

Causing death by driving offences

Literature review

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1.0 Death by driving: the Scottish landscape

1.1 Framework of offences

In Scotland, 'homicide' is the umbrella term which encapsulates the separate offences¹ of murder and culpable homicide. Through this distinction, a range of circumstances in which a death can be caused is represented. Since the introduction of the Road Traffic Act 1960, causing death by means of a motor vehicle has been treated separately under statutory law, and is now specifically provided for by the UK-wide Road Traffic Act 1988. Despite this, potential still exists for prosecutions to be brought under the common law², but the view in Scotland, supported by *Purcell*³, seems to be that any prosecution under common law, even in the most serious of cases, can only be for culpable homicide and not murder, unless there was a wilful act intended to kill or cause physical injury. A vehicle can, of course, be used as a weapon.⁴

Part one of the Road Traffic Act 1988 contains the relevant offences which pertain to death by driving. The broad offences are:

1. Causing death by dangerous driving⁵
2. Causing death by careless or inconsiderate driving⁶

¹ For a discussion about the extent to which these offences are separate, see Ferguson, P., and Mc Diarmid, C., 2014. *Scots Criminal Law: A Critical Analysis*. Edinburgh: Edinburgh University Press. at 9.21.

² As in *Brodie v HM Advocate*, 1992 S.C.C.R. 487 and *McDowall v HM Advocate*, 1998 J.C. 194, both discussed by Ferguson and McDiarmid., 2014. (n1) at 9.24.1.

³ *HM Advocate v Purcell*, 2008 J.C. 131. *Purcell* confirmed that the wicked recklessness required for murder requires both indifference to the consequences and an act which indicates the accused's intention to cause physical injury. However, this does not sit easily with the outcome in *Petto v HM Advocate* [2009] HCJAC 43 where a murder conviction was returned in the absence of an obvious intention to cause injury. For an extended discussion of the tension between these understandings see McDiarmid, C., 2012. "Something wicked comes this way": the mens rea of murder in Scots Law. *Juridical Review* 283.

⁴ As was the situation in the high profile case of *HM Advocate v Webster*, 2011 unreported. For discussion of the facts of this see, *Webster v HM Advocate*[2013] HCJAC 161. The fact that a vehicle can be used as a weapon to assault a victim was recognised in *Purcell* (at para 5).

⁵ Road Traffic Act 1988, s 1.

⁶ 'Causing death by careless or inconsiderate driving', s 2B.

More specifically, the Act now provides for a range of circumstances which death by careless or inconsiderate driving might occur: driving whilst unlicensed or uninsured⁷ or driving whilst disqualified⁸ or driving under the influence of drink or drugs⁹.

Additionally, there are the related offences of causing serious injury by dangerous driving¹⁰ and causing serious injury by driving when disqualified¹¹.

In criminal law, offences are traditionally understood as being constituted by *actus reus* (an act) and *mens rea* (a mental state). The *actus reus* of all these offences is ultimately the causing of death. Causation as a concept has been the subject of much intellectual discussion amongst criminal lawyers. A simplified understanding may be taken from *MacDonald*¹², where the court set out that the test was twofold: the “but for” test (factual causation), followed by a consideration of proximity (legal causation). If “too remote” then a causal link cannot be established. The establishment of the causal link can be assessed on the basis of foreseeability. This conceptualisation of causation is evident in the court’s assessment of culpability.¹³

The *mens rea* of causing death by dangerous driving here is essentially understood in the same way as the concept of recklessness, reckless having been traditionally been defined under Scots Law as “an utter disregard for the consequences”¹⁴. Section 2A provides that driving is dangerous if it falls below what would be expected of a competent and careful driver and is dangerous. In assessing this, regard will be had to the circumstances and what was within the knowledge of the accused at the time.¹⁵

⁷ S 3ZB, as introduced by the Road Safety Act 2006.

⁸ S 3ZC, as introduced by the Criminal Justice and Courts Act 2015.

⁹ S 3A, as introduced by the Road Traffic Act 1991.

¹⁰ S 1A, as introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹¹ S 3ZD, as introduced by the Criminal Justice and Courts Act 2015.

¹² *McDonald v HM Advocate*, 2007 S.C.C.R. 10.

¹³ See for example, *Sharp v HM Advocate*, 2003 S.C.C.R. 573 where explicit reference is made to what was reasonably foreseeable to the appellant having made the decision to drive towards a friend’s oncoming van.

¹⁴ *Transco PLC v HM Advocate*, 2004 J.C. 29.

¹⁵ S 2A(3).

To recognise carelessness as a *mens rea* for criminal conduct is a departure from the general common law position that negligence alone will not suffice to invoke criminal sanctions.¹⁶ The criminal law's treatment of negligence has been the subject of academic commentary¹⁷, but generally, this is considered to be a lesser form of recklessness, with recklessness sometimes referred to as "gross negligence".¹⁸ In the context of fatal driving offences, older Scottish authority has commented specifically that careless driving should not be regarded as being akin to reckless.¹⁹ The meaning of carelessness is provided for in section 3ZA of the 1988 Act, where it is defined as driving which "falls below what would be expected of a competent and careful driver". Assessment of this shall take into account the "circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused"²⁰ in addition to any inconvenience caused by the driving.²¹ Cunningham discusses the fact that 'carelessness' does not require driving in the sense that it created a risk of harm to anyone. Instead, the pertinent question is about how far below the required standard of driving someone fell.²²

Sections 3ZB, 3ZC and 3A of the Act have been interpreted as strict liability offences, meaning all that is required are the conditions, of not being allowed on the road at the time or intoxication, to be met.²³ This resulted in commentators, such as Cunningham, concluding that the principle of causation had been corrupted by section 3ZB (which she also felt had few redeeming features and was essentially a 'backstop' to section 2B and section 1).²⁴ The Scottish courts have considered this in more detail in *Stewart*.²⁵ Stewart had pled guilty on the basis of legal advice that section 3ZB was a strict liability offence. After a reference by the Scottish Criminal Case Review Commission, the Court of Criminal Appeal agreed that

¹⁶ See Ferguson and McDiarmid., 2014. (n1) at 6.17 for discussion.

¹⁷ Start, F., 2011. Rethinking Recklessness. *Juridical Review* 163.

¹⁸ See Ferguson and McDiarmid., 2014. (n1) at 6.17.

¹⁹ *Sharp v HM Advocate*, 1987 S.C.C.R. 179.

²⁰ S 3ZA(3).

²¹ S 3ZA(4).

²² Cunningham, S.K., 2015. Has law reform policy been driven in the right direction? How the new causing death by driving offences are operating in practice. 9 *Criminal Law Review* 711.

²³ As supported by *R v Williams* [2010] EWCA Crim 2552; [2011] Crim L.R 471.

²⁴ Cunningham., 2015. (n22).

²⁵ *Stewart v HM Advocate*, 2018 S.L.T. 25.

this was an exceptional case and that because of the cyclist's actions in driving into the path of Stewart's vehicle, the appellant's driving had not contributed to the death. The Court of Criminal Appeal confirmed that a driver cannot simply be guilty because they have been involved in a fatal accident.²⁶ Instead, it must be shown that the accused has done something other than simply put their vehicle on the road. It must be proved that there was some minimal contribution to the death, but that this does not need to be the principle cause of death.

1.2 Scottish statistics

The Scottish Government provides a record of the number of people proceeded against and convicted of causing death by dangerous driving, causing death by careless driving when under the influence of drink and drugs and causing death by careless driving through an additional workbook published alongside the Criminal Proceedings in Scotland 2017-18 statistical bulletin. These most recent publicised statistics pertain to the period 2007-8 to 2016-17.²⁷

1.2.1 Proceedings and convictions

For all three offences, the total number of proceedings over this ten year period was 387. The total number of persons convicted was 311.²⁸ This represents an 80 per cent conviction rate. To contextualise these conviction rates, Scottish Government figures for Criminal Proceedings in Scotland, published in 2018, show an average conviction rate (for all crimes and offences) of 87.5 per cent between 2007-08 and 2016-17.²⁹ Therefore, with the exception of convictions for death by careless driving when under the influence of drink or drugs (where the conviction rate is 100 per cent), these rates of conviction appear to be broadly similar to the general population of cases.

²⁶ As per *R v Hughes* [2013] UKSC 56.

²⁷ Scottish Government, 2018. *Causing death by dangerous driving, careless driving and careless driving when under influence of drink/drugs*. Available at: < <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCrimProc/DDCD1617> > [Accessed 28 March 2018].

²⁸ The total for the ten year period is not provided in the Government's publication, but this was calculated from the individual totals provided for each year.

²⁹ Scottish Government, 2018. *Criminal Proceedings in Scotland 2016-17*. Calculated from table 4c. Available at: < <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCrimProc/tab1617CP> > [Accessed 9 March 2018].

More specifically, in relation to death by driving offences, during this ten year period, there were 157 proceedings brought for death by dangerous driving, 143 of which resulted in convictions (91 per cent). Thirteen proceedings were brought over the ten year period for death by careless driving when under the influence of drink or drugs, all of which resulted in conviction, as said. Causing death by careless driving alone was the subject of 217 proceedings over the ten years, (none of which were in the first two years of this recorded period), and of these, 155 resulted in conviction (71 per cent conviction rate). The total number of proceedings and convictions were at their highest over the ten year period in 2015-16.

1.2.2 Penalties

The Scottish Government provides information on four types of penalties issued for three of the relevant offences over the ten year period 2007-8 to 2016-17, as illustrated in table 1 below.

Table 1: Penalties by offence type

Offence/ Type of penalty	Death by dangerous driving	Death by careless driving involving drink/drugs	Death by careless driving
Custody	138	13	24
Community	3	0	103
Financial	2	0	25
Other	0	0	3

On the 24 March 2018 an enquiry was made to the Scottish Government Justice Analytical Services concerning the data available on death by driving offences, with a specific enquiry made about disqualification data, which was not provided in the material currently published by the Government. In response to this enquiry, the Justice Analytical Services provided the following data on death by dangerous driving disqualifications on 17 April 2018:

Table 2: Disqualifications for death by dangerous driving convictions

Year/ Dis- qualification period	2007/ 8	2008/ 9	2009/ 10	2010/ 11	2011/ 12	2012/ 13	2013/ 14	2014/ 15	2015/ 16	2016/ 17
No Dis- qualification	1	1	7	2	3	1	0	1	2	2
2 years and less	0	1	4	10	10	8	3	6	9	8
2-4 years	0	2	4	7	7	8	5	9	5	7
4-10 years	10	5	9	3	3	11	7	6	13	7
Over 10	2	0	0	1	0	1	1	2	0	0
Till past test	13	14	10	12	8	8	9	12	12	7
Total	26	23	34	35	31	37	25	36	41	31

1.2.3 Limitations of official statistical data

The data published in relation to proceedings and convictions does not provide details on driving offences which specifically cause death. Instead the categories provided are: dangerous and careless driving; driving under the influence; speeding, unlawful use of a motor vehicle, vehicle defect offences; seat belt offences; mobile phone offences and other motor offences. As stated, the information provided on death by driving offences is provided as additional data. This additional data is helpful for the purposes of assessing the legal landscape, but nevertheless, contains some important limitations.

