Butterworths Road Traffic Service

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NEW LEGISLATION

After the deluge of new legislation and commencement orders which we reported in the last bulletin we have enjoyed a period of calm and there have been no new Acts or statutory instruments specifically on road traffic law, but the following affect criminal law practitioners of all types.

Criminal Procedure Rules 2015, SI 2015/1490

The 2015 rules differ in a number of respects from the 2014 rules which they replace. The following is a brief summary of the key changes:

1. The Rules have been rearranged to remove the empty Parts and to restore the sequence which was originally intended.
2. Rule 3.3 now imposes on the parties an explicit duty to communicate with each other so as to find out: the intended plea; what is agreed and what is likely to be disputed; what information or other material is required of the other party; and what is to be done by whom and when.
3. Rule 3.13 now requires a plea and trial preparation hearing in the Crown Court. This will take place earlier than the present PCMH, and it is intended that further pre-trial hearings will be unnecessary in many cases. New r 3.13 supports the arrangements outlined in the Criminal Practice Directions: Amendment No 4.
4. Part 4 (Service of documents) makes new provision about service by electronic means. Rule 4.6 allows for service, not only by sending directly to the recipient, but also by deposit at a website address. Rule 4.7 limits the documents that must now be handed over or sent by post.
5. Rule 5.1 now allows for applications and notices and other information needed by the court to be submitted electronically where arrangements for this have been made.

6. Rules 8.1 and 8.3 (initial details and content of the prosecution case) has been amended. The amendments support the new arrangements for more information to be provided in 'NGAP' cases so that the defendant receives sufficient information about the prosecution case at the earliest possible opportunity.
7. Amendments have been made consequential upon the Criminal Justice and Data Protection (Protocol No 36) Regulations 2014 (European supervision orders).
8. Various amendments have been made regarding written witness statements: time limits for objection and reading material aloud. These changes follow from the provisions of the Deregulation Act 2015 which remove the inflexible seven-day time limit for objecting and the inflexible requirement for reading aloud (now limited to where any member of the public or a reporter is present).
9. Changes to expert evidence make explicit the duty to give a realistic time limit within which expert evidence can be prepared.
10. The Part dealing with restriction on cross-examination by a defendant is now Part 23 (replacing Part 31) and the procedures have been aligned with the rules supporting other measures introduced by the Youth Justice and Criminal Evidence Act 1999 to assist vulnerable witnesses to give their best evidence.
11. Other amendments relate to: directions to the jury (r 25.14); misconduct by jurors (r 26.3); retrial after acquittal (Part 27 replacing Parts 40 and 41 of the 2014 Rules); representations about driving disqualification or endorsement (r 29.1); and European protection orders (r 31). Part 33 (confiscation and related proceedings) reproduces with amendments the rules in Parts 56–61 of the 2014 Rules; Part 42 (Appeal to the Court of Appeal) reproduces with amendments the rules in Parts 71–73 of the 2014 Rules); new rr 49.11, 49.12 and 49.13 (respectively, overseas forfeiture order, restraint order and confiscation orders) have been added; and there has been general updating to reflect, for example, the new behaviour orders.

Criminal Practice Directions

Amendment No 4 to the Criminal Practice Directions replaces: the practice direction on case management (CPD 1 General matters 3A Case management); and the practice direction on jury irregularities.

The Criminal Practice Directions 2015 will be made in early October 2015 and they will align with the new structure of the Criminal Procedure Rules 2015.

CASES OF NOTE

No insurance – burden of proof that particular use not covered by policy

In *Director of Public Prosecutions v Whittaker* [2015] EWHC 1850 (Admin), [2015] ALL ER (D) 47 (July) a police officer stopped the respondent who was

driving a van. On inspection, the officer found that the van contained a lot of DVDs and the way in which they were arranged indicated that it looked like a mobile library. The respondent was charged with using a motor vehicle on the road when there was not in force, in relation to that use, a policy or insurance that complied with s 143 of the Road Traffic Act 1988. That was on the basis that the certificate of insurance did not cover business use of the vehicle on the road. At the end of the prosecution case, the respondent made a submission of no case to answer. The justices found that the burden of proof had been on the prosecution to prove that contention beyond reasonable doubt that the respondent had been using the vehicle for business. It then found that there was no case to answer because the essential element necessary to show that the respondent had been trading at the time he had been stopped was missing. Accordingly, they dismissed the summons. The prosecution appealed by way of case stated.

