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Causing Death by Unlicensed, Disqualified or Uninsured Driving: Blameless Driving and the Scope of Legal Causation

R v *Hughes (Michael)* [2013] UKSC 56

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On 25 October 2009, shortly after 4.30 pm, the appellant (H) was travelling east from Carlisle on the A69 single-carriageway road towards Newcastle upon Tyne, when his vehicle was involved in a collision with another vehicle, driven by the victim (D). This collision had resulted in D suffering serious injuries, and upon being taken to hospital, D later died from those injuries. Prior to the collision, D had been working on the west coast of Scotland where he had worked a series of 12-hour night shifts and was driving back to Newcastle upon Tyne. At the time of the collision he had driven around 230 miles of a 400-mile journey. Additionally, it was found that D was a drug user and a significant quantity of heroin and other controlled drugs were found in the blood analysis after the incident. Before the collision occurred between the two vehicles, witnesses had stated that D had been driving erratically for some time and had drifted off the road both at the nearside and across to the wrong side of the centre white

line. Further witness evidence stated that an oncoming vehicle had to swerve to avoid being hit by D, who was driving on the wrong side of the road at the time. H was driving at a speed of approximately 45–55 mph in a 60 mph speed limit as he rounded a right-hand bend on the correct side of the road when the vehicle driven by D headed towards him. H tried to steer away from D's vehicle, but D took no avoiding action. It was accepted subsequently that H's driving had been faultless and D was entirely responsible for the collision which caused his death.

At the time of the accident, H was driving uninsured and without a full driving licence, his licence having been revoked previously on medical grounds. Subsequently, H had passed a medical test and was, at the time of the collision, able to drive under a provisional licence although had not yet obtained a full driving licence. H was charged under the offence created by s. 3ZB of the Road Traffic Act 1988, inserted by s. 21(1) of the Road Safety Act 2006. Section 3ZB states, *inter alia*, that a person is guilty of an offence if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence contrary to s. 143 of the 1988 Act (using a motor vehicle while uninsured or unsecured against third party risks) or s. 87(1) of the 1988 Act (driving otherwise in accordance with a licence). Prosecution for the offences under s. 143 and s. 87(1) can result in punishment of a fine, penalty points and disqualification from driving. When convicted under s. 3ZB, a person can be liable to imprisonment for up to two years.

At the trial at first instance, Newcastle Crown Court heard that H was to be prosecuted for the two offences under s. 3ZB, causing death by driving unlicensed (s. 3ZB(a)) and causing death whilst being uninsured (s. 3ZB(c)) rather than being prosecuted for the two separate offences under s. 147 and s. 87 of the 1988 Act. The Recorder of Newcastle Crown Court held that H's driving had not caused D's death, and that D was entirely responsible for his own death. The Crown appealed ([2011] EWCA Crim 1508) challenging the ruling of the Recorder that 'as a matter of law, a jury could not reasonably be directed that in any real sense the defendant was a cause of the death of D' (at [5]). The Court of Appeal, however, considered itself bound by the decision in *R* v *Williams* [2010] EWCA Crim 2552, insofar as it was not an element of the offence that a defendant's driving had to exhibit any fault contributing to the accident. It was sufficient enough that a defendant was uninsured, driving without a licence or disqualified, and that his car had been involved in the fatal collision.

Accordingly, the Court of Appeal found, under s. 3ZB of the 1988 Act, H was criminally responsible for the death of D, as the offence did not require that there be anything wrong with the defendant's driving. The Court of Appeal maintained that the wording in s. 3ZB was sufficiently clear to establish Parliament's intention that driving on a road without any right to be there was sufficient for the offence.

H appealed to the Supreme Court, the question for determination being whether a driver charged under s. 3ZB caused death whenever he was on the road and a fatal accident involving his vehicle occurred, or whether he only caused it if he did, or omitted to do, something connected to the control of his vehicle which was open to proper criticism and contributed in some more than minimal way to the death.

Held, allowing the appeal, under s. 3ZB it is not necessary for the Crown to prove careless or inconsiderate driving, but there must be something open to proper criticism in the driving of the defendant, beyond the mere presence of his vehicle on the road, and which contributed in some more than minimal way to the death. Parliament might have intended to make s. 3ZB an aggravated form of the offence of having no insurance or driving without a licence, but the court felt that it was unclear whether that intention extended to attaching criminal responsibility for a death to a defendant whose driving was blameless beyond being in a motor vehicle, driving without insurance or a licence, or being subject to disqualification.

