

Mobile Device Use in Vehicles



DAVIS

Mobile Device Use in Vehicles: New Regulations & Changes to the Highway Code from 25/03/2022

The statutory offences restricting the use of mobile devices in vehicles take the form of Regulations. Contravention will usually be dealt with by Fixed Penalty Notice carrying a fine of £200 and 6 penalty points on the offender's licence. However, the fixed penalty notice is not the only option available to the enforcement agencies. Drivers using a mobile telephone (or any other device) may also be charged with the more serious offences of 'dangerous' or 'careless or inconsiderate driving' by a police officer where their conduct warrants a more serious charge.

The current legislation can be found in The Road Vehicles (Construction and Use) (Amendment) (no.4) Regulations 2003 (amending the Road Vehicles (Construction and Use) Regulations 1986) Regulation 110. These originally came into effect on the 1st December 2003. The practical effect was to insert a new Regulation 110 into the earlier 1986 Regulations. This made it an offence '*for a person to drive a motor vehicle on a road if he is using (a) a hand-held mobile telephone or (b) a hand-held device of a kind specified in the Regulations which performs an interactive function by transmitting and receiving data*'. It is also an offence to cause or permit another person to drive whilst using a device falling into (a) or (b) above or for someone supervising a provisional driver to use a hand-held telephone or device whilst that learner driver is behind the wheel.

However, when the regulation was introduced in 2003, the technical capabilities of mobile devices were considerably less than today. The requirement that the device had to 'transmit and receive data' means that many modern software applications are not covered by the legislation, although they would be equally distracting (if not more so) in actual use. The shortcomings of the law were made apparent in the case of DPP V. Ramsay Baretto [2019].

In this case, the defendant's conviction for filming an accident, on his mobile phone, as he drove past was quashed in the High Court on the grounds that the offence required not only (i) that the driver was holding a mobile phone in his hand but also (ii) that the phone was being used for 'interactive communication'. Using the phone to record video did not amount to 'interactive communication' and the appeal was allowed.

This legal loophole was addressed on the 25th March 2022 when the Road Vehicles (Construction and Use) (Amendment) (No.2) Regulations 2022 [SI 2022/81] came into effect. The Regulations were laid before Parliament on the 1st February 2022 under powers granted to the Secretary of State for Transport under the Road Traffic Act 1988. They follow an earlier formal consultation exercise.

Consultation on the Use of Mobile Phone Whilst Driving

This formed part of the Moving Britain Ahead initiative. The Department for Transport published a Consultation Document called *"Using a Mobile Phone While Driving Consultation on Changing the Law"* in October 2020. The purpose of the consultation was to revisit the subject of mobile telephone use whilst driving with a view to removing the shortcoming that had become increasingly obvious between the available mobile device technology and the law. The intention was to ensure that any use of a hand-held or portable device for any purpose would be an offence – with only specific and clearly defined exceptions. The consultation document also made it clear that the scope of the law would be changed to include any "similar" devices that may be used such as tablets and gaming equipment that can prove equally distracting for drivers. The consultation period closed in January 2020.



Extending the Offence

The Consultation Document's intention was to propose a move away from the need for the mobile device to receive/transmit data as a requirement of the offence to focus on the type of device and the fact that it is capable of receiving and transmitting information (even if not used in this way at the time of the offence). By focusing on potential capability, rather than physical use at the time of offence, those devices using locally stored data or being used in flight mode would still be covered.

The public response to the consultation exercise showed overwhelming support, with over 80% of those questioned supporting the mandated changes and associated changes to the Highway Code (Rule 149) to support the new rules.

The Regulations cover England, Wales and Scotland.

The Road Vehicles (Construction and Use) (Amendment) (No.2) Regulations 2022 add new words into the Road Vehicles (Construction and Use) Regulations 1986 regulation 110 by adding the words ***“is capable of transmitting and receiving data, whether or not those capabilities are enabled.”*** thereby removing the requirement that the device is transmitting and receiving data. The Regulations also clarify what “using” the device will henceforth include.

Previously Covered	Now Extended to
<p>Holding mobile phone or similar device to:</p> <ul style="list-style-type: none"> • Make a phone call • Receive a phone call • Send a text message • Send an email • Access social media sites • Access streaming services 	<p>Holding a mobile phone or similar device to:</p> <ul style="list-style-type: none"> • Illuminate the screen • Unlock the device • Check the time • Check notifications • Make, receive or reject a telephone or internet call • Sending, receiving or uploading oral or written content • Sending, receiving or uploading a photo or video • Using camera, video or sound recording functionality • Drafting any text message • Accessing stored data including books, audio files, photos, videos, films, playlists, notes or messages. • Accessing any application (defined as any software program that uses a web browser or offline on a mobile device) • Accessing the internet

Exception to the Regulation & Emergencies

Two-way radios are expressly excluded.

