

Prosecuting Drivers Causing Death: Prosecutorial Decision-Making following the Road Safety Act 2006: Final Report to the Crown Prosecution Service

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Scope

This Report relates to research conducted with funding from an Arts and Humanities Research Council Early Career Fellowship and from the Society of Legal Scholars and involved access to CPS files subject to a research undertaking dated September 2010. I (Dr Sally Cunningham) was granted access to 15 files in which charges of causing death by driving whilst uninsured, unlicensed or disqualified (CDUD; s.3ZB Road Traffic Act 1988) were brought following a road death incident. I was also permitted to interview up to 15 CPS lawyers. In addition to the files accessed at the CPS and subject to the research undertaking, access was also gained to files relating to road death investigations kept by three police forces, some of which included correspondence with CPS lawyers.

The project sought to examine the way in which the new offences introduced under the Road Safety Act 2006 of causing death by careless driving (CDCD; s.2B Road Traffic Act 1988) and CDUD are operating in practice. These offences are serious in nature, both triable either way and carry a maximum penalty of five and two years' imprisonment respectively. I had previously conducted an empirical study of the police and CPS response to road death incidents for the purpose of my PhD, completed in 2004, and the present project sought to build on that knowledge and assess the changes to investigations and prosecutions of road death in the intervening period. The research questions were:

- Has the creation of a new offence of CDCD influenced the decision making process for police and CPS prosecutors in deciding what offence to charge in the case of a road death incident (RDI)?
- Has the ability to charge alternative counts of manslaughter and causing death by dangerous driving (CDDD) affected the way in which decisions in these cases are made?
- Where CDCD is charged and convicted, what is the sentence passed by the judge/magistrate?
- Are defendants less likely to plead guilty to CDCD than they were to plead guilty to careless driving before the RSA 2006, given that there is a possibility of a custodial sentence being passed?
- Are CPS prosecutors less reluctant to accept pleas to CDCD on a charge of CDDD than they would have been where the lesser charge was only careless driving?
- When is the new offence of causing death by unlawful driving used?
- Finally, the project will be comparative in nature, to the extent that it may be that there are different practices built up in different police forces/CPS Areas.

- To what extent is there consistency between Areas as to the approach taken to charging decisions in cases of RDIs?
- Has HM CPS Inspectorate's recommendation in relation to specialist prosecutors been implemented and, if so, what effect has this had on the decision-making process?
- What changes have been made to the investigation of RDI's in individual police forces and what represents best practice in this regard?

These questions were those set out in the original research proposal. As the research progressed, at least one other research question was developed: How is mode of trial decided in cases of CDCD and CDUD? The answers to these questions will be discussed below, and will form the basis of a number of peer-reviewed articles to be published in esteemed academic journals in the coming months.

The findings presented here are not to be circulated beyond the Crown Prosecution Service and should be considered in the strictest of confidence. If the CPS wishes to make use of the findings, or to quote from this report, prior permission must be obtained from its author.

Findings

The findings have been split into a number of themes, some of which will form the basis of articles to be submitted to peer-reviewed academic journals. The themes are:

1. How the offence of CDCD is operating in practice
2. How the offence of CDUD is operating in practice
3. Sentencing in CDCD cases
4. Issues relating to mode of trial of the two offences
5. Key elements of and changes to the investigation of fatal collisions by the police
6. Key elements of and changes in the prosecution of offences arising from fatal collisions
7. The relationship between the police and CPS in fatal collision investigations and prosecutions
8. Victim (bereaved family) care in fatal collision cases
9. Legally interesting cases

It should be noted that these findings relate to the project as a whole, and only some of them are subject to the research undertaking with the CPS. Cases accessed through the CPS are those with the pre-fix "CDUD" followed by a number.

In the event, 16 files were accessed but, of these, two did not involve any charge of CDUD and had been incorrectly entered on the CPS database. The outcome of the 14 cases that were relevant to the study can be seen in Table 1:

Table 1: Prosecutions for CDUD

Case Ref no.	Offences Charged	Mode of Trial	Outcome	Sentence
CDUD1	s.3A; s.3ZB (unlicensed)	Crown Court (indictable only)	Guilty pleas to both	2yrs on ct 1 + 6mths conc.
CDUD2	s.1; s.3ZB (uninsured)	Crown Court (indictable only)	Guilty plea to ct1; ct2 to lie on file	5yrs
CDUD3	s.1; s.3ZB (unlicensed); s.3ZB (uninsured)	Crown Court (indictable only)	Guilty plea to s.1 after plea to s.2B rejected. Ct 2 to lie on file. G plea to Ct 3.	2yrs 6mths on ct 1 + 4mths conc.
CDUD4	s.3ZB (uninsured)	Crown Court (Delected)	No evidence offered.	NA

CDUD5	s.3ZB (unlicensed); s.3ZB (uninsured)	Crown Court	D pleaded G to both.	24wks susp. 1yr.
CDUD6	s.3A; s.3ZB (unlicensed)	Crown Court (indictable only)	Guilty plea to s.3A; s.3ZB dropped.	4yrs
CDUD7	s.12A Theft Act; s.3ZB (unlicensed); s.3ZB (uninsured)	Crown Court (indictable only)	Guilty pleas to all counts	26mths on Ct 1; + 12mths conc. + 12mths conc.
CDUD8	s.2B; s.3ZB (unlicensed)	Crown Court (mags declined jurisdiction)	Guilty plea to s.2B; count 2 dropped.	3mths susp. 12mths
CDUD9	s.3ZB (unlicensed) x 2 s.3ZB (uninsured) x 2	Crown Court	Guilty pleas to all counts	12mth community order
CDUD10	s.3ZB (one count both unlicensed and uninsured)	Crown Court	Guilty plea. ("uninsured" removed from indictment).	24wks
CDUD11	s.3ZB (one count both unlicensed and uninsured)	Crown Court	Count amended to 2 separate counts. Guilty plea to s.3ZB uninsured (other count dropped)	12wks susp. 12mths
CDUD12	s.1 & s.3ZB (uninsured)	Crown Court (indictable only)	G plea to s.1. Count 2 deleted as per judge's orders.	4 yrs prison; 5yr ban + extended retest
CDUD13	s.3A; s.3ZB (uninsured); s.3ZB (disqualified)	Crown Court (indictable only)	G plea to all 3 counts	5yrs count 1; 1yr each concurrent for counts 2&3. Disqualified 7 yrs and extended test
CDUD14	s.3ZB (uninsured)	Crown Court	Guilty plea	8mths YOI; 2yr ban + extended retest

In addition to the files relating to CDUD accessed at CPS headquarters, 30 files were accessed from police Force A, 46 files were accessed in Force B and 42 files in Force C. These files related to investigations into fatal collisions that ended in no further action nor prosecution for any number of offences, with the causing death offences under the RTA 1988 being of particular interest. Subsequently, interviews were conducted with officers from the other these three forces and from a fourth force, and with CPS lawyers from 9 different CPS Areas and with barristers external to the CPS and defence lawyers.

The s.2B offence: has it led to a downgrading of charges?

Prior to the Road Safety Act 2006, drivers whose driving fell below the standard of a competent and careful driver, but not far below that standard, and were involved in a fatal collision in which their driving caused the death of another person, could be convicted of the offence of driving without due care and attention.¹ The fact that a death had been caused was no more than an aggravating factor in sentencing,² and might be mentioned in passing in court for sentencing reasons alone. The penalty for driving without due care and attention is that of a fine and penalty points on the offender's driving licence. The gap between the penalties for the offences of CDDD and careless driving was thus huge, meaning that where someone was charged with CDDD (14 years maximum), an acquittal on that charge followed by a conviction for careless driving and a non-custodial sentence could come as a shock to bereaved families. This was the reason for the creation of the new offence of CDCD. Simultaneously, The RSA provided a statutory definition of the underlying offence of careless driving for the first time. Section 3ZA of the RTA 1988 defines careless driving in the following way:

(2) A person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver.

(3) In determining for the purposes of subsection (2) above what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

This uses terminology already in operation under s.2A RTA 1988 in relation to dangerous driving, although that offence requires the driving to fall *far* below the standard of a competent and careful driver. Unlike dangerous driving, careless driving does not require the driving to have been "dangerous" in the sense that it creates risk of harm to anybody.³ However, the relevant distinguishing feature

¹ Road Traffic Act 1988, s.3. "Careless driving" is merely a short-hand term for this offence.

² *Simmonds* [1999] 2 Cr. App. R. 18.

³ Another difference is that there is no equivalent to s.2A(2) which allows dangerous driving to be based on the dangerous condition of the vehicle.

in causing death offences is clearly the question of how far below the required standard of driving D's actions fell. That will be the pertinent question for any CPS prosecutors presented with a file of evidence following the police investigation into a fatal collision.

The findings are that the introduction of the new offence of CDCD has not affected to any perceivable degree the way in which prosecutors categorise bad driving resulting in a fatality as either careless driving or dangerous driving.⁴ Victim support groups, in particular, are concerned that official statistics on the number of prosecutions brought for causing death by dangerous driving have fallen quite dramatically since the introduction of the new offence,⁵ but the evidence from this research is that cases of CDDD are *not* generally being downgraded to CDCD.

Plea bargains are fairly rare in the force areas that were investigated. Of 19 cases charged as CDDD, three resulted in a conviction for CDCD due to a plea to that offence being accepted by the prosecution. This represented one case for each of the three police force areas in which the study was conducted.⁶ Case A22 was one in which D had lost control on a bend and collided with V, travelling in the opposite direction. This was a case which arguably should have been charged as CDCD rather than CDDD from outset, but it seems that the charge may have been influenced by the attitude and evidence of D who was lied initially, blaming V for the collision, and only admitted he was at fault at a late stage in the process. In B20 it appears that the plea to CDCD may have been accepted primarily because it was not seen to be in the public interest to go to trial on the CDDD charge, since V's family, who were close to D, did not want to see D prosecuted. In C22 a lorry driver ran a red light and collided with a pedestrian. CDDD was charged on the basis that this amounted to driving far below that expected of a competent and careful driver, and reference was made by the reviewing lawyer to the CPS Legal Guidance to support this.⁷ However, a plea to CDCD based on a written statement in which D said his attention was

⁴ At least, not in the locations that were the subject of the research.

⁵ The official statistics show that in 2007 there were 233 convictions for CDDD; this fell to 114 convictions in 2011: *Criminal Justice Statistics England and Wales 2011*, Table A4.4.

⁶ There was also one plea to CDCD accepted on a charge of causing death by careless driving whilst under the influence of drink or drugs. In 37 the evidence on which the Crown hoped to rely to prove by way of back-calculation that D was over the legal blood-alcohol concentration limit at the time of the collision was excluded under s.78 PACE, due to a mistake made by the custody officer and D not being offered the statutory option of providing a blood sample to replace the breath sample. The back-calculation was deemed inadmissible by the judge, leading the Crown little option but to accept a plea to CDCD.

⁷ The online Legal Guidance includes "failing to have a proper and safe regard for ... pedestrians or in the vicinity of a pedestrian crossing" as an example of circumstances likely to be characterised as dangerous driving:
https://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_guidance_on_prosecuting_cases_of_bad_driving/ Note that this example is not included in the examples of dangerous driving provided in the CPS *Policy for Prosecuting Cases of Bad Driving* (2007).

drawn to an unusual vehicle to his left, and that he had been focusing on a separate set of traffic lights further down the road, was accepted.

Interviews with prosecutors⁸ provide mixed results in terms of how they themselves assess the impact of the new offence of CDCD on their decision-making. Some admitted that the existence of a new lesser offence carrying the potential for a prison sentence might lead to the temptation to accept a plea to the lesser offence on a CDDD charge. Others maintained that although temptation exists, and in fact there are "subtle pressures" (from the courts) to enter into such plea bargains, they do their best to resist this. Most agreed that the new offence made their task much easier in terms of explaining charges to bereaved families.

Another finding was that prosecutors perceive the new offence to be a more "realistic" charge. What they suggested was that prior to the RSA 2006 coming into force, they might have charged CDDD in cases where the evidence of the standard of driving was equivocal, in that they felt it was worth "taking a shot" at the more serious offence rather than accepting that the case was one that would be dealt with by a mere fine and/or penalty points on a careless driving charge. This meant that weak cases were likely to go to court and might more readily result in a downgrading of charges or jury acquittal. The suggestion is that cases charged as CDDD are now likely to be stronger cases since "top end" careless driving can be prosecuted as CDCD. Many lawyers seem to be more confident in their ability to distinguish dangerous from careless driving than has previously been found,⁹ although some admit that they still find the borderline cases difficult. Some lawyers (and police officers) were of the opinion that the distinction between careless and dangerous driving is quite a clear one to make,¹⁰ particularly with the assistance of the examples provided in the CPS policy guidance, while others remain of the opinion that there is difficulty in judging where dangerous driving starts and careless driving ends.

That this difficulty is sometimes experienced was clear from some of the files. In A07, for example, early advice following a meeting between the CPS and investigating officers confirmed that the case was one on the borderline between CDDD and CDCD. D was driving his newly purchased high performance car when, after overtaking another car and negotiating a right hand bend, the car left the carriageway to the offside colliding with a tree, killing D's passenger. Further advice suggested the local CPS had settled on CDCD, at which point there was a discussion of whether it was high level carelessness or of medium

⁸ Interviews were conducted with 13 CPS lawyers from across England.

⁹ See Cunningham, "The Unique Nature of Prosecutions in Cases of Fatal Road Traffic Collisions" [2005] Crim LR 834.

¹⁰ Two separate interviewees (one a barrister external to the CPS and the other a police officer) recommended the crude "fuck me" test by which one placed oneself in the position of a bystander and imagined the level of profanity with which one would exclaim on witnessing the piece of driving. Others put it in less crude terms in suggesting that in making the decision as to whether to charge CDDD, they would imagine themselves having to make their case in front of a jury.

severity.¹¹ This was somewhat surprising given the initial discussion of it being a borderline case. At that stage, the case was discussed by lawyers at CPS headquarters as part of the monitoring agreement on the new offences, two of whom agreed it was close to the borderline between CDDD and CDCD, but disagreed amongst themselves as to which side of the border it fell. One was of the opinion that it was CDDD on the basis that the "speed and manner of the aggressive overtake was a recipe for disaster: we also have evidence of his propensity to do this at least once before and boast about it afterwards. He was a significant risk to other road users and I would be happy to let a jury decide whether his driving crossed the threshold into dangerousness." The other was not convinced it crossed the threshold into dangerous driving: "I'm not persuaded the overtaking was aggressive as opposed to quick. I see nothing that suggests he tried to run them off the road or intimidate them". Ultimately, the Chief Crown Prosecutor (CCP) endorsed a charge of CDCD, which was explained to the family on the basis that it was not a prolonged course of bad driving, nor was there evidence of use of alcohol or drugs by D, nor of a mobile phone. The car appeared to have been driven competently before the moment it was seen to accelerate away by witnesses. D pleaded guilty to CDCD and was sentenced to two years' imprisonment and disqualified from driving for three years, on the basis that the judge was of the view it fell at the top end of CDCD and just short of CDDD.

