

*Using a Mobile Phone or
Hand-held Device while Driving:
Current Legal Regulation
and a Case for Reform*

Jordan Briggs*

Abstract—This article evaluates the criminal offence that purports to prohibit motorists from using portable electronic devices whilst driving motor vehicles on roads. It argues that the offence is deficient because it prohibits neither the use of non-hand-held electronic devices, nor ‘offline’ use of hand-held ones. The offence’s inability to proscribe driving motorists’ use of many modern technologies means that it fails to vindicate the safety-enhancing policy which motivated its creation. Furthermore, no alternative driving-related criminal offence appears capable of biting on device use that falls outside the scope of the specific offence. To remedy this mischief, three reforms to the specific offence are proposed.

* Harris Manchester College, Oxford. I am grateful to the OUULJ editorial board for their comments on earlier drafts. All errors remain my own.

It would have been much better to have drafted legislation which was less cumbersome but its effect is clear. The legislation does not prohibit all use of a mobile phone held while driving....'

'Hand-held devices which have no interactive communication function are not included in the definition. Thus, if while driving, a person takes photographs or films on an ordinary digital camera he is not in breach of the regulation.'

Thirlwall LJ, *DPP v Barreto*¹

Introduction

According to the RAC's 2018 'Report On Motoring', 25% of British motorists make or receive calls on a hand-held mobile phone while driving a vehicle.² 19% check texts, emails or social media while so doing. These findings are concerning because, for reasons laid out below, vehicle control skills deteriorate when mobile phones or portable electronic devices are used while driving. In 2011, the World Health Organisation³ concluded that use of such devices while driving can, amongst other things, lengthen motorists' reaction times to unexpected driving-related events, shorten 'following' distances between one motorist and the vehicle in front, and compromise abilities to maintain correct

¹ [2019] EWHC 2044, [47] and [35]

² p46: <https://www.rac.co.uk/pdfs/report-on-motoring/rac10483_rom-2018_content_web> (21 September 2018, accessed 13 March 2020)

³<https://www.who.int/violence_injury_prevention/publications/road_traffic/distracted_driving_en.pdf?ua=1> (14 February 2011, accessed 10 March 2020) See also similar 2018 findings of the Royal Society for the Prevention of Accidents: <<https://www.gov.uk/government/statistical-data-sets/ras50-contributory-factors>> (26 September 2019, accessed 10 March 2020)

road position. As early as 1994, one study found that experienced motorists' hazard perception skills revert to the level of a beginner when distracted by a mobile phone.⁴ Such impairment increases the likelihood of involvement in a road traffic accident.⁵ In 2017 the Department for Transport recorded 773 casualties associated with road traffic collisions where a driver's mobile device use was a contributory factor in the accident. All associated expense and hardship could have been avoided, had the offending motorist refrained from using their mobile device while driving.

To reduce avoidable road traffic accidents and associated human casualties, it is appropriate and desirable to legally prohibit motorists from using distracting portable electronic devices while driving a vehicle. Such regulation of individual conduct is justified by a concern to prevent harm to other persons and property.⁶

⁴ McKenna, F., & Crick, J. 'Hazard perception in drivers: a methodology for testing and training' (1994) Transport Research Laboratory Report, CR313

⁵<<https://www.rospa.com/rospaweb/docs/advice-services/road-safety/drivers/driver-distraction.pdf>> esp. p4 (July 2017, accessed 13 March 2020)

⁶ In the course of editing this work, discussions arose about whether the forthcoming driving-related regulations could be charged as 'paternalistic' because they seek to regulate personal conduct. In the author's view, the charge is misplaced: (1) A great deal of law regulates how persons conduct themselves; only in relation to a small subgroup of laws is the paternalism charge is appropriate and interesting. The charge applies, appropriately, to state intervention which primarily seeks to bring about the good *of the regulated subject herself*. By contrast, the primary aim of these regulations is the protection of *others* (see 3A, below). Furthermore: (2) paternalistic interventions have, at least since J.S. Mill, been felt defensible when they seek to prevent 'harm' to others. That is a central aim of these regulations (and, to pre-empt a reply, this point is not displaced by the supposition that regulators' collateral concerns may have related to ensuring the safety of the driving motorist themselves). For these twin reasons, it is suggested that the paternalism

Unfortunately, the regulation which presently aims to achieve this is unfit for purpose. Regulation 110 of the Road Vehicles (Construction and Use) (Amendment) (No 4) Regulations 1986 (hereafter ‘Regulation 110’) only prohibits driving motorists from using *hand-held* devices to *exchange data* with other devices or the internet. The Regulation 110 does not prohibit driving motorists’ use of devices without internet connectivity. It also fails to prohibit driving motorists’ use of devices which exchange data without ever needing to be held in one’s hand (the dangers associated with which are discussed in Part 2, below). Law reform should be undertaken without delay. As technology advances, the number and variety of dangerously distracting offline and non-handheld electronic devices will increase. If future motorists use such devices while driving, the number of distracted road users (and, therefore, the risk and/or prevalence of avoidable road traffic accidents) may further increase. Anticipating such developments, this article argues for the broadening of Regulation 110 to expose to specific legal sanction motorists who, for any purpose, ‘operate’ any ‘mobile phone’ or ‘portable electronic device’ while driving. Lowering the threshold of liability in this manner would allow a greater range of appreciably dangerous and distracting uses of mobile technology to attract criminal liability under this specific offence. Deterrence against such use would be most effective if these changes (and penalties associated with the offence) were widely publicised, and police enforcement was effective⁷ and consistent.⁸

debate is misplaced and distracting and that, in any event, the regulations are readily defensible under conventional ‘harm’ principles.

⁷ Indeed, lowering the threshold of liability will likely *facilitate* effective enforcement. Ambiguities about precisely which uses and devices fall within the regulation (discussed below) would be obviated, allowing the offence to be invoked with greater consistency and confidence.

