Butterworths Road Traffic Service

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UNLIMITED FINES AND THE CRIMINAL COURTS CHARGE

The first ever fixed-term Parliament kept its main criminal justice legislative surprises until the end. A number of key Acts went on to the statute books, followed by what has been described as a 'flurry' of commencement orders, shortly before Parliament was dissolved. Many of the new or newly commenced provisions merely amend existing legislation. Other provisions, however, are not merely 'original', but can truly be described as 'groundbreaking'. We begin this bulletin by looking at two such innovations, both of which are financial.

In the early 1990s there was a brief experiment with unit fines. The aim was to match financial penalties more closely to ability to pay. Fines were announced as numbers of units (each standard level had its maximum, eg level 5 was '50'). The value of the unit could be anywhere from £4–£100 was the product of a means assessment (with, as now, assumptions about means being made where no information had been provided by the defendant). To ensure there was 'no cheating', the sentencing court was not usually told what this figure was. The process was intellectually defensible. Equality of impact brings fairness to punishment. The mistake, however, was to move in one step from a system of little means-related adjustment of financial penalties to one where the range was so vast. For example, a parking offence might cost the defendant anywhere from £20–£500. There was an outcry from people on higher incomes, who complained about fines which, while in keeping perhaps with their means, were out of all proportion they felt to their offences. The protest succeeded. Unit fines were quickly scrapped (in 1993).

The practice in recent years has been to use net weekly pay as the base, with sentencing guidelines for particular offences expressed as a fraction or multiple of this figure. Band C, for example, has a starting point of 150% 'relevant weekly pay' and a range of 125–175%. Of course, identifying the band and the appropriate point within it merely form the beginning of the

process, and the narrative in the Magistrates' Court Sentencing Guidelines goes into considerable detail on the subsequent approach to the assessment of fines. Of particular note in the present context, the following is stated about 'high income offenders'. '*Where an offender is in receipt of very high income, a fine based on a proportion of relevant weekly income may be disproportionately high when compared with the seriousness of the offence. In such cases the court should adjust the fine to an appropriate level; as a general rules, in most cases the fine for a first time offender pleading not guilty should not exceed 75% of the maximum fine*'.

However, that no longer works for many offences. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 11) Order 2015, SI 2015/504, implemented the remainder of s 85 of that Act. Section 85 provides that where a relevant offence would on commencement day be punishable on summary conviction by a fine or maximum fine of £5,000, however expressed, and the offence was committed on or after that date, the court may impose fine of *any* amount. The commencement date is 12 March 2015. (See also The Legal Aid, Sentencing and Punishment of Offenders Act (Fines on Summary Conviction) Regulations 2015, SI 2015/664, which disapply s 85 to certain offences and make various other amendments.)

Unlimited fines may now, therefore, be imposed for a large number of road traffic offences. This raises the potential, if bands and relevant weekly pay remain the key parts in the equation, of wealthy offenders receiving fines vastly in excess of the sort of numbers which even the unit fine system produced. It is not only Premier League footballers and bankers whom this will dramatically effect; there are many people whose earnings could potentially result in fines substantially greater than the old level 5.

We await with keen interest the guidance of the Sentencing Council and, no doubt also, the Court of Appeal as to how this should work in practice.

We turn from the progressive to the regressive. A variety of fees have been chargeable in Magistrates' Courts for a very long time, and it is unsurprising that the figures have risen, in some cases substantially, since public finances came under strain. Requiring defendants to contribute to the costs of running the criminal courts, is however, entirely novel. It has arrived in the form of the criminal courts charge. The charge is one of the innovations made by the Criminal Justice and Courts Act 2015 (CJCA 2015), achieved by the insertion of ss 21A–21F in the Prosecution of Offences Act 1985 and by the Prosecution of Offences Act 1985 (Criminal Courts Charge) Regulations 2015, SI 2015/796. The charge applies to all offenders who were aged 18 or older when the offence was committed. The only main exceptions are where the court grants an absolute discharge or makes a hospital order.