The facts of A07 are not uncommon, meaning that prosecutors are likely to be faced with this borderline question not infrequently. Clarke *et al* found that 44 per cent of fatal collisions involved a vehicle going out of control on a bend, with the mean age of the drivers at fault in these cases being significantly younger than in their sample as a whole.¹² Another case in the current sample was A17, where D lost control on a bend, but this time collided with a car coming in the opposite direction, killing a passenger in the oncoming car. There was some evidence of D's driving from one of his passengers. The first reviewing lawyer thought that the facts presented a prima facie case of CDDD, and the second reviewing lawyer agreed, citing para.5.25 of the charging policy,¹³ which states that:

Dangerous driving not only includes situations where the driver has taken a deliberate decision to drive in a particular way, but also covers situations where a driver has made a mistake or an error of judgement that was so substantial that it caused the driving to be dangerous, even if only for a short time.

The CCP, however, disagreed with the way in which this paragraph had been interpreted, suggesting that the examples given in the guidance indicate that the situation is really designed to account for examples where there is a seriously

¹¹ Under the Sentencing Guidelines cases of CDCD are split into three levels of severity with different starting points and sentence ranges – see below.

¹² Clarke, Ward, Bartle and Truman, "Killer Crashes: Fatal road traffic accidents in the UK" (2010) 42 Accident Analysis and Prevention 764-770.

¹³ Crown Prosecution Service, *Policy for Prosecuting Cases of Bad Driving* (2007).

dangerous manoeuvre in itself, for example failing to see and negotiate a junction. Given that the police were unable to establish the speed at which D attempted to negotiate the bend, she was of the opinion that CDCD would be the appropriate charge. This was confirmed after a visit to the scene of the collision by the CCP, first reviewing lawyer, and senior investigating officer. D pleaded guilty to CDCD and was imprisoned for 16 months and disqualified for three years.

These, and a few others, were not typical cases, however.¹⁴ In accordance with lawyers' own self-appraisal in interviews, in most cases the decision as to whether a case was one of dangerous or careless driving was fairly clear-cut. Indeed, there is evidence that in some types of cases there has been a change in approach, meaning that CDDD is more likely to be charged when previously the careless driving offence was deemed appropriate. The most obvious example of this is cases involving fatigue. The 1996 version of the CPS Charging Standard listed "fatigue/nodding off" as conduct likely to support a charge of careless, rather than dangerous driving. In the 2007 edition of the charging policy, however, such conduct has been upgraded to an example of dangerous driving.¹⁵ Even before the change in the policy was made, there were cases of fatigue that were being prosecuted as CDDD, but there was inconsistency in approach.¹⁶ Those cases in the current sample where drivers (usually of lorries) were suspected of falling asleep were prosecuted for CDDD.

Whilst the approach to lorry drivers falling asleep at the wheel is now consistent, placing them in the category of dangerous drivers, those that are awake but try to use technology in their cab to keep themselves entertained present new dangers to road users and problems to prosecutors in selecting a charge. In A18 and A27 both Ds were found to have laptops in their cabs, and it was suspected that D had been watching DVDs whilst driving. In A18 D struck a pedal cyclist he failed to see on the nearside of the road, and pleaded guilty to CDDD.¹⁷ In A27, by contrast, D was charged with CDCD and pleaded guilty to that offence. D claimed that he had been listening to, but not watching, the DVD, and this was

¹⁴ Prior to the new offence of CDCD coming into force, however, HMCPSI did similarly find that cases involving drivers who had left the road or lost control of their vehicles was one of three categories of cases in which there was an apparent inconsistency in the charges brought, with nine of 25 cases charged as careless driving, eight as causing death by careless driving whilst under the influence of drink or drugs, and eight as CDDD: HM CPS Inspectorate, *The second thematic review of Crown Prosecution Service decision-making, conduct and prosecution of cases arising from road traffic offences involving fatalities* (2008), para.5.31, available at http://www.hmcp.si.gov.uk/inspections/inspection_no/426/.

¹⁵ CPS, above n.13. "Driving when too tired to stay awake" is an example of dangerous driving listed under para.5.27.

¹⁶ See Cunningham, *Driving Offences: Policy and Practice* (Ashgate 2008), p.51.

¹⁷ Although the plea to CDDD was made on the basis that D was not watching the DVD as alleged. D was sentenced to 16 months' imprisonment and 2 years' disqualification.

impossible to disprove. Whilst there was initial consideration of a CDDD charge, the final decision after consulting with the CCP was to charge CDCD.¹⁸

Sentencing for CDCD will be discussed further below, but it is worth noting one particular case at this stage which stands out because of the sentence passed. In C29 the judge described the case as the worst case of CDCD that he could imagine, sentencing D to four-and-a-half years' imprisonment. D had been travelling at 58mph in a residential 40mph zone, when he collided with a car that was turning right in front of him, killing one of the occupants of that car. Although there was some blame to be placed with the driver of the second car,¹⁹ it is difficult not to wonder whether a charge of CDDD might have been warranted in this case.

Given the ongoing problems that exist in trying to distinguish between CDDD and CDCD it has been suggested by this author that it might be an improvement to the law to base the distinction between the more serious and less serious driving offence (currently dangerous and careless driving) on psychologists' typology of mistakes and violations.²⁰ The distinction between the two is that violations are deliberate breaches of a rule (e.g. the Highway Code) whilst mistakes are inadvertent errors often attributed to lapses in concentration. Psychologists suggest that whilst violations can be deterred, making them appropriate to form the basis of serious criminal offences, mistakes cannot be deterred and can only be reduced by way of retraining.

This idea for distinguishing between driving offences was put to interviewees during the course of this project. Although a small number of police officers thought the idea merited some consideration, most lawyers were confident that such a distinction would not work in practice. An example can be given of the facts of case B24. There D failed to give way at a crossroads on a rural road and drove across the path of V's taxi, which had priority, causing a fatal collision. In that case a charge of CDDD was brought and D was convicted at trial, and sentenced to 18 months' imprisonment. If CDDD had required a "violation" to have been committed in the form of a *deliberate* contravention of a rule of the road the case would most likely have failed, however. D was not paying sufficient attention to the road and had not seen that he was approaching a give way sign, but he did not ignore that sign deliberately. The objective test of dangerous driving under current law prevented him being able to plead that as a defence.

¹⁸ The case was one of the few that stayed in the magistrates' court, where D was sentenced to 24 weeks' imprisonment and disqualified for 12 months. At the time of the charging decision the case was deemed not suitable for summary trial, and it is somewhat surprising that it was later represented as falling within the lowest category of momentary inattention for the purposes of sentencing.

¹⁹ Due to the relationship between this second D and V, it was deemed not to be in the public interest to prosecute him for CDCD.

²⁰ See Cunningham, "Punishing Drivers who Kill: Putting Road Safety First?" (2007) 27 *Legal Studies* 288-311 and Cunningham, *Driving Offences: Law, Policy and Practice*, Ashgate, 2008.

This case can be compared with C32, however, where the facts were similar. D, who was used to driving on the right hand side of the road, failed to give way at a crossroads and collided with a vehicle on the main road, killing D's passenger. In this case the CPS lawyer concluded that D had "gone across this junction at speed and ignored the more than adequate give way signage. There is no evidence at present which would lead me to believe that this is a deliberate act of bad driving, and is other than the failure to properly heed the road signage. It is a well known accident spot. It is driving without due care rather than dangerous." This case suggests that contrary to the decision in B24, some prosecutors *do* already take into account the question of whether D's bad driving was deliberate or not. It is submitted that the approach in B24 is the better one both in terms of correctly applying the current law and in terms of an assessment of D's culpability in such cases. In C32 the Crown had expected the case to fall within the middle tier of the three sentencing levels for CDCD but, in the event, the judge sentenced D to a community order, placing it within the bottom level, and described it as a case of "momentary inattention". This is surprising given that others might have placed it at the borderline of top end of CDCD/bottom end of CDDD (as in B24).

Criminalisation of "momentary inattention"

Many of those interviewed suggested that rather than the borderline between CDDD and CDCD being a problem, the real challenge came in deciding whether or not to prosecute at all at the bottom end of the scale. Some of the most prevalent cases of CDCD appear to be the "looked but did not see" cases: those where D, driving a car, pulls out into the path of a motorcycle. Clearly all drivers have an obligation to make sure the road is clear of all traffic before conducting such a manoeuvre, but it is these cases that tend to be placed within the bottom level in terms of sentencing and classified as "momentary inattention". Clarke *et al* identified collisions involving right of way violations as providing a second main problem area for road safety, the first being loss of control collisions involving young men, discussed above. Right of way violations made up 16 per cent of collisions in their sample but here the drivers at fault tend to be elderly drivers.²¹ Typical of such a case (although not involving an elderly driver) was B06 where D attempted to turn right from a main road into a side road. He had thought he had sufficient time to make the manoeuvre as the only vehicle he saw coming in the opposite direction, a car, was some way away. However, V, riding a motorbike at a speed of between 33-38mph in a 30mph zone, overtook that car and collided with the rear of D's car. D pleaded not guilty but was convicted by a jury and sentenced to 180 hours unpaid work and a two year disqualification.

Such cases will require careful consideration and analysis on the part of the prosecutor in making a charging decision, given that often the deceased is also to blame in such instances and the question becomes whether D has in fact

²¹ Clarke et al, above n.12, at 768.

fallen below the standard of the competent and careful driver. In B06 the police collision investigator was of the opinion that V would have been visible to D, and it is this piece of evidence which appears crucial to the charging decision. In A29, by contrast, the evidence was that V was travelling at a minimum of 68mph in a 40mph limit when D turned across his path. The decision was to NFA the case, on the basis that the prosecution would be unable to prove that V was within D's view at the time that she commenced her manoeuvre. The CPS stood by their decision, despite vociferous views from V's father that a prosecution should ensue.

Of all the cases prosecuted as CDCD in the sample, only one resulted in an acquittal (C21). That was another case involving a motorbike, in which D pulled out from a T-junction into V's path. The evidence of the police collision investigator was that V was travelling at 42mph in a 30mph limit but that he would have been available to be seen by D when D commenced his manoeuvre. The cause of the collision, then, was that D pulled out into the path of V, but V's speed was a contributory factor in that had he been travelling at 30mph he would have been able to stop in the distance available to him. The senior investigating officer in the case was of the opinion that there was sufficient evidence to provide a realistic prospect of conviction, but that it would not be in the public interest to prosecute given that D had voluntarily surrendered his licence (it was also an influencing factor that D was in his eighties). However, the CPS disagreed and D was charged with CDCD. D elected trial in the Crown Court, his defence being that it was possible that V may not have been in his view if he was travelling at the top of the range of speed estimated. D's acquittal after a four day trial had been predicted by prosecution counsel.

What these cases show is that CDCD can capture those who are only part responsible for the fatal collision, with some degree of responsibility lying with the deceased. In these cases, as noted by Padfield, "most of these offenders have a clean record, impeccable character, and show real remorse",²² and D will be unlikely to receive a custodial sentence if convicted. There appears to be an inverse relationship between the role that blameworthiness, in the form of negligence, plays, and the contribution of D to the end result for which D is penalised. As noted by one CPS lawyer, "it's nearly always the case that there is fault on both sides in any RTC". So, where D drives carelessly, rather than dangerously, there is likely to be further contributions to the fatal collision outside the control of D, such as the actions of V him/herself. One barrister suggested that it is "unpalatable" for counsel to point out the contribution of the deceased, particularly when nobody has warned the bereaved family that this could be a mitigating factor. Such cases are probably amongst the most difficult judges have to deal with but, in most cases, D will plead guilty.²³

²² Padfield, "Time to bury the custody 'threshold'?" [2011] Crim LR 593-612, at p.607.

²³ Although there was considerable variation between the forces as to how Ds pleaded on a charge of CDCD. In Force ♣, for example, all 10 Ds charged with CDCD pleaded guilty to that offence. In Force ♡ on the other hand, only one of the six Ds charged with CDCD

The borderline between CDCD and no criminal liability can perhaps be seen in the one case in the sample where charges were dropped. In B36 D collided with a pedestrian at the apex of a bend on a country lane, where V was out walking his dog. On the one hand, V was found to have a blood alcohol concentration of 110mg/100ml²⁴ and was walking on the inside of the bend, rather than the outside where he would have been more visible. On the other hand, D claimed that he had been blinded by the sun and, if that were true, he should have adapted his driving accordingly. The CPS lawyer in the case decided that there was a realistic prospect of conviction on a charge of CDCD, but stated that he "would not be wholly surprised if a jury were to acquit". The charges were dropped after prosecution counsel reviewed the case once D had entered a plea of not guilty at the Crown Court. In another case where the final decision was one of NFA, it is interesting to note the CPS lawyer's ground for his decision was that the test of a competent and careful driver "does not require perfection".²⁵

The application of the Public Interest test: "nearest and dearest" cases

As well as a change in the law, the RSA 2006 also led to a change in charging policy. It has already been noted that certain examples of dangerous driving have been added to the non-exhaustive list in the 2007 version of the charging policy, but another way in which that policy was altered was in relation to the application of the public interest test in what was known as "nearest and dearest" cases. It was formerly CPS policy that where the only person to have died was a relative or close friend of D, a charge of CDDD would be unlikely unless D drove in such a way as to show serious disregard for the lives of others. This approach was replaced with a policy whereby the "public interest will normally demand that a prosecution takes place in cases of causing death by dangerous driving or causing death by careless driving when under the influence of drink or drugs", even in "nearest and dearest" cases.²⁶ In "nearest and dearest" cases of CDCD under s.2B, however, CPS prosecutors "may exercise our discretion not to prosecute in cases where the degree of culpability on the part of the driver is low, or where the circumstances of the case would make it unjust to prosecute".²⁷ In making that decision, consideration is to be given to whether the driving was careless "only as a result of a true error of judgement".²⁸

The issue of "nearest and dearest" arose in a number of cases in the sample. In C07, for example, the CPS lawyer gave considerable thought to the question of the public interest where D had been in collision with a lamppost and caused the death of her mother. As well as considering D's clean record and the background

pleaded guilty. In Force 4 all but one of the six Ds charged with CDCD pleaded guilty, and the sixth case was that of the acquittal.

²⁴ For the purposes of illustration, the legal limit for driving is 80mg/100ml.

²⁵ Case 29.

²⁶ CPS 2007 para.4.12.

²⁷ Ibid para.4.13.

²⁸ Ibid para.4.14.

to the relationship between D and V, consideration was given to the wishes of D's two brothers, who were both adamant that prosecution was not required in the public interest. The decision was one of NFA. Again, in C11 the decision was taken not to prosecute when three generations of the same family were the occupants of a car that left the road and collided with a tree. It was felt not to be in the public interest to prosecute D for the death of her elderly grandmother. These can be compared with C08 in which D's husband was killed in a head-on collision with another car. In this case D refused to surrender her licence voluntarily and, as a result, it was thought that prosecution in the public interest was required for the benefit and safety of the wider public. D pleaded guilty to CDCD and was sentenced to 12 months' disqualification and a conditional discharge.