As mentioned, an enquiry was made to the Scottish Government about available death by driving offences data which confirmed that the published data includes all convictions where the 'death by dangerous driving' was the only charge/conviction in a case but only some convictions where there were multiple convictions (of any charge) in a particular

case. As a result of the enquiry made, additional information was provided on the numbers of additional charges involved in multi-conviction cases. Table 3 below shows this:

Table 3: Additional charges as part of multi-conviction cases

2007/ 8	2008/ 9	2009/ 10	2010/ 11	2011/ 12	2012/ 13	2013/ 14	2014/ 15	2015/ 16	2016/ 17
0	0	1	3	2	4	2	5	4	1

Whilst this additional data is welcomed, limitations in the data continue to exist. There is no way to assign these additional convictions to the same cases, nor with the sentences attributed to each case.

As such, it seems appropriate to raise a wider point about how official data tends to represent sentenced cases. This issue is not restricted to death by driving offences nor is it one which is unique to Scotland. The representation of sentencing practices by official data tends to make relatively little distinction between single and multi-conviction cases. How should the effective sentence in a multi-conviction case be represented? Where there is more than one conviction, a main, or principal, conviction is usually selected by an official administrative body (e.g. criminal records office), not by the court. Although in many cases this may be thought by the administrative body to be a self-evident decision, it may often be less apparent, where, for instance, there is more than one conviction which might appear to be of similar gravity. Those selecting the conviction against which the total effective sentence is to be recorded may select the conviction which receives the most severe penalty. However, this raises its own difficulties. For example, multiple-conviction cases may attract different sentences. Sentences may be passed consecutively, concurrently (or in some combination of the two), or, in cumulo (covering all offences in a single sentence). This can make it difficult for an administrative data body to know what the court perceives to be the principal conviction. The consequence of this complex problem is that the different gravity of different cases may not be clearly reflected in the representations made by official data about sentencing practices. Furthermore, the comparison between sentences passed for cases which may or may not have involved more than one similarly serious conviction is questionable. Tata instead suggests the development of a more holistic approach to the

recording and representation of sentencing data, which would be complementary to ‘the principal conviction approach’ so as to capture the inter-relationship between offences.³⁰ Therefore, whilst the data provided by the Scottish Government is indicative, it does not currently provide a picture of the legal landscape in its entirety.

1.3 Statutory sentencing penalties and review of sentencing in the Scottish Court of Criminal Appeal

The maximum sentence which can be imposed in this context has been prescribed by Parliament. For death by dangerous driving, the most serious of the offences contained within the 1988 Act, this is 14 years’ imprisonment, with a minimum disqualification period of two years and compulsory re-test.

There is greater difference of sentencing in the context of causing death by careless or inconsiderate driving. Where this is caused by drink or drug intoxication (section 3A), the maximum penalty is 14 years’ imprisonment, with a minimum disqualification period of two years with a compulsory extended re-test required.

For death by careless or inconsiderate driving under section 2B, the maximum penalty is five years’ imprisonment, with a minimum disqualification period of 12 months and discretion as to the issue of a re-test.

For causing death by driving whilst unlicensed or uninsured (section 3ZB) the maximum penalty is two years’ imprisonment with a minimum disqualification period of 12 months and discretion as to the issue of a re-test. For causing death by driving whilst disqualified (section 3ZC) the maximum penalty is 10 years’ imprisonment with a minimum disqualification period of two years with a compulsory extended re-test required. For causing serious injury by driving whilst disqualified (section 3ZD) the maximum penalty is four years’ imprisonment with a minimum disqualification period of two years with a compulsory extended re-test required.

³⁰ Tata, C., 1997. Conceptions and representations of the sentencing decision process. 24(3) *Journal of Law and Society* 395. These issues were also explored by the Scottish Sentencing Information System project which concluded that official data derived from Scottish Criminal Records Office would not provide sufficiently meaningful information to be useful to inform and assist sentencing practice. See for example: Tata, C., and Hutton, N., 2003. Beyond the Technology of Quick Fixes: Will the judiciary act to protect itself and shore up judicial independence? 16(1) *Federal Sentencing Reporter* 67.

A review of Scottish sentencing appeal cases was carried out.

1.3.1 Death by careless or inconsiderate driving

It would appear that much like culpable homicide, in practice, sentences of 12 years may be considered as the upper end of what is available for an accused who is found guilty of the most serious of the death by careless driving- those driving under the influence of drink or drug.³¹ The recent case of *Grant* involved a successful appeal against sentence for 12 years' imprisonment.³² This period of imprisonment was reduced to seven years and four months on the basis that it was excessive, especially in the context of a recognised mitigation (the appellant's relationship with the deceased). On this point, reference was made to the guidelines set by the Sentencing Council for England and Wales which advises a starting point of eight years' imprisonment (see section 2.0 below). *Grant* also involved a conviction under section 3ZB because he was unlicensed and uninsured at the time of the collision.³³

Discussion about the limits of sentencing in the context of section 3ZB can also be seen in *Fleming*, where a sentence of five years' imprisonment and eight years' disqualification was substituted for a five year imprisonment and disqualification for six years and eight months.³⁴ The Court of Criminal Appeal agreed that the sentencing judge had been right to consider that this case fell between the categories set out by the Sentencing Council for England and Wales in respect of careless driving due to momentary inattention (with aggravating factors) and careless driving falling short of dangerous (see section 2.0 below).

³¹ See for example the case of *Hanlon v HM Advocate*, 2000 G.W.D. 4-131 where a sentence of nine years' imprisonment was substituted for a seven year sentence for a culpable homicide which included violent circumstances and *Crabb v HM Advocate*, 1999 G.W.D. 20-940 where an appeal against a ten year sentence for a culpable homicide was refused in what was described as a "terrible offence". Although in the more recent case of *HM Advocate v Colquhoun*, 2012 unreported, Susan Colquhoun received a sentence of nine years' imprisonment with an extension period of three years for killing her partner. In addition to a charge of culpable homicide, however, Colquhoun was also convicted of attempting to defeat the ends of justice. Sentencing statement. Available at: < <http://www.scotland-judiciary.org.uk/8/968/HMA-v-SUSAN-JOAN-COLQUHOUN> > [Accessed 8 March 2018].

³² *Grant v HM Advocate* [2013] HCJAC 11. Grant had pled guilty to charges under s 3A(a)(b) and s 3ZB.

³³ *HM Advocate v Roulston*, 2006 J.C. 17 also involved an appeal against sentencing under s 3A. Here, it was held a discount of 25 per cent was too lenient and three years' imprisonment was increased to seven, alongside a ten year disqualification period.

³⁴ *Fleming v HM Advocate*, 2013 S.C.L. 386.

Likewise, *Rai* provides insight into what is considered appropriate sentencing in the context of section 3ZB. Here the offender was both disqualified and uninsured, had previous motoring convictions, had been working at the time of the collision and was driving on the motorway at night -all of which were considered aggravations. A period of 12 months and 18 months' imprisonment for each charge was substituted for sentences of nine and 12 months' imprisonment due to the application of a sentencing discount.³⁵ This was also a case which considered the issue of causation in more detail, given that his car was amongst a number of vehicles involved in the collision which resulted in death.³⁶

A review of Scottish Court of Criminal Appeal decisions on sentencing in respect of death by careless driving show that appeals are as likely to be from the Crown on the basis of lenient sentencing as from an appellant claiming excess. For example, in *McKay*, the Crown appealed against a community service order of 240 hours and one year disqualification for a conviction under section 2B. This appeal was allowed, with a four year disqualification substituted. Despite the appeal being allowed, it was recognised that a community service order can be appropriate in circumstances such as this, where the respondent had suffered emotional and psychological consequences, that is to say the use of community service as a punishment did not automatically render the sentence unduly lenient. The Court commented that there exists a "spectrum" of negligent driving, rather than categories, which can be kept in mind during the court's assessment of culpability.³⁷

An example of an unsuccessful Crown appeal under section 2B can be seen in *McCourt* where it was considered that a community service order amounting to 300 hours unpaid work (to be carried out over a year) alongside a five year disqualification (with re-test requirement attached) was unduly lenient. This appeal was refused on the basis that the sentence had correctly been directed towards the culpability of the accused and not causation (on the issue of a cyclist not wearing a helmet).³⁸ Importantly, the respondent had a previous conviction for causing death by reckless driving obtained in 1986, which had resulted in 12 months' imprisonment and disqualification for a period of ten years.

³⁵ *Rai v HM Advocate*, 2012 S.C.L. 283.

³⁶ See also *HM Advocate v Kelly*, 2009 G.W.D. 31-527 where concurrent sentences for convictions under s 3ZB and 2B were reduced to nine months' imprisonment, from 12, and 27 weeks' imprisonment (from 36).

³⁷ *HM Advocate v McKay*, 2011 S.L.T. 250.

³⁸ *HM Advocate v McCourt*, 2014 J.C. 94.

1.3.2 Death by dangerous driving

Likewise, Crown appeals are significant in the context of Scottish death by dangerous driving cases. Two unsuccessful appeals have both been categorised by the trial judges as ‘level two’ seriousness, (in reference to the Sentencing Council for England and Wales, see section 2.0 below), are *McKeever* and *Milligan*. In both the Court warned against rigid application of English guidelines.

