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Case Comment

Relevance of driving skill to a charge of dangerous driving

Christopher J. Newman

Subject: Criminal law . **Other related subjects:** Police. Road traffic.

Keywords: Dangerous driving; Police officers

Legislation:

[Road Traffic Act 1991 \(c.40\) s.2](#)

Cases:

[R. v Bannister \(Craig\) \[2009\] EWCA Crim 1571; \[2010\] 1 W.L.R. 870; \[2009\] 7 WLUK 737 \(CA \(Crim Div\)\)](#)

[Milton v Crown Prosecution Service \[2007\] EWHC 532 \(Admin\); \[2008\] 1 W.L.R. 2481; \[2007\] 3 WLUK 463 \(DC\)](#)

***J. Crim. L. 12** *Keywords* Dangerous driving; Police traffic officers; Road traffic offences, Driver ability

On 13 January 2008, the appellant was on duty as a road traffic police officer driving on the M4 motorway near Swansea. It was dark and there was no road lighting. The road surface conditions were extremely wet; it was raining heavily. The appellant, whilst acknowledging that he had seen the surface water stated that he did not think it was deep. At around 18.10 that evening the car aqua-planed and crashed into a group of trees at the edge of the motorway. This caused the car to be damaged beyond repair. The appellant suffered minor injuries and no other person was involved in the collision.

The appellant was charged with dangerous driving contrary to s. 2 of the Road Traffic Act 1988, as amended by s. 1 of the Road Traffic Act 1991, which provides that a person who drives a mechanically propelled vehicle dangerously on a road is guilty of an offence. Section 2A(1) of the 1988 Act provides a two-limbed, objective test as to when a person ***J. Crim. L. 13** is to be regarded as driving dangerously. First, a person will be so regarded if the way he drives falls far below what would be expected of a competent and careful driver *and* it would be obvious to a competent and careful driver that driving in that way would be dangerous.

The trial was held at Cardiff Crown Court in February 2009. The appellant stated that he had been responding to an emergency call and that he had completed an advanced training course which had enabled him to drive safely at high speed in the conditions concerned where it would not be safe for the ordinary competent and careful driver to do so. The appellant maintained that this was relevant to this issue of whether he was driving dangerously, taking into account the decision in *Milton v Crown Prosecution Service* [2007] EWHC 532, [2008] 1 WLR 2481. The decision of the court in *Milton*, reached by Smith LJ and Goss J, was that if unfavourable circumstances such as drunkenness and illness could be taken into account, then evidence of specialist skill and ability should also be considered. The trial judge in this case then summed up the case to the jury presenting the issues raised in *Milton*. Notwithstanding this, the appellant was convicted of dangerous driving and sentenced to 20 weeks' imprisonment, disqualified from driving for two years and required to resit an extended driving test. The appellant appealed against conviction and sentence and initially the sentence was reduced to a fine, a 12-month driving ban and the requirement to resit an extended driving test (see [2009] EWCA Crim 1350). The appeal against conviction was not heard on that occasion as the court considered it necessary for there to be a full discussion as to whether *Milton* had been correctly decided. The basis for the appeal against conviction provided by the appellant was that the summing-up by the trial judge had not made clear to the jury what the correct position of the law was based on *Milton*. Furthermore, the appellant argued that the summing-up had been unsatisfactory and that the conviction was unsafe.

HELD, IN ALLOWING THE APPEAL, giving the reserved judgment of the court, their Lordships stated that taking into account the driving skills of a particular driver was inconsistent with the objective test of the competent and careful driver set out in the Road Traffic Act 1988. The court held that circumstances such as drunkenness did not go to the standard of the competent and careful driver, but instead related to the condition of the driver, as stated in s. 2A(3) of the 1988 Act, and these are as relevant as the driver's knowledge of the unroadworthiness of a car or the conditions of the weather or the road. The court stated that these factors could be taken into account without departing from the test laid down in the statute. In contradistinction to that, taking into account the special skill of a driver would be a departure from the test of the competent and careful driver which has been set out in the Act and would, in effect, rewrite the clear intention of the legislators. The court stated that the decision in *Milton* was not correct and that special skill or lack of special skill was irrelevant when considering whether the driving was dangerous within the context of the objective test.

Having reached the conclusion that applying *Milton* was incorrect, the court held that the summing-up of the trial judge on the basis of *Milton* ***J. Crim. L. 14** had not provided a proper basis for a safe conviction for dangerous driving. This was in spite of the summing-up being more favourable to the appellant than the law permitted. It was not relevant to the issue of dangerous driving as to whether or not the appellant had been on police duty, responding to an emergency call, yet this featured heavily in both the evidence and the summing-up. The court stated that there was a real and substantial risk that the jury were confused by the summing-up as to the proper way in which the statutory test should have been applied. It was accepted by the Crown that no useful purpose would be served by a retrial, and the conviction for dangerous driving would be quashed and a conviction of careless driving would be substituted. Accordingly, the appellant was fined, the disqualification period reduced from 12 months to 3 months and the requirement to take a retest was also quashed.

