

31 August 2018

DEPARTMENT FOR TRANSPORT

**SUPPLEMENTARY REPORT
RELATING TO THE CONSULTATION ON**

**Cycling and Walking Investment Strategy Safety Review: proposals for new
cycling offences, August 2018**

**HUGH J. OLSON
ADVOCATE**

1. BACKGROUND

1.1. On 12 August 2018 the Department for Transport published a consultation looking at whether new offences equivalent to causing death by careless or dangerous driving and causing serious injury by careless or dangerous driving should be introduced for cyclists. In that consultation the Department stated at para. 1.10 “The Department is conducting further work to understand the context of the law in relation to Scotland and will publish this information, including on GOV.UK, before the end of August 2018.” This report is part of that work.

1.2. I have been asked to provide an analysis of the adequacy of Scottish criminal common law in relation to deaths or serious injury caused by cyclists.

1.3 Laura Thomas prepared a report on the law in England and Wales published on 9 March 2018¹ (‘the March 2018 Report’). Her report also considered the statutory offences in the Road Traffic Act 1988 that apply in Scotland as well as in England and Wales². I do not have anything to add to her analysis of the Road Traffic Act 1988 other than to highlight that the definition of ‘road’ is slightly different in Scotland than in England and Wales³. My report is intended to be a supplement to the March 2018 Report and should be read together with it. I have used the March 2018 Report as a statement of the current English law.

2. SUMMARY

2.1. Is the current Scots law on cyclists causing death or serious injury sufficient?

2.1.1. The March 2018 Report considered that the law in England and Wales was insufficient⁴:-

- (1) the gap between manslaughter and the historic offence of wanton and furious driving was too wide; and
- (2) the use of a historic offence aimed at carriage driving did not fit with the modern approach to road safety, it was difficult to define, not objective in scope and did not allow for a transparent and consistent sentencing practice focused on culpability and harm.

2.1.2. The position in Scotland is not the same as in England and Wales. There are two important differences:-

¹ <https://www.gov.uk/government/publications/cycle-safety-review>

² March 2018 Report 4.1-4.2, sections 5 and 6

³ s.192 (1) “road

(a) in relation to England and Wales, means any highway and any other road to which the public has access, and includes bridges over which a road passes, and

(b) in relation to Scotland, means any road within the meaning of the Roads (Scotland) Act 1984 and any other way to which the public has access, and includes bridges over which a road passes,

⁴ March 2018 Report 17.3-17.4

(First) The Scottish common law crime of culpable homicide is similar to but not the same as manslaughter. Culpable homicide covers circumstances that might be prosecuted as causing death by dangerous driving and would, therefore, cover cases that might be prosecuted as causing death by dangerous cycling. The differences between culpable homicide and manslaughter mean that some of the difficulties encountered in England and Wales in prosecuting deaths caused by cyclists as manslaughter do not apply in Scotland.

(Second) The Scottish common law crime of culpable and reckless conduct can be used to prosecute cyclists who cause serious injury. Culpable and reckless conduct can be prosecuted in any level in Scottish courts from Justice of the Peace Courts (maximum sentence 60 days imprisonment), the Sheriff Court either summary (maximum sentence 1 year imprisonment) or on indictment (maximum sentence 5 years imprisonment), and in the High Court of Justiciary (maximum sentence life imprisonment). Although the crime of culpable and reckless conduct is not the same as the proposed new offence of causing serious injury by dangerous cycling it would cover many cases that might be prosecuted as causing serious injury by dangerous cycling.

2.1.3. As the existing Scottish crimes of culpable homicide and culpable and reckless conduct overlap with the proposed new offences of causing death by dangerous cycling and causing serious injury by dangerous cycling there is not the same 'gap' in Scotland as was identified in England and Wales. There is, however, no Scottish crime that might cover causing death by careless cycling or causing serious injury by careless cycling.