At the time of the data collection, the CPS policy guidance on charging in cases of bad driving was under review and prosecutors were consulted on what improvements they felt could be made to the guidance. One prosecutor from the CPS Area covering Force C was keen to receive further guidance on how prosecutorial discretion ought to be exercised in these cases. The concern was particularly in relation to cases where D's own child is killed, where it was suggested that even in cases above low culpability, including medium culpability and possibly low-end dangerous driving, public opinion would probably weigh against prosecution, but it was felt that the current policy "seems to stymie us into prosecuting". At the time of writing, a draft "Driving Incidents Guidance" has been published for public consultation, seemingly taking this request on board in suggesting that in cases where D has demonstrated "a higher degree of culpability" but where there is no evidence of a continuing danger to others, it may be that prosecution is not in the public interest.²⁹

In addition to the issue of "nearest and dearest", the CPS lawyer from Area C made the request for CPS prosecutors to enjoy greater discretion when applying the public interest test in other fatal cases, such as case C21 above, where it seems the CPS were in agreement with the police that the public interest did not require a prosecution, but where they felt bound by the policy guidance to bring charges for CDCD. The new draft guidance does appear to recognise that a CPS prosecutor enjoys discretion in applying the public interest test, stating that in doing so the "level of culpability of a driver is likely to be relevant. The greater the degree of culpability, the greater the public interest in favour of prosecution".³⁰

²⁹ CPS, *Consultation on the draft guidance on charging offences arising from driving incidents* (2012), p.2, available at:

http://www.cps.gov.uk/consultations/draft_driving_consultation_2012.pdf.

³⁰ *Ibid* at p.4.

The s.3ZB offence: teething difficulties in establishing the requirements of the offence

Whilst CDCD fits quite nicely into a hierarchy of offences punishing drivers who cause the death of another through their bad driving, the offence under s.3ZB sits, if not outside, then at the very bottom of the hierarchy. The offence, which could be referred to by the shorthand of “causing death by unlawful driving” (CDUD) requires only that the defendant was involved in a fatal collision as a driver of a vehicle, and that at the time of the collision he³¹ should not have been on the road due to either not having a valid insurance policy or a valid driving licence, or because he had been disqualified from driving. Each of these underlying offences is a strict liability offence, meaning that D will be liable under s.3ZB even if he had (good) reason to think he was driving within the law. The offence is one that has recently been described as one which “lets rip a double-barrelled discharge of strict liability”.³²

In 2009, the year after the offence came into force, 54 offences under s.3ZB were charged in England and Wales.³³ Given the scarcity of the offence it would be unlikely to come across any significant number of such cases from a random trawl of files relating to fatal collisions, and so a more targeted approach was taken by securing agreement from CPS headquarters to access 14 files relating to such charges. These files came from across England and Wales but were accessed at CPS offices in London.³⁴

The files, including all evidence submitted to the CPS by the police, along with correspondence between the police and CPS and between lawyers, showed that when it was first introduced, the offence unsurprisingly caused some degree of head-scratching amongst CPS lawyers. The offence is set out as follows:

3ZB Causing death by driving: unlicensed, disqualified or uninsured drivers

A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under—

(a) section 87(1) of this Act (driving otherwise than in accordance with a licence),

(b) section 103(1)(b) of this Act (driving while disqualified), or

(c) section 143 of this Act (using motor vehicle while uninsured or unsecured against third party risks).

Sullivan and Simester provide a robust criticism of the problems posed by this offence, specifically regarding the issue of the courts’ interpretation of “causing”

³¹ In every case accessed for this project, the defendant on a s.3ZB charge was male.

³² Sullivan and Simester, “Causation without limits: causing death while driving without a licence, while disqualified, or without insurance” [2012] Crim LR 753-766 at 753.

³³ According to statistics provided to the author by the CPS.

³⁴ The fieldwork for this part of the project took place from August to October 2011 and was funded by the Society of Legal Scholars Research Activities Fund.

in this context, negating the need to go into such detail here.³⁵ However, it is worth reporting on the way in which the offence has operated in practice, both before and after the clarification provided by the courts on the requirements of the offence in the cases of *Williams*³⁶ and *H.*³⁷ Many of the concerns expressed by Sullivan and Simester were already to be found in the correspondence of and interviews with prosecuting lawyers.

A summary of the findings relating to the 14 cases can be found in Table 1 above. An interesting preliminary point to make is that of the 14 cases in which CDUD was charged, it was charged alongside another “vehicular homicide” offence in eight cases,³⁸ and was the only “causing death by driving” offence on the indictment in six cases. Of even more significance, perhaps, is the fact that *none* of the defendants in any of the cases faced a trial on the s.3ZB charge. In the eight cases where the offence was additional to a more serious charge, D pleaded guilty to all charges (3 cases), or a plea was accepted to the more serious charge with the CDUD offence left to lie on the file (2 cases) or dropped (3 cases). Of the six cases where CDUD was the only causing death offence, D pleaded guilty to that offence in all but one case, where no evidence was offered.

This last case (CDUD4) was one where the potential injustice of a serious triable either way offence predicated on a double dose of strict liability can be effectively illustrated. In that case D was, as far as he was aware, driving home legally one evening when the deceased’s car collided with a glancing blow with the front of a pick-up truck which was stopped in a drive at the side of the road, encroaching slightly into the carriageway. Her car rebounded and veered into D’s oncoming car. D had been driving within the speed limit and had no chance to avoid the collision. It was only after the collision that D discovered that, due to a problem with his direct debits and a clerical error at his insurance company meaning that they only corresponded with his previous address, his insurance had been cancelled over a month before the collision.

D admitted in interview that ultimately it was his responsibility to ensure that he had a valid insurance policy in place, but attempted to mitigate this in interview by saying that he had taken advice from the “lady at the bank” as a result of being told that “some” of his direct debits had unavoidably been cancelled. The police were content to issue him with a fixed penalty notice for driving without insurance, but the file was forwarded to the CPS for consideration. At that stage, the CPS lawyer raised the potential for the CDUD offence and this was later

³⁵ Sullivan and Simester, above n.32

³⁶ [2010] EWCA Crim 2552.

³⁷ [2011] EWCA Crim 1508.

³⁸ The additional offences were under sections 1, 2B and 3A of the Road Traffic Act 1988, and s.12A of the Theft Act 1968 (aggravated vehicle taking).

charged.³⁹ D elected trial by jury. It is worth quoting at length from prosecution counsel's notes on the file to explain what happened next:

Prior to the hearing I discussed the case with [counsel for the defence]. We discussed whether this was a strict liability case or whether the Crown had the burden to prove that the death was caused by the defendant driving a vehicle on the road. [The defence] took the view that the Prosecution had a burden of proving a causal link and that it was not sufficient simply to say that the cause was putting a vehicle on a road when there was no insurance. ... We discussed the fact that the Crown's own evidence was that there could be no civil liability on [D] for the accident and that in those circumstances we felt that the case would be reduced to admissions in order that the only issue was the interpretation of the law. That I put forward the prosecution position that Parliament had intended this to be a strict liability offence and that that was the basis on which we were arguing the case.

It was discussed whether [D] would consider pleading guilty with a basis of plea that indicated that he had no civil liability for the accident or death. It was noted that there was to be a special reasons argument⁴⁰ in relation to the insurance and I expressed the view that the Crown's position was that there would be Special Reasons if the Judge found as a matter of fact that the defendant had a) been unaware of the direct debit being stopped and b) didn't receive the letter from the insurance company because it was sent to his old address in circumstances where he had properly notified his change of address but the insurance company had overlooked it. Despite best endeavours No deal.

The defendant was arraigned and entered a not guilty plea.

[The judge] ... was very very critical of the decision to prosecute. He raised the issue that on the prosecution papers there could be no civil liability on the defendant and expressed the view that the prosecution was absurd. He said that his interpretation of the law was that the prosecution had to prove that the defendant caused the accident. I advised him of Parliament's intention and the view set out in Wilkinson Road Traffic. He disagreed with me!

The Judge said that the outcome of the case would depend on the Judge's summing up to the Jury and that he was against me. He said that even if he was wrong and changed his mind he couldn't see how this was a criminal case and that even taking the sentencing guidelines into account this fell into the very lowest bracket and was only worthy of a nominal sentence. He said that he was of the view that a Special Reasons argument not to disqualify had obvious merit.

I was heavily encouraged to consider the public interest in adjourning for trial.

My own view is as follows

If Parliament really intended strict liability then the offences was very badly drafted. The wording talks of the defendant causing the death by driving on a road and at the same time having no insurance. The law is very unclear therefore.

³⁹ The other surviving driver responsible for the crash in that he left a vehicle in a dangerous position was charged under s.22A RTA 1988.

⁴⁰ This is the argument that D ought to avoid the mandatory term of disqualification from driving in sentencing.

In this case there is clearly no civil liability for the accident or death on the defendant. He did not contribute to the accident and couldn't have avoided it. But for his lack of insurance he would not have been prosecuted.

There is merit in his special measures application. If convicted the likely sentence would have been an absolute discharge.

The victim's family have expressed the view that they do not feel that this prosecution is necessary.

There was no public interest in prosecuting this case regardless of the interpretation of the law. ...

In the circumstances therefore I offered no evidence. The case was dismissed. ...

[The judge] thanked the Crown for reviewing the case and taking a pragmatic and sensible decision. He said that if there was ever a case to test the correct interpretation of the law this was not it. He personally would not have allowed it to have gone to a jury.

Of course, the case to test the correct interpretation was that of *Williams*. The result of that case would suggest that the CPS in CDUD4 was right to bring the charge in terms of it satisfying the Code for Crown Prosecutor's evidential test, given that it confirmed that no fault was required in relation to D's driving and that all that was required was that D's driving was a cause of the fatality.

However, CDUD4, and other cases, raises the issue of the degree to which CPS lawyers ought to exercise their discretion in applying the public interest test in such cases. This was also an issue that was raised in interview with CPS lawyers, with specific mention made of the offence being committed "as a result of a genuine mistake or misunderstanding" as a factor listed in the Code as weighing against the public interest.⁴¹ However, the official prosecution policy on the specific offences suggests that such a factor is only to be taken into account where the deceased is a member of D's family.⁴² As noted by Sullivan and Simester, it may not be uncommon for administrative errors and delays to result in somebody holding a reasonable belief that they are entitled to drive when that is not the case.⁴³ It is questionable whether it is right that the discretion of prosecutors must be relied upon to prevent blameless drivers from being charged with a serious offence.

Another case demonstrates how, even where D is clearly to blame for driving without the necessary documentation, it can appear rather harsh to punish him for the death of another. In CDUD9 D, a citizen of an EU country other than the

⁴¹ Code for Crown Prosecutors (2010), p.13, para.4.17 (d). Available at: <http://www.cps.gov.uk/publications/docs/code2010english.pdf> It should be noted that since the cases in this study were decided a new edition of the Code was published in 2013. All references in this Report are to the 2010 edition.

⁴² Paragraph 4.15 of the CPS Policy for Prosecuting Cases of Bad Driving reads: "Where the illegality arose as a result of a genuine mistake on the part of the driver, for example, a mistaken belief that he/she was insured, it may not necessarily be in the public interest to prosecute the driver where the deceased was a close relative or friend."

⁴³ Sullivan and Simester, above n.32, at 759.

UK, was driving a car belonging to a friend of a friend. He knew he was not insured, but he was under the impression that he could legally drive on his provisional licence because he was under the supervision of his friend, who was a full licence holder. This might have been the case, but for the fact that D was driving on a motorway. From CCTV footage it could be seen that D was in the middle lane of three, overtaking a lorry, when an unidentified third vehicle abruptly moved from lane three into the middle lane. In an attempt to avoid a collision with this other car D braked and lost control of his vehicle which rotated into the path of the lorry, resulting in the two vehicles colliding and two passengers in the car D was driving being killed. The third vehicle continued without stopping.

The original suggestion from the CPS lawyer reviewing the case was that D be charged with driving other than in accordance with a licence or for the police to take no further action. It was thought D had reacted in the same way as "most other drivers"⁴⁴ would have done when a car moves towards them suddenly from the outer lane. When asked by a senior colleague to look again at a CDUD charge, the CPS lawyer admitted he had real difficulty, due to the lack of case law at the time, in determining the meaning of causation for s.3ZB. However, he acknowledged that the case was one which might be "a suitable case to take through the courts for the higher courts to clarify what Parliament really meant". D was charged with four counts⁴⁵ of CDUD and pleaded guilty. The harshness of the charges was, however, mitigated by a non-custodial sentence of a twelve month community order. In that case it was decided it was not in the public interest to prosecute D's friend for permitting him to drive with no insurance,⁴⁶ but D was not deemed close enough to the deceased to avoid prosecution himself in the public interest.

Besides the discretion of CPS lawyers, the only other way for a defendant charged with such an offence to avoid liability, it seems, is to call on the sympathies of the jury. In one case which came to light through interviews with

⁴⁴ This explains why D was not prosecuted for CDCD, although what "most" drivers do and what a "competent and careful" driver would do is not necessarily one and the same. See Cunningham, above n.20.

⁴⁵ One charge of causing death by unlicensed driving and one for causing death by uninsured driving relating to each of the deceased.

⁴⁶ It would also have been possible for the friend to have been prosecuted under s.3ZB as a secondary party. This did not happen in any of the cases in the sample but cases where this has happened were mentioned in interviews with lawyers, and some cases have been reported in the media. For example, the first ever case of a person successfully prosecuted for aiding and abetting the offence may be that of Lauren Mellish, who was the owner of and passenger in a car involved in a fatal collision, and was sentenced to six months' imprisonment: <http://www.guardian-series.co.uk/news/efnews/9363673/>. There is also one reported sentencing case. Mark Headley pleaded guilty to CDUD when his girlfriend caused the death of a young boy in a car park whilst he was giving her an ad hoc driving lesson. Headley's sentence of eight months' imprisonment was subsequently upheld by the Court of Appeal, although the period of his disqualification was reduced from three to two years: *R v Headley* [2012] EWCA Crim 1212.

lawyers, and which was also reported in the local media,⁴⁷ the jury's verdict was one which can only really be explained by way of "jury equity" or "nullity" in light of the confirmation of the legal requirements of the offence in *Williams*. In this case D had borrowed a pick-up truck, and was driving it without insurance. He was driving on a straight piece of road, about 400 yards further down the road from a set of traffic lights. He was driving within the speed limit with a line of cars behind. He intended to turn right and indicated and slowed; it was accepted he was driving entirely appropriately. The driver of the car behind realised a bit late that D had stopped, but managed to stop herself within the space available to her without colliding with D's vehicle. However, the van behind that car was being driven by the deceased (V) who, for some unknown reason, clearly did not see that the two vehicles ahead of him had pulled up and at the last moment swerved out into opposite side of the carriageway. V's van collided with a lorry coming in the opposite direction, which was exceeding the speed limit. Based on *Williams*, which had only been decided shortly beforehand, the Crown said that had D not been on the road this would not have happened and so he was therefore guilty of CDUD. In defence counsel's closing arguments to the jury he said:

The question for you in this case is a narrow one, it's not technical, it doesn't need a lawyer to define it, it's a plain English word: "cause". Did the defendant cause the accident that resulted in [V's] death? ... The prosecution say this is simple: if he hadn't been on the road this would not have happened. Well where do you draw the line on that sliding door argument? For example, if Ford didn't make cars this wouldn't have happened, if the government didn't build roads, this wouldn't have happened, if the internal combustion engine hadn't have been invented, this wouldn't have happened, if [V] had decided to stop and get a sandwich, this wouldn't have happened, if the traffic lights at the junction had been set to stay on red for 5 seconds longer, this wouldn't have happened; you can go on and on. To suggest such an argument is contrived to say the least. ...

