MEANING OF "DRIVE"

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1. Meaning of "drive"

Section 3(1) of the *Road Traffic Act* 1986 provides:
drive includes to be in control of a vehicle.

(a) Defendant observed pushing motor cycle on roadway – whether "driving a motor cycle"

In pushing the motor cycle from the hotel to the point at which the defendant was apprehended he could not properly be said to be driving the motor cycle within the meaning of the section. There must be a distinction between driving on the one hand and pushing a motor cycle on the other. To drive is not simply to control, and not simply to be in charge of a motor cycle, and that there must be something further that the person to be charged does, which would bring him within the ordinary understanding of the meaning of the word "drive" a motor cycle. Accordingly, the magistrate was in error in finding the charge proved.

Per Murphy J:

> "The section contains no definition, nor does a definition of driving appear at any other point in the *Motor Car Act*, but I accept the view expressed by Widgery L, in *R v MacDonagh* [1974] QB 448; [1974] 2 All ER 257, where at All ER p260 he stated that in order to constitute an offence against a similar section in the English Act the activity which is being performed by the defendant must fall within the ordinary meaning of the word "drive". I also agree with His Lordship that there must indeed be a distinction between driving on the one hand and pushing a motor cycle on the other.
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> I agree with Gillard J's view as expressed in *McGrath v Cooper* [1976] VicSC 75; [1976] VicRp 54; (1976) VR 535 that to drive is not simply to control, and not simply to be in charge of a motor cycle, and that there must be something further that the person to be charged does, which would bring him within the ordinary understanding of the meaning of the word "drive a motor cycle". In my view, in this case, there was nothing else to which the Magistrate could have directed his attention to enable him to decide that the applicant had in fact driven the motor car whilst his blood alcohol content exceeded the permitted limit.
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> Accordingly, in my view, it was the duty of the Magistrate in the circumstances of this case to dismiss the information. He did not do so and in my view for this reason he was wrong. The order nisi should be made absolute on the first ground set out."

Per Murphy J in *Coombe v Currucan* [1981] VicSC 421; MC 13/1982, 21 September 1981.

(b) Defendant steering a motor car being pushed by another person

The person behind the steering wheel namely, the defendant did not have control of the propulsion of the vehicle, and since he did not have the power to urge the vehicle forwards or backwards, it could not be said that he was driving the vehicle in the relevant sense.

Caughey v Spacek [1968] VicSC 73; [1968] VicRp 78; [1968] VR 600, followed.

Per Gillard J:

> "The car was being propelled not by its own motive power or any act on the part of the defendant, but solely by the force being exerted by his brother's motor car.
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> His Honour finally said in *Caughey v Spacek* [1968] VicSC 73; [1968] VicRp 78; [1968] VR 600:
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> > "It might, I think, be said that true it was the respondent's inability to drive the car in its broken-down condition that prompted him to obtain the tow to enable it to be moved."
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> *Mutatis mutandis*, those words can be applied directly to the facts of this case.
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> Although Mr Uren strongly relied on that *dictum* of Sir Henry Winneke, it does not support the view that he was submitting here. In my opinion, Sir Henry accepted the view that being towed was not driving in the relevant sense, and he so held. That is the *ratio decidendi* of his decision. The underlying notion of that *ratio* was that at the material time, the person behind the steering wheel did not have control of the propulsion, and since he did not have the power to urge the vehicle forwards or backwards, it could not be said that he was driving the vehicle in the relevant sense. I adopt that reasoning of Sir Henry Winneke and, indeed, I believe I am bound by it, despite any criticism by the Court of Appeal of the decision in *Wallace v Major* [1946] KB 473; [1946] 2 All ER 87.
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> In my view, this order nisi should be discharged with the usual order as to costs. Orders accordingly."

Per Gillard J in *McGrath v Cooper* [1976] VicSC 75; [1976] VicRp 54; [1976] VR 535; MC 43A/1976, 16 March 1976.

(c) Defendant got into car but could not move car due to its position on railway lines
HELD: Order absolute. Conviction quashed.
The intention of the defendant was not relevant. The question was one of objective fact. Did he actually drive the car? No. The defendant had no control over the means of propulsion and the car did not move. Both movement and control appear on the authorities, to be necessary ingredients of driving.