The appeal was dismissed. Once a defendant had produced a valid certificate of insurance, but the prosecution was maintained on the basis that it was contended that he had been using the vehicle in a way not permitted by the insurance certificate, proof of the user in question reverted to the prosecution. The fact that the police might not be in position to rebut an exculpatory account whose accuracy was questionable did not justify requiring a defendant to assume a legal burden.

Whether a user of a motor vehicle had a valid certificate of insurance was something peculiarly within his own knowledge, and something that it was reasonable and proportionate to expect him to substantiate. The same did not apply to whether the respondent had been using the van for a business purpose on the day in question while he had been using the road. If he had been conducting business with another, evidence could be given of that by any person who had observed the transaction or its consequences and the contents of the van might themselves disclose evidence of such.

Although there might be suspicion as to the activity the respondent had been engaged in on the relevant day, in the absence of any inquiry or any evidence of the use to which the van had been put that day, the state of the van alone had not been enough to enable a reasonable tribunal to be sure of the business use. The effect of the evidence was just as consistent with personal use of the van, and without further incriminatory details, any other conclusion would have been based on speculation rather than a rational conclusion from inferences.

Sentencing causing serious injury by dangerous driving

In *R v Buckle* [2015] EWCA Crim 229, [2015] 1 Cr App R (S) 68 it was held that a starting point of five years' imprisonment, the statutory maximum sentence, was fully justified on the particular facts. The appellant had caused serious injuries to multiple occupants of his vehicle, having driven at speed while drunk and disqualified The case did not involve 'near death' for the victims of the incident, but, taking all of the factors together, the offence was of the most serious of its type.

Just a few months after being disqualified for drink-driving, B was driving a vehicle in excess of the 30mph speed limit. He rounded a corner without slowing down, causing the rear of the vehicle to slide, and crashed into a tree. B's partner, her two sons and her daughter were passengers in the vehicle. B had been drinking and his partner's daughter had expressed concerns about getting into the vehicle as she considered B to be drunk. Her mother reassured her and told her to get into the vehicle. Tests later showed that B had two-and-a-quarter times the permitted level of alcohol in his blood. B's partner's eldest son, aged 21, suffered a fracture of the lumbar spine, a tear to his lung and a tear to his intestine, causing an internal bleed. He developed anaemia and underwent surgery to stabilise his back by the insertion of a metal rod for support that would have to remain in place permanently. B's partner's daughter, aged 18, sustained three fractures to her spine for which she also required surgery for the insertion of metal rods to support her back. She sustained a perforation of the bowel, which required several operations, and had reduced function of her aorta. Cracked ribs sustained in the incident caused problems with her lungs. She had difficulty walking and suffered considerable pain, which meant that she had to give up her studies as a result of the injuries that she sustained. Additionally, she suffered from a severe form of post-traumatic stress disorder as a result of the incident.

B had a lengthy record, including four convictions for driving with excess alcohol, and numerous convictions for driving while disqualified and without insurance. At the time of the offence, B was disqualified from driving and subject to a community order for his most recent offence of drink-driving. He also had convictions for numerous breaches of court orders.

On appeal against sentence, B submitted that the sentence was manifestly excessive and that the recorder was wrong to define the case as the most serious of its type. The starting point should have been less than that for a Category 2 offence in the Death by Dangerous Driving Guideline, which pertained to a solely fatal incident where the driving had caused a 'substantial risk of danger—five years' imprisonment'.

This submission was rejected. In the causing death guideline, the sentencing range for the most serious level of case was 7–14 years. This meant that the Sentencing Guidelines Council considered that there were cases of causing death by dangerous driving where a multiplicity of aggravating factors would have the potential to take the case to the very top of the sentencing range for the offence. The same approach should be taken with regard to the maximum sentence for the instant offence. Taking all the features of the present case together, adopting the maximum sentence as a starting point was fully justified. The credit of 30% which was then given by the recorder, reducing the sentence to 42 months, was, if anything, generous.

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

We reported the case of *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB), [2014] RTR 25 in our October 2014 bulletin. We now report the appeal [2015] EWCA Civ 172, [2015] RTR 19.

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).

At first instance 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 subset 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).'