2.1.4. The issue in Scotland is different from that in England. In Scotland there is not the same obvious gap that needs to be filled by legislation. The issue in Scotland is not is it necessary for there to be legislation, rather it is – is there a place for modernising the law in Scotland?

2.2. Is there a place for modernising the law in Scotland?

2.2.1. The March 2018 Report recommended that there should be legislative change to tackle the issue of dangerous and careless cycling that causes serious injury or death in order to bring cycling in line with driving offences.

2.2.2. In England, deaths and serious injury caused by cyclists have attracted a great deal of attention. There have been a number of high-profile cases e.g. at the Central Criminal Court on 23 August 2017 Charles Alliston was acquitted of manslaughter but convicted of wanton and furious driving after he rode into Mrs Briggs when she was crossing a road in London. Mrs Briggs suffered serious head injuries and died a week later. Mr Alliston was sentenced to 18 months detention in a Young Offender's Institution. At Reading Crown Court on 11 October 2017 Richard

Manners admitted causing bodily harm by wilful misconduct after crashing into a 4 year old boy in a pedestrian-only area while riding a bike with no brakes. He was imprisoned for 27 weeks.

- 2.2.3. The position in Scotland is very different. Because of the lack of high-profile cases of death or serious injury caused by cyclists in Scotland, there has not been the same discussion in Scotland about whether or not the law should be reformed.
- 2.2.4. The March 2018 Report⁵ identified from road casualty data that between 2011 and 2016 there had been 20 pedestrian fatalities in collisions between pedestrians and cyclists (not necessarily due to the fault of the cyclist) in England and Wales. There were no deaths in collisions between pedestrians and cyclists in Scotland in the same period 2011 to 2016. However, COPFS have advised that a cyclist was involved in a death in 2017 -see below.
- 2.2.5. There have been no cases reported in the law reports of prosecutions of cyclists for culpable homicide in Scotland.
- 2.2.6. The last prosecution of a cyclist for culpable and reckless conduct reported in the law reports was in 1956 in Scotland.⁶ Culpable and reckless conduct is, however, still part of the modern prosecutor's armoury, for example, in 2017 there was a collision between a motorcyclist and a cyclist in which the motorcyclist died. The Crown Office and Procurator Fiscal Service carried out an investigation into whether the cyclist should be prosecuted for culpable and reckless conduct. There was insufficient admissible evidence to prosecute the cyclist and as a result there was no prosecution.
- 2.2.7. The March 2018 Report recommended legislative reform because of problems with the current state of English criminal law.⁷ However the March 2018 Report also identified reasons for reform that would apply in Scotland as well.
- 2.2.8. For example, what is now the offence of causing death by dangerous driving (originally reckless driving) was introduced in 1955 because of a perception that juries would not convict for manslaughter. The consultation is an opportunity to find out if there is a concern that juries in Scotland might not convict of culpable homicide but might convict of a statutory offence of causing death by dangerous cycling. Although in Scotland in driving cases it is possible for prosecutions to be brought for culpable homicide rather than causing death by reckless driving in practice the charge of culpable homicide is reserved for the most serious

⁵ See section 15.5

⁶ *Quinn v Cunningham* 1956 J.C. 22 overruled on the law by *H.M. Advocate v Harris* 1993 J.C. 150

⁷ March 2018 Report Section 17

cases⁸. The consultation is an opportunity to see whether in Scotland creating a statutory offence of causing death by dangerous cycling and reserving culpable homicide for the most serious of cases would provide prosecutors with another option to deal with these cases. Similarly, if there was a statutory offence of causing serious injury by dangerous cycling then culpable and reckless conduct could be reserved for the most serious cases.

2.2.9. The consultation is also an opportunity for there to be a discussion about whether or not cyclists should be subject to the same laws as drivers as they are in other countries, e.g. Ireland, Holland, and Germany by introducing statutory offences of causing death or serious injury by careless cycling.