If we've reached a point where we're saying a man's mere presence on the road is a minimal cause, then you will convict. But if you do so please do it for the right reasons. Namely that you think his driving was a cause; a cause that means he's culpable for what happened. That's the only good reason. A bad reason would be that you don't like the fact he drove at all without insurance; a bad reason would be that someone has died, and a person must be held accountable; a bad reason is that you don't want to face the alternative, which is that [V] made a mistake that day when his attention was diverted, or made a mistake, an error of judgement, when he decided to turn in front of the lorry.

It took the jury nineteen minutes to return a verdict of not guilty. Defence counsel here was appealing to the jury's objective and rational side, and the arguments reflect those of the Recorder's terminating ruling in *H*.⁴⁸ But that ruling in *H*, and hence the applicability of the Recorder's reasoning, was overturned on appeal, suggesting, as highlighted by Sullivan and Simester, that,

⁴⁷ "Sudden braking led to death", Leicester Mercury, 1st June 2011.

⁴⁸ *H* [2011] EWCA Crim 1508 at [28].

contrary to both common sense and reliance on existing criminal law doctrine, a *sine qua non* connection between D's unlawful presence on the road and V's death will be sufficient to establish liability.⁴⁹ But the words of defence counsel in opposition to any closing arguments by prosecution counsel and summing up by the judge will undoubtedly have provided the straw at which a jury, who could clearly see the injustice of convicting the defendant in this case, could grasp.

Some lawyers in interview suggested that the problem was not with the spirit of the law in itself, but in the specific terminology used. There are those who agree that, with perhaps the exception of cases where D honestly and reasonably believed he was entitled to drive, it is right that D be held responsible for the death of another person when his driving led him to be involved in a fatal collision, irrespective of his standard of driving at the time. However, they did recognise that the use of the word "causing" in s.3ZB by the parliamentary draftsmen was incongruent with the purpose of the law, which was to punish those who had been driving when they ought not to have been. Better would have been to use such terminology as "owing to the presence of a vehicle on a road".⁵⁰ This might have avoided the need to stretch the meaning of the doctrine of causation to such an extent as to leave it devoid of any application, as critiqued by Sullivan and Simester, whilst satisfying the Government's intention.

Duplicious charges?

Given the technical nature of the offence under s.3ZB, and the lack of defence open to a driver in such a situation, it is unsurprising that so many of the defendants in the current study pleaded guilty. It is perhaps more surprising that so many were willing to plead guilty to the more serious offences on the indictment in many cases, given that those offences do at least involve some degree of assessment to be made of the defendant's driving, with the scope for argument as to whether the underlying offence was committed (see above). The results of the research suggest that there is some variation in the approach of the CPS to cases where D has driven badly and caused death and additionally has committed one of the documentary offences. Some will charge CDUD in addition to the more serious offence of CDDD or CDCD, whilst others will charge the more serious offence plus the underlying documentary offence (i.e. driving without insurance, or other than in accordance with a driving licence, or whilst

⁴⁹ It remains a mystery why the principle confirmed in *Kennedy (No.2)* [2007] UKHL 38, allowing for a voluntary act of the victim to break the chain of causation, was not applied in *Williams* or *H*. It could be argued, however, that V's act in this case would not have broken the chain of causation if *Kennedy* was applied as it could not be seen to be voluntary (his swerving could have been an automatic reaction to the danger ahead). However, given the degree of negligence displayed by V and the remoteness of D's act to the final outcome, it might be accurate to suggest that D's act was merely the setting in which another cause operated (*Smith* [1959] 2 QB 35), and that V's act was "daft and unexpected" (*Roberts* (1972) 56 Cr App R 95).

⁵⁰ This was also a suggestion given in the case review in CDUD9.

disqualified).⁵¹ This may be because there are those within the legal profession who view the charging of both offences as “duplicitous”.⁵² Those who charge both causing death offences, however, point to the fact that Parliament intended there to be a separate offence and they are merely ensuring application of the statute. The CPS legal guidance on this point states that where there is evidence that the driving fell below the required standard, making a charge of CDDD or CDCD appropriate, “section 3ZB may also properly be charged without it being duplicitous or oppressive because the offences deal with different aspects of the defendant's alleged criminality”.⁵³

Further confusion has arisen over the question whether s.3ZB creates one offence or three separate offences. It will be common that where D is either unlicensed or disqualified from driving, he will also be uninsured, since if D has lied about the fact that he does not have a valid licence, this will usually invalidate his insurance. Where D was both unlicensed and uninsured prosecutors seemed unsure as to whether they ought to charge one single count of CDUD or two separate counts. D was both uninsured and unlicensed/disqualified in half of the cases in the sample. In five of these cases D faced two counts under s.3ZB, whilst in the remaining two cases there was one count under s.3ZB to cover both unlicensed *and* uninsured driving. In both of these two cases, however, the indictment was amended. In CDUD10 the reference to uninsured driving was removed completely from the indictment, due to it being recognised by the Crown as “duplicitous”. In CDUD11 the indictment was amended at the request of prosecution counsel and separated into two separate counts, leading D to plead guilty to causing death by uninsured driving, and the second count relating to unlicensed driving was then dropped.⁵⁴ There is nothing in the CPS policy guideline to help determine whether s.3ZB creates one offence or three. One could draw parallels with s.2B of the Road Traffic Act which, according to the CPS, creates two separate offences of causing death by careless driving and causing death by inconsiderate driving, meaning that a

⁵¹ The 54 cases of CDUD charged in 2009 emanated from only 22 of the 43 separate police forces in England and Wales, with some forces (as advised by their local CPS Areas) seemingly making far greater use of the offence than others.

⁵² Of the files accessed within the three police forces discussed in relation to the findings on CDCD, only Force A made use (as a result of CPS advice) of the s.3ZB offence (these files were excluded from the 30 accessed through the police, since they were part of the sample of 14 cases accessed via the CPS). The other two forces both charged no insurance/no licence alongside offences of causing death by careless or dangerous driving. In 18, for example, D was charged with CDDD, failing to provide a specimen, driving without insurance and driving other than in accordance with a licence. Also, in 29 D pleaded guilty as charged to CDCD, fail to stop, fail to report, no insurance and driving whilst disqualified.

⁵³

http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_guidance_on_prosecuting_cases_of_bad_driving/

⁵⁴ There was, however, some confusion at court, as indicated in the file notes, over the indictment and to which count D was pleading guilty.

single count averring to both would be “bad for duplicity”.⁵⁵ Where more than one count of CDUD does appear on an indictment, relating to one and the same death, any sentence passed will be served concurrently. However, it is yet another example of how this offence was not “thought through properly” (to quote a defence solicitor in interview).

Sentencing

Both CDCD and CDUD are triable either way offences, and are the subject of a definitive sentencing guideline from the Sentencing Guidelines Council.⁵⁶ Despite many of these cases receiving a final sentence that could have been passed in the magistrates’ court, the majority of them are committed to the Crown Court for trial.

CDCD

The Sentencing Guidelines categorise cases of CDCD into three levels. The top category covers the most serious cases of CDCD falling just short of dangerous driving; the bottom category covers cases of momentary inattention with no aggravating factors, and the middle category is the dust-bin to catch all that fall in between. Those in the bottom category will get a community order, whilst the starting point for those in the middle category is a custodial sentence. The most striking aspect of sentencing in cases of CDCD is that many of them result from momentary inattention, placing them within the bottom level of sentencing. However, even these cases are often heard at the Crown Court, despite falling within the sentencing powers of the magistrates’ court. Of the 22 cases within the sample, four were sentenced at the magistrates’ court after a guilty plea. Guilty pleas were also prevalent in the Crown Court,⁵⁷ where the guidelines are usually cited by judges passing sentence.

In addition to the data from the sample of cases obtained via the police, access was also given to a spreadsheet of cases maintained by the CPS centrally over a twelve month period when the RSA 2006 first came into force.⁵⁸ It was felt that a “monitoring period” would be valuable because of concerns that CDCD would be prosecuted where CDDD would be appropriate and because CDUD was a new offence with a unique offence structure. During the monitoring period CPS prosecutors nationally were asked to inform headquarters of any cases where, having received a file for a charging decision, CDCD or CDUD were considered as

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http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_guidance_on_prosecuting_cases_of_bad_driving/

⁵⁶ Sentencing Guidelines Council, *Causing Death by Driving: Definitive Guideline* (2008).

⁵⁷ The high number of cracked trials appears to be caused in many cases by D awaiting a defence expert report before deciding to plead guilty on the day of trial.

⁵⁸ The period appears to cover Oct 2008 to Oct 2009.

a possible charge.⁵⁹ These cases were then tracked through to completion and it was documented whether the cases were charged or not and, if so, what the outcome at court was. This provides some valuable information about the early operation of these offences, although no qualitative data about the nature of the offence is included.

This monitoring data shows that during the twelve month monitoring period, of 57 cases charged as CDCD,⁶⁰ guilty pleas were entered in all but one case. Just under half of the cases (25) stayed in the magistrates' court, with a small majority being committed to the Crown Court for trial, where ultimately a guilty plea was entered. Of those that were committed, 15 were sentenced to a term beyond the powers of the magistrates, with 17 cases being sentenced to terms that would have been available to the magistrates had the case been dealt with summarily.⁶¹ This suggests that those in the sample are not necessarily representative, and that there is some geographical variation in the number of these cases dealt with at the magistrates' court.⁶²

In the sample of files under discussion here, apart from the "nearest and dearest" case of C08, the most lenient sentence passed for CDCD in the magistrates' court was probably that of A06 where D pleaded guilty and was sentenced to a three month community order to include a curfew from 7pm to 7am. Seemingly recognising that D could potentially be a danger to other road users, however, the judge disqualified D from driving for two years, rather than the minimum of 12 months. In this case D had inexplicably failed to see a car approaching from the opposite direction and had turned right across that car's path, causing the driver of the other car to take evasive action and mount the verge, colliding with V who was standing on the footpath. This was a case represented as one of momentary inattention with no aggravating features. The lowest sentences at the Crown Court can be seen in cases such as A16, B21, C20 and C32 where D received a 12 month community order and was ordered to carry out between 80 and 120 hours of unpaid work.

At the other end of the spectrum are those cases which fall not far short of dangerous driving. The sentencing range for a level one offence stops at three years' imprisonment, despite the statutory maximum being five years, to allow

⁵⁹ HMCPSI welcomed this initiative but suggested that there was an argument for extending this to all cases arising from a road traffic fatality: HMCPSI, above n.14, para.5.60.

⁶⁰ This is a smaller number than will have been charged over that period, since not all CPS Areas seem to have conformed with the request to keep headquarters informed of these cases.

⁶¹ 26 weeks' imprisonment (whether suspended or not) or less.

⁶² This accords with the findings of studies related to mode of trial which suggest that local cultures of magistrates are a key influence on mode of trial decisions: Cammiss, "Deciding Upon Mode of Trial" (2007) 46 *Howard Journal* 372-384; Herbert (2004) "Mode of trial and the influence of local justice" (2004) 43 *Howard Journal* 65-78.

for there being aggravating factors which can justify going above the range,⁶³ as demonstrated in case C29, discussed above. This was also true in one of the cases from the CPS monitoring data, where the sentence passed was one of four years' imprisonment. This was reduced to three years on appeal,⁶⁴ the Court of Appeal stating that "although the sentence range is placed by the Guidelines Council at 36 weeks to three years' custody, there must be ... cases which justify a sentence up to the statutory maximum of five years after a contested trial".⁶⁵ It was held that the judge was fully entitled to go outside the sentencing range, and that he was also entitled to withhold the normal discount of one third for a guilty plea, given that the case against D was overwhelming. However, the sentence was to be reduced because:

*We are left with the uneasy feeling that the judge was unduly influenced by his view that the appellant should have been prosecuted for causing death by dangerous driving, a view which we can fully understand. A sentencing judge must take great care to be totally faithful not only to the facts of the case, but also to the offence with which he is dealing. By placing this case at the statutory maximum, but for the plea, he left no room for the sort of case which might contain other aggravating features, or relevant previous convictions. It can be said on the other side of the coin that he cannot have given any weight to the appellant's young age and previous good character.*⁶⁶

This last case does suggest that, despite the findings from the main sample in the project reported here, there is the occasional case which is prosecuted as CDCD when the appropriate charge would have been CDDD. In such cases the statutory maximum does at least allow the sentencing judge the ability to pass a sentence akin to that which would have been passed had the more appropriate offence been charged.⁶⁷ However, in those cases where D's driving does not fall within the top category of CDCD cases, and warrants only a short or suspended prison sentence, the positive effects of that sentence are questionable. What seems clear from media reports is that a low prison sentence does little to help bereaved families find a sense of justice. CPS lawyers, though, are very conscious of this and do their best to manage expectations in regards to sentencing. In interview they expressed views that for many bereaved families the sentence, no matter how high, will never provide satisfaction, although this can vary greatly depending on the individuals involved, with a small number of relatives being able to judge D's behaviour in an objective manner and expressing opposition to the imposition of any custodial sentence.

⁶³ The Sentencing Guidelines are drafted with first time offenders convicted after trial in mind, meaning that previous convictions and/or significant aggravating factors may take the case beyond the sentencing range: SGC, above n.56, at p.8.

⁶⁴ *Shepherd* [2010] 2 Cr. App. R. (S.) 54.

⁶⁵ At [23].

⁶⁶ At [29].

⁶⁷ The starting point in a case of CDDD in the bottom level of seriousness is three years' imprisonment.

