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CASE AND COMMENT

PUBLIC ASSEMBLY: THE NEW HIGHWAY CODE

THE Criminal Justice and Public Order Act 1994, which attracted so much controversy during its passage, continued to provoke dissent in the first case to reach the House of Lords on the interpretation of its public order provisions. The question in *Director of Public Prosecutions* v. *Jones* [1999] 2 W.L.R. 625 was the extent of the public's right to use the highway and, more specifically, whether a public assembly may constitute a lawful user.

Since 1994 the police have had the power in certain circumstances to request from the local council an order prohibiting in a specified area and for a limited time "trespassory assemblies" of 20 or more people (under the inserted section 14A of the Public Order Act 1986). Such orders apply to land to which the public has no, or only a limited, right of access and anyone who participates in an assembly which they know to be prohibited by an order under the Act commits an offence. The present case arose out of a gathering of around 20 people (there to protest at restricted access to the site) on the verge of the A344 outside the perimeter fence of Stonehenge, an area in relation to which there existed a section 14A order which had been approved by the Home Secretary. The defendants refused to move on when requested to do so by the senior police officer at the scene and were arrested. Their convictions before Salisbury magistrates were reversed by the Crown Court, then reinstated by the Divisional Court. The House of Lords, by the narrowest margin, allowed their appeal.

The House agreed that an analysis of the extent of the new criminal offence required reference to the civil law, and the usual nineteenth century cases on nuisance and trespass were cited. All members of the House also held that public use of the highway could not be limited to passage and repassage and must encompass activities

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incidental or ancillary thereto. However, that was as far as the minority was prepared to go: Lords Slynn of Hadley and Hope of Craighead decided that while it may be legitimate to stop on the highway, say, to catch one's breath or to make a sketch, protest was a purpose entirely alien to passage and hence exceeded the public's right of access. That this might create a dislocation between the civil law of trespass (and therefore the penal law of trespassory assembly) and the criminal prohibition on obstruction of the highway under section 137 of the Highways Act 1980 was either inconsequential or a necessary result of Parliament's decision to import the civil law into the criminal by the 1994 Act. In either event, the law was sufficiently clear that reference to the European Convention on Human Rights (ECHR) was unnecessary. Even taking account of the ECHR, the minority emphasised that the rights most relevant to this appeal, those to freedom of expression in Article 10 and to freedom of peaceful assembly in Article 11, are subject to exceptions. Lord Hope went further and argued that any resolution of this issue as a matter of competing rights would require the courts to consider the position of landowners whose right to private property is protected by Article 1 of the First Protocol to the ECHR and whose interests were not represented before the court.

The majority (Lord Irvine of Lairg L.C., Lord Clyde and Lord Hutton) adopted a more fluid concept of the public's right to use the highway so as to include "all those reasonable extensions which may from time to time be recognised as necessary to its exercise" (*Hickman* v. *Maisey* [1900] 1 Q.B. 752, 757–758, *per* Collins L.J.). Accordingly, the majority affirmed that a range of activities which could not plausibly be described as incidental to passage, such as charitable collections, children playing on the pavement or the distribution of campaign leaflets should be accepted as lawful users of the highway. This definition was sufficiently broad to accommodate a right to assemble in circumstances such as those of the defendants. This conclusion was also felt to be consistent with the United Kingdom's obligations under the ECHR, in relation to which the majority emphasised that official tolerance of activities other than those incidental to passage on the highway was not a sufficient substitute for the legal right to assemble there. However, the right to use the highway for the purpose of a public assembly was not held by the majority to be unlimited: to be lawful the user must not constitute an obstruction of the highway; nor must it amount to a public or private nuisance or threaten a breach of the peace. Moreover, the activities must not unduly impede passage, the principal lawful purpose for which the highway may be used, and they must be reasonable. These will always be questions of fact for the trial court, requiring it to take account of factors such as the size of the

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gathering, its duration and the nature of the highway upon which it occurs.