3. TEXTBOOKS REFERRED TO

3.1. The main sources that I have considered are :-

1. *Jury Manual* published by the Judicial Institute for Scotland, online version last modified 9 June 2017⁹. This provides guidance to Scottish judges on the law and possible forms of directions to be given to juries. It is not intended to be an authoritative statement of the law, but it is 'a first port of call, providing a useful, but non- authoritative, checklist of points to bear in mind'¹⁰.
2. Gordon, GH, *The Criminal Law of Scotland* 3rd and 4th editions – the Scottish equivalent of *Smith and Hogan*.
3. Brown, A, *Wheatley's Road Traffic Law in Scotland* 5th edition
4. Omerod and Laird, *Smith and Hogan's Criminal Law* 14th edition

⁸ Brown, A *Wheatley's Road Traffic Law in Scotland* 5th ed, p.33

⁹ <http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManualJune2017.pdf>

¹⁰ Lord Malcolm in *McGartland v H.M. Advocate* 2015 HCJAC 23 at para 31

4. SCOTTISH COMMON LAW OFFENCES RELATING TO DEATHS AND SERIOUS INJURY CAUSED BY CYCLISTS

4.1. Prosecution of common law offences

4.1.1. In theory common law offences such as culpable homicide and culpable and reckless conduct can be prosecuted in any Scottish criminal court. In practice culpable homicide will be prosecuted in the High Court of Justiciary (where the maximum sentence is life imprisonment) and culpable and reckless conduct causing serious injury would be prosecuted in either the High Court of Justiciary or the Sheriff Court before a jury (where the maximum sentence is five years imprisonment).

4.1.2. Where a case is being prosecuted in the High Court or in the Sheriff Court before a jury the decisions on whether a prosecution should be brought and, if so, on what charges and in which court are made by Crown Counsel acting on behalf of the Lord Advocate who is the head of the Crown Office and Procurators Service (COPFS) (similar to the Crown Prosecution Service in England and Wales).

4.1.3. There are no Scottish guideline cases for sentencing in involuntary culpable homicide cases involving road traffic cases and the Scottish Sentencing Council has not yet produced any guidance. English cases on manslaughter and the guidance of the Sentencing Council of England and Wales would be considered by Scottish courts¹¹. There is no Scottish guidance on sentencing for culpable and reckless conduct cases.

4.1.4. Sentences for involuntary culpable homicide and for culpable and reckless conduct will depend upon the particular circumstances of the case and the degree of culpability. It may be obvious but it is worth stating that it is perfectly possible for a case that is prosecuted in the High Court of Justiciary (where the maximum sentence is life imprisonment) to result in the accused being admonished or fined or sentenced to a short period of imprisonment as if he or she had been prosecuted in the Sheriff Court. Just because the case is prosecuted in the High Court of Justiciary does not mean that the sentence will be a 'High Court' sentence. It is also possible that where a case is prosecuted in the Sheriff Court, if the sheriff considers that his or her sentencing powers are inadequate to deal with a particular case, the sheriff can remit the case to the High Court of Justiciary for that court to exercise its greater sentencing powers.

4.2. Culpable homicide

4.2.1. The common law offence of culpable homicide is a broad offence covering:-

¹¹ E.g. *H.M. Advocate v Noche* [2011] HCJAC 108

‘the killing of human beings in all circumstances, short of murder, where the criminal law attaches the relevant measure of blame to the person who kills.’¹²

4.2.2. It is similar to, but different from the English concept of manslaughter¹³.

4.2.3. There are two categories of culpable homicide:-

- (1) Voluntary culpable homicide – where the death was caused intentionally and the case would be murder but for, for example, a partial defence of diminished responsibility or provocation.
- (2) Involuntary culpable homicide – where the death is caused unintentionally.

4.2.4. We are concerned with involuntary culpable homicide, and in particular deaths where the death is a foreseeable result of a person’s negligent conduct¹⁴. There is no requirement for a criminal act as in unlawful act manslaughter, and there is not the same requirement for death to be foreseeable as in gross negligence manslaughter.

