Hilary Term
[2016] UKSC 5
On appeal from: [2014] EWCA Crim 829

JUDGMENT

R *v* Taylor (Appellant)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Sumption
Lord Carnwath
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

3 February 2016

Heard on 15 December 2015

Appellant	*Respondent*
Andrew McGee	Steven Kovats QC Duncan Atkinson
(Instructed by Trinity Advocates)	(Instructed by Crown Prosecution Service Appeals and Review Unit)

LORD SUMPTION: (with whom Lord Neuberger, Lady Hale, Lord Mance, Lord Carnwath, Lord Hughes and Lord Toulson agree)

1. This is an appeal by leave of the Court of Appeal on a point of law arising in the course of the trial of the appellant, Jack Taylor, in the Crown Court at Exeter for aggravated vehicle taking, contrary to section 12A of the Theft Act 1968.

The facts

2. The facts can be shortly stated. On the evening of 23 June 2012, the appellant, who was in Exmouth, took a Ford Transit Tipper truck from a friend, David Marriott, in order to collect another friend from Exeter. The truck belonged to Marriott's employer, and the Crown alleges that it was taken without the owner's consent. Having picked up the friend, the appellant was driving back to Exmouth when he collided on a bend in a narrow country lane with a scooter driven by Steven Davidson-Hackett. The scooter slid under the wheels of the truck, and Davidson-Hackett was killed. The appellant was later found to be over the drink drive limit. He was also uninsured. But the Crown, after a careful investigation of the accident, accepts that there was no evidence on which a jury could be sure that the manner of his driving was at fault or open to criticism.

The statutory framework

3. Section 12 of the Theft Act provides that a person shall be guilty of an offence if

> "without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it."

This a summary offence carrying a maximum sentence of six months imprisonment.

4. There are a number of offences of varying degrees of gravity which may be committed by drivers whose manner of driving causes death, injury or damage. At the relevant time, they included manslaughter, causing death by dangerous driving, causing death by careless or inconsiderate driving, dangerous driving, careless or

inconsiderate driving, causing death by careless driving when under the influence of drink or drugs, and various other offences involving drink or drugs. All of these offences require mens rea, generally provided by the absence of due care. The appellant was not charged with any of them, and in the light of the agreed facts about the manner of his driving, he could not have been convicted of any of them. Instead, he was charged with aggravated vehicle taking contrary to section 12A of the Theft Act 1968.

5. Section 12A of the Theft Act was inserted by section 1 of the Aggravated Vehicle Taking Act 1992. It provides so far as relevant, as follows:

> "12A Aggravated vehicle-taking
>
> (1) Subject to subsection (3) below, a person is guilty of aggravated taking of a vehicle if -
>
> > (a) he commits an offence under section 12(1) above (in this section referred to as a 'basic offence') in relation to a mechanically propelled vehicle; and
> >
> > (b) it is proved that, at any time after the vehicle was unlawfully taken (whether by him or another) and before it was recovered, the vehicle was driven, or injury or damage was caused, in one or more of the circumstances set out in paragraphs (a) to (d) of subsection (2) below.
>
> (2) The circumstances referred to in subsection (1)(b) above are -
>
> > (a) that the vehicle was driven dangerously on a road or other public place;
> >
> > (b) that, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person;

> (c) that, owing to the driving of the vehicle, an accident occurred by which damage was caused to any property, other than the vehicle;
>
> (d) that damage was caused to the vehicle.
>
> (3) A person is not guilty of an offence under this section if he proves that, as regards any such proven driving, injury or damage as is referred to in subsection (1)(b) above, either -
>
> (a) the driving, accident or damage referred to in subsection (2) above occurred before he committed the basic offence; or
>
> (b) he was neither in nor on nor in the immediate vicinity of the vehicle when that driving, accident or damage occurred."

At the time when section 12A was enacted, it carried a maximum sentence of two years' imprisonment, or five years if the accident caused the death of the victim. The five years was increased by section 285(1) of the Criminal Justice Act 2003 to 14 years.

6. The Crown contends that the only element of fault required for the offence under section 12A(2)(b) is the unauthorised taking of the vehicle, and that no further fault on the part of the defendant need be proved in relation to the occurrence of the accident.