⁸ For the twin value of effective enforcement and publishing penalties (rather than simply increasing penalties), see [46] and [59]-[65]:

To make this argument, the analysis begins by explaining why it is dangerous to use a mobile phone while driving. Attention then turns to the current legal regulation of driving motorists' use of mobile phones and other devices. Afterward, the 'driving whilst using a mobile phone offence' is compared with other driving-related criminal offences (in terms of substantive rules and impossible sanctions) to illustrate precisely why the former should be amended. Finally, the aforementioned two reforms are proposed and, after considering how the issue is managed in overseas jurisdictions, regulation of some 'hands-free' telephone kits and portable Global Positioning Systems ('GPS') is advised.

1. Why is it dangerous to use a mobile phone while driving?

The Transport Research Laboratory ("TRL") has found that any 'cognitively complex' task performed while driving will impair a motorist's vehicle control. The more the motorist has to think about a task, the more they will be distracted from driving. If the task requires the motorist to use their hands in some way, or avert their eyes from the road, the distraction becomes greater still. In light of these factors, Dr Shaun Helman – chief scientist at TRL – attests that there is a 'hierarchy'⁹ of distracting tasks. Having a hand-held telephone conversation is toward the upper end because the task is cognitively complex and requires the

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/565100/mobile-phones-driving-consultation-impact-assessment.pdf 1> (1 July 2016, accessed 25 March 2020)

⁹ It should be stressed that no firm, official 'hierarchy' can be constructed because the degree of cognitive complexity required for any task will depend on the particular circumstances of each case.

motorist's hands.¹⁰ Perhaps surprisingly, hands-*free* telephone conversations are similarly highly distracting. The cognitive complexity associated with a hands-free telephone call is such that, for up to five minutes after it concludes, the motorist remains around four times more likely to be involved in a road traffic accident than would ordinarily be expected.¹¹ Somewhere toward the middle of the hierarchy are tasks like tuning one's radio or dealing with climate controls. These are cognitively straightforward and require only short periods of hand use and visual attention. The least distracting tasks of all would require only very momentary manual *or* visual engagement; reading a traffic sign, for example.

Using a mobile phone or portable electronic device while driving, for any purpose, negatively impacts driving performance. Both classes of device entail considerable cognitive complexity in the discharge of their functions; the 'output' of the device (e.g. displaying online or offline material on an electronic screen, spoken words of a telephone caller) changes in response to (and usually requires *further* responses from) the motorist. Indeed, some uses require very great cognitive complexity –checking social media or playing a video game while driving, for example (in both cases, the motorist must divert visual and manual attention away from driving, and process the information being viewed). What's important, for present purposes, is to appreciate that for both mobile phones and portable electronic devices, the *minimum* cognitive complexity involved with most of the online *or* offline functionalities they offer will cause a dangerous

¹⁰ House of Commons Transport Committee, 'Road Safety: mobile phones', HC 2329, Q6: <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/transport-committee/road-safety-mobile-phones/oral/103088.html>> (12 June 2019, accessed 5 March 2020)

¹¹ *ibid*, Q16

depreciation in driving ability.¹² That is why mobile phones and electronic portable devices are comparably distracting and can justifiably be considered and regulated together.

2. *Modern Law*

A. Background

S41 Road Traffic Act 1972 empowers the Transport Secretary to make secondary legislation regulating the construction and use of motor vehicles. In 1986, this power was exercised to introduce the Road Vehicles (Construction and Use) Regulations. These contained basic safety standards with which vehicle construction industries had to comply; that, for example, every vehicle had to provide seatbelts¹³ and could not emit any avoidable smoke or vapour.¹⁴ In 2003, Regulation 110 was inserted into the 1986 regulations. So far as is relevant, Regulation 110 is as follows:

‘110. Mobile telephones

(1) No person shall drive a motor vehicle on a road if he is using—

(a) a hand-held mobile telephone; or

¹² Some tasks associated with mobile phones and portable electronic devices are, of course, far less distracting than this (e.g. picking one up or switching one off; the manual and visual attention required is only minimal). However, as is discussed below (at 3(A)), such momentary uses fall outside the policy motivating Regulation 110, so should not be prohibited alongside the dangerously distracting exercises of electronic functionality here discussed.

¹³ reg47, The Road Vehicles (Construction and Use) Regulations 1986 SI 1986/1078

¹⁴ reg61, *ibid*

(b) a hand-held device of a kind specified in paragraph (4).

(4) A device referred to in paragraphs (1)(b), (2)(b) and (3)(b) is a device, other than a two-way radio, which performs an interactive communication function by transmitting and receiving data.’

Regulation 110 was introduced in light of evidence collected by TRL in the 1990s, which suggested that use of mobile phones while driving was both prevalent and demonstrably unsafe.¹⁵ Cognisant of that evidence, in 2000 the Government cautioned that, if motorists did not stop using their mobile phones while driving, they would review the case for creating a specific offence prohibiting such use (other driving-related criminal offences then existing are outlined in part 4, below).¹⁶ Motorists did not stop using their mobile phones while driving, so Regulation 110 was enacted. Of course, lawmakers regulated only those uses of mobile phones which were prevalent in 2003 (i.e. largely, telephone calls and text messages).¹⁷ This is important

¹⁵ ‘Driving and mobile phones’, House of Commons Briefing Paper SN366, November 2016, p.4
<<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00366#fullreport>> (8 November 2016, accessed 29 February 2020)

¹⁶ ‘Tomorrow’s roads: safer for everyone’, Department for the Environment, Transport and the Regions, March 2000, Chapter 3 p.26
<<https://webarchive.nationalarchives.gov.uk/20100202151921/http://www.dft.gov.uk/pgr/roadsafety/strategytargetsperformance/tomorrowssafeforeveryone>> (1 March 2000, accessed 15 March 2020)

¹⁷ That is, lawmakers did not foresee how technology would develop, and drafted Regulation 110 only to reflect what was available in 2003. There are ‘gaps’ in the regulation today *not* because there was deliberate legislative restraint in 2003, but because modern technology now has developed far beyond the uses and devices that constituted a mischief in (and were reflected in research prior to) Regulation 110.

background. It illustrates that the policy motivating Regulation 110 was to increase road safety by specifically prohibiting use of new portable technologies which, while widely used, were appreciably dangerous and distracting to driving motorists.