The sums vary according to the classification of the offence and the plea, but the minimum, even for a trial by a single justice on the papers, is £150, and this rises to £520 and £1,000 for conviction after a trial of, respectively, a summary offence and an offence triable either way.

As this bulletin is being written, there is some controversy as to whether 'either way' offences triable only summarily by reason of low value are 'either

way' or 'summary' for the purpose of the charge. Schedule 1 to the Interpretation Act 1978 defines 'offence triable either way' as an offence '*which, if committed by an adult, is triable either on indictment or summarily'* but '*references to the way or ways in which an offence is triable are to be construed without regard to the effect, if any, of section 22 of the Magistrates' Courts Act 1980 on the mode of trial in a particular case'*. We can see no reason why this definition should not apply to the charge, which would make low value criminal damage, etc, 'either way' for that purpose. Low value shoplifting, on the other hand, is probably a 'summary offence' for the purposes of the charge, since the procedure is governed by s 22A, and not s 22 of the 1980 Act and the court cannot direct trial on indictment. This is a bizarre result since the defendant can elect Crown Court trial for low value shoplifting, but not for low value criminal damage.

This is not the only area of doubt. The rules provide that where a person is dealt with in the same proceedings for an offence and for failure to comply with various kinds of orders, the latter will not attract a separate charge. The rules are silent, however, on the treatment of multiple offences in the same proceedings and on the treatment of Bail Act offences where there has been a failure to surrender in the course of the proceedings. Guidance has been given that multiple offences should only attract one charge, namely the highest relevant amount, but this is certainly not explicit in the Regulations, which do, on the other hand, cater expressly for cases involving multiple breaches of more than one requirement of a court order. The CPD 19.C.9 provides that the offence of failing to surrender to bail 'stands apart from the proceedings in respect of which bail was granted. The seriousness of the offence can be reflected by an appropriate and generally separate penalty being imposed …'. Consequently, the guidance is that the offence of failure to surrender, if dealt with apart from the offences to which the bail related, should attract the charge, with the 'substantive' offences attracting a further charge when they are eventually sentenced. If this approach is right, its harshness is apparent from the following example. D is charged with low value shoplifting and is bailed to appear at court. He arrives half an hour after his bail time with the excuse that his train was delayed. The court takes the view that D should have allowed more time to get to court and he is charged with a Bail Act offence. He pleads not guilty on the basis there was 'reasonable cause' for his lateness. The matter is tried immediately and D is convicted. The court must now impose a charge of £520, at least if it sentences the Bail Act offence there and then. D then pleads not guilty to the theft. If he is convicted of this offence after a trial another £520 must be imposed (or £1,000 if the view is taken that low value shoplifting is an 'either way' offence because the defendant can elect trial).

We return to the figures. These are large sums for most pockets, they must be ignored when determining the substantive sentence and the ability to remit the charge in whole or in part is very restricted. When dealing with an offender who is a serving prisoner, or who is on that occasion sentenced to imprisonment, the charge (in common with the surcharge) cannot be 'written off' by the imposition of an immediate term in default. However, again like

the surcharge, the power to impose one day's detention in default under s 135 of the Magistrates' Courts Act 1980 remains available.

It remains to be seen how much of the charge fines officers will succeed in collecting, but with many offenders appearing before the court frequently and/or dependent on state benefits, it is likely that the default rate will be high.

OTHER CHANGES MADE BY CRIMINAL JUSTICE AND COURTS ACT 2015 OF RELEVANCE TO THE PROSECUTION OF ROAD TRAFFIC OFFENCES

New offences

Section 29 of the Act inserts new ss 3ZC and 3ZD in the Road Traffic Act 1988 (RTA 1988). The former creates a new offence of causing death by driving when disqualified from driving, triable only on indictment with a maximum penalty of ten years' imprisonment (replacing the former either way offence which had a maximum of two years' imprisonment). The latter creates an offence of causing serious injury (defined as physical harm which amounts to grievous bodily harm for the purpose of the Offences against the Person Act 1851) by driving when disqualified. This is triable either way with a maximum penalty of four years' imprisonment on indictment. In both cases disqualification followed by disqualification until a test is passed are obligatory. Consequential amendments are made by Sch 6 as to, for example, alternative verdicts.