Padfield uses CDCD as an illustration of cases which straddle the custody threshold “quite dramatically”,⁶⁸ causing difficulty for the courts in applying the Sentencing Guidelines and producing a large number of appeals.⁶⁹ The sense of unease that judges have in sentencing these cases is palpable, with a phrase such as “no sentence I pass can restore the family’s loss” being almost ubiquitous. That such sentencing problems would arise was foreseen by the Sentencing Advisory Panel, who in initially preparing advice for the Sentencing Guidelines Council noted that the offence “is likely to encounter a particular difficulty ... because of the considerable gap between the outcome of the offence (the death of at least one person) and the degree of the offender’s culpability”.⁷⁰

CDUD

The sentencing guidelines for CDUD distinguish between disqualified driving on the one hand, and uninsured and unlicensed driving on the other. If D was unlicensed or uninsured and there are no aggravating factors, the starting point will be a medium community order. Where D was disqualified from driving, however, the starting point will be 12 months imprisonment.⁷¹ In the current study disqualified driving was actually quite rare, having been relevant to only one case, in which s.3ZB was charged alongside the more serious offence of causing death by careless driving whilst under the influence of drink or drugs. This fact is not insignificant since, as pointed out by Roberts *et al*, driving without insurance can be committed inadvertently, whereas driving whilst disqualified is usually intentional,⁷² meaning that the two offences cover variable degrees of culpability. They found, however, that the public are sensitive to these distinctions in expressing their sentencing preferences for such cases.⁷³ It is unfortunate that the government, in proposing the new offence, failed to reflect such subtlety and instead left such distinctions to be reflected by the judiciary.

Of the 14 cases in the current sample, all were heard at the Crown Court.⁷⁴ As with CDCD, in most cases the Crown will represent the case as not suitable for summary trial, but there is the odd case where prosecutors are content for the case to be heard in the magistrates court but where it is then committed to the Crown Court: in one case D elected; in one case the magistrates declined jurisdiction. As can be seen from Table 1, the sentence passed in those cases

⁶⁸ Padfield, above n.22 at 605.

⁶⁹ Ibid, at 606.

⁷⁰ Sentencing Advisory Panel, *Consultation Paper on Causing Death by Driving Offences* (2007) para.46.

⁷¹ SGC, above n.56, p.17.

⁷² The law does not require such intention, but Roberts *et al* were suggesting that in practice most drivers *know* that they have been disqualified from driving.

⁷³ Roberts, Hough, Jacobson, Moon and Bredee, “Public attitudes to the sentencing of offences involving death by driving” [2008] Crim LR 525-540.

⁷⁴ Only half of the cases, however, involved triable either way offences only. The other half were cases where at least one count related to an indictable only offence.

where CDUD did not share the indictment with a more serious charge was within the powers of the magistrates in all but one case (CDUD14).

The CPS monitoring data suggest that the findings relating to these 14 cases are not unrepresentative. It should be noted that it is likely that many of those 14 cases will be included within the monitoring data, but in the period Oct 08 – Oct 09 the spreadsheet includes 44 cases in which the s.3ZB offence was under consideration for charge.⁷⁵ As noted above, it is not always clear from the data what the final offence classification was, but it can be seen that six of those cases were dealt with by way of a guilty plea at the magistrates' court. Unfortunately the data is not complete in identifying the underlying documentary offence on which such charges were based, but it does seem that those based on disqualified driving went to the Crown Court where they were likely to receive a higher prison sentence. The highest sentence passed was 12 months' imprisonment, which was passed in three cases. The most lenient sentence passed at the Crown Court indicated in the data was a case where D pleaded guilty to one count under s.3ZB and was sentenced to 40 hours unpaid work and the mandatory 12 month disqualification. The vast majority of those that were tried at the Crown Court were also dealt with by way of a guilty plea.

Issues relating to mode of trial of CDCD and CDUD

CDCD and CDUD are both triable either way offences. Despite many of these cases receiving a final sentence that could have been passed in the magistrates' court, the majority of them are committed to the Crown Court for trial. Of the 22 cases of CDCD within the sample, four were tried and sentenced at the magistrates' court, where the guidelines are usually cited by judges passing sentence.

As mentioned above, of the 14 cases of CDUD in the current sample, all were heard at the Crown Court. The mismatch that was found between the expected sentence at the time of the recommendation as to mode of trial, and actual sentence on conviction, can be explained to some extent by the proliferation of guilty pleas in these cases. In CDUD 9, for example, the CPS lawyer expressed a preference for trial on indictment on the basis that two people had died in the collision, which of itself amounted to an aggravating factor. Unlicensed or uninsured driving with at least one aggravating factor would take the case into the middle band, the starting point for which is 26 weeks custody,⁷⁶ the magistrates' statutory maximum. The sentencing range could render their powers insufficient, and thus the CPS lawyer recommended the case not suitable for summary trial. In the event, however, D pleaded guilty and was sentenced to a 12 month community order, was tagged with a curfew of 10pm-7am for four

⁷⁵ This includes cases where s.3ZB was charged alongside more serious offences, as well as cases where it was considered but not charged, but where a more serious offence such as CDDD was charged on its own.

⁷⁶ SGC, above n.56, p.17.

months concurrent on each count, and was disqualified from driving for 12 months.

The monitoring data from the CPS shows that during the twelve month monitoring period, of 57 cases charged as CDCD,⁷⁷ guilty pleas were entered in all but one case. Just under half of the cases (25) stayed in the magistrates' court, with a small majority being committed to the Crown Court. Of those that were committed, 15 were sentenced to a term beyond the powers of the magistrates, with 17 cases being sentenced to terms that would have been available to the magistrates had the case been dealt with summarily.⁷⁸

As noted above, this suggests that there is some geographical variation in the number of these cases dealt with at the magistrates' court. In interviews, CPS lawyers were asked the reasons why cases tended to be committed to the Crown Court. The principal reason, which was also evident from the files, was that the Crown felt it was appropriate to represent the case as not suitable for summary trial. However, where prosecutors were happy to keep the case in the magistrates' court there were other factors at play. Despite magistrates having previously dealt with all cases of careless driving arising out of a fatal collision, it seems that many benches are reluctant to accept jurisdiction in cases of CDCD. This was explained by CPS lawyers on the basis that magistrates were afraid the case would involve complex forensic evidence. It was also noted by lawyers on both sides that if a driver wanted to fight the case, it would be sensible to elect trial in the Crown Court since the chances of acquittal would be far higher.⁷⁹

In deciding whether to represent the case as suitable for summary trial or not, the main criterion for the CPS lawyer will be the likely sentence if D were convicted.⁸⁰ Where a case is judged to be one of momentary inattention one would, therefore, expect it to be represented as suitable for summary trial, given that it will fall into the bottom category under the sentencing guidelines and should receive a community order. However, that is not always the case, and generally prosecutors seem to be wary of recommend cases as being suitable for summary trial given the sensitivity of the cases.

For example, in A16 it was thought by the first reviewing lawyer that the case was one of momentary inattention, with no aggravating factors, placing it within the bottom category with the likelihood of it attracting a medium community order:

⁷⁷ This is a smaller number than will have been charged over that period, since not all CPS Areas seem to have conformed with the request to keep headquarters informed of these cases.

⁷⁸ 26 weeks' imprisonment (whether suspended or not) or less.

⁷⁹ Whilst it is generally accepted that trial by jury is always more likely to end in an acquittal than trial in the magistrates' court, it was thought by lawyers that juries would be particularly sympathetic to those charged with CDCD.

⁸⁰ The Legal Guidance suggests that prosecutors should compare the circumstances of the particular case with which they are dealing with those in the Guideline": https://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_guidance_on_prosecuting_cases_of_bad_driving/.

This is always difficult in these cases. The Sentencing Guidelines would suggest that this is in the lowest band of offending. There are no factors indicating higher culpability or greater degree of harm. On the other hand there are no factors indicating lower culpability. That being so the starting point is medium level community order and the range low level to high level community order. Given the Sentencing Guidelines are really ruling out custody I cannot say that this case must go to the Crown Court. Having said that if [D] does not plead guilty at the earliest opportunity in the magistrates' court we should not be minimising the seriousness of this case but should suggest the Crown Court as being more suitable given that the death of a person is involved. NB if this case does end up in the Crown Court I would consider it suitable for an in house lawyer to deal with even if it is a trial.

The file later went to the CCP, who advised that the case only just crossed the borderline and was not suitable for summary trial:

In my view fact that D had 7 seconds in which to see V makes this more than momentary inattention, and therefore would fall in SGC's 'other cases' category, with starting point of 9 months custody. As such the magistrates' sentencing powers would not be sufficient (although it may be that a non-custodial sentence will in fact be imposed taking account other mitigating factors).

The case was committed to the Crown Court, where D pleaded guilty at the plea and case management hearing and was sentenced to a 12 month community order with 12 months supervision, and was disqualified from driving for 12 months.

In those cases where the prosecutor does recommend a case as suitable for summary trial, there is a level of consciousness as to how this might be taken by the family. In case A06, for example, the CPS lawyer noted that:

I appreciate that a family would be surprised that a prosecutor would be representing the matter suitable for summary trial when new legislation had been introduced to allow imprisonment to be imposed and to allow a Crown Court to deal with such cases and even alarmed that the prosecutor represented no aggravating features, which would of course mean no other aggravating features other than the death of [V] which was represented in the actual charge.

Similarly, in A14, after recommending a charge of CDCD suitable for summary trial it was noted that the latter recommendation should also be communicated to the bereaved family:

this should be included in the letter to next of kin so are aware in advance. Indeed, I suggest that the MOT procedure is one which requires most attention as it will be the decision most scrutinised by the family, and which may be most difficult for them to understand particularly if the Prosecution represent SST and the Magistrates decide NSST it can give the unfair impression that the Prosecution view the case less seriously than the court does.

Despite this awareness about the impact the decision on mode of trial will have on families, CPS lawyers are clear that the decision is to be made in an objective fashion, free of any perceived pressures from the family:

that's the only part of the process where I don't think it would be correct to take the family's views into account on because venue isn't something that a lay person could sensibly determine, I think it's very much a legal judgment... So I don't take the family's... I always know that the family invariably will want that case at the Crown Court, that isn't something that should be taken into account at venue.⁸¹

One explanation for the number of cases ending up in the Crown Court and being sentenced to a term within the magistrates' powers is that when prosecutors make the recommendation as to mode of trial they are taking the case at its highest and on the assumption that D will plead not guilty:

And of course it is taking the prosecution's case at its highest, you know, at plea before venue, so it's generally not too difficult to get these cases in the Crown Court. It's just a matter of practical prosecuting really, and as I've said, even if there were cases where we were happy for them to be dealt with at the magistrates court by and large the defence will elect anyway.⁸²

One of the most serious cases dealt with at the magistrates' court is probably that of A27, in which D pleaded guilty to CDCD and was sentenced to 24 weeks' imprisonment. It is perhaps particularly surprising that this case did not go to the Crown Court, given that the CPS had previously been considering a charge of CDDD; although the chairman of the bench considered the case to be a difficult one with the possibility of committing for sentence, it was a rare case that was kept in the magistrates' court.

Those that go up to the Crown Court often end in a guilty plea because it is only in the latter stages of the process that the defence manage to obtain reports that confirm the evidence provided by the Crown. This is often related to causal factors in the crash, such as speed, as set out in the police FCI's report. But sometimes it can relate to other aspects of the case, such as the medical cause of death, as in 20. Here, D turned his car across the path of an oncoming motorbike at traffic lights. The defence initially denied the CDCD charge on the basis of lack of causation. In this case, V did not die until more than three weeks after the collision. The medical cause of death was a deep vein thrombosis (DVT) brought on by D remaining immobile in hospital due to the injuries sustained in the collision. The defence sought an expert to comment on whether the medical treatment V had received was appropriate. Once in receipt of this, D pleaded guilty to CDCD. He was sentenced to 16 months' imprisonment, with the aggravating factor that he had previously been guilty of driving without due care and attention in relation to a fatal collision (prior to the RSA 2006). His appeal against sentence was dismissed.

In that case earlier notes on the file suggest that, despite the final sentence, it was not always clear that it was not suitable for summary trial. The acting CCP in a review endorsement questioned the first reviewing lawyer's assessment that it was suitable for summary trial, stating that the fact D had failed to see V for

⁸¹ CPS lawyer in interview.

⁸² CPS lawyer in interview.

almost 6 seconds placed the case in the middle tier for sentencing purposes. However, a note on the file suggested that it was actually D's decision to elect trial in the Crown Court that may have led to the case being committed for trial.

Lawyers were of the opinion that many defendants would choose to elect. One prosecutor mentioned the common reason of D wanting his "day in court", or because D has been advised to elect by his defence solicitor, often because they expect a jury to be more sympathetic to D than a district judge would be. Other prosecutors agreed that it would be good legal advice from the defence solicitor to elect:

We've almost universally asked for it to go to the Crown Court. If I were defending, as I did do for 10 years, I'd elect if the Crown didn't ask for it to go to the Crown Court. I'd sooner take my chances with a jury than magistrates, particularly on issues such as the quality of driving, with juries I think you always stand the chance of there but for the grace of God principle, they'll be thinking about their driving. If you've got a person with no previous convictions, which a jury likes, often they won't, you've got a jury who are going to think carefully about their driving if you represent it properly, and I think they're going to be reluctant to convict. The majority have been guilty pleas. There's an awful lot of credit for a guilty plea in a case like this in the Crown Court. I can see I'm going to contradict what I said a few moments ago - if I thought my client had a good case and were intent on fighting I'd elect. For a guilty plea there's an awful lot of credit on cases like this, put my hands up. Technically it applies in every case, but in a case like this credit is particularly important.⁸³

Another also thought it might be more beneficial to enter an early guilty plea, but could see why the defence often elect:

[A] long time ago I used to defend; if I was defending now I could see the advantage of a quick guilty plea to a death by careless in the magistrates court. But people don't seem to do that. People seem to... it's a serious charge, because it carries 5 years potentially, and they could get committed for sentence anyway, so I think there's a safety first tactic on the defence side of things, which is to procrastinate, wait for it to go to the Crown Court. Bear in mind also that at that stage, although they'll get initial details of the prosecution case, they won't have every detail about everything, so they might be wary about what exactly they're pleading to and what they're admitting. But certainly if they got hold of the case, and they've got time to do that early enough and say this is a low end careless and deal with it in the magistrates. But the other thing I have to say is I think benches of magistrates and their legal advisors are wary of fatality cases, I mean ironically of course they used to deal with them when it was just careless, but that was at a time that all they could ever do is to fine and put points on licences, so I think magistrates will be wary of handling those cases in terms of sentence. And I think, yes, prosecutors and defence lawyers too will be thinking we'd rather have this in front of the judge, thank you very much. So, I think all of those factors come into play. The other thing is, in terms of that mode of trial decision, to flag up at the first hearing, which is when this issue is decided, yes, this is a community penalty only, is to commit yourself to a course which you may not want to commit yourself

⁸³ CPS lawyer in interview.

to at that particular stage. So, that element of procrastination applies I expect to everyone involved in the investigation at that stage. So, rarely do they get dealt with at the magistrates' court.

This last quotation highlights the tensions in our criminal justice system. The adversarial nature of the system means that the defence are unlikely to show their cards until they know the full nature of the case against them. Initiatives to encourage "speedy" justice might in fact have the side-effect of pushing more cases up to the Crown Court, since the decision as to venue might come before all the information is available and D is willing to plead guilty.