McKeever involved a sentence of six years’ imprisonment (discounted to four) in the context of alcohol impairment. The court noted that although this was perhaps generous, it was not unduly lenient.³⁹ In *Milligan*, a sentence of six years’ imprisonment and eight years’ disqualification (with re-test condition) was upheld, with it being noted that the trial judge had heard the evidence and was in a better position than the appeal court to assess sentence.⁴⁰

In the context of death by dangerous driving, examples of successful appeals by the Crown can be seen in the case of *Stalker*, where 18 months’ imprisonment was recognised as unduly lenient where the circumstances of the fatality included the respondent racing other drivers⁴¹, and *Macpherson*, where a period of 18 months’ imprisonment was substituted for one of four years on the basis of previous motoring convictions, being under the influence of cannabis at the time of the collision and having modified the car.⁴²

Obviously it is appeals from convicted drivers which ultimately address the issue as to what is to be considered an excessive sentence in respect of a death by dangerous driving conviction. The Court of Criminal Appeal has considered claims that seven years’ imprisonment was excessive in two cases. The first was, *Sharp*, where the appellant had been involved in driving at speed towards a friend’s oncoming van, resulting in the injury of three pedestrians and death of one. Here the appeal was refused on the basis that the consequences (of losing control) were reasonably foreseeable in the circumstances.⁴³ Similarly, a sentence of seven years was considered in *Vierregge*, where speeding had

³⁹ *HM Advocate v McKeever*, 2016 S.C.L. 564.

⁴⁰ *Milligan v HM Advocate* [2015] HCJAC 84.

⁴¹ *HM Advocate v Stalker*, 2004 S.L.T. 292.

⁴² *HM Advocate v Macpherson*, 2005 S.L.T. 397.

⁴³ *Sharp v HM Advocate*, 2003 S.C.C.R. 573. Here the seven years’ imprisonment was specifically to be carried out in a young offender institution.

resulting in the death of four people, but it had been argued that the accused was of previously good character and suffering from genuine remorse. Here, the appeal was allowed on the basis of the lack of aggravating factors.⁴⁴

Other considerations of what is excessive in the context of death by dangerous driving have taken place in cases such as *Lynn*, which involved the death of three individuals and injury of a fourth.⁴⁵ Here it was held that although the case did warrant a deterrent sentence given the high speeds involved, ultimately the trial judge had miscategorised the case as one at the extreme end of seriousness. Similarly, in *Wright* and *Dingwall*, appeals against excessive sentence were allowed and sentences reduced accordingly. In *Wright*, five years' imprisonment and a ten year disqualification was substituted with a five year disqualification (but no change to imprisonment period) on the basis that, although the trial judge had been right to disregard the fact that the deceased was not wearing a seatbelt, no aggravating factors existed.⁴⁶ In *Dingwall*, five years' imprisonment and ten years' disqualification was substituted for four years' imprisonment and seven years' disqualification on the basis that a starting point of five years' imprisonment was excessive (and that a discount must also be applied to reflect the guilty plea which was tendered). Here, the respondent's speed had been excessive (80 mph in a 40mph zone). The case analysis notes that in addition to the mitigating factors already taken into account by the sentencing judge (presumably the fact that the deceased was his girlfriend⁴⁷, since this is mentioned), the appellant presented a low risk of reoffending and was supported by his family and people from the local community.⁴⁸

1.3.2 Causing serious injury by dangerous driving

There appears to be only one Scottish case which has considered the issue of sentencing for a section 1A offence in a Scottish context. In *Dulas* the accused had been sentenced to 27 (discounted from 36) months' imprisonment and was disqualified for a period of five

⁴⁴ *Vierogge v HM Advocate*, 2003 S.C.C.R. 689. Here the seven year sentence was substituted for one of five and a half years.

⁴⁵ *Lynn v HM Advocate*, 2009 S.C.L. 324. Here both accused had pled guilty; the first was sentenced to 10 years and two months' imprisonment and the second to eight years' imprisonment (both were disqualified from driving). These were substituted for sentences of seven years and eight months and six years.

⁴⁶ *Wright v HM Advocate*, 2007 J.C. 119.

⁴⁷ It is not elucidated with specificity whether the death of the girlfriend was considered mitigation in its own right or whether the mitigating factor was the presumed psychological affect her death had on him.

⁴⁸ *Dingwall v HM Advocate*, 2005 S.C.C.R. 700.

years. He appealed on the grounds of the custodial punishment being excessive.⁴⁹ The Court of Criminal Appeal recognised that the sheriff had been correct to pass a custodial sentence, given the impact on the victim (including post-traumatic stress and limited employment ability following the offence) and in particular the disabilities he had suffered as a result of the offence, but that as a starting point, three years' imprisonment was excessive where there were no aggravating factors. Resultantly, the appeal was allowed and a sentence of 18 months' imprisonment was substituted.

The fact that no sentencing guideline exists for the new offence has been the subject of discussion in England. In *R v Dewdney*⁵⁰ it was stated that the death by dangerous driving guidelines were helpful, but that given the statutory maximum sentence for an offence under section 1A compared to the offence of dangerous driving, it was necessary to apply a "degree of compression" in the sentences available to the court to reflect the different types of dangerous driving and consequences which could arise from a section 1A offence. Here, the court commented that it was not helpful to consider the worst imaginable type of case that would attract a sentence at the maximum level. Instead, it was more realistic to identify broader bands of conduct that would represent the most serious kind of offending within the ambit of the offence. In *Dewdney* specifically, it was held that a high degree of culpability existed due to the excess alcohol present at the time of the offence, his previous convictions (including those for dangerous driving) and the fact that the offender had ignored warnings from his passengers about the character of his driving. As such, the renewed application was refused and it was held that a sentence of 32 months' imprisonment and three years' disqualification (with the requirement to pass an extended text) was not excessive.

2.0 Sentencing guidelines

The Road Traffic Act 1988 is UK wide legislation. Guidelines have been provided in relation to the Act by the Sentencing Council for England and Wales. The guidelines are sequentially structured and consider the offences of death by dangerous driving, death under the influence of alcohol or drugs, death by careless driving and death by driving where disqualified, uninsured or unlicensed. As mentioned above, these guidelines have been

⁴⁹ *Dulas v HM Advocate* [2016] HCJAC 91.

⁵⁰ *R v Dewdney* [2014] EWCA Crim 1722; [2015] 1 Cr App R (S) 5.

referred to in Scottish decision-making on sentencing.⁵¹ As such, they have particular relevance in a Scottish context.

2.1 Sentencing methodology

The sentencing methodology provided by the Sentencing Council for England and Wales is as follows⁵²: identify dangerous offenders (those who pose a significant risk of harm), identify an appropriate starting point based on the facts of the case, consider any aggravating factors present, consider mitigatory factors present, apply a reduction for a guilty plea under the approach set out in earlier Sentencing Council guidelines⁵³, consider whether an ancillary order is appropriate, consider the principle of totality (i.e., is the sentence proportionate and balanced) and then provide reasons for the sentence which has been decided. Where the sentence imposed is outside the range provided in the guidelines, detailed reasons must be provided for this.

Although this appears to be a highly directive methodology, this decision-making process is explicitly recognised as “fluid” and requiring the structured exercise of discretion.⁵⁴

2.2 Determinants of seriousness

The starting point for sentencing is an assessment of culpability. To assess culpability generally what must be considered is evidence of the quality of driving involved and the degree of foreseeability of harm. The Sentencing Council for England and Wales distinguish between factors intrinsic to the quality of driving- ‘determinants’ - and aggravating factors. It is noted there are varying degrees to which an aggravating factor can be present and it is the trial court which is best placed to judge the impact of this on sentencing.

Determinants identified by the Sentencing Council are: awareness of risk, factors of impairment (including drugs or alcohol), speed, culpable behaviour (e.g. aggressive driving

⁵¹ Sentencing Council, 2008. *Death by Driving: Definition Guideline*. [pdf] Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/web_causing_death_by_driving_definitive_guideline.pdf> [Accessed 8 March 2018].

⁵² Sentencing Council, 2008. (n51) at p 9.

⁵³ Sentencing Guidelines Council, 2007. *Reduction in Sentence for a Guilty Plea: Definitive Guideline*. [pdf] Available at: <[https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction in Sentence for a Guilty Plea -Revised 2007.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-_Revised_2007.pdf)> [Accessed 22 March 2018].

⁵⁴ Sentencing Council, 2008. (n51) at p 9.

or mobile phone use) and the victim (e.g. whether s/he was a vulnerable road user). They also distinguish between ordinary distractions and gross avoidable distractions which divert attention for longer periods.

An example of an aggravation is if more than one person is killed (although it is noted that this in itself may give rise to separate charges being brought, with concurrent sentences attached). Previous convictions for motoring offences will also be considered as aggravations as will irresponsible behaviour such as failing to stop at the scene or trying to suggest that a victim was responsible for the collision.

2.3 Mitigating factors

The assessment of seriousness is also informed by the presence of any mitigatory factors. Mitigatory factors include the effect of the offence on the offender (physical and emotional) and any relationship with the victim(s) of the offence. Remorse is considered as personal mitigation, as is providing assistance in the aftermath of the offence. However, not providing assistance is not considered a determinant of seriousness since it is recognised that there may be factors related to this inaction, such as stress following the incident. On the issue of a good driving record, it is said that this does not automatically provide mitigation, but may be considered if for example, the good driving record had an input into public service (e.g., ambulance driving). Lack of driving experience and 'youth' are explicitly not considered to be mitigatory.⁵⁵

Where intoxication is part of the offence, taking drink or drugs unwittingly will also be considered as a mitigation. Under section 2B, it will also be taken into consideration whether the victim or a third party contributed to the commission of the offence. Lastly, where the context of the offence includes being unlicensed, disqualified or uninsured, the court can consider whether a genuine emergency had arisen, falling short of a defence, and whether the offender genuinely believed they were legally able to drive at the time of the offence.

⁵⁵ Sentencing Council, 2008. (n51) at p 6.

2.4 Levels of seriousness

Decision-making in sentencing in England and Wales is informed by the level of seriousness. In relation to section one, three levels of seriousness are provided for in the guidelines, with each providing a sentencing range.

Level one represents the most serious cases which would be decided upon in this context. Level one cases might involve prolonged bad driving and/or gross impairment and/or group of determinants. For example, cases which involve multiple deaths or a very bad driving record. Here, the starting point for sentencing is eight years' imprisonment and the suitable range is between seven and 14 years.

At level two, the offender is considered to pose a substantial risk to society. Such cases may involve excessive speeding, including racing, and impairment. The starting point for sentencing is five years' imprisonment at level two and the range is between four and seven years.

Level three offenders are considered to pose a significant risk to the public. Cases within this category may involve speeding or tiredness. At level three, the starting point for sentencing is three years' imprisonment and the appropriate range is between two and five years.

Under section 2B, the nature of the offence is divided into three categories: careless or inconsiderate driving not falling far short of dangerous driving, other cases of careless or inconsiderate driving and careless or inconsiderate driving arising from momentary inattention with no aggravating factor. For the first category, the starting point in sentencing is 15 months' imprisonment and the range is between 36 weeks and three years. For the second category, the starting point is 36 weeks' imprisonment. The range here starts at a community order (high) but can go to two years imprisonment. The starting point for the last category is a community order (medium) and the range is between a low and high community order.