Regulation 3(1)(b) includes a specific **exception** to the general principle that using a mobile device when driving is an offence. This limited exception relates to the use of the mobile device to effect contactless payment for goods or services. In such cases handing/using the device **does not constitute an offence** at the time of use, **provided the following criteria** is satisfied: -

- (a) the person is using the mobile device to make a contactless payment; and*
- (b) the goods or services are being received at the same time or promptly after the contactless payment is made; and*
- (c) the motor vehicle must be stationary.*

Emergency Use



No offence is committed under the Regulations if the driver is using a hand-held device to **call the police**, or if they are acting in response to a genuine emergency and it would be **impossible or impractical for them to cease driving** to make the call.



If the car is **temporarily stationary** but the **engine is running** whilst a hand-held mobile is being used, **this is still an offence**. The engine as a rule needs to be switched off with the vehicle safely parked and not causing an obstruction. Use of a phone in a traffic jam would be an offence unless using a hands-free facility or device. The only circumstances where the use of a phone hands-free could be lawful is where the vehicle is likely to be stationary for some time due to an incident, the engine is stopped and the handbrake is on or an automatic is in the park mode. There would need to be reasonable evidence to support the assumption that traffic would remain at a standstill for some time.



Update to the Highway Code Rule 149

The Secretary of State has also revised the Highway Code under the powers granted to them under the Road Traffic Act 1988 section 38 (3). The proposed changes were laid before both Houses of Parliament on 1st February 2022. They support the changes made by regulations and provide clear guidance to motorists on the prohibited and permitted uses of mobile devices when driving. The revised text is provided below. The changed wording is shown in italics for ease of reference. There are six changes in total- four of these reflect the changes to the Regulations. Two are made to ensure that motorists properly understand the interactions with the mobile device that are now prohibited or permitted.

Although the Highway Code is not legislative in content, it will be relied upon by the courts in any civil or criminal proceedings, and the court may draw appropriate inferences from the failure to observe its provisions when determining issues of liability or guilt.



Rule 149



“You **MUST** exercise proper control of your vehicle at all times. You **MUST NOT** use a hand-held mobile phone, or similar device, *capable of interactive communication (such as a tablet) for any purpose* when driving or when supervising a learner driver. *This ban covers all use of a hand-held interactive communications device and it applies even when the interactive communication capability is turned off or unavailable.* You **MUST NOT** pick up the phone or similar device while driving to dial a number and then put it in the cradle for the duration of the conversation. You **MUST NOT** pick up and use your hand-held phone or similar device while stationary in traffic.

*There is an exception to call 999 or 112 in a genuine emergency when it is unsafe or impractical to stop. There is also an exception if you are using a hand-held mobile phone or similar device to make a contactless payment at a contactless payment terminal. Your vehicle **MUST** be stationary, and the goods or services **MUST** be received at the same time as, or after, the contactless payment.*

Never use a hand-held microphone when driving. Using hands-free equipment is also likely to distract your attention from the road. It is far safer not to use any telephone *or similar device* while you are driving or riding – find a safe place to stop first or use the voicemail facility and listen to messages later.

You may park your vehicle using a handheld remote control app or device. The app or device **MUST** be legal, and you should not put other people in danger when you use it.”

Other Regulations covering the positioning of mobile telephone equipment (and satellite navigation systems)

The Road Vehicles (Construction and Use) Regulations 1986 – Regulation 104

“No person shall drive or cause or permit any other person to drive, a motor vehicle on a road if he is in such a position that he cannot have proper control of the vehicle or have a full view of the road and traffic ahead”

This latter Regulation would clearly have application to the positioning of any device whether in a temporary cradle or mounted in a hands-free kit affixed to the vehicle. The positioning must not obstruct the driver’s *full* view of the road. So, the positioning of a windscreen or dashboard mounted satellite navigation system would also come under this Regulation.

An offence under the latter Regulations will be considered a contravention of Section 42 of the Road Traffic Act 1988. This makes it an offence to fail to comply or to cause or permit non-compliance with the Construction and Use Regulations.



Dangerous, Careless or Inconsiderate Driving Offence

Dangerous, careless or inconsiderate driving is also possible when using a phone – even hands free. If the police witness the driver's behaviour and decide that the driver satisfies the requirements of a more serious offence then they can be charged even though no accident has occurred. The fact that the phone was being used hands free can still be evidence for the prosecution if there is cause to suspect that this distraction caused or contributed to the unlawful conduct.

Where the driver is charged with a more serious offence under the Road Traffic Act, the fact that they are driving a Large Goods Vehicle/ bus/coach will increase the level of culpability associated with the offence and this in turn will increase the fine/penalty to be imposed by the court under the current Sentencing Guidelines.

Employer's Liability

If an employer requires a driver to make or receive calls on a hand-held phone whilst driving, or to use a phone installed in a vehicle (even hands-free) and this acts as a distraction that causes the driver to drive carelessly or dangerously then the employer can be liable if the employee is charged. If a fatal accident occurs there may be a cause of action against the directors or senior managers under the Corporate Manslaughter Act.

