

The appeal against sentence succeeded, however, to the extent that the period of disqualification was reduced to 12 months.

Causing serious injury by dangerous driving – length of disqualification

In *R v Ellis* [2014] EWCA Crim 593, [2014] 2 Cr App R (S) 50 the appellant pleaded guilty to this offence and was sentenced to two years' imprisonment and disqualified from driving for a period of eight years.

Late one evening, the appellant had tried to race and overtake a vehicle in front of him. Passengers in the appellant's car described him driving at consistently fast speeds, often greatly in excess of the speed limit, rapidly accelerating or racing, braking suddenly and driving like a 'boy racer'. When the vehicle in front braked upon approaching a roundabout, the appellant was unable to stop, collided with its rear, skidded across the road and collided head-on with another vehicle. The driver of the other vehicle, V, suffered serious injuries, sustaining a fractured skull and an open compound fracture of her ankle. The appellant was knocked unconscious. At the time of sentencing, V was still suffering from physical and neurological injuries, experiencing great pain. Her sight was affected and she had to wear a leg brace. Her ability to walk was affected and she could no longer drive or work, with her life having effectively been turned upside down by the incident.

On appeal it was held that, while there were currently no sentencing guidelines for this offence, assistance could be obtained as to the relevant approach to the appropriate disqualification period and the related issue of culpability from the approach taken to those issues in cases of causing death by driving and dangerous driving, making suitable allowance for the fact that the consequences of the driving would be different and the standard of driving under consideration could also differ. A period of disqualification operated to protect the public from future offending. The risk that such offending would re-occur had to be considered by the court and culpability was relevant to the assessment of that risk. Disqualification was also intended to punish and to deter others. Nevertheless, a lengthy disqualification could lead to further offending because of the temptation to drive unlawfully and could additionally hamper rehabilitation because of its affect on the ability of the offender to obtain or maintain employment.

This was an extremely bad case of dangerous driving. The appellant's culpability was therefore high and the harm caused was very serious. A lengthy ban was therefore inevitable. Nevertheless, the period of disqualification was too long. In particular, there was an absence of previous convictions or driving infractions of any kind and the assessment of the risk of re-offending was low. The appellant was very remorseful and, although he had no memory of the incident, had accepted full responsibility for it and for the serious injuries caused to V. His employment did not require him to drive, but it was inevitably the case that disqualification for a period of seven years after release from custody would make it harder for him to get employment. A period of five years, four years after the appellant's release from custody, would be sufficient to meet the objectives of the protection of the public, punishment and deterrence and this term was therefore substituted.

Compensation

It was held in *R v Carrington* [2014] EWCA Crim 325, [2014] 2 Cr App R (S) 41 that it would not be wrong in principle to make a compensation order where the defendant would have to borrow money in order to satisfy that order provided that there was sufficient material on which to conclude that there were sound prospects of the defendant being able to repay the loan (because such material was lacking in the present case the order, together with an order for payment of prosecution costs, was quashed).

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