Caughey v Spacek [1968] VicSC 73; [1968] VicRp 78; (1968) VR 600; and
Wallace v Major [1946] KB 473; (1946) 2 All ER 87, followed.

Per Murphy J:

> "It seems clear that in England and in Victoria, a person guiding a broken-down vehicle that is being towed, does not drive a motor car: *Wallace v Major* (1946) 1 KB 473; [1946] 2 All ER 87 and *Caughey v Spacek* [1968] VicSC 73; [1968] VicRp 78; (1968) VR 600. The 'robust common-sense' that led Sir Henry Winneke to adopt Lord Goddard's test laid down in *Wallace v Major* (*supra*) may be most material in the instant case. The fact that the respondent's lack of control over the operation and movement of the car in that case prevented the court from saying that he was driving the car, appears to me to be material here.
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> In my opinion, the intention of the respondent is not relevant. The question is one of objective fact. Did he actually drive the car? I think not. The respondent had no control over the means of propulsion and the car did not move. Both movement and control appear to me, on the authorities, to be necessary ingredients of driving.
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> The example given by Macfarlan J of stopping at a traffic light appears to me to involve moving the car up to the light and controlling it by stopping it there. If the defendant in such a case as Macfarlan J contemplates could have proven that he got into the car after it had been stopped (even with the engine running) by someone else at the lights, and he was then apprehended before the car moved in any way again, I myself doubt very much whether it could be held that he drove the motor car within the meaning of s81A.
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> Accordingly, in the present case, on the facts found by the magistrate, and on which this case was argued before me, I am of the opinion that it was not open to the magistrate to find that the car was driven by the respondent. It could be said that he attempted to drive it, but it could not be driven."

Per Murphy J in *Ross v Kenny* [1976] VicSC 299; MC 61/1976, 28 June 1976.

(d) "Drive", "Driving" – meaning of considered
(1) Tink v Francis. Car being pushed. F. was intercepted whilst steering a motor car being pushed by 4 youths. The car had run out of petrol and had been pushed some 200 yards whilst F. was seated in the driver's seat. When tested, F. had a blood alcohol content of .180. The information was dismissed on the ground that F. was not "driving" the car. On order nisi to review—

HELD: Order nisi discharged. There was no evidence as to the speed at which the car was being pushed; nor was there any evidence as to the terrain, that is, whether the roadway was level or on an incline. There was no evidence to find that any momentum gained by the pushing of the vehicle, gave any significant degree of freedom to F. to control the speed of the car. F. was not "driving" within the ordinary meaning of that word.

(2) Hughes v McFarlane. Car under tow; tow rope broke just prior to accident. McF. was steering a motor car being towed by another car. The tow rope broke and McF.'s vehicle travelled some 30 yards onto the incorrect side of the road, and collided with an oncoming vehicle. McF. was found to have a blood alcohol level in excess of .05, and was driving during a period of disqualification. These charges were dismissed on the ground that McF. was not "driving" the car. On order nisi to review—

HELD: Order nisi discharged. Due to the fact that there was no evidence of the terrain, that the vehicle was not towed at a very fast rate of speed, that it did not travel any appreciable distance after the tow rope broke, and that there was insufficient time available to exercise control of the vehicle, it was open to find that McF. was not, in a substantial sense, in control of the movement and direction of the car, as to show that he was "driving" the vehicle.

(3) Harris v Broadbent. Car coasting downhill; engine having cut out. H. had started his motor car and commenced to drive down a hill. When H. was about half-way down the hill, the engine cut

out, and H. was unable to re-start it due to the ignition wires having burnt out. H. then allowed the car to coast down the hill, and due to the speed which it gained, the car slewed and skidded when negotiating a bend towards the bottom of the hill. H. was later charged with careless driving and found guilty. On order nisi to review—

HELD: Order nisi discharged. The propulsion of the car was due to H.'s starting of the engine, and after the engine stopped, the extent and degree to which H. relied on the use of the driver's controls showed that he was, in a substantial sense, controlling the movement and direction of the car. In giving the word "drive" its ordinary meaning, H. was "driving" the car.

HELD:
(1) Per curiam: Activities are not to be "driving" unless they come within the ordinary and natural meaning of the word.

(2) Per Young CJ and Southwell J: Whether a person is "driving" a motor vehicle is largely a question of fact.