The Court of Appeal dismissed the appeal. The judge was right to find that cl 6(1)(e)(iii) of the Uninsured Drivers' Agreement was incompatible with art 1(4) of the Second Directive and that the United Kingdom was thereby in breach of its obligations under EU law. A breach by a Member State of its obligation under EU law gave rise to liability where the rule infringed was intended to confer rights on individuals, the breach was sufficiently serious and there was a direct causal link between the breach of the obligation and the damage sustained by the injured party (it was accepted that the first and third of these conditions were satisfied). The scope of the obligation of the MIB, as the United Kingdom's authorised body, to pay compensation, including the permitted exclusions, was clearly defined by art 1(4) itself and there was no discretion to adopt additional elements. The judge's conclusion

that the nature of the breach was sufficiently serious to justify state liability entitling the claimant to compensation was correct.

Validity of insurance requirements for notification of use in other Member States and payment of additional premiums for such use

Article 2 of Directive 90/232 provides:

> 'Member States shall take the necessary steps to ensure that all compulsory motor insurance policies …
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> -cover, on the basis of a single premium and during the whole term of the contract, the entire territory of the European Union, including any period in which the vehicle remains in other Member States during the term of the contract; and
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> -guarantee, on the basis of the same single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher.'

In *Litaksa Uab v Bta Insurance Co Se* C-556/13, [2015] RTR 21 a road haulage company insured two vehicles and it was stipulated in the contracts that the vehicles would be used only for transporting passengers or goods in Lithuanian territory. The contracts also obliged the company, in the event that it intended to use the vehicles beyond a 28-day period in another Member State, or to transport persons or goods there, first to inform the insurer and to pay a premium supplement. The vehicles were involved in road traffic accidents in the United Kingdom and Germany. The company had not notified the insurer of its intention to use the vehicles in those Member States. The insurer compensated the victims of the accidents and then brought proceedings seeking reimbursement by the haulage company of half of the compensation paid to the victims. The Lithuanian Supreme Court referred two questions to the Court of Justice concerning the compatibility of the stipulations with art 2 of Directive 90/232.

The Court of Justice of the European Union held that the provisions of art 2 of Directive 90/232 were aimed not exclusively at the relationship between the insurer and victim but also at that between the insurer and the party insured and implied that, in return for payment by the party insured of the single premium, the insurer assumed the risk of compensating the victims of any accident involving the insured vehicle, regardless of the EU Member State in whose territory that vehicle was used or the accident took place. It followed that a premium which varied according to whether the insured vehicle was to be used only in the territory of the Member State in which that vehicle was normally based or in the entire territory of the EU did not fall within the concept of 'single premium' in art 2.

Apportionment of liability

We deal quite extensively with this topic in Section D Accident offences at [3.8] ff. Many of these cases involve pedestrians failing to take proper care for their own safety and motorists who fail to drive at appropriate speeds or keep a proper lookout for potential dangers.

In *Jackson v Murray* [2015] UKSC 5, [2015] RTR 20 a 13-year-old schoolgirl alighted from a school minibus, which had its hazard lights illuminated, on a country road, when light was fading, and stepped out from behind the minibus into the path of an oncoming car. The car was being driven at 50mph, and the driver made no allowance for the possibility that a child might attempt to cross the road in front of him. The car hit the girl, who sustained severe injuries. In her claim in negligence against the car driver, the judge found that he had failed to drive with reasonable care, in that he ought to have identified the minibus as a vehicle from which children were likely to alight and foreseen the risk of a child, however foolishly, attempting to cross the road and ought to have modified his driving accordingly. The judge, however, considered that the principal cause of the accident was the recklessness of the pursuer in attempting to cross the road without taking proper care that it was safe to do so, and he held her 90% contributorily negligent. The Inner House of the Court of Session reduced her responsibility for the accident to 70%, holding that, despite greater causative potency of the negligence of the driver, the major share of the responsibility for the accident had to be attributed to the pursuer.

The Supreme Court, by a majority of three to two, upheld the pursuer's appeal.

> '20 Section 1(1) (of the Law Reform (Contributory Negligence) Act 1945) does not specify how responsibility is to be apportioned, beyond requiring the damages to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage (not, it is to be noted, responsibility for the accident). Further guidance can however be found in the decided cases. In particular, in *Stapley v Gypsum Mines Ltd* [1953] A.C. 663 at 682, Lord Reid stated:
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> > "A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."
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> 26 (In *Eagle v Chambers* [2003] EWCA Civ 1107, [2004] R.T.R. 9) Hale LJ noted that there were two aspects to apportioning liability between claimant and defendant, namely the respective causative potency of what they had done, and their respective blameworthiness. In relation to the former, it was accepted that the defendant's causative potency was much greater than the claimant's on the facts of the case.

