Taking ‘Causing Serious Injury by Dangerous Driving’ Seriously

Sally Cunningham*

Introduction

In May 2011, when the then Transport Secretary Philip Hammond announced the coalition Government’s new “Strategic Framework for Road Safety”,¹ the focus was on introducing fixed penalty notices for careless driving.² He said: “Our central focus will be on supporting road users who have weak driving skills or who display a lapse of judgement to improve their driving, while focusing enforcement resources against those who deliberately decide to undertake antisocial and dangerous driving behaviour.”³ Leaving apart the question of quite how fixed penalty notices are supposed to help offenders improve their driving,⁴ the Framework contains no specific recommendations in relation to the more serious offence of dangerous driving. Just under five months later, however, the Ministry of Justice announced that it would be tabling amendments to the Legal Aid, Sentencing and Punishment of Offenders Bill to introduce a new offence of causing serious injury by dangerous driving.⁵

The announcement came three days after a newspaper reported on the case of James Ramsden who was sentenced to two years and nine months’ imprisonment by Judge Stephen Ashurst, Recorder of York, who said his hands were “very much tied” by sentencing guidelines. Ramsden was already disqualified when he drove a stolen car and smashed into another vehicle seriously injuring another driver who spent 11 days in hospital. Prior to the collision Ramsden had driven the wrong way down a one-way system and reached speeds of 109mph, chased by police, who stated that it was a “miracle” that nobody had died. The fact that his sentence was for more than the two year maximum for dangerous driving is explained by the consecutive sentences for three separate offences: one year and eight months for

* Senior Lecturer, University of Leicester. Thanks to Professor CMV Clarkson and two anonymous reviewers for comments on earlier drafts.


⁴ It is also doubtful that such measures will have a deterrent effect on bad driving. In Portugal on-the-spot fines were introduced in 2001. A study attempting to assess the deterrent effect of this along with other policies found that the enactment of the on-the-spot payment policy actually pointed to an increase in reckless driving. See Tavares, Mends and Costa, “The Impact of Deterrence Policies on Reckless Driving: The Case of Portugal” (2008) 14 Eur. J. Crim. Policy Res. 417-429, at 426. The authors conclude that severity factors (the cost of any fine, for example), and certainty factors (i.e. increasing police patrols in order to increase the number of violations detected) must be combined with celerity factors (the time elapsed between the commission of the offence and the application of the penalty) in order to improve deterrence rates.

dangerous driving (having received a four month reduction for his guilty plea); four months for driving while disqualified; and nine months for car theft. However, it seems that this is just one example of cases which have caused sufficient concern to prompt the Government to take action against dangerous drivers.

Whilst the coalition Government may take credit for the new offence, it seems that the catalyst for its creation was the campaign work of Karl Turner, Labour MP for Kingston Upon Hull East. He had introduced a private member’s bill under the ten minute rule in May 2011, the purpose of which had been to increase the maximum sentence for dangerous driving from two to seven years’ imprisonment in order to cater for cases involving particularly severe aggravating factors such as the causing of serious injury, and which had been received sympathetically by members of parliament. Additionally, before the last election, the Labour Government had already decided that it would increase the maximum penalty for dangerous driving to five years’ imprisonment, as announced by Claire Ward, the then Under-Secretary of State for Justice on 7th January 2010.

It appears, then, that all parties will be able to take credit for the new offence. The question that arises, however, is whether any credit is due. The proposal was certainly welcomed by a number of bodies, including RoSPA and Brake. Was the creation of such an offence justifiable, given the plethora of new criminal offences introduced in recent years, not least in relation to driving?

The offence

The Bill was amended in Public Bill Committee on 13th October to insert the following provision into the Road Traffic Act 1988:

“1A Causing serious injury by dangerous driving

(1) A person who causes serious injury to another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

(2) In this section “serious injury” means—

(a) in England and Wales, physical harm which amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861, and

