Trinity Term
[2013] UKSC 56
On appeal from: [2011] EWCA Crim 1508

JUDGMENT

R *v* Hughes (Appellant)

before

Lord Neuberger, President
Lord Mance
Lord Kerr
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

31 July 2013

Heard on 5 June 2013

Appellant	*Respondent*
Robert Smith QC	John Price QC
C J Knox	Sarah Whitehouse
(Instructed by John Donkin Solicitors)	(Instructed by CPS Appeals Unit)

LORD HUGHES AND LORD TOULSON, delivering the judgment of the court

1. This case concerns the true ambit of the new offence created by section 3ZB of the Road Traffic Act 1988 ("the 1988 Act"). This new section was added by section 21(1) of the Road Safety Act 2006 ("the 2006 Act"). It provides:

> "3ZB Causing death by driving: unlicensed, disqualified or uninsured drivers.
>
> A person is guilty of an offence under this section 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 under-
>
> (a) Section 87(1) of this Act (driving otherwise than in accordance with a licence);
>
> (b) Section 103(1)(b) of this Act (driving while disqualified), or
>
> (c) Section 143 of this Act (using a motor vehicle while uninsured or unsecured against third party risks)."

On conviction on indictment, this offence carries imprisonment for up to two years.

2. On a late Sunday afternoon in October 2009 the defendant Mr Hughes was driving his family in his camper van. They were on their way home from a motor sports event. The road was the A69 single-carriageway trunk road which runs more or less due west from Newcastle-upon-Tyne towards Carlisle. Mr Hughes and his family were travelling east towards Newcastle. The speed limit was the national limit of 60 mph. His driving was faultless, and his speed a steady 45-55 mph. As he rounded a right-hand bend on his correct side of the road he was confronted by a motor car driven by a Mr Dickinson in the opposite direction. Mr Dickinson's car was veering all over the road; it twice crossed to its wrong side and it smashed into Mr Hughes's camper van, tipping it over and trapping some of

the occupants inside. The oncoming driver, Mr Dickinson, suffered injuries in the impact which proved fatal.

3. Without saying any more it would be apparent that the collision was entirely the fault of Mr Dickinson. As it transpired, he was under the influence of heroin, as well as overtired. He worked at a power station at Largs on the west coast of Scotland. He had worked a series of 12 hour night shifts. That Sunday he had driven from Largs to Newcastle and was on his way back, a round trip of something like 400 miles, of which he had completed about 230. He was a drug user. He was maintained on a prescription dose of methadone, no doubt as a substitute for heroin, but on this day blood analysis proved that he had taken a significant quantity of heroin. He additionally had other controlled drugs in his blood, although they would not, given the heroin level, have had a significant bearing on the accident. No doubt because of the combination of heroin and over-tiredness, Mr Dickinson had been driving erratically for some time before the collision. He had wandered both off the road to the nearside and across to the wrong side of the centre white line. There had nearly been an earlier collision when he was partly on the wrong side of the road, and an oncoming car had had to swerve to avoid being hit by him. Mr Dickinson had appeared to following drivers to be unaware of this incident, and rather than taking any avoiding action he had merely drifted back to his correct side of the road in the course of the swerving pattern he was exhibiting. That earlier oncoming driver was fortunate. Mr Hughes was not. He too tried his best to avoid collision by steering to his left, but Mr Dickinson took no avoiding action at all and the impact was the result. It is accepted on all sides that there was nothing Mr Hughes could do to avoid the collision.

4. Although his manner of driving could not be criticised, Mr Hughes was without insurance. That was not, in this instance, through inadvertence. He had, culpably, chosen to disregard what everyone knows is the duty of a driver to carry insurance against liability to a third party. He had, and advanced, no excuse for being uninsured. He was also without a full driving licence. He was not disqualified from driving, but his licence had, several years earlier, been revoked on medical grounds. Subsequently he had passed a medical test and had received a letter offering congratulations on being able to get his licence back. A licence had been issued to him, which he said he thought was a full licence but which was in fact a provisional one. Whatever the truth about his belief on this score, he was undoubtedly guilty of the two offences of driving uninsured and driving without a full licence, for both of these offences are ones of strict liability which can be committed without any fault on the part of the driver. Those offences, contrary respectively to sections 143 and 87 of the 1988 Act, rendered him liable to prosecution, to fine, to penalty points and to disqualification. Neither of those offences carries a sentence of imprisonment.

