

*Causing Death by Careless driving—10 years on*

*August 2018*



## Foreword

It is hard to imagine that just over a decade ago, our laws failed to distinguish between a death and a dent caused by a careless driver. This denial of consequences greatly aggravated the suffering of bereaved families already devastated from the sudden death of a loved one.

I have given this issue much thought over both my professional and personal life. That was true even before I was hit by a careless driver whilst cycling. The crash meant my wrist was badly broken and it strengthened my resolve to ensure our roads were made safe for those walking and cycling. This includes a justice system that is not complacent towards road danger but ensures drivers are held accountable for the harm they pose to others, especially those more vulnerable.

Whilst as London's Deputy Mayor and Road Safety Ambassador, I consulted with road users and published London's Lawless Roads. This identified ways in which the justice system could help reduce road danger, with increased use of driving bans a key call. I am pleased to see the Mayor of London's recently published Vision Zero Action Plan includes encouraging the greater use of driving bans. As shown in this report, whilst there has been progress with holding drivers accountable for the deaths they cause, too many are still escaping a driving ban.

Now in the House of Lords, I am reminded of the controversy caused by the proposed introduction of *Causing Death by Careless driving*. There was much concern that drivers would be sent to prison for minor lapses, adding "injustice to tragedy". This report should reassure them that this did not happen.

I am a patron of RoadPeace because I am proud of the work that RoadPeace does to deliver safer roads and a fairer justice system. They represent road crash victims determined to ensure lessons are learned and others are spared death, disability, and heartbreak.

And lessons need to be learned from this report. The fears of victims and campaign groups that downgrading would result have not been relieved. This report should be a call to action by a government keen to increase active travel.

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## Key Findings

*Causing death by careless driving* was introduced ten years ago to close a critical gap—that between the charge of *Causing death by dangerous driving* which almost always resulted in a custodial sentence and *Careless driving*, a summary offence which very rarely resulted in a driving ban and did not carry a custodial sentence. This report analysed the evidence from the first decade on its impact on three key areas:

- Recognition of road death
- Downgrading and under-charging
- Proportionate sentencing

### **Recognition of road death**

*Causing death by careless driving* has resulted in more wrongful road deaths being rightfully recognised in court in Britain.

#### England and Wales

- 2,072 road deaths were recognised and prosecuted as caused by careless driving (2008-17).
- This charge became the most common causing death by driving charge used, reaching a high of 285 prosecutions in 2010, and being used in 18% of fatal collisions in 2010 and 2012.

#### Scotland

- 217 road deaths were prosecuted as caused by careless driving (2007-8—2016-17).
- They reached a high of 43 in 2014-15, and were prosecuted in 24% of fatal collisions in 2014-15 and 2015-16.

#### In both jurisdictions

- fatal collisions are now considerably more likely to result in a successful prosecution of a causing death by driving offence. In England and Wales around one in 10 fatal collisions resulted in a conviction in 2007; in 2017, it was over one in four. In Scotland, it was one in 10 in 2007 and reached one in four in 2016, dropping slightly in 2017.

This does not mean that all culpable drivers are being prosecuted or convicted, just that the situation has improved in both jurisdictions. RoadPeace continues to hear from families of their dissatisfaction with the decision not to prosecute. As a key objective of this charge was the recognition of culpable road death, then *Causing death by careless driving* has helped.

### **Downgrading and undercharging**

There was much concern that the introduction of this charge would lead to dangerous drivers facing a lesser charge. This could be either by undercharging with the lesser charge used from the start of proceedings, or downgrading with the charge changing later, either by the CPS, judge or jury.

#### England and Wales

- From 2011 to 2013, proceedings for *Causing death by careless driving* exceeded those for *Causing death by dangerous driving*, with a ratio of around 3:2. They have since evened out.
- A driver in a fatal collision was more likely to be prosecuted for *Causing death by dangerous driving* in 2017 than they were in 2007.
- The data does, however, suggest that many cases which started out as *Causing death by dangerous driving* ended up as *Causing death by careless driving*, i.e. downgrading. This was especially true over 2011-15.

## Scotland

- After the introduction of *Causing death by careless driving* in 2008, *Causing death by dangerous driving* dropped dramatically, from 29 in 2007-08 to seven in 2014-15, before rising in the last two years.
- In 2014-15 there were over six times as many prosecutions for *Causing death by careless driving* than for *Causing death by dangerous driving*. By 2016-17, this was down to 2.6 times as many. This change in the ratio between the two offences was both more dramatic and more sustained than in England and Wales.
- There was also a decline in the proportion of fatal collisions resulting in a charge for *Causing death by dangerous driving*. This dropped from 11% in 2007-08 to 4% in 2014-15. This also contrasted with that found in England and Wales.
- This data is consistent with undercharging<sup>1</sup> being a problem in Scotland.

That drivers in Scotland who would previously have been taken to court for *Causing death by dangerous driving* have been facing a lighter charge is an unfortunate, unintended consequence of introducing *Causing death by careless driving*. The persisting lack of clarity on the boundaries between *Careless driving* and *Dangerous driving* has undoubtedly contributed to this.

### **Proportionate sentencing**

In the debates that preceded the introduction of *Causing death by careless driving*, there was significant concern that drivers could be imprisoned for a momentary lapse in attention. This report found no evidence of excessive sentencing. The opposite was found in Scotland where the number of drivers imprisoned and their custodial sentence lengths have decreased.

## England and Wales

- A minority of drivers convicted of *Causing death by careless driving* received a custodial sentence. Between 2010-2016, it ranged between 19% to 30%, before reaching 32% in 2017.
- The use of community sentences, the punishment suggested in the Sentencing Guidelines for the less serious examples of *Causing death by careless driving*, declined significantly in (from 67% to 25%).
- Suspended prison sentences have increased in use from 19% to 41%.
- The minimum ban period of 12 months for *Causing death by careless driving* has not been followed for a significant number of those sentenced (up to 21%, in 2015). (Exemptions for *Causing death by dangerous driving* were never more than 3%). This indicates lenient sentencing with convicted drivers not being taken off the road.

## Scotland

- One in seven convictions for *Causing death by careless driving* resulted in prison, a lower rate than in England and Wales.
- Community sentences rose from 45% to 67%.
- Relative to fatal collisions, the proportion of the two offences that result in a custodial sentence is the same in 2017 (9%) as it was in 2007.
- But, of those that are sent to prison, a quarter will face the shorter sentences of *Causing death by careless driving*.

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<sup>1</sup> Caution is needed in the interpretation of this data as there are far fewer fatalities and proceedings in Scotland than in England and Wales.

## 1. Introduction

Ten years have passed since *Causing death by careless driving* was introduced on 18 August 2008. Previously, a driver responsible for a fatal crash but whose culpability fell short of dangerous driving was only charged with a summary offence of *Driving without due care and attention*, i.e. *Careless driving* - the same charge a driver might get for backing into a tree. The death was not mentioned at court and a plea could be sent by post. Drivers were not even required to attend court for the sentence. As a summary offence, the sentence was slight with no option of custody. Offenders were not banned but only received a few penalty points. So the death was not recognised and there was a large sentencing gap.

Indeed RoadPeace was founded after such an experience. In October 1990, Mansoor Chaudhry (26) was riding his motorcycle when a van driver ran a red light and killed him. With only the charge of 'careless driving' deemed applicable to his crime, the driver pleaded guilty and received a minor fine and three penalty points. His mother Brigitte Chaudhry went on to found RoadPeace. And, for the next 15 years, RoadPeace campaigned to get death and serious injury recognised in driving offences, with the charge of homicide, an indictable only offence, being used where a death occurred.

*Causing death by careless driving* was a move in the right direction, as it recognised the death. But, since it was only an either-way offence, some bereaved families still had to see their cases heard and sentenced in the Magistrates Court, alongside petty crimes. And whilst it closed the sentencing gap, both proponents and opponents had concerns about unintended consequences. Campaigners warned it could lead to downgrading of dangerous driving. Opponents feared it would result in custodial sentences for drivers whose momentary lapses had caused a death. For more on the history of the offence of *Causing death by careless driving*, see Appendix A.

### Aim and structure of report

Our aim is to evaluate the impact that *Causing death by careless driving* has had in its first decade of operation.

Section 2 provides an overview of causing death by driving. This includes highlighting the multiple offences currently available, the low priority the justice system allocates causing death by driving, the lack of prosecution, and the overlap between careless and dangerous driving. It summarises recent developments by the Ministry of Justice (MoJ) and the Department for Transport (DfT).

Section 3 reviews the use of *Causing death by careless driving*, with a comparison of *Causing death by dangerous driving*. The analysis is based on MoJ statistics, particularly with their annual criminal justice outcome statistics, and thus focuses on England and Wales. Where data on Scotland is available, this is used and provides a comparison with England and Wales. Our analysis considers:

- How effective it was in increasing the number of wrongful road deaths being rightfully recognised in court
- Whether drivers were avoiding the more serious charge of *Causing death by dangerous driving*
- Whether sentencing was proportionate

Section 4 reviews developments in the last two years, including proposals underway and the progress being made in London.

Section 4 ends the report with a summary of conclusions and calls.

For brevity *Causing death by careless driving* has been shortened to *Death by Careless* and *Causing death by dangerous driving* to *Death by Dangerous*.

## 2. Causing death by driving – the context

There are seven causing death by driving offences. As shown below, most of these offences were introduced in the last decade, and apart, from *Death by Dangerous* and *Death by Careless*, are very rarely used.

**Table 1 Causing death by driving offences**

	Year introduced	Mode of trial	Years		Prosecutions	
			Maximum prison sentence (years)	Minimum driving ban (years)	2008-2017	2017
Causing <i>Death by Dangerous</i> driving	1991	Indictable only	14	2	2,016	225
Causing <i>Death by Careless</i> driving under the influence of drink or drugs	1991	Indictable only	14	2	257	25
Causing death by driving under influence of drug	2017	Indictable only	14	?	5	5
Causing death by driving whilst disqualified	2015	Indictable only	10	2	4	2
Causing death by aggravated vehicle taking	2004	Indictable only	10	2	65	2
Causing <i>Death by Careless</i> driving	2008	Either-way	5	1	2,072	237
Causing death by unlicensed or uninsured driving	2008	Either-way	2	1	105	6

Source: (MoJ, 2018a; CPS, 2018a)

### Second class crime

None of the causing death by driving offences qualify as homicide. This means they are not considered by the national Homicide Working Group, or included in the Homicide database which collects much information on the offences and offenders. It also means families who are bereaved by law breaking drivers do not qualify for the MoJ funded Homicide caseworker support service.

