Butterworths Road Traffic Service

Bulletin Editor
Adrian Turner
Barrister

CRIMINAL PRACTICE DIRECTIONS 2015

The Criminal Practice Directions 2015, [2015] EWCA Crim 1567 have been handed down. These Practice Directions supplement many parts of the Criminal Procedure Rules and include other directions about practice and procedure. They came into force on 5 October 2015.

PRACTICE DIRECTIONS (COSTS IN CRIMINAL PROCEEDINGS) 2015

The Practice Directions (Costs in Criminal Proceedings) 2015, [2015] EWCA Crim 1568 also came into force on 5 October 2015.

CASES OF NOTE

Enforceability of parking charges

Since the Protection of Freedoms Act 2012 criminalised wheel clamping, it has been necessary for landowners to pursue other means to recover charges for unauthorised parking. In *ParkingEye v Beavis* [2015] EWCA Civ 402, [2015] RTR 27, [2015] CTLC 86, the respondent car park operator ran a car park on behalf of another company. The terms of the contract required free parking, but allowed the operator to keep any charges it collected for breach of parking rules. Notices were erected stating that users undertook to be liable for a charge of £85 in the event of non-compliance. An overstaying motorist challenged the charge on the basis that it was a 'penalty' and not a 'liquidated sum' and, consequently, was not enforceable, alternatively, that it was an unfair term for the purpose of the Unfair Terms in Consumer Contracts Regulations 1999.

The charge was upheld at first instance and on appeal. The judge had correctly looked at both commercial and social factors and had been correct to conclude the charges were not 'unconscionable'. Parliament was to be taken, in its enactment of the 2012 Act, as having decided it was in the public

interest for parking charges to be recovered provided they were properly drawn to the notice of car park users. As to reg 5 of the 1999 Regulations, the operator had not failed to deal in good faith and it had properly displayed the conditions for use of the car park. The fact that it made a profit from parking charges was irrelevant.

The level of charge must, however, be proportionate to the loss suffered and be capable of commercial justification. In the case considered below, Edis J remarked that an accredited trade association is in a better position to know what charges can be justified commercially than a county court judge sitting in a small claims court with only the evidence of the claimant to go by.

Access to DVLA records

The enforcement of parking charges depends on the ability of the claimant to access DVLA registered keeper records. In *R (on the application of Duff) v Secretary of State for Transport* [2015] EWHC 1605 (Admin), [2015] RTR 28 the claimant was a certified bailiff, whose services did not include operating any car parks, but included dealing with unauthorised or disruptive parking on private land (large commercial estates, handling very substantial vehicular traffic). The enforcement process involved the use of warning signs stating that contraventions would result in recoverable sums. To pursue offenders, the claimant made requests of the DVLA under reg 27 of the Road Vehicles (Registration and Licensing) Regulations 2002 to locate the registered keepers of offending vehicles. From July 2014 the defendant Secretary of State required the claimant, to access the register, to become a member of an accredited trade association, a policy adopted to ensure that car park management companies applying for data operated to appropriate standards within a code of practice. The claimant sought judicial review of that decision on the ground that it was irrational to require him or his clients to join such an association as none were appropriate. (A further ground of challenged was that reference by the Secretary of State to concern about compliance challenge with the Data Protection Act 1998 was misplaced, as the claimant's relevant services did not involve personal data.)

The claim was dismissed. The overall structure of the codes of practice of the accredited trade associations was suitable for providing a degree of regulation for the claimant. The differences between his business model and that of a parking management company were far less substantial than the similarities. The Secretary of State was entitled to conclude that the claimant was engaged in an activity that had given rise to public concern and which required a raising and maintenance of standards across the industry, and the fact that the claimant was already subject to some control (by the county court) as a bailiff was irrelevant. The county court was not concerned, for example, with such thing as the fairness of signs.

Under reg 27(1)(e) of the Road Vehicles (Registration and Licensing) Regulations 2002 the Secretary of State had a discretion in considering whether an applicant had reasonable cause for wanting the information sought, and he was entitled to have a policy which governed the exercise of that discretion.

'38 The existence of an independent and free appeal body is a matter which the Secretary of State is entitled, in my judgment, to regard as a real benefit to the public interest conferred by the policy. The submission of (counsel for the claimant) was that there is a clear "legislative steer" requiring disclosure to any person who had reasonable cause to want it, which is usually understood to relate to a person wishing to enforce a liability. Since it is common ground that the claimant is such a person disclosure should be made to him. He submits that the policy which requires membership of an ATA runs contrary to that "steer". There are two answers to this, in my judgment:

(i) the legislation creates a discretion: disclosure may be made to a person whom the Secretary of State considers has a reasonable cause for wanting it. He is entitled to have a policy which governs the exercise of that discretion; and

(ii) in any event, a person who wanted disclosure to enforce a genuine liability by improper means would have a cause for wanting it, but not a reasonable cause. The function of the policy is to prevent malpractice and thus to ensure that disclosure is made to those whose cause is reasonable in this sense.

