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# Causing Serious Injury by Dangerous Driving: Time for a Sentencing Guideline?

*R v Allen* [2021] EWCA Crim 1405

**Adam Snow**

Law School, Liverpool John Moores University, UK

## Abstract

This case comment concerns the the case of *R v Allen* [2021] EWCA Crim 1405 involving the sentencing of a defendant for causing serious injury by dangerous driving. In particular it notes the absence of a dedicated sentencing guideline on causing injury by dangerous and careless driving and the inadequacy of the current practice of relying on the death by dangerous driving sentencing guideline.

## Keywords

Dangerous Driving, careless Driving, motoring, serious Injury, road Traffic

*Allen* was an appeal against a sentence in respect of two sentences both of 38 months imprisonment (to run concurrently) and including 67 months disqualification from driving for the offence of causing serious injury by dangerous driving contrary to s.1A Road Traffic Act 1988.

Section 1A holds that

1. A person who causes serious injury to another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.
2. In this section “serious injury” means—
  - (a) in England and Wales, physical harm which amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861, ...

Section 1A is an either way offence punishable with a maximum of 12 months when tried summarily or 5 years when tried on indictment. (See Schedule 2 Road Traffic Offenders Act 1998) The offence is also subject to obligatory disqualification when tried on indictment of a period no shorter than two years.

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## Corresponding author:

Adam Snow, Senior Lecturer in Law, Law School, Liverpool John Moores University, UK.

E-mail: [a.j.snow@ljmu.ac.uk](mailto:a.j.snow@ljmu.ac.uk)

Allen was driving his car down the A68 in County Durham. The road is a single carriageway that narrows at certain points to allow for chevron-marked slip roads in the centre of the road. At a certain point on the road there was a marked area for turning into a farm with chevrons and broken white lines leading up to and encasing the turning. Road markings indicated the need to exercise caution with “SLOW” printed on the road and additional arrows warning drivers of the need to stay left. Mr Allen ignored these warnings and attempted to overtake two vehicles travelling at approximately 45–50 miles per hour pulling into the chevroned area. Unfortunately, Mr Nicholas Copson was travelling in the other direction, indicating a right turn and he pulled into the chevroned area.

There was a head on collision in which Mr Copson suffered catastrophic bodily injury, including complete paralysis from the chest down and eventual bilateral amputation of his legs. Mr Allen’s son was also injured in the crash and suffered a fractured spine and damaged spleen and liver. Mr Allen also suffered serious injury leading to requirement of a permanent colostomy.

Mr Allen plead guilty to causing serious injury by dangerous driving mid-way through his trial and was awarded a 5% discount on sentence as a result.

**Held, allowing the appeal,** that the sentence of 40 months imposed (before 5% credit was applied) was manifestly excessive. There are no sentencing guidelines for this offence and instead the judge in the crown court (relying the Court of Appeal decision in *R v Dewdney [2014] EWCA Crim 1722*) used the sentencing guideline for causing death by dangerous driving to assess the relevant factors in approaching sentence. The judge stated the offence was a single act of dangerous overtaking seen in the context of clear road markings warning of the hazards. Furthermore the extent of the injuries suffered by Mr Copson and Mr Allen’s son were at the very top end of those envisaged under the act. Accordingly, this was a level one offence that, had it caused the death of either Mr Copson or Mr Allen would have attracted a category range of 7–14 years. Given that the maximum sentence for the Section 1A offence is 5 years the trial judge reduced the tariff downwards to reflect this fact.

The Court of Appeal accepted the appellant’s argument that the driving was not sufficiently bad to place the offence in a category one level of seriousness.

Category 1 offences under the guideline are

The most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others

The relevant aggravating and mitigating factors from the guideline are

A prolonged, persistent and deliberate course of very bad driving AND/OR

Consumption of substantial amounts of alcohol or drugs leading to gross impairment

AND/OR

A group of determinants of seriousness which in isolation or smaller number would place the offence in level 2.

