Background

With the Government having now announced a review of road traffic offences and sentencing, Prof Allsopp asked how CTC would propose to reform the former. He noted, entirely correctly, that there is a long history of well-intentioned but unsuccessful attempts to create a workable legal framework, notably the North Review in the late 1980s, to which Prof Allop had himself provided input.

The problem is that driving offences create a unique legislative problem, since driving is the one activity routinely undertaken by essentially decent law-abiding citizens, which nonetheless carries a significant risk of killing or maiming a fellow citizen. There is no other activity quite like this.

Hence there is huge and understandable reluctance on the part of everyone involved in the criminal justice system – police, prosecutors, magistrates, judges, juries, many of whom are themselves drivers – to come down hard on fellow drivers for offences arising from "momentary lapses" which they could easily imagine committing themselves ("there but for the grace of God go I").

Yet this reluctance to tackle bad driving both reflects and reinforces the perception that road danger is "just one of those things", not a serious crime, and that those who use the roads as vulnerable road users (notably pedestrians and cyclists, but including children) had better beware of the risks they are taking.

This societal failure to accept the need to pay full attention when driving, and to avoid endangering others, creates a situation which disproportionately undermines pedestrians' and cyclists' safety. International comparisons show that Britain has a very good overall road safety record, but a relatively poor one in terms of the safety of pedestrians, cyclists and children. We tentatively suggest that the hostility in the UK to proposals for "presumed liability" laws (whereby drivers would be presumed to be liable for injury damages suffered by pedestrians or cyclists they collide with, unless they could show that victim was culpably at fault) are indicative of a peculiarly high cultural reluctance in Britain to acknowledge the degree of responsibilities which drivers have for the safety of more vulnerable road users.

Sentencing framework

How do we tackle this? Well, the aim needs to be a framework of offences and sentences which sends clearer signals about drivers' responsibilities to drive safely, while gaining a level of acceptance that previous reforms have failed to achieve, from everyone involved in the legal system, notably juries.

Firstly let me set how CTC feels that sentencing policy (i.e. the final step in the road justice process) could reflect this balance. In outline, CTC believes that:

- The sentencing framework should make much greater use of substantial driving bans for offences which have caused serious harm (or which had the potential to do so), where the driving was not obviously 'reckless' or 'dangerous' in terms of the drivers intentions or state of mind.
- Long prison sentences should, by contrast, be reserved for offenders who have evidently driven with dangerous or reckless intent, or who have a history of past offences – including those who have breached past driving bans.

We note that both limbs of this outline proposal can be justified in terms of public protection. Drivers in the first category may not be 'dangerous people' in terms of their attitudes, hence there is no reason to assume they need to be locked up for public protection. Nonetheless,

they have demonstrated that they are capable of causing serious danger, hence it is entirely justifiable to prevent them from driving for a substantial period – on public protection grounds – and to require that they demonstrate rigorously that they have become safe drivers before allowing them to resume driving. Prison is necessary though for those in the second category, as their behaviour demonstrates that a driving ban may not offer adequate public protection to prevent them causing further danger.

Offences framework: historic problems

So the next question is how to create an framework of offences which paves the way for these sentencing principles to apply at the final stage of the judicial process.

Intuitively, one would start with the framework which applied prior to the 1991 Road Traffic Act, by distinguishing between what were known as "careless" and "reckless" driving. The latter was more culpable as the driver was more obviously displaying a wilful disregard of their duty of care for others.

The problem with this was that prosecutors encountered persistent difficulties in proving beyond reasonable doubt that the accused driver had been in a reckless state of mind ('mens rea'). Drivers' legal teams were routinely able to secure lenient sentences for their clients by casting doubt on the evidence that their client's 'mens rea' amounted to 'recklessness', as opposed to mere 'carelessness'.

In response to this, the North Review proposed an objective framework of offences, to be known as 'dangerous' driving' and 'driving without due care and attention'. The former was defined as falling 'far below' the standard that would be expected of a careful and competent driver, with the definition also requiring that the driving had caused danger (of personal injury or serious property damage) that would be obvious to a competent and careful driver. By contrast, 'Driving without due care and attention' merely falls 'below' the above standard, and does not include the element of causing obviously foreseeable danger.

The North Review did not include an offence of causing death by careless driving – entirely sensibly – on the basis that it was hard to conceive of ways in which a driver could kill through culpably criminal driving in which the danger would NOT have been obvious to a competent and careful driver.