In 2006, breach of Regulation 110 became a criminal offence contrary to s41(D)(b) Road Traffic Act 1998¹⁸ (hereafter ‘s41(D)(b)’):

‘41. Breach of requirements as to control of vehicle, mobile telephones etc.

A person who contravenes or fails to comply with a construction and use requirement—

(b) as to not driving... a motor vehicle while using a hand-held mobile telephone or other hand-held interactive communication device... is guilty of an offence’

Before going any further, it is important to understand that this article argues for reform of Regulation 110, not of s41(D)(b). It is appropriate and desirable that s41(D)(b) should impose criminal liability on those who breach the underlying regulation, given that criminal penalties might deter against using a mobile phone while driving, thereby decreasing distracted driving and increasing road safety. What *is* problematic is the substance of the underlying regulation. It should henceforth be remembered that when this article refers to Regulation 110, attention is being drawn specifically to the unsatisfactory phrasing and meaning of the substantive rules it presently contains. When s41(D)(b) is cited, we are concerned not with the substance of the rules in Regulation 110, but with the fact that criminal liability arises from their breach.

¹⁸ As amended by s26 Road Safety Act 2006

B. Regulation 110

Regulation 110 can be broken into four parts. To have breached it, the motorist must have: (1) driven, a (2) motor vehicle on a road, while (3) ‘using’, either a (4.i) hand-held mobile telephone or (4.ii) ‘hand-held device’ which performs an ‘interactive communication function by transmitting and receiving data’.

‘The law on the first two criteria is clear. As to (1), the common law provides that a person will be ‘driving’ if they are ‘in control’ of a vehicle’s movement and direction.¹⁹ Consequently, a person will be ‘driving’ if seated behind the steering wheel of a vehicle which, while stationary, has an ignited engine.²⁰ As regards (2), a ‘motor vehicle’ is defined by the 1986 Regulations as ‘a mechanically propelled vehicle intended or adapted for use on roads’.²¹ Any car, motorbike, heavy goods vehicle etc. will clearly be a ‘motor vehicle’.

The problems with Regulation 110 lie in criteria (3) and (4). As to (4), which can be dealt with shortly, a device is ‘hand-held’ if it in fact is held by the driver while its interactive communication function is exercised, or must be held at some point to invoke or manage that function.²² If a device need not be held to instigate or manage the functions discussed in (3), below, its operation by a driving motorist can never contravene Regulation 110.

Criterion (3) is most problematic. The issues were exposed in *DPP v Barreto*. The appellant, who had been apprehended after using his smartphone while driving to record video footage of a nearby road traffic accident, was charged with

¹⁹ *DPP v Alderton* [2003] EWHC 2917, para 23

²⁰ *Planton v DPP* [2011] All ER (D) 11

²¹ reg3, The Road Vehicles (Construction and Use) Regulations 1986

²² Reg(110)(6)(a))

an offence contrary to s41D(b). Lady Justice Thirlwall, having properly construed Regulation 110 and s41(D)(b), held that ‘mobile telephones’ and ‘hand-held devices’ are *only* in ‘use’ for the purposes of the Regulation when being operated to transmit or receive data.²³ This is because the word ‘other’ in s41(D)(b) functionally equates ‘hand-held interactive communication devices’ with ‘hand-held mobile telephones’; in *both* cases, not simply the former, there must be some communicative functionality for the regulation to bite. On this interpretation a mobile phone or hand-held device isn’t being ‘used’ if it is exercising an offline function only. Writing a text message while driving doesn’t trigger Regulation 110. Sending that message will do so.

This highly literal and narrow interpretation runs contrary to the policy motivating Regulation 110 (i.e. the approach is not conducive to bringing new portable technologies within the specific s41(D)(b) offence). However, it is doubtful whether a broader, purposive interpretation could safely have been adopted. Considerable linguistic strain would have been required to bring, for example, digital cameras, digital gaming devices and offline tablets within the existing categories of ‘hand-held mobile telephone’ and ‘hand-held device which performs an interactive communication function’. Even if the court had succeeded in so doing, the problem would remain for future courts facing the same task as technology develops further beyond what was available in 2003. Indeed, in this light, the narrow interpretation in *Barreto* might appear something of a blessing in disguise. In highlighting (or, perhaps, *creating* through interpretation) the legal lacuna whereby digital cameras, portable gaming devices (etc.) are clearly *not* specifically prohibited, the Court of Appeal have provided a strong and urgent reason for the legislature to take stock of the 17 years’ worth of research and

²³ *Barreto*, para 37

technological developments that have accrued since 2003 and update Regulation 110 accordingly. As long as Lady Justice Thirlwall's approach remains good law, it is strikingly apparent that the policy motivating Regulation 110 is not being vindicated. Rather than being an object of our resentment, then, *Barreto*, could be praised for incentivising the legislature to begin the peculiar process of circumspect and well-informed law review for which they are esteemed and, should law reform occur, relieving future courts from an increasingly onerous interpretive burden.

To recapitulate before proceeding; the s41(D)(b) offence is committed only if a motorist, while driving a motor vehicle on the road, uses a device to exercise a function which involves the transmitting or receipt of data, when that device is actually in the hand or must have been at some stage to initiate or manage the communicative function.

3. The case for reforming Regulation 110

A. Comparing s41(D)(b) with other driving-related criminal offence

When a driving motorist uses mobile technology in a manner that falls outside Regulation 110 and s41(D)(b), it is possible (depending on the facts) that criminal liability may be incurred under another driving-related offence. To appreciate precisely why Regulation 110 requires reform notwithstanding availability of liability under other offences, a summary of these alternative offences is required. Unfortunately, there is rather unprincipled and confusing overlap and separation between these offences and s41(D)(b), in terms of their substantive requirements and imposable penalties. To assist in the forthcoming comparison, the

substance and penalties associated with the s41(D)(b) offence are stated below.