It is even worse for the two either-way offences, which includes *Death by Careless*. With these, the prosecution does not have the right to appeal the sentence. So neither the Crown Prosecution Service (CPS) nor the family can appeal an unduly lenient sentence, including, as the case studies show, when the charge was prosecuted as *Death by Dangerous*.

### Lack of prosecution

With human error contributing to 95% of road collisions (ROSPA, 2017), RoadPeace believes there could be many more prosecutions. This is especially true as the CPS prosecution guidance states:

*“The defendant’s driving need not be the sole, principal or even a substantial cause of the death. It need only be beyond a negligible cause of the death”* (CPS, 2018a).

There are several reasons why a prosecution does not occur, including:

- the causes did not include driver culpability
- the culpable driver died in the collision
- the driver was thought to be culpable but not criminally culpable, e.g. undiagnosed medical condition
- evidence of criminal culpability was too weak to support a prosecution
- prosecution was not considered to be in the public interest (e.g. where victims were close friends or family)
- the causes were unknown

Lack of prosecution is a key concern for RoadPeace, as most fatal collisions, and even more injury collisions, result in no prosecution. RoadPeace has long called for reasons for No Further Action to be collated and reported. This would allow comparison over time as well as between road user types (both victim and offender) and between police services. This call has been supported by others, including Cycling UK, London Cycling Campaign, British Cycling, 20s Plenty for Us, Road Danger Reduction Forum (RoadPeace, 2017).

CPS prosecution of fatal collisions has been reviewed by Her Majesty's Crown Prosecution Service Inspectorate (HMPSI). A joint inspectorate report reported being disappointed to find " *no systematic procedure for monitoring and analysing performance by CPS Areas*" with fatal collisions. ....only by collecting such data consistently

### Careless or dangerous?

As shown above, *Death by Dangerous* and *Death by Careless* account for the vast majority of all causing death by driving prosecutions. And there is also much overlap between the two offences in how they are defined. For careless driving, the CPS state:

*"A person is to be regarded as driving without due care and attention if (and only if) the way he or she drives falls below what would be expected of a competent and careful driver" (CPS, 2013).*

While for dangerous driving, it must fall **far** below what would be expected of a competent and careful driver. Box 1 highlights the ways in which the charging standards given for these offences overlap (RoadPeace, 2014). With no guidelines on how to distinguish between situations where the same action should be considered dangerous rather than careless, interpretation inevitably becomes inconsistent.

### Recent developments

In December 2016, the MoJ launched a consultation on driving offences and penalties relating to causing death or serious injury. This was not the comprehensive review announced by the Justice Minister in May 2014. Instead the MoJ posed three reforms:

1. Maximum lifetime custodial sentences for *Death by Dangerous* and *Death by Careless when Under the Influence of Drink/Drugs*
2. Minimum two year driving ban for causing death by driving offences
3. Causing serious injury by careless driving with maximum custodial sentence of 2-3 years

The consultation also asked about other desired changes to road traffic law. The MoJ published its response to the consultation in October 2017, stating its intention to introduce the maximum lifetime custodial sentence "*when parliamentary time allows*". This proposal had generated much media attention and many consultation responses. The MoJ concluded further consideration was needed with the proposals on driving ban and causing serious injury by careless driving (MoJ, 2017a).

In 2017, the DfT commissioned research on the need for causing death by dangerous/careless cycling, and has recently launched a consultation on these offences (DfT, 2018).

# YOU SAY CARELESS, I SAY DANGEROUS

## What do the CPS Charging standards say?

### CARELESS DRIVING

- **overtaking on the inside;**
- **driving inappropriately close to another vehicle;**
- **inadvertently driving through a red light;**
- **emerging from a side road into the path of another vehicle;**
- **tuning a car radio; when the driver was avoidably distracted by this action;**
- **using a hand-held mobile phone or other hand-held electronic equipment** when the driver was avoidably distracted by that use (note that this is an offence itself under Regulation 110 of the Road Vehicles (Construction and Use) (Amendment) (No. 4) Regulations 2003). If this is the only relevant aspect of the case it is more appropriate to use the specific offence;
- **selecting and lighting a cigarette** or similar when the driver was avoidably distracted by that use.

### DANGEROUS DRIVING

- racing or competitive driving;
- failing to have a proper and safe regard for vulnerable road users such as cyclists, motorcyclists, horse riders, the elderly and pedestrians or when in the vicinity of a pedestrian crossing, hospital, school or residential home;
- speed, which is particularly inappropriate for the prevailing road or traffic conditions;
- aggressive driving, such as sudden lane changes, cutting into a line of vehicles or **driving much too close to the vehicle in front;**
- **disregard of traffic lights** and other road signs, which, on an objective analysis, would appear to be deliberate;
- disregard of warnings from fellow passengers;
- **overtaking which could not have been carried out safely;**
- driving when knowingly suffering from a medical or physical condition that significantly and dangerously impairs the offenders driving skills such as having an arm or leg in plaster, or impaired eyesight. It can include the failure to take prescribed medication;
- driving when knowingly deprived of adequate sleep or rest;
- driving a vehicle knowing it has a dangerous defect or is poorly maintained or is dangerously loaded;
- **using a hand-held mobile phone or other hand-held electronic equipment** whether as a phone or to compose or read text messages when the driver was avoidably and dangerously distracted by that use; R v Browning (2001) EWCA Crim 1831, R v Payne [2007] EWCA Crim 157
- driving whilst avoidably and dangerously distracted such as whilst reading a newspaper/map, talking to and looking at a passenger, **selecting and lighting a cigarette** or by **adjusting the controls of electronic equipment such as a radio**, hands-free mobile phone or satellite navigation equipment;
- a brief but obvious danger arising from a seriously dangerous manoeuvre. This 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 for only a short time. Cases that illustrate this principle include:
  - Att. Gens Reference No 32 of 2001 (2002) 1 Cr.App.R. (S) 121 **offender failed to stop at a junction where there was a give way sign**, failing to see a taxi that was being driven across the junction perfectly properly and colliding with it...

Source: CPS (2013), Road Traffic Offences – Guidance on Charging Offences arising from Driving Incidents, [www.cps.gov.uk/legal/p\\_to\\_r/road\\_traffic\\_offences\\_guidance\\_on\\_prosecuting\\_cases\\_of\\_bad\\_driving/#a29](http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_guidance_on_prosecuting_cases_of_bad_driving/#a29)

Box 1 CPS charging standards

### 3. Causing *Death by Careless* driving – data analysis

Our objective was to understand the effect of introducing the charge of *Death by Careless* in both England and Wales and in Scotland. But this charge cannot be viewed in isolation.

In many collisions, the CPS will need to choose between *Death by Careless* and *Death by Dangerous*. And, often, this choice is not easy (RoadPeace, 2014; Pearce, 2002; Cunningham S. K., 2013a). From the outset, RoadPeace and other campaigning groups were concerned that the new charge would mean that some drivers would escape conviction of the more serious charge.

*Death by Dangerous* can result in *Death by Careless* either by:

- undercharging, when the CPS uses the charge of *Death by Careless* from the start of court proceedings when *Death by Dangerous* was more appropriate; or
- downgrading, when proceedings start as *Death by Dangerous* but, at the instruction of the CPS, judge or jury, this is reduced to *Death by Careless*

#### **Box 2 How a driver can face *Death by Careless* instead of *Death by Dangerous***

This is an important issue in itself for which there is some evidence in both jurisdictions. As the introduction of *Death by Careless* affected prosecutions and convictions for *Death by Dangerous* our entire analysis looks at both offences. This also provides a reasonably reliable picture of causing death by driving offences as a whole, as together they account for 88% and 95% of total prosecutions in this period.

The analysis covers the change over time of prosecutions, convictions, types of sentences, custody and bans. As fatal collisions dropped 42% over the period, rates for these variables against fatal collisions are also provided. Much of the discussion is of changes in these rates, as they broadly correspond to changes in the likelihood of different events - going to court, being found guilty or going to jail. And, it is on these changes that any evaluation of the fairness and effectiveness of the introduction of the charge of *Death by Careless* should hinge.

The decade in question also saw severe cuts in government budgets. The MoJ suffered more than other departments, with a 40% cut expected by 2020 compared to 2010 (Emmerson, 2017). Courts closed and CPS staff decreased. Police also suffered, with roads policing disproportionately affected. (RoadPeace, 2017) Also during this period, the early guilty plea scheme was introduced where much priority was given to securing guilty pleas and avoiding the cost of trials (MoJ, 2014a).

#### **Proceedings at the Magistrates Court**

##### ***England and Wales***

Introduced on 18 August 2018, *Death by Careless* was not available as a charge for collisions preceding this date. Time taken for investigation and deliberation on charging meant that only two cases came to court in that year. Subsequently, the number rose rapidly and peaked at 285 in 2010, before gradually declining to a low (201) in 2015 and then rising again to 237 in 2017. After 2008, *Death by Dangerous* declines significantly; from 2011 to 2013, proceedings for *Death by Careless* exceeded those for *Death by Dangerous*, with a ratio of around 3:2; subsequently, they have evened out.

**Table 2 Fatal collisions and proceedings, England and Wales**

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Fatal Collisions <sup>2</sup>	2,481	2,137	1,871	1,555	1,615	1,475	1,449	1,477	1,459	1,520	1,444
<i>Proceedings</i>											
Death by Dangerous	276	266	252	196	177	163	144	176	188	229	225
Death by Careless	0	2	178	285	254	261	234	205	201	215	237
Total	276	268	430	481	431	424	378	381	389	444	462
<i>As percentage of fatal collisions (%)</i>											
Death by Dangerous	11%	12%	13%	13%	11%	11%	10%	12%	13%	15%	16%
Death by Careless	0%	0%	10%	18%	16%	18%	16%	14%	14%	14%	16%
Total	11%	13%	23%	31%	27%	29%	26%	26%	27%	29%	32%

Source: MoJ (2018a), DfT (2017), Transport Gov Scotland (2017), RoadPeace estimate

### Undercharging

This data permits analysis of the specific concern that the introduction of *Death by Careless* would lead to a fall in the use of *Death by Dangerous*. If this were happening, a decline in the proportion of fatal collisions that resulted in proceedings for *Death by Dangerous* would be seen in the data. Table 2 shows this actually rises initially – see Box 3, but it never drops significantly below 11% level of 2007 (pre-*Death by Careless*). By the end of the period, the percentage had risen to 16%. This data therefore does not provide evidence that there was an increase in undercharging.