This is similar to the framework provided for an offence under section 3ZB. The offence is subcategorised into cases where: (1) the offender was disqualified from driving or was unlicensed or uninsured plus two or more aggravating factors from the list provided. Sentencing here starts at 12 months' imprisonment with a range of between 36 weeks and

two years' imprisonment. (2) The offender was unlicensed or uninsured plus at least one aggravating factor from the list provided. The starting point here is 26 weeks' custody and the range is a community order (high) up to 36 weeks' imprisonment. (3) The offender was unlicensed or uninsured and no aggravating factors are present. The starting point here is a community order (medium) and the range within the community orders which can be offered are between low and high.

For section 3A, the previous categories of careless driving are subdivided by the amount of alcohol which is found in the offender.

2.5 Use of guidelines in a Scottish context

It is clear in reviewing Scottish cases on causing death by driving, that the factors influencing sentencing are similar to those provided by the Sentencing Council for England and Wales, and indeed, explicit reference is often made to these guidelines.⁵⁶ However, the exact influence of the guidelines appears not to be definite. The Court of Criminal Appeal has engaged in specific discussion about the level of seriousness, as categorised by the Sentencing Council's guidelines⁵⁷ and the fact, for example, that the guidelines do not demand that the disqualification length be matched to the imprisonment period⁵⁸. Yet despite this, the Court of Criminal Appeal has stated explicitly that strict adherence to the English sentencing guideline is to be avoided⁵⁹ and that the Scottish approach to sentencing is "rather less formulaic than the English sentencing guidelines."⁶⁰

Certainly, an examination of older appeals cases shows that the Scottish courts have not always adopted the principles now articulated (and set out in the guidelines formally since 2008). This is particularly exemplified in death by careless driving cases such as *Seaton*, where it was held that two years' imprisonment was not excessive given the grave consequences which arose as a result of the appellant's careless driving, despite the devastating effect the incident had had on him and the fact that he had lost his job as a

⁵⁶ See for example *Wright v HM Advocate*, 2007 J.C. 119.

⁵⁷ For example in *Neil v HM Advocate* [2014] HCJAC 67 where it was held that a level one categorisation was inappropriate and that level two best represented the facts.

⁵⁸ *Geddes v HM Advocate*, 2015 S.L.T. 415.

⁵⁹ *HM Advocate v McKeever*, 2016 S.C.L. 564.

⁶⁰ *Milligan v HM Advocate* [2015] HCJAC 84, Lord Menzies at 5.

result⁶¹, and in *Sharp*⁶² where a £250 fine and one year disqualification period had been imposed, but the period of disqualification was reduced to six months on the basis that the death of the passenger should not have been regarded in sentencing.

As regards the use of the English sentencing guidelines in a Scottish context,⁶³ Brown re-emphasised that other authorities are never definitive in sentencing in Scottish courts⁶⁴ and that in the context of sentencing death by driving offences, Scottish sentencers have been invited to take consideration of sentencing in other Scottish offences, for example culpable homicide.⁶⁵

More recently, Brown has also provided case comment on the cases of *Brierley v HM Advocate*⁶⁶ and *Burke v Laing*⁶⁷ which are concerned with section 1A of the 1988 Act- where driving causes serious injury but not death. In *Burk*, the court considered that English guidelines form a relevant consideration in Scotland if approached with care⁶⁸ and in *Brierley* it was noted that the Sheriff Appeal Court was unaware of any Scottish decision which had considered section 1A of the 1988 Act.

3.0 Assessment of culpability

Levels of culpability are determined, in part, by the *mens rea* of the offence. Typically, in criminal law, crimes of intent are considered to suggest the highest level of offender culpability. In this context, ‘dangerous’, (‘reckless’) driving under section 1 are those which will be considered most serious in terms of culpability. Carelessness as a form of *mens rea* is, therefore, less serious and implies less culpability. Interestingly, the penalties associated with careless driving under the influence of drugs or alcohol (section 3A) suggest an

⁶¹ Seaton v HM Advocate, 1999 G.W.D. 14-664.

⁶² *Sharp v HM Advocate*, 1987 S.C.C.R. 179, following *McCallum v Hamilton*, 1986 J.C. 1 regarding the death of the victim.

⁶³ Brown, G., 2015. Case Comment: The proper use of English sentencing guidelines and further observations on the guilty plea discount-Geddes v HM Advocate. 136 *Criminal Law Bulletin* 3.

⁶⁴ As per *Deeney v HM Advocate*, 2015 S.C.L. 329.

⁶⁵ *Neill v HM Advocate* [2014] HCJAC 67.

⁶⁶ Unreported 8 November 2016 (HCT).

⁶⁷ [2016] SAC (Crim) 31.

⁶⁸ Brown, G., 2017. Case Comment: Causing serious injury by dangerous driving (s. 1A 1RTA 1988). 146 *Criminal Law Bulletin* 7.

assessment of culpability which sits closer to causing death by dangerous driving, than causing death by careless driving (section 2B).

In strict liability offences, such as those contained within the Road Traffic Act 1988⁶⁹, it is not necessary to prove culpability in order to obtain a conviction. However, culpability must be assessed against the harm which has been caused, the presence of aggravating factors and presence of factors in mitigation. This will be considered in more detail below.

3.1 Culpability and harm

The Sentencing Council for England and Wales make clear that it is because this category of offences contains harm to someone (specifically, death) that culpability is the starting point in terms of sentencing.⁷⁰ In the cases of the unlicensed, disqualified or uninsured drivers, culpability arises just from being on the public road in the vehicle; that is to say, culpability is linked to the prohibition rather than the driving itself.⁷¹

For Roberts et al, the level of culpability involved in death by driving offences is not usually associated with such serious harm, making it a particularly interesting category of criminal offences.⁷² They cite previous studies of public attitudes which support this, such as Canadian research conducted by Doob and Roberts which found that drinking and driving was only perceived to be serious to the extent that it resulted in actual harm.⁷³ For them, this study particularly emphasised the fact that loss of life often eclipses level of culpability in public perceptions, since in the example Doob and Roberts used with their participants, it was made clear that the driver had no culpability, but that despite this, punitive sentencing recommendations were nevertheless made by participants in the study.⁷⁴

⁶⁹ Sections 3ZB, 3ZC and 3a, despite the above comments about the associated penalties.

⁷⁰ Sentencing Council, 2008. (n51) at p 1.

⁷¹ Sentencing Council, 2008. (n51) at p 2.

⁷² Roberts, J., Hough, M., Jacobson, J., Moon, N., and Bredee, A., 2008. *Attitudes to the sentencing of offences involving death by driving*. Sentencing Advisory Panel, Research Report-5. [pdf] Available at: <http://www.icpr.org.uk/media/10375/Attitudes%20to%20sentencing%20of%20Death%20Driving%20offences.pdf> [Accessed 16 March 2018].

⁷³ Ibid, at p 6.

⁷⁴ Ibid, at p 1.

3.2 Culpability and causation

As suggested above, assessments of culpability pertain to the constituent elements of the offence, most obviously the *mens rea* of the offence, but also causation, which is a constituent element of all result crimes. For Cooper, in all homicide offences, questions of culpability and blameworthiness are inevitably mixed up with the concept of causation, and homicide caused by driving offences should not invite a different treatment of the legal concept of causation.⁷⁵

Cooper identifies the culpable act in question as the flawed standard of driving itself; the death in question flows directly from the conduct. The difficulty is determining the extent to which the outcome of death can fairly be attributed to the bad driving. As with causation generally, both legal and factual causation must be present. Factual causation is for the jury to assess on the basis of the individual circumstances; what feels fair. The conduct in question does not have to be the sole cause of the death, but it must be significant. Generally, this is not a legal concept which can be applied with consistency and precision and as such, road traffic cases will not offer certainty over the concept of legal causation either.

Therefore, it seems that any discussion of culpability invariably demands an assessment of individual factors of each case before the court.

3.3 Culpability and character

Berman discusses the fact that sentencing considerations are divided into offence conduct (such as the harm caused) and offender characteristics (such as their personal circumstances and previous convictions).⁷⁶ He discusses this in the context of Federal Sentencing Guidelines in the US, arguing that these guidelines, along with mandatory sentencing statutes, have emphasised conduct and limited judges' opportunity to consider offender characteristics - something he links to the strong desire for uniformity of decision-making and consistency in sentencing practices.⁷⁷ For him, sentencing judges have a

⁷⁵ Cooper, S., 2012. Culpable Driving and Issues of Causation. 76 *Journal of Criminal Law* 431.

⁷⁶ Berman, D.A., 2005. Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reform. 58(1) *Stanford Law Review* 272.

⁷⁷ *Ibid.*, at p.281.

“unique and uniquely important case-specific perspective” on the real persons who actually commit offences and the significance of character”.⁷⁸

Tata develops the point about the inescapable inter-relationship of offence and offender information. He argues that while a sharp division between ‘offence’ and ‘offender’ characteristics makes sense in abstract analysis, close empirical observation of the reality of decision-making destabilises this simple binary separation. “‘Offence’ and ‘offender’ information may be notionally and legally distinct, but interpretively they operate synergistically, constituting ‘typified whole-case stories’.” Rather than seeing such contextual inter-relationship as problematic, Tata suggests that the empirical reality, (which sentencing shares with other areas of discretionary decision-making), instead raises questions for the efficacy of policy. An implication is that the production of reform instruments, such as guidelines, could employ case vignettes or scenarios. This would also enable multi-offence cases to be addressed in a more meaningful, holistic way, rather than imagined only as an aggregation of separate, discrete individual pieces of information, as is common in guideline methodologies to-date. Such a holistic vignette or scenario method could complement, and be more intuitively meaningful to sentencers than, abstracted two-dimensional offence-offender methodologies⁷⁹.

Certainly, under Scots Law, sentencing does afford a unique assessment of character. Generally speaking, sections 101⁸⁰ and 166⁸¹ of the Criminal Procedure (Scotland) Act 1995 prohibit the accused’s previous convictions from being put to the court prior to a charge being proved. The main rationale for this is to protect the accused from prejudice.⁸² As with most rules of evidence, this rule is subject to a number of exceptions, one being where evidence of previous convictions will be required to support a substantive charge.⁸³ This would have application in the context of a section 3ZC offence, where the allegation pertains

⁷⁸ Ibid, at p.291.