In relation to blameworthiness, the defendant was equally if not more blameworthy. In that regard, Hale LJ noted that a car could do much more damage to a person than a person could usually do to a car, and that the potential "destructive disparity" between the parties could be taken into account as an aspect of blameworthiness. The court had consistently imposed a high burden upon the drivers of cars, to reflect the potentially dangerous nature of driving. In the circumstances of the case, the judge's apportionment had been plainly wrong …'

'41 Given the Extra Division's conclusion that the causative potency of the defender's conduct was greater than that of the pursuer's, their conclusion that "the major share of the responsibility must be attributed to the pursuer", to the extent of 70 per cent, can only be explained on the basis that the pursuer was considered to be far more blameworthy than the defender. I find that difficult to understand, given the factors which their Lordships identified. As I have explained, they rightly considered that the pursuer did not take reasonable care for her own safety: either she did not look to her left within a reasonable time before stepping out, or she failed to make a reasonable judgment as to the risk posed by the defender's car. On the other hand, as the Extra Division recognised, regard has to be had to the circumstances of the pursuer. As they pointed out, she was only 13 at the time, and a 13-year old will not necessarily have the same level of judgment and self-control as an adult. As they also pointed out, she had to take account of the defender's car approaching at speed, in very poor light conditions, with its headlights on. As they recognised, the assessment of speed in those circumstances is far from easy, even for an adult, and even more so for a 13 year old. It is also necessary to bear in mind that the situation of a pedestrian attempting to cross a relatively major road with a 60mph speed limit, after dusk and without street lighting, is not straightforward, even for an adult.

42 On the other hand, the Extra Division considered that the defender's behaviour was "culpable to a substantial agree". I would agree with that assessment. He had to observe the road ahead and keep a proper look-out, adjusting his speed in the event that a potential hazard presented itself. As the Extra Division noted, he was found to have been driving at an excessive speed and not to have modified his speed to take account of the potential danger presented by the minibus. The danger was obvious, because the minibus had its hazard lights on. Notwithstanding that danger, he continued driving at 50mph. As the Lord Ordinary noted, the Highway Code advises drivers that "at 40mph your vehicle will probably kill any pedestrians it hits". As in *Baker v Willoughby* and *McCluskey v Wallace*, that level of danger points to a very considerable degree of blameworthiness on the part of a driver who fails to take reasonable care while driving at speed.

43 In these circumstances, I cannot discern in the reasoning of the Extra Division any satisfactory explanation of their conclusion that the major share of the responsibility must be attributed to the pursuer: a

conclusion which, as I have explained, appears to depend on the view that the pursuer's conduct was far more blameworthy than that of the defender. As it appears to me, the defender's conduct played at least an equal role to that of the pursuer in causing the damage and was at least equally blameworthy.' (per Lord Reed JSC)

Accordingly, an apportionment of 50% was substituted.

Assessing the basic hire rate

The decision of the High Court in *Stevens v Equity Syndicate Management Ltd* (Section D Accident Offences, [3.39]) has been upheld by the Court of Appeal at [2015] EWCA Civ 93, [2015] RTR 24. The Court noted the practical difficulties of assessing irrecoverable amounts for additional benefits that should be stripped out. This requires levels of disclosure and analysis which are often disproportionate to the sums involved in many claims.

'34 The difficulty arises because credit hire companies do not routinely value such additional benefits. They quote and charge a single credit hire rate. It follows that any attempt to value the benefits at a later stage in a proportionate way must necessarily involve a degree of imprecision. The best that can be hoped for, absent a very expensive exercise of disclosure and analysis, is a reasonable approximation. Nevertheless, as Lord Hoffmann went on to explain in *Dimond v Lovell* ([2000] R.T.R. 243; [2002] 1 A.C. 384; [2000] 2 W.L.R. 1121), a reasonable estimate could be arrived at by considering what Mrs Dimond would have been willing to pay an ordinary hire company for the use of a car. I do not understand Lord Hoffmann to have been saying that it was necessary to consider what Mrs Dimond would herself have been prepared to pay. The attitude of the driver who is not at fault must be irrelevant to the analysis. For example, it may be that, as in the present case, that person would never have hired a car at all. The analysis is, as Aikens LJ said in *Pattni v First Leicester Buses Ltd* ([2011] EWCA Civ 1384; [2012] R.T.R. 17), an objective one and it is to determine what the BHR would have been for a reasonable person in the position of the claimant to hire a car of the kind actually hired on credit.