(3) Per McInerney and Southwell JJ: The word "drive" as used in ss28(1), 81(1), 81A(1) of the *Motor Car Act* 1958, should be given the same meaning.

(4) Per Young CJ: Before a person can be said to be driving a motor vehicle, he must at least have some control over the movement and direction of the vehicle, and have something to do with the propulsion. The propulsive force includes sources within the vehicle and other forces externally applied.

(5) Per McInerney J: Before a person can be said to be driving a motor vehicle, not only must he have control over the steering or braking systems, but also he must have control over the means of propulsion of the vehicle.

(6) Per Southwell J: Before a person can be said to be driving a motor vehicle, he must in a substantial sense control the movement and direction of the motor vehicle. In determining this question, it is relevant to consider the extent and degree to which the person driving was relying on the use of the driver's controls.

Per Young CJ:

> *[at pp4-6]:* "The word "drives" is an ordinary English word in very common use. But it is a word of imprecise connotation. *The Oxford Dictionary* gives at least twenty-seven meanings of the verb. Although the expression "a person who drives a motor car" is generally well understood the question what does the word "drives" mean in the sections of the *Motor Car Act* with which we are concerned is not to be answered by stating what the man in the street would say it means in any given circumstances.
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> Further the meaning given to the word is not to be tested by supposing other circumstances and related words. Much must depend upon the purpose of any particular enquiry. For instance, if a car is temporarily stationary at traffic lights and the question is asked, who is driving that car, the question can be sensibly answered although the car is not in motion.
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> A majority of the meanings of the verb "drive" given in the *Oxford Dictionary* contain some connotation of force or propulsion. Yet generally the force or propulsion is not provided by him who drives. The man who "drives" a horse cart no more provides the force which moves the cart than does the man who "drives" a motor vehicle. In each case, however, he is more or less in control of the propulsive force. The qualification is intended to encompass, amongst other things the contrariness attributable to animate and inanimate objects alike. The answer to the question in any given case whether the defendant was "driving" a motor vehicle is largely a question of fact: *Pullin v Insurance Commissioner* [1970] VicSC 62; [1971] VicRp 31; (1971) VR 263.
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> In none of the decided cases has there been a suggestion that any meaning other than the ordinary meaning should be given to the word "drive". Nor has any case attempted to give an exhaustive definition of the word. What the Courts have done is to say whether in the circumstances of the particular case the defendant was driving the vehicle within the ordinary meaning of the verb. It is therefore a mistake to regard the authorities as laying down a test. There emerges, however, from a consideration of the authorities the view that before a person can be said to be driving a motor vehicle he must at least have some control over the movement and direction of the vehicle (*Ames*

v MacLeod (1969) SC 1) and generally that he must have something to do with the propulsion. (Cf. *R v MacDonagh* [1974] 2 All ER 257; (1974) QB 448 at p452.) Few, if any, of the authorities will be found to be inconsistent with such a view of the ordinary meaning of the word "drive". The question whether a person in given circumstances is driving the car will often turn on the extent and degree to which the person was relying on the use of the driver's controls: *R v MacDonagh, ubi sup.*

The ordinary meaning to be attached to the word "drives" when applied to a motor car should, I think, embrace the notion of some control of the propulsive force which, if operating, will cause the car to move. The propulsive force is not, however, to be confined to sources within the motor vehicle itself, but includes at least the force of gravity and, if momentum can with sufficient accuracy be described as a force, its momentum. I see no reason why it should not also include other forces externally applied."

McInerney J:

[at pp11-12] ... We were referred to a great number of decisions both in Australia and in England in which the meaning of the word "drive" in the phrase drives (or driving) a motor car has been considered. To some of these decisions it will be necessary to return, but since the first enquiry must be as to the ordinary and natural meaning of the word "drive" as used in the context of the *Motor Car Act*, I think that the proper approach of this Court is that advocated by Lord Warrington of Clyffe in *Barrell v Fordree* (1932) AC 676 at p682, namely, "to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases."

I turn then to consider the ordinary natural meaning of the word "drive" as used in the phrase "drives a motor car." In the context of the present Act the word is used as a transitive verb, implying the doing of some act to produce a result. In its ordinary acceptation the word would be understood as involving the application of some propulsive force to another person or thing to produce a movement in a certain direction, primarily forward, but on occasions backways or sideways...