Penalties

For offences under the Road Vehicles (Construction and Use) Regulations: Regulation 110.

The offence will be dealt with by Fixed Penalty Notice. From the 1st March 2017, the penalties were increased to: -

- (a) A £200 fine (formerly £100); and
- (b) 6 penalty points on the driver's licence (formerly 3 points).

Fixed Penalty Notice offences are listed in the Road Traffic Offenders Act 1988 Part III, Schedule 3. The penalty points were statutorily increased from 3 points to 6 points under the Road Traffic Offenders Act (Penalty Points) (Amendment) Order 2017.

For fixed penalty offences under Regulation 104 (Other Construction and Use Offences):

- (a) A fine of £100 or £200; and
- (b) 3 penalty points on the driver's licence.

Regulation 104 offences will take the form of Fixed Penalty Notices.

Under new proposals, where unlawful use of a mobile phone is implicated in the death of a person, a new life prison sentence was available to the courts early in 2021.

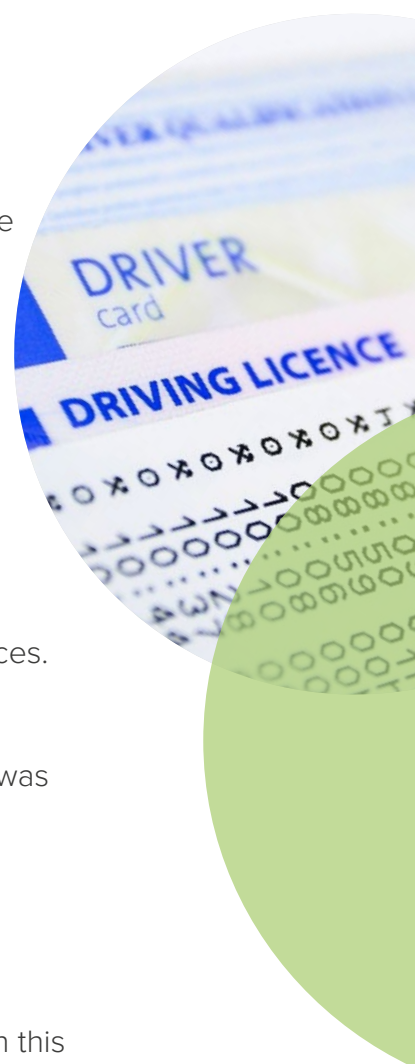
Repeat Offences & Challenges

Where a further offence under Regulation 110 is committed, then this second offence will qualify for a further 6 points and fine. On the basis that the driver accepts the Fixed Penalty Notice, the fine would be a minimum of £200.

Under the principles of totting up, two offences of using a hand-held phone whilst driving within a 3-year period would give 12 penalty points. Under sentencing rules, this would qualify for a minimum 6-month disqualification in the absence of mitigating circumstances.

The driver will have the right to challenge the Fixed Penalty Notice in court. If the matter goes to court, the maximum fine that can be imposed for the offence is £1,000 for drivers (Level 3) or in the case of HGV drivers, this increases to £2,500 (Level 4). Challenging the notice is not without an element of risk; but given the fact that the driver will face the possibility of a ban and that their livelihood is at stake, going to court may be a sensible calculated risk. With the current levels of disapproval of mobile phone use in vehicles, the magistrates are likely to fine repeat offenders harshly, so the maximum tariff is a strong possibility.

The effective period is the same as the effective period for other points on a licence – 3 years.



Practical Guidance

If you have an employee Fleet Policy, it should be updated to make it clear to all employees that any interaction with a hand-held device is prohibited whilst driving, with the exception of emergency use or making payment for goods or services when the car is stationary. It should be made clear that simply touching the device whilst driving can lead to prosecution. Drivers should be encouraged to store their phone out of their line of sight to avoid temptation.

If you don't have a Fleet Policy, it might be time to adopt one. Examples can be found online or you could approach road safety organisations for their assistance.

Ideally the policy or guidance from management should absolutely prohibit making or taking calls whilst driving. There is ample evidence to show that conversing whilst driving adversely affects concentration, slows down reaction times and increases the chances of collision. If it is not practical to ban taking or receiving calls, the need to use a hands-free kit (which should be supplied or available and working) and to keep calls short and minimal should be stressed.

Any policy guidance must be seen to be enforced. Steps should be taken to ensure that it is being followed and any breaches are dealt with swiftly and effectively by those in charge. A policy that is not enforced or partially or sporadically enforced is pointless and will be no defence. Senior management should be seen to abide by the rules as well.

Office based staff should be encouraged to avoid calling colleagues whom they know to be in a vehicle or to request a call back when they become aware that their colleague is driving and the matter is not time sensitive. Any calls should be kept short and to the point.