‘Using a mobile phone while driving, s41(D)(b)

(a) *Requirements:* Defendant must have driven a motor vehicle on a road while using [to exchange data] a hand-held mobile telephone or hand-held device with an interactive communication function

(b) *Roadside penalty:* £200 and 6 penalty points.

(c) *Maximum sentence after trial:* £2,000 or driving disqualification.²⁴

The three alternative offences are outlined in turn, each followed by a comment on whether and how they intersect with s41(D)(b).

i. Driving without reasonable consideration for other persons, Road Traffic Act 1988 (‘RTA 1988’), s3

(a) *Requirements:* Defendant must have driven a mechanically propelled vehicle on a road or other public place and in fact inconvenienced other persons.²⁵ For example flashing lights to force drivers in front to give way, braking without good cause or driving through a puddle causing pedestrians to be splashed.²⁶

(b) *Roadside penalty:* Up to £100 and 3 penalty points.

²⁴ Penalties: <<https://www.rac.co.uk/drive/advice/legal/mobile-phone-laws/>> (12 November 2019, accessed 5 March 2020)

²⁵ RTA 1988, s3ZA(4)

²⁶ <<https://www.cps.gov.uk/legal-guidance/road-traffic-charging/>> (3 January 2019, accessed 10 March 2020)

(c) *Maximum sentence after trial*: Unlimited fine and imposition of between 3 and 9 penalty points, *or* disqualification for fixed period.²⁷

This offence could bite on the driving motorist who, while distracted by use of *any* electronic device (including but not limited to data-exchanging hand-held devices) in some sense inconveniences another person. Facts satisfying this offence could also ground a claim in the tort of nuisance against the offending motorist, so long as the inconvenience is sufficiently grave to constitute an interference with the affected person's rights. This offence could, then, impose criminal liability in respect of devices which fall outside the scope of Regulation 110 and s41(D)(b). What is strange, however, is that although the conduct prohibited by this offence is *more* objectionable than that under s41(D)(b) (i.e. here, electronic device use *and* conduct which has inconvenienced another person), roadside penalties for 'driving without reasonable consideration for other persons' are *lower* than those imposable under the mobile phone offence. That is, inconveniencing others when making a telephone call while driving attracts a lighter roadside fine and fewer penalty points than making a telephone call while driving *per se*. Thankfully, this counter-intuitive scheme of sanctioning disappears upon conviction, where the maximum sentence for this offence exceeds that which is imposable under s41(D)(b); setting aside disqualification, which both offences may impose, 'driving without reasonable consideration for other persons' allows imposition of higher financial penalties *and* requires imposition of penalty points (*cf.* points cannot be imposed alongside a fine pursuant to s41(D)(b)).

²⁷ Penalties: <<https://www.rac.co.uk/drive/advice/legal/driving-offences/>>

ii. Driving without due care and attention ('careless driving'), RTA 1988, s3

(a) *Requirements*: Defendant must have driven a mechanically propelled vehicle on a road or other public place in a manner that, objectively judged, fell below the standard expected of a competent and careful driver.²⁸ For example, overtaking on the inside, emerging from a side road into the path of another vehicle or inadvertently driving through a red light.²⁹

(b) *Roadside penalty*: Up to £100 and 3 penalty points.

(c) *Maximum sentence after trial*: Unlimited fine and imposition of between 3 and 9 penalty points, *or* disqualification for fixed period.³⁰

What is crucial to understand about this offence is that, in assessing whether a motorist's driving was 'careless', no relevance is attached to the fact that, at the material time, a separate driving-related offence was being committed. That is, driving will not be 'careless' simply because the motorist was in fact committing an offence contrary to s41(D)(b). Indeed, Crown Prosecution Service ('CPS') guidelines advise that where hand-held device use 'is the only relevant aspect of the case', the specific offence should be used. Two consequences flow from this. First, it appears that the 'careless driving' offence *is* appropriate when the driving motorist, in addition to using a hand-held device for data exchange, does something *else* that is objectionable. When, for example, a motorist loses control of their vehicle while speaking on a hand-held telephone, hand-held device use is no longer 'the only relevant aspect of the case' and the 'careless

²⁸ RTA 1988, s3ZA(2)

²⁹ No. 27

³⁰ No. 28

driving' charge is available. Second, the 'careless driving' offence appears available when a driving motorist uses a device falling outside the scope of Regulation 110, but *without* the requirement that they do something else that is objectionable. In light of CPS examples that 'tuning a car radio' and 'selecting and lighting a cigarette' can constitute careless driving,³¹ distracting use of an iPad, 'offline' mobile phone or other device would, without more, appear to satisfy the offence.³²

Two evaluative observations are apposite. First, again, the roadside penalties for this offence are lower than those imposed pursuant to s41(D)(b). The motorist who commits the s41(D)(b) offence *and* drives carelessly would receive a roadside penalty half as grave as she who only commits the s41(D)(b) offence.³³ Second, it is odd that, in cases where there has been no impairment in vehicle control, different roadside penalties attach in respect of data-exchanging (s41(D)(b)) and 'offline' devices (this offence) given that, as it happens, neither class of device is inherently more distracting than the other. Both may be used to

³¹ No. 27

³² There is of course little, if any, logical basis for retaining simple mobile phone use (i.e. use *without* some other objectionable fact like loss of vehicle control) and simple 'offline' device use in different criminal offences. The distinction is arbitrary because both are iterations of the *same* offensive behaviour (i.e. dangerously distracting portable electronic device use), are thus similarly objectionable (i.e. such use is dangerously distracting and avoidable) but nevertheless attract *different* roadside penalties and maximum sentences. To remedy this, this article is advocating for the broadening of Regulation 110 so that *both* these types of electronic device use fall within s41(D)(b).