[at p14]: The essential element in driving the car seems to me to be setting or keeping a car in motion by the application or operation of the driving mechanism. By means of the brakes and the steering it is possible to control and regulate the direction and speed of the travel. If the driving mechanism (the engine, gears and transmission) be intact, it is possible to "drive" the car, be the brakes and/or the steering ever so deficient, deficient, indeed, to the point of non-existence.

However hazardous or unenviable may be the lot of a person undertaking the driving of such a car, he is nevertheless "driving" it ... *[at pp37-38]:* "...I think that there is discernible in the cases an over-emphasis of the capacity to control or the exercise of control over direction and speed to the virtual exclusion of the element of the application to the car of propulsive force by its own engine... *[at p44]:* ... In my own view, propulsion as well as guiding is necessary and I would with respect disagree with the view that if a person does no more than guide a vehicle or regulate its course and pace he must necessarily be said to have "driven" that vehicle ..."

[at p59]: ... The view adopted in the Victorian cases accords also with what I regard as the ordinary and natural meaning of the word "drive". I do not think that it suffices that the person charged with having driven a motor vehicle should have had control over the steering or braking systems of the vehicle or of both. I think he must also have control over its means of propulsion..."

[at p64]: ... It seems to me that the recent English decisions have concentrated too much on the elements of the control of steering and of braking, matters which although undoubtedly ingredients of driving are, in my view, ancillary to the control of the propulsive force of the vehicle. To the extent that the English decisions neglect the last mentioned ingredient they lose sight of one of the essential factors of driving and lead inevitably to strange conclusions of fact, as, for instance, in *Ames v MacLeod*, *McQuaid v Anderton* [1980] 3 All ER 540; [1981] 1 WLR 154, and *Caise, Fox v Wright* [1981] RTR 49.

I am therefore of the view that these order to reviews should be decided in accordance with the tests formulated in *Doyle v Harvey*, *Caughey v Spacek* and *McGrath v Cooper* and not in accordance with the tests in *Ames v MacLeod* and *MacDonagh's Case*..."

Southwell J:

[at p12]: ... In my respectful opinion the appropriate test to apply is that stated in *Ames v MacLeod* and adopted by the Court of Appeal, namely, "was the defendant in a substantial sense controlling the movement and direction of the car." As the Court of Appeal went on to say, the answer to that question will "often" (I would use the expression "usually") turn on "the extent and degree to which the defendant was relying on the use of the driver's controls"..."

Per Young CJ, McInerney and Southwell JJ in *Tink v Francis; Hughes v McFarlane; Harris v Broadbent* [1983] VicRp 74; [1983] 2 VR 17; MC 14/1983, 13 December 1982.

(e) Motor cycle coasting downhill – engine not running – rider seated side saddle

1. A person may be said to be driving a motor vehicle if he is in a substantial sense controlling its movement and direction.

Tink v Francis [1983] VicRp 74; (1983) 2 VR 17, followed.

2. Where a person seated side saddle on a motor cycle, which was travelling of its own motion at approximately 10 km/h along a street down a slight decline, the direction of travel controlled by means of the handle bars and the speed controlled by the brakes, it was open to find that the person was driving the motor cycle.

Per Connolly J (Williams and Andrews JJ agreeing):

"The effect of some at least of the decided cases may be summarized, doubtless incompletely, as follows:-

(a) a vehicle under tow is not being driven: *MacNaughtan v Garland* [1979] Qd R 240 following *Wallace v Major* (1946) KB 473; [1946] 2 All ER 87 which in turn had been followed in *Caughey v Spacek* [1968] VicSC 73; [1968] VicRp 78; (1968) VR 600. See also *Hampson v Martin* (1981) 2 NSWLR 782. In 1983 the Full Court of Victoria, in the course of deciding a number of appeals involving this question reviewed the authorities elaborately and came to this conclusion in *Hughes v McFarlane; Tink v Francis* [1983] VicRp 74; (1983) 2 VR 17 holding that a person at the wheel of a vehicle under tow who continued steering after the tow accidentally parted was not driving. In *McQuaid v Anderton* [1980] 3 All ER 540; (1981) 1 WLR 154 and other decisions of the Queen's Bench Division the contrary is decided. I do not examine them, as being inconsistent with *MacNaughtan v Garland.* I shall merely say that the criticism of *Wallace v Major* which they evince has not found support in most States of Australia.