However the courts and juries persisted in acting as if 'driving without due care and attention' meant 'careless' driving, in the common parlance sense of the word. In other words, the attempt to eliminate the unprovable element of 'mens rea' had failed. Driving which had led to someone's death continued to be dismissed as mere 'carelessness', with defence lawyers playing on juror's uncertainties on how to decide whether the standard of their client's driving had fallen 'far below' or just 'below' the standard of a competent and careful driver (and many jurors will doubtless respond by thinking of themselves as fitting the definition of 'competent and careful drivers').

Worse still, if the prosecutors had decided to prosecute merely for a 'careless' driving offence (e.g. if they believed they would be unable to convince a jury that the driving was 'dangerous'), then the maximum sentence was 6 months, actual sentences were typically just a few hundred pounds, while the fact that someone had been killed would often not even be mentioned in court. This caused immense distress to road crash victims.

The subsequent introduction of the offences of causing death by careless driving, and causing serious injury by dangerous driving, are at best well-intentioned but misguided attempts to patch up a dysfunctional legal framework. The fundamental problem was, and still is, that Lord North's intended 'objective' distinction between 'dangerous' and 'careless' driving is not being respected.

Offences framework: possible solutions

Faced with this situation, CTC believes there are broadly 3 solutions whose pros and cons need to be weighed up, in dialogue with police, prosecutors, the judiciary and other legal experts, in order to identify the best route towards the sentencing outcomes outlined above.

- *Option 1: Refine and clarify the intended 'objective' distinction between higher and lower-tier driving offences.*

This could be done by removing the references in the definitions to "below" and "far below" the standard of driving (after all, it isn't measurable, and merely gives defence lawyers a basis for sowing doubt in jurors' minds about convicting for 'dangerous' offences), and redefine the distinction so it rests entirely on whether the driving would have caused danger that would have been obvious to a competent driver who was driving with all due care and attention. Note that this distinction relates to how the person was driving *at the time of the incident*, not to whether they are a 'competent and careful driver' in general terms.
The advantage of this proposal is that, like the current framework, it avoids the difficulties of proving a driver's 'mens rea' beyond reasonable doubt. It is hopefully an improvement though, in that it eliminates a different subjective element (namely whether the driving was 'below' or 'far below' that of a competent and careful driver'). However it is arguably still at odds with the apparent desire of juries to be able to distinguish between dangerous lapses by fallible yet basically well-meaning drivers (like themselves?) and those guilty of more obviously irresponsible risk-taking.

- *Option 2: Revert to a distinction between 'reckless' and careless', but clarify that the driver's state of mind ('mens rea') can be inferred from the manner of their driving.*

This option would more closely reflect the difference that the public (and hence jurors) seems to want to make, whilst hopefully avoid the pitfalls of proving 'mens rea', as per the legal position prior to the 1991 Road Traffic Act. Legal advice would be needed though on whether this would work in practice.

- *Option 3: Eliminate the distinction between upper and lower tier driving offences, and instead rely on sentencing guidelines to make the necessary distinctions.*

There is a legal precedent for this: the offence of 'theft' covers everything from stealing a sweet from the news agent, to massive heists. It would mean that the jury was deciding merely whether the driving was culpable; deciding the degree of culpability (and hence the severity of the sentence) would be entirely in the hands of the magistrate or judge. The advantage is that it might well prove easier to instil an understanding of new legal and sentencing principles among magistrates and judges, than among the wider public (and hence juries). On the other hand, if juries felt they had no say in the fate of the driver in front of them, might they be reluctant to convict at all?

Each of these options has pros and cons. It must be acknowledged that legislating for driving offences is inherently difficult (as history has shown) and none of the above is obviously *the* right answer. CTC will be urging the Ministry of Justice to begin deliberations on reforming this area of the law as soon as possible, but to make the process as open and participatory as possible, allowing plenty of scope for dialogue between different players and interested parties. Given the past

history, and the importance of traffic law to road safety (and particularly to the safety of the most vulnerable road user groups), it is vital to try and get it right this time.

Further information can be found in CTC's overview briefing on traffic law and enforcement, and a more detailed briefing on the legal framework and sentencing. Other CTC briefings relating to traffic law and enforcement are accessible via http://www.roadjustice.org.uk/information/legal, other safety-related briefings are at https://www.ctc.org.uk/campaign_policies/category/818, while the full set of CTC campaigns briefings is at www.ctc.org.uk/campaignsbriefings.