

Changes to the Highway Code 2021

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Changes to the Highway Code 2021: not all road users are created equal

Following the Government's long-awaited consultation to review and update the Highway Code several updates were implemented on 15 September 2021.

You will no doubt have spotted several articles covering the proposed changes and how this will impact pedestrians, cyclists, horse riders and motorists alike.

The changes encompass 33 rule amendments and introduce two new rules which are summarised [here](#). A link to the official Government consultation can be found by clicking [here](#).

While the Highway Code has been updated incrementally over the years to ensure it remains relevant to modern road usage, campaigners have long fought for it to be updated to reflect the increasing number of vulnerable road users. In 2020 alone, a rise partly caused by the pandemic, the number of miles cycled on British roads increased by over 45% to an estimated 5 billion. For context, this increase covered more miles than those cycled in the previous 20 years combined.

In addition to the new and updated rules, there are three further proposed new rules on the horizon. We believe it is these that will have the greatest impact upon how liability will be considered in our claims. Those rules are discussed in more detail below.

Rule H1 of the proposed changes to the Highway Code introduces, for the first time a hierarchy of road users. Previously, heavy goods vehicles (HGVs) and pedestrians, no matter how vulnerable, were treated equally under the Highway Code. The changes propose

that there will be an increasing scale of responsibility for road users beginning with pedestrians, cyclists, horse riders, motorcyclists, car and van drivers and large vehicles/HGVs at the upper end of the scale (which reflects the civil courts' approach to liability – particularly the question of 'causative potency'). The purpose is that those "road users who can do the greatest harm have the greatest responsibility to reduce the danger they may pose to others", according to the DfT communication. While the hierarchy is broadly welcomed for differentiating between a pedestrian child and a HGV driver, concerns have been raised that those at the lowest end of the scale, particularly cyclists, may act less responsibly if they feel the onus is now on others to protect them.

The Government's research suggests Rule H1 has almost 79% support in adopting a hierarchy of road users, but a survey conducted by road safety charity, IAM Roadsmart, suggests 26% of those surveyed were against the Rule and 19% were unconvinced of its benefit.

The Government will say the purpose of the hierarchy is to encourage a culture of safety and responsibility on British roads, it will not give vulnerable users priority in every situation. All road users remain responsible for their own safety when using the road. However, given for example, the attitude of

some motorists to cyclists being perceived as a nuisance on the roads, it is difficult to see how the changes can be easily criticised.

The second major proposed change to the Highway Code is Rule H2. This Rule introduces a stronger priority for pedestrians at junctions. The onus will be upon drivers and riders to look out for, predict and respond to pedestrian behaviour at junctions – be that at designated crossing points or otherwise. The wording of Rule H2 imposes an obligation on drivers and riders (emphasis added):

- At a road junction you **should** give way to pedestrians who are crossing or waiting to cross a road you are turning into or from which you are turning;
- You **must** give way to pedestrians on a zebra crossing;
- You **must** give way to cyclists and pedestrians on a parallel crossing;
- You **should** give way to the above if they are waiting to cross on their respective crossings;
- Cyclists **should** give way to pedestrians on shared cycle/pedestrian tracks;
- Only pedestrians and wheelchairs/mobility scooters **should** use the pavement.

Clearly, the above will have wide ranging ramifications for drivers and riders alike, particularly in situations where there is now an obligation, not advice or guidance, on actions that must be taken in specific circumstances. Presently, pedestrians only have priority if they

have already stepped out onto a junction or crossing and should wait until approaching vehicles have stopped before moving into the road. Under Rule H2, if a pedestrian is standing on a pavement waiting to cross, a driver or rider should give priority to the pedestrian (i.e., adopt a more courteous approach to driving).

There is no mention of pedestrians or other users having to find the safest, or more established crossing points. It is, however, worth noting that the changes emphasise that cyclists need to give priority to pedestrians – there is a greater emphasis on the need for cyclists to take care of other road users, reflecting the serious harm that can occur if a cyclist collides with a pedestrian.

The third proposed major change is in respect of protecting and prioritising cyclists at junctions under Rule H3. Cyclists will now be protected and given a right of way when passing on the inside of vehicles turning left. This change has been widely criticised by the haulage industry for potentially putting the lives of cyclists at risk (cyclists can of course be difficult to spot alongside an HGV – it is a common cause of fatal collisions involving cyclists, particularly in heavily built-up areas). It is suggested that the change will encourage unsafe manoeuvres by cyclists.

Rule H3 will advise drivers or riders not to cut across cyclists who are travelling straight ahead, when that driver or rider intends to turn

into or out from a junction, or when changing lanes. Drivers and riders must not turn at a junction if it would cause the cyclist to swerve or stop, and a safe gap should be allowed by drivers and riders at or around junctions, roundabouts or when cyclists are passing slow moving or stationary traffic. We struggle to see how this could be criticised – one can hardly imagine such discourteous driving being acceptable at any time.

Rules H2 and H3 are perfect examples of the shift in protecting the vulnerable road user. Drivers and riders must now look out for and adopt responsibility for ensuring the safety of others. Drivers can no longer consider themselves “kings of the road”.

The greater responsibility imposed upon drivers could see a shift in how courts assess contributory negligence in future claims involving vulnerable road users. While such assessments of apportionment are highly fact sensitive, judgments in cases such as *Baker v Willoughby* [1970] A.C. 467, *Eagle v Chambers (No. 1)* [2004] RTR 9 and *Jackson v Murray* [2015] UKSC 5 (all car versus pedestrian collisions) could now, under the newly proposed Rules, be decided even more favourably for the vulnerable road user. However, it would be wrong to see the changes to the Highway Code as being a prelude to a sea-change in the court’s attitudes given that assessment of liability has always taken account of the differences between different road users. As



Lord Reid stated in *Baker v Willoughby*, restoring the 75/25 split in favour of the pedestrian over the Court of Appeal's 50/50 apportionment:

"There are two elements in an assessment of liability, causation and blameworthiness. I need not consider whether in such circumstances the causative factors must necessarily be equal, because in my view there is not even a presumption to that effect as regards blameworthiness.