35 Here I think one finds the answer to the questions I have posed. The rates quoted by companies for the basic hire of a vehicle of the kind actually hired by the claimant on credit hire terms may vary. No doubt some are offered on very favourable terms. So also those at the top of the range may reflect particular market conditions which allow some companies to charge more than others. But it seems to me reasonable to suppose that the lowest reasonable rate quoted by a mainstream supplier for the hire of such a vehicle to a person such as the claimant is a reasonable approximation to the BHR. This is likely to be a fair market rate for the basic hire of a vehicle of that kind without any of the additional services provided to the claimant under the terms of the credit hire agreement.

36 It follows that a judge faced with a range of hire rates should try to identify the rate or rates for the hire, in the claimant's geographical area, of the type of car actually hired by the claimant on credit hire terms. If that exercise yields a single rate then that rate is likely to be a reasonable approximation for the BHR. If, on the other hand, it yields a range of rates then a reasonable estimate of the BHR may be obtained by identifying the lowest reasonable rate quoted by a mainstream supplier or, if there is no mainstream supplier, by a local reputable supplier. I would reject (counsel for the claimant's) submission that in circumstances such as these it is permissible simply to look at the highest figure in the range and, if it is greater than or equal to the claimed credit hire rate, conclude that the defendant has failed to prove that the BHR is less than that rate. That, it seems to me, would be manifestly unjust particularly since the credit hire company is in the best position to elaborate upon and give disclosure relating to its charging structures but has not been required to do so in light of the modest size of the claim.

37 I believe that this approach is not only consistent with the observations of Lord Hoffmann in *Dimond* but also with those of Lord Hobhouse. It will be recalled he thought there were other ways of reaching the same answer, one of which was that preferred by Judge LJ in the Court of Appeal. He had taken the view that the excess cost was not reasonably incurred as the cost of hiring the substitute car. The right of recovery was limited to the reasonable cost, that is to say the lesser sum.

38 With these principles in mind I turn to the decision of Burnett J in this case. As I have said, he considered that the search must be for the figure that the claimant would have been willing to pay on the basis that he had gone into the ordinary hire market to find a temporary replacement for his vehicle, and that questioning of the claimant should be directed to exploring that issue. He then went on to find that had Mr Stevens done so he would have picked a figure a little less than the average at which the recorder had arrived. In these circumstances, the error made by the recorder in taking an average had not worked to the disadvantage of AEL or Mr Stevens.

39 In my judgment Burnett J has fallen into error in the way he approached the exercise but not in the answer to which he came. As I have sought to explain, the analysis must be directed to stripping out the irrecoverable costs from the basic hire rate the claimant has agreed to pay or, conversely, ascertaining the part of the charge which is attributable to the basic hire of the particular vehicle the claimant has chosen. This is an objective exercise and the evidence of the claimant about what he would have done had he gone into the market to hire a vehicle on standard hire terms is likely to be of little assistance to the judge seeking to carry it out. The search must rather be for the lowest reasonable rate quoted by a mainstream supplier for the basic hire of a vehicle of the kind in issue to a reasonable person in the position of the

claimant. This, it seems to me, is a proportionate way to arrive at a reasonable approximation to the BHR.

40 Nevertheless, application of the correct approach in the context of this case seems to me to yield a figure for the BHR which is very close to but a little less than that at which the recorder arrived. The recorder properly focused on four mainstream suppliers offering for basic hire with a nil excess in Mr Stevens' locality a vehicle of the kind actually hired by him on credit hire terms. However, and as the parties agreed before the judge, the recorder then fell into error in taking an average. In my judgment he ought rather to have taken what he considered to be the lowest reasonable rate from within the range he had identified. I entirely agree with Burnett J that had he done so he would have arrived at a figure a little less than that which he actually chose.' (per Kitchin LJ)

Success fees and after the event insurance

In *Lawrence v Fen Tigers Ltd (No 3) (Secretary of State for Justice and others intervening)* [2015] UKSC 50, [2015] 1 WLR 3485 the Supreme Court rejected (but only by a majority of 3:2) challenges to the success fee and after-the-event insurance regime which was in place from 1999 to 2013.

The shortcomings of the scheme and the unfairness it could work in some cases were noted. However, the scheme had as its purpose a legitimate aim, to which it was proportionate. It was rational and coherent and had the safeguard of judicial scrutiny as to whether costs had been reasonably incurred. It was no answer that other measures might have been taken which would have operated less harshly against non-rich defendants.

Cases of note