5. Rather, however, than being prosecuted for, and suffering the consequences of, these two offences, Mr Hughes was prosecuted for two offences under the new section 3ZB, namely for causing the death of Mr Dickinson at time when he was uninsured and without full driving licence. On his behalf it was submitted that he had not committed either additional offence because he had not caused the death of Mr Dickinson. The Recorder of Newcastle ruled in his favour on that point, but the Crown appealed that ruling to the Court of Appeal, Criminal Division. By the time of the hearing, the Court of Appeal considered itself bound to allow the Crown's appeal by an intervening decision in another case involving section 3ZB. Consistently with that earlier decision – *R v Williams* [2010] EWCA Crim 2552; [2011] 1 WLR 588, it ruled that Mr Hughes had – in law - caused the death. *Williams* had held that it was not an element of the offence that the defendant's driving had to exhibit any fault contributing to the accident. It had held, moreover, that it was enough that the defendant was uninsured, or without full licence, and that his car had been involved in the fatal collision. The Court of Appeal in the present case followed that ruling. Mr Hughes appeals against its decision.

6. It follows that the question for this court is whether or not these two decisions of the Court of Appeal Criminal Division are correct. If they are, the consequence is, as Hooper LJ observed in the course of his judgment in the present case, that Mr Hughes is held criminally responsible for the death of Mr Dickinson although on a common sense view Mr Dickinson was entirely responsible for the collision which resulted in his immediate death. It also follows that if the injuries which Mr Hughes's wife and son sustained had proved fatal, as easily might have happened, he would have had no defence to the charge of also causing the deaths of his own close family. This would have been notwithstanding the fact that Mr Dickinson, if he had survived to be prosecuted, would on any view have been guilty of causing their deaths by dangerous driving (section 1 of the 1988 Act) or, at the very least, by careless driving coupled with being unfit to drive through drugs (section 3A of the same Act), both of which are very serious offences carrying a maximum sentence of 14 years.

7. The circumstances of *Williams* demonstrate that the problem raised by this case is neither unusual nor exceptional. There too the defendant was uninsured, again in that case deliberately so. He was driving in a perfectly proper manner along an urban dual carriageway, within the prevailing 30 mph speed limit, when a pedestrian jumped over the central reservation, stepped out right in front of his car, and was killed in the impact. It was agreed on all sides that there was nothing the defendant could have done to avoid hitting the pedestrian, and that unhappily the pedestrian was entirely responsible for his own death. The jury made it clear by two questions that it was uncomfortable with the prospect of convicting the defendant in these circumstances, but loyally abided by the judge's direction that fault in the manner of driving was not an element in the offence and that it made no difference if the pedestrian was the principal cause of his own death, so long

only as the presence of the defendant's car was a cause of the death, and not de minimis. Williams was convicted and the Court of Appeal upheld his conviction.

8. The duty of every driver to maintain insurance against liability to third parties who might be injured in any road accident is of great public importance. The public expects that a person injured in a road accident through the fault of someone else will have recourse to proper compensation for his injuries and loss. Since the driver at fault may well not have the money to meet the necessary compensation himself, this can only be achieved by insisting on compulsory insurance against the risk. So firm is this public expectation that for over 60 years the motor insurance industry as a whole has accepted the obligation to provide compensation even where the driver at fault had no insurance, so that the innocent injured person shall not be left without compensation. The cost of this safety net inevitably falls on the great majority of law abiding drivers who do have insurance; their premiums have to be increased to an extent to pay for those who flout their obligations. So Mr Hughes, in the present case, was committing a serious offence in seeking to profit by not paying the insurance premium which he ought to have paid and by leaving it, in effect, to the rest of the driving public to pay it for him. Public and parliamentary frustration with such people is entirely understandable. It may also be the case (although not here) that the irresponsible driver who fails to take out insurance is also irresponsible in the manner of his driving. In that event public offence is understandably the greater. To a lesser extent similar frustration may be felt with the driver who has no full driving licence, especially if he has failed to pass a driving test.

9. The difficulty, however, exposed by the present case and others like it is that instead of Mr Hughes being punished for what he did wrong, namely for failing to pay his share of the cost of compensation for injuries to innocent persons, he is indicted and liable to be punished for an offence of homicide, when the deceased, Mr Dickinson, was not an innocent victim and could never have recovered any compensation if he had survived injured. A further difficulty is that since using a car uninsured is an offence of strict liability, it is an offence which may well be committed not only by the likes of Mr Hughes, who deliberately fail to take out insurance, but also by those who overlook a renewal notice, or who find themselves uninsured because of an office mistake by brokers, or because they have driven someone else's car when both they and the owner believed there was valid insurance but in fact there was not, for example because a condition in the policy had been overlooked. 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. Has Parliament used language which unambiguously has such far reaching effects?