The proceedings

7. The appellant was charged on an indictment containing five counts. Of these Counts 1, 2 and 5 can for present purposes be ignored. Count 1 related to a previous occasion; Count 2 related only to David Marriot; and the Crown decided not to proceed on Count 5. That left only Count 3, which charged him with aggravated vehicle taking; and Count 4, which charged him jointly with Marriott with causing the death of Mr Davidson-Hackett while driving uninsured, contrary to section 3ZB of the Road Traffic Act 1988 (as inserted by section 21(1) of the Road Safety Act 2006).

8. On 31 July 2013, the Supreme Court gave judgment in *R v Hughes* [2013] 1 WLR 2461, holding that an offence under section 3ZB of the Road Traffic Act 1988 required proof that there was some element of fault in the defendant's control of the vehicle, which contributed in a more than minimal way to the victim's death.

9. The case came before the Recorder of Exeter (His Honour Judge Gilbert QC) on 13 January 2014. At the opening of the case, an application was made on behalf of both defendants to vacate Count 4 in the light of the decision in *Hughes*. After an adjournment overnight, the Crown accepted that there was no fault in the manner of Mr Taylor's driving and announced that they would offer no evidence on Count 4. A verdict of Not Guilty was accordingly directed on that count.

10. The question then arose whether the decision in *Hughes* also ruled out a conviction on Count 3. The Recorder was invited by both parties to rule on this point. The Crown sought to distinguish *Hughes*. It relied on the decision of the Court of Appeal (Criminal Division) in *R v Marsh* [1997] 1 Cr App R 67 as authority for the proposition that there was no element of fault in the offence of aggravated vehicle taking. The Recorder decided that point against them. He ruled that fault had to be proved in relation to the accident. The Crown asked for leave to appeal his ruling on the count of aggravated vehicle taking, and the proceedings were adjourned until the appeal had been disposed of.

11. The appeal was heard on 9 April 2014 by the Court of Appeal (Criminal Division) (Pitchford LJ, Sweeney J and HHJ Bourne-Arton). They allowed the appeal on the ground that *Marsh* remained binding authority, but certified a question of general public importance and gave leave to appeal to the Supreme Court. The certified question was as follows:

> "Is an offence contrary to section12A(1) and 2(b) of the Theft Act 1968 committed when, following the basic offence and before recovery of the vehicle, the defendant drove the vehicle, and without fault in the manner of his driving the vehicle was involved in an accident which caused injury to a person."

The authorities

12. Three cases are directly in point, *R v Marsh* [1997] 1 Cr App R 67, *R v Williams* [2011] 1 WLR 588, and *R v Hughes* [2013] 1 WLR 2461.

13. The facts of *Marsh* were in the relevant respects indistinguishable from those of the present case, except that the injury to the victim was not fatal. Like the present

case, it turned on the meaning of the words “owing to the driving of the vehicle, an accident occurred by which injury was caused to any person” in section 12A(2)(b). The Court of Appeal ruled that fault in relation to the accident was not an element of the offence. The judgment of the court was delivered by Laws J. He held that the only relevant requirement of the subsection was that the driving of the vehicle should have been the cause of the accident, and that it was not legitimate to imply words which would require proof that the *manner* of the driving was the cause of the accident. He pointed out that section 12A(2)(a) expressly required that the vehicle should have been driven dangerously, but that no corresponding requirement of fault could be found in subsections (b), (c) or (d). He therefore concluded that once it was established that the basic offence of taking the vehicle had been committed, no further element of fault was required.

14. In *Williams*, the offence charged was causing death by driving when unlicensed, disqualified or uninsured, contrary to section 3ZB of the Road Traffic Act 1988. The statute provided that a person committed an offence if, being unlicensed, uninsured or disqualified, he “causes the death of another person by driving a motor vehicle on a road”. (The reference to disqualified drivers has since been removed, and separate offences created to cover them.) The facts were that the defendant was driving through Swansea, without a licence or insurance, when a pedestrian crossed the central reservation and stepped in front of his car. On the facts, the accident was entirely the fault of the pedestrian. Nevertheless, the trial judge ruled that fault was not an element of the offence, and the defendant was convicted. His ruling was upheld by the Court of Appeal. They considered, at para 14, that “the approach of this court in *Marsh* applies even more clearly to the offence under section 3ZB of the 1988 Act”.