(These determinants include alcohol or drugs, avoidable distractions, vulnerable road users, awareness of risk and seriously culpable behaviour.)

The Court of Appeal found that the driving activities of Mr Allen were neither prolonged, persistent nor deliberate. Furthermore Alcohol and drug use was not a factor in this offence. The Court agreed with Mr Allen that the warning signs on the road were warnings and not mandatory signs and thus his driving was not of the worst example of dangerous driving. The Court further stated that had they required recourse to the sentencing guidelines for death by dangerous driving then they would have assessed Mr Allen’s driving as category 2 seriousness in that this was

driving that created a substantial risk of danger: it was a highly dangerous piece of uphill overtaking at substantial speed, involving a hatched area and with disregard of clear road sign warnings (at [23])

Further aggravating factors taken into account by the court included that there were multiple victims. By way of mitigation the court accepted that Mr Allen had a good driving record, both he and his Son were badly injured in the crash and the Covid pandemic pressure on prisons.

The Court of Appeal concluded that they did not require the sentencing guidelines to determine the case and instead relied on a broad understanding of the overall seriousness of the offending by reference to the mitigating and aggravating circumstances (at [26]) set against a 5-year maximum penalty.

The Court concluded that

In our judgment, as indicated, a notional sentence of 40 months before credit for guilty plea, achieved by reference to the starting point for level 1 offending was manifestly excessive. In our judgment, taking into account culpability and harm and the relevant aggravating and mitigating factors, a notional sentence of around 30 months' custody after trial was appropriate (at[27]).

The Court additionally reduced the extended part of the disqualification (Required under S, 35A Road Traffic Offenders Act 1988) (19 months to 14 months and 15 days) making the overall disqualification (subject to extended retest) 62 months and 15 days.

## Commentary

### Context

This discussion should be seen in the context of death and serious injuries on the road continuing to be a problem in England and Wales, and around the world (Passmore J, 2019). Between 2010 and 2020 the average number of people killed or seriously injured on England and Wales roads each year totals 23,038. According to the Department for Transport, during the pandemic year of 2020 there was a 21% reduction in road traffic and a commensurate 21% reduction in the number of people killed or seriously injured down to 19,896, of which 1317 were killed and 18,579 were seriously injured. Approximately 30 people are killed each week and 412 face serious injuries on the road in England and Wales. To put that into context 11 people are the victims of murder or manslaughter each week.

According to Ministry of Justice figures there were 373 prosecutions leading to 317 convictions for the offence of causing serious injury by dangerous driving, of which 206 were sentenced to immediate custody and a further 80 received a suspended sentence. In the same year 184 drivers were prosecuted for death by dangerous driving of which 154 were convicted, 144 received immediate custody and 9 received a suspended sentence. Thus approximately 14% of all deaths on the road lead to a prosecution for death by dangerous driving, whereas only 2% of serious injuries are prosecuted under the dangerous driving offence. Hopefully the proposed offence of causing serious injury by careless driving will fill the gap in prosecutions in the immediate future.

### The Court of Appeal in Allen

*Allen* is another case in a line of developing case law that is somewhat ambivalent on the utility of the death by dangerous driving guideline in sentencing non-fatal serious injuries. *R v Dewdney [2014] EWCA Crim 1722* established that the courts should have regard to the levels of offending in the death by dangerous driving guideline as an aid to assist determining the relevant aggravating and mitigating factors. The court in *Dewdney* felt this was preferable to developing an ostensible worst imaginable type of case and then assessing the defendant against that standard (at [27]). The court in *Dewdney* held that once the category range had been determined the court should then proceed on a compression basis to

reflect the fact that the maximum sentence for the death offence was 14 years whereas it is only 5 for the serious injury case.