For those that go to the Crown Court because the magistrates refuse jurisdiction, prosecutors might think there is little point in recommending the case as suitable for summary trial due to the attitudes of magistrates:

To be honest it's very rare for magistrates to accept jurisdiction; very very rare. They just, I managed to persuade a DJ I went over and did the hearing myself and it was a 80-something-year-old driver who pulled out into path of speeding motorcyclist – case of momentary inattention on part of D in front of speeding motorcyclist and I managed to persuade the DJ to accept jurisdiction but then the defendant elected! ... If Parliament wanted it to be an indictable only offence, they would have said so... it does seem that magistrates will take the easy option and get rid and say not suitable; because it's death and they don't want to be... well, I don't know what the thinking is, but it just seems to be we don't want to know, it's going to involve complicated evidence and reconstruction analysis, but that's a fallacious argument, so it's far better that 12 jurors are asked to interpret expert evidence on speed and stopping distances but I can't think...

Another prosecutor, asked if it was difficult to persuade magistrates that they are competent to try a case of CDCD, responded:

They don't like it. It's often their decision that means it's ended up at the Crown Court. I mean I haven't got the statistics on that but I know that in the last few cases that we've lost at the Crown Court on careless when I've asked the lawyers on the case, you know when we've done our post mortems, and I've said what did we represent, and they say, well we represented... and I can see on our case analysis they've made clear representations that it was suitable, and the bench has just declined jurisdiction. So I think the bench feel uncomfortable with dealing with these cases.

This was confirmed by defence solicitors:

Magistrates obviously get anxious about new legislation as they're lay people and anything involving a death and err on the side of caution and send it to the Crown Court.

A barrister thought similarly:

I would be gobsmacked if magistrates accepted jurisdiction. I would have thought the CPS would have said it's so serious it's got to go, and if they hadn't I can't believe there's a defence solicitor in the country who wouldn't say you're going to a jury on this.

There is a degree of concurrence between the different players here, then. Lay magistrates are unlikely to accept jurisdiction but in many cases prosecutors will not be disappointed by this and, unless a case is to be tried by a district judge in the magistrates' court, would prefer it to go to Crown Court:

If I can guarantee a district judge [laughs], which I can't, I might be more happy to have it in the magistrates' court. ... Because I think that, well it's the age old issue, I think defence lawyers try a lot of things in front of magistrates which have a habit, no matter how firmly you try to deal with them, something happens, and it just isn't right, whereas they won't do that in front of the district judge and they certainly won't do it in the Crown Court.

This last point may be an issue which applies in all triable-either way cases, but what the cases and interviews from this project suggest as a whole is that the causing death by driving cases are a "special case" due to the level of severity of the harm done compared to the blameworthiness of the defendant. The reasons for the sentencing of cases at the Crown Court within the magistrates' sentencing powers is complex; it must be a combination of Ds pleading not guilty initially, Ds electing trial in the Crown Court, prosecutors not wanting to recommend a case as suitable for summary trial for a number of reasons and magistrates not wanting to take cases.

Key elements of and changes in the prosecution of offences arising from fatal collisions

Her Majesty's Crown Prosecution Inspectorate (HMCPPI) first published a thematic review of the advice, conduct and prosecution by the CPS of road traffic offences involving fatalities in 2002.⁸⁴ That report made a number of recommendations, probably the key being that Chief Crown Prosecutors (CCPs) nominate one or more lawyers with suitable experience to specialise in road traffic fatality cases and receive appropriate training. By 2008 "substantial progress" had been made on this recommendation,⁸⁵ and in those Areas which took part in this research, all had individual or a small team of specialists tasked with reviewing these cases. It was commented on in interview, however, that as a result of cuts such specialists are working in smaller teams than was the case a few years ago. It should also be noted that when the research was conducted, CPS headquarters sent out requests to all Areas for specialists willing to be involved in the research to be identified and communicated back to the research directorate. Despite such a request, few Areas responded or were able to identify suitable individuals. As a result, it is likely that those lawyers interviewed are ones employing best practice, creating a bias in the research results. Those Areas that were unable to provide the names of specialists, and so did not take part in the research, may not be working to the same high standards.

During the period of the cases researched for this project (2008-2011), quality assurance of charging decisions was in place by way of a requirement that all charges be authorised by the CCP. This requirement was for a monitoring period when the new offences were first brought in and has since ended. It is now the case that the CCP, a Deputy Chief Crown Prosecutor or "nominated senior decision maker" must authorise decisions. During the monitoring period the degree of oversight exercised depended on the policy of the local Area. In some Areas one lawyer would review the file and seek authorisation from the CCP; at the other extreme a file might be seen by two reviewing lawyers and then the CCP, with possible additional input from headquarters.

The research found that in many cases the CPS conducts an early review to give the case "a steer". How soon after the collision this takes place varies from Area to Area, but might be within 14 days of a collision.⁸⁶ At this stage the evidence available for review may be minimal, given that the FCI's report, often crucial to a prosecution, will not be available until several weeks or months after the

⁸⁴ HMCPPI, *Report on the Thematic Review of the Advice, Conduct and Prosecution by the Crown Prosecution Service of Road Traffic Offences Involving Fatalities in England and Wales* (2002), available at http://www.hmcpipi.gov.uk/inspections/inspection_no/225/.

⁸⁵ HMCPPI, above n.14, p.60. It was noted, however, that there is no national specialist training available.

⁸⁶ HMCPPI identified the policy in North Yorkshire (not an Area taking part in this study) of consultation taking place within 72 hours as "good practice" potentially warranting adoption nationally: above n.14, para.4.6.

collision. When a full file review is conducted, however, it is often the case that the review is extremely thorough. In Area A in particular, the charging advice often ran into several (as many as ten) pages of word-processed notes, demonstrating that a great deal of time had been spent considering the evidence in the case and applying the relevant law to the available facts. As noted by HMCPSI, "Recording reviews properly helps to focus the mind and thereby ensures a better, more effective, review and accountability for decisions. It also helps prosecutors provide reasons to victims' families when writing to them or in meetings to discuss the case".⁸⁷ HMCPSI similarly found that "The presentation of the advice to the police continues in the main to be of a high standard. The majority of advices/MG3s were well reasoned and comprehensive, with a detailed consideration of the evidence and outlining the reasons for the decision" although "[o]thers simply restated the CPS policy and guidance and/or did not consider all possible charges".⁸⁸

The guidance available to CPS prosecutors in deciding whether to prosecute in these cases is fairly extensive. A "Policy for Prosecuting Cases of Bad Driving" was published in 2007 and updated in 2010,⁸⁹ replacing a "Charging Standard" on driving offences. In addition to this, the CPS Legal Guidance website provided further guidance with additional reference to case law. The need to consolidate these two sources of guidance has since been recognised, and the CPS is, at the time of writing, currently consulting on a new Driving Incidents Guidance to replace both sources.⁹⁰

The findings of the project were that in most cases the decision-making was consistent and in accordance with the guidance. Whether bereaved families agree with the final decision as to charge, however, is not something that can be measured against such an objective standard. It seems that the existence of a serious triable either way offence carrying the potential of a custodial sentence has made the classification of the suspect's driving as "careless" driving rather than "dangerous" driving far more palatable than it would have been prior to the creation of CDCD. The fact that CDCD is a lesser offence to CDDD carrying a lower maximum penalty, and lower chance for a prison sentence, means that in some cases where the judgement is made by the CPS that the driving fell below the standard of a competent and careful driver,⁹¹ but not far below that standard,⁹² bereaved families will be disappointed with the charging decision.

Another issue that will no doubt impact on bereaved families is the timeliness with which a decision as to charge is made. Bereaved families often complain of having their lives put on hold and being unable to achieve "closure" whilst a court case, or the potential for one, remains ongoing. The fact that CDCD is a

⁸⁷ HMCPSI, above n.14, para.5.41.

⁸⁸ *Ibid*, para.5.44.

⁸⁹ Available at: http://www.cps.gov.uk/Publications/docs/pbd_policy_english.pdf

⁹⁰ http://www.cps.gov.uk/consultations/draft_driving_2012_consultation_index.html

⁹¹ The test for careless driving under s.3ZA of the Road Traffic Act 1988.

⁹² The test for dangerous driving under s.2A of the Road Traffic Act 1988.

triable either way offence has the potential to increase delays in reaching a charging decision, in that unlike the summary only offence of careless driving, a six month time limit does not apply, affording the luxury of a lengthier investigation before a final charging decision need be made. However, there is evidence that the CPS are conscious of the needs of bereaved families in this regard, with protocols having been agreed between the police and CPS in some Areas setting out timescales for submission of the police file and the provision of CPS advice.⁹³ Although CDCD does not carry a statutory time limit, it should be borne in mind there might be the potential for other summary-only offences to be charged and it would be unfortunate to lose the ability to do so due to delays in the investigation. Agreed timescales can be important in ensuring that decisions are made without undue delay, although such timescales need to be realistic, given that there was some slippage leading to revised deadlines for the provision of advice by the CPS in some cases.

Another way in which the CPS seeks to mitigate the stress of experiencing a court case for bereaved families is to attempt to ensure as far as possible continuation of care in terms of families dealing with the same lawyers throughout the process.⁹⁴ Some Areas will use Crown Advocates to present the case in the Crown Court on the basis that this allows them to ensure such consistency, and encourages Crown Advocates to develop their skills dealing with the bereaved. However, whilst this is true in some Areas HMCPPI has found that there is no consistent approach to case handling after charge at a national level, and highlighted the need for continuity of handling.⁹⁵ Where barristers are used, many Areas have a small pool from which they select a barrister not only for their legal and advocacy skills but for their people skills. HMCPPI confirms this in that counsel they interviewed were seen to be "sympathetic to the needs of the witnesses and families, speaking appropriately to the relatives when required".⁹⁶

Specialist prosecutors interviewed for this project appeared to take great pride in their work, one describing it as "hard work but enjoyable". It was pointed out that there is the potential for huge (emotional) cost to prosecutors from working on these cases in the same way as there is for the police. Prosecutors expressed a feeling of personal obligation to review every single piece of material, with it

⁹³ For example, at the time of HMCPPI's second review, the Metropolitan Police had agreed such a protocol with the CPS in London: HMCPPI, above n.14, para.4.11. In the current project, Area A had agreed a protocol with the relevant police force regarding timescales, although there was at least one case giving rise to a complaint from a bereaved father regarding the delay in reaching a charging decision. Since then the timescales have been tightened.

⁹⁴ This is something requested by RoadPeace, the charity representing road crash victims in written evidence to the House of Commons Justice Committee: House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System*, Ninth Report of Session 2008-09, HC 186 (2009), p.32, available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/186/186.pdf>.

⁹⁵ HMCPPI, above n.14, para.2.22.

⁹⁶ *Ibid*, para.7.11.

being pointed out that “these cases are not only sad but can also be horrific”.⁹⁷ Ultimately, however, the tragic nature of the cases provides an explanation for the increased quality of decision-making and a degree of solidarity with the police:

*I think perhaps that’s why there is such a quality in terms of the quality of the service the police give and that we aim to give; in an environment where we have reduced resources, the cases just get quicker and quicker going through and it can become more and more of a machine, sausage factory element; perhaps that’s why we stop on these as we do with the other major investigations.*⁹⁸

The relationship between the police and CPS in fatal collision investigations and prosecutions

The CPS, as the independent agency tasked with the prosecution of offences in England and Wales, is, it can be argued, still fairly young, given that it only recently celebrated its 25 year anniversary. Its introduction was not without teething difficulties, with tensions being felt between the CPS and the police, who were to some degree resentful that the power to decide whether to continue with a prosecution had been taken from them.⁹⁹ A study of road deaths occurring in 1999-2000 found that at that time there was evidence of a certain degree of continuing antagonism between the police and CPS in a small number of files examined.¹⁰⁰ By the time of the current study, however, all such vestiges of animosity had disappeared. As can be seen from quotations from police officers and CPS lawyers below, there is new-found mutual respect between the two agencies. It might be thought that this stems from the reforms introduced by the Criminal Justice Act 2003, under which the “statutory charging scheme” shifted the decision-making power to bring charges from the police to the CPS, meaning that the latter became decision-makers rather than mere “decision-reversers”.¹⁰¹ However, that is unlikely to be the case. Unlike other serious offences where a suspect is likely to be held in custody until a decision as to charge is made, in cases of road death even if the suspect is initially arrested at the scene of the collision (an increasingly common scenario it would seem) in the vast majority of cases he or she will remain at liberty whilst the investigation is ongoing and even prior to the statutory charging scheme it was usual for the police to seek CPS advice prior to charge.¹⁰² In that respect, little has changed in

⁹⁷ CPS lawyer in interview.

⁹⁸ *Ibid.*

⁹⁹ Fionda, J., “The Crown Prosecution Service and the Police: A Loveless Marriage?” (1994) 110 LQR 376.

¹⁰⁰ Cunningham, S., *Criminal Charges Brought in Cases of Road Death Incidents in the East Midlands: Implications for Law Reform*, PhD thesis at the University of Leicester (2004) p.88.

¹⁰¹ This is a term coined by Sanders prior to the CJA 2003. See, for example, Sanders, A., “Prosecution Systems” in McConville, M. and Wilson, G., *The Oxford Handbook of the Criminal Justice Process* (2002).

¹⁰² Cunningham, above n.9.

that the CJA 2003 has merely formalised and enforced working practices already in existence in these cases. Unlike a decade ago, however, it appears that the police have little to complain about in relation to the final decision as to charge, and they are almost always in agreement with the CPS decision.

The Association of Chief Police Officers (ACPO) appears to have welcomed the greater role taken on by the CPS in all criminal cases, describing the statutory charging scheme as "a significant, unparalleled, collaborative project between two organisations that historically had not fully trusted each other".¹⁰³ The claim from the ACPO Lead on collision investigation, ACC Sean White, that there exists a "healthy demarcation" between the police and CPS¹⁰⁴ is supported by officers "on the ground". Some examples of views expressed by investigating and senior investigating officers reflect the idea that working with specialist lawyers seems to be the secret behind the success here:

[We have a] very good relationship [with the CPS] built up over the last 6-7 years due to two prosecutors working on all cases. Going back 10-15 years it has changed out of all proportion. Their decision was final; no discussion. Now if we want a meeting we get it.

And:

[Our relationship with the CPS] is good. Working practices are really good. We talk to specialist lawyers so we're only ever talking to 1 of 5 specialists. Non-specialists don't follow the evidence on the first explanation, whilst specialists understand straight away. We have a close relationship with no barriers to communicating. Some issues arise after charge where evidence gets "lost". I have not had advice I have disagreed with since the CIU was set up.

And:

[We have an] excellent relationship. Top ranking lawyers; can't speak highly enough of them. I'll base my case around what they tell me.

Two further officers referred to the CPS as "our partners" or having a "partnership" with the CPS, who make "objective and sensible" decisions, although it was recognised that the CPS work under "massive pressures".

The fact that the positive feelings of the majority of police officers are reciprocated can be seen in interviews with CPS lawyers:

[Our relationship with the police is] really good. It's been getting much better. Closer interaction. Ten years ago there was no interaction until the case got to court. Now it goes back and forth. The file is submitted earlier and the quality is spot on. The police are supportive of what we want; there's nothing they could do better.