15. In *Hughes*, where the same offence was charged, the facts were remarkable. Mr Hughes was driving his family’s camper van, when a vehicle approached in the other direction, veering all over both sides of the road. The other driver, a Mr Dickinson, was overtired, having driven a long distance, and high on heroin. There was a collision in which Mr Dickinson was killed. It was common ground that Mr Hughes’ driving was faultless and that there was nothing that he could have done to avoid the accident. But he was driving without a licence or insurance, and was prosecuted under section 3ZB for causing Mr Dickinson’s death. The trial judge ruled that he had not committed the offence because he had not “caused” the death. The Court of Appeal [2011] 4 All ER 761 overturned the ruling, once again applying *Marsh*. It held, as it had done in *Williams*, that “the approach of this court in *Marsh* applies even more clearly to the offence under section 3ZB.”

16. The decision was reversed in the Supreme Court. The judgment of the court was delivered by Lord Hughes and Lord Toulson. They started by drawing attention to the consequences of the Court of Appeal’s decision at para 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?"

17. The argument of the Crown, as summarised at para 15 of the judgment, was that the object of the enactment was 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". This court's reasons for rejecting that argument in *Hughes* may be summarised as follows:

(1) The statutory requirement that the driving should cause the death was not satisfied if all that could be shown was that the accident would not have happened if the uninsured driver of the car had not been on the road. The fact that the car was on the road was a precondition of the accident, and perhaps the occasion for it, but was not the effective cause or even one among a number of effective causes:

> "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." (para 25)

(2) In the absence of a test of effective causation, the offence would be committed even in a case where the casualty resulted from the deliberate act of the victim, as in the case of the suicide or attempted murder considered in para 16 of the judgment.

(3) The culpability of the defendant's conduct in taking the vehicle in the first place could not logically constitute the *mens rea* appropriate to an offence the essence of which that it caused a man's injury or death.

> "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." (para 17)

(4) The fact that there were other offences which were unquestionably fault-based, including the offence of causing death by careless or inconsiderate driving, which was created by the same statute, did not mean that there was no element of fault in the offence of causing death while driving unlicensed or uninsured. It was not uncommon for the elements of different offences to overlap, and for particular offences to add little to those which already exist.

(5) The gravity of any offence of homicide, and the potential severity of the penalties, meant that if Parliament intended these consequences to follow in a case where the conduct of the defendant had not caused the death, it must make its intention unequivocally clear, not least so that the court could be satisfied that the legislators had confronted the moral dilemma with knowledge of the consequences.

Should we depart from Hughes?

18. The Crown's primary case on this appeal was that the decision in *Hughes* should be overruled under Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. The main point urged in support of this course was that that the Crown had conceded in *Hughes* that the absence of fault could not be irrelevant in all circumstances. It is correct that when taxed with some of the more extreme consequences of the Crown's case, Counsel beat a tactical retreat on this point. He

accepted that the defendant could not be convicted if the death was due to the deliberate act of the deceased. As Lord Hughes and Lord Toulson pointed out (para 16), "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". Counsel submitted that the exception could be rationalised on the ground that the deliberate act of the victim broke the chain of causation. But as the judgment points out, that presupposes that there is a chain of causation to be broken. What is clear is that the concession did not displace the need for argument or analysis. It simply exposed the weakness of the Crown's case. Lord Hughes and Lord Toulson dealt with the matter as an issue of principle. It is difficult to imagine that their conclusion or their reasons would have been any different if the Crown had stuck to its original, extreme position.

19. In those circumstances, the only basis on which it could be right to depart from the decision now is that the court as presently constituted takes a different view. A mere difference of opinion can rarely justify departing from an earlier decision of this court. I can see nothing in the present case which could justify our taking such a course, and I would decline to do so.

Can Hughes be distinguished?

20. The next question is whether, on the footing that *Hughes* is binding for what it decides, it can be distinguished. The Supreme Court left open the question how far its reasoning could be applied to the offence under section 12A of the Theft Act and it expressed no view on the correctness of the decision in *Marsh*. This was because there were differences between the offences created by section 3ZB of the Road Traffic Act 1988 and section 12A of the Theft Act 1968 and differences in the statutory language which created them.