6 The Telegraph, “Judge hits out at sentencing rules as he jails car thief” 4th October 2011
7 Although Mr Turner was not the first to make such a proposal; previously David Burrowes, Conservative MP for Enfield, Southgate had proposed similar amendments in 2006.
8 Dangerous Driving (Maximum Sentence) Bill (Bill No.190), withdrawn at second reading in October 2011.
9 See Karl Turner MP, “Comment: A small change to the law will have a big impact on justice”, 12 July 2011 at: http://www.politics.co.uk/comment-analysis/2011/07/12/comment-a-small-change-to-the-law-will-have-a.
10 Although when Karl Turner’s Bill was discussed in the Commons Mr Crispin Blunt, Parliamentary Under-Secretary of State for Justice suggested that the Government “do not want to pursue a pattern of constantly tinkering with legislation if we can possibly avoid it, so we must consider other possible solutions if they are available”: Hansard HC Deb, 22 June 2011, col.140.
13 The Road Safety Act 2006 created new offences of causing death by careless driving and causing death by driving whilst uninsured, disqualified or unlicensed, which came into force in August 2008.
(b) in Scotland, severe physical injury."\(^{14}\)

The offence is triable either way; section 1A(5) amends Part 1 of Schedule 2 of the Road Traffic Offenders Act 1988 to the effect that the maximum penalty is 12 months if tried summarily and five years if tried on indictment. Although the clause is the only one not to be mentioned in the Explanatory Notes to the Bill, the objective of the new offence is expressed elsewhere as being “to address and close the gap in sentencing by enabling the courts to reflect the consequences of dangerous driving in a targeted manner”\(^{15}\). The gap to which this refers is that between dangerous driving and causing death thereby, the latter offence carrying a maximum penalty of fourteen years’ imprisonment.

This is a constructive offence in much the same vein as causing death by dangerous driving: it requires that D drove dangerously, and was involved in a collision resulting in serious injury to another party. No further mens rea or fault element is required relating to the causing of injury than the underlying conduct crime of dangerous driving, which is defined by section 2A of the Road Traffic Act 1988:

a person is to be regarded as driving dangerously if:

(a) the way he drives falls far below what would be expected of a competent and careful driver, and

(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

“Dangerous” in this context refers to a danger of injury to any person or of serious damage to property.\(^{16}\) Thus, as with causing death by dangerous driving, there is a lack of correspondence between the underlying offence, requiring an objective risk of injury, and the constructive offence, requiring that serious injury be caused. That in itself is not unusual within the criminal law, particularly when one looks at non-fatal offences against the person such as s.20 inflicting grievous bodily harm. Indeed, it is noteworthy that although the new offence attempts to employ modern terminology in requiring “serious injury”, that term is to be defined in the same way as grievous bodily harm under sections 20 and 18 of the Offences Against the Person Act 1861. Reference to the parliamentary committee debate reveals that modernisation of the law in this area is very much part of the law reform agenda, since the change is welcomed on the basis that it will “allow the Government to give serious consideration to ongoing work by the Law Commission, which is in the process of reviewing the law of offences against the person and which will produce—in a year or so or perhaps slightly longer—a report on modernising the law of offences against the person. …. Perhaps unintentionally, the Government have opened the door to, and assisted the work of, the Law

\(^{14}\) Legal Aid, Sentencing and Punishment of Offenders Bill, Clause 129. At the time of writing the Bill was still at Committee Stage in the House of Lords. It has been presumed that by the time of publication the clause will have been passed with little or no amendment.


\(^{16}\) Road Traffic Act 1988, s.2A(3).
Commission, which I hope will yield fruit in modernising the law of violence against the person.”17

With that in mind, however, it is somewhat disappointing that the offence makes reference to “grievous bodily harm” at all. Far better, surely, to attempt to define “serious injury” in some other way, independent of the current law on violent offences. That might, however, pre-empt any redefinition by the Law Commission and result in a future dissonance between “serious injury” in a case of dangerous driving and “serious injury” in a case of violence against the person. Currently, “grievous bodily harm” (GBH) means no more than “serious bodily harm” in any case,18 although the Crown Prosecution Service (CPS) has drawn up guidance on what might amount to this. Examples of what would usually be included within the meaning of GBH are:

- injury resulting in permanent disability or permanent loss of sensory function;
- injury which results in more than minor permanent, visible disfigurement; broken or displaced limbs or bones, including fractured skull;
- compound fractures, broken cheek bone, jaw, ribs, etc;
- injuries which cause substantial loss of blood, usually necessitating a transfusion;
- injuries resulting in lengthy treatment or incapacity;
- psychiatric injury. As with assault occasioning actual bodily harm, appropriate expert evidence is essential to prove the injury.19