⁷⁹ Tata, C., 2007. Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process. 16 *Social & Legal Studies* 425.; see also Tata, 1997. (n30).

⁸⁰ S 101(1) pertains to solemn procedure.

⁸¹ S 166(3) pertains to summary procedure.

⁸² *Lewry v HM Advocate* [2013] HCJAC 62.

⁸³ 101(2) (solemn cases) and 166B(1) (summary cases).

to conduct carried out whilst already disqualified from driving. Therefore, the existence of a previous conviction(s) which led to disqualification are part of the substantive charge itself.

Where no exceptions exist, it is only at the sentencing stage that previous convictions can be known to the court.

3.4 Reducing culpability through mitigating factors

As suggested, the Sentencing Council for England and Wales link other factors to culpability. Culpability is increased by consuming drugs or alcohol on the basis that this is akin to deliberate behaviour by the offender (regardless of the actual manner of the driving involved). However, culpability will be lessened if it is recognised that the harm has been caused as a result of something like misjudging speed or having restricted visibility. Likewise, where there exists a close or family relationship with the victim, the degree of mitigation offered by this is linked to the offender's culpability: if their culpability is high, this mitigation will have less effect.

The position advanced by the Sentencing Council for England and Wales is that any recognised mitigation may lower the offender's culpability. This will be considered in relation to more specific factors below.

3.4.1 Impact on the offender

Scottish sentencing decisions appear to be in keeping with the Sentencing Council for England and Wales's approach of viewing the impact on the offender as a potentially mitigating factor. Within the Sentencing Council's guidelines, effect on the offender is classified as being either physical (serious injury being caused to the offender), or, emotional within a limited capacity (having a close relationship with the person or people killed).⁸⁴ However, some examples which the courts must consider clearly go beyond this binary conceptualisation.

An example is Dr James Neil's conviction for death by dangerous driving. In 2003, Dr James Neil pled guilty of death by dangerous driving and was sentenced to five years' imprisonment.⁸⁵ The circumstances of this involved speeding and overtaking on the wrong

⁸⁴ Sentencing Council, 2008. (n51) at p 5 para 22 and 23.

⁸⁵ The Herald, 2003. *Consultant who killed two in crash is jailed. Doctor feared he was having a breakdown*. Available at: <http://www.heraldscotland.com/news/11906600.Consultant_who_killed_two_in_crash_is_jailed_Doctor_feared_he_was_having_breakdown/> [Access 16 March 2018].

side of the road, which resulted in the death of two teenagers.⁸⁶ Neil's professional contributions to society were not considered enough to outweigh the danger he was held to pose to the public during initial sentencing, but did influence the court during an application for the early return of his licence. Neil successfully argued for this early return on the basis that as a consultant anaesthetist he had to be able to provide services. Interestingly, Neil had been allowed to continue practising as a doctor, despite receiving a custodial sentence.⁸⁷

Elsewhere, the case *Noche* involves a discussion of factors which are not immediately identifiable in the Sentencing Council for England and Wales.⁸⁸ Here, in the context of death by dangerous driving, the original sentence was a period of community service. This had taken into account the fact that the driver was a Spanish national who had been working in Scotland during the time of the fatality and the fact that the only factor implying culpability was his being on the wrong side of the road following a turn in the road. This was successfully appealed by the Crown on the basis of undue leniency and, in consequence, the Court of Criminal Appeal imposed a sentence of 12 months' imprisonment, despite the fact that the sentencing judge had considered that, as a Spanish national, imprisonment would have greater effects for Mr Noche in terms of contact with his family during a custodial sentence.

Impact on the offender, therefore, covers a wide spectrum of factors and ones which can have wide implications in terms of the overall assessment of culpability. Given this, the individual nature of the decision-making must be recognised.

The theoretical basis for understanding the impact to the offender has been considered in academic literature. Wasik uses the Sentencing Council for England and Wales's inclusion of trauma or loss as mitigating in youth sentencing as a starting point to discuss the role of bereavement as a mitigating factor more generally, since for him, this is often overlooked as

⁸⁶ BBC News, 2007. *Crash driver wins licence fight*. Available at: <
http://news.bbc.co.uk/1/hi/scotland/south_of_scotland/6686959.stm> [Access 8 March 2018].

⁸⁷ It would appear that the General Medical Council may remove information on disciplinary proceedings after a period of ten years which means that no further information on the nature of the GMC's decision making over this matter could be accessed.

⁸⁸ *HM Advocate v Noche*, 2012 S.C.L. 329.

an object of inquiry.⁸⁹ He recognises what is suggested above: that mitigation relating to the immediate circumstances of the offence is based upon reduced culpability. He notes that this often involves the application of partial defences (to murder), but that mitigation can also be based on sympathy and mercy, as seen in the context of death by driving offences and the sentencing guidelines which surround these offences. Wasik suggests that the rationale behind this categorisation is not entirely clear. He recognises that the bereavement of a loved one/someone close is treated as separate from the issue of remorse and refers to Walker, who has previously commented that when there is compassion for the offender, but no precise reason for reducing the severity of the sentence, then this can be viewed as mercy.⁹⁰

3.4.2 Personal mitigation

Perhaps this is also where the effect of remorse can be placed. As suggested above, remorse is considered by the Sentencing Council for England and Wales as personal mitigation and certainly, the approach of the Scottish courts has been to recognise remorse as a factor which can impact upon sentencing, not just in the context of death by driving but across all criminal cases. The question of whether remorse should affect the sentencing of an offender is one which has been at the heart of a number of legal philosophers' work.

Recently, Maslen has discussed this issue in depth, outlining five arguments which justify mitigating a sentence on the grounds of desert: the changed person argument, the reduced harm argument, the already punished argument (where remorse is viewed as self-imposed punishment), the responsive censure argument (where mitigation is the proper response to the offender's communication of genuine remorse) and the merciful compassion argument.⁹¹ For Maslen, the responsive censure argument permits the widest application of remorse-based mitigation, but there also exists consequentialist grounds for limiting the mitigatory role of remorse.

Padfield, whilst recognising the merits of Maslen's theoretical accounts, ultimately questions how this understanding can offer assistance to the lawyer in practice. Padfield notes that

⁸⁹ Wasik, M., 2018. Bereavement as a mitigating factor. 4 *Criminal Law Review* 278.

⁹⁰ Walker, N., 1999. *Aggravation, Mitigation and Mercy in English Criminal Justice*. Oxford: Blackstone. at p 132.

⁹¹ See for example, Maslen, H., 2015. *Remorse, Penal Theory and Sentencing*. Oxford: Hart Publishing.

remorse or an apology can assuage the fear and guilt of both the victim and the community in which an offender occurs.⁹²

At the level of practical understanding, remorse has been described as “complex blend of emotion and cognition”⁹³ It involves an acceptance of personal responsibility and for Padfield is not incompatible with slipping back into crime in the future or with previous convictions⁹⁴. Zhong acknowledges that empirical work on remorse is less prevalent than theoretical work, but that the empirical studies which do exist point to the fact that remorse does have an impact on perceptions and judgements about an individual.⁹⁵

Interestingly, however, in Zhong’s study, whilst judges recognised the significance of remorse in terms of sentencing, they also acknowledged their own difficulty in assessing genuine remorse and the fact that there may be a place for forensic psychiatric experts to play in assisting with this. Murphy also recognises this, arguing that it poses particular practical problems for offering credit (through a sentencing discount) for the expression of remorse.⁹⁶ For him, if remorse is to be considered, it should be at a later stage, such as parole, when enough time has elapsed to provide reliable evidence of remorse.⁹⁷ This, however, does not assist when the sentencing judge must make a decision as to whether a prison sentence should be administered or whether alternative means of disposal is appropriate in the circumstances.

In his examination of a range of domestic and international settings⁹⁸, Weisman argues that the showing of remorse is often a, even the, most critical feature in the ways punishment is thought to be deserved. Acknowledging the difficulties of distinguishing between sincere or genuine remorse and that which may be less so, Weisman shows that the demonstration of

⁹² Padfield, N., 2015. Publication Review. 74(3) *Cambridge Law Journal* 627.

⁹³ Zhong, R., 2013. *So You’re Sorry? The Role of Remorse in Criminal Law*. Yale Medicine Thesis Digital Library. at p 1. [pdf] Available at: <<https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1852&context=ymtdl>> [Accessed 23 March 2018].

⁹⁴ Padfield, 2015. (n92).

⁹⁵ Zhong, 2013. (n93) at pp 8-9.

⁹⁶ Murphy, J.G., 2006. Well Excuse Me- Remorse, Apology and Criminal Sentencing. 38 *Arizona State Law Journal* 371. at 379.

⁹⁷ Ibid, at p. 382.

⁹⁸ Weisman, R., 2014. *Showing Remorse: Law and the Social Control of Emotion*. New York: Routledge

convincing signs of remorse is what legal professionals, including judicial sentencers, as well as the wider community, tend to look for. More broadly, it is the attitude of the person (including remorse) to his or her offending which is, he argues, the central organising lens through which judgements about the seriousness of the case as a whole appear to be interpreted. This in turn raises the question of the practical feasibility of a sharp distinction between 'offence' as opposed to 'offender' characteristics.

3.4.3 Apology and Restorative Justice

Closely linked to the issue of remorse is that of apology.⁹⁹ As a concept this has perhaps been most developed in the context of restorative justice practices, if not necessarily a defining feature.

Restorative Justice (RJ) brings into two-way communication, in a safe way, those affected by a criminal offence.¹⁰⁰ RJ is a victim-sensitive approach oriented towards repairing, as far as possible, the harm caused by crime or other transgressions. A core element of Restorative Justice is active participation by the victim, the offender and possibly other parties (the community).¹⁰¹ Marshall states: 'Restorative justice is a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.¹⁰² Central to the value of RJ is that it is voluntary for all the key participants. RJ does not require apology (though it may often ensue), nor forgiveness by the persons harmed, nor should its efficacy be based on whether or not it reduces reoffending (though there is some evidence that it can).

"Restorative justice should be thought of as a process that will be helpful to many people harmed and should be assessed on that basis."¹⁰³ Further, most scholars of RJ argue that it is best seen as a supplement to the formal criminal justice process, rather than seeking to

⁹⁹ Although Murphy argues that an apology is something quite different from remorse and repentance. For him, remorse is an internal state and repentance is an internal mental act. Both are aspects of character that have external manifestations but are not external. Murphy, 2006. (n96) at p. 383.

¹⁰⁰ Shapland, J., 2017. Restorative Justice; the research evidence and implications for Scotland. 5(1) *Scottish Justice Matters* 4.