The median time for all offences between the offence itself and first court appearance is around six months. Causing death by driving offences are more complex and can take a year or more, though precise data is not available. So courts will often hear cases that related to collisions from one or even two years before. But nearly all the drop in fatal collisions in this period occurred during 2007-10, see Table 2. The rates per fatal collision of prosecution, conviction etc. are therefore probably biased upwards by the higher caseloads from previous years passing through the system in 2009-10. From 2011-17, fatal collisions vary much less and this effect of cases lagging in the system would cease to bias the calculations.

### Box 3 Why the rise in rates in 2009-10?

It must be emphasised here that RoadPeace believes that, though it may not have increased in England and Wales, lack of prosecution and undercharging continues to be a common and, for the bereaved, a traumatising reality. Many drivers whose actions have led to a death escape prosecution or face a lower charge than they should through lack of evidence or unwillingness of either the police or the CPS to test the case in court, see Box 4. This includes the only known example where a private prosecution was undertaken for *Death by Careless*. Private prosecutions, whilst technically possible, are prohibitively expensive.

[Lauren Mansfield](#) (15) was walking on a road near her home with her boyfriend when she was hit from behind and killed by a local farmer driving a 4x4. The driver claimed to have looked in his wing mirror at a passing vehicle and was then momentarily blinded by the bright sunshine when he returned looking ahead. He could not remember if the sun visor had been lowered. The collision investigators concluded the driver should have had 150m visibility yet the CPS referred to the driver being “*suddenly presented with a black hole of shade on the road*”. Lauren’s family appealed the CPS decision not to prosecute, but they were unsuccessful.

[Aaron Britt](#) (16) was leaving his sixth form college. With traffic stopped in the turn lane, Aaron began to cross the road, and was hit by a speeding driver coming up the hill in the through lane.

<sup>2</sup> All years to 2016, fatalities for E&W = GB less Scotland. 2017 – interim estimates.

The car driver testified that he never saw Aaron. He neither braked nor did an emergency stop. The police estimated that the driver's average speed was 35.9 mph on the 30mph road, high enough to warrant prosecution. The CPS decided otherwise, describing the driver's speed as "*slightly in excess of the speed limit*" but not enough for the driving to be considered "*below the standard expected of a careful and competent driver in the particular circumstances*", despite the hundreds of other students leaving the college at the same time, and the fact that the Highway Code states the speed limit is the maximum and not appropriate where pedestrians and cyclists are nearby.

Aaron was an only child. Not only must his parents now adjust to a life without him, they also face a world in which the justice system fails to condemn speeding that kills.

[Matthew Byrne](#) was killed crossing the road one morning by a driver who admitted being distracted by changing the car radio. The driver moved the vehicle after the crash which affected the police ability to accurately determine the point of impact and vehicle speed. The police did estimate the vehicle speed to be between 33-43 mph in a 30 mph limit. Despite this, the CPS decided not to prosecute. The family appealed but were unsuccessful. The driver was only prosecuted for the summary offence of having a defective tyre.

[Michael \(Mick\) Mason](#), was cycling along Regent Street on an early February evening when he was hit and critically injured by a car driver. CCTV showed both his lights working with Regent Street well lit. He was hit from behind and the driver claimed "I just didn't see him". The police decided No Further Action without even referring the case to the CPS. The family appealed and the police tried to justify their actions on the grounds that Mick was wearing dark clothing, not using a cycle helmet and that Regent Street was very busy at the time, with Mick's bike lights easily lost amongst the other lights.

Thanks to crowdfunding, a private prosecution was possible. Witnesses, which the police had rejected, reported Purcell driving relatively fast. She was also said to have continued up Regent Street after the crash with a witness testifying that he had run up the street to the car which was stopped at the lights and made it pull over. Whilst the trial ended in an acquittal, the judge rejected the defence lawyer's request to dismiss the case. (Dollimore 2017)

#### Box 4 No prosecution examples

[Jake Mitchell](#) (12) was cycling with friends when he was hit and killed by a driver who overtook three cars and a tractor. The police collision investigator concluded the overtaking was safe to do and recommended no prosecution. The CPS initially agreed but upon appeal by Jake's parents, decided to prosecute. At court the judge dismissed the case on the basis that the independent expert (i.e. police collision investigator) did not think the driving qualified as careless. At the inquest, where witness testimony was heard, those in the three cars overtaken before the crash all strongly criticised the overtaking.

[Hilary Lee](#) was cycling when she was hit and killed by a lorry travelling in the same direction that had moved over as the road narrowed. The lorry was equipped with all required mirrors and had no blind spots but the lorry driver stated he had not seen her. The police estimated Hilary would have been visible for 17 seconds. The driver was prosecuted for *Causing Death by Careless* driving but was acquitted.

[Jake Thompson](#) (27), was crossing a junction when a lorry driver accelerated through as the lights changed. His speed was calculated to be at least 38 mph on a 30 mph road. The CPS decided there was insufficient evidence to support a realistic prospect of conviction, and it was not in the public interest to prosecute. After the family complained to the Independent Police Complaints

Commission, a re-investigation was undertaken and identified additional witnesses and evidence. The CPS then decided a prosecution was justified for Causing *Death by Careless* Driving. A five day trial was scheduled but the judge accepted the defence's argument that there was lack of evidence to prove the death could have been avoided at a lower speed. He stopped the trial without hearing from the independent expert witness who had prepared a report. The judge directed the jury to find the driver "not guilty". Jake's family and solicitor were not consulted for the adverse case report that should have been produced, nor have they ever seen its findings.

### Box 5 Acquittal examples

#### *Downgrading*

But what about downgrading? RoadPeace has helped a number of bereaved families where the charges changed from *Death by Dangerous* to *Death by Careless*. Three examples are shown below in Box 6. One of these was before the trial, another was at the discretion of the judge on the morning of the trial, and the third was at the end of the trial when the jury had failed to agree on a verdict.

[Mary Daly \(80\)](#) an active grandmother was walking home on the pavement when she was hit and killed. A driver in a BMW sports car had accelerated upon exiting a roundabout and lost control. He ran off the road and hit Mrs. Daly from behind. She died two hours later.

The driver was arrested and charged with *Death by Dangerous*. On the day the Crown Court trial was to start, the CPS agreed to accept a guilty plea to *Death by Careless*. The driver was sentenced to the minimum one year driving ban and 160 hours of community service. The judge also gave the driver a 28-day electronic tag for falsely claiming Mrs Daly had walked into the road. The family had no right to appeal as *Death by Careless* is an either-way offence.

[Alister Dodd \(54\)](#) was riding his motorcycle to work when he was hit by a driver on the wrong side of the road. The car driver, tired of waiting, had attempted to overtake a van between two bends. The driver was arrested and charged with *Death by Dangerous*. After two trials ended with the jury unable to agree on a verdict, the judge accepted the driver's plea to *Death by Careless*. The driver was given a suspended 10 month custodial sentence, ordered to do 200 hours community service and fined £750 court costs. She was also banned from driving for two years but was not required to retake her driving test.

[Vera \(80\) and George Maskell \(81\)](#) were hit and killed by a lorry driver who was exceeding the speed limit in a parking lot. He did not slow at a give-way sign and failed to see the couple, despite them being visible for several seconds. The driver was blind in one eye and is losing his sight in the other eye. He claimed to have been looking out for vehicles, not pedestrians.

He was prosecuted for *Death by Dangerous* but the jury acquitted him and found him guilty instead for the lesser *Death by Careless* charge. He was given a nine months suspended prison sentence as his defective eyesight was reported to have prevented him from a community sentence. He was also banned from driving for only 18 months. The Maskell family was shocked to realise they were unable to appeal this lenient sentence.

### Box 6 Downgrading examples

A detailed academic study found that in three of the 19 cases (16%) charged with *Death by Dangerous*, a plea of *Death by Careless* had been accepted. But this study concluded that "the introduction of the new offence of *Death by Careless* has had little or no effect on the way in which prosecutors categorise bad driving...that cases of *Death by Dangerous* are not generally being downgraded to *Death by Careless* (Cunningham S. K., 2013a, p. 5)".

This study was based on interviews with practitioners and the examination of police and CPS files from three police areas. This methodology is clearly the most appropriate way of understanding if downgrading has occurred for any individual case. However, its general conclusion relies on the pattern of decision-making in the three forces studied being representative of the other 40 police areas, as the author acknowledges (Cunningham S. K., 2013a).

The detailed data on court statistics for motoring offences (MoJ, 2018c) allows the issue of downgrading to be approached from a different angle. As noted above, a *Death by Dangerous* case starts in the Magistrates Court where, if the charges are not terminated or dismissed, it will be committed for trial at the Crown Court. But many of these cases appear to be “missing” from the Crown Court record – the numbers do not tally. This picture is reversed for *Death by Careless* – there were regularly more recorded cases in the Crown Court than were committed for trial by the Magistrates Court (MC).

**Table 3 Court proceedings, England and Wales**

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
<b><i>Death by Dangerous</i></b>												
Committed for trial by MC	275	265	250	193	172	162	141	176	188	228	223	2,273
Crown Court Proceedings	267	261	260	182	130	129	118	135	132	164	203	1,981
Difference	-8	-4	10	-11	-42	-33	-23	-41	-56	-64	-20	-292
<b><i>Death by Careless</i></b>												
Committed for trial by MC	0	0	125	208	176	177	180	154	147	154	162	1,483
Crown Court Proceedings	0	2	51	246	236	226	229	183	181	237	201	1,792
Difference	0	2	-74	38	60	49	49	29	34	83	39	309

Source: MoJ (2018c)

The picture presented by this data must be considered suggestive, rather than conclusive. There can be mistakes in the court statistics. And, since a case will often be heard in different courts in different years (see *Death by Dangerous* for 2007 and *Death by Careless* in 2009), an exact yearly tally would not be expected. However, over the decade, 292 (13%) *Death by Dangerous* cases went “missing” and there were 309 *Death by Careless* cases “extra”. There are, of course, good reasons why any particular case might be downgraded. However, the fraction missing rose significantly in the period 2011-16.

This issue of acceptance of pleas was raised by RoadPeace, Cycling UK (then CTC) and a number of other groups in a CPS consultation on the charging of driving offences. In response the CPS cited the code for prosecutors on this before conceding that they would include “a paragraph reminding prosecutors to adhere to the appropriate guidance whenever any consideration is given to accepting a plea to a lesser charge in cases of causing *Death by Dangerous* driving” (CPS, 2013, p. 10). In the two following years, 2014 and 2015, the percentage of the “missing” *Death by Dangerous* cases actually increased further before declining substantially in 2017.