Given the lack of precision in the meaning of GBH, concerns have been voiced over the definition of serious injury in the new offence.20 What alternatives might there have been to defining “serious injury” by reference to the current law on violent offences? The Government collects data on KSI (Killed and Serious Injury) collisions as part of its road safety agenda; the definition of “serious injury” within the statistics for Road Casualties in Great Britain is:

An injury for which a person is detained in hospital as an “in-patient”, or any of the following injuries whether or not they are detained in hospital: fractures, concussion, internal injuries, crushings, burns (excluding friction burns), severe cuts, severe general shock requiring medical treatment and injuries causing death 30 or more days after the accident.21

Arguably this definition has a lower threshold than the CPS guidance on GBH, given that it is conceivable that someone might be detained in hospital without suffering one of the injuries

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17 Mr Robert Buckland (MP for South Swindon) (Con), Hansard, Legal Aid, Sentencing and Punishment of Offenders Bill Deb 13 October, 2011, col.820.
It should also be noted that if someone were to die 30 or more days after a collision caused by dangerous driving, the offence of causing death by dangerous driving would be appropriate. Whilst medical evidence may often be adduced in dangerous driving trials in order to support aggravating factors in sentencing, it is foreseeable that cases under the new offence will involve far more legal argumentation as to the existence or otherwise of “serious injury”, with the potential of lengthening trials and increasing costs. But even before a case comes to trial the definition of “serious injury” might cause problems and lead to disparity in prosecutorial decision-making. It is already the case that the decision to charge either dangerous driving or careless driving engages the discretion of prosecutors to a high degree, in deciding whether the offender’s driving fell “far below” the standard of a competent and careful driver, or merely “below” that standard. The addition of the possibility of a more serious charge in cases resulting in injury, depending on whether that injury is to be classified as “serious” or not, will undoubtedly create yet another “grey” area in the law, increasing the potential for disparity in decision-making. Doubtless it is preferable to keep the involvement of “value” judgments to a minimum in order to maximise consistency in decision-making in such cases.

It is worth noting that this offence does not expand the reach of the criminal law in that it does not criminalise any additional offenders. Anyone who drives dangerously prior to the coming into force of this offence is liable for dangerous driving. The key perceived benefit of the offence, as itemised in the Impact Assessment prepared by the Ministry of Justice, is to allow courts access to greater sentencing powers to reflect the more serious consequences of a driver’s actions, where those consequences are serious but fall short of death: “Victims who face life-changing injuries as a result of dangerous driving, their families, and society may feel better served by the level of punishment delivered by the [Criminal Justice System]”. Although it seems that there were no plans for the offence when the Department for Transport’s Strategic Framework for Road Safety was published earlier in the year, it is arguable that such an offence would not appear in such a publication, given that the Government concedes that the evidence of whether such an offence would enhance road safety by deterring dangerous driving is equivocal, at best. This is, then, primarily about sentencing and thus issues of proportionality in sentencing must be addressed.

**Sentencing**

The Government states that “our best estimate is that there will be an upward pressure of around 20 prison and probation places, which would result in a small impact of around £1m”. It is not at all clear how this “best estimate” was arrived at, and could be nothing more than plucking a figure out of thin air. There were 22,660 people seriously injured on the

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23 Impact Assessment No: MOJ111, n.15 above, p 2.
24 Ibid.
25 Ibid.
road in Great Britain in 2010 and 3,939 convictions for dangerous driving in England and Wales in 2009/10. Anecdotal evidence suggests that offences such as dangerous driving are unlikely to result in prosecution unless a collision results, and in only those cases that are serious will resources be likely to be spent carrying out a sufficiently detailed investigation to provide evidence to support a court case (the exception being dangerous driving occurring when D is being pursued by the police). This might suggest that the Government has provided a gross underestimate for what is a triable either-way offence. The statistics do not specify which particular offences lead to imprisonment, but of 1,435 offenders sentenced for motoring offences in the magistrates’ court in 2009, 215 received immediate custody. In the Crown Court, 1,100 motoring offenders received immediate custody in 2009, of a total of 2,278 sentenced. If, on the other hand, the Government’s estimated figure of 20 additional prison places is correct, one is left wondering whether such small numbers truly warrant the creation of a new offence.

