

## **Paper by His Honour Judge McFarland**

1. The road traffic provisions contained in the Criminal Justice (NI) Order 2008 can be summarised as follows –

### **Matters primarily relating to Magistrates' Court proceedings**

- New definition for careless and inconsiderate driving (62)\*
- New offence of causing death/gbi by careless or inconsiderate driving (52) \*
- New offence of causing death/gbi by unlicensed, disqualified or uninsured driving (53) \*
- Increase of penalty for uninsured driving (55) \*
- Increase of penalty for failure to stop (57) \*
- Power to require specimens of breath at roadside or hospital (59) \*
- Provision to allow disqualification from driving after conviction for any criminal offence (91) \*
- Seizure and retention of vehicles causing alarm, distress or annoyance (65 & 66) \*\*

### **Matters relating to Crown Court proceedings**

- Increase of penalty for driving whilst disqualified (on indictment) (56) \*
- Provision for imposition of penalty points for furious driving (58) \*
- Extension of causing death/gbi under the influence offence to include failing to give permission for a laboratory test of blood specimen (63) \*
- Alternative verdict provisions for motor manslaughter (64) \*

## Provisions not yet in force

- Installation of speed assessment equipment, and new offences relating to failure to comply (54)
  - Power to dealing with disqualified drivers by alcohol ignition interlock conditions (60)
2. The provisions marked \* came into force for offences committed on or after 16 July 2008 (Commencement No. 3 Order SR 2008 No. 293 (c16)). The provisions marked \*\* came into force on the 5<sup>th</sup> January 2009 (Commencement No. 4 Order SR 2008 No. 472 (c28))
3. **Article 62.** The new definition for careless and inconsiderate driving adds little to the existing common law interpretation. The new statutory definition is “the way he drives falls below what would be expected of a competent and careful driver”. Lord Goddard CJ in **Simpson –v- Peat [1952] 2 QB 24** stated that a driver “exercising the degree of care and attention which a reasonable prudent driver would exercise” ought not to be convicted of careless driving. The new definition does assist in that it completes the codification of the dangerous/careless driving offences. With dangerous driving evidenced by driving falling far below the standard of a competent and careful driver, the approach to deciding careless driving is now basically the same –
- Determine what would be considered the standard of a competent and careful driver
  - Ask yourself – does the defendant’s driving fall below that standard?

As with dangerous driving you can take into account matters known to the driver at the time, but the test still remains an objective test (see **Milton –v- DPP [2007] 4 All ER 1026**).

4. Before considering the new offences of causing death or grievous bodily injury by careless or inconsiderate, unlicensed, uninsured, or disqualified driving, the following table sets out the offences now covering causing injury or death whilst driving a motor vehicle –

Offence	Maximum penalty
Furious driving causing injury	2 years **
Careless/inconsiderate driving causing death/grievous bodily injury	5 years
Aggravated uninsured, disqualified or unlicensed driving resulting in death/grievous bodily injury	2 years
Taking and Driving Away a vehicle resulting in injury	5 years
Taking and Driving Away a vehicle resulting in Death/grievous bodily injury	14 years
Careless Driving under influence causing death/grievous bodily injury	14 years *
Dangerous driving causing death/grievous bodily injury	14 years *

(\* Serious Offences and \*\* Specified Offence under the Criminal Justice (NI) Order 2008 for offences on or after 15 May 2008)

5. **Article 52.** The new offence of causing death or grievous bodily injury by careless driving can be tried summarily or on indictment.

- As long as there is some causal link, however small, between the death and the driving that is sufficient. The following direction to a jury in a causing death by dangerous driving case was approved in **R –v- Kimsey [1996] Crim LR 35** – You do not have to be sure that the defendant's driving was the principal, or a substantial, cause of the death, as long as you are sure that it is a cause and that there was something more than a slight or trifling link.
- Grievous bodily injury (unique to NI) equates to grievous bodily harm in the OAPA 1861 i.e. really serious bodily injury