These qualifications serve to ensure that the rights of landowners are not unduly prejudiced by the decision of the majority and provide an answer to those who argued that, once lawful user is permitted to exceed passage and repassage, there is no logical basis upon which one can prevent activities such as "squatting, putting up a tent, selling and buying food or drinks" (Lord Slynn). Of course, the concept of reasonableness is rather nebulous and there will be scope for benches of magistrates to come to different conclusions in defining it. However, even the majority's approach required the trial court to draw an uncertain line around what is regarded as incidental to passage, a term which elicited a range of responses in the House from stopping to make a sketch to pausing to keep alive a particular association with a place en route.

It is important to draw attention to the differences of approach among those who constituted the majority. While the Lord Chancellor began his speech by referring to the "fundamental constitutional importance" of the issue raised by the appeal, Lord Clyde preferred the more modest method of adopting a very broad approach to what could be regarded as incidental to passage. In a section heavily reminiscent of Dicey, he stated: "if an individual may properly stop at a point on the road for any lawful purpose, so too should a group of people be entitled to do so". A further issue is the relevance of the intention or purpose of those engaged in the protest. The Lord Chancellor felt that the right of assembly existed irrespective of purpose whereas Lord Clyde, and by implication, Lord Hutton, held this factor to be part of the pertinent circumstances of the assembly. The latter view is preferable, rendering the law on this point consistent with that on obstruction of the highway and allowing the court to provide great protection for protest which approaches the core values of free speech on matters of political controversy.

The decision of the majority is to be welcomed for a number of reasons. It renders consistent the legal regulation of public assemblies, whether proceedings are brought by a landowner or the police and irrespective of whether the forum is civil or criminal. It also reveals how much scope the courts will have under the Human Rights Act 1998 for interpreting existing primary legislation in a manner which is consistent with the protection of Convention rights. In this case the majority interpreted what could be a highly oppressive piece of legislation in a manner which recognised, in the words of Lord Hutton, that "for members of the public to assemble together to express views on matters of public concern . . . is one of the fundamental rights of citizens in a democracy". The European Court of Human Rights has

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recently held that police officers exercising powers of arrest for a breach of the peace must take account of the effect of their actions on the protected rights to freedom of speech and assembly (*Steele* v. *United Kingdom* [1998] Crim. L.R. 893). *D.P.P.* v. *Jones* is in keeping with this approach: its immediate effect has been the decision of the Chief Constable of Wiltshire not to seek a section 14A order in relation to this year's gathering at Stonehenge; its longer term influence will be on all those, whether the police, local authorities, the Home Secretary or magistrates, who have cause to apply these provisions in future.

Ivan Hare

MONDEO MAN, ROAD RAGE AND THE DEFENCE OF NECESSITY

Ian Howell, driving a Mazda, attempted to overtake David Backshall who was driving a Ford Mondeo. This led to an "appalling example of road rage" involving a fight between the two drivers and the smashing by Howell of the Mondeo's windscreen. Backshall drove away and in his attempt to escape engaged in some unorthodox driving manoeuvres. The two men were charged with affray and two counts of dangerous driving. Backshall was convicted of driving without due care and attention contrary to Road Traffic Act 1988, s. 3, and appealed to the Court of Appeal: *R.* v. *Backshall* [1999] 1 Cr. App. R. 35.

The central question for the court was clear: was necessity (otherwise known as duress of circumstances) a defence to a charge of careless driving? The defence of necessity or duress of circumstances is available when "from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury" (*R.* v. *Martin* (1989) 88 Cr. App. R. 343, 346, *per* Simon Brown J.). The defence is also available where the defendant reasonably believes there to be a threat of death or serious injury even if there is in fact no such threat (*R.* v. *Cairns*, (Court of Appeal, 22 February 1999, unreported)).

The argument that the defence is available to careless driving was straightforward. It had been stated by the Court of Appeal in *R.* v. *Pommell* [1995] 2 Cr. App. R. 607 that duress of circumstances was available to all crimes except murder, attempted murder and treason, by analogy with duress of threats. The defence had been said, obiter, to be available to careless driving in *R.* v. *Symonds* [1998] Crim. L.R. 280 and *D.P.P.* v. *Harris* [1995] Cr. Ap. R. 170, *per* Curtis J. It would indeed seem odd if necessity was a defence to dangerous driving but not to the lesser and alternative charge of careless driving.

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