It is already the case that, as an aggravating factor in sentencing, serious injury resulting from dangerous driving will normally lead to a custodial sentence. In the case of Stokes the defendant, who was running late, had driven through the red light of a pelican crossing and collided with two nine-year-old pedestrians, who suffered serious injuries. D accepted that he was guilty of careless driving, but contested the charge of dangerous driving on the basis that his driving had not fallen far below the standard of a competent and careful driver. He was convicted at the Crown Court and sentenced to twelve months’ imprisonment. D was previously of good character and had a clean licence. The Court of Appeal noted that there were no aggravating factors with regards to D’s driving, and that it was a single piece of bad driving. Nevertheless, the judge had been entitled to take into account the consequences of the bad driving, which were lucky not to have been fatal. However, because the criminality of the driving was “very much at the bottom end of the scale”, D’s sentence was quashed and replaced with a sentence of eight months’ imprisonment. Research by Pearce gives some indication of the sorts of sentences dangerous driving offenders can expect to receive. In a

28 The current edition of Sweet and Maxwell’s Current Sentencing Practice (2010) lists 13 cases in the category of “Reckless or Dangerous driving” (B12-1.3A). Of these, four resulted in serious injury; one caused an injury short of serious injury; five involved a chase by police; there were two assaults on traffic wardens using a car; and one case of road rage. Spencer and Brajeux note that the fact that someone has been injured is likely to be the reason why they are prosecuted for an ‘incidental’ offence such as dangerous driving: Spencer, J. and Brajeux, M.-A., “Criminal Liability for Negligence – A Lesson From Across the Channel?” (2010) 59 I.C.L.Q. 1-24 at 3.
29 This compares to 608 sentences of immediate custody (of a total of 2,595 sentenced for motoring offences) in 1999. See Ministry of Justice, Sentencing Statistics, England and Wales 2009, Table 1b.
30 Interestingly, whilst the number of motoring offenders in the magistrates’ court has decreased substantially, the number in the Crown Court has increased from a total of 1,604 motoring offenders in 1999, although the number of custodial sentences has stayed almost the same (1023 in 1999). Ibid, Table 1c. Available at http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/publications/sentencingannual.htm.
questionnaire of convicted offenders fifteen per cent received a prison sentence and two per cent a suspended sentence.\textsuperscript{33}

The alternative to creating a new offence would have been to increase the maximum penalty for dangerous driving. In Karl Turner’s Bill, the proposed sentence was a maximum of seven years’ imprisonment. This would arguably have been going too far: after all, the maximum penalty for s.20 inflicting grievous bodily harm, which can be seen as a more serious offence on the basis that it requires foresight of harm, only carries a maximum penalty of five years’ imprisonment. If proportionality in sentencing is something that the criminal justice system strives to implement, an offence which requires only negligence in relation to causing injury warrants a lesser, or at least certainly not a more severe, sentence than one that can only be committed with cognitive \textit{mens rea} present. Thus, the Government considered whether rather than creating a new offence it ought to raise the sentence for dangerous driving to five years’ imprisonment across the board. This would allow for a variety of aggravating factors, including but not limited to the causing of serious injury, to aggravate an offence to the extent that a sentence beyond the current two year maximum could be imposed. This option was estimated to require an increase of 230 prison places\textsuperscript{34} on the basis that it would lead courts to drag up sentences across the whole spectrum of dangerous driving cases as courts would perceive the offence as having increased in seriousness.\textsuperscript{35} The Government rejected this option on the basis that a more targeted approach to offences resulting in serious injury was preferred.\textsuperscript{36} The effect of this, of course, is to emphasise the role of luck in criminal liability.

\textbf{Where should the focus lie: Results or the Standard of Driving?}

The causing of serious injury is already an aggravating factor in sentencing under the current law.\textsuperscript{37} The question is whether such consequences are sufficiently pertinent in assessing D’s blameworthiness not only to warrant a higher sentence than would otherwise have been applied, but to ensure a higher sentence than in cases where such consequences are absent,\textsuperscript{38} in addition to a separate offence label. There were some Members of Parliament who were of the opinion that the option to increase the maximum penalty across the board would have been preferable, on the basis that:

\begin{quote}
[T]he mischief we all seek to cure is better addressed with an extension of the existing sentencing powers from two to five years. … There are many instances of such appalling driving, where it is a miracle that nobody was injured. We can all think of examples where red lights were jumped, corners taken at great speed and so on. My fear is that we
\end{quote}