10. Before the 2006 Act, the principal offences relating to bad driving, and to causing injury by it were, except for manslaughter, contained in the 1988 Act and were as set out below. All remain in existence.

(i) Manslaughter, a common law offence where death is caused by gross negligence; the sentence is at large.
(ii) Under section 1 of the 1988 Act, causing death by dangerous driving; this has carried imprisonment up to a maximum of 14 years since the Criminal Justice Act 2003.
(iii) Under section 3A, causing death by dangerous driving when the driver was unfit through drink or drugs or over the legal alcohol limit; this too carries imprisonment up to a maximum of 14 years.
(iv) Under section 2, dangerous driving, irrespective of whether accident or injury ensued; the maximum sentence has remained at two years for decades.
(v) Under section 3, careless or inconsiderate driving; this is a summary only offence and does not carry custody.
(vi) Under sections 4 and 5, four offences involving drink or drugs, namely driving or being in charge when either unfit or over the prescribed alcohol limit; these are also summary offences and carry maxima of six months imprisonment for the driving offences and three months for the in charge offences.
(vii) There were in addition a great many summary only offences relating to the condition of vehicles and to the qualifications required of drivers; amongst them were the offences of using a motor vehicle whilst uninsured and driving without a full driving licence; these, as mentioned earlier, did not and do not carry imprisonment at all.
(viii) Lastly for present purposes should be listed driving when disqualified by court order, contrary to section 103; this is a summary offence and carries a maximum of six months imprisonment.

11. The new offence created by section 3ZB, with which we are now concerned, was introduced into the 1988 Act by section 21 of the 2006 Act. At the same time, the next door provision of the 2006 Act, section 20, created another new offence of causing death by careless or inconsiderate driving, also inserted into the 1988 Act as section 2B, and carrying a maximum of five years' imprisonment. It is plain that before these additions, there was a substantial gap between, on the one hand, dangerous driving, carrying a maximum of two years' imprisonment, and, on the other, manslaughter and the offences under sections 1 and 3A relating to causing death, with a maximum sentence up to 14 years. The

sentencing powers available for some of the non-fatal offences had for years attracted judicial criticism as too low. A prime example is dangerous driving, for which the maximum has remained two years for decades, no matter how outrageous the driving, no matter how many people were endangered and no matter how bad the defendant's record for bad driving. Moreover, this offence, with its two year maximum, was the only available offence even when the dangerous driving had caused grievous injury and perhaps permanent disability; a greater sentence was available only in the event of death being caused. The penalty for uninsured driving could readily be seen likewise to fail to cope adequately with bad cases, especially for serial offenders, of whom there are many.

12. That is the context in which Parliament created the two new offences of causing death by careless driving (section 2B) and causing death when uninsured etc (section 3ZB), no doubt in an attempt to fill part of the perceived gap. That does not, however, answer the question what is the ambit of the offence under s 3ZB.

13. The duty of a court faced with legislation is faithfully to construe its meaning. It is not to impose upon it a judicial view of what it ought to have said. It is for that reason irrelevant that the gaps in the 1988 Act offences and penalties could easily have been cured by different means, for example by increasing the available penalties for dangerous driving, driving whilst uninsured and driving whilst disqualified, and by adding the offence of causing grievous bodily harm by dangerous driving. The last of these changes has subsequently had to be made by the addition of what is now section 1A of the 1988 Act, inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which creates the offence of causing serious injury by dangerous driving and defines serious injury (for England and Wales) as physical harm amounting to grievous bodily harm.

14. What has to be decided in this case is what is meant by the expression in section 3ZB "causes the death of another person by driving…" Although that question is asked in this context of a driver who is committing one of the three specified offences, it is formulated in a way which could equally be asked of any driver. Has a driver caused the death of another person by his driving:

(a) whenever he is on the road at the wheel and a fatal incident involving his vehicle occurs? or

(b) when he has done or omitted to do something in his control of the vehicle which is open to proper criticism and contributes in some more than minimal way to the death?