## Scotland

In Scotland, there have been a total of 217 proceedings for *Death by Careless*, with a peak of 43 in 2014-15, see Table 4. *Death by Dangerous* dropped dramatically, from 29 in 2007-08 to seven in 2014-15, before rising in the next two years. The switch in the ratio between the two offences was both more dramatic and more sustained than in England and Wales. In 2014-15 there were over six times as many prosecutions for *Death by Careless* than *Death by Dangerous*.

That this drop in *Death by Dangerous* is associated with the introduction of *Death by Careless* is seen more clearly when considering the rates of prosecution against fatal collisions. Scotland also saw fatal collisions drop 45% over this period. But *Death by Dangerous* was dropping faster. As a result, the proportion of fatal collisions leading to a prosecution for *Death by Dangerous* dropped from 11% in 2007-8 to 4% in 2014-15<sup>3</sup>, before picking back up to 7% in 2016-17.

**Table 4 Fatal collisions and proceedings, Scotland**

	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
<i>Fatal collisions</i> <sup>4</sup>	255	245	196	189	175	162	159	181	157	141
<i>Proceedings</i>										
<i>Death by Dangerous</i>	29	22	26	13	8	12	14	7	16	10
<i>Death by Careless</i>	-	-	16	25	26	26	17	43	38	26
<i>Total</i>	29	22	42	38	34	38	31	50	54	36
<i>As percentage of fatal collisions (%)</i>										
<i>Death by Dangerous</i>	11%	9%	13%	7%	5%	7%	9%	4%	10%	7%
<i>Death by Careless</i>	0%	0%	8%	13%	15%	16%	11%	24%	24%	18%
<i>Total</i>	11%	9%	21%	20%	19%	23%	19%	28%	34%	26%

Source: Transport Gov Scotland (2017, 2018); Scotland Gov (2017)

The data for Scotland therefore suggests that the introduction of *Death by Careless* resulted in undercharging, with many drivers escaping the charge of *Death by Dangerous* and its stiffer sentencing regime.

Note: Detailed data on court proceedings for Scotland is not available, so an analysis of downgrading similar to that for England and Wales is not possible.

## Convictions

### England and Wales

Convictions, conviction rates (CR) and the proportion of fatal collisions resulting in convictions are shown in Table 5 below.

For the both offences convictions broadly follow the pattern shown for proceedings – initially convictions for *Death by Careless* rise at the expense of *Death by Dangerous*, going on to exceed them substantially before they return towards parity in the final two years. But because some of the *Death by Dangerous* appear to be downgraded to *Death by Careless*, this pattern is exaggerated – the decline in *Death by Dangerous* is more extreme, as is the rise in *Death by Careless*.

<sup>3</sup> The rise of *Death by Dangerous*/FC to 13% may be attributable to the drop in fatal collisions, see Box 3 above for clarification.

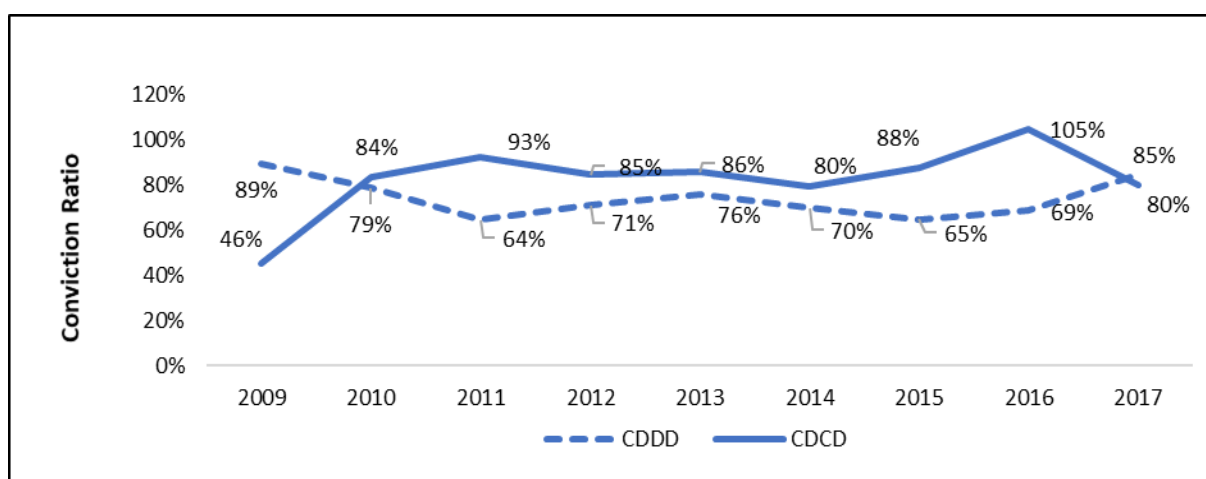
<sup>4</sup> Fatality figures are for the earlier calendar year in for the relevant column e.g. prosecutions for 2007-08 are set against fatalities for 2007.

**Table 5 Convictions, England and Wales**

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<b>Convictions</b>											
<i>Death by Dangerous</i>	233	221	225	154	114	116	109	123	122	157	191
<i>Death by Careless</i>	-	4	81	238	235	221	201	163	176	225	189
<b>Total</b>	<b>233</b>	<b>225</b>	<b>306</b>	<b>392</b>	<b>349</b>	<b>337</b>	<b>310</b>	<b>286</b>	<b>298</b>	<b>382</b>	<b>380</b>
<b>Conviction rate (%)</b>											
<i>Death by Dangerous</i>	84%	83%	89%	79%	64%	71%	76%	70%	65%	69%	85%
<i>Death by Careless</i>	-	200%	46%	84%	93%	85%	86%	80%	88%	105%	80%
<b>Total</b>	<b>84%</b>	<b>84%</b>	<b>71%</b>	<b>81%</b>	<b>81%</b>	<b>79%</b>	<b>82%</b>	<b>75%</b>	<b>77%</b>	<b>86%</b>	<b>82%</b>
<b>As percentage of fatal collisions (%)</b>											
<i>Death by Dangerous</i>	9%	10%	12%	10%	7%	8%	8%	8%	8%	10%	13%
<i>Death by Careless</i>	-	0%	4%	15%	15%	15%	14%	11%	12%	15%	13%
<b>Total</b>	<b>9%</b>	<b>11%</b>	<b>16%</b>	<b>25%</b>	<b>22%</b>	<b>23%</b>	<b>21%</b>	<b>19%</b>	<b>20%</b>	<b>25%</b>	<b>26%</b>

Source: MoJ (2018a)

Changes in CR for the two offences provide an alternative angle on this. In 2009, the CR for *Death by Dangerous* was 89%, just above the 86% average for all motoring offences in that year (MoJ, 2018a). As *Death by Careless* came into widespread use, the CR for *Death by Dangerous* dropped into the range 64%-74% before returning to 85% in 2017, see Figure 1 below.



**Figure 1 Conviction rates, England and Wales**

Changes in the CR for *Death by Careless* move in the opposite direction, reaching 93% in 2011 and 105% in 2016. They return to a figure in the more normal range (80%) in 2017. So, through most of this period, the CR for *Death by Careless* was above that for *Death by Dangerous*. This contrasts with the pattern for the same offences where a death has not been caused: the CR for *Dangerous driving* averaged 91% over the same period; this is higher than that for *Careless driving* (81%) (MoJ, 2018a).

The proportion of fatal collisions resulting in a conviction for *Death by Dangerous* rises then drops marginally as *Death by Careless* becomes more widely used. However, this value recovers and reached its maximum in 2017. The rate for *Death by Careless* rises fast before declining; and from 2010 onwards the combined rate for the two offences is more than double that of *Death by Dangerous* before *Death by Careless* was introduced. In 2017, this variable was nearly three times that of 2007. The trend is best seen in Figure 2 below.

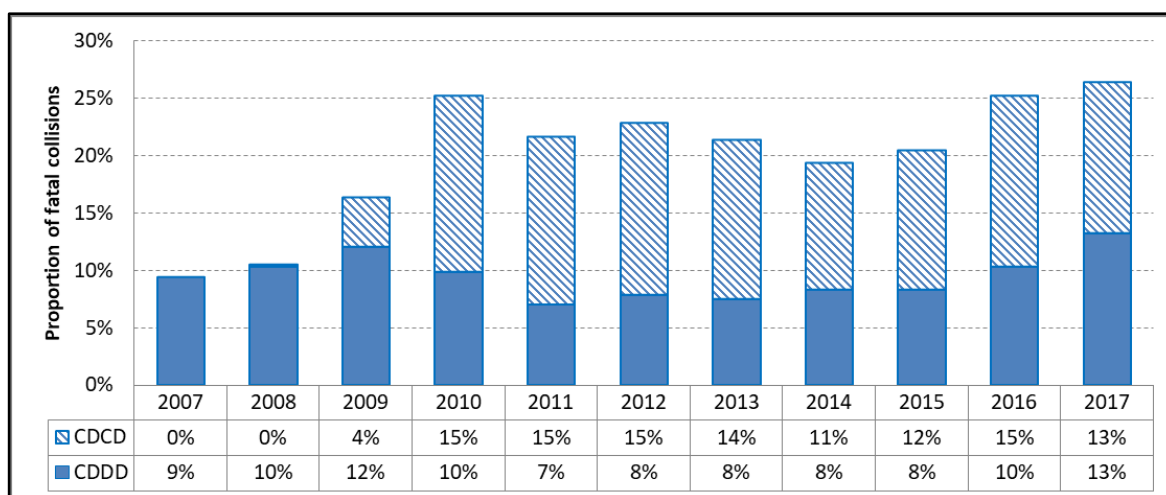


Figure 2 Proportion of fatal collisions resulting in a conviction, England and Wales

In England and Wales, fatal collisions are now considerably more likely to result in a successful prosecution: previously, around one in 10 resulted in a conviction; in 2017, it was over one in four. This means a larger proportion of drivers being held properly accountable and more families being spared further suffering.

### Scotland

Convictions in Scotland track the changes already discussed in relation to proceedings above: with the increase in *Death by Careless* there is a drop in *Death by Dangerous*. In the last three years, the number of *Death by Dangerous* convictions is roughly half what it was in the two years before *Death by Careless* came into widespread use.