- Maximum sentence at petty sessions is 6 months custody and/or fine with obligatory disqualification, and 5 years custody on indictment
- NI authorities suggest that there should be no distinction between death and grievous bodily injury cases. McDermott LJ in **R –v- Sloan [1989] NI 58** stated:  
 “We have no doubt that the local reference to grievous bodily injury as well as death is both rational and sensible. The offence is aimed at really bad driving whether described as dangerous or reckless and the culpability of that driving can rarely be judged simply by regarding the fact that serious injury rather than death is the consequence of the dangerous driving. This is a logical approach because the borderline between serious injury and death is often a fine one - some people survive appalling injury others succumb to a comparatively minor injury. As Lord Taylor said in Attorney-General's Reference [Nos 24 and 45 of 1994] (Rayner and Wing) (1995) 16 Cr.App.R(S) 583 at 586: "Essentially we have to look at the cases in the light of the offender's criminality". Thus it appears to us that it cannot be argued that 'causing death' is the major offence and 'causing grievous bodily injury' is the minor offence and that sentencing should reflect such a distinction.....if Parliament had intended that such a distinction should be drawn it would have created two distinct offences with different penalties attaching to each.”
- The English Sentencing Guidelines Council has issued a Guideline (for sentences after 4 August 2008) suggesting that careless driving should be placed into one of three categories – momentary lapse, driving just short of dangerous, and a middle band. Using these categories the following table is suggested –

<b>Careless/Inconsiderate driving arising from momentary inattention with no aggravating</b>	<b>Other cases of careless/inconsiderate driving</b>	<b>Careless/inconsiderate driving falling not far short of dangerousness</b>
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<b>factors</b>		
<b>Starting Point</b>	<b>Starting Point</b>	<b>Starting Point</b>
Community Order (Medium)	36 weeks	15 months
<b>Sentencing Range</b>	<b>Sentencing Range</b>	<b>Sentencing Range</b>
Community Order (Low) – Community Order (High)	Community Order (High) – 2 years	36 weeks – 3 years

- If this approach is adopted by NI courts, it would appear that the PPS are likely to prosecute the lowest and some middle categories in the Magistrates' Court
- Recognised aggravating factors are –
  - Highly culpable standard of driving at time of offence***
    - (a) the consumption of drugs (including legal medication known to cause drowsiness) or of alcohol (although clearly if the consumption is over the prescribed limit, the offending is likely to be dealt with with the more serious charge);
    - (b) driving while the driver's attention is avoidably distracted, e.g. by reading or by use of a mobile phone (especially if hand-held)
    - (c) driving when knowingly suffering from a medical condition which significantly impairs the offender's driving skills.
    - (d) driving when knowingly deprived of adequate sleep or rest
    - (e) driving a poorly maintained or poorly loaded vehicle, especially where this has been motivated by commercial concerns
  - Driving habitually below acceptable standard***
    - (f) other offences committed at the same time, such as driving without ever having held a licence; driving while disqualified; driving without insurance; driving while a learner without supervision; taking

a vehicle without consent; driving a stolen vehicle;

(g) previous convictions for motoring offences, particularly offences which involve bad driving or the consumption of excessive alcohol before driving

***Outcome of offence***

(h) more than one person killed as a result of the offence (especially if the offender knowingly put more than one person at risk or the occurrence of multiple deaths was foreseeable)

(i) serious injury to one or more victims, in addition to the death(s)

***Irresponsible behaviour at time offence***

(j) behaviour at the time of the offence, such as failing to stop, falsely claiming that one of the victims was responsible for the crash

(k) offence committed while the offender was on bail.

- Recognised mitigating factors are –
  - (a) a good driving record;
  - (b) the absence of previous convictions;
  - (c) a timely plea of guilty;
  - (d) genuine shock or remorse (which may be greater if the victim is either a close relation or a friend);
  - (e) the offender's age (but only in cases where lack of driving experience has contributed to the commission of the offence),
  - (f) the fact that the offender has also been seriously injured as a result of the accident caused by the driving, and
  - (g) rendering of positive assistance at scene of the incident.