15. The Crown argument, presented by Mr John Price QC, is that the words of section 3ZB are sufficiently clear to establish that the parliamentary intention was to make a driver guilty in situation (a). The purpose, it is said, was to create not only an aggravated form of the offences of using a motor vehicle uninsured, or driving unlicensed or disqualified, but to impose criminal liability for a death if it involved the presence of the defendant at the wheel of a car on the road where he had no business to be. The fault is sufficient, it is said, in driving at all when he had no right to be on the road.

16. On paper that argument appeared to have the virtue of certainty, however counter intuitive its results might be in some situations which it is by no means far fetched to imagine. However, as the hearing progressed Mr Price recognised that this argument could not be pressed to its logical limit. He accepted that the section would not apply if the "victim" was attempting to commit suicide by running front of a vehicle, or if another motorist crashed into the defendant's car in an attempt to kill or seriously to injure someone inside it. Once that is accepted, it is difficult to see where else a line is to be drawn than by following the normal approach to causation taken by the common law. The elusiveness of a third way (ie neither the application of the ordinary approach to questions of causation nor the strict construction that the unlicensed or uninsured motorist is guilty of the offence whenever he is involved in a collision which results in death) became apparent during Mr Price's attempts in his oral argument to ring fence possible exceptions to the strict construction, He concentrated on the mental state of the third party, ie whether he was suicidal or homicidal or attempting to cause serious injury or merely drunk or extremely reckless. Now it would be correct to say that applying the ordinary approach of the common law to a question of causation, the more deliberate the act of the third party, the more likely it is to be regarded as the effective cause of the accident; but that presupposes that the question of causation is to be determined on the ordinary common law approach. If, as a matter of construction, the offence is purely situational, ie it is committed by virtue of the fact that when involved in a fatal accident the defendant was uninsured [etc], it can make no logical difference what was the state of mind of the third party.

17. It may readily be accepted that the intention was to create an aggravated form of the offence of having no insurance [etc], but that only begs the question whether the intention was to attach criminal responsibility for a death to those whose driving had nothing to do with that death beyond being available on the road to be struck. It is certainly true that an uninsured person ought not to be driving at all, although there is no general prohibition on his driving and if he paid for insurance he could drive perfectly lawfully, but this too begs the question whether the intention was to make him criminally responsible as a killer for an offence of homicide in the absence of any act or omission on his part which contributed to the death other than his presence as a motorist capable of being hit. To say that he is responsible because he ought not to have been on the road is to

confuse criminal responsibility for the serious offence of being uninsured with criminal responsibility for the infinitely more serious offence of killing another person. The criminal law is well used to offences of which there are aggravated forms carrying additional punishment where greater harm has been done. The escalating offences of common assault, assault occasioning actual bodily harm, and causing grievous bodily harm are but simple examples; there are many more. But ordinarily, the greater punishment is linked to additional harm which is caused by a culpable act on the part of the defendant. In the case of section 3ZB, it is not. On the contrary, the present offence, if construed in the manner for which the Crown contends, represents a rare example of double strict liability, where both the underlying or qualifying condition is an offence (in the cases of unlicensed or uninsured driving) which can be committed unwittingly as well as deliberately, and also the aggravating element can be constituted by an event for which the defendant is not culpable.

18. A trenchant expression of the approach which the Crown's submission reflects was advanced in a consultation document in 2005, at least in relation to a disqualified driver. There the possible view was set out that

> "the mere fact of taking a vehicle on the 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)

A similar argument can no doubt be advanced in relation to drivers without insurance, although there is greater scope for them to be committing the offence inadvertently. But the difficulty about this view is that however culpable it may be to drive when uninsured, unlicensed, or disqualified, if the driving is of an acceptable standard it is simply not accurate to call it negligent. The description of such a proposition by Professors Sullivan and Simester ([2012] Criminal Law Review 754) as a colourable attempt to pass off strict liability as something else is pejorative as expressed, but correct in substance. If what was meant was that there was some moral equivalence between careless or dangerous driving on the one hand and driving whilst disqualified (or uninsured or unlicensed) on the other, that may well be a tenable view so far as it goes, but a careless or dangerous driver is only fixed with criminal responsibility for a death when the manner of his driving contributes more than minimally to that death; equivalence would suggest that the same should be true of the uninsured, disqualified or unlicensed driver. The question remains whether the approach reflected in the Crown's argument is, or is not, the one ultimately adopted by Parliament.