The court recognised that the law frequently had to distinguish between the conduct without which the resulting consequences would not have occurred (the 'but for' test) and a legally effective cause of the deaths. By the test of common sense outlined in *Galoo Ltd* v *Bright Grahame Murray (a firm)* [1994] 1 WLR 1360, H had created the opportunity for his car to be run into by D, but what

brought about the death of D was his own dangerous driving and driving under the influence of drugs.

> It was a matter of the merest chance that H's car was what D hit. He might just as easily have hit a tree, which would have been a similar intervening event, yet it would not be said that the death had been caused by the planting of the tree. (at [25])

Their Lordships stated that if, in creating liability for a homicide offence, Parliament wished to go beyond the recognised common law approach to causation, then unambiguous language must be used in the statute to do this. It was concluded that by using the words 'causes death by driving' in s. 3ZB of the 1988 Act, Parliament had not chosen such unambiguous language. Therefore, it was held that s. 3ZB requires at least some act or omission which involves some element of fault. It was held in the present case that there was nothing in the manner of H's driving that contributed in any way to the death.

Commentary

The issues faced by the Supreme Court in this appeal from the Court of Appeal occur at the crossroads between public policy (in respect of those who advocate a robust policy in respect of road safety to deal with socalled 'drivers who kill'), causation and statutory interpretation. Clearly, it is the manifest duty of every driver to maintain a valid certificate of insurance; this duty is imposed by means of Road Traffic Act 1988, s. 143. Similarly s. 83(1) of the 1988 Act requires all drivers to comply with the terms

of their driving licence. The creation of the offence under s. 3ZB was introduced alongside another offence of causing death by careless or inconsiderate driving. This was inserted into the Road Traffic Act 1988 by s. 20(1) of the Road Safety Act 2006 as s. 2B. The s. 3ZB offence was intended to address the perception that the 'penalty for uninsured driving could readily be seen to fail to cope adequately with bad cases … for serial offenders' especially where the uninsured, unlicensed or disqualified driver had caused the death of another road user. In this case, however, it appeared that H was being punished under a homicide offence for the dangerous driving of D despite the availability of charges under s. 83 and s. 143 of the 1988 Act.

Intervening acts and s. 3ZB

The offence of driving without insurance is one of strict liability, the scope of prohibited activity, therefore, covers not only those, like H, who knowingly drive uninsured and not in accordance with their licence, but also those who are uninsured due to a mistake on the part of the insurance company or those who disregard or overlook an insurance renewal notice. Lord Hughes and Lord Toulson, delivering the judgment of the court, emphasised the gravity of the s. 3ZB offence, stating that the offence was considered to belong to the category of homicide offences and as such, '… if the ruling in the present case is correct, all such persons will be guilty of a very serious offence of causing death by driving if a fatal collision ensues, even if they could have done nothing to avoid it' (at [9]).

The previous appeal by the Crown to the Court of Appeal in this case led to a number of distinguished commentators criticising both the drafting of the statute and the apparent relish with which the Court of Appeal had adopted a broad interpretation of the language of the statute. Sullivan and Simester provided a comprehensive discussion on the issues of causation raised within the Court of Appeal's decision and noted that by drafting s. 3ZB in the terms that it had done, Parliament had not sufficiently decoupled causation from personal responsibility. By requiring that the defendant 'causes the death of another person', they argued that the normal legal principles of causation apply and that the blameworthiness of the driver needed to be more than his presence on the road in an uninsured, unlicensed or disqualified state (G. R. Sullivan and A. P. Simester, 'Causation Without Limits: Causing Death While Driving Without a Licence, While Disqualified, or Without Insurance' [2012] Crim LR 753).

The judgment of the Supreme Court in this case makes considerable reference to these 'normal legal principles of causation'. First, when considering the chain of causation between H's driving and the death of D, the appellant argued that D, by being under the influence of drugs and not in a fit state to drive, had committed a voluntary and informed act which had broken the chain of causation. The court highlighted the case, familiar to all students of criminal law, of *R* v *Kennedy (No. 2)* [2007] UKHL 38 where the victim of a voluntary drugs overdose was held to be solely responsible in law for his own death, despite being handed

a loaded syringe by the defendant. The court accepted that, in the current case, D did not choose voluntarily to kill himself; instead he drove dangerously and caused the collision which caused the injuries that ultimately killed him. If the driving of H was a cause that was more than minimal (the principle of *de minimis* shown in *R* v *Hennigan* [1971] 1 All ER 133), then the court held that issues of independent acts and omissions as in *Kennedy* would not assist H. It is difficult to conclude anything other than the collision in which D was killed was a decisive factor rather than minimal. The question for their Lordships to consider was, therefore, whether H was, in law, a cause of the death of D simply by being present on the road.

