

# DRYSTONE

## CHAMBERS



Claire Howell, a senior member of our criminal and regulatory teams, with a wealth of experience in cases involving vehicular issues, explains when driving can be established as 'dangerous' following the recent Judgement in R v Holder.

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### What factors are relevant and admissible to establish that driving is dangerous?

#### Summary

1. In the recent case of **R v Holder [2023] EWCA Crim 5** the Court of Appeal considered what conduct was encompassed with the definition of 'dangerous driving' under the Road Traffic Act 1988.
2. The authority contains an interesting analysis and timely reminder of the important of scrutinising the factors relied upon by the Prosecution to establish that the driving was 'dangerous'.
3. It is important in these cases to scrutinise:
  - a. What evidence is relevant to the 'driving';
  - b. What evidence is relevant to the circumstances in which the driving took place.

This judgment appears to suggest that the latter cannot, of itself, form the basis for a conviction, or at least cannot form the basis of a conviction if it would not, by itself, amount to dangerous driving.

4. In this case there was an example of:
  - a. Evidence **relevant to the driving** which **could form the basis of a conviction**;
    - i. speed, failing to look in the right direction;
  - b. Evidence **relevant to the circumstances in which the driving took place** which **here couldn't form the basis of a conviction alone**, but which informed what

driving would be expected of a competent and careful driver in those circumstances;

- i. passenger not wearing a helmet;
  - c. Evidence which was **not relevant** to either of the above and was thus rightly excluded;
    - i. defendant's lack of a driving licence.
5. The defendant was 17 years of age. He was driving a stolen motorcycle on a 20mph residential road at between 37 and 44mph. His friend, the deceased, who was 14 years of age, was riding on the back. Neither of them were wearing helmets and the defendant had no driving licence.
6. Whilst speeding down the road the defendant looked behind over his shoulder to speak to two passers by. The vehicle drifted, hit the kerb and he and the deceased were thrown from the vehicle. The deceased slid along the pavement and collided with two nearby poles and a telephone junction box sustaining injuries which killed him. The defendant sustained only minor injuries.
7. The defendant was charged with causing death by dangerous driving. The Prosecution relied upon the uncontroversial elements of the excessive speed and failure to look in the right direction as evidence of dangerous driving. However, they also sought to rely upon the defendant's lack of driving licence and the fact that he had driven the deceased when the deceased was not wearing a helmet.
8. The Trial Judge accepted the defence submissions that the defendant's lack of driving licence could not be a relevant admissible factor, and the Court of Appeal did not criticise this decision. This, it is suggested, must be correct as the lack of a driving licence is a separate offence, but is not, of itself, relevant to the standard of the driving.
9. However, the defence submissions that:
  - a. the fact that the passenger was not wearing a helmet could not be relevant to the defendant's driving of the vehicle;
  - b. and further, because the legislation contained an exemption permitting Sikh's not to wear helmets for religious reasons, logically the absence of a helmet could not be said to be dangerous;

were rejected by the Learned Judge who held that the fact that the deceased was not wearing a helmet was *'part and parcel of the driving'* that the jury had to consider and rejected

10. Whether driving is 'dangerous' for the purposes of the Road Traffic Act 1988 is addressed by section 2A of the Act which provides that:

*"(1)For the purposes of sections 1, 1A and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—*

*(a)the way he drives falls far below what would be expected of a competent and careful driver, and*

*(b)it would be obvious to a competent and careful driver that driving in that way would be dangerous.*

*(2)A person is also to be regarded as driving dangerously for the purposes of sections 1, 1A and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.*

*(3)In subsections (1) and (2) above "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.*

*(4)In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried"*

11. The Court of Appeal emphasised again that driving is dangerous **if and only if**, the criteria in section 2A of the Act are made out. The Court differed from the precise reasoning of the Trial Judge but endorsed the Learned Judge's observation that the failure to wear a helmet was *'part and parcel'* of the driving and was admissible in the circumstances of this case.

12. The Court concluded this because s2A(1)(3) states that the jury should have regard to both *'the circumstances of which he could be expected to be aware'* and *'to any circumstances shown to be within the knowledge of the accused'* in determining **both limbs** of the dangerous test under s2A:

- a. That the driving fell far below that expected of a competent and careful driver (under s2A(1)(a))  
**"First Limb";**

- b. and that it would be obvious to a competent and careful driver that driving in such a way would be dangerous (under s2A(1)(b))  
“**Second Limb**”;

13. Thus the court concluded that the jury would be entitled under s2A(1)(3) to take into account the circumstances in which that driving took place as being relevant to **both**:

- a. whether the driving in those circumstances did fall below the standard of a competent and careful driver;
- b. AND whether it would be obvious to a competent and careful driver in those circumstances that driving in that way would be dangerous.

14. However, in this case the Court went onto specifically state that it would **not** have been open to the jury to convict the defendant of dangerous driving ONLY on the basis that he was driving someone who was not wearing a helmet. When considering both limbs, the jury were entitled to look at the ‘driving’ (the speed and failure to look in the right direction) in the circumstances of the case, which here included the passenger wearing no helmet.

15. Section 2A(3) states that evidence of the circumstances could, in of it itself, render the driving dangerous. There is no suggestion that the jury have to consider factors relating directly the driving in isolation (here speed, and not looking forward) before considering the circumstances (here not wearing a helmet). Indeed, the section says the reverse, that the circumstances are part of the consideration in both limbs as to whether the driving is dangerous. As the Court stated (para 19 of the judgment), there may be cases where it is the circumstances which render the driving dangerous rather than factors intrinsic to the driving itself.

16. By stating that the circumstances of not wearing a helmet in this case could not, alone, amount to dangerous driving. It may be that all the court meant was that factor alone did not fall so far below the standard so as to amount to dangerous driving.

17. This judgment emphasises once again the importance of analysing exactly what factors are relied upon by the Prosecution in these cases

#### About the author

**Claire Howell** is experienced in dealing with cases where death is alleged to have resulted from careless or dangerous driving. She is known for:

- her skill in handling the technical and complex road accident investigator and pathological expert evidence that can be involved in such cases;
- an ability to deal with complex legal arguments in this area of the law.