19. It would plainly have been possible for Parliament to legislate in terms which left it beyond doubt that a driver was made guilty of causing death whenever a car which he was driving was involved in a fatal accident, if he were at the time uninsured, disqualified or unlicensed. One formulation might have been that on which it is clear from the material before us that the Government originally consulted, at least in relation to disqualified or unlicensed (but not uninsured) drivers. That formulation was that "anyone driving whilst disqualified [etc] whose vehicle was involved in a collision which resulted in death shall be guilty of an offence". Another equally clear course might have been to mirror the existing statutory language in the neighbouring section 170 of the 1988 Act (failing to stop after an accident), and to stipulate that "If an accident causing the death of another person occurs owing to the presence on a road of a motor vehicle, the driver of that vehicle shall be guilty of an offence if the circumstances were that he was committing [any of the three specified offences]". If such formulations (or similar ones) had been adopted, there could have been no doubt that Mr Hughes and Mr Williams were guilty of the offence. However, that would have gone beyond the effect of the present offence on the Crown's own argument. It would have included cases of death resulting from would-be suicide or from the deliberate ramming of the vehicle with intent to kill or cause serious harm. It would likewise have included the uninsured driver who was sitting stationary at the traffic lights, or at the kerbside about to pull away, when struck by an oncoming vehicle driven dangerously by someone else for, although stationary, there is no doubt that in law such persons would be "driving": see for example *Planton v Director of Public Prosecutions* [2001] EWHC Admin 450; [2002] RTR 107. So also would have been included the driver whose car struck a pedestrian who fell into the road in front of him as a result of drunken horseplay with others on the pavement, or for that matter who engaged in a game of "chicken" running in front of oncoming cars. And in the same way the driver would, under such language, be guilty if driving impeccably but involved in a collision caused entirely by someone else, the result of which was to push his vehicle onto a pavement where an innocent child is killed. Such factual scenarios are by no means hypothetical. Nor is the case where the accident is caused entirely independently of the driver by interference from within the car, as is illustrated by the recent case of *R v Meeking* [2012] EWCA Crim 641; [2012] 1 WLR 3349 where a passenger pulled on the handbrake at speed and caused a crash which the driver could not prevent. If he had been uninsured and had survived, but a child in the rear seat had been killed, he too would then have been made guilty, by such a formulation, of killing the child. Thus if unequivocal language of this kind had been used, it would have been beyond doubt that the new offence was committed simply as a result of the defendant being in a situation, viz a fatal accident, whether caused by his driving or not, when committing one of the three specified offences. If such had been the intention of Parliament, it was very easy of achievement.

20. Parliament did not, however, adopt language of this kind. Instead it used the expression "causes…death…by driving". That imports the concept of

causation. It is trite law, and was common ground before us, that the meaning of causation is heavily context-specific and that Parliament (or in some cases the courts) may apply different legal rules of causation in different situations. Accordingly it is not always safe to suppose that there is a settled or "stable" concept of causation which can be applied in every case. That said, there are well recognised considerations which repeatedly arise in cases turning on causation. For the appellant Hughes, Mr Robert Smith QC relied upon two such recurrent propositions. The first is that a chain of causation between the act of A and a result may be broken by the voluntary, deliberate and informed act of B to bring about that result. The second is the distinction between "cause" in the sense of a sine qua non without which the consequence would not have occurred, and "cause" in the sense of something which was a legally effective cause of that consequence.

Voluntary intervening act

21. Mr Smith submitted that a person is not to be held liable for the free, deliberate and informed act of a second person, not acting in concert with him. He relied on the decision of the House of Lords in *R v Kennedy (No 2)* [2007] UKHL 38; [2008] 1 AC 269, in which that proposition was reiterated in those terms by Lord Bingham at para 14, citing *Hart and Honore's Causation in the law* 2nd ed (1985). He submitted that the independent acts and omissions of Mr Dickinson in driving as he did fell into this category and thus broke the chain of any causation connecting any driving of the defendant to the fatality. It is certainly true that the deliberate act of B may break the chain of causation between something done by A and that deliberate act. That was so in *Kennedy (No 2)*. There the charge was unlawful act manslaughter. Kennedy had prepared a syringe of heroin for a man called Bosque, had handed it to him at his request, and had been present when Bosque injected himself. Bosque died of the heroin. The only unlawful act alleged against Kennedy was that he caused heroin to be administered to Bosque (an offence contrary to section 23 of the Offences Against the Person Act 1861). The occurrence whose cause was under investigation was thus not the death of Bosque, but the administration of the drug. Kennedy had doubtless encouraged and assisted Bosque to administer the drug. But Bosque had administered it to himself deliberately and as a matter of free choice. Kennedy had not caused him to administer it.