39 Therefore I find that the policy does not offend against the terms of reg.27(1)(e) , and its application to the claimant is not irrational.' (per Edis J)

(On the Data Protection Act ground, it was held that on the evidence, the decision to extend the policy to the claimant had not been taken because of any concern that he posed any particular risk, and that the claimant had failed to establish that the decision had been taken because of a misconceived fear that the Data Protection Act 1998 might be breached by disclosure to the claimant.)

Duty of care – checking mirror

In *Dursan v J Sainsbury plc* [2015] EWHC 223 (QB), [2015] RTR 13, while crossing a two-lane road, D was knocked over and killed by an HGV. The vehicle was fitted with mirrors compliant with Directive 2003/97/EC, including a Class VI mirror on the nearside corner of the cab giving a view of the blind spot immediately in front of the vehicle. It was dark and wet and D was wearing dark clothing, though there was street, vehicular and shop lighting. Traffic was stopping and starting. It was agreed that once D had started to cross the road the driver would only have been able to see him through his nearside mirrors, if at all. The driver claimed he had checked his nearside window, nearside mirrors and then offside mirrors before moving forward. D's widow submitted he should have made a final check in his Class VI mirror before moving forward.

The claim failed. There was no prescribed or recommended sequence of visual checks. It was for the driver to do what he thought appropriate, subject to the considerations prescribed by the Highway Code and the handbook produced by the DSA. The lorry was positioned slightly ahead of the rear of

a bus before it moved forward, so D would have had to negotiate a dog-leg around the back and offside the bus before crossing in front of the lorry. Even if the lorry driver had had a better view, however, he might have completed his mirror checks before D came into view. It was likely that only a second or two elapsed between the driver's check of his nearside mirror and then moving forward. It was unreasonable to expect the driver to have anticipated a pedestrian entering into that space in such a short time. The possibility that a pedestrian would have acted as D did was not one which should have been within the driver's contemplation. Even if the driver had rechecked the nearside mirror it could not be established that D would have been visible. In the circumstances the driver could not be criticised for not rechecking his Class VI mirror before moving forward.

Duty of care – contributory negligence

In *Sinclair v Joyner* [2015] EWHC 1800 (QB), [2015] RTR 29 an accident occurred on a narrow rural road in which the parties were travelling in opposite direction. The claimant was on a bicycle, cycling very close to the centre of the road and standing on her pedals. The defendant was driving a car and saw the claimant cycling towards her as she (the respondent) rounded a bend. The defendant slowed down, but as her vehicle passed the defendant claimant there was a collision between the front tyre of the bicycle and the rear offside tyre of the defendant's vehicle, and the claimant fell to her right onto the road. The claimant, who was not wearing a helmet, sustained serious and permanent injuries, as a result of which he was unable to give evidence. The claimant contended that the defendant had failed to keep a proper lookout in that she failed to assess the hazard presented by the claimant and thereby failed to allow the claimant to pass by her safely.

It was found that, given the evidence of the claimant's reconstruction expert, the mostly likely explanation was that after the impact between the vehicles the claimant had been unable to regain control of her bicycle and fell onto the road after the defendant's vehicle had passed. The hazard presented to the defendant was such that the reasonable prudent driver would have applied the brakes immediately and stopped, to allow the claimant sufficient room to ride past. There was ample time for the defendant to do so had she properly assessed the risk the claimant presented. Accordingly, her failure so to act was negligent.

Clearly, the claimant bore some responsibility for the accident. By riding in in a central position in the road she materially contributed to the damage caused. However, there was no other contributory negligence. No evidence having been adduced to show that failing to wear a helmet had made the claimant's injuries worse, and the causative potency of the motor vehicle was highly significant in assessing apportionment. The claimant's fault was, therefore, assessed at 25%.

Fitness to drive – power to withdraw licence issued by another Member State

In *Aykul v Land Baden-Württemberg* C-260/13 [2015] RTR 25, the Court of Justice of the European Union considered the effect of the following articles of Directive 2006/126.

Article 2(1) of Directive 2006/126 provides: 'Driving licences issued by Member States shall be mutually recognised.'

Article 11(4), second sub-paragraph, provides: 'A Member State shall refuse to recognise the validity of any driving licence issued by another Member State to a person whose driving licence is restricted, suspended or withdrawn in the former State's territory.'

