

NOTES / AANTEKENINGE

WHAT DOES “REASONABLE CONSIDERATION” MEAN IN THE OFFENCE OF INCONSIDERATE DRIVING?

1 Introduction

The offence of inconsiderate driving contained in section 64 of the National Road Traffic Act 93 of 1996 has been described as a “somewhat nebulous provision” (*S v Smith* 1976 1 SA 756 (T) 757D-E). Yet this provision has been in existence for many years (see, *eg*, s 48(1)(f) of the Motor Vehicle Ordinance 15 of 1938), and has appeared in essentially the same formulation in the Road Traffic Ordinance (of the erstwhile four provinces of the Republic of South Africa) in the form of section 139, and the Road Traffic Act 29 of 1989 in the form of section 121, before coming into force as part of the National Road Traffic Act 93 of 1996, in the form of section 64.

Section 64 provides as follows: “No person shall drive a vehicle on a public road without reasonable consideration for any other person using the road.” The elements of the offence have been identified as (i) driving (ii) a vehicle (iii) on a public road (iv) without reasonable consideration (v) fault (see Hoctor “Road Traffic Offences” in Milton and Cowling *South African Criminal Law and Procedure Vol III: Statutory Offences* (2005) G3-38; and Cooper *Motor Law Vol I* (1982) 542). This note does not seek to discuss elements (i), (ii) and (iii), which are general requirements for a range of road traffic offences (see, for discussion of these aspects, Hoctor G3-3 to G3-10 and G3-38; Cooper 45, 53-57 and 60; Snyman *Criminal Law* 4ed (2002) 389-392; and Burchell *Principles of Criminal Law* 3ed (2005) 897). However, the requirement that the accused drive without reasonable consideration for any other person using the road is unique to and at the heart of the offence described in section 64, whilst the fault requirement is closely related to this requirement. The latter two requirements will thus be examined in the discussion which follows.

2 Conduct evidencing lack of reasonable consideration for other road users

As follows from the requirement that the accused has “driven” the vehicle concerned, it is necessary that the vehicle must be moving, that is, that the offence relates to the act of driving *per se* (*S v De Villiers* 1974 2 SA 602

(SWA) 604C-D). Thus merely parking a vehicle illegally, in so doing interfering with traffic flow, does not constitute a contravention of the section (*S v De Villiers supra* 605C-D; and *S v Mongo* 1992 1 SACR 387 (E) 390c-d). The distinction between the conduct criminalized by the offence of negligent driving (as set out in s 63 of the National Road Traffic Act of 1996) and the conduct to which the offence of inconsiderate driving applies lies in the fact that negligent driving can be committed whether or not other road users are present, whilst the requirement of lack of reasonable consideration for other road users in inconsiderate driving requires that other road users be present (*S v Van Rooyen* 1971 1 SA 369 (N) 370A-D; *S v Ephraim* 1971 4 SA 398 (RAD) 400D-F; and see also the English case of *Dilks v Bowman Shaw* [1981] RTR 4). It is not, however, required for a conviction of inconsiderate driving that the accused's driving be categorized as negligent (*S v Van Rooyen supra* 370B; and *S v Ephraim supra* 401H-402A).

Various types of conduct may constitute acting without reasonable consideration for other road users: failure to concede a right of way (*R v Vosconcelos* 1966 3 SA 683 (RAD) 685G-686A; and *R v Tafireyi* 1974 (2) PH H(S)184 (A)); driving on the wrong side of a barrier line (see *S v Van Rooyen supra* 369D-F, although on the facts the absence of any other road-users at the time of the relevant conduct excluded liability); failure to allow other (overtaking) vehicles to pass (*R v Delport* 1942 EDL 209; and see *R v Reddy* 1948 2 SA 1047 (N) where it was held that liability was not established as there was no indication on the facts that the complainant was lawfully able to pass); changing lanes without a proper signal (*S v Smith supra* 757D-F); failure to dip or dim headlights (*S v Joubert* 1969 2 SA 436 (T)); failure to keep a proper look-out (*S v Hein* 1976 2 SA 397 (O)); negligently failing to recognize timeously the significance of the obstruction ahead (*S v Killian* 1973 2 SA 696 (T) 698H-699A); deliberately spraying pedestrians with water from a puddle (see the English case of *Pawley v Wharldall* [1965] 2 All ER 757); persuading another vehicle to pull off the road, and thus concede right of way, by hooting whilst driving at speed, thus inducing in the driver of the other vehicle the belief that such vehicle was out of control (*S v Ephraim supra*); and breaching the regulations in relation to a traffic sign (see the English case of *Gibbons v Kahl* [1956] 1 QB 59).

Whilst the possibility of liability for inconsiderate driving was identified in all the above cases, the respective courts failed to convict in cases such as *S v Smith (supra)*, *S v Joubert (supra)*, *S v Hein (supra)*, and *Gibbons v Kahl (supra)*. In these cases the courts required, in addition to the bare conduct set out above, "very positive evidence of inconsiderate driving" (see *S v Smith supra* 757F). The nature of this additional requirement thus falls to be discussed below.