Extension of disqualification

Section 30 makes some minor changes to the new provisions governing extension of disqualification where a custodial sentence is also imposed. These provisions were inserted by s 137 of the Coroners and Justice Act 2009, which came into force on 19 March 2015 by virtue of SI 2015/819. The provisions – new s 35A of the Road Traffic Offenders Act 1988 and new s 147A of the Powers of Criminal Courts (Sentencing) Act 2000 – add an extension to the length of the disqualification equal to the part of the custodial sentence which the offender has to serve.

Mutual recognition of disqualification

Section 31 gives effect to a proposed new bilateral agreement between the UK and the Republic of Ireland which will permit mutual recognition of driving disqualifications between the two states. Section 31 amends Ch 1 of Pt 3 of the Crime (International Co-operation) Act 2003, which was enacted to implement the European Convention on Driving Disqualifications 1998. The Republic of Ireland and the UK are the only signatories to the Convention and so it has been commenced only in relation to mutual recognition of driving disqualifications between those countries.

Section 31 and Schedule 7, to which it gives effect, contain considerable detail, but in summary:

- Subsection (3) amends the duty on the UK in s 54 of the Criminal Injuries Compensation Act 2003 (CICA 2003) to give notice of a driving disqualification to the authorities in the Republic where a disqualification has been imposed on an offender in the UK. New s 54(1)(aa) of that Act provides that the obligation arises only if the offender is resident in the Republic or if the offender is not normally resident in the Republic but holds a Republic driving licence. The disqualification would only be notified to the Republic where it related to a qualifying UK road traffic offence as set out in Sch 3 to the CICA 2003 (Great Britain offences) or in new Sch 3A to that Act (Northern Ireland offences) (inserted by Sch 7).
- Subsection (4) amends s 56(1) of the CICA 2003 to require the UK to recognise a driving disqualification if an offender is disqualified in the Republic following conviction for a qualifying road traffic offence as set out in the new Sch 3B to that Act (inserted by Sch 7). The obligation to recognise the disqualification would only arise where the offender is normally resident in the UK, or is not normally resident in the UK but holds a Great Britain or Northern Ireland licence.
- Subsection (5) inserts a new section after s 71 of the CICA 2003 to define the term 'the specified agreement on driving disqualifications'. This agreement can only be an agreement between the UK and the Republic to mutually recognise driving disqualifications imposed in either state.

Trial by single justice on the papers

Sections 46–49 of, and Sch 11 to, the CJCA 2015 prescribe a new procedure of trial by a single justice on the papers. This has been achieved by inserting new ss 16A–16F and 121(5A), (5B) in the Magistrates' Courts Act 1980 and subsequent references are to that Act unless otherwise stated.

Where a relevant prosecutor issues a written charge it must at the same time issue a requisition *or* a single justice procedure notice (Criminal Justice Act 2003, s 29(2)). The latter course may be taken in respect of any summary offence not punishable with imprisonment where the defendant is an adult (for the conditions of trial by a single justice on the papers, see Magistrates' Courts Act 1980, s 16A). Service of the notice must be accompanied by service of such documents as are prescribed by the Criminal Procedure Rules (s 16A(2), and Criminal Justice Act 2003, s 29(3B)).

The notice is a document which requires the recipient to indicate his plea to the charge and, if guilty, whether or not he wishes the case to be tried in accordance with the single justice procedure (Criminal Justice Act 2003, s 29(2B)).

If the recipient indicates a not guilty plea or a desire not to be dealt with under the single justice procedure the case will proceed before a full court in the normal way (s 16A(1)(d)). The court must then issue a summons to the

accused (s 16B(3)). Otherwise, provided the court is satisfied as to service of the notice and accompanying documents, the case may proceed under the single justice procedure.