¹⁰¹ European Forum on Restorative Justice. Available at: <www.euforumrj.org/about-the-forum/restorative-justice/> [Accessed 23 April 2018].

¹⁰² Marshall T., 1999. *Restorative justice: an overview*. Research Development and Statistics Directorate: Home Office. [pdf] Available at: <http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf> [Accessed 23 April 2018].

¹⁰³ Kirkwood, S., and Munro, M., 2017. Warm Words but No Action. 5(1) *Scottish Justice Matters* 3.

replace it. The Scottish Sentencing Council's Draft Sentencing Guideline on 'Principles and Purposes of Sentencing' notes at 5d that purposes may include:

"Giving the offender the opportunity to make amends. Sentencing acknowledges the harm caused to victims and/or communities. Sentencing may also aim to recognise and meet the needs of victims and/or communities by requiring the offender to repair at least some of the harms caused; this may be with the co-operation of those affected."¹⁰⁴

One question which is sometimes raised is whether, if it is voluntary, people wish to take part in RJ. In their evaluation of three schemes which ran in different parts of England and at different stages of criminal justice (pre-release from custody, during community justice sentences, pre-sentence and as diversion from prosecution, with both adult and young offenders), Shapland et al found that between 36 per cent and 83 per cent of victims wanted to take part. The rate depended on the time since the offence and its nature. When delivered as mediation or conferencing with well-trained facilitators, the RJ events ran smoothly, even though many of these were for serious violence, robbery or burglary. Many persons harmed (victims/survivors) appreciated that the offender was willing to face them and to answer the key questions which victims face (e.g. 'Why did you do it?' 'Why me?' 'What did you do with the money?' 'How do you feel now about what you did?' etc) In general, victims/survivors did not want direct reparation from the offender (money or work for them) but they did want the offender to try to turn his or her life around by taking definite steps to resolve underlying drivers of offending. "Victims found the process produced more closure for them, with victims of more serious offences finding restorative justice even more helpful than those victimised by less serious offences."¹⁰⁵

Whyte and Kearney discuss the development of restorative practices in Scotland, which they say sympathise with the Scottish tradition of assythment- traditionally where the family of a

¹⁰⁴ Scottish Sentencing Council, 2017. *Principles and Purposes of Sentencing: Draft Sentencing Guideline*. [pdf] Available at: <<https://www.scottishsentencingcouncil.org.uk/media/1505/principles-and-purposes-of-sentencing-draft-sentencing-guideline.pdf>> [Accessed 29 April 2018].

¹⁰⁵ Kirkwood and Munro, 2017. (n103); Shapland, 2017. (n100); Shapland, J., Robinson, G., and Sorsby, A., 2011. *Restorative justice in*

practice. Abingdon: Routledge. See also the video of Professor Shapland's presentation about the prospects of Rj in Scotland available at: <<http://www.scottishinsight.ac.uk/Programmes/Learningfromotherplaces/RestorativeJustice.aspx>> [Accessed 23 April 2018].

person harmed could seek damages.¹⁰⁶ Their recent article focuses on the *Restoration in serious crime* (RiSC) initiative, developed at the University of Edinburgh between 2012 and 2016. This initiative aimed to develop a model for crime particularly where parties involved in the offence were known to each other. Initially the case studies used by RiSC involved death by driving offences where the deceased and the driver were known to one another. During the recent *Restorative Justice in Scotland Dialogues* event ‘Does restorative justice have a role to play in homicide?’, Whyte elaborated on one of these case studies: a mother’s experiences of her son being killed by a driver who failed to stop at the scene of the offence. This case involved a conviction for culpable homicide (perjury and failing to stop) rather than a conviction under the Road Traffic Act, but importantly the mother emphasised her need to hear the offender’s voice, which was silenced during the court process. Despite this silence in the formal setting of the court, the offender himself communicated his desire to apologise to his victim’s family through third parties- something that was hugely significant for all those involved in the process.¹⁰⁷

Referring to the Scottish Government’s annual statistics on road deaths, Whyte and Kearney point to a further limitation of Government data: that no information is provided about whether or not parties involved (victims and deceased) are known to one other. Using figures on sudden death/suicide as a proxy, they estimate that between six and 60 people are directly affected by each death which occurs.¹⁰⁸ They comment that in their first case study “a major focus became the wider social network of both the deceased victim and the convicted person. Mothers emerged as important motivators in the ripple of change effected by the work”, whilst in the second case study, there existed a deep rooted need by the victim’s mother to hear any apology being offered.¹⁰⁹

Whilst many RJ practices operate separately from the criminal justice process, evidence suggests that apologies in this context have a significant impact on victims’ families. Certainly this is the position that is accepted by Bibas and Bierschbach, who cite empirical

¹⁰⁶ Whyte, B., and Kearney, N., 2017. Peacebuilding and RiSc: Elements of a Scottish Model for Restorative Practices in Serious Crime. 5(1) *Scottish Justice Matters* 11.

¹⁰⁷ RJ and Homicide, video available at: <https://www.scottishinsight.ac.uk/ProgrammeEventPages/RestorativeJustice/Dialogue4/tabid/6360/Default.aspx> [Accessed 13 April 2018].

¹⁰⁸ Whyte and Kearney, 2017. (n106) at p.12.

¹⁰⁹ Ibid.

research carried out by Poulson which confirms that remorse and apologies matter immensely to victims.¹¹⁰ This study suggested that 74 per cent of offenders will apologise in restorative justice conferences but that when the only opportunity to apologise exists in the court room, 71 per cent of offenders would not apologise.¹¹¹ For Bibas and Bierschbach it is in the criminal arena, where victims' wound are the deepest, that remorse and apology has the most significance and that although sentencing is the one place where remorse and apology do play a role, the sentencing stage is not especially well structured in terms of promoting it.¹¹² They recognise that 'commodifying' an apology can subvert and cheapen it. They also recognise that it can be difficult to measure sincerity. They argue, however, that discerning sincerity and honesty is the role that judges are tasked with and expert at, leaving them better placed for such assessment. Yet despite this, even insincere apologies are better than none at all since the wrong of the offence is publicly highlighted and over time it may ultimately promote genuine repentance from the offender. More than this, it can potentially vindicate victims whilst reinforcing social norms.¹¹³ Murphy echoes this opinion to some extent, commenting that some victims will not care whether the apology offered is sincere (since there is a publically humiliating aspect to having to apologise). However, he does question whether the degree of community which exists in reality is overstated amongst those who prioritise offers of remorse and apology in the criminal setting.¹¹⁴

Addressing these and other concerns, the Scottish Government, in accordance with section of the Victims and Witnesses (Scotland) Act 2014, recently produced fairly detailed guidance on the delivery of Restorative Justice in Scotland in accordance with section 5 of the so that where RJ is available it is "delivered in a coherent, consistent, victim-focused manner across Scotland, and are in line with the EU Victims' Rights Directive."¹¹⁵

¹¹⁰Bibas, S., and Bierschbach, R., 2004. Integrating Remorse and Apology into Criminal Procedure. 114(1) *The Yale Law Journal* 85. at p 116.

¹¹¹ Poulson, B., 2003. A Third Voice: A Review of Empirical Research Outcomes on the Psychological Outcomes of Restorative Justice. 167 *Utah Law Review* 189.

¹¹² Bibas and Bierschbach, 2004. (n110) at p.141.

¹¹³ Ibid, at p. 142-144.

¹¹⁴ Murphy, 2006. (n95) at pp. 384-385.

¹¹⁵ Directive 2012/29/EU establishing minimum standards on the rights, support and protection of the victims of crime. [pdf] Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>> [Accessed 29 April 2018].

4.0 Public perception of sentencing

Before examining death by driving cases specifically, the context of public perception research should be briefly sketched. In general the public assign a high level of support for proportionality in sentencing. However, empirical research across western countries has now also established that although public opinion tends to regard sentences in the abstract as too lenient, this is in large part, at least, a function of limited public knowledge. Although the picture varies partly demographically, in general people tend to over-estimate the seriousness of crime (e.g. the prevalence of violence), and under-estimate the sorts of sentences passed. When little or no information about the case is provided people tend to imagine the gravest offences carried out by the most culpable offenders, When people are asked (e.g. in opinion polls) to give their 'top-of-the-head' responses to abstract questions about crime and justice they may tend to rely on images of the most serious of offending, which is most prominently reported in the media, often because of their seemingly lenient treatment. Thus, the widespread view that sentencing is too lenient appears to be based on a widespread under-estimate of the reality of sentencing practices.

When, however, people are given vignettes of different cases, research tends to find that the sentences people suggest tend to be less disparate from that which the courts do pass. This phenomenon has been repeatedly found in research across the western world.¹¹⁶ That said, the picture is nuanced, complex and contingent on context and methodology, invoking wider feelings of insecurity about contemporary life. Thus, it may be too simplistic to simply dismiss this as no more than a problem of public ignorance or populism which can be corrected only by a top-down strategy of mass public education.¹¹⁷

Arguably, informed public attitudes should be a consideration when drafting sentencing guidelines to cases where driving causes death, since such cases give rise to a great deal of community concern.¹¹⁸ As such, this will be considered in more detail below.

¹¹⁶ For an overview see, for example, by Gelb, K., 2014. Public opinion about sentencing. Chapter in G. Bruinsma and D. Weisburd (eds.), *Encyclopaedia of Criminology and Criminal Justice*. New York: Springer; Roberts, J., and Hough, M., 2005. *Understanding Public Attitudes to Criminal Justice*. Maidenhead: Open University Press.

¹¹⁷ See for instance Hutton, N., 2005. Beyond Populist Punitiveness? 7(3) *Punishment & Society: the International Journal of Penology* 243.

¹¹⁸ *Ibid.*

4.1 Culpability and public perception

In 2008, Roberts et al conducted research in England and Wales which explored public reaction to the four offences under the Road Traffic Act 1988: causing death by dangerous driving, death by careless driving, causing death by careless driving whilst under the influence of drink or drugs, causing death by careless or inconsiderate driving, and causing death by driving when driving without a licence, insurance or whilst disqualified.¹¹⁹

Examining attitudes towards culpability was a key part of this research. A difference in attitude could be seen between survey results and those obtained from focus groups.¹²⁰

Emphasising culpability was also noted to increase punitive feeling amongst participants.