Causation and fault: challenging the* Williams *orthodoxy

In the present case the Court of Appeal had considered that it was bound by the (then) recent decision in *R* v *Williams (Jason John)* [2010] EWCA Crim 2552, which appeared to decide conclusively that the mere presence of the defendant on the road, without suitable insurance, licence or being subject to disqualification, was sufficient to be held to cause the death of the victim. It was not an element of the offence that the defendant had exhibited any fault in contributing to the accident and, indeed, it did not matter that the defendant may have been blameless. It was enough that he was uninsured and involved in a fatal collision for the offence to be complete. The facts of *Williams* are slightly different in that the defendant (W) was driving uninsured on an urban dual carriageway, within the speed limit. A pedestrian (V) jumped over

the central reservation and into the path of the car. It was agreed at trial that W could have done nothing to avoid hitting V and that V was the principal cause of his own death. The judge at first instance and the subsequent judgment of the Court of Appeal supported the interpretation of s. 3ZB that fault in the manner of driving was not an element of the offence and that the presence of W's vehicle, uninsured, unlicensed or disqualified would be a cause of death of V.

The decision of the court in *Williams* placed causation issues within the sphere of the 'but for' test. Counsel for H in the present case decided that the issue of fault was something of a blind alley and instead concentrated upon the meaning of 'causes death by driving'. The Supreme Court accepted the appellant's submission that rather than merely finding that the presence of H's vehicle on the road was a 'but for' event which caused the death of D, a common-sense approach would see H as the legal cause of D's death only when there was some additional feature of the driving which was blameworthy (citing Glidewell LJ in *Galoo Ltd* v *Bright Grahame Murray (a firm)* [1994] 1 WLR 1360). In this case, it was successfully argued that the legal cause of D's death was the dangerous driving and druginduced state of D, and that H was entirely faultless. Their Lordships stated (at [32]) that there must be something more than 'but for' causation. It may well be that in many cases the driving would amount to careless or inconsiderate driving, but it might not do so in every case. As was articulated earlier in the judgment:

> By the test of common sense, whilst the driving by H created the opportunity for his car to be run into by D, what brought about the latter's death was his own dangerous driving under the influence of drugs. It was a matter of the merest chance that what he hit when he veered onto the wrong side of the road for the last of several times was the oncoming vehicle which H was driving. He might just as easily have gone off the road and hit a tree, in which case nobody would suggest that his death was caused by the planting of the tree, although that too would have been a sine qua non. (at [25])

Statutory interpretation and s. 3ZB

The issue of statutory interpretation runs parallel with the consideration of causation issues in relation to s. 3ZB. Their Lordships stated that the rule of construction that applied to penal legislation was analogous to the principle of legality as explained by Lord Hoffmann in *Secretary of State for the Home Department, ex p. Simms and O'Brien* [2000] 2 AC 115:

> The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of

> express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. (at [131])

Although *Ex p. Simms and O'Brien* was concerned with a breach of human rights, it was held that, similarly, the gravity of a conviction for homicide was such that if Parliament wished to displace the normal approach to causation recognised by the common law and substitute a different rule, it had to do so unambiguously. This was the approach suggested by Sullivan and Simester and one accepted by the Supreme Court. It was held that Parliament had chosen not to adopt unequivocal language (other constructions of the offence which had been suggested are within the judgment (at [34])) and, therefore, an intention to create the meaning contended for by the Crown could not be attributed to it. The 2005 Home Office Consultation Paper stated that:

> … the mere fact of taking a vehicle on a road when disqualified is, in the Government's view, as negligent of the safety of others as is any example of driving below the standard of a competent driver even if the disqualified driver at a particular time is driving at an acceptable standard. (Home Office Consultation Paper, *Review of Road Traffic Offences Involving Bad Driving*, February 3, 2005, para. 4.2)

It is clear from the decision in this case, however, that the Supreme Court does not believe the wording of the eventual offence was sufficiently equivocal as to impose a homicide conviction upon a driver who, other than lacking a valid insurance or driving licence, was entirely blameless. The offence under s. 3ZB may well be part of an attempt by the government to provide a robust response to uninsured, unlicensed and disqualified drivers. All those interested in road safety would concede the necessity of this. In the current case, however, the Supreme Court has moved to restrict the extent to which such zealotry could interfere with the operation of normative criminal law principles and thereby constrain disproportionate and unjust sentencing imposed as the result of cosmetic and political imperatives.