³³ In effect, the s41(D)(b) offence is overridden by the 'careless driving' offence, and roadside penalties are imposed pursuant to the sanctioning scheme of the latter.

exercise functions that are distracting to a lesser³⁴ or greater³⁵ degree, depending on the required cognitive complexity, hand use and visual attention. Imposing comparatively lighter roadside sanctions in respect of ‘offline’ devices is arbitrary, then, because ‘offline’ tasks can be just as dangerously distracting as ‘online’ ones.

iii. Dangerous driving RTA 1988, s2

(a) *Requirements*: Defendant must have driven a mechanically propelled vehicle on a road or other public place in a manner that fell far below the standard expected of a competent and careful driver *and* it must have been obvious to a competent and careful driver that driving in such a manner would be dangerous. For example, street-racing, failing to have proper and safe regard for vulnerable road users (such as cyclists or horse riders) or driving much too close to the vehicle in front.³⁶

(b) *Roadside penalty*: Penalised only in court.

(c) *Maximum sentence after trial*: Triable either way. Summarily, an unlimited fine and/or six months’ custodial sentence. On indictment, two years’ custodial sentence.³⁷

Mercifully, operation of this offence largely mirrors that of ‘careless driving’. It is irrelevant to assessment of whether driving was ‘dangerous’ that at the material time, grounds for the s41(D)(b) offence were present. The offence is only available if,

³⁴ Online: Pausing a song streamed from Spotify. Offline: Switching off a mobile phone.

³⁵ Online: Browsing social media. Offline: Using an offline video-gaming console while driving.

³⁶ No. 27

³⁷ No. 28

in *addition* to hand-held mobile phone use, the ‘driving falling far below’ and ‘obvious to a competent and careful driver’ limbs are satisfied. The offence can, indeed, bite on use of devices falling outside the scope of Regulation 110 and s41(D)(b), so long as both limbs are made out.

However, this offence does not fill the gaps in Regulation 110 because the former is engaged in substantively different situations to the latter. S41(D)(b) bites on behaviour which is likely to render driving hazardous, engaging *before* there is actual loss of vehicle control. Remember, this comparative analysis seeks offences which can assist in vindicating the danger-*preventing* policy motivating Regulation 110. ‘Dangerous driving’ does not assist us because it cannot be used to charge the motorist who, while not yet having lost control of their vehicle, risks such hazardous driving in future by beginning to use an electronic device.

In light of all the above, attention should be drawn to a substantively inaccurate passage in *DPP v Barreto*. At paragraph 51, Lady Justice Thirlwall advised against motorists thinking that her narrow interpretation of Regulation 110 and s41(D)(b) was ‘a green light for people to make films [recorded on hand-held devices] as they drive’, given that ‘driving while filming events... may be cogent evidence of careless driving, and possibly of dangerous driving’ which ‘on conviction may result in the imposition of penalties significantly more serious than those which flow from breach of [Regulation 110]’. This is not wholly accurate. True, ‘careless driving’ *would* be available in the circumstances described, given that the offence does not seem to require appreciable deterioration in vehicle control. Also accurate is the comment that penalties upon conviction under the ‘careless driving’ offence may be ‘substantially more serious’ than under s41(D)(b) (as only under ‘careless driving’ can both a fine *and* penalty points be imposed). However, ‘dangerous driving’ would

be *unavailable* in the circumstances described; the charge could be used only if driving ‘fell far below the standard expected of a careful and competent driver’ and where the dangerousness of such driving would have been ‘obvious’ to a competent and careless driver. That these elements are necessary for the offence is misleadingly overlooked in paragraph 51. The oversight is understandable because the law in this area is overlapping and complicated. The solution proposed in this article is as follows: in circumstances that operating a mobile phone or any type of portable electronic device while driving appreciably and dangerously impairs motorists’ vehicle control, Regulation 110 should be widened so that, in line with its motivating policy, s41(D)(b) may *prima facie* bite on *all* incidents of such use without requiring that the device is exchanging data at the relevant time.

B. Why is reform of Regulation 110 necessary?

The above comparative analysis illustrates that only one criminal offence can impose liability in situations falling outside the scope of Regulation 110 and s41(D)(b). ‘Careless driving’ contrary to s3 RTA 1988 may impose criminal liability on the driving motorist who, without suffering any impairment in driving ability, operates a wholly ‘offline’ or hands-free device, or an internet-enabled device for an offline purpose. However, notwithstanding the availability of sanctioning pursuant to s3, it is here maintained that Regulation 110 should be reformed so that in such circumstances criminal liability is incurred under s41(D)(b), not s3 RTA 1988. This is for three reasons.

First, broadening Regulation 110 would helpfully clarify the overlap between s41(D)(b) and other driving-related criminal offences and simplify law enforcement by the police and CPS. Attending police officers would no longer need to inquire into the internet functionality and usage of the relevant device before deciding whether to issue a high roadside sanction pursuant to

s41(D)(b) or its lower equivalent under s3 RTA 1998. For the CPS, expanding Regulation 110 would expedite charging decisions because prosecutions would no longer turn on the potentially-contentious fact of whether a device was exchanging data at the material time. Perhaps most usefully, reform would clarify the boundaries between the existing driving-related criminal offences. If a motorist was apprehended using any portable electronic device, the correct offence would be s41(D)(b). If the motorist's driving was *also* careless, dangerous or had inconvenienced others, the attending officer or CPS might prefer to charge under a different offence.³⁸ However, the starting point would clearly and sensibly be the s41(D)(b) offence.

Second, the policy underlying Regulation 110 is specifically directed toward remedying the mischief with which we are here concerned. In 2003, only hand-held devices exercising data-exchanging functions were sufficiently widespread to warrant attention in legislators' efforts to increase road safety by exposing to specific legal sanction motorists' use of prevalent and dangerously distracting portable technology. While that policy remains good today, scientific advances have rendered the substance of Regulation 110 outdated, namely in the introduction of hands-free devices and expansion of 'offline' functions for which hand-held devices may be used. The risks associated with modern driving motorists' use of such technology falls neatly within the scope of the policy motivating the regulation; all that's required is the updating of its particulars.