22. That principle does not assist Mr Hughes in the present case. The occurrence whose cause is under investigation here is the death of Mr Dickinson. He did not voluntarily and deliberately kill himself; he drove dangerously and without thought and as a result caused the collision in which he died. Here, if the driving of Mr Hughes was a cause of the death at all, this is the familiar case of concurrent causes. There are many examples of two or more concurrent causes of an event, all effective causes in law. A road traffic accident is one of the commoner cases, for such events are only too often the result of a combination of

acts or omissions on the part of two or more persons. Where there are multiple legally effective causes, whether of a road traffic accident or of any other event, it suffices if the act or omission under consideration is a significant (or substantial) cause, in the sense that it is not de minimis or minimal. It need not be the only or the principal cause. It must, however, be a cause which is more than de minimis, more than minimal: see *R v Hennigan* (1971) 1 All ER 133. It follows that this appeal depends not on the narrow concept of independent intervening deliberate action (sometimes called novus actus interveniens) but on the broader question whether the driving of Mr Hughes was in law a cause of the death of Mr Dickinson.

"But for" cause and legal cause

23. The law has frequently to confront the distinction between "cause" in the sense of a sine qua non without which the consequence would not have occurred, and "cause" in the sense of something which was a legally effective cause of that consequence. The former, which is often conveniently referred to as a "but for" event, is not necessarily enough to be a legally effective cause. If it were, the woman who asked her neighbour to go to the station in his car to collect her husband would be held to have caused her husband's death if he perished in a fatal road accident on the way home. In the case law there is a well recognised distinction between conduct which sets the stage for an occurrence and conduct which on a common sense view is regarded as instrumental in bringing about the occurrence. There is a helpful review of this topic in the judgment of Glidewell LJ in *Galoo Ltd v Bright Grahame Murray (a firm)* [1994] 1 WLR 1360. Amongst a number of English and Commonwealth cases of high authority, he cited at pp 1373-1374 the judgment of the High Court of Australia in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 515, in which Mason CJ emphasised that it is wrong to place too much weight on the "but for" test to the exclusion of the "common sense" approach which the common law has always favoured, and that ultimately the common law approach is not susceptible to a formula.

24. In the earlier section 3ZB case of *Williams* the principal focus of the argument was the defendant's submission that the new offence under section 3ZB depended on proof of some fault in the driving of the defendant. That submission failed in large part because of the simultaneous creation by the 2006 Act of the second new offence of causing death by careless driving by inserting section 2B into the 1988 Act. The view was taken that this necessarily meant that section 3ZB must catch cases which would not in any event fall within section 2B. The argument in Williams did not focus centrally on the meaning of "causes...death…by driving". In the present case, Mr Smith for the appellant has disclaimed any argument that fault is a necessary element of the offence under section 3ZB. He has concentrated on the meaning of the expression "causes…death…by driving". Logically that is a separate question from whether

section 3ZB has to be read as requiring an element of careless or inconsiderate driving. As a matter of fact, recent legislative history is replete with examples of new offences which very largely overlap with each other, or with existing offences, so that it is not altogether safe to draw a conclusion from the juxtaposition of the two new offences that they do not also overlap. If it be assumed that Mr Smith's concession is correct, it does not follow from the fact that section 3ZB contains no requirement that the defendant driver should have committed the offence of careless or inconsiderate driving that he is not required to have done or omitted to do something in the driving of the car which has contributed to the death, before he can be held to have caused it by his driving. In the present case, as in that of *Williams*, there is no suggestion that there was anything which the defendant either did or omitted to do in the driving of the car which contributed to the least extent to the fatality. The driving of the two defendants was, no doubt, a "but for" cause of the death. It set the scene or provided the background to, or occasion for, the fatal collision. But that does not resolve the question whether it was a legally effective cause.

25. By the test of common sense, whilst the driving by Mr Hughes created the opportunity for his car to be run into by Mr Dickinson, 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 Mr Hughes 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.