4.2.5. A Scottish judge might choose to direct a jury in an involuntary culpable homicide case by using the direction in the *Jury Manual*¹⁵ (n.b. in this context ‘unlawful act’ means negligence- it does not mean a criminal act as it would in unlawful act manslaughter¹⁶):-

‘Culpable homicide is causing someone’s death by an unlawful act which is culpable or blameworthy. It’s killing someone where the accused didn’t have the wicked intention to kill, and didn’t act with such wicked recklessness as to make him guilty of murder. The unlawful act must be ...¹⁷ reckless or grossly careless. Recklessness or gross carelessness means acting in the face of obvious risks which were or should have been appreciated and guarded against or acting in a way which shows a complete disregard for any potential dangers which might arise. It’s immaterial whether death was a foreseeable result or not.

For the Crown to prove this charge, you would need to be satisfied:-

- (1) That the accused committed an unlawful act
- (2) That act must have been ...¹⁸ reckless or grossly careless in the sense I’ve defined it
- (3) That death was the direct result of the unlawful act.’

4.2.6. This can be compared with the direction that a judge might give in a case of causing death by dangerous driving¹⁹:-

‘A person drives dangerously if and only if:-

¹² *Drury v HM Advocate* 2001 S.L.T. 1013 Lord Justice General Rodger at para 13

¹³ *Transco PLC v HM Advocate* 2004 JC 29 Lords Osborne and Hamilton at paras 6 and 40

¹⁴ Gordon, G.H. *The Criminal Law of Scotland* para. 31.03

¹⁵ p.43.2

¹⁶ *Smith and Hogan’s Criminal Law* 14th ed. 15.3.1.1

¹⁷ I have omitted the words ‘intentional or at least’ as they apply to a case of voluntary culpable homicide.

¹⁸ I have omitted the words ‘intentional or’.

¹⁹ *Jury Manual* p.81.5

The way he drives falls far below what would be expected of a competent and careful driver, and
 It would be obvious to a competent and careful driver that the manner of driving... would be dangerous.
 Dangerous driving in this context covers risk of injury to anybody, including the accused driver and his passengers, and risk of serious damage to property. It covers driving in the face of obvious and material dangers which should have been seen, appreciated and avoided. It also covers driving which shows a complete disregard of potential danger resulting from the manner of driving. It's driving that shows a high degree of negligence, much more than lack of due care and attention. It's courting material risks deliberately, or ignoring or being grossly inattentive to risks that would be obvious to a careful driver.'

- 4.2.7. The difference between the crime of culpable homicide and the statutory offence of causing death by dangerous driving (and therefore any new offence of causing death by dangerous cycling) is that in culpable homicide the prosecution must prove that the accused had *mens rea* – he or she acted in the face of obvious risks which were or should have been appreciated, or he or she had a complete indifference to the consequences of his or her conduct.²⁰ Whether or not the accused had *mens rea* can be proved by inference from external facts, e.g. the way in which the accused drove²¹.
- 4.2.8. The statutory offence is different – the court must consider the quality of the driving (or cycling)- whether the driving (or cycling) fell far below what would be expected of a competent and careful driver (or cyclist) and not what the state of mind or intention of the driver (or cyclist) was. The test is purely objective.
- 4.2.9. There is an interesting academic debate that could be had about where the boundary between culpable homicide and causing death by dangerous driving lies. In the abstract I find it difficult to envisage a set of circumstances in which it would be possible to say 'these facts mean that this is not a case of culpable homicide, it is a case of causing death by dangerous driving'. It may, of course, be possible to say 'this is a case which would be better prosecuted as a case of causing death by dangerous driving than as culpable homicide.'
- 4.2.10. It is clear that many, if not all, cases that could be prosecuted under the proposed new offence of causing death by dangerous cycling could be prosecuted as culpable homicide. The issue is whether there is a place for modernising the law by creating a new offence of causing death by dangerous cycling and reserving culpable homicide for the most serious cases.