\textsuperscript{34} Impact Assessment, n.15 above, p.3.
\textsuperscript{35} Ibid, p.6.
\textsuperscript{36} Ibid. In Committee it was suggested by one member of the Conservative Party, however, that the penalty for dangerous driving itself might warrant an increase in sentence “at some future point”: Mr Buckland, \textit{Hansard}, Legal Aid, Sentencing and Punishment of Offenders Bill Deb 13 October 2011, col.819.
\textsuperscript{37} See Stokes above n.31.
\textsuperscript{38} Given the higher maximum penalty than that available currently for dangerous driving, sentences are likely to be proportionately higher than similar cases where no serious injury is caused. However, the five years is a \textit{maximum} penalty, something seemingly forgotten by some of the MPs commenting on the Bill (see, for example, Mr David Burrowes, \textit{Hansard}, HC Deb, 2 Nov 2011, col.1051).
will not cure those mischiefs by simply recognising, quite properly, that the existing powers of sentence do not cover those examples where serious injury has taken place.\textsuperscript{39}

Mr Blunt recognised but rejected such arguments:

Some people maintain that the courts should focus on the standard of the driving rather than the consequences. They say that whether death or serious injuries result from a piece of bad driving is a matter of chance, however serious the result. I appreciate that argument, but only to a degree. While it is certainly true that the standard of driving must be the most important factor in judging culpability, the Government believe it important to ensure that we strike a balance between the level of criminal fault on the part of dangerous drivers and the consequences of that criminal fault for the victim. We believe that the maximum sentence of five years for the new offence will give the courts the ability better to address that balance\textsuperscript{40}

Mr Buckland responded:

The Minister was right to say that one of the factors paramount in the minds of the legislation’s authors was the course of driving itself, and that there was for a long period a school of thought that the consequences were of secondary importance. We have moved away from that approach. I have noticed in the past 15 or 20 years a move by the Court of Appeal away from just focusing on the driving, and an increasing emphasis on the consequences. That is why I welcome this provision—because it deals with consequences.\textsuperscript{41}

It is true that the Court of Appeal has indeed increased its emphasis on the consequences of bad driving, which can be seen not only in relation to dangerous driving in cases such as Stokes, but also careless driving. The case of Simmonds\textsuperscript{42} overruled Krawec,\textsuperscript{43} allowing courts to take the consequence of death into account when sentencing for careless driving. There is, of course, now a specific offence to allow for a custodial sentence in cases of causing death by careless driving, but it should also be noted that the Court of Appeal, in making the change in Simmonds, did so as a reaction to a “new” statutory scheme where causing death by driving was, at the time, punishable by a maximum of 10 years’ imprisonment.\textsuperscript{44}

If the courts are to take their lead from Parliament, it is for Parliament to decide whether consequences falling short of death are now sufficiently aggravating to lead to conviction for a separate offence to the standard dangerous driving offence. The question of whether moral luck should be allowed to affect criminal liability is one on which legal philosophers have been unable to agree.\textsuperscript{45} As noted by Willett: “it is often a matter of chance whether the

\textsuperscript{39} Anna Soubry, \textit{Hansard} Legal Aid, Sentencing and Punishment of Offenders Bill Deb 13 October, 2011, col.818.
\textsuperscript{40} \textit{Hansard} Legal Aid, Sentencing and Punishment of Offenders Bill Deb 13 October, 2011, col.816-817.
\textsuperscript{41} Ibid, col. 819.
\textsuperscript{42} [1999] 2 Cr. App. R. 18
\textsuperscript{44} This was raised to 14 years by the Criminal Justice Act 2003.
damage done is great or not. It is … frequently the skill of other drivers or the alertness of the police that prevents more serious consequences”. However, given that we do allow for “chance” or “outcome luck” to influence the liability of drivers in cases of fatal collisions, it could be argued that consistency would require it to be taken into account in collisions resulting in injuries falling short of death. After all, improvements in medical care and technology over time mean that many collisions which in the past could have been fatal no longer lead to death if the victim is fortunate enough to receive the necessary care.