Only the documents which have been served and any written mitigation from the defendant may be considered; oral evidence is not permitted (s 16A(3)). As to the admissibility of statements, see s 16F. The proceedings may be held in private and in the absence of the parties (s 16A(6)–(7)). If the court decides that it is not appropriate to convict the accused under the single justice procedure it may not try or continue to try the charge in that way; the trial must be adjourned, if has begun, and a summons must be issued requiring the accused to appear before the court for trial (s 16B(3)).

The court may also decide after conviction that it is not appropriate to try the matter under the single justice procedure, or the court may propose to disqualify the defendant under s 34 or s 35 of the Road Traffic Offenders Act 1988 and thus be obliged to give the defendant the opportunity to make representations. In the first case the court must adjourn the trial and issue a summons, and the same applies in the second case if the defendant indicates a wish to make representations (s 16C).

Provision is made for the making of a statutory declaration where the defendant was not aware of the single justice procedure notice (s 16E).

The powers of the single justice on conviction are restricted to orders of discharge, fines, ancillary financial orders and orders of endorsement and disqualification (121(5A)).

The Criminal Procedure (Amendment No 2) Rules 2015, SI 2015/646 make amendments consequential on the new provisions.

CHANGE MADE BY THE CRIMINAL JUSTICE AND COURTS ACT 2015 RELATING TO CIVIL PROCEEDINGS

Where in civil proceedings on a claim or counterclaim for personal injury damages the court finds that the claimant is entitled to damages, but, on an application for dismissal by the defendant, the court is satisfied on a balance of probabilities that the claimant has been fundamentally dishonest in that claim or a related claim, the court must dismiss the primary claim unless it is satisfied that the claimant would thereby suffer substantial injustice (CJCA 2015, s 57(1), (2)). The duty to dismiss includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest (CJCA 2015, s 57(3)). When dismissing the claim the court must record the amount of damages it would have awarded on the primary claim but for its dismissal (CJCA 2015, s 57(4)). Further provisions deal with subsequent criminal proceedings against the claimant for the fundamental dishonesty. These provisions apply only to claims started by the issue of a claims form on or after 13 April (see s 57(9) and SI 2015/778).

Sections 58–61 deal with rules against inducements to make personal injury claims.

NEW ROAD TRAFFIC AND TRANSPORT REGULATIONS AND COMMENCEMENT ORDERS

There has been a great of relevant, secondary legislation since the last bulletin, which we turn to consider in order of date made.

Construction and Use

The Road Vehicles (Construction and Use) (Amendment) Regulations 2015, SI 2015/142, are, in brief, concerned with: a) the speed threshold at which category 'T' tractors are required to comply with higher standards of vehicle construction and use under the 1986 Regulations; and b) the speed threshold at which most agricultural trailers are required to comply with higher braking standards. The threshold rises from 20–40 mph for these vehicles. The Regulations also amend the 1986 Regulations to increase the maximum authorised laden weight of a combination comprising a category 'T' tractor and a single agricultural trailer (with certain exceptions).

Retention and sale of registration marks

The Retention and Sale of Registration Marks Regulations 2015, SI 2015/193, amend the Retention of Registration Marks Regulations 1993 and the Sale of Registration Marks Regulations 1995 to allow applications for retention, or assignment of vehicle registration marks to be made on the internet and not just by submitting documents. Other changes are also made to the retention and sale of registration marks.

Smoke-free vehicles where children are present

Section 96 of the Children and Families Act 2014 amended the Health Act 2006 to enable regulations to be made for private vehicles carrying persons under the age of 18 to be smoke-free.

The Smoke-free (Private Vehicles) Regulations 2015, SI 2015/286, have consequently been made. They apply to private vehicles which are enclosed, but caravans and motor caravans are excluded when they are being used as living accommodation. There is no duty to display no smoking signs, but a penalty may be given in respect of an offence. The regulations come into force on 1 October 2015.