3 Formulating a test for inconsiderate driving

Whilst the crime can be committed where the accused is aware of driving without consideration for other road users, typically, as befits the requirement of reasonableness, the test which is applied relates to the

assessment of an objective criterion (see, eg, *R v Delport* 1942 EDL 209). The same position obtains in English law in respect of the analogous offence of careless and inconsiderate driving, contained in section 3 of the Road Traffic Act of 1988, in terms of which there is one objective standard which applies to all drivers, even learner drivers (*McCrone v Riding* [1938] 1 All ER 157). Thus, in English law, as in South African law, there is no need to prove any knowledge or awareness by the accused that her driving fell below the requisite standard (*R v Lawrence* [1981] RTR 217).

In *S v Joubert* (*supra*), the court evaluated the act of inconsideration to other road users in terms of whether the complainant was “embarrassed or inconvenienced” by the conduct in question. The use of the term “embarrass” (which means causing a person “to feel awkward or self-conscious or ashamed” (*Concise Oxford Dictionary* 8ed (1992)) is difficult to justify. Surely the question of whether someone is embarrassed involves a subjective assessment of the state of mind of the “victim”? Such an assessment can hardly be reconciled with the objective criterion under discussion.

The court in *S v Killian* (*supra*) did not see fit to correct this terminological oddity, although it did state that it was not a prerequisite for a conviction of inconsiderate driving that some person was actually embarrassed or inconvenienced by the accused’s conduct, holding instead that evidence of such embarrassment or inconvenience (or lack thereof) would simply be relevant in establishing inconsiderate driving (698D-G). By holding that liability follows even where the other road user who is inconvenienced by the accused’s conduct is unaware of such conduct, provided that such conduct “calculated to embarrass or inconvenience another user of the road” is proven (698G-H), the court in *Killian* effectively excluded a consideration of the victim’s mental state. (In the light of this finding, the ongoing reference to “embarrassing” conduct is all the more difficult to fathom.)

Thus, the test for inconsiderate driving is premised upon the reasonable person in the circumstances of the accused. As stated in *S v Killian* (*supra* 698E-F):

“The offence is that of driving ‘without reasonable consideration’ for any other person using the road and that can only mean ‘without that consideration which a reasonable man would have shown in the situation and circumstances prevailing at the time’.”

In particular, it is submitted that the court will examine whether the accused acted with disregard for the rights and convenience of other road users (see *Cooper* 543). This formulation appears in a number of cases (*S v Ephraim supra* 402A and 402E; and *S v Hein supra* 399G-H and 400D), and encompasses the pretermission of the duty to drive with respect for other road users present (see *S v Van Rooyen supra* 370A-B). This may be contrasted with the position in relation to negligent driving, where, in addition to the infringement of the rights of others, the accused shows disregard for the safety of other road users (*S v Ephraim supra* 402B-C). In each case, whether the accused by her conduct caused actual inconvenience or

infringed the rights of other road users will be a question of fact for the court to decide, in the light of prevailing circumstances at the time of the conduct including the expected level of traffic, the time of day, and peculiar hazards (see the English case of *Walker v Tolhurst* [1978] RTR 513). If a motorist takes action in response to an emergency situation, her actions are to be judged against what was a “reasonable” course of action in those circumstances in assessing whether or not the driving amounted to an offence (see *eg S v Lombard* 1964 4 SA 346 (T); *S v Crockart* 1971 2 SA 496 (RAD); *S v Erwin* 1974 3 SA 438 (C); and see further the English case of *Jones v Chief Constable of Avon & Somerset* [1986] RTR 259). According to English authority (*Pawley v Wharldall supra*), the phrase “other persons using the road” includes a passenger in the vehicle being driven, and is not restricted to persons outside the vehicle.

4 Fault

As indicated in the above discussion, the principal form of fault in respect of inconsiderate driving is negligence, in the form of an unreasonable failure to foresee the presence of other persons on the road, and that the manner of driving is likely to inconvenience other road users or infringe their rights (see, *eg, R v Delpport supra* 211-212; and *S v Killian supra* 698H-699A). It may be that the accused has knowledge of other road users coupled with foresight that the manner of driving is likely to inconvenience other road users or infringe their rights, in which the offence will be committed intentionally (see, *eg, R v Delpport supra* 212).

5 Conclusion

In the light of the breadth of the offence of inconsiderate driving, it bears emphasizing that there should only be a conviction for this offence where there is actual inconvenience or infringement of the rights of other road users. Nevertheless, it is submitted that, if properly enforced, this offence could play a significant role in dealing with the scourge of selfish, imprudent and careless driving, thus ensuring that all road users using vehicles pay due care and attention to the rights of other road users.

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