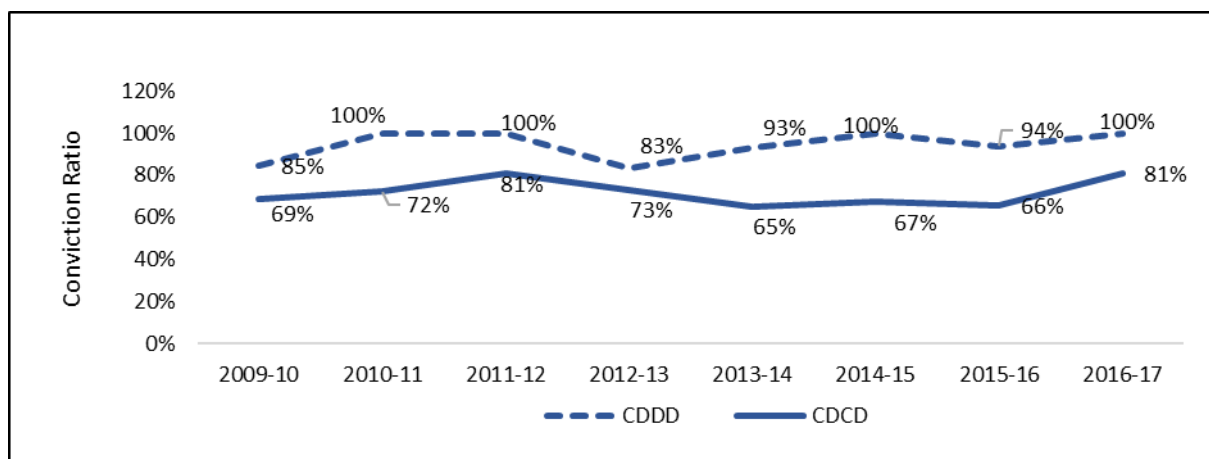
Table 6 Convictions, Scotland

	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
<b>Convictions</b>										
<i>Death by Dangerous</i>	25	20	22	13	8	10	13	7	15	10
<i>Death by Careless</i>	-	-	11	18	21	19	11	29	25	21
<b>Total</b>	25	20	33	31	29	29	24	36	40	31
<b>Conviction rates (%)</b>										
<i>Death by Dangerous</i>	86%	91%	85%	100%	100%	83%	93%	100%	94%	100%
<i>Death by Careless</i>	-	-	69%	72%	81%	73%	65%	67%	66%	81%
<b>Total</b>	86%	91%	79%	82%	85%	76%	77%	72%	74%	86%
<b>As percentage of fatal collisions (%)</b>										
<i>Death by Dangerous</i>	10%	8%	11%	7%	5%	6%	8%	4%	10%	7%
<i>Death by Careless</i>	0%	0%	6%	10%	12%	12%	7%	16%	16%	15%
<b>Total</b>	10%	8%	17%	16%	17%	18%	15%	20%	25%	22%

Source: Scotland Gov (2017)

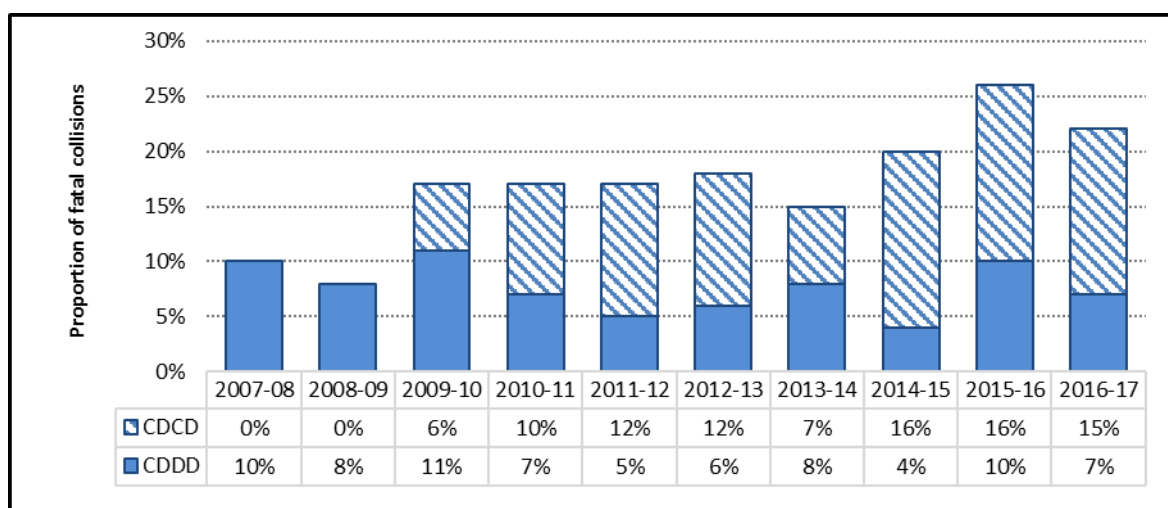
Changes in conviction rates provide additional support for the idea of undercharging in Scotland, see Figure 3. These show a CR for *Death by Dangerous* that starts in 2009-10 at 85%, very similar to England and Wales, but then rises, reaching 100% in four of the following seven years. In only one of

the remaining three years does the CR drop below that in 2009-10. The CR for *Death by Careless* remains consistently lower than *Death by Dangerous* in Scotland<sup>5</sup>.



**Figure 3 Conviction rates, Scotland**

By the end of the period, the proportion of fatal collisions from which a driver was convicted had more than doubled to 22%. This is a broadly similar to the rate for England and Wales.



**Figure 4 Proportion of fatal collisions resulting in a conviction, Scotland**

## Sentences

This section looks at the overall distribution between different types of sentence for *Death by Careless*<sup>6</sup>. Guidance on sentencing published just before the *Death by Careless* came into law suggested that a mix of community and custodial sentences could be expected. The use of community orders when the death was caused by “momentary inattention” (Level 3) directly addresses one of the objections raised before *Death by Careless* was introduced.

<sup>5</sup> This tracks a similar pattern for the CRs of the same offences with no death in England and Wales. (Data for Scotland was not available.)

<sup>6</sup> Unlike other sections, no comparisons are made with sentencing outcomes for *Death by Dangerous*, which are very largely for prison. The outcome on the two offences together will be covered again in the section on custody.

**Table 7 Sentencing Guidelines for Causing death by careless driving**

Level	Nature of offence /Level of seriousness	Starting Point	Sentencing range
Level 1 High	Careless or inconsiderate driving falling not far short of dangerous driving	15 months custody	36 weeks–3 years custody
Level 2 Medium	Other cases of careless or inconsiderate driving	36 weeks custody	Community order (HIGH)–2 years custody
Level 3 Low	Careless or inconsiderate driving arising from momentary inattention with no aggravating factors	Community order (MEDIUM)	Community order (LOW)–Community order (HIGH)

Source: SGC (2008)

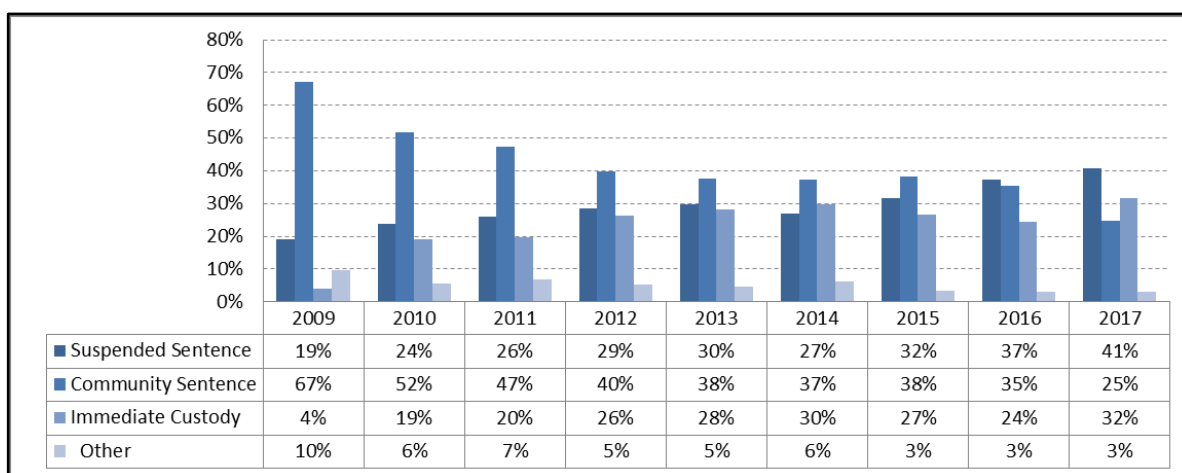
The findings below show clear contrasts between the way these guidelines have been implemented in the two jurisdictions.

### England and Wales

As seen in Figure 5, there appears to be a widening gap between the sentences suggested in the 2008 guidelines and those given in practice.

Two major trends can be seen across the period: community sentences, which drop from 67% to 25% of total; and suspended sentences, which rise from 19% to 41%. The third major category, immediate custody, rises irregularly over the nine years shown.

These changes reflect trends that are apparent more widely in the criminal justice system in England and Wales, where community sentences have been on the decline and suspended sentences on the rise (Prison Reform Trust, 2018). But, in comparison to data for other either-way offences (MoJ, 2018a), the trends for *Death by Careless* are more pronounced.

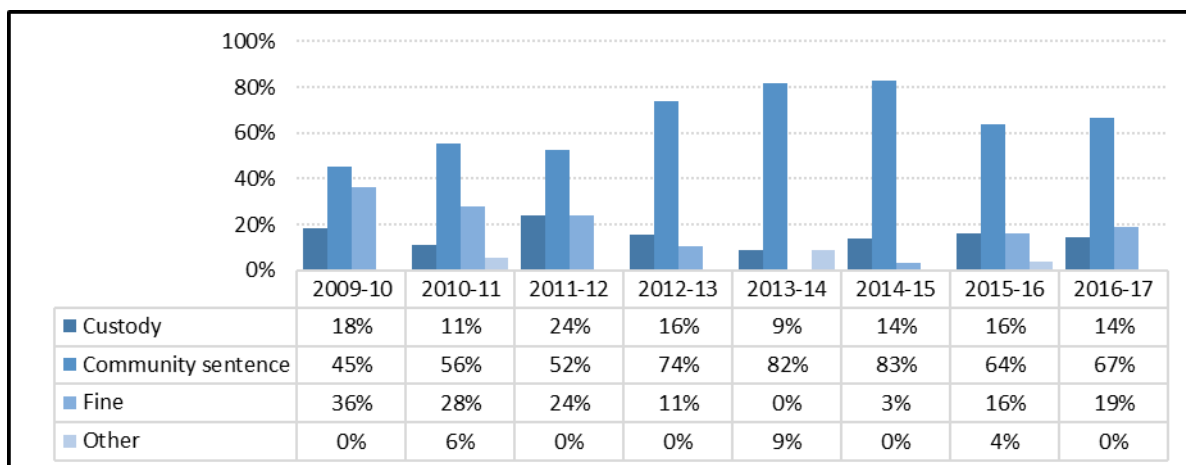


**Figure 5 Distribution of sentences for *Death by Careless*, England and Wales**

### Scotland

As shown in Figure 6, community sentences dominate, rising to 82% in 2013/14. This is to be contrasted with their decline in England and Wales. By 2016-17, two of three drivers convicted of *Death by Careless* were given a community sentence.