¹⁰³ House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System*, Ninth Report of Session 2008-09, HC 186 (2009), p.32, available at:

<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/186/186.pdf>.

p.10.

¹⁰⁴ ACC Sean White in interview.

And:

[We have a] fantastic relationship [with the police]. [Investigating fatal collisions] is something [the force] does very very well. Outstanding. Fantastic quality of files, fantastic communication, a lot of information and consultation in the early stages They could do with more resources, but in truth it's the one area which I think has always been exceptional.

And:

Because of the types of cases they are you have to rely on the expertise of the officers as a lawyer. [We have an] excellent relationship [with them] ... They are specialists who respond well to CPS advice.

This demonstrates what Baroness Scotland has referred to as the “cross-fertilisation of education” between the CPS and the police as a result of the implementation of the Statutory Charging Scheme, allowing the police to “better understand the information that is likely to bring about a successful prosecution” and prosecutors to “better understand some of the challenges that investigators face”.¹⁰⁵ Given the personal relationships that can develop in the field of road death investigation, such cross-fertilisation appears to be particularly concentrated. Other prosecutors described their relationship with the police as “pretty good”, “very good” or “excellent”. An unusual description of the relationship was that:

[Our relationship with the police is] very good. However, in early doors there will be heat between us because we want them to do things they don't want to do. Different thresholds are applied by the police, who are looking for enough evidence to charge, and the CPS looking for enough evidence to secure a conviction in the Crown Court.

This last suggestion was unrepresentative of the interviews as a whole, but perhaps reflects the fact that the degree to which relationships have progressed varies according to geographical location, dependent upon how recently the recommendations of HMCPSI have been adopted in providing specialist prosecutors to work on road death cases. In those Areas where the same specialists have been working alongside police officers in a dedicated CIU for some time, the benefits are clear. The experience built-up by specialist police officers and specialist lawyers working as a team is key to a good working relationship characterised by mutual respect. A number of prosecutors compared the quality of work provided by CIUs as comparable to the investigation of other serious crime, setting it apart from the lesser quality evidence received in relation to “volume” crime:

Files are very very detailed. It's evidence that a lot of resources are committed to them. The quality of the investigation and the files is extremely high. It's marked in comparison to the generality of cases. If you compare it with an MIT [Major Incident Team] case you see the same quality and level of investigation.¹⁰⁶

¹⁰⁵ HC Justice Committee, above n.103, p.14.

¹⁰⁶ CPS lawyer in interview.

Another prosecutor who had been point of contact for the police in road death cases described the relationship as very good and rewarding, and she found the police to be “supportive and extremely helpful”. Prosecutors, she said, are guided by police expertise and the officers “display true professionalism”. She noted that the work of the police was not “perfect” but that road death cases are “investigated to equivalent standard as rapes and murders”. It is not clear, however, how far the Areas that took place in the current study can be seen to be representative of the situation as it currently stands in England and Wales generally. In its 2008 review HMCPSP found that in “many” areas there was a lack of clarity in dealings between the CPS and police.¹⁰⁷

The employment of best practice is illustrated in those Areas where there are protocols in place agreeing what should be provided by the police to the CPS and when, and reciprocal timelines for provision of CPS advice. The police are tasked with investigating all road traffic fatalities, whether or not a surviving driver may have been at fault for the collision. The police will normally refer to the CPS any case where a surviving driver could be the subject of a prosecution, although it may be the case that in some police forces a value judgement is made in force as to the non-existence of fault on the driver’s part. Some forces may deal with this through a quick telephone call to the specialist lawyer, making the CPS aware of the case but dispensing with the need to take up valuable prosecutors’ time by forwarding files in cases where it was clearly the driver who died who was at fault. Others have an agreement that even if it is a case of “rubber stamping” a case of NFA, the CPS should see the completed file. An example of this is case A13 where D was never treated as anything more than a witness, given that it was clear from the outset that V was at fault in pulling out into D’s path, but a file was sent to the CPS nevertheless for NFA to be decided.

Protocols might also allow for regular meetings, every quarter at least, to flash-out issues that have arisen concerning the processes engaged in dealing with road death cases. Such meetings can be valuable not only in clearing up any issues that have the potential to lead to resentment, but also in fostering the development of close personal relationships and encouraging direct communication between agencies. In the current project there was clear evidence from case files that lines of communication remain open between CPS and police during the course of a charging decision. Some use email more than others, whilst the more traditional might communicate via the phone (leaving the trail for researchers more difficult to follow). Face to face meetings are also common and on difficult cases the police will sometimes take prosecutors to the scene of the collision in order to explain the evidence and help with their understanding of the case. HMCPSP has recommended that prosecutors always consider the need to attend the scene when making a charging decision and preparing a case for trial.¹⁰⁸

¹⁰⁷ HMCPSP, above n.14, para.9.3.

¹⁰⁸ HMCPSP, above n.14, para.5.47

Interestingly, although the telephone out-of-hours service for charging decisions provided by CPS Direct has generally been well received,¹⁰⁹ those police officers interviewed in the current study expressed a reluctance to use CPS Direct in road death cases and there was evidence of involvement of CPS Direct in only one case file examined. The reasons for this are twofold. First, the suspect will not normally need to be kept in custody and, if arrested, will be released on bail pending completion of the investigation and submission of a full file to the CPS. Second, if it is felt that the suspect ought to be kept in custody, most often in a case where the suspect has failed to stop and there are aggravating circumstances such as drink or drugs or some other criminal activity, police officers expressed that they would rather wait until normal working office hours (assuming the custody time limit will not expire) to phone local CPS lawyers because: (a) they have a good relationship with those individuals; and (b) they know that they will have the necessary expertise to make a decision, unlike CPS Direct lawyers who will not be road death specialists. In some cases the SIO may have the personal telephone number of the local specialist lawyer, and permission to seek advice out of hours if the need arises. The close relationship that exists between police and prosecutors in some Areas allows such informal agreements to arise.¹¹⁰ There is evidence that this close relationship is beneficial not just in terms of dealing with the immediate question relating to the disposal of the case, but also in dealings with bereaved families.

Victim (bereaved family) care in fatal collision cases

Despite the positive findings represented above and elsewhere from the project indicating that in the Areas where the current research was conducted there is clear evidence of best practice being adopted, dissatisfaction with the criminal justice system's response to road death appears widespread. Media reports of specific cases in which bereaved families have complained about sentences passed are common, particularly at a local level, with occasional pleas to deal more seriously with drivers involved in fatal collisions.¹¹¹ There are clearly some cases where mistakes are being made, as indicated by remarks made by the judge in some cases.¹¹² Surprisingly, despite the offence of CDCD having been created as a response to victim pressure groups calling for the gap in sentencing between careless and dangerous driving causing death to be closed, there have recently been calls from at least one victim group for the new offence's

¹⁰⁹ See discussion of evidence to the HC Justice Committee, above n.103, para.23.

¹¹⁰ More formally, HMCPSI recommends that area service level agreements/protocols should provide for arrangements for obtaining early advice from a specialist prosecutor outside normal office hours: HMCPSI, above n.14, para.2.49, recommendation 9.

¹¹¹ See, for example, Craig Woodhouse, "500 killer drivers cheat jail in 5 years" *The Sun*, 23rd Sep 2012, available at: <http://www.thesun.co.uk/sol/homepage/news/4552401/.html>

¹¹² See, for example, the case of Jordan Clayton sentenced by Judge Stephen Everett for CDCD on a charge of CDDD: *The Bolton News*, "Judge criticises handling of bypass death trial", 15th Feb 2012, available at <http://www.theboltonnews.co.uk/news/9531736.print/>

abolition.¹¹³ This last proposal seems to have been made on the basis that victims' groups suspect that CDCD is being charged where CDDD would be the appropriate offence, leading to a downgrading of charges and lesser sentences.¹¹⁴ Although it is true that the official statistics show a drop in the number of convictions in CDDD since CDCD was introduced,¹¹⁵ the current project found no clear evidence of downgrading, suggesting that either downgrading is occurring outside the Areas researched or that there are alternative explanations such as the reduction in the number of road traffic fatalities over the period.¹¹⁶ The problem faced by the criminal justice system, including the CPS and courts, is that the culpability displayed by a careless driver who causes death may be low, albeit the consequences of such carelessness were disastrous. Although there are claims that drivers who kill face lower sentences than offenders guilty of killing by other means, it has to be accepted that to compare those guilty of CDCD or CDDD with convictions for manslaughter is not to compare like with like.¹¹⁷ For a bereaved relative, however, such arguments will be difficult to accept since the focus will be on the loss suffered.

The fact that the victim movement remains strong in this field can be seen in the fact that RoadPeace was one of only a few organisations that submitted written evidence to the House of Commons Justice Committee when examining the role of the CPS.¹¹⁸ The active nature of such groups suggests that despite the improvements in the way in which victims are dealt with found in this research,

¹¹³ www.StopDangerousDrivers.com supported by Karen Lumley MP: *Redditch Advertiser*, "MP gets tough on dangerous drivers who kill" 2nd Nov 2012, available at: http://www.redditchadvertiser.co.uk/news/10018232.MP_gets_tough_on_dangerous_drivers_who_kill/

¹¹⁴ This cross-party call has been recently joined by Andrew Bridgen, MP for North West Leicestershire: <http://www.thisisleicestershire.co.uk/tougher-sentences-death-drivers/story-17370725-detail/story.html>

¹¹⁵ See n.5 above.

¹¹⁶ Road deaths fell to an all-time low in 2010, although they began to rise again in 2011: Department for Transport, *Reported Road Casualties 2011* (2012).

¹¹⁷ The Institute of Advanced Drivers submitted a Freedom of Information request to the Ministry of Justice the result of which was a finding that the "average" sentence for manslaughter is 6.6 years, while the average for CDDD is 4 years: <http://www.iam.org.uk/news/latest-news/1094-lenient-sentences-for-dangerous-drivers> However, this ignores the fact that the statistics for manslaughter will include all species of manslaughter, ranging from those convicted on a charge of murder where murder is not proved or the suspect successfully pleads one of the partial defences of diminished responsibility or loss of control, to those where the suspect is guilty of unlawful act manslaughter. If sentences for gross negligence manslaughter, the species of manslaughter most comparable to CDDD in terms of the culpability of the offender, were used on their own as a comparator the likelihood is that the average sentence for CDDD would be far higher if reported sentencing cases are anything to go by. See: *Johnson* [2009] 2 Cr App R (S) 28 (3 and a half years reduced to 2 and a half years on appeal); *Barrass* [2011] EWCA Crim 2629 (2 years 8 months upheld on appeal); *Holtom* [2011] 1 Cr App R (S) 18 (3 years upheld on appeal); *Winter and Winter* [2011] 1 Cr App R (S) 78 (7 years for first appellant upheld; 5 years for second appellant reduced to 4 years).

¹¹⁸ Above n.103, pp.185-188.

there is room for improvement, particularly if the findings here are confined to the geographical areas under examination. Objectively, however, there have been huge improvements in the way in which victims in the form of bereaved families are treated, providing victims with what Edwards labels a “non-dispositive” participatory role in the justice system.¹¹⁹

Although there has been a trend over the last decade or so for government to proclaim that they are putting victims “at the heart of the criminal justice system” and promoting prosecutors as “champions” of victims’ rights, the House of Commons Justice Committee has recently warned that such rhetoric is a damaging misrepresentation of reality.¹²⁰ However, from the evidence collected for the current project, it can be said that cases of road death provide an example of the CPS rising “to the challenge of developing good policies for engaging with victims”.¹²¹ As noted by the ACPO Lead on collision investigation, in the past decade the police, CPS, courts and coroners have become far more attuned to the impact on the family that a road death and subsequent investigation have.¹²²

The argument presented here is that focusing on the needs of bereaved family in addition to the question of proving a court case has advanced the work of the CPS and police in working together towards an additional shared aim. It is inevitable that in a process the purpose of which is to bring offenders against the state to justice, the primary focus will be on the suspected offender and on the public interest in securing a conviction for any offence. But as the previously “forgotten party”¹²³ the victim, in the form of a bereaved relative, is now also enjoying to a high standard what Ashworth has referred to as “service rights”,¹²⁴ such as the provision of information to victims regarding the progress of “their” case. The provision of such rights has been facilitated by the close working relationship between the police and CPS and by the Victim Focus Scheme (VFS).

The VFS applies to cases of homicide, including CDDD and CDCD, where the case is heard in the Crown Court,¹²⁵ and it was agreed in March 2010 that the scheme should be extended to cases of road death heard in the magistrates’

¹¹⁹ Edwards, I., “An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making” (2004) 44 Brit. J. Criminol. 967-982.

¹²⁰ HC Justice Committee, above n.103, para.83. For a useful summary of the Report see Hall, “The Relationship between Victims and Prosecutors: Defending Victims’ Rights?” [2010] Crim LR 31-45.

¹²¹ HC Justice Committee, above n.103, para.94.

¹²² ACC Sean White in interview.

¹²³ Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001), chapter 10, para.240.

¹²⁴ Ashworth, A. and Redmayne, M., *The Criminal Process*, (4th ed., 2010), p.52.

¹²⁵ CPS, *Victim Focus Scheme: Crown Prosecution Service: Service for Bereaved Families* (2007) available at <http://www.cps.gov.uk/legal/assets/uploads/files/VFS%20%28Bereavement%29%20-%20nov%2009.pdf>

court.¹²⁶ Under the VFS, a meeting will be offered by the CPS to a bereaved family once the decision to charge has been made, with the aim of informing the family of the processes involved in the case and what outcome they might expect. Further meetings should be offered at specific points in the process, including conviction and sentencing or acquittal. Although compliance with the VFS is mandatory it has been welcomed in some Areas, with the lead CPS lawyer in one Area who suggesting that they had shifted from providing victim meetings out of necessity to positively welcoming victims in:

There should be a meeting at every stage of the process so that they feel we are representing their best interests throughout the process. The Victim Focus Scheme is the minimum standard.

Others agreed that meetings are very important to make families feel involved and that their views are taken on board and respected. Many prosecutors put themselves in the shoes of bereaved families, displaying a good deal of empathy. This accords with what Shapland in her role as chair of the JUSTICE committee refers to as the need for "integrity" in criminal justice, by ensuring that victims are accorded proper concern and respect.¹²⁷

As such, the involvement that victims have in these cases can probably be classified as what Edwards labels "expressive" participation,¹²⁸ in that as well as providing victims with information, the police and CPS are willing to listen to the views of bereaved families, without those views having any real active influence. The Code for Crown Prosecutors makes it clear that victims' views should be taken into account when applying the public interest test in deciding whether or not to prosecute,¹²⁹ but in the cases in the current sample the formal charging decision made reference only to the fact that a death had been caused as justifying prosecution in the public interest. There was no evidence that the views of bereaved families affected the application of this test; the assumption would be that the majority would be in favour of prosecution but in the odd case where the family did not want to see a prosecution this would never trump the requirement of the "overall public interest"¹³⁰ which must be regarded by prosecutors. It is perhaps surprising, then, that HMCSI has criticised the CPS:

We considered that the relevant cases in our sample were ones where the public interest required a prosecution. However, it was not always clear that the prosecutor had considered the view expressed by the victim's family. In some instances, the view was expressed in the victim personal statement ... and it would appear that this may not necessarily be taken as requiring a review of the decision to prosecute. Care needs to be taken to ensure that victims' families' views are

¹²⁶ See: http://www.cps.gov.uk/legal/v_to_z/homicide_cases_-_guidance_on_cps_service_to_bereaved_families/

¹²⁷ See Shapland, "Creating Responsible Criminal Justice Agencies" in Crawford and Goodey, *Integrating a Victim Perspective within Criminal Justice*, (Ashgate 2000), p.149.