Third and related to the above, under the current law a driving motorist charged with s41(D)(b) could undesirably attempt to escape liability by maintaining that the hand-held device he operated while driving wasn't in fact being used to

³⁸ In such circumstances, we might expect roadside sanctions and maximum sentences to be aggravated beyond those currently available under s41(D)(b).

exchange any data at the material time.³⁹ Bearing in mind that it is for the prosecution to establish guilt, it might prove difficult to overcome that argument unless the attending police officer happened to record persuasive evidence that the device was in fact being used for an *online* purpose. One solution might lie in the prosecution obtaining the relevant device's usage records, to ascertain whether telephone, messaging or internet functions were being exercised at the material time. This could, however, be very time-consuming, given that data could only be released if the request complied with Part 3 of Data Protection Act 2018 which, in implementing the European Union General Data Protection Regulation (GDPR), sets down comprehensive substantive requirements regulating the release of individuals' data to law enforcement pursuant to prosecution of a crime. The simple and preferable solution would be to broaden of Regulation 110 to embrace 'online' and 'offline' uses of electronic devices.

And so, having discussed the history and policy behind Regulation 110, its substance, its deficiencies and alternative driving-related criminal offences, the time has come to consider possible reforms. Two are suggested, as well as proposing a carve-out that would allow driving motorists limited use of GPS and hands-free telephone kits, given the considerable benefits they furnish.

³⁹ *R v Nader Eldarf*, (cited in *Barreto* at [5])

4. Proposed reforms to Regulation 110

A. Removing the ‘interactive communication function’ requirement

Lawmakers should forego the requirement that devices must be exercising an ‘interactive communication function’ to fall within the scope of the revised Regulation. Doing so would simplify the law and, by obviating the need to obtain information about the offending device’s usage records, its enforcement. The change would also allow the regulation to prohibit driving motorists’ distracting use of a broader range of devices, such as camera and video recorders, offline electronic ‘tablets’, offline wrist mounted ‘smartwatches’ and portable video-gaming devices. It is appropriate to draw those devices out of the ‘careless driving’ offence and into the regulation because their use falls within the policy motivating the regulation; to increase road safety by specifically prohibiting and deterring use of portable technologies which are appreciably dangerous and distracting to driving motorists. The same grounds explain, of course, why we are only here concerned with *electronic* devices. There is no doubt that a motorist would be dangerously distracted by, say, reading a book or playing a physical game while driving. The point is that such activities fall outside the policy motivating Regulation 110, so may remain prohibited by the ‘careless driving’ offence.

Proposed change: Driving motorists must not operate ‘mobile phones’ or ‘portable electronic devices’. For the avoidance of doubt, a provision could explain that no device need have been exercising an interactive communication function to fall within the scope of the revised regulation.

B. Flexible drafting: Replacing ‘use’ with ‘operate’ and removing ‘hand-held’

As mobile technology is a rapidly-changing industry, lawmakers should draft the revised regulation in terms sufficiently broad to pre-emptively prohibit motorists from interacting with their devices in manners that have not yet been invented. For example, it would be a mistake to prohibit driving motorists from ‘operating portable electronic devices by voice or touch’ because that regulation would cease to apply if, as appears likely, mobile phones develop to track and become operable by users’ eye movements.⁴⁰ Importantly, if any future, not-yet-invented technological development was to proven to be ‘all-things-considered beneficial’ to motorists (i.e. to furnish benefits without being intolerably distracting), a case could be made for its exemption from prohibition. Examples of such devices, and a possible approach to the all-things-considered beneficial assessment, are considered below. That said, as Regulation 110 is characterised and motivated by a policy of risk-reduction, the *prima facie* position should be that distracting mobile device use is prohibited *unless* compelling evidence can be furnished to justify specific exemption, which justifies lawmakers’ adoption of the broad ‘operating’ trigger.

Lawmakers should also, for similar risk-reducing reasons, abandon the condition that devices must be ‘hand-held’ to qualify for prohibition. Dangerous distraction accompanies the cognitively complex functions associated with hands-free devices (recall the ‘hierarchy’ of such tasks in section 2) so, to best vindicate the risk-reducing policy motivating Regulation 110, such devices should be brought within the *prima facie* prohibition.

⁴⁰ <<https://www.theguardian.com/lifeandstyle/2015/sep/27/phones-that-track-our-eye-movements>> (27 September 2015, accessed 25 March 2020)

However, many jurisdictions take the view that ‘hands-free telephone kits’ are all-things-considered beneficial and, so, are specifically exempt from prohibition under relevant driving laws. This is a delicate balance and it is discussed below.

Proposed change: Driving motorists must not ‘operate’ the above devices.

C. Specific exempted devices

As suggested above, it is arguable that some specific portable electronic devices are all-things-considered beneficial; that, while distracting to driving motorists, they may already furnish such benefits that, on balance, their prohibition would be impractical or unwise. In considering whether a device should be exempt from prohibition on this ground, lawmakers could undergo something of a balancing exercise. Placed on one side of the scales would be the benefits associated with the functionality of a device; whether it furnishes practical, safety-enhancing, convenience-related or other goods. On the other, lawmakers would consider the extent to which functions offered by the device are dangerously distracting to the driving motorist. Only if the benefits furnished by the device outweigh its associated distractions could it be considered ‘all-things-considered beneficial’ and, all else being equal,⁴¹ qualify for exemption from the general prohibition on driving motorists’ use of portable electronic devices.

Two devices which might qualify for exemption on these grounds are ‘hands-free’ mobile telephone kits and portable GPS

⁴¹ That a device had become very widely used by driving motorists, for example, would be an extraneous factor suggesting that its prohibition would be impractical. Prevalence should not, however, feature in the primary balancing exercise because, when relevant, it points in favour of tolerating a device – its inclusion would undermine the risk-minimising policy which motivates Regulation 110.

systems. 'Hands-free' kits enable motorists to make or receive telephone calls without touching their mobile phone. Motorists control the kits by speaking either into a headset (connected to the mobile phone with Bluetooth) or out loud - into a car's inbuilt microphone or a dashboard-mounted microphone. Portable GPS systems are rectangular screens, typically 5-7 inches diagonally across, which are mounted on the dashboard or windscreen and which direct the driving motorist to their selected destination along a route downloaded from the internet.