²⁰ *Transco PLC v HMA* 2004 JC 29 Lord Hamilton at paras 37 and 38

²¹ Lord Hamilton, para 38

4.3. Culpable and reckless conduct

4.3.1. The *Jury Manual* contains a useful explanation of the crime.

‘1. [T]here are two ways in which reckless conduct may become criminal. Reckless conduct to the danger of the lieges [to the danger of the public] will constitute a crime in Scotland and so too will reckless conduct which has caused actual injury.

2...The standard of recklessness appears to be the same in both statutory and common law crimes. The test is entirely objective. It is open to the trial judge, in charging the jury to adapt the judicial test for reckless driving in terms of the former section 2 of the Road Traffic Act 1972...’

4.3.2. A Scottish judge might choose to direct a jury in a culpable and reckless conduct case that-²²

‘It’s a crime to endanger others by reckless conduct. This crime can be committed in many different ways. Its essence is this. It involves exposing an individual, or particular individuals or the public generally, to a significant risk to life or health.

A high degree of recklessness is needed, more than carelessness or negligence. The accused must have acted with an utter disregard of the consequences of his conduct on the public, with total indifference to their safety.

It’s not necessary for actual injury to have been caused, it’s enough if there was the potential for injury or exposure to risk. It’s not necessary to prove that the accused intended to endanger anyone, or to have been alive to that possibility and disregarded it recklessly. That’s because the test you’ve to apply is an objective one. You’ve to look at the conduct involved, and decide objectively if it amounts to reckless disregard of public safety. You’ve to decide, using your collective common sense, if the risks would have been obvious to a reasonable person.

For the Crown to prove this charge, you would need to be satisfied:

- (1) that the accused behaved in the way described in the charge
- (2) that such conduct showed utter indifference to the safety of others.’

4.3.3. Again, there is an interesting academic question about where the boundary between culpable and reckless conduct and causing serious injury by dangerous cycling might be. I suggest that practice they would cover similar circumstances.

4.3.4. Again the issue is whether there is a place for modernising the law by creating a new offence of causing death by dangerous cycling and prosecuting for culpable and reckless conduct in the most serious cases.

5. AN EXAMPLE

5.1. In *R v Alliston [2017]* Mr Alliston was tried at the Central Criminal Court on indictment for unlawful act manslaughter and wanton and furious driving. The circumstances of this case as set out by Her Honour Judge Wendy Joseph

²² *Jury Manual* p.44.2

QC in her sentencing remarks²³ provide material to consider how such a case might have been prosecuted in Scotland. I will assume that the evidence that would be available to COPFS in deciding on a prosecution would be:-

- (1) Mr A was cycling at approximately 18 mph approaching traffic lights at a junction.
- (2) Mrs B was walking towards the accused on the other side of the junction.
- (3) The traffic lights were green for Mr A.
- (4) Mrs B decided to cross the street.
- (5) Mrs B may or may not have seen Mr A.
- (6) Mr A saw Mrs B as she stepped off the pavement.
- (7) It was clear to Mr A that Mrs B was in danger.
- (8) It was Mr A's responsibility as a road user not to run into Mrs B and this was obvious to him.
- (9) Mr A swerved and slowed to between 10 and 14 mph as he went through the yellow box at the junction.
- (10) Mr A shouted at Mrs B twice to 'get out of the f*!\$ing way'.
- (11) Mrs B had almost reached the centre of the road but could not go further because of on-coming traffic.
- (12) On his own account Mr A did not try to slow any more but, having shouted at Mrs B twice, he took the view that she should get out of his way – he said 'I was entitled to go on'
- (13) That meant that Mr A had to thread a path between Mrs B in the middle of the road and a parked lorry on his left.
- (14) When Mrs B realised her danger, in the shock of the moment, she clearly did not know what to do or which way to move for the best.
- (15) The result was that Mr A rode straight into her.
- (16) If Mr A's bicycle had a front-wheel brake he could have stopped but, on this illegal bike, he could not.
- (17) Mr A was not even trying to slow or stop.
- (18) Mr A expected Mrs B to get out of his way.
- (19) It was not merely the absence of a front brake but Mr A's whole way of riding that caused the accident.