The Smoke-free (Vehicle Operators and Penalty Notices) (Amendment) Regulations 2015, SI 2015/939, provide, again with effect from 1 October 2015, provide that the driver of a private vehicle that is smoke-free is under a duty to cause persons to stop smoking in that vehicle.

Rehabilitation course for relevant drink offences

The Rehabilitation Courses (Relevant Drink Offences) (Amendment) Regulations 2015, SI 2015/366, amend the Rehabilitation Courses (Relevant Drink Offences) Regulations 2012 to deal with defects in the latter and to take in the formation of the Driver and Vehicle Standards Agency.

Motorways

The Motorways Traffic (England and Wales) (Amendment) (England) Regulations 2015, SI 2015/392 apply only to England. New smart motorways schemes which enable the use of the hard shoulder as an additional lane have introduced the use of emergency refuge areas in place of hard shoulders, and the Motorways Traffic (England and Wales) Regulations 1982 are amended to provide for use of these areas. Contravention of the regulations is an offence under s 17(4) of the Road Traffic Regulation Act 1984.

Wearing of seat belts by children

The Motor Vehicles (Wearing of Seat Belts by Children in Front Seats) (Amendment) Regulations 2015, SI 2015/402, amend the Motor Vehicles (Wearing of Seat Belts by Children in Front Seats) Regulations 1993. The Motor Vehicles (Wearing of Seat Belts) (Amendment) (No 2) Regulations 2015, SI 2015/574, amend the Motor Vehicles (Wearing of Seat Belts) Regulations 1993. Both sets of amendments have been made to implement the requirements of Council Directive 2014/37/EU.

Road vehicles registration and licensing

The Road Vehicles (Registration and Licensing) (Amendment) Regulations 2015, SI 2015/403, amend the Road Vehicles (Registration and Licensing) Regulations 2002 to make provision for registered keepers and vehicle traders to notify certain changes online or by telephone. They also allow for vehicle traders, in certain circumstances, to notify the Secretary of State of these changes on behalf of the registered keeper. Provision is also made for designating persons who are registered keepers of 50 or more vehicles to be able to choose at first registration and/or following a relevant change, whether and when to have a new registration document issued, rather than have one issued as a matter of course, and to choose the address to which such a document is to be issued.

Driving licences

The Motor Vehicles (Driving Licences) (Amendment) (No 3) Regulations 2015, SI 2015/719 revoke SI 2015/412 (the No 2 amendments) but with identical substantive provisions. They amend the Motor Vehicles (Driving Licences) Regulations 1999 to implement Article 7(5)(a) of Directive 2006/126/EC. Regulations 4 prohibits a person from holding more than one Britain, Northern Ireland or Community driving licence. Any breach constitutes an offence under s 91 of the Road Traffic Offenders Act 1988. An exception is made for those who hold a document authorising them to drive a motor vehicle which was issued by a state before the date on which that state became a Member State or a party to the EEA agreement.

Downloading of data from recording equipment

The Passenger and Goods Vehicles (Recording Equipment) (Downloading of Data) Regulations 2015, SI 2015/502, amend s 97D of the Transport Act 1968 to take account of Commission Regulation (EU) No 581/2010 on

the maximum periods for the downloading of relevant date from vehicle units and driver cards (90 days substituted for 56 days).

Driving licence counterparts

The Road Safety Act 2006 (Commencement No 11 and Transitional Provisions) Order 2015, SI 2015/560, brought into force on 8 June 2010, s 10 of, and Sch 3 to, the 2006 Act. These provisions amend the Road Traffic Act 1988 and the Road Traffic Offenders Act 1988 to abolish the driving licence counterpart in Great Britain. Counterparts to driving licences will no longer be issued with driving licences, endorsements will no longer be entered onto counterparts and GB licence holders will no longer be required to retain or produce their counterpart. Endorsements will instead be entered solely onto an individual's electronic driving record maintained by the Driver and Vehicles Licensing Agency. Courts and the DVLA will retain counterparts as they come into their possession and destroy them. The Road Safety Act 2006 (Consequential Amendments) Order 2015, SI 2015/583, makes consequential repeals, revocations and amendments of other legislation.