Hands-free kits are commendable in several respects. They desirably prevent motorists from dangerously physically handling their mobile phones while driving. They are practically useful, given that motorists may make and take calls when it is impractical or unsafe to stop the vehicle and use a hand-held telephone. They are commercially useful to businesses like taxi and delivery companies, who rely on contacting their service-drivers quickly. Hands-free kits are a convenient means by which such commercial needs may be met. However, a growing body of research illustrates that these kits very significantly distract to driving motorists. Dr Gemma Briggs - a senior researcher on the link between mobile phone use and drivers' abilities - found that use of a hands-free kit so impairs hazard perception that using motorists fail to detect hazards placed directly in front of them on the road.⁴² Indeed in 2002, Burns et al. found that the reaction times of motorists using hands-free kits were *worse* than those of alcohol-intoxicated motorists.⁴³ The benefits *and* disbenefits of hands-free kits, then, are considerable.

⁴² Transport Committee, Oral Evidence, at No 11. Q18.

⁴³ Intoxicated to the legal limit of 80mg/100ml blood: p14. 'How Dangerous is Driving with a Mobile Phone? Benchmarking the Impairment to Alcohol', C. Burns et al:
<https://www.researchgate.net/publication/259258482_How_Dange

Globally, legal responses to hands-free kits differ. Notwithstanding their associated risks, use by driving motorists is permitted in many jurisdictions including Germany,⁴⁴ New South Wales (Australia),⁴⁵ Japan⁴⁶ and Brazil⁴⁷. It is difficult to say, of course, whether such tolerance flows from a desire to accept the kits' benefits notwithstanding their dangers, or simply a failure to positively prohibit. A more nuanced approach is however taken in France⁴⁸ and Spain,⁴⁹ in which only 'entirely hands-free' are permitted. Motorists may only make and take calls by using the car's inbuilt microphone or after purchasing a dashboard-mounted unit. Bluetooth headsets, which diminish or exclude motorists' aural perception abilities in at least one ear, are deemed too distracting and are prohibited. An interesting question arises in respect of similar 'entirely-hands free' functionality offered by applications which may be installed onto mobile phones.⁵⁰ When the application senses that the motorist's vehicle is in motion, it

rous_is_Driving_with_a_Mobile_Phone_Benchmarking_the_Impairment_to_Alcohol> (1 January 2002, accessed 15 March 2020)

⁴⁴ <<https://legalknowledgeportal.com/2015/01/29/driving-in-germany-what-are-you-allowed-to-do-with-your-mobile-phone-behind-the-wheel/>> (29 January 2015, accessed 25 March 2020)

⁴⁵ Road Rules 2014, Reg 300:

<http://classic.austlii.edu.au/au/legis/nsw/consol_reg/rr2014104/s300.html>

⁴⁶ <<https://www.drivers.com/article/273/>>

⁴⁷ Brazilian Traffic Code Art 252, VI:

<http://www.planalto.gov.br/ccivil_03/leis/L9503.htm>

⁴⁸ <<https://www.autoevolution.com/news/using-headphones-on-a-motorcycle-becomes-illegal-from-1st-of-july-2015-97244.html>> (29 June 2015, accessed 25 March 2020)

⁴⁹ <<http://invictamoto.blogspot.com/2015/04/spain-bluetooth-headsets.html>> (22 April 2015, accessed 25 March 2020)

⁵⁰ 'Hands Free' applications should not be confused with mobile phones' 'Driving Mode' functionality. Many iterations of the latter *disable* mobile phones from communicating information to and from motorist while the vehicle is in motion. Iterations of the former *facilitate* such communicative exchange.

will activate text-to-speech processors and ‘read out’ the content of text messages (and other notifications) through the mobile phone’s inbuilt speaker. However, while offering similar hands-free functionality to inbuilt car microphones or dashboard mounted units, lawmakers should not exempt these applications from the revised regulation because they offer distractions which other ‘entirely-hands free’ kits do not. If the application is to communicate clearly with the driving motorist, the mobile phone must be sufficiently proximate for the microphone to receive instruction to (and for the inbuilt speaker to audibly transmit information to) the motorist. The applications incentivise motorists to leave their mobile phones nearby while driving,⁵¹ which runs contrary to the risk-reducing policy motivating the Regulation 110 scheme. Inbuilt car microphones and dashboard mounted units, by contrast, are operable when the mobile phone is stowed in the vehicle’s glove compartment or similar. If the law seeks to allow some ‘entirely hands-free’ functionality, the above is good reason to endorse the ‘kits’ and not the applications.

GPS devices, too, clearly have their benefits.⁵² They are practically useful; conveniently assisting motorists’ navigation.

⁵¹ The point is buttressed by the fact that, at present, many ‘hands free’ applications are reviewed as unreliable and inoperable (see, for example

<https://play.google.com/store/apps/details?id=com.sec.android.automotive.drivelink&hl=en_GB> (accessed 29 January 2020)). The driving motorist whose hands-free application malfunctions might be quite keenly tempted to pick up and manually operate a device to manually exercise a function they’d hoped to discharge vocally. This observation is not conclusive, but points against hands-free applications being ‘all-things-considered’ beneficial.

⁵² Note that use of mobile phones’ navigation applications (e.g. Google Maps) should *not* be exempted from prohibition under the revised regulation to discharge the navigation function. This is because, in addition to issuing navigation instructions, the mobile phone may sporadically communicate text messages and other notifications to the

They may, in some respects, increase road safety. The systems might prevent motorists from dangerously handling their mobile phone while driving to use navigation applications. Further, many systems alert the motorist when the speed limit has been exceeded, thereby assisting safer road use in that regard. Yet, like hands-free kits, GPS devices are also appreciably distracting to driving motorists. Distraction flows from the cognitive complexity involved with hearing and processing the spoken instructions and aligning one's driving accordingly and, should the system be disabled from issuing audible instructions, from directing visual attention away from the road and onto the screen.⁵³ The distraction would obviously increase if, as 63% of respondent motorists to a 2016 US National Safety Council self-reported having done,⁵⁴ a motorist attempts to program a route into the device while driving their vehicle.