COMMENTARY

The decision of the Court of Appeal in this case to revisit the finding of the High Court in *Milton* was perhaps inevitable. The decision in *Milton* fundamentally altered the statutory test laid down in s. 2 of the Road Traffic Act 1988 and, by implication, the essence of the legislative provision relating to dangerous driving, which s. 2A of the Road Traffic Act 1988, as amended, was specifically designed to combat. The decision of the present case is particularly significant when considering the evolution of the law relating to dangerous driving and represents an acknowledgement of the mischief that the legislation was seeking to correct.

Development of the offence of dangerous driving

In 1985 the Department of Transport and the Home Office commissioned a combined review of road traffic law, which resulted in the 1988 publication of the so-called "North Report". One of the principal recommendations was that the offence of reckless driving as defined in s. 2 of the Road Traffic Act 1972 was defective insofar as it required proof of a mental element, an ingredient confirmed by the House of Lords in *R v Lawrence* [1982] AC 510. The North Report recommended that any offence of dangerous driving should be fully objective in nature and that the courts should be able to take into account the consequences of poor driving which resulted in death, injury or damage to property. The Road Traffic Act 1988 went some way to achieving this aim by having a tiered approach to driving offences, with dangerous driving contrary to s. 2 of the Road Traffic Act 1988 being the higher-level, bad-driving offence.

Further revivification of the scope of the legislation occurred with the enactment of the Road Traffic Act 1991 which expanded on the objective nature of the test. Section 2A(1)(a) states that a person is to be regarded as driving dangerously if, and only if, the way the accused drove fell far below what would be expected of a careful and competent driver. Section 2A(1)(b) goes on to require that it is obvious to a careful and competent driver that driving in the manner of the accused would be dangerous. Section 2A(3) further states that in determining what ***J. Crim. L. 15** would be expected of, or obvious to, a competent and careful driver, regard shall be had not only to the circumstances of which he could be expected to be aware, but also to those circumstances within the knowledge of the accused.

Milton and the case for the skilled driver

As has already been identified, the most contentious authority relied upon by the appellant in the present case was that of *Milton v Crown Prosecution Service* [2007] EWHC 532, [2008] 1 WLR 2481. The facts of *Milton* bear a remarkable similarity. Both involved police officers, on duty, driving high-performance police vehicles. In *Milton*, the police officer (M) was testing the vehicle's handling characteristics by driving at fast speeds on public roads. This included driving at 148 mph on the M5 motorway. M was tried and acquitted of dangerous driving because the trial judge had taken into account M's expertise. The prosecution appealed on the grounds that such subjective considerations do not form part of the objective test under s. 2 of the 1988 Act. At the retrial, the district judge decided it should not and M appealed. The appeal centred on whether the advanced driving skills of M should be a relevant circumstance. The prosecution contended that if the term included driving ability, then it may open the floodgates to the admission of evidence as to an accused's driving skills, as a test of driving ability would necessarily have to work both ways including those who had little driving skill being able to circumvent the objective standard of the competent careful driver. In his judgment, Smith LJ, in finding for the defendant, M, held that the floodgates would not be open as only the extremes of special skill and the almost complete lack of skill would be capable of affecting the objective assessment.

Case history of admissible circumstances

It is perhaps of some significance to the present case that the objective nature of the test has been reinforced on a number of occasions. In *R v Collins (Lezlie)* [1997] RTR 439 a police officer's mistaken belief that a road was safe due to the actions of his colleagues was not held to be a relevant factor when considering the actual driving of the police officer with regard to the statutory test of the careful and competent driver. Similarly, in *Attorney-General's Reference No. 4 of 2000* [2001] EWCA Crim 780, [2001] 2 Cr App R 22, Lord Woolf CJ reaffirmed the objective nature of the test when he stated that it is the jury who should set the standard as to what is or is not dangerous driving.

The meaning and scope of admissible circumstances under s. 2A was considered by the court in the present case with reference to the decision of the Court of Appeal in *R v Woodward* [1995] 2 Cr App R 388 in which it was decided that a driver who rendered himself drunk by virtue of ingesting a large amount of alcohol had, in effect, rendered himself in a dangerously defective state to drive and therefore was a circumstance to which the court could admit as a relevant circumstance under s. 2A(3). Similarly, the decision of the court in *R v Marison* [1997] RTR 457 to ***J. Crim. L. 16** admit evidence of a driver's knowledge that he was subject to hypoglycaemic episodes and *R v Pleydell* [2006] 1 Cr App R 12 where consumption of cocaine was also considered to be a relevant circumstance under s. 2A(3). These cases, the appellant maintained, were wholly negative to the defence case and that more favourable circumstances should also be taken into account without affecting the objective nature of the test. The court disagreed with this and stated (at [16]) that by taking into account the special skill of the driver in assessing whether the driving is dangerous, then it follows inevitably that the standard being applied is not that of the competent and careful driver, but instead is modified to the driver with special skills.

Conclusion

When conducting a holistic review of the evolution of the legislation and the resultant case law, it is difficult to argue that the decision in *Milton* did anything other than modify the objective test as laid down in s. 2 of the 1988 Act. The appellant in the present case tried to build upon the decision of *Milton* and entrench the need for the courts to take account of driving skill. The decision of their Lordships, however, firmly rejected any dalliance with a modified test and saw a return to the orthodoxy of the objective test as it was originally intended by Parliament.

Christopher J. Newman

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