However, the previous Government justified the creation of the new offence of causing death by dangerous driving partly on the basis that: “The broad framework of the law can justifiably hold drivers to account for the consequences of their actions, …, as well as the criminality of the actions themselves, and fatal consequences are uniquely dreadful”. Is it now justified for the current Government to go one step further in extending the law to take account, at offence level, of consequences not “uniquely dreadful” but rather “life changing”? It has long been recognised that the nature of the harm of death is so final and unique that the criminal law operates in an entirely different way in deciding whether to allocate responsibility for its cause. This might explain why, despite the central role that luck plays in such cases, offences of causing death by dangerous and careless driving have been created. However, such offences can be criticised on the basis that they breach the principle of correspondence, since D is held liable for a result which fails to feature in the fault element of the offence which requires, in the case of dangerous driving, only that D drove far below the standard of the competent and careful driver and in so doing created a risk of injury to other road users. It could be argued, then, that leaving aside the “unique” nature of death as a harm justifying the causing death offences, causing serious injury by dangerous driving is in fact more justifiable as a result crime on the basis that it does not offend against the principle of correspondence to the same degree.

**Offence options**

If it is conceded that it is appropriate that drivers be punished for the results of their actions, rather than merely the risks that they take with the standard of their driving, there seems to be a number of options open to any legislature. The British parliament has, with the Legal Aid, Sentencing and Punishment of Offenders Bill chosen a sliding scale of offences. Where D drives dangerously but fortunately either escapes causing a collision or causes a collision where only damage or slight injury result, D is labelled according to his or her conduct and sentenced to a maximum of two years’ imprisonment. Where, on the other hand, D

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unfortunately causes a collision resulting in injury that is assessed to be “serious”, D will be liable to be labelled as a causer of such injury and sentenced to a maximum of five years’ imprisonment. Finally, should D’s driving cause a fatal collision, D will be labelled as a causer of death and sentenced to a maximum of 14 years’ imprisonment.

An alternative way to take results into account to a certain extent, but to keep down the number of driving offences in existence, is to go the way of jurisdictions such as Northern Ireland or Queensland, Australia, and provide a general endangerment offence to cover bad driving, but provide a higher maximum penalty for those who cause GBH or death. In Northern Ireland the offence of causing death or serious injury by dangerous driving carries a maximum penalty of 14 years’ imprisonment.\(^{51}\) In Queensland the offence of dangerous operation of a vehicle carries a maximum penalty of 10 years’ imprisonment where D causes death or GBH where none of the listed aggravating factors apply, or 14 years imprisonments where the offence is aggravated by D having been intoxicated, excessively speeding or taking part in an unlawful race.\(^{52}\) Here, then, although the results of the crime are recognised, the focus remains on the standard of driving.\(^{53}\)

At the other end of the spectrum is Minnesota which, whilst having one offence label of Vehicular Homicide and Injury, provides four different penalties according to the severity of the harm caused by driving in a grossly negligent manner, or in a negligent manner aggravated by such features as drink or drugs.\(^{54}\) A maximum penalty of ten years’ imprisonment applies when death is caused. For injury falling short of death, the maximum penalties available are: five years’ imprisonment for causing “great bodily harm”; three years’ imprisonment for causing “substantial bodily harm”; one year imprisonment for causing “bodily harm”.\(^{55}\) Here, then, the focus is on the degree of harm caused rather than the standard of driving. It should be noted, however, that Minnesota’s sentencing grid system, reducing and almost removing the discretion of sentencing judges, can explain the need for such offence specificity.

Prior to the enactment of the 2011 Bill, England and Wales singled out death as the one result that warranted special treatment with the existence of a special dangerous driving offence. This was the case, despite the killing of another human being by gross negligence already being an offence under common law manslaughter. Conversely, it has never been an offence to cause injury short of death, no matter how serious, through negligent means in the absence of some form of \textit{mens rea}. Off the roads anyone who fails in his or her duty to another person and causes GBH thereby may be liable to damages in tort but would only face criminal charges relating to the underlying duty of care.\(^{56}\) Death, then, has always carried with it some

\(^{51}\) Article 9 of the Road Traffic (Northern Ireland) Order 1995.
\(^{52}\) Queensland Criminal Code 1899, s.328A(4).
\(^{53}\) Such offence structure, with the same offence label but different penalties for cases aggravated by their results, can also be seen in this country with, for example, s.12A Theft Act 1968 (aggravated vehicle-taking where the maximum penalty is two years or 14 years, depending on whether the result is injury/damage to property or death) and s.3 Dangerous Dogs Act 1991 (where s.3(4) provides a higher maximum penalty where injury results).
\(^{54}\) Minnesota Statutes 2009, §609.21.
\(^{55}\) Ibid.
\(^{56}\) For example, health and safety offences or child neglect.
uniqueness as a harm, supposedly justifying the imposition of criminal punishment in the absence of cognitive risk-taking. Having introduced a specific result crime of negligence to driving scenarios, might it be that, for consistency’s sake, we ought to see new offences cropping up in other contexts such as Corporate GBH or causing or allowing serious injury to a child or vulnerable person? The idea that the uniqueness of the harm of death justifies more serious offences where the harm is partly attributable to the role luck plays appears to have been undermined by the creation of the new driving offence. Where might this lead?