The claimant held an Austrian driving licence. She was stopped by police in Germany while driving and found to have consumed cannabis. She was fined and her Austrian driving licence was withdrawn by a German district office, who informed her that she could, in the future, apply for authorisation to drive again in Germany by producing a medical-psychological expert's report from a centre with official recognition in Germany establishing her fitness to drive motor vehicles.

The claimant filed a complaint against that decision. She contended that the German authority was not empowered to verify her fitness to drive motor vehicles, that being a matter falling solely within the competence of Austria, the Member State which issued the licence. The Administrative Court referred various questions to the Court of Justice.

The Court of Justice held that the second sub-paragraph of art 11(4) of Directive 2006/126 permitted any Member State, not only the Member State of normal residence, to refuse to recognise the validity of a driving licence issued by another Member State. That also applied where a Member State refused to recognise the validity of a driving licence issued by another Member State prior to a decision to restrict, suspend or withdraw the licence. A Member State in whose territory an offence was committed had the sole competence to punish the offence by ordering, as necessary, withdrawal of a driving licence or of the right to drive, with or without an order that no application could be made for the issue of a new driving licence during a particular period.

It was for the authorities of the Member State in whose territory an offence had been committed to determine whether the holder of a driving licence issued by another Member State was once again fit to drive in its territory. It was for the referring court to examine whether the Federal Republic of Germany was not in fact refusing indefinitely to recognise the driver's driving licence and to ascertain whether the conditions subject to which, under German legislation, a person might recover the right to drive in Germany complied with the principle of proportionality and did not exceed what was appropriate and necessary to attain the objective of Directive 2006/126.

It was open to the claimant to produce an expert's report and apply for renewed authorisation to drive motor vehicles in Germany using her Austrian driving licence, and, in any event, on the evidence, the ban would lapse after five years. Accordingly, as the German provisions were proportionate to the Directive's objective of improving road safety, they did not appear to constitute a refusal to recognise the claimant's Austrian driving licence.

Sentencing – impermissible to increase a custodial sentence for an imprisonable offence because the defendant had also committed non-imprisonable driving offences

In *R v Lindo* [2015] EWCA Crim 735, [2015] 2 Cr App R (S) 31, [2015] Crim LR 834 the appellant had been stopped by the police while driving a motor car. He only had a provisional driving licence and was uninsured. A search of the vehicle revealed a quantity of cannabis and a subsequent search of his home led to the discovery of drug paraphernalia. A search of his mobile phone revealed further evidence of drug dealing.

The judge said that, while driving, the offender had put people at risk who could potentially be injured or have their vehicle damaged given that he had no insurance. The judge considered that this amounted to evidence of greed and compounded the offence of possession of cannabis with intent to supply. He imposed no separate penalty in respect of the two driving offences because this could properly be reflected in the sentence for the cannabis offence. Accordingly, the judge increased the starting point for the drug offence from 12 to 18 months' imprisonment, before reducing the sentence by one third to reflect the guilty plea.

The Court of Appeal held that the judge's approach had been wrong. It was impermissible to treat non-custodial offences as meriting an additional custodial period, and the comments about greed could not be justified in the context in which they had been made. The sentence was, therefore, reduced to eight months' imprisonment with the order of no separate penalty left to stand since it would serve no purpose to impose fines.

Sentencing – consecutive sentence for dangerous driving

In *R v Maloney* [2015] EWCA Crim 798, [2015] 2 Cr App R (S) 32, [2015] Crim LR 831 M had been in a relationship with V for two-and-a-half years. V was seven months pregnant. Against a background of violence, M asked V to get into his vehicle. He became angry with her and began to shout. V did as M asked but subsequently screamed at him to let her out of the vehicle. M punched V several times. V continued to scream, but M would not stop the car. V opened the front passenger seat door while the vehicle was still moving and, at that point, M stopped the vehicle. V tried to get out but M grabbed her jacket and V broke free and fell out of the car onto her knees. M grabbed her by the hair and, again, ordered her to get back in the car. M continued pulling at V's hair when two passers-by intervened, dragging M off V. One of

the interveners leant into the vehicle and attempted to remove the keys from the ignition. As he did so, M drove the vehicle some 30 m along the road, with the intervener continuing to hold onto the open door of the vehicle. M eventually stopped the vehicle and the intervener was able to let go. The judged imposed a sentence of 18 months' imprisonment for the assault on M and six months concurrent for dangerous driving.