26. This is a statute creating a penal provision, and one of very considerable severity. The offence created is a form of homicide. To label a person a criminal killer of another is of the greatest gravity. The defendant is at risk of imprisonment for a substantial term. Even if, at least in a case of inadvertent lack of insurance or venial lack of licence, a sentence of imprisonment were not to follow, the defendant would be left with a lifelong conviction for homicide which would require disclosure in the multiple situations in which one's history must be volunteered, such as the obtaining of employment, or of insurance of any kind. Nor should the personal burden or the public obloquy be underestimated; to carry the stigma of criminal conviction for killing someone else, perhaps a close relative, perhaps as in the kind of situation referred to in para 19 an innocent child, is no small thing. A penal statute falls to be construed with a degree of strictness in favour of the accused. It is undoubtedly open to Parliament to legislate to create a harsh offence or penalty, just as it is open to it to take away fundamental rights, but it is not to be assumed to have done so unless that interpretation of its statute is compelled, and compelled by the language of the statute itself. The rule of construction which applies to penal legislation, and *a fortiori* to legislation which

carries the penalty of imprisonment, is not identical to, but is somewhat analogous to, the principle of statutory interpretation known as the principle of legality.

27. Lord Hoffmann described that principle in this way in *R v Secretary of State for the Home Department Ex p Simms and O'Brien* [2000] 2 AC 115, 131E:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights…. But 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."

This is not a case of fundamental human rights However, the gravity of a conviction for homicide, for which the sentence may be a term of imprisonment, is such that if Parliament wishes to displace the normal approach to causation recognised by the common law, and substitute a different rule, it must do so unambiguously. Where, as here, Parliament has plainly chosen not to adopt unequivocal language which was readily available, it follows that an intention to create the meaning contended for by the Crown cannot be attributed to it.

28. It follows that in order to give effect to the expression "causes…death…by driving" a defendant charged with the offence under section 3ZB must be shown to have done something other than simply putting his vehicle on the road so that it is there to be struck. It must be proved that there was something which he did or omitted to do by way of driving it which contributed in a more than minimal way to the death. The question therefore remains what can or cannot amount to such act or omission in the manner of driving.

29. The decisions of the Court of Appeal in *Williams* and in the present case have received academic commentary including a case note on *Williams* by Professor Ormerod at [2011] Crim LR 473 and the article by Professors Sullivan and Simester referred to above. All consider that on a correct construction of the section more is required than the mere fact of involvement of D's vehicle in a fatal accident whilst D is driving without a licence, etc, so as to give proper meaning to the words "causes the death…by driving…" As is apparent from what we have said, we agree. Sullivan and Simester have gone on to canvass what the additional

ingredient might involve, if short of some form of fault or driving which is properly open to criticism. They suggest that the additional ingredient required is something giving rise to responsibility for the death but that "responsibility is not to be confused with culpability". They postulate examples of the driver who, in the agony of the moment, swerves the wrong way, or who encounters an unexpected natural hazard such as black ice.

30. Mr Smith's concession led him similarly to accept that if an unlicensed driver in the agony of the moment swerves to avoid a car being driven across the road in the way that Mr Dickinson drove, but in so doing he makes "the wrong movement" and is involved in a collision which "might have been avoided" if he had acted differently, he would be guilty under the section. But even if one were to remove the inherent ambiguities of "might" by requiring simply that the manoeuvre be "a" cause of the death, this still begs the vital question: by what standard is the jury to judge what was the "wrong" movement? There might be several variations to the scenario in which an oncoming motorist acts as Mr Dickinson did. D1 is unable to swerve and is hit by the oncoming vehicle with the resulting death of the oncoming motorist and/or a passenger in one or both of the vehicles. D2 swerves but is struck by the oncoming car and the impact causes D2's vehicle to collide with another vehicle or a pedestrian. D3 swerves and avoids colliding with the oncoming vehicle but collides with another vehicle or pedestrian. Yet there is no principled difference in the criminal responsibility of these defendants in respect of the death or deaths of the victim or victims.

31. The same difficulty is encountered if one considers "unexpected natural hazards". Sullivan and Simester suggest that D would be guilty if he lost control of his vehicle on a treacherous road surface but without any culpability, but that is to attach guilt to mere presence on the road (which of itself they do not consider to be enough for purposes of causation). If the suggestion were nevertheless correct, it begs the question whether there is any difference in D's causation between cases where the hazard is naturally occurring and cases where it occurs through human agency? Would it apply if a falling rock (or other heavy object) lands naturally on the road in front of him but also where it falls from the back of an insecure tailgate of a lorry in front of D or is thrown or dropped in front of his vehicle? Similary, is there a difference in terms of D's causation between him skidding on invisible black ice which has formed naturally and skidding unavoidably on a pool of oil deposited by another motorist which made the surface dangerous?