It is worth considering how the new offence fits into the CPS’s range of options for prosecuting driving cases overall. In a case of a road traffic collision resulting in injury the first question for any prosecutor will be whether the standard of driving warrants prosecution for careless driving or dangerous driving. If it is deemed to be bad enough to amount to careless driving the case will be dealt with in the magistrates’ court and D sentenced to a fine and penalty points. If the standard of driving is that much worse to warrant a charge of dangerous driving, the question then becomes whether the injury is sufficiently severe to warrant a charge with a maximum penalty of five rather than two years’ imprisonment. In many cases, however, it will be clear from the condition of the injured party that serious injury has been caused, and the question then becomes whether D’s driving will be careless or dangerous, the answer to that question determining whether D be subject to a non-custodial sentence or one of five years. One can foresee in the near future calls for a new offence of causing serious injury by careless driving, mirroring the offence of causing death by careless driving introduced by the Road Safety Act 2006 in order to narrow the gap in sentencing between careless and dangerous driving in cases resulting in death. The most difficult of cases will no doubt be those on the cusp of dangerous and careless driving where V has suffered an injury from which he or she may or may not make a full recovery. One does not envy the prosecutor making the charging decision in such cases.

In cases where GBH is caused by driving, it remains open to the CPS to charge s.20 OAPA 1861, but this of course requires proof of cognitive mens rea. That said, although subjective

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57 Responses to the consultation on the review of bad driving offences from the legal profession (with the exception of the CPS) were overwhelmingly opposed to introducing a custodial sentence for careless driving causing injury partly because unlike death, one could not argue this was a special case for saying that the low level of culpability warranted imposition of a custodial sentence: Home Office, _A Summary and Next Steps: The Review of Road Traffic Offences Involving Bad Driving_ (2005), p.7.
58 When the Corporate Manslaughter and Corporate Homicide Bill was discussed by the House of Commons Home Affairs and Work and Pensions Committee, it was considered whether the proposed offence should extend to injuries at work, as well as deaths. It was noted that the Canadian Criminal Code, which provides for corporate liability for both manslaughter and injury, has an individual offence of causing injury by criminal negligence, whereas in England and Wales only manslaughter (and deaths caused by dangerous driving) are based on a negligence standard. It was argued that extending the Bill to non-fatal injuries to create a corporate offence where there was no individual offence would be inequitable. It was decided that injuries should not be added to the Bill as this would risk the Bill losing its clear focus on manslaughter and might delay the introduction of the Bill. However, the committee envisaged that an offence of corporate grievous bodily harm could be added in due course: Home Affairs and Work and Pensions Committee, _Draft Corporate Manslaughter Bill_, (HC 2005-06, 540-1), paras. 75-81.
59 Such suggestions were made by various bodies at the time of the last Review of Bad Driving offences. The CPS supported an increase in penalty for careless driving up to a term of 51 weeks in cases where serious injury was caused (provided the penalty for dangerous driving were increased to a maximum of five years’ imprisonment). ACPO thought that serious injuries should have been included within the scope of the new causing death by careless driving offence. Home Office, above n.57, pp.21; 27.
recklessness must be proved it is worth remembering that all that D must have foreseen in such cases is some harm, rather than GBH.\textsuperscript{60} Thus, it is entirely appropriate in a case where D has driven dangerously to the degree that D realised that injury could be caused to passengers or other road users, to charge s.20 in addition to dangerous driving, thereby increasing the maximum penalty available to the court to five years’ imprisonment. This was the approach taken in \textit{Stranney},\textsuperscript{61} confirming \textit{Bain}.\textsuperscript{62} A recent example of the employment of s.20 in driving cases is that of Lee Anthony Bradley, who pleaded guilty to one count of attempting to cause GBH with intent and two counts of s.20 after he drove along the pavement into a group of club-goers in Rochdale and was sentenced to an indeterminate sentence of imprisonment for public protection with a minimum of six years.\textsuperscript{63} With a new offence which also carries a maximum penalty of five years’ imprisonment, there is less incentive to prosecute a driver for the more difficult to prove s.20 now. In addition, there still exists the offence of wanton and furious driving under s.35 OAPA 1861, requiring the causing of bodily harm and carrying a maximum of two years’ imprisonment. However, this offence is reserved in practice for those offences where dangerous driving cannot be prosecuted due to the fact that the driving took place other than on a road or other public place.\textsuperscript{64}