Roberts et al recognised that whilst the 'spontaneous' reaction to these offences are usually punitive, this does not accurately reflect the state of public attitudes, especially when people are given specific case information. Their research used both quantitative and qualitative methods. The survey employed a representative sample of 1,031 adults in England and Wales, examining perceptions of seriousness and opinions about appropriate punishments. Questions were posed about six case vignettes. In addition, 23 focus groups with 101 participants were conducted and concluded that the limits of public tolerance for sentencing in these cases is broader than would be imagined after taking a simple poll question. Their report for the Sentencing Advisory Panel emphasised this from the outset: the public underestimate sentencing.¹²¹

While there has been no in-depth research into public attitudes and knowledge of death by driving offences in Scotland, research in other jurisdictions has quite recently been undertaken, most notably by Roberts et al in England and Wales.¹²² Broadly speaking, the research found that, in common with research into attitudes about crime in general, when asked in the abstract, people considered sentencing for causing death by driving far too lenient. Crucially, however, people tended to under-estimate very significantly the severity of

¹¹⁹ Roberts, J., Hough, M., Jacobson, J., Moon, N., and Bredee, A., 2008. Public attitudes to the sentencing of offences involving death by driving. *7 Criminal Law Review* 525.

¹²⁰ Roberts, J., Hough, M., Jacobson, J., Moon, N., and Bredee, A., 2008. *Attitudes to the sentencing of offences involving death by driving*. Sentencing Advisory Panel, Research Report-5. at pp 32-33. [pdf] Available at: <http://www.icpr.org.uk/media/10375/Attitudes%20to%20sentencing%20of%20Death%20Driving%20offences.pdf> [Accessed 16 March 2018].

¹²¹ Ibid.

¹²² Roberts et al, 2008. (n119).

current sentencing practices. The research found “a very wide gulf” between the sentences which people believe the courts pass. For the ‘dangerous’ offence the public favoured a custody rate of 71 per cent but expected a custody rate from the courts of just 31 per cent, In reality it was 95 per cent. Similarly, for ‘careless-drunk offences’ the discrepancy was nearly as large: the public favoured a custody rate of 76 per cent but expected a custody rate from the courts of just 41 per cent. In reality, it was 94 per cent. This suggests that not only do people greatly underestimate the realities of sentencing practices (at least in England and Wales), but that, in general, preferred sentences may, in fact, be slightly less severe than the practices of the courts.¹²³

That said, there is an important exception in relation to causing death when unlicensed, disqualified or uninsured. The research in England and Wales found that “the position in relation to the is both starker and more complicated.....[P]eople rate the disqualified offence as more serious than ‘careless’ driving.”¹²⁴ The premediated aspect of the offender having knowing that s/he should not be driving was linked to an increase in perceived culpability. Causing death whilst under the influence of drink or drugs produced the strongest reaction from participants in Robert et al’s study and was considered comparable to murder, so for them for anomalous in their study of public perception to sentencing in this context.¹²⁵ This, Roberts et al note, is a situation which is complicated for the drafters of guidelines in that Parliament appears, in setting the relative sentencing maxima, to have treated, for example, the ‘disqualified’ offence as less serious than the ‘careless’ one.¹²⁶ Participants in Robert et al’s study considered this to be more serious than careless driving, despite the fact that it is formally treated as less serious than careless driving.

For Roberts et al, public education would be beneficial in this area since their evaluation of views were conducted after further information was provided to participants. They leave open the question of what is considered an acceptable gap between public opinion and practice.¹²⁷

¹²³ Roberts et al, 2008. (n120). However, the ‘real’ sentences rely on official data and given its limitations noted above we should be cautious about drawing such conclusions.

¹²⁴ Roberts et al, 2008. (n119) at p. 536.

¹²⁵ Roberts et al, 2008. (n120).

¹²⁶ Ibid.

¹²⁷ Ibid.

Roberts et al comment that in the context of causing death by driving offences, a more restricted scope exists for sentencing factors, especially mitigation, when compared with public perception on the sentencing of other offences such as burglary.¹²⁸ Aggravating factors were deemed to be more influential than mitigating factors in terms of attitudes towards sentencing. However, what amounted to an aggravation or mitigating was not mutually exclusionary. For example, remorse was considered by participants in this study to be mild mitigation, but when absent, this was considered a significant aggravation. Conversely, whilst fleeing after the offence was considered an aggravation, helping was not considered a strong mitigation. Instead this was treated with neutrality given the view that offering assistance in the aftermath of a crime was simply the right thing to do and something that the offender should have been doing anyway.

Participants were also highly influenced by the absence of prior driving offences, and offenders were considered to be more culpable if they had not learnt from previous mistakes. Youth was given little weight by focus groups but the issue of having a close relationship with the deceased (and especially being related to them) proved a more difficult subject of discussion for participants involved. Most concluded, however, that this should have no impact upon the penalty since a death had still been caused and it was the death which was being punished. Little sympathy was given for the offender's remorse on the basis that it was 'too late' and inconsequential. Similarly, injury caused to the offender was treated with little sympathy, viewed as self-inflicted.

Focus groups saw little role for beavered relatives. The common consensus seemed to be that relatives could never be rational in the circumstances. Roberts et al's study research included interviews with victims' relatives, who perhaps unsurprisingly, did express dissatisfaction about sentencing including disqualification period. Their views on what constituted mitigation also differed from other participants in the study. A further source of dissatisfaction for the victims' relatives was the impersonality and routine nature of court proceedings.

¹²⁸ Roberts, J., Hough, M., Jacobson, J., Moon, N., and Steel, N., 2009. *Public Attitudes to the Principles of Sentencing*. Research Report-6, Sentencing Advisory Panel. [pdf] Available at: <http://www.icpr.org.uk/media/10369/Attitudes%20to%20principles%20of%20sentencing.pdf> [Accessed 16 March 2018].

4.2 Personal mitigation and public perception

Lovegrove has also considered the public's sense of justice in the context of death by driving, particularly in relation to their views on personal mitigation. For him, the proportionality principle frames the Australian Sentencing Guidelines Council's statement on the decision-making to be followed by sentencing judges. As such, he examines how Andrew von Hirsch's proportionality theory understands personal mitigation in sentencing, how it can be applied in an empirical study and as such, whether this theory is consistent with the public's sense of justice.¹²⁹

Under Lovegrove's understanding of the proportionality theory, there are four categories for personal mitigation: reduced culpability (where defences, for example provocation, or foreseeability may be relevant), the absence of prior convictions, equity mitigation (where compassion is offered for offender's suffering and the acknowledgement of their wrongfulness by way of remorse or an apology) and equality of impact (where some offenders will be more affected by punishment than others, such as young offenders). Following from Lovegrove's empirical study involving 471 participants, he concludes that the "public do not view personal mitigation through a proportionalist's eyes"¹³⁰. Instead, there is more to their sense of justice than proportionality of punishment.

4.3 Public opinion as a source law reform

Cunningham discusses the fact that the Road Safety Act 2006, which introduced sections 2B and 3ZB into the Road Traffic Act 1988 was influenced by campaigns from families of those killed as a result of driving offences.¹³¹ Despite this, fears that causing death by dangerous driving would be 'downgraded to' causing death by careless driving upon its introduction and as such, section 2B muddies the waters in borderline cases which might have been otherwise charged under section 1.¹³² Her research found such claims to be overstated. Prosecutors interviewed in her study were of the view that it was not so much the distinction between dangerous and careless driving which poses them a problem, but instead the

¹²⁹ Lovegrove, A., 2010. Proportionality theory, personal mitigation, and people's sense of justice. 69(2) *Cambridge Law Journal* 321.

¹³⁰ *Ibid*, at p 344.

¹³¹ Cunningham., 2015. (n22).

¹³² A view espoused by Hirst, M., 2008. Causing death by driving and other offences: a question of balance. 5(1) *Criminal Law Review* 399.

decision whether or not to prosecute at the bottom end of the scale. For example, cases which involve momentary inattention. Despite this conclusion, Cunningham recognises that there have been occasional cases prosecuted under section 2B, where section 1 would have been the more appropriate charge. Cunningham also recognises that many cases will fall short of bereaved families expectation in terms of sentencing, but if their expectations can be managed, they are made to feel as though their case matters and their loss officially recognised, then the offences introduced by the Road Safety Act 2006 affords clear benefits for families.

Certainly, in Roberts et al's 2008 study, all of the interviews conducted with close relatives of the victim showed there to be a deep dissatisfaction at the sentence passed.¹³³ Their perceptions were that sentences were lenient, with the typical descriptors reported as "disgusting", "an insult" and "total disgrace".¹³⁴ In particular, anger and incomprehension was expressed at the fact that the offender would be expected to serve half, or less than half, of the period in custody, after which the offender would be able to return to their normal life, despite the fact that their lives had been irrevocably changed. These feelings appeared to be aggravated by experiences of immersion in a confusing and alienating court environment and wider criminal justice system. Fury at the offender was intensified by a feeling that s/he had shown no remorse and would not be required to pay properly for the harm caused. The sense of a lack of remorse, and that the offender seemed to be indifferent to the harm done and to their suffering, was a central source of anger, to which all relatives returned. Asked if it would have made a difference to them if the offender had shown genuine remorse, most said that it would have made some difference to how they felt and indeed were looking for signs of genuine remorse. That said, they did not believe it should necessarily change the sentence.

The wider sense of confusion, marginalisation even alienation from an apparently insensitive system was also important. Roberts et al suggest that interviewees' comments about sentences passed suggest there is a need for clearer explanation of sentences in court. "The difficulty is that victims listen to the passing of sentence in a state of great emotional intensity. Some of our interviewees said they could not remember all of what is said..."¹³⁵

¹³³ Roberts et al, 2008. (n120) at p.52.

¹³⁴ Ibid.

¹³⁵ Ibid, p. 59.

5.0 Other commonwealth jurisdictions

Storey discusses the category of ‘unlawful act manslaughter’ which exists in England, Australia and Canada.¹³⁶ Given these and other similarities, the approach taken in Canada and Australia will be considered below. Generally, what can be said is that the maximum penalty laid down by Parliament in the UK would appear to be analogous to other commonwealth jurisdictions, as too would the conceptually different treatment of these types of offences.

5.1 Canada

Canada is a single jurisdiction, with criminal offences being regulated by the Criminal Code. The Criminal Code dictates that a sentence must be consistent with the fundamental principles and fundamental purpose of sentencing. Section 718 of the Code dictates that the fundamental purpose is essentially proportionality of sentencing, as it relates to the responsibility of the offender.

