

R. v. Hundal, [1993] 1 S.C.R. 867

You already read the facts for this case in the previous session

(...)

(e) *Modified Objective Test*

Although an objective test must be applied to the offence of dangerous driving it will remain open to the accused to raise a reasonable doubt that a reasonable person would have been aware of the risks in the accused's conduct. The test must be applied with some measure of flexibility. That is to say the objective test should not be applied in a vacuum but rather in the context of the events surrounding the incident.

There will be occasions when the manner of driving viewed objectively will clearly be dangerous yet the accused should not be convicted. Take for example a driver who, without prior warning, suffers a totally unexpected heart attack, epileptic seizure or detached retina. As a result of the sudden onset of a disease or physical disability the manner of driving would be dangerous yet those circumstances could provide a complete defence despite the objective demonstration of dangerous driving. Similarly, a driver who, in the absence of any warning or knowledge of its possible effects, takes a prescribed medication which suddenly and unexpectedly affects the driver in such a way that the manner of driving was dangerous to the public, could still establish a good defence to the charge although it had been objectively established. These examples, and there may well be others, serve to illustrate the aim and purpose of the modified objective test. It is to enable a court to take into account the sudden and unexpected onset of disease and similar human frailties as well as the objective demonstration of dangerous driving.

A modified objective test was aptly described by McIntyre J. in *R. v. Tutton, supra*, at p. 1413. Although he was dealing with criminal negligence, his words, at p. 1432, are apt in considering the dangerous driving section which is essentially concerned with negligent driving that constitutes a marked departure from the norm:

The application of an objective test under s. 202 of the *Code*, however, may not be made in a vacuum. Events occur within the framework of other events and actions and when deciding on the nature of the questioned conduct surrounding circumstances must be considered. The decision must be made on a consideration of the facts existing at the time and in relation to the accused's perception of those facts. Since the test is objective, the accused's perception of the facts is not to be considered for the purpose of assessing malice or intention on the accused's part but only to form a basis for a conclusion as to whether or not the accused's conduct, in view of his perception of those facts, was reasonable. . . . If an accused under s. 202 has an honest and reasonably held belief in the existence of certain facts, it

may be a relevant consideration in assessing the reasonableness of his conduct. For example, a welder, who is engaged to work in a confined space believing on the assurance of the owner of the premises that no combustible or explosive material is stored nearby, should be entitled to have his perception, as to the presence or absence of dangerous materials, before the jury on a charge of manslaughter when his welding torch causes an explosion and a consequent death.

In summary, the *mens rea* for the offence of dangerous driving should be assessed objectively but in the context of all the events surrounding the incident. That approach will satisfy the dictates both of common sense and fairness. As a general rule, personal factors need not be taken into account. This flows from the licensing requirement for driving which assures that all who drive have a reasonable standard of physical health and capability, mental health and a knowledge of the reasonable standard required of all licensed drivers.

In light of the licensing requirement and the nature of driving offences, a modified objective test satisfies the constitutional minimum fault requirement for s. 233 (now [s. 249](#)) of the [Criminal Code](#) and is eminently well-suited to that offence.

It follows then that a trier of fact may convict if satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place". In making the assessment, the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.

Next, if an explanation is offered by the accused, such as a sudden and unexpected onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. If a jury is determining the facts, they may be instructed with regard to dangerous driving along the lines set out above. There is no necessity for a long or complex charge. Neither the section nor the offence requires it. Certainly the instructions should not be unnecessarily confused by any references to advertent or inadvertent negligence. The offence can be readily assessed by jurors who can arrive at a conclusion based on common sense and their own everyday experiences.

Application of These Principles to the Facts

Let us now consider whether the modified objective test was properly applied in this case. The trial judge carefully examined the circumstances of the accident. He took into account the busy downtown traffic, the weather conditions, and

the mechanical conditions of the accused vehicle. He concluded, in my view very properly, that the appellant's manner of driving represented a gross departure from the standard of a reasonably prudent driver. No explanation was offered by the accused that could excuse his conduct. There is no reason for interfering with the trial judge's finding of fact and application of the law.

In the result the appeal must be dismissed.

Dangerous operation of motor vehicles, vessels and aircraft

249 (1) Every one commits an offence who operates

(a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;