In *R v Vincer* [2014] EWCA Crim 2743 a sentence of 3 years was reduced to 2 years when a defendant who had been drinking seriously injured two victims in a different vehicle, plus himself, had stayed at the scene and demonstrated remorse as well as a previously good character with a wife and two children to support. These were mitigating factors that a judge should have taken into account. In addition the Court of Appeal held that the trial judge had erred by not having regard to the sentencing guideline for the s. 1 offence.

In *R v Jenkins* [2015] EWCA Crim 105 the imposition of consecutive sentences in respect of injuries sustained by two separate victims arising out of a single crash were overturned and a concurrent sentence of the same length of each individual sentence was substituted. The definitive factor being the Court of Appeal decision in *R v Noble* [2002] EWCA Crim 1713 (a case concerning the s. 1 offence – death by dangerous driving) that held that as these are single instances of dangerous driving then the totality principle should reflect the nature of offending not the amount of harm caused since that relied on chance.

In *R v Sandulache* [2015] EWCA Crim 1502 the defendant's early guilty plea, absence of previous convictions, absence of concurrent offending (no license / no insurance) and the fact he did not fail to stop or evade capture and expressed immediate remorse were all relevant mitigating factors. In *Allen* the Court of Appeal likewise used the category offending guidelines for the s.1 offence but expressed doubts over using the guideline in a more prescriptive way (at [23]).

What seems clear from the line of emerging case law is that the severity of injury plays only a minor part in determining the appropriate sentence. Perhaps this is to be expected considering the reliance on the s.1 guideline since death is not subject to gradations of injury. Even where there are multiple serious injury casualties it is clear, as discussed above, *Noble* holds that sentences should be concurrent rather than consecutive. Thus dangerous driving incidents that lead to multiple seriously injured persons will only ever receive a maximum total sentence of 5 years, which given the mitigating factors the court must take into account is unlikely to be imposed.

It is somewhat strange that the court listed the serious injuries to Mr Allen's son as a mitigating factor considering he was one of the victims of the crash, and for which he was sentenced. Indeed Mr Allen's sentence for the injury caused to his son was exactly the same as that caused to Mr Copson – so the effect of such mitigation is unclear. Presumably the court took the holistic approach that causing serious injury to one's loved one will cause additional trauma to the defendant (above and beyond the physical ones suffered).

It would appear that the extent of the injuries caused to victims (and the number of victims) is not, as yet, a major factor to consider for the sentencing judge (although not one they can ignore). The emerging case law on culpability seems to focus primarily of the offender's standard of driving minus any special mitigation (remorse, continued presence at the scene, lack of concurrent offending, a good driving record and the impact on the offender's family and network). It is a dangerous driving offence where serious injury is caused rather than a serious injury offence that happens to be caused by dangerous driving.

This is unfortunate considering that the s.1A offence was deliberately enacted to avoid the situation where the severity of punishment was only concerned with the standard of driving under s. 2 RTA 1988 (dangerous driving). The lacuna that the government sought to fill was the lack of consideration of the consequences of that dangerous driving. It would seem from *Allen* – and the line of case law from the Court of Appeal we are still somewhat in that position. The severity of injury seems to be an actus reus requirement without a serious reflection in sentencing.

This is hardly surprising given the underlying reliance on the death by dangerous driving guideline which contains no reference to "harm" as a relevant factor in sentencing. There are no gradations of death, however there are gradations of serious injury, a fact recognized in the inflicting grievous bodily harm sentencing guidelines which can have an effect on the sentence. It is time that a guideline was developed for this offence to reflect the extent of injuries caused in sentencing decisions. There is additional impetus for this approach, rather than letting the Court of Appeal develop ad hoc guidance,

due to the proposed offence of causing serious injury by careless driving which is currently at committee stage in the House of Lords. Perhaps now is the time for Sentencing Council to consider a definitive guideline on serious injury by dangerous driving and careless driving which reflects on the amount of harm caused as an essential component of a just sentence.

Author

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