21. Four differences are, at least potentially relevant:

(1) Unlike driving while unlicensed or uninsured, which are offences of strict liability, section 12A of the Theft Act requires that the defendant should have committed the "basic offence" of taking the vehicle without consent. That is not an offence of strict liability. Under section 12(1) knowledge of the absence of authority is an essential element.

(2) Although aggravated vehicle-taking carries a higher sentence if the vehicle is involved in a fatal accident, the death of the victim is not an element of the offence. This is not therefore strictly speaking an offence of homicide.

(3) The offence under section 3ZB is causing the death of another person "by driving a motor vehicle on a road." By comparison, it can be argued that the driving is merely incidental to the offence of aggravated vehicle-taking as defined in section 12A of the Theft Act. The dangerous driving, personal injury or damage to property which constitute the first three aggravating circumstances must have occurred after the taking of the vehicle and before its recovery, but there is no requirement that the defendant should have been driving it, provided that he was party to the taking of the vehicle and was in or in the immediate vicinity of the vehicle when the driving, accident or damage occurred. He may have been a passenger or standing by the kerbside. Indeed, in the circumstances referred to in section 12A(2)(d) ("that damage was caused to the vehicle") it is not even necessary that the vehicle should have been driven at the time of the damage. These considerations might be taken to suggest that it is the harm rather than the driving which is the gravamen of the offence.

(4) Section 12A(3) makes special defences available in two specific cases where the defendant could not be held responsible, namely where the damage occurred before he took the vehicle and where he was neither in nor in the vicinity of the vehicle at the relevant time. This would arguably have been unnecessary if the offence was subject to a more general requirement of fault.

22. I shall return to these factors below. For present purposes it is enough to observe that the essential point made in *Hughes* is common to both offences. The phrase "caused the death of another person by driving a motor vehicle on a road". (section 3ZB of the Road Traffic Act 1988) and the phrase "owing to the driving of the vehicle, an accident occurred by which injury was caused to any person" (section 12A(2)(b) of the Theft Act 1968) both posit a direct causal connection between the driving and the injury. If the requirement of causation is satisfied by the mere fact that the taking of the vehicle accounted for its being in the place where the accident occurred, then all of the anomalous consequences which this court regarded as extraordinary in *Hughes* apply equally to the offence under section 12A. It means that the defendant is liable to be convicted and sentenced to a long period of imprisonment on account of an aggravating factor for which he bears no responsibility.

Strict liability

23. This brings me to the fundamental reason why in my opinion this appeal must succeed, and why I would have taken the same view even if I had felt able to distinguish the language of section 12A of the Theft Act or depart from the reasoning in *Hughes*. The Crown's argument effectively invites the court to treat the section as imposing strict liability for the aggravating factors which differentiate this offence

from the basic offence under section 12, in circumstances where that course is neither necessary nor warranted by the language of the Act.

24. “The full definition of every crime”, said Stephen J in *R v Tolson* (1889) 23 QBD 168, 187, “contains expressly or by implication a proposition as to a state of mind”. The reason was stated in the same case by Wills J, at pp 171-172:

> “It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. ‘It is a principle of natural justice and of our law’ says Lord Kenyon, CJ, ‘that *actus non facit reum, nisi mens sit rea*. The intent and act must both concur to constitute the crime’: *Fowler v Padget* (1798) 7 TR 509, 514.”

25. The leading modern case to this effect is *Sweet v Parsley* [1970] AC 132, in which the rule was reaffirmed by the House of Lords after a period in which it had been somewhat inconstantly applied. Lord Reid expressed the general principle at p 149:

> “it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary. It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word ‘knowingly’, is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say ‘must have been’ because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.”

26. The rule was never absolute, even in late Victorian England, when *Tolson* was decided. But in general a criminal offence will require proof of mens rea unless strict liability is either required by the clear language of the act or necessary for the achievement of its purpose. Cases in the latter category usually involve regulatory statutes. Wills J, immediately after the passage which I have quoted, gave as examples “bye-laws … regulating the width of thoroughfares, the height of

buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience". Such legislation generally has two characteristic features. The first is that its requirements are founded on collective convenience rather than moral imperatives. Lord Reed in *Sweet v Parsley* called such offences "quasi-criminal". But, as he observed at p 149, where the offence carries a significant moral stigma, it is necessary to consider "whether, in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape". The second characteristic feature of offences of strict liability is that, although fault in the actual commission of the offence may be unnecessary, there are nonetheless positive steps that the prospect of criminal liability may cause people to take in order to prevent the offence from occurring. Lord Diplock put the point concisely in the same case, at p 163:

> "Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. *But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation.*" (emphasis added)

The main reason why the House of Lords declined to hold Miss Sweet strictly liable for the fact that her tenants kept cannabis in the rooms which she let out to them was that there were no reasonable steps which she could have taken to stop them doing it or discover that they had: see in particular pp 150F-H (Lord Reid), 154-5 (Lord Morris), 157B-D (Lord Pearce).

Section 12A

27. The first point to be made about section 12A of the Theft Act is that it is in no sense a regulatory or "quasi-criminal" enactment. Aggravated vehicle-taking is a serious crime. Driving offences causing serious injury or damage are a source of growing public concern. The aggravating factors which differentiate the section 12A offence from the basic offence expose the defendant to a maximum sentence of 14 years imprisonment, the same as for causing death by dangerous driving. Although the death of the victim is not strictly speaking an element of the offence, the increased maximum sentence for cases where someone has been killed reflects the real stigma associated with it. Even where the only damage is to property, the maximum sentence is two years.

28. The one respect in which section 12A imposes strict liability is that the offence may be committed not only by the driver but by anyone else who was party to the basic offence under section 12(1) and is in or in the immediate vicinity of the vehicle at the time of the dangerous driving, injury or damage. That emerges unequivocally from the statutory language. But it is important to note that it is also a rational response to the mischief of the enactment, which has close analogies to the principle underlying cases of strict liability identified by Lord Diplock in *Sweet v Parsley*. The Act treats someone who has been party to the taking of a vehicle without authority as having control over it thereafter. He is in a position to take positive steps to ensure that it is driven safely and not in a manner which causes personal injury or damage to property. That is the rationale of the proviso that he must have been in or in the immediate vicinity of the vehicle at the time when the dangerous driving, injury or damage occurred. His responsibility continues to be engaged while he is present.

29. However, it is one thing for the legislature to make a person who has taken a car without authority responsible for the fault of another person who drives it in his presence. It is another thing altogether to make him responsible for personal injury or damage which could not have been prevented, because it occurred without fault or was entirely the fault of the victim. That would be a sufficiently remarkable extension of the scope of the strict liability to require clear language, such as the draftsman has actually employed to impose liability on a taker who is not the driver. There is no such language in section 12A. Of the four aggravating circumstances identified in subsection (2), (a) expressly imports a requirement of fault (the car must have been driven dangerously), while (b), (c) and (d) contain nothing which expressly excludes such a requirement. As Lord Reid explained in *Sweet v Parsley*, at p 149D-E, this difference cannot itself be enough to make (b), (c) and (d) operate independent of fault. On the contrary, in the case of (b) and (c), it is implicit in the requirement that the accident must have occurred "owing to the driving of the vehicle", that there will have been something wrong with the driving. As this court pointed out in *Hughes*, the driving cannot be said to have caused the accident if it

merely explained how the vehicle came to be in the place where the accident occurred.

Application to the facts

30. It follows from the admitted absence of fault in the driving of the vehicle that the driving did not cause the death of Mr Davidson-Hackett.

31. The Crown ran an alternative argument to the effect that excess of alcohol in the appellant's blood at the time of the accident constituted sufficient fault to go to the jury. This was said to be because "if he had been sober he would not have been driving at all, [and] the fatal accident would not have happened". To my mind this argument is misconceived. The relevant fault is the fault in the driving which is necessary to establish the causal connection between the driving and the accident. The fact that the appellant had excess alcohol in his blood establishes that he was guilty of the summary offence under section 5(1)(a) of the Road Traffic Act 1988, but not that this circumstance had anything to do with the accident. On the agreed facts, it had none. I need not therefore comment on the oddity of the suggestion that he was only driving his friend back to Exmouth because he had drunk too much and would not have driven if he had been sober.

Disposition

32. I would express the test applicable in this case in the same terms as Lord Hughes and Lord Toulson expressed it in *Hughes* at para 36. There must be "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".

33. For these reasons I would allow the appeal and answer the certified question "No".