Civil enforcement of parking contraventions

The Civil Enforcement of Parking Contraventions (England) General (Amendment) Regulations 2015, SI 2015/561, amend the Civil Enforcement of Parking Contraventions (England) General Regulations 2007 to introduce a ten-minute grace period before a penalty charge is payable and a penalty notice can be served in relation to a parking contravention where a vehicle is stationary in a designated parking place.

New fixed limit drug/driving offences

The Crime and Courts Act 2013 (Consequential Amendments) (No 2) Order 2015, SI 2015/733, makes amendments to the Road Traffic Offenders Act 1988 which are consequential on the insertion of s 5A of the Road Traffic Act 1988, which creates new offences of driving and being in charge of a motor vehicle with an excess of a specified controlled drug.

The Drug Driving (Specified Limits) (England and Wales) (Amendment) Regulations 2015, SI 01/911, add amphetamine to the list of specified drugs and prescribe a limit of 250.

Immobilisation, removal and disposal of uninsured vehicles

The Motor Vehicles (Insurance Requirements) (Immobilisation, Removal and Disposal) (Amendment) Regulations 2015, SI 2015/854, amend the 2011 Regulations of the same name.

In summary, the changes are primarily concerned with cases where there appear to be more than one owner, and with the correction of errors.

Public service vehicles

The Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) (Amendment) (England and Wales) Regulations 2015, SI 2015/888, amend the 1990 Regulations. Regulations 3–7 are amended to omit out-of-date or redundant provisions. Regulation 7 is amended by adding provisions which recognise the introduction of travel concessions and electronic methods of fare payment. These provisions extend the types of conduct by passengers which may constitute an offence under s 25 of the Public Passenger Vehicles Act 1981.

Breathalyser, etc, changes

The Deregulation Act 2015 seems from its title to be an unlikely place to find the most significant reforms of the breathalyser law to be made for many years. However, s 52(a) and Sch 11 achieved this by: removing the defendant's right to replace breath specimens where the lower reading is 50 microgrammes or less; removing the need for a preliminary breath test before an evidential breath test may be taken; and extending the role of health care professionals. These provisions were brought into effect on 10 April 2015 by the Deregulation Act 2015 (Commencement No 1 and Transitional and Saving Provisions) Order 2015, SI 2015/994. The Act also widens the ambulance exemption to various requirements/offences by adding to 'ambulance purposes' vehicles being used 'for the purpose of providing a response to an emergency at the request of an NHS ambulance service' (see s 50 of, and Sch 9 to, the 2015 Act).

Civil enforcement of parking contraventions

The Civil Enforcement of Parking Contraventions (England) (Amendment No 2) Regulations 2015, SI 2015/1001, amend SI 2007/3482 and SI 2007/3483. SI 2007/3483 allows for a notice of penalty charge to be sent through the post on the basis of CCTV evidence alone. The amendments curtail the use of CCTV to require a notice to be affixed to the vehicle by a civil enforcement officer, subject to certain exceptions. Consequential changes are made to SI 2007/3282.

CASES OF NOTE

Appeal from revocation of licence

In *R (Hitchen) v Oxford Magistrates' Court* [2015] EWHC 271 (Admin), [2015] All ER (D) 196 (Feb), following her collision with a number of parked cars, a 78-year-old woman had her licence revoked under s 93 of the RTA 1988 on the basis of possible chronic obstructive pulmonary disease or an as yet undiagnosed condition. Her appeal to the Magistrates' Court was unsuccessful and that court refused to state a case for the opinion of the High Court. The claimant sought judicial review.

The issues were: the proper approach by a Magistrates' Court to an appeal of this sort; and whether the court had acted rationally by ignoring or excluding

evidence obtained by the claimant after the revocation on the basis it had not been indicative of her condition on the date of revocation.