6. **Article 53.** The new offence of aggravated unlicensed, uninsured or disqualified driving is similar (but not identical) to the offence of aggravated vehicle taking (Articles 172A and 172B of the Road Traffic (NI ) Order 1981). A different wording with regard to causation of the injury is used – “owing to the driving of the vehicle, an accident occurred by which death/grievous bodily injury was caused to any person” in the 1981 Order, whilst the new offence requires the defendant to have caused the death or grievous bodily injury. The

EWCA in **R –v- Marsh [1997] Crim LR 205** have held that “owing to the driving of the vehicle” in the English statute equivalent to Arts.172A and 172B does not imply any fault in the driving of the car. In the new offence, use of the verb ‘causes’ would clearly require proof of a causal link, but as there is no need to prove that careless, inconsiderate or, indeed, dangerous, driving caused the death/grievous bodily injury, it is uncertain as to what type of driving this wording is intending to cover. If the driving was careless or dangerous, other, more serious, offences would have been committed. The 1981 wording is clear – owing to the driving an accident occurred by which death/grievous bodily harm was caused. The 2008 wording does leave room to doubt. Presumably, it was intended that the criminality is determined by the decision to drive a vehicle without permission, uninsured, as a disqualified or uninsured driver. After that you suffer the consequences of whatever may happen. Sentencing maximums are 6 months at petty sessions and 2 years on indictment. The Sentencing Guidelines Council have suggested the following sentences –

Nature of offence	Starting point	Sentencing Range
<b>Disqualified, or uninsured or unlicensed plus 2 + aggravating factors</b>	12 months	36 weeks – 2 years
<b>Uninsured or unlicensed plus 1 aggravating factor</b>	26 weeks	Community Order (High) – 36 weeks custody
<b>Uninsured or unlicensed</b>	Community Order (Medium)	Community Order (Low) - Community Order (High)

Aggravating and mitigating factors are as set out above (paragraph 5).

7. **Article 55.** The offence of driving without insurance now attracts a custodial sentence of up to 6 months in addition to the Level 5 fine (which had been the previous maximum). It would appear that this offence would be less culpable than driving whilst disqualified as the latter involves an element of contempt of a court order. The amendment clearly reflects growing concern about persistent offenders, and it is suggested that a graduated response is adopted to re-offending.
8. **Article 57.** The level of fines for failing to stop when required by a constable in uniform is increased to Level 5 (vehicle) and Level 3 (cycle), and Level 3 for failing to produce licence etc. (from the previous Level 3 maximum).
9. **Article 59.** There were several amendments to the provisions relating to preliminary breath samples, powers of arrest, and provision of blood, urine and breath specimens inserted by the Road Traffic (NI) Order 2007 from 15 November 2007. Article 59 further refines these provisions and will be dealt with by District Judge McNally.
10. **Articles 65 and 66.** These provisions permit a uniformed police constable to seize a motor vehicle which he suspects is being, or has been, driven carelessly and is causing, or is likely to cause alarm, distress or annoyance to members of the public, although before doing so, he must warn the driver that he will seize the vehicle should the use of the vehicle continue, and he fails to comply with the warning. A new offence of failing to stop when ordered to do so by a constable exercising a power under Article 65 is created, with a Level 3 fine. The regulations made under Art 66 are found at S.I. 2008 No. 495, but no role is given to the courts in respect of any aspect of this matter, although the County Court, or High Court, may have to deal with civil claims arising out of wrongful seizure and disposal of the vehicles.
11. **Article 91.** This allows the imposition of unlimited disqualification from driving for a person convicted of any offence, which actually places the court back in the pre- Road Traffic Offenders (NI) Order 1996 situation which abolished the disqualification provisions for some of the minor road traffic offences. It does, however, now cover all

criminal offences. Article 91(3) provides – “A court shall not make an order under paragraph (1) unless the court has been notified by the Secretary of State that the power to make such orders is exercisable by the court and the notice has not been withdrawn.” It is suggested that this should not be used on a random or punitive basis, but in cases where there is a genuine risk that the use of a vehicle will lead to re-offending. It is however hard to rationalise as a disqualification is really for the protection of the public, and shall normally relate to driving offences. It could be of some relevance if vehicles are used for robberies or abduction in sex cases. It would hardly deter the offender, but would give the police power to arrest if the offender is observed driving a vehicle.