Custody is much less common than in England and Wales, whilst fines are used much more frequently. In 2009-10, twice as many drivers were given a fine than a custodial sentence. By 2016-17, both had decreased, but fines still outnumbered custodial sentences. Suspended prison sentences were not reported used.



**Figure 6 Distribution of sentences for *Death by Careless*, Scotland**

Note: Scotland’s own sentencing guidelines are currently being developed (Scottish Sentencing Council, 2018).

### Custody

Determining the length of any prison sentence starts with the guidelines, shown in Table 7. Custodial sentences are given as the starting point for the two higher levels of seriousness, though for Level 2 this is only 36 weeks. Adjustments are then made for any aggravating or mitigating factors to determine where they should be in the sentencing range; a discount of up to 33% is given for an early plea<sup>7</sup>.

Analysis of custodial sentences addresses two principal causes of concern:

1. Would there be too little custody, if *Death by Careless* led to lighter sentencing for dangerous drivers due to undercharging or downgrading?
2. Would there be too much custody, for drivers guilty of no more than minor lapses?

### England and Wales

#### *Impact on the numbers jailed?*

Table 8 shows the change in the numbers of drivers going to jail in England and Wales after *Death by Careless* was introduced.

As *Death by Careless* increases and *Death by Dangerous* declines, despite the general increase in convictions, the much lower custody rate of the former (32% maximum) results in a reduction in the numbers jailed. Examples of where driver avoided custody after being convicted of the lesser charge are shown in Box 7. But, as fatal collisions are declining too, the proportion resulting in a custodial sentence changes little.

Custody for *Death by Dangerous* does decline but this is mostly in line with the fall in fatal collisions. Where it does have an impact, it is limited in extent (one or two percentage points) and in duration, 2011-15. By 2017 the proportion of fatal collisions resulting in jail (12%) for this offence is higher than in 2007 (9%).

<sup>7</sup> Guilty pleas are very common. During one period of monitoring, of the 57 cases charged as *Death by Careless*, guilty pleas were entered in all but one case (Cunningham, S.K., 2013b).

**Table 8 Custodial sentences, England and Wales**

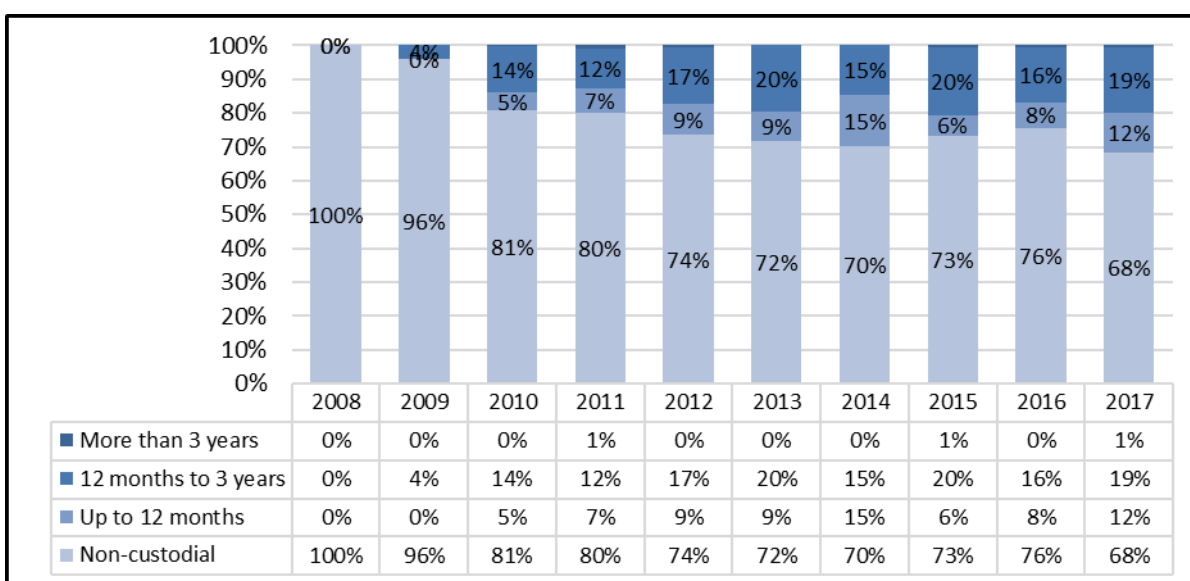
	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<i>Custodial sentences</i>											
<i>Death by Dangerous</i>	214	206	218	140	110	111	104	116	114	153	174
<i>Death by Careless</i>	0	0	3	45	46	59	56	49	46	55	59
<b>Total</b>	<b>214</b>	<b>206</b>	<b>221</b>	<b>185</b>	<b>156</b>	<b>170</b>	<b>160</b>	<b>165</b>	<b>160</b>	<b>208</b>	<b>233</b>
<i>Custody rate (%)</i>											
<i>Death by Dangerous</i>	92%	93%	94%	89%	96%	96%	95%	94%	93%	97%	91%
<i>Death by Careless</i>	-	0%	4%	19%	20%	26%	28%	30%	27%	24%	32%
<b>Total</b>	<b>92%</b>	<b>92%</b>	<b>72%</b>	<b>47%</b>	<b>45%</b>	<b>50%</b>	<b>52%</b>	<b>57%</b>	<b>54%</b>	<b>54%</b>	<b>62%</b>
<i>As percentage of fatal collisions (%)</i>											
<i>Death by Dangerous</i>	9%	10%	12%	9%	7%	8%	7%	8%	8%	10%	12%
<i>Death by Careless</i>	0%	0%	0%	3%	3%	4%	4%	3%	3%	4%	4%
<b>Total</b>	<b>9%</b>	<b>10%</b>	<b>12%</b>	<b>12%</b>	<b>10%</b>	<b>12%</b>	<b>11%</b>	<b>11%</b>	<b>11%</b>	<b>14%</b>	<b>16%</b>

Source: MoJ (2018a)

While downgrading may have affected the number of drivers going to prison for *Death by Dangerous*, its impact was small and ultimately offset by other factors.

*Momentary inattention and custody?*

As shown in Figure 7, most sentences given are non-custodial, though this fraction has declined. Sentences over three years are rare (less than 2%) and the maximum sentence has only been given once, in 2017.



**Figure 7 Distribution of custodial sentences for *Death by Careless*, England and Wales**

Most drivers who were imprisoned were sent to jail for 9 months to three years – the sentencing range for a Level 1 or Level 2 offence. And this fraction expanded to 19% of all those sentenced. This would be drivers who had “shown careless or inconsiderate driving not far short of dangerous”. The average custodial sentence was 15 months at the both the beginning and the end of the period, with a small dip in 2013-14.

[James Whybrow](#) (18), passenger, was killed when the driver (17) was speeding and lost control. Initially charged with *Death by Dangerous*, after over a year, the driver eventually offered a guilty plea to the lesser charge of *Death by Careless*. James' family were encouraged to accept this which they did, to their regret. The driver was sentenced to 200 hours community service, a two year driving ban and a requirement to take an extended driving test. The judge said that although he deserved a suspended custodial sentence, it would be waived in light of his inexperience, good character and the fact that he had killed a friend.

[Karl Austin](#) (45), a very experienced cyclist, was participating in a time trial when he was hit from behind by a speeding lorry. He was not alone as many other cyclists were competing. Nor was he difficult to see as he had a flashing light on the back of his bike, whose brightness had been commented on that night by other riders. The CPS initially declined to prosecute and only agreed after Derbyshire Police appealed, for the first time ever. Using ANPR, Derbyshire Police contacted hundreds of motorists who had driven on that road that summer evening and asked them about the sun and visibility.

The lorry driver eventually pleaded guilty and then the Austin family had to fight to get the sentencing moved from the Magistrates Court to the Crown Court. The District Judge agreed to move it to the Crown Court where the driver was given a suspended 24 week sentence, reduced from 36 weeks by his guilty plea. He also received an 18 month supervision order, a four month tagged curfew and a driving ban of two years. The lack of remorse shown added to the suffering of the Austin family.

Karl was killed on what would have been his sister Linda's birthday but she had been killed in a crash 22 years earlier where the driver was only convicted of careless driving.

[Joe Daniels](#) (18) was one of three friends killed when a young driver (21) lost control and crashed into a telegraph pole. The driver, who was familiar with the road, had admitted speeding and coasting down a steep hill with bends when he clipped a kerb. He was prosecuted for *Causing Death by Dangerous Driving* but convicted of *Causing Death by Careless Driving*. He was jailed for 10 months and disqualified from driving for three years.

[Ben Regan](#) (20), was hit and killed by a driver who had been speeding up to 40-45 mph in a 30mph limit when he hit Ben. The driver then fled the scene. He turned himself in, via his solicitor, the following day. He did not receive a blood-alcohol test until approximately 3 pm that day, 13 hours after the incident. This was the result of going to the police custody suite, rather than to the main police station. Had he been proven to be over the legal alcohol limit for driving, he could have been prosecuted for the much tougher charge of *Causing Death by Careless Driving When Under the Influence of drink/drugs*, which carries a maximum custodial sentence of 14 years.

The CPS decided to prosecute for *Causing Death by Careless driving*, rather than for *Causing Death by Dangerous driving*. Along with this charge, the driver was prosecuted for *Driving without insurance, causing death whilst driving without insurance, failure to stop, and failure to report the accident*. He was sentenced to 21 months in prison and given a two year three month driving ban. At the sentencing, the judge stated the suspicion that the driver was worse the wear for alcohol. The police also wanted to charge both the driver's mother, who he had called and who had come and picked him up after the crash, and his girlfriend, who had been a passenger in his car at the time of the crash, with perverting the course of justice. But the CPS decided not to pursue this – even though both freely admitted to it.