A pedestrian has to look to both sides as well as forwards. He is going at perhaps three miles an hour and at that speed he is rarely a danger to anyone else. The motorist has not got to look sideways though he may have to observe over a wide angle ahead: and if he is going at a considerable speed he must not relax his observation, for the consequences may be disastrous. and it sometimes happens, though I do not say in this case, that he sees that the pedestrian is not looking his way and takes a chance that the pedestrian will not stop and that he can safely pass behind him. In my opinion it is quite possible that the motorist may be very much more to blame than the pedestrian. and in the present case I can see no reason to disagree with the trial judge's assessment. I would therefore restore the trial judge on this issue."

Moreover, as observed by Hale LJ (as she then was) in *Eagle v Chambers*:

"The court 'has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon': Latham L.J. in Lunt v Khelifa [2002] EWCA Civ 801, para. 20."

The changes do not provide a "one size fits all" counter argument to allegations of contributory negligence against a vulnerable road user. While those road users who can cause the greatest harm will adopt a greater responsibility, this does not eradicate the responsibility of a pedestrian or cyclist to ensure their own safety on the road, i.e., just as all the above-mentioned cases make clear.

Drivers and insurers of larger vehicles (e.g. vans, HGVs, buses) may be particularly concerned by Rule H3. Those of us who deal with motor liability will be all too familiar with collisions arising from drivers of HGVs etc. not spotting cyclists or pedestrians in or around the driver's blind spots. How therefore can a driver who may be unable to see the cyclist who has right of way, give way? The finalised wording of the Rule must consider the education and visibility of vulnerable road users.

Motorcyclists, while trained to ride differently to cyclists in traffic, are not differentiated or referenced in Rule H3 as it stands. Motorcycle riders will not be afforded the same priority or right of way in the same circumstances.

Most accidents involving vulnerable road users will occur away from motorways. The now implemented changes to the Highway Code do, however, consider improving safety on our motorways. A selection of those changes to existing Rules are summarised below:

- Rule 126 now clarifies what tailgating is and how it will be enforced by the police.
- Rule 138 provides clarification on overtaking





on dual carriageways and motorways.

- Rules 257 and 258 cover advice on how drivers should respond and react to amber or red light signals respectively.
- Rule 261 confirms drivers must not exceed displayed speed limits, which apply to their vehicle type and which are enforced by the police.
- Rules 263 to 271 cover advice relating to emergency situations and the use of hard shoulders.

As referenced above, while the number of cyclists using British roads has increased significantly to record levels in 2020, it is important to note that vehicular traffic was 21% down during that same period. Despite this the number of reported cyclist casualties in 2020 remained very similar (a drop in 2020 of only 0.96%). As Britain emerges from its various lockdowns and travel restrictions imposed by the pandemic, it is anticipated that pre-COVID travel habits will eventually return - particularly during autumn and winter months. The number of drivers will increase, and fewer cyclists are expected on the roads as the seasons change.

In light of this return to increased volumes of cars, motorcycles and large vehicles on the roads and the prioritisation of pedestrians and cyclists, the Government has to invest in communicating and educating road users of the changes to the Highway Code. A failure to do so will only lead to confusion and conflict between those listed in the new hierarchy of

road users. In addition, the Government is committed to reducing greenhouse gas emissions and increasing alternatives to vehicular travel, particularly on the busier roads in towns and cities.

The Government promotes a shared spaces initiative on British roads, however without significant investment in infrastructure the vulnerable road users - which the new Highway Code seeks to better protect - could be put at risk. Without this education and investment in infrastructure the possibility of conflict and accident between road users in proximity will surely remain.

The roll out of the changes to the Highway Code must make it clear to all road users across the new hierarchy that they must adopt responsibility for their own safety and for the safety of others. Providing added protection to the vulnerable will not absolve them of responsibility altogether. More can be done in this regard, particularly in relation to making helmets compulsory for bicycles and now e-scooters and mandating high visibility/reflective clothing and the use of lights when using the road at night.

On the issue of e-scooters, there is only one passing mention of this new and rapidly growing mode of transport. The issues surrounding the insurance of e-scooters has been a topic of much debate in the past 18 months or so. Many are ridden illegally on British roads - they are currently defined as motor vehicles and must therefore meet the

legal requirements of motor vehicles that use our roads – to include motor insurance, licence plates, lights etc. Privately owned e-scooters can only be ridden on private land with the permission of the landowner. Despite potential fines of up to £300, six points on a driving licence (if held) and confiscation of the scooter, the number of riders seen in town and city centres would suggest they are undeterred or ignorant of the restrictions in place.

From July 2020 the Government approved e-scooter trials across the UK. In certain circumstances and with a proper rental agreement some e-scooters can be used on roads or cycle lanes in specified areas. It remains illegal to ride on pavements or pedestrianised zones. Rental operators are responsible for insuring scooters under the trial scheme and riders must hold a full or provisional licence and be over 16 years old. Those scooters capable of being rented under the scheme are limited to 15.5mph (the same as e-bikes under electric power). The Government must acknowledge the growing trend in use of this mode of transport and adapt the Highway Code to reflect where e-scooter riders will sit in the hierarchy, how best to protect those riders and also other road users (e.g., speed limiters, lights, helmets, horns).

Key contacts

For further information on the proposed changes to the Highway Code or motor liability generally please do not hesitate to contact one of the co-authors



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