5.1.1 Offences and penalties

The Canadian Criminal Code provides the offence of ‘dangerous operation causing death’ under section 249(4). The provision includes the fact that the maximum sentence cannot be in excess of 14 years. More relevant in practice are the offences of impaired driving causing death (section 255(3)), driving with a blood alcohol unit above 0.08 per cent and causing death (section 255(3.1)) and failing or refusing to take a required test without a reasonable excuse and causing death (section 255(3.2)). The maximum penalty for each of these is a life sentence, any driving prohibition deemed appropriate by the sentencing judge and/or any fine the judge deems appropriate. There is no minimum penalty.

Aggravations and mitigations must be considered during sentencing. Aggravations include: the victim’s injuries (if not dead), prior convictions, the failure to seek assistance for addiction or behavioural problem and not taking responsibility for the offence (but this will not include pleading not guilty, instead it relates more to a lack of remorse). Mitigations include: previous good character, showing remorse, having aboriginal status, being of young or old age, having a mental or physical disability, having financial dependents, pleading guilty.

¹³⁶ Storey, T. 2017. Unlawful and dangerous: a comparative analysis of unlawful act manslaughter in English, Australian and Canadian Law. 79(4) *Journal of Criminal Law* 234.

5.1.2 Sentencing

Statutory sentencing maxima associated with causing death by driving and causing serious injury by driving increased in Canada in 1985, 1999, 2000 and 2008. Despite this, Solomon and Perkins-Leitman recognise the fact that maximum sentences are rarely used in Canada, with only one case seemingly employing the maximum sentences.¹³⁷ To further emphasise the reluctance to impose maximum sentences, they discuss the case of *R v Walsh* where the offender fled the scene, was twice the legal alcohol limit, had 18 previous convictions related to impaired driving (and 96 other criminal convictions) and was recognised as being likely to re-offend, but yet was not designated a ‘dangerous offender’ as per the prosecutor’s application.¹³⁸ There are also low charge and conviction rates for these crimes.

Resultantly, this has caused dissatisfaction, especially amongst victims’ families. One high profile group which has enacted legal change is ‘Mothers Against Drink Driving’ (MADD). For them: “The short sentences imposed in some cases of impaired driving causing death or bodily harm, the generous credit given for pre-conviction imprisonment and the fact that many of these offenders are paroled after serving only one-third of their sentence has generated controversy and angered victims of impaired driving.”¹³⁹

Some academic commentators have voiced similar concern that the principles underlying the law in this area are “convoluted”, leaving judges able to “pick and choose among the principles to justify the sentence that they wish to impose”¹⁴⁰, despite the existence of sentencing guidelines. However, Solomon and Perkins-Leitman comment that the focus on ‘tough laws’ which often originates from campaign groups, obfuscates the lack of focus or implementation of practical preventative measures, such as breath tests.¹⁴¹ The table below show the sanctions for impaired driving causing death cases in Canada for the period 1994/95 to 2014/15.

¹³⁷ Solomon, R., and Perkins-Leitman, D., 2014. Canada Sentencing Law and Impaired Driving. *Les Cahiers de PV* 28. at p 3 [pdf] Available at: <http://www.agpv.ca/images/stories/docs/Solomon_Perkins_mai2014.pdf> [Accessed 23 March 2018].

¹³⁸ [2009] JQ 9144 (Qc Prov Ct)

¹³⁹ MADD, *Sentencing for Impaired Driving*, [pdf] Available at: <http://www.madd.ca/media/docs/MADD_Canada_Sentencing_Framework_FINAL.pdf> [Accessed 23 March 2018]. MADD prompted the elimination of conditional sentences of imprisonment for impaired driving causing death and bodily harm which did result in increased prison sentences.

¹⁴⁰ Solomon, R., and Perkins-Leitman, D., 2014. (n137) at p 9.

¹⁴¹ Although it should be noted that Solomon acted as the National Director of Legal Policy for Mothers Against Drunk Driving Canada and Perkin-Leitman was working as Solomon’s research assistant.

Table 4: Selected Sanctions for Impaired Driving Causing Death: Canada, 1994/95-2014/15¹⁴²

Year	Persons convicted	Custody (%)	Conditional sentence (%)	Probation (%)	Fine (%)	Other (%)
1994/95	29	97	0	41	0	14
1995/96	42	88	0	52	5	26
1996/97	47	87	0	43	2	26
1997/98	49	82	0	45	8	33
1998/99	55	80	6	39	2	67
1999/00	42	79	10	33	5	57
2000/01	51	75	16	33	8	61
2001/02	41	80	10	34	0	80
2002/03	42	62	29	40	5	90
2003/04	50	64	24	22	6	94
2004/05	58	66	17	31	5	84
2005/06	45	67	7	22	4	47
2006/07	56	57	23	27	5	61
2007/08	61	59	20	33	2	70
2008/09	60	72	18	23	3	58
2009/10	54	83	6	20	2	65
2010/11	48	85	4	25	0	69
2011/12	35	83	0	26	3	71
2012/13	48	83	0	21	2	65
2013/14	40	88	0	18	0	58
2014/15	31	71	0	10	0	48

5.2 Australia

Australia cannot be talked about as a single jurisdiction. Instead, it comprises of nine jurisdictions, six of which are individual states: New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania.¹⁴³

¹⁴² Taken from MADD, 2017. *Sentencing For Impaired Driving Causing Death: Canada, 1994/95-2015/16*.at p 7. [pdf] Available at: < <https://madd.ca/pages/wp-content/uploads/2018/01/Sentencing-for-Impaired-Driving-Causing-Death-1994-95-to-2015-16-28Nov-201729.pdf> > [Accessed 17 April 2018].

5.2.1 Offences and penalties

In New South Wales (the biggest jurisdiction) and Western Australia, death by dangerous driving is dealt with by the equivalent offence of “dangerous driving occasioning death”¹⁴⁴. The maximum penalty for this offence is ten years imprisonment, but this increases to 14 years if aggravations are present. Similar to UK jurisdictions, aggravations include alcohol or drug impairment.¹⁴⁵ Also explicitly mentioned in the statutory definitions provided is where the accused has been driving a vehicle to escape pursuit by a police officer.

In South Australia, section 19A of the Criminal Law Consolidation Act 1935 provides the offence of ‘causing death or harm by use of vehicle or vessel’. This involves driving a vehicle in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to any person, and as such causing death.¹⁴⁶ Subsection three of the same provision mirrors this offence where the consequences are serious harm rather than death.

The maximum penalty for a first offence is 15 years imprisonment with mandatory licence disqualification for ten years or longer.¹⁴⁷ The maximum penalty for a first offence which is an aggravated or for a subsequent offence is imprisonment for life and mandatory licence disqualification for ten years or longer.¹⁴⁸

Aggravations are contained within the Road Traffic Act 1961. These include attempting to escape the pursuit of a police officer, being disqualified at the time, being under the influence of alcohol above the proscribed level,¹⁴⁹ or driving at excessive speed¹⁵⁰.

5.2.2 Sentencing

Government publications confirm that between 2011–12 and 2015–16, 56 people were sentenced in the higher courts of Victoria for a principal offence of culpable driving causing

¹⁴³ The remaining jurisdictions are the two Australian Territories within mainland Australia (Northern Australia and Australian Capital Territory). Australian Commonwealth Government is the final jurisdiction.

¹⁴⁴ S 52A Crimes Act 1990.

¹⁴⁵ S 52A(7) Crimes Act 1990.

¹⁴⁶ Criminal Law Consolidation Act 1985 s 19A (1).

¹⁴⁷ Ibid, s 19A(1)(a)(i).

¹⁴⁸ Ibid, s 19A(1)(a)(ii).

¹⁴⁹ All contained in s 45(3).

¹⁵⁰ S 45A.

death.¹⁵¹ Over the same period, it is reported that 46 of the 56 people sentenced for culpable driving causing death received a period of imprisonment, with a further three people receiving an aggregate sentence of imprisonment.¹⁵²

The table below shows the principal sentence of imprisonment for culpable driving causing death during this five year period.

Table 5: Imprisonment for culpable driving causing death 2011-12 to 2015-16

Imprisonment length (years)	Number of people
Four- less than five	6
Five-less than six	18
Six-less than seven	10
Seven-less than eight	7
Eight-less than nine	3
Nine-less than ten	0
Ten-less than eleven	2

The data also provides information on other offences finalised at the same hearing, for example theft or failing to stop at the scene of the offence. The total effective sentence of imprisonment and non-parole periods are also provided in this summary. Total effective imprisonment lengths ranged from three years and nine months to 16 years, and non-parole periods ranged from one year and six months to 11 years.¹⁵³

6.0 Conclusions

Current sentencing practices in Scotland in relation to causing death by driving appear to be guided by both current sentencing for culpable homicide convictions and the guidelines offered by the Sentencing Council for England and Wales in relation to causing death by driving. Broadly speaking, the structure and sentencing of existing offences appears to be broadly similar to other comparable jurisdictions. Noting the value of available statistical

¹⁵¹ Sentencing Advisory Council, 2017. *Sentencing Snapshot*. Available at: <https://www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/200-sentencing-trends-culpable-driving-causing-death-higher-courts> [Accessed 27 March 2018]

¹⁵² Ibid.

¹⁵³ Ibid.

information about causing death by driving offences, this report also notes the limitations of such official data, based as they tend to be on a principal conviction, which can obscure comparisons between multi-conviction cases.

It has been noted that this category of offences represents specific challenges to sentencing, in particular the demands of proportionality. Proportionality in sentencing is normally thought to involve an assessment of both harm and culpability. Invariably resulting in extremely high degree of harm, such offences are relatively unusual in that they may often, though not always, be thought to have involved a relatively low degree of culpability.

Scotland appears to lack in-depth research about public opinion and attitudes in cases of causing death by driving offences. However, based on the available research evidence world-wide, public attitudes and knowledge of these cases need to be understood in the wider context of how public attitudes are, in part, a function of limited public knowledge about sentencing. When asked in the abstract about whether sentencing is 'too tough', 'too lenient' or 'about right', the vast majority of people rate it as 'too lenient'. People tend to over-estimate the seriousness of offences and the significantly under-estimate the severity of sentences passed by the courts. When, however, people are given vignettes of different cases, research has established that the sentences people suggest sentences which are fairly similar to that which the courts pass. Research suggests that relatives of the victims harboured very negative feelings about the criminal justice process, which may be intensified by not hearing any explanation (in particular remorse) from the offender. It is possible that there may be some scope to consider carefully the desirability and feasibility of Restorative Justice as a victim-sensitive option which offers, (but in no sense coerces), a means to bring into two-way communication, in a safe way, those affected by a criminal offence. This would not replace the formal criminal process, but rather be complementary to it.

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