5.1.1. While obviously I would defer to Crown Office's views on prosecution it seems to me that Mr A could have been prosecuted for culpable homicide:-

- (1) Mr A's cycling could fairly be described as reckless or grossly careless.
- (2) Mr A either acted in the face of obvious risks which were or should have been appreciated and guarded against, or
- (3) Mr A acted in a way which showed complete disregard for any potential dangers which might arise.

5.1.2. For a charge of involuntary culpable homicide it is immaterial whether death was a foreseeable result or not. This is in contrast to gross

²³ March 2018 Report 11.2

negligence manslaughter where the risk of death must have been reasonably foreseen²⁴.

5.1.3. Culpable homicide also differs from unlawful act manslaughter in that the fact that Mr A was riding an 'illegal bike' might form one of the circumstances from which a jury could infer that Mr A had the *mens rea* for culpable homicide, but it would not be an essential part of the charge as it would be for unlawful act manslaughter²⁵.

5.1.4. An alternative of culpable and reckless conduct could also have been libelled (set out) to take account of the possibility that the jury might find that Mrs B's death was not caused by Mr A. In that case the jury could convict of culpable and reckless conduct on the following basis:-

- (1) Mr A exposed Mrs B to a significant risk to life or health.
- (2) Mr A acted with an utter disregard for the consequences of his conduct on Mrs B, with total indifference to her safety.
- (3) Looking at Mr A's conduct objectively it amounted to a reckless disregard of public safety.
- (4) The risks would have been obvious to a reasonable person.

6. CONCLUSION

6.1. There are significant differences between the law in England and Wales and the law in Scotland relating to the prosecution of 'bad' cycling resulting in death or serious injury. Culpable homicide and culpable and reckless conduct can be used to prosecute behaviour that would be covered by offences of causing death injury by dangerous cycling or causing serious injury by dangerous cycling.

6.2. There is no Scottish crime or offence that can be used to prosecute behaviour that would be covered by offences of causing death by careless cycling or causing serious injury by careless cycling.

6.3. In Scotland the immediate need for reform that exists in England and Wales does not exist as culpable homicide and culpable and reckless conduct can be used to prosecute cases where death or serious injury has been caused by a cyclist.

6.4. In Scotland the areas for discussion are:-

- (1) Is there a place for modernising the law by creating a new offence of causing death by dangerous cycling and reserving culpable homicide for the most serious cases?
- (2) Is there a place for modernising the law by creating a new offence of causing serious injury by dangerous cycling and reserving culpable and reckless conduct in the most serious cases?

²⁴ March 2018 Report 7.5.3

²⁵ March 2018 Report 7.8

(3) Is there a place for modernising the law by creating new offences of causing death by careless cycling and causing serious injury by careless cycling?

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31 August 2018

Biography

Hugh J. Olson

Hugh Olson was called to the Scottish Bar in 1996 having practiced as a solicitor since 1990. He is a member of Arnot Manderson Advocates.

He was a Standing Junior to the Department of Transport in Scotland from 2006 to 2009. Since 2009 he has been a standing junior to the Advocate General for Scotland acting for the UK Government in Scotland.

In 2011 he was appointed as an ad hoc advocate depute. He has prosecuted cases in the High Court of Justiciary.

In 2017 he was appointed as the Deputy Traffic Commissioner for Scotland.

He is ranked in four practice areas by Legal 500:-

- Civil liberties, human rights, public inquiries, and public and administrative law
- Personal injury, medical negligence and professional negligence
- Employment
- Property, construction and agriculture