\textbf{Conclusion}

The creation of the offence of causing serious injury by dangerous driving does not feature within the Government’s road safety strategy and appears to have no ambition to increase the safety on Britain’s roads. However, the very raison d’être of driving offences is surely utilitarian in nature in punishing those whose standard of driving fails to live up to that which we expect of citizens permitted to take the lives of others in their hands in being granted a driving licence. Driving offences, with the exception of the causing death offences have, until now, been conduct crimes, criminalizing the creation of risks of harm and independent of the need to prove the materialisation of any harm. The creation of a result crime for harms falling short of death paves the way for further offences in the same vein, whether that be an offence of causing serious injury by careless driving or offences penalising the causing of serious injury by other negligent means. This is, then, a big step for the legislature to take. Professor Spencer and Marie-Aimée Brajeux have argued, even before the creation of the new causing serious offence, that the English law of aggravated endangerment offences is “unsatisfactory because it is so complex, arbitrary and muddled”.\textsuperscript{65} Their suggestion, providing food for thought, is that we ought to borrow from the French and replace the various causing death by driving offences and suchlike with general offences of negligent homicide and negligent

\textsuperscript{60} Savage; Parmenter [1992] 1 A.C. 699.
\textsuperscript{61} [2008] 1 Cr. App. R. (S.) 104.
\textsuperscript{63} Independent, “Man who drove into clubbers jailed” 20 May 2011.
\textsuperscript{64} Crown Prosecution Service, \textit{Policy for Prosecuting Cases of Bad Driving}, (2007). However, one recent example of the offence being charged in relation to injury caused on the public road is Norman [2007] EWCA Crim 624 in which the appellant had pleaded guilty to s.35 on the basis of wilful neglect rather than “wanton and furious” driving and was sentenced to 51 weeks’ imprisonment suspended for 12 months coupled with a supervision order, quashed on appeal and replaced by a 12 month community rehabilitation order.
\textsuperscript{65} Above, n.28, at 6.
injury, which would give the law “a degree of coherence that it clearly lacks at present”.66 Instead, the Government have added to the incoherence with yet another aggravated endangerment offence.

Arguably the new offence does fit in with the Government’s road safety strategy, albeit in a misguided fashion. The Government seems keen to follow a “them and us” agenda in relation to road safety. Those drivers that make the odd error of judgment are to undergo educative treatment, since they are normal, law-abiding citizens who occasionally slip-up behind the wheel. Those criminals who choose to violate the rules of the road, maiming or killing others, on the other hand, deserve considerable time behind bars.67 But what this fails to recognise is that the current law on dangerous and careless driving does not distinguish between drivers based on their attitude, but on a sliding scale of how far below a particular standard the driver fell. Some otherwise law-abiding people will find themselves facing considerable prison sentences, as they already do under the causing death offences.68 The danger is, though, that the new offence will undermine the utilitarian function of the conduct crime of dangerous driving, which is likely to become rarely used, diminishing the strength of the message being conveyed that risking people’s safety and lives by driving badly is something that deserves censure and warrants deterring.

66 Ibid, at 21. However, at 24 a word of warning is offered in relation to sentencing. Spencer and Brajeux note that French attitudes are far less punitive than those in England, and that we should pause before introducing general crimes of negligence because of this fact and the likely consequences for the prison population if they were introduced.
67 See the text to n.3 above.
68 Padfield notes that of 13 sentencing cases relating to causing death by careless driving handed down by the Court of Appeal since 2009, “most of these offenders have a clean record, impeccable character, and show real remorse”: Padfield, N. “Time to Bury the Custody ‘Threshold’?” [20011] Crim LR 593 at 607.