¹²⁸ Edwards, above n.119.

¹²⁹ Code for Crown Prosecutors (2010) para.4.18.

¹³⁰ *Ibid*, para.4.19.

*always taken into account when determining whether or not to proceed with a prosecution.*¹³¹

There seems little benefit in encouraging prosecutors to take such steps when it is highly unlikely that any views expressed will affect the decision to prosecute, and in fact doing so might increase the danger of victims believing participation will affect decision-making, something warned against in particular by Hall.¹³²

The police are involved in the VFS through FLOs, with whom prosecutors should liaise in organising meetings and getting a sense of what to expect from families in the meetings and what the family's particular needs might be. Police and prosecutors find that the reaction of bereaved families to the situation in which they find themselves, to the offender's behaviour and to any decisions made in relation to prosecution can vary hugely depending upon the character and personality of the bereaved, as one might expect. This is sometimes reflected in the Victim Personal Statement (VPS) that relatives are permitted to make in advance to be read by/to the judge in sentencing. Relatives will be informed that any VPS they make is unlikely to have an impact on sentencing, but that it is an opportunity for their views to be heard. Again, the question arises as to whether it is beneficial for victims to have such a role of expressive participation, and prosecutors must be careful to manage expectations in this regard. Ashworth is clear that it would be unfair if sentences on offenders varied according to whether a particular victim is forgiving or vengeful,¹³³ and in the current project that full range of victim approach was evident from the VPSs and other documents on file.

At the one end of the spectrum are victims that might be classed as "vengeful" who, as put by one prosecutor, "want the death penalty bringing back. It's murder in many people's view". She provided a specific example of a case in which it was clear from the evidence that the deceased, who was heavily drunk, was the cause of his own death and that the driver involved had no chance of stopping when the deceased ran out in front of the car. The deceased's partner, however, perhaps due to the psychological trauma she had experienced, could not accept this. She was "an eyewitness to the fact that that driver could not stop, and yet she described that as murder".¹³⁴ Such cases in particular will create real challenges for prosecutors, who are clearly trained in dealing with legal processes rather than emotional victims. For those families that chose to attend meetings with prosecutors to discuss a decision not to prosecute there will likely be benefits in terms of the family coming to terms with what has happened and the provision of information regarding what exactly happened.

¹³¹ HMCPSI, above n.14. para.5.38.

¹³² Hall, above n.120.

¹³³ Ashworth, "Victims' Rights, Defendants' Rights and Criminal Procedure" in Crawford and Goodey, *Integrating a Victim Perspective within Criminal Justice* (Ashgate 2000), p.199

¹³⁴ CPS lawyer in interview.

However, such meetings are a choice for the bereaved to make, and they may not always feel able to face the facts of what has happened.

At the other end of the spectrum are a surprisingly large group of bereaved who are able to forgive, and even feel empathy for the position in which the surviving driver finds him/herself.

The fact that CDCD is a triable-either-way offence which is most often heard in the Crown Court might in itself be a way in which the new offence has improved bereaved families' satisfaction with the criminal justice process in such cases. But whether or not a case is dealt with summarily or on indictment, what seems to matter most to many families is the defendant's willingness or otherwise to accept responsibility and recognise the harm he/she has done. The problem with our adversarial system, however, is that there is much to prevent such apology being forthcoming. Although a defendant is likely to be tempted to plead guilty at an early stage thanks to the discount in sentence that such a plea will bring, the characteristics of road death investigations act as a deterrent to this.

It was mentioned by several interviewees that it is increasingly common for suspects to be represented by solicitors from their insurance companies who advise against admitting any offence, at least until a defence report is completed to confirm the findings of the police investigation, since admission of guilt will foreclose any civil negotiations for damages. This lengthens the process and is not necessarily in the best interests of the defendant in the long run, particularly where the defendant can see that he/she was at fault and may lose any sentence discount by delaying entering a guilty plea. The adversarial nature of our criminal justice system does not help victims in this regard, and it is questionable whether it helps defendants. There is a fine balancing act for a defence lawyer in advising a defendant to plead guilty and apologise or await the in-depth forensic evidence which will incontrovertibly demonstrate the defendant's fault.

Although the "forgiving" families above expressed a view that the sentence was less important to them than the acceptance of guilt, for many the fact that the new offence of CDCD provides for the possibility of a prison sentence where careless driving kills was the main benefit of the new offence. In practice, however, it will often be the case that a driver will not face a prison sentence, since the application of the sentencing guidelines precludes a prison sentence in those cases falling within the bottom of three levels of seriousness.¹³⁵ The danger, then, is that bereaved families will have their hopes for a prison sentence dashed. This is where the VFS does an important job of managing expectations. When asked whether the creation of the new offence of CDCD had raised expectations as to sentencing amongst bereaved families, leading to further disappointment further down the line, the response from prosecutors was in the negative, on the basis that in practice there is no danger of an expectancy of high sentences because, as expressed by one prosecutor: (1) FLOs don't raise

¹³⁵ SGC, above n.56.

expectations; (2) the CPS makes the charging decision and notifies families in a letter under the VFS in which sentencing is detailed; (3) meetings take place with bereaved families to explain sentencing. She admitted that there are some difficult situations experienced by prosecutors, but that the majority of families understand issues related to sentencing.¹³⁶ Another prosecutor put it less guardedly: "Families are happy nine-tenths of the time... Families rarely kick off but when they do, boy do they kick off".

Even though the VFS seems to be successful in general, work continues to refine the process and improve the experience for victims. For example, one prosecutor told of a particularly negative experience she had had, and how this prompted change in processes with the police:

I've only had one Victim Focus meeting when I came out personally traumatised and astonished that an officer let me go into that unprepared. There was a huge breakdown between the husband and wife, they had brought their two-year-old daughter who was in the room playing, and the family had never actually had any counselling from anybody, and as a result of that we set in place a best practice agreement between ourselves and all the major police investigation teams in [the Area] to prevent a reoccurrence. Because sometimes, very sadly, the families are just not in a position to be able to meet with us. They might think they are, but we are very dependent on the FLO not to lead us into these meetings and be blindsided, and I think that's really important as well that there should be an agreement between the local CPS and the investigative teams around these meetings and the pre-briefing.

Although it is the CPS rather than the police who undertake to meet obligations under the VFS, FLOs have an integral part to play, and it is also the case that many SIOs will assist in the provision of information to bereaved families by also offering a meeting at the conclusion of any case. This is likely to take place after the court case has been completed, or subsequent to the inquest in a case where a criminal prosecution has not been pursued, and allows families to have access to the FCI's reconstruction of the collision explained in laymen's terms, which can be highly beneficial to families in understanding and coming to terms with what happened.

¹³⁶ The unlikelihood of an offender receiving a prison sentence might be overstated in some cases however. In case 07 the defendant pleaded guilty to CDCD and received a two year prison sentence, with the FLO noting that this result was "unexpected". The case was one where the fault of the defendant was clearly at the higher end of "carelessness", potentially bordering on dangerous, and such a sentence should not have been unexpected. The danger is that the desire to avoid disappointment for families may lead to prosecutors downplaying the chances of imprisonment rather than providing a realistic expectation of the outcome.

Conclusions

The findings of this project suggest that, despite media representations to the contrary, the way in which fatal collisions are investigated and prosecuted is an example of best practice of teamwork by the police and CPS. The improvements that have been made stem primarily from better working relationships between the two agencies, which it has been argued have come about as a result of having the interests of bereaved families at heart. This does not translate into a scenario in which the presumption is that a prosecution must be brought so that “justice can be done”, but rather allows for families to be treated with respect in allowing them to remain informed of the processes and to take the time carefully to explain decisions to them, whether that decision be to prosecute or to take no further action against a surviving driver. Lines of communication are kept open between the police and CPS in order to facilitate both the decision-making process with regards to any potential defendants and the provision of information regarding that decision to the bereaved. The author is, however, cognisant of the fact that there may be several police forces and CPS Areas who have yet to attain the high standards uncovered by the current project, due to the way in which participants in the project were, to some extent, self-selecting.

Police officers quite rightly exhibit a high level of pride in the work they conduct investigating collisions and in dealing with bereaved families. For prosecutors, the work can be difficult and meetings with families are no doubt challenging. As one prosecutor pointed out, it is important to remember that they are not counsellors, whilst another said that meetings with families, although difficult, are one of the most rewarding parts of dealing with these cases. The benefits are clear:

I think like anything else that I've seen implemented in the CPS where prosecutors have to adopt a personal one-to-one approach and it's no longer faceless behind a letter, it really does concentrate the mind.¹³⁷

This project initially set out to discover how the new causing death by driving offences created by the Road Safety Act 2006 are operating in practice, and to see whether the objectives of the offences are being met. What is clear is that the experience of bereaved families has improved immensely, but only partly due to the fact that new imprisonable offences have been created. Those prosecutors who deal with bereaved families on a daily basis see the benefit of incorporating victims' needs within the work that they do, but are not always supportive of the existence of the new offences. One insight on the desirability of extending the role of victims beyond that of “service rights” and into the realm of offence creation neatly summarises the paradoxes of justice in these cases:

If I was the Secretary of State for Justice and I had, you know, a six month consultation with bereaved families who had all experienced RTA deaths I would have come out of that consultation thinking I must give these families something. And I would definitely have felt like that. Whether or not it's then the right thing to

¹³⁷ CPS lawyer in interview.

do for everybody else involved in the food chain, i.e. the defendant, and the defence case, is another matter completely, but you know the sort of the more modern approach to criminal justice is very much a sort of victim led approach, and that's great as far as we're concerned and as far as we have a massive duty to explain ourselves and be accountable to victims. Whether or not that means that parliament should be dancing to that tune I don't think; well that's more arguable...

The new offence of CDCD has been welcomed by some lawyers, filling, as it does, what was described by one barrister as a "ridiculous hole in the law",¹³⁸ its value lying in the idea that it "provides a high degree of satisfaction to the family of the deceased".¹³⁹ CPS lawyers who in interview allowed their own personal view to be expressed occasionally conveyed a certain degree of discomfort with the offence, on the basis that it focuses on the consequences rather than wrongdoing and criminalises to a serious degree those guilty of a momentary lapse. Those barristers that categorised themselves as "old fashioned lawyers" also took the view that the offence takes the role of luck in criminalisation too far. Having been quite critical of the law when it was first passed this author, as a result of conducting the current project, is close to agreeing with Professor Hirst that the offence itself is not objectionable, but that "What is objectionable is the excessively punitive sentencing regime prescribed for the new offence, in which substantial prison sentences may be imposed for tragic driving errors that are not even grave enough to be categorised as 'dangerous driving'".¹⁴⁰ What the project suggests, however, is that Hirst's concern that "[t]he new offence will doubtless muddy the waters in borderline cases that might previously have been charged as CDDD",¹⁴¹ whilst not unfounded, overstates the reality. And although it is true that many cases will fall short of bereaved families' expectations in terms of sentencing, if those expectations can be managed the offence affords clear benefits for families in making them feel that their case "matters", by being dealt with at the Crown Court, and providing official recognition of their loss.

CDUD, on the other hand, is a legislative creation that lacks any redeeming features.¹⁴² There are few instances in which it is used other than as a back-stop to a charge of CDDD or CDCD, where D is clearly at fault in his driving, making it superfluous. In those cases where it is charged alone due to the driving being faultless, it is unclear what benefit the short custodial sentence (often suspended) that results can have. It is unlikely to provide any benefit in terms of general deterrence for the underlying offences given that, as noted by D in

¹³⁸ Barrister in interview.

¹³⁹ CPS lawyer in interview.

¹⁴⁰ Hirst, "Causing death by driving and other offences: a question of balance" [2008] Crim LR 339-352 at 343.

¹⁴¹ *Ibid.*

¹⁴² See Sullivan and Simester, above n.32; Duff, "Whose Luck is it Anyway?" in Clarkson and Cunningham *Criminal Liability for Non-Aggressive Death* (Ashgate 2008); Clarkson, "Aggravated Endangerment Offences" (2007) 60 *Current Legal Problems* 278-295, Cunningham, *Driving Offences: Law, Policy and Practice* (Ashgate 2008), pp.113-118.

CDUD5 in police interview, explaining his offence: "if the police pull you up, you go and stand in front of a magistrates with no qualified driver [*sic*] and you get a couple of hundred quid fine or whatever; you don't think you're going to kill someone or whatever". The offence has done more harm than good in that it "corrupts" principles of causation, and should never have been created.

Recommendations

The findings of this report are largely positive with regards to how the CPS conducts its business in relation to death by driving cases. However, there is room for improvement and it is not clear that the positive findings from the Areas that participated in the project are representative of the position nationally. The recommendations are made below as suggestions to Areas which are not currently operating best practice, and to improve decision-making across the board.

1. Consideration should be given by each Area to the recommendations made by HMCSI in its most recent report of 2008. Not all recommendations have been adopted by all Areas, but in those that have done so, the benefits are evident. For example, each Area should give consideration to formalising working practices between the police and CPS in a protocol. This could include timescales for submitting a file to the CPS and then for a response, and for circumstances in which early advice will normally be requested/provided, with access to CPS lawyers out of hours if the need arises. It might also provide for regular meetings between the CPS and SIOs on general issues as well as specific cases. Ideally, it would require that the CPS should always receive a file for confirmation that NFA is appropriate, as well as in cases where prosecution is thought appropriate.
2. Some monitoring of implementation of HMCSI recommendations, as in (1) ought to be conducted. Despite specialist prosecutors supposedly being nominated, some Areas said that they were unable to identify the relevant specialists to be involved in the research. This is of concern, in that all Areas should easily be able to identify such specialists in order that review files be allocated accordingly. Although I am told that specialist training is offered, the uptake is not monitored. Again, some oversight of such issues would be useful.
3. The new offence of causing serious injury by dangerous driving under s.143 Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force on 3rd Dec 2012. Consideration needs to be given to whether

these cases will be dealt with in the same manner as the current causing death offences.

4. It would be useful to maintain a database of road death cases, tracking the legal outcomes of any investigation as occurred during the monitoring period following the RSA 2006. This can help inform policy at a national as well as a local level and help to demonstrate a more transparent approach to the investigation of such incidents, increasing public confidence. Given the concerns of those such as RoadPeace that CDCD is leading to a downgrading of cases which ought to be prosecuted as CDDD, such data may well provide some reassurances to such groups.