While few jurisdictions absolutely prohibit motorists' use of GPS devices, restrictions on the manner of their use is relatively common. For example in South Africa and Washington state (USA), motorists must program their destination into their GPS device before beginning their journey; they are forbidden from touching the device thereafter.⁵⁵ In California (USA), GPS devices may only be used if they're mounted on the windshield

driver (perhaps, in so doing, inducing manual interaction with the device). GPS devices, by contrast, have the sole and predictable function of issuing navigation instructions. Lawmakers, when considering which device should be exempted from prohibition to discharge the navigation functionality, should select that with the least distracting influence. GPS devices, not mobile phones, should benefit from exemption.

⁵³ Transport Committee, Oral Evidence, at No. 11. Q86.

⁵⁴ <<https://www.nsc.org/road-safety/safety-topics/distracted-driving/parking-lot-safety>> (publication date not given, accessed 13 March 2020)

⁵⁵ Regulation 308A National Traffic Act 1996:
<<https://www.gov.za/documents/national-road-traffic-act>>

within a five-inch square in the lower corner nearest the driver.⁵⁶ Both responses clearly attempt to accommodate the benefits associated with GPS devices while minimising the risks they pose.

Ultimately, whether UK lawmakers wish to prohibit driving motorists' use of 'hands-free' kits and GPS devices turns on whether the benefits associated with these devices are deemed sufficiently weighty to justify tolerating their associated risks. This balancing exercise should of course be informed by existing research on devices' associated risks but, before a prohibitive decision is made, it would be very useful for researchers to *also* gather quantitative data on their benefits. Common-sense inferences can be drawn about their practical utility and tendency to disincentivise hand-held phone use but, without empirical backing, lawmakers might be more inclined toward outright prohibition.

The forthcoming suggestions take into account the empirical data here discussed, but strongly defend the benefits of hands-free kits and GPS devices. To ignore those benefits because they presently lack evidential backing would be narrow-minded and unduly dismissive. Absence of evidence is not evidence of absence. In light of this it is here proposed that, notwithstanding the general 'hands-free' prohibition, 'entirely hands-free' should be tolerated under the revised regulation, like in France and in Spain (i.e. that Bluetooth headsets are *not* permitted).⁵⁷ With regard to GPS devices it is suggested that, like in California and South Africa, devices must be mounted in a

⁵⁶ <<https://legalbeagle.com/6513133-california-gps-windshield-law.html>> (10 December 2018, accessed 13 March 2020)

⁵⁷ For detail on hazards associated with Bluetooth headsets: <<https://www.medicaldaily.com/distracted-driving-hands-free-bluetooth-cell-phone-388911>> (8 June 2016, accessed 25 March 2020)

small corner of the driver-side windscreen and that drivers must program in their destination before beginning their journey.

Proposed exemption: Driving motorists may use (i) cars' inbuilt or dashboard-mounted microphones to exercise mobile telephone functionality and (ii) GPS systems when mounted within a 5-inch square in the lower corner nearest the driver, so long as they are not touched while the vehicle is in motion.

Conclusion

Accommodating the above reforms, Regulation 110 would read as follows:⁵⁸

110. Mobile telephones

(1) No person shall drive a motor vehicle on a road while operating—

- (a) a mobile telephone; or
- (b) a portable electronic device.

(2) This Regulation is contravened irrespective of whether the operation of a mobile telephone or portable electronic device involves the exercise of any interactive communication functionality.

(3) 'Portable electronic devices'—

- (a) Include headsets worn by the driver facilitating discharge of any functions asso-

⁵⁸ Similar changes to s41(D)(b) are advised.

ciated with a mobile telephone or portable electronic device.

(b) Exclude portable ‘GPS’ devices mounted on the windscreen within a 5-inch square in the lower corner nearest the driver.

(i) No GPS device may be touched by the driver while the engine of the motor vehicle is running.

These amendments are, in the final analysis, driven by a very simple modernising intuition. In 2003, legislators decided to prohibit driving motorists’ use of mobile phones and other communication devices because evidence suggested that they were dangerously distracting. Sensibly reflecting equipment that was available in 2003, the ensuing Regulation 110 was cast in terms of hand-held and data-exchanging devices. Modern technology, however, marched on. In 2005, an application called ‘Google Maps’ was launched which offered motorists real-time navigation assistance while they were driving. The first iPhone was released in 2007. Allowing users to download whatever applications they wished, the iPhone marked an expansion in the online and offline functions which a mobile telephone might exercise. In 2011, the installation into mobile telephones of voice-controlled personal assistants like Siri meant that many devices no longer needed physical handling to be used. The following decade saw, among many other things, rapid development and sale of electronic ‘tablet’ computers, digital cameras, portable gaming consoles, smartwatches and the introduction of 3G, then 4G, then 5G mobile internet to most of the above. No longer are ‘hand-held devices exercising data-exchanging functions’ the only technology that may be carried into a vehicle and dangerously used by a driving motorist.

This article has suggested amendments allow Regulation 110 to prohibit, subject to limited carve-outs, driving motorists’

use of *all* portable electronic devices irrespective of their internet functionality, the method by which they are operated or the purposes for which they are used. To most effectively deter against such use and enhance road safety, these revisions should be widely publicised and police enforcement should be both consistent and effective. Of course, there is no telling how technology will develop in the new decade into which we are presently entering. The amendments here proposed may themselves appear outdated before too long. To guard against this, Regulation 110 should be regularly reviewed to assess its ability to bite on whatever portable technology comes to exist in the future. Only by so doing can we hope to vindicate the safety-enhancing policy underlying Regulation 110 which, unlike the words in which it currently finds expression, is timeless in its desirability.