32. To draw fine distinctions between these cases would be to make the law confusing and incoherent, as well as being unmanageable for trial courts, both for judges and juries. We are driven to the view that there is no logical or satisfactory intermediate position between holding (a) that the law imposes guilt of homicide whenever the unlicensed motorist is involved in a fatal accident and (b) that he is guilty of causing death only when there is some additional feature of his driving

which is causative on a common sense view and the latter entails there being something in the manner of his driving which is open to proper criticism. To give effect to the words "causes…death…by driving" there must be something more than "but for" causation. If causing death by driving cannot be constituted simply by being involved in a fatal collision, it would be contrary to the common law's common sense approach to agony of the moment situations for it to be constituted by (for example) a desperate last-millisecond attempt to swerve out of the way of the oncoming vehicle of such as Mr Dickinson. Once this is accepted, there is no stopping point short of some act or omission in the driving which is open to criticism, ie which involves some element of fault. Mr Smith's concession in the present case proves, on close inspection, to go further than it should. The statutory expression cannot, we conclude, be given effect unless there is something properly to be criticised in the driving of the defendant, which contributed in some more than minimal way to the death. It is unwise to attempt to foresee every possible scenario in which this may be true. It may well be that in many cases the driving will amount to careless or inconsiderate driving, but it may not do so in every case. Cases which might not could, for example, include driving slightly in excess of a speed limit or breach of a construction and use regulation. If on facts similar to the present case, D who was driving safely and well at 34 mph in a 30 mph limit, or at 68 mph in a 60 mph limit was unable to stop before striking the oncoming drunken driver's car, but would have been able to stop if travelling within the speed limit, his driving would be at fault, and one cause of the death, but would be unlikely to amount, by itself, to careless driving. The same might be true if he could not stop in time because a tyre had become underinflated or had fallen below the prescribed tread limit, something which he did not know but could, by checking, have discovered.

33. Juries should thus be directed that it is not necessary for the Crown to prove careless or inconsiderate driving, but that there must be something open to proper criticism in the driving of the defendant, beyond the mere presence of the vehicle on the road, and which contributed in some more than minimal way to the death. How much this offence will in practice add to the other offences of causing death by driving will have to be worked out as factual scenarios present themselves; it may be that it will add relatively little, but this is the inevitable consequence of the language used and the principles of construction explained above.

34. We were referred to the decision of the Court of Appeal in *R v Marsh* [1997] 1 Cr App R 67, which was relied upon in *Williams*. That case concerned the offence of aggravated vehicle taking, contrary to section 12A (1) of the Theft Act 1968. Under that section if the defendant has committed the basic offence of wrongful taking of, or driving, or allowing himself to be carried in, such a vehicle, he is made criminally liable for the aggravated offence if certain specified additional events happen to the vehicle. Two of those additional events are accidents causing injury to a person, or damage to some property other than the

vehicle, if they occur "owing to the driving of the vehicle". *Marsh* held that no element of driver's fault was imported into that offence. The language and construction of the section are different from the section here under consideration. The different language of section 12A makes it clear that a defendant may be guilty even if the vehicle is being driven by someone else at the time of the specified additional events, although a defence is then provided in the case of injury if the defendant was not present at the time. Whilst there might be some force in the contention that the expression "owing to the driving of the vehicle" imports an element of causation similar to that involved in "causing…death…by driving", the point was not argued before us and should be left open. It does not assist the construction of the present statute to compare it with different words of a different statute creating a different type of offence.

35. The certified question in this case asks:

> "Is an offence contrary to section 3ZB of the Road Traffic Act 1988, as amended by section 21(1) of the Road Safety Act 2006, committed by an unlicensed, disqualified or uninsured driver when the circumstances are that the manner of his or her driving is faultless and the deceased was (in terms of civil law) 100% responsible for causing the fatal accident or collision?"

36. For the reasons set out, enquiry into apportionment of liability in civil terms is not appropriate to a criminal trial. But it must follow from the use of the expression "causes…death…by driving" that section 3ZB requires at least some act or omission in the control of the car, which involves some element of fault, whether amounting to careless/inconsiderate driving or not, and which contributes in some more than minimal way to the death. It is not necessary that such act or omission be the principal cause of the death. In which circumstances the offence under section 3ZB will then add to the other offences of causing death by driving must remain to be worked out as factual scenarios are presented to the courts. In the present case the agreed facts are that there was nothing which Mr Hughes did in the manner of his driving which contributed in any way to the death. It follows that the Recorder of Newcastle was correct to rule that he had not in law caused the death by his driving. The appeal should be allowed and that ruling restored.