The Court of Appeal reduced the sentence for assault to eight months on the ground the judge had been wrong to conclude that M had targeted a 'vulnerable' victim in the sense intended by the sentencing guidelines. He had not targeted her because of her vulnerability. He was simply angry and she happened to be vulnerable. Reflecting her vulnerable state and the sustained nature of the assault, the case fell at the top of category 2 and, taking into account M's youth and other mitigation, the appropriate sentence was eight months' imprisonment. It was conceded that the sentence for dangerous driving was unobjectionable, and the Court of Appeal ordered it to run consecutively. It was argued that the period of two years' disqualification (with an obligatory extended driving test) should be reduced because of its impact on M's employment prospects, but the Court of Appeal declined to reduce the disqualification.

Sentencing – causing serious injury by dangerous driving

In *R v Darkwa* [2015] EWCA Crim 260, [2015] Crim LR 648 D pleaded guilty to two counts of causing serious injury by dangerous driving and one count of driving with excess alcohol. She was driving a car without insurance and having consumed alcohol (on her account around five glasses of vodka). Her speed was between 42 and 56 mph in a 30 mph limit. She stuck two pedestrians as they were crossing a pedestrian crossing. One of the victims was rendered in a persistent vegetative state. Analysis of D's breath disclosed an alcohol level of 61 mg. The judge took the maximum sentence of five years for the causing injury offences as his starting point and then reduced this to three-and-a-half years' imprisonment to reflect the early pleas of guilty. The judge then imposed a consecutive term of six months' imprisonment for the drink driving offence on the ground that the element of drink had not been taken into account when determining the sentence for the dangerous driving offences. He refused to give credit for the guilty plea because D had no conceivable defence to the charge, it was obvious she was driving over the limit and this was her third alcohol-related offence.

The Court of Appeal allowed the appeal to the limited extent of reducing the excess alcohol sentence by four weeks. D's record was relevant to the starting point of the sentence, but not to the determination of credit for plea. The absence of a defence was not in principle a reason for affording some credit. In an 'overwhelming' case it might not be appropriate to not give the maximum discount, but some credit should still be given.

In *R v Hussain* [2015] EWCA Crim 1016, [2015] 2 Cr App R (S) 52 H collided with a pedestrian while driving in excess of 20 mph of the speed limit and

attempting to jump a red light. The victim suffered life-threatening injuries. The judge imposed a sentence of two years' imprisonment and seven years' disqualification (with the obligatory extended driving test). H had three previous convictions for speeding and one of using a mobile telephone while driving during the period 2007 and 2009. As a result he was disqualified for nine months in 2009. In 2012 H received a fixed penalty for driving through a red light.

The Court of Appeal held that the judge had been right to treat the previous convictions as an aggravating factor. He had also been right only to reduce the prison sentence by 10% because of the lateness of the guilty plea. The prison sentence was not manifestly excessive, but the disqualification was reduced to four years. The only gainful employment H had undertaken, at least in the recent past, involved driving and it was possible that in the future his ability to drive would be important to his chances of obtaining properly remunerative employment.

Sentencing – dangerous driving: suspended sentence and length of disqualification

In *R v Fairweather* [2015] EWCA Crim 1027, [2015] 2 Cr App R (S) 56 F was driving a minibus. As he approached a railway level crossing its sirens were on and the red warning lights were flashing. However, he continued driving, at about 10 mph, and crashed with the descending barrier. He remained at the scene, put the barrier to one side and called the police. F was 58 and had no previous convictions since 1975. The judge, guided by a pre-sentence report, was minded to impose a sentence of 12 months' imprisonment, suspended for 18 months, with an unpaid work requirement. Counsel then indicated that he had not been given the chance to address the judge. It was claimed that F could not perform any unpaid work since he had to look for a new job to prevent him from losing his home. Unimpressed by this, the judge then revisited the sentence and imposed a sentence of 12 months' immediate imprisonment. He additionally imposed a period of three years' disqualification (and the obligatory extended driving test).

The Court of Appeal held that counsel, when pleading for a suspended sentence, should have also addressed the matter of suitable requirements. Unpaid work did not require the consent of the offender, and the reasons given for F's unwillingness to undertake unpaid work were wholly unjustifiable. The Probation Service had in place arrangements which ensured that unpaid work could be carried out outside an offender's employment. However, the judge had taken too high a starting point for the sentence and, with allowance for the late guilty plea, the Court substituted a term of five months' imprisonment. The Court could see no reason for increasing the disqualification from the mandatory period of one year. F had an exemplary driving record and was a professional driver. The period of disqualification was, therefore, reduced to 12 months.

Sentencing – length of community orders

In *R v Khan (Gulan Ahmed)* [2015] EWCA Crim 835, [2015] 2 Cr App R (S) 39 the Court of Appeal quashed a two-year community order where it

contained only an unpaid work requirement. Unpaid work must be completed within one year, and this period was substituted.

Cases of note