The Administrative Court (Simler J) held that the nature of the proceedings was a complete rehearing involving a de novo assessment by the court of whether the decision under challenge was correct. Bad driving, together with the fact that an elderly driver was involved, might combine to give rise to the possibility that an age-related cognitive impairment had been the likely cause of an accident, but if there was particular evidence which contradicted the general evidence about ageing, the court needed to state clear reasons to explain why the inference of age-related cognitive decline was nevertheless to be drawn as the likely cause. In the present case, that had not been done and there had been no evidential basis, therefore, for inferring a relevant disability. In the light of the specialist's evidence, this was not a case where the cause of the bad driving could have been something else.

The court might have been entitled to conclude that the expert evidence had not been conclusive, but it had not been entitled, without more, to say that it had not been indicative of the claimant's condition. This failure made the decision 'irrational' in the public law sense and the claim, accordingly, succeeded.

Remedies for non-disclosure

In the (stalking) case of *R v Broadman* [2015] EWCA Crim 175, [2015] Crim L R 451, despite frequent requests from the defence, the prosecution failed to serve a key exhibit – a master CD of call data – a few days before the trial was due to start. This prevented the defence from carrying out necessary expert analysis of the data (the issue was whether the calls had been made by the defendant). The defence, therefore, sought an adjournment and the Crown supported this application. However, the period of adjournment would have been at least eight months and the judge was not prepared to countenance this on case management grounds. The judge decided, therefore, to deal with the unfairness caused by the late disclosure by excluding the evidence under s 78 of the Police and Criminal Evidence Act. This effectively brought the prosecution to an end and the prosecution applied for leave to appeal pursuant to s 58 of the Criminal Justice Act 2003.

The Court of Appeal (Sir Brian Leveson P, Andrew Smith and Phillips JJ) granted leave but dismissed the appeal. The defence request for the call data was clearly justified and the defendant would clearly have suffered prejudice if the case had been adjourned. The directions for trial at the PCMH had been plain and the Crown was not entitled to expect there would be no sanction if it failed to comply unless the case had been brought back for a further order. This was not to be taken, however, as encouraging over-zealous pursuits of inconsequential material in the hope that the CPS would not be able to comply. This was itself an abuse of the process of the court and judges should be expected to identify such tactics and impose sanctions on those who sought to manipulate the system.

Bad driving cases – relevance of good character

Any good driving record can come to an end at some point, and evidence of a history of good driving and good character is of little if any weight when a court has to determine whether or not a defendant drove without due care and attention on a particular occasion. In *R v McCarthy* [2014] EWCA Crim 1963, [2015] RTR 10, the judge had given confusing and inconsistent directions on the admissibility and weight of the evidence (from several persons) of previous good driving and previous good character. Nevertheless, the sole issue was whether or not the appellant should have seen the deceased earlier, and there was CCTV evidence supporting the Crown's case that she should. Therefore, the conviction – for causing death by careless or inconsiderate driving – was not unsafe.

Sentencing decisions

There have been a number of reported appeals concerning the most serious motoring offences.

Causing death offences

In *R v Usaceva* [2015] EWCA Crim 166, [2015] RTR 17 the defendant had previously received two fixed penalties for using a mobile phone while driving. Nevertheless, she did this again – sending and receiving texts and calls from two mobile phones – as she drove at speed on a single carriageway. So distracted from driving, she ran into the back of a car, causing it to hit the kerb and spin into the path of an oncoming lorry. The car driver died. In interview the defendant denied using mobile phones on this or on previous occasions, and denied the existence of the second mobile phone.

The defendant pleaded guilty on re-arraignment to causing death by dangerous driving. The judge concluded that she must have been fiddling with one or more of the phones at the time of the collision. This, together with her record of using phones while driving, put the case at the top of the four–seven year range and the defendant had failed to show real remorse. The judge took the top of the range as the starting point and then discounted this for the belated guilty plea. No further discount was made to reflect the fact that the defendant was a single parent with an eight-year-old son. The judge also imposed ten years' disqualification.