#### Box 7 Lenient sentencing examples

Appeals are very rare. As mentioned previously, with *Death by Careless*, the prosecution does not have any right to appeal, but the defendant does. In 2016, an appeal was allowed, see below.

[Reginald Morris](#) (89), was crossing the road when he was hit by a speeding driver who witnesses testified was driving erratically and dangerously. He died 23 days later from the injuries sustained in the collision. The driver was prosecuted for Causing *Death by Dangerous* driving. Despite witnesses testifying to being so alarmed by the driving that they commented how someone was going to die, the jury convicted him of the lesser Causing *Death by Careless* driving charge. He was sentenced to 30 months custodial sentence and a three year driving ban, with an extended driving test. At the sentencing, the judge noted “*You were showing off in your one-day old, very powerful car*”.

He was allowed to appeal the sentence. The Court of Appeal reduced the custodial sentence by six months but did not reduce the driving ban. Reginald’s family’s focus was on the driving ban, which they had hoped would be increased.

### Box 8 Sentencing and appeal example

Only a detailed examination of the case files could determine if momentary inattention led to jail – the problem for many of those who originally opposed *Death by Careless*. But non-custodial sentences (if we include suspended custody) make up around three quarters of all sentences, until they dip to two thirds in 2017. As the examples in Box 7 show, drivers can escaped custody even when their culpability greatly exceeds momentary inattention.

### Scotland

As shown above, the Scottish court data indicates a problem of undercharging, as the proportion of fatal collisions resulting in *Death by Dangerous* dips from 11% as far as 4%.

#### Impact on the numbers jailed?

How the numbers of drivers going to jail in Scotland changed after *Death by Careless* was introduced can be seen Table 9 below. As *Death by Careless* increases and *Death by Dangerous* declines, despite the general increase in convictions, the much lower custody rate of the former (24% maximum) results in a halving of the numbers jailed. Despite the decline in fatal collisions, the proportion resulting in a custodial sentence still declines in the period 2010-11 to 2015-16. And, despite the more than doubling of the convictions per fatal collision, the corresponding rate for custody is only just back up to its 2007 level (9%).

**Table 9 Custodial sentences, Scotland**

	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
<b>Convictions</b>										
<i>Death by Dangerous</i>	24	20	22	12	8	10	13	7	13	9
<i>Death by Careless</i>	-	-	2	2	5	3	1	4	4	3
<b>Total</b>	<b>24</b>	<b>20</b>	<b>24</b>	<b>14</b>	<b>13</b>	<b>13</b>	<b>14</b>	<b>11</b>	<b>17</b>	<b>12</b>
<b>Custody rates (%)</b>										
<i>Death by Dangerous</i>	96%	100%	100%	92%	100%	100%	100%	100%	87%	90%
<i>Death by Careless</i>			18%	11%	24%	16%	9%	14%	16%	14%
<b>Total</b>	<b>96%</b>	<b>100%</b>	<b>73%</b>	<b>45%</b>	<b>45%</b>	<b>45%</b>	<b>58%</b>	<b>31%</b>	<b>43%</b>	<b>39%</b>
<b>As percentage of fatal collisions (%)</b>										
<i>Death by Dangerous</i>	9%	8%	11%	6%	5%	6%	8%	4%	8%	6%
<i>Death by Careless</i>			1%	1%	3%	2%	1%	2%	3%	2%
<b>Total</b>	<b>9%</b>	<b>8%</b>	<b>12%</b>	<b>7%</b>	<b>7%</b>	<b>8%</b>	<b>9%</b>	<b>6%</b>	<b>11%</b>	<b>9%</b>

Source: Scotland Gov (2017)

The conclusion for Scotland is that undercharging may have had a significant effect on the number of drivers going to prison. Data on duration of sentences in Scotland was not available, but if sentencing followed the guidelines, it can be concluded that the introduction of *Death by Careless* has led to:

- Less prison for drivers who should have faced a charge of *Death by Dangerous*, and
- A drop in the total amount of prison time served.

In Scotland, fears for some of the unintended consequences of *Death by Careless* have been confirmed.

### Driving bans

Driving bans are given in addition to the main sentence. They are mandatory for *Death by Careless*, though the minimum period is 12 months (SGC, 2008). For *Death by Dangerous*, the disqualification must continue until the offender passes an extended driving test; for *Death by Careless*, this is discretionary.

The analysis only covers England and Wales, as data was not available for Scotland.

Total number of bans rises as *Death by Careless* is introduced, dips slightly in the period 2011-14, before rising again in 2016 and 2017, when it reaches an all-time high, see Table 10. Despite bans being mandatory for both offences, the number given is less than the number sentenced due to exemptions. Exemptions are allowed (see below) but the exemption rate is considerably higher for *Death by Careless* than for *Death by Dangerous*.

**Table 10 Driving disqualifications, England and Wales**

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<i>Banned</i>											
<i>Death by Dangerous</i>	233	221	233	158	113	113	107	120	121	154	191
<i>Death by Careless</i>	-	4	67	193	192	198	168	137	137	190	161
<b>Total</b>	<b>233</b>	<b>225</b>	<b>300</b>	<b>351</b>	<b>305</b>	<b>311</b>	<b>275</b>	<b>257</b>	<b>258</b>	<b>344</b>	<b>352</b>
<i>Exempted</i>											
<i>Death by Dangerous</i>	0%	0%	0%	0%	2%	3%	3%	2%	1%	2%	0%
<i>Death by Careless</i>	-	0%	8%	18%	17%	12%	16%	16%	21%	16%	14%
<b>Total</b>	<b>0%</b>	<b>0%</b>	<b>2%</b>	<b>11%</b>	<b>12%</b>	<b>9%</b>	<b>11%</b>	<b>10%</b>	<b>13%</b>	<b>10%</b>	<b>7%</b>

Source: MoJ (2018a)

### Too many exemptions?

According to Sentencing Guidelines, bans are “subject to the usual (very limited) exceptions<sup>8</sup>, and therefore an important element of the overall punishment for the offence” (SGC, 2008, p. 7). Court rulings from the 1940s established that the circumstances personal to the defendant could **not** provide grounds for an exemption. Rather, in the ruling of the Court of Appeal<sup>9</sup>, a matter must:

- be a mitigating or extenuating circumstance;
- not amount in law to a defence to the charge;
- be directly connected with the commission of the offence;
- be one which the court ought properly to take into consideration when imposing sentence (Sentencing Council, 2018).

<sup>8</sup> The “exceptional hardship” loophole offered by Section 35 of the Road Traffic Offenders Act 1988, does not apply here. It is for Disqualification for repeated offences, i.e. drivers facing disqualification through totting up.

<sup>9</sup> R v Wickens (1958) 42 Cr App R 436 (CA)

For *Death by Dangerous*, exemptions were indeed “very limited” – never more than 3%. For *Death by Careless*, it was different. The proportion exempted seems surprisingly high, particularly in the period 2010-16. If the highly restrictive grounds for exemption were applied rigorously, an exemption rate in the range 16-20% would seem unlikely and hardly qualify for the description “very limited”.

## 4. Conclusions and calls

### Conclusions

The analysis was intended to evaluate the impact of *Death by Careless* on the three key areas of concern identified at the start of this report: recognition of road death; downgrading and undercharging, and proportionate sentencing.

#### **Recognition of road death**

*Death by Careless* has resulted in more wrongful road deaths being rightfully recognised in court. The number of drivers held accountable for causing a death has increased. Before *Death by Careless* was introduced in England and Wales in 2007, there were 276 proceedings for *Death by Dangerous*. In 2017, *Death by Dangerous* and *Death by Careless* led to 462 proceedings. As a proportion of fatal collisions, proceedings for these two offences almost tripled, from 11% to 32%.

In Scotland, it rose from 11% in 2007/08 to a high of 34% in 2015/16, with 24% from *Death by Careless*. By 2017, it was 26% with 18% from *Death by Careless*.

In both jurisdictions, fatal collisions are now considerably more likely to result in a successful prosecution. In England and Wales around one in 10 resulted in a conviction in 2007; in 2017, it was over one in four. In Scotland, it was one in 10 in 2007 and reached one in four in 2016, dropping slightly in 2017.

This does not mean that all culpable drivers are being prosecuted, just that the situation has improved. RoadPeace continues to hear from families of their devastation with the decision not to prosecute. As this is not collated, the scale of this problem is not known. But as a key objective of this charge was the increased recognition of death, then *Death by Careless* has helped.

#### **Downgrading and undercharging?**

Before *Death by Careless* was introduced, there was concern that: drivers would increasingly face this charge when previously they would have faced *Death by Dangerous* (undercharging); that CPS and judges would too easily accept pleas for the lower charge or that juries would in some cases only convict defendants on the lower charge (downgrading).

The court data in England and Wales suggested downgrading (particularly in the period 2011-16) but its impact on the number of drivers being convicted of *Death by Dangerous* relative to the number of fatal collisions was marginal. A driver in a fatal crash was more likely to face a charge of *Death by Dangerous* in 2017 than in 2007.

In Scotland the picture is much clearer, proceedings for *Death by Dangerous* went into sharp decline after *Death by Careless* was introduced, with the proportion of fatal collisions leading to a prosecution for *Death by Dangerous* dropping from 11% in 2007-8 to 4% in 2014-15. They did pick back up to 7% in 2016-17. This data is consistent with the undercharging that had been feared.

That drivers who would previously have been taken to court for *Death by Dangerous* have been facing a lighter charge is an unfortunate, unintended but not unanticipated consequence of introducing *Death by Careless*. The persisting lack of clarity on the boundaries between *Careless driving* and *Dangerous driving* has undoubtedly contributed to this.

### ***Proportionate sentencing?***

This report found no evidence of excessive sentencing. Prison has not been used for low level careless driving. A minority of drivers convicted of *Death by Careless* received a custodial sentence. Between 2010-2016, it ranged between 19% to 30%, before reaching 32% in 2017. Custody rates in Scotland were much lower, at around one in seven for those convicted of *Death by Careless*.

In Scotland, the decrease in fatal collisions, along with the decline in the use of *Death by Dangerous* and the low custody rates for *Death by Careless* meant that the number of drivers sent to prison halved. And, relative to fatal collisions, though convictions have proportionately more than doubled, custody has proportionately flat lined: a driver causing a fatal crash in Scotland is no more likely to go to prison, but they will often be facing a shorter sentence. This is a serious concern if it is due to dangerous driving is being downgraded to careless.

The use of community sentences, the punishment suggested in the Sentencing Guidelines for the less serious examples of *Death by Careless*, declined significantly in England and Wales (from 67% to 25%) but rose in Scotland (45% to 67%). In England and Wales, suspended prison sentences have taken up much of the slack. A fresh look at sentencing options is urgently required.