The Court of Appeal (Jackson LJ, Mitting and Jay JJ) dismissed the appeal. The judge had been entitled to reach the conclusions he did, and the public interest required the sentence not to be discounted despite the upheaval it would cause in the upbringing of the defendant's child.

In *R v Etherington* [2014] EWCA Crim 1867, [2015] 1 Cr App R (S) 7 the defendant deliberately drove at speed at two teenage girls when he was under the influence of drugs. Both girls died. The defendant pleaded guilty under the early guilty plea scheme. The case fell in the highest sentencing category, but the judge reduced the starting point from 14 to 12 years to reflect the defendant's age and personal mitigation. He then discounted the sentence by

25% to reflect the early guilty plea, reducing the normal level of credit in such circumstances because the case against the defendant was 'overwhelming'. This was the main issue in the appeal.

The Court of Appeal (Treacy LJ, Openshaw J and Sir Richard Henriques) dismissed the appeal. The case was overwhelming. The defendant's car had been fitted with a black box recorder. The defendant drove at the girls intending to scare them or simply to show off. He failed to brake when it must have been obvious that a tragedy was imminent, he then failed to stop, he lied to the police and he tried to blame the girls. The sentencing guideline on credit for plea in an overwhelming case was 20%, so the defendant had in fact received greater credit than was required. There was no mention in the early guilty plea scheme of any further discount in a case that feature overwhelming evidence.

See further on credit for plea *R v Walter* [2014] EWCA Crim 2110, [2015] 1 Cr App R (S) 22. The defendant indicated a wish to plead guilty at a preliminary hearing, but the prosecution was still awaiting the accident investigator's report and specific counts were not drafted until a later date. The Court of Appeal (VP Hallett LJ, Supperstone and Globe JJ) agreed with the trial judge that the discount (from a starting point of 13 years) should be only 20%. The case had nearly every possible aggravating feature and the evidence was overwhelming. An indication of plea before the indictment was drafted did not warrant a higher discount. There was abundant, other evidence than the report.

Causing serious injury by dangerous driving

In *R v Vincer* [2014] EWCA Crim 2743, [2015] 1 Cr App R (S) 51 the defendant drove in excess of the speed limit having consumed alcohol to a level of twice the legal limit. He crashed into a car, causing serious injury to the occupants. He had not intended to drive, but he had received a call from his brother's partner claiming that he was about to assault her, a threat which the defendant took seriously. The defendant tried to phone other family members, but when he failed to reach anyone he decided to drive to his brother's house, which was less than one mile away. On his way there he clipped a kerb when driving at excess speed, lost control of the car and then collided with the other vehicle.

The judge took the view that the decision to drive was highly irresponsible. The defendant could, for example, have called a taxi. The Court of Appeal (VP Hallett LJ, Popplewell and Edis JJ) agreed, but found some mitigation in the fact that the defendant was going to rescue somebody he believed to be at risk and he would not otherwise have driven that night. The judge had not had the benefit of the guideline case of *R v Dewdney* [2014] EWCA Crim 1722, since it was decided only afterwards. This case was less serious than *Dewdney.* There was significant personal mitigation – good record, remorse, etc. The Court of Appeal determined that the appropriate starting point under those guidelines was three years' imprisonment which, with full credit for plea, reduced the sentence to two years' imprisonment (the judge had imposed three years).

In *R v Jenkins* [2015] EWCA Crim 105, [2015] RTR 16 the defendant caused two people to be injured by dangerous driving aggravated by the fact he was 'thrill seeking' at the time, uninsured and held only a provisional licence. The judge placed each count near the top of the range. He gave full credit for plea, which reduced each sentence to three years' imprisonment, but then made the terms consecutive.

The Court of Appeal (Treacy LJ, Swift, Baker JJ) accepted the submission that consecutive sentences were inappropriate where the offences arose from the same incident. The Court agreed with the starting point of four-and-a-half years, and held that this was a case which justified a reduction of only 20% since the evidence was overwhelming. Accordingly, the Court substituted a term of three years and seven months on each count, concurrent.