For both offences, bans are mandatory, though exemptions are allowed in “very limited” and tightly defined circumstances. In England and Wales, exemptions for *Death by Dangerous* were never more than 3%. For *Death by Careless*, proportion exempted seems surprisingly high, particularly in the period 2010-16. If the highly restrictive grounds for exemption were applied rigorously, an exemption rate in the range 16-20% would seem unlikely and hardly qualify for the description “very limited”. This needs to be investigated and, if necessary, the guidelines clarified or training provided.

## RoadPeace calls

### 1. Comprehensive legislative reform

The introduction of *Death by Careless* is an example of a change in the law that has had both positive outcomes and unintended negative consequences due to flaws in the wider legislative and sentencing framework.

The government's recent approach to driving offences has been piecemeal and has tended to respond to or be directed towards news headlines. At present, this looks set to continue. What is needed, and indeed was promised by the Justice Secretary over four years ago, is a comprehensive review. This should include:

- a. Review of the definition, charging standards, and sentencing for the different levels of unsafe driving, e.g. careless and dangerous driving. Additional emphasis should be given to the protection of vulnerable road users.
- b. Bringing greater consistency to the treatment of culpability, especially with regard to unsafe/illegal driving leading to serious injury, see Appendix 2.
- c. Greater consideration of alternative sentences, including driving disqualifications and vehicle confiscations. Short term impoundments, as introduced in Canada for low level drink drive offenders, should be considered.
- d. Consideration should be given to the option of amending dangerous driving so that magistrates, but not defendants, could refer cases to the Crown Court. Removing the right to trial by jury was proposed for a wide range of offences (Leveson, Rt Hon Sir Brian, 2015).

This call is not new. In March 2001, RoadPeace responded to the government's consultation on road traffic penalties, stating that "*What is needed is a comprehensive and integrated approach to criminal justice reforms: penalties is just the start*" (RoadPeace, 2001). Over 17 years on, we continue to campaign for a comprehensive review. This includes recognition of serious injury caused by law-breaking drivers, not just those involving dangerous or disqualified drivers.

### 2. Justice outcomes and data linkage

Justice outcomes of collision investigations need to be reported. This would clarify which collisions involved criminal culpability (and how severe). And with the majority of fatal collisions not resulting in a prosecution, the reasons for this should also be known. This would include how many were down to driver not found culpable, not in the public interest, lack of evidence, etc.

DfT is committed to the Safer System approach. It has also invested in the Collision Recording and Sharing (CRASH) information management system, which it is encouraging police services to use. Some police services use NICHE, a crime information management which tracks court outcomes with crimes and crashes. CRASH should do the same. DfT's upcoming STATS 19 review should provide the opportunity to incorporate justice outcome data.

### 3. CPS quality assurance, especially with contentious cases

Victims, campaigners and MPs have raised repeated concerns about the CPS handling of fatal and serious injury related prosecutions. Improvement on collation of performance data for the CPS was called for under a recent criminal justice joint inspection (HMCSI and HMIC).

Lessons should be learned from appeals, acquittals and complaints. In acquittals, the prosecution has to produce an adverse case report, but these are not collated or shared. They should be, with bereaved families asked to contribute how they thought the prosecution could have been improved. Cases where families have appealed the charging decision should also be collated.

#### 4. Treatment of Victims

Causing *Death by Careless* driving was introduced after calls from the bereaved for rightful recognition.

Victims still deserve better. All causing death by driving charges should qualify as homicide offences. Greater priority would then be allocated to investigating and prosecuting criminal road deaths. This would also improve the rights and support offered to bereaved families. It would ensure that bereaved families (and CPS) would have the right to appeal an unduly lenient sentence with *Death by Careless*. They would also be offered the support of a homicide caseworker, under the national service funded by the MoJ.

Whilst the introduction of the *Death by Careless* charge has helped ensure drivers are held accountable for the deaths they cause, much more could and should be done. This includes ending the justice system's complacency towards road danger and treating road crime as real crime. This would mean victims of road traffic crime, including those injured and intimidated, were treated as victims of crime.

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## Appendix 1. Causing death by careless driving – History

Causing *death by careless driving* took over 20 years to be introduced. In 1988, the North Committee conducted a review of road traffic law which recommended replacing *Causing death by reckless driving* with *Causing death by dangerous driving*. But it did not support the introduction of *Causing death by careless driving* (Pearce, 2002).

In 1998, the Department of Transport, Local Government and the Regions commissioned a research study on four key questions:

- Has the 1991 Road Traffic Act made a difference to the pattern of prosecutions and convictions for Dangerous Driving and Careless Driving?
- Is there a problem in the current definitions of Dangerous Driving and Careless Driving which results in the lesser charge of Careless Driving covering a wide range of behaviour from minor inattention to serious negligence?
- Is there a need for a new offence of *Causing Death by Careless Driving*?
- Are the heavier sanctions available for Dangerous Driving being used to the degree intended by the legislation?

After much delay, the report was published in 2002. Like the North report, the research study did not support the introduction of a *Causing death by careless driving* offence, although it did acknowledge its postal survey found 55% support for this offence (Pearce, 2002). The argument against its introduction included that the offences covered did not imply sufficient culpability to justify taking fatal consequences into account, and also concern around disproportionate penalties with sentencing being more influenced by the tragic consequences than the drivers' culpability.

In 2000, the government undertook a consultation on road traffic penalties. RoadPeace produced a detailed response which included the following:

*It's not just a question of the penalties: RoadPeace advocates reforms to the current road traffic penalties which go further than the proposals in the Penalties Review. In addition, reform of the criminal justice system generally must go further. Urgent change is needed in the following areas:*

- *The criminal offences themselves: the criminal offences need to ensure that the fact of death or injury is key in criminal proceedings, while at the same time retaining a variety of sentences based upon the level of culpability of the defendant (RoadPeace, 2001).*

In 2005, the Home Office launched a consultation on Review of Road Traffic Offences involving Bad Driving. One of the reforms proposed was

- *To ensure the fatal consequences of careless driving are properly taken into account, a new offence of causing Death by Careless driving, triable on indictment only, and carrying a maximum penalty of 5 years' imprisonment will allow the courts to impose a custodial sentence where appropriate (Home Office, 2005).*

Shortly after Charles Clarke had again taken cabinet responsibility for the Home Office<sup>10</sup>, a consultation was launched on Road Traffic Offences involving Bad Driving (RoadPeace, 2005). This eventually resulted in the new offence of *Causing Death by Careless or inconsiderate driving*, which was introduced as an amendment to the Road Traffic Act 1988, s.2B by the Road Safety Act 2006 (Parliament, 2006). Sally Keeble, MP Northampton North, campaigned for this offence, including with a Private Members Bill and an Early Day Motion supported by 150 Members of Parliament.

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<sup>10</sup> He was Secretary of State for the Home Department from 15 December 2004 to 5 May 2006.

Opponents, which included most of the legal profession and many in the House of Lords, feared it would lead to drivers being imprisoned for momentary lapses. The Magistrates Association's Road Traffic Committee was strongly opposed to *Causing death by careless driving*, arguing that it "*would mean the consequences of the careless driving would become the dominant factor in assessing the seriousness of the offence, rather than the culpability which is the present approach. The culpability of a careless driver is likely to be at the lowest level*" (Magistrates Association, 2005).

After much debate, this offence was included in the Road Safety Act 2006, but as an either-way offence.

The new charge fell short of what RoadPeace had been campaigning for. It was not a single homicide charge and was an either-way offence which meant the risk of the lesser charge receiving less investigation and downgrading. It also still required a differentiation at the charging stage between careless and dangerous driving. However, with the explicit mention of the death and a one year minimum disqualification, along with a custodial sentence option, it was welcomed at the time as a step in the right direction (RoadPeace, 2006).

## Appendix 2. Sentencing—consequences vs culpability

The Sentencing Council had begun a review of sentencing for causing death/serious injury by driving but this

1. was put on hold after the Justice Secretary announced a full review was to occur, and
2. did not include the basic offences which fall under the Magistrates Sentencing guidelines

Some of the issues that still need to be addressed are shown below.

**Table A2.1 Custodial sentences and consequences (years)**

	Basic offence	Causing serious injury by...	Causing death by...	Increase for serious injury	Increase for death
Dangerous driving	2	5	14	3	12.0
Careless driving when under the influence of drink/drugs	n/a	n/a	14	0	13.5
Disqualified driving plus moving error	n/a	4	10	3.5	9.5
Careless driving	0	n/a	5	0	5.0
Unlicensed and uninsured plus moving error	n/a	n/a	2	0	1.5
Drink driving	0.5	n/a	n/a	0	0
Unlicensed driving	0.5	n/a	n/a	0	0
Disqualified driving	0.5	n/a	n/a	0	0
Uninsured driving	0.5	n/a	n/a	0	0
range	0-2	0-5	2-14	0-3.5	0-13.5

n/a= no specific charge available

Sentencing for causing death/serious injury is inconsistent, both between and within offences:

- The maximum custodial sentence for an impaired careless driver who causes a fatal crash is nine years longer than that of a sober careless driver. But if the crash is not fatal, then the increase in possible prison sentence is only six months.
- The maximum penalty for a death caused by an impaired drink driver is 28 times that for drink driving, including when it results in a serious injury.
- For dangerous drivers, it is seven times more for causing a death than the basic offence, and 2.4 times that when a serious injury drink driver, ten times that for dangerous driving.
- And whilst careless sober drivers who cause serious injuries are not at risk of any custodial sentence, if the injury proves fatal, then a custodial sentence is possible with a maximum limit of five years.

## About RoadPeace

RoadPeace, the national charity for road crash victims, has been helping the families cope with the aftermath of road death and injury since 1992. We provide emotional support and information to help the bereaved and injured understand and navigate the justice system.

Our support does not stop there. We campaign for an end to the belief that crashes are accidents and casualties are inevitable. Crashes are preventable, especially those involving criminality.

RoadPeace's Justice Campaign calls for

- improved investigations
- effective inquests
- appropriate prosecution and sentencing
- fair and timely civil compensation
- rights for crash victims
- traffic law enforcement that reduces road danger

RoadPeace monitors the justice system's response to road traffic crime. In 2017, RoadPeace published two key reports:

[Lawless Roads: road policing, casualties and driving offences since 2010, England and Wales](#)

[Road Death Investigation: Overlooked and Underfunded](#) (the first national review of road death investigation in Britain)

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