(b) Pushing a vehicle with one hand on the steering wheel is not driving: *R v MacDonagh* (1974) QB 448; [1974] 2 All ER 257; and allowing a lorry to run down hill after letting off its brake and jumping clear is not driving it away: *R v Roberts* (1965) 1 QB 85; [1964] 2 All ER 541.

(c) A vehicle being pushed by persons other than the person at the wheel is not being driven by the latter: *McGrath v Cooper* [1976] VicRp 54; (1976) VR 535; *Tink v Francis* [1983] VicRp 74; (1983) 2 VR 17.

(d) A person supervising a learner driver is not himself driving: *Rowe v Hughes* [1974] VicRp 7; (1974) VR 60.

The Full Court in *MacNaughtan v Garland*, as has been seen, adopted the notion of driving as being the controlling of the movement and direction of the vehicle in a substantial sense. This leaves open the extent of the control of movement as distinct from direction which is called for. Now there is a strong body of opinion for the view that driving involves having something to do with the propulsion of the vehicle. See e.g. *R v Roberts* (*supra*) at p88. In *McGrath v Cooper* (*supra*) at p539 Gillard J said:-

"The underlying notion of driving is the control over propulsion. The word 'driving' implies an urging forward. The whole concept is that the person must have control of the force that pushes the vehicle backwards or forwards. He must have control of the mode of moving the vehicle. The means of propulsion and their control are necessary attributes to driving. This is brought out in my view with the precise use that can be made of the various verbs. If one were seated in the front seat, without the engine running, but able to control the course of the car, then the appropriate verb to use in those circumstances would be that the person behind the wheel was 'steering' the vehicle, and, in the absence of other factors, it would be a misuse to say that he was 'driving' the vehicle."

In *Hampson v Martin* (*supra*) Foster J after yet another elaborate review of the authorities said, at p796:-

"I have become completely satisfied that the meaning of the word 'drive', as an ordinary English word, cannot be satisfied by the limited operations of a person in the driving seat of a towed vehicle, using only the steering wheel and brakes, and having no control over the means of propulsion of the vehicle."

This is the view which appears to have prevailed in Victoria: *Tink v Francis* (*supra*). In my view we should follow this line of authority especially as the seminal passage from the judgment of Lord Parker CJ in *R v Roberts* (*supra*) was obviously drawn on by the Full Court in *MacNaughtan v Garland.* It should be noted however that the notion of **[4]** control of the propulsion of the vehicle does not necessarily mean that at the moment charged the motor must be running. One of the group of cases

under consideration when *Tink v Francis* was decided was *Harris v Broadbent*. The defendant in that case was driving his car down a hill when the engine cut out. He was unable to restart the motor but continued to steer the car while it coasted and eventually stopped. The offence was committed during the defendant's handling of the vehicle after the engine cut out. Young CJ at p20 said:-

> "In my view the defendant was driving the car in the ordinary meaning of that word. He was in a substantial sense controlling its movement and direction. The propulsion of the car was due to the defendant's starting of it and the momentum which it thus obtained. After the engine stopped, he was in control of the propulsion at least to the extent of controlling the speed of the vehicle by the use of the brakes. I think that the Magistrate was right to convict ... ."

The propulsive force which drives a motor vehicle is ordinarily the power of its motor. There is, as it seems to me, no reason to doubt the correctness of the view that a towing or pushing force applied by another vehicle or by human agency does not lead to the conclusion that the person at the wheel is driving. There remains the situation which is relevant in this case and that is the deliberate employment of the force of gravity so as to cause the vehicle to progress down the highway. I do not think that the initial propulsion need necessarily be due to the starting of the motor. In other words it seems to me that a person who causes a vehicle to move by the force of gravity down a road is in a substantial sense controlling its movement. A person in this position is to be distinguished from the driver of a towed vehicle in that it is he who chooses the direction and applies the propulsive force. The person at the wheel of a towed vehicle must go where he is taken and applies the controls for the purposes only of conforming to the path of the towing vehicle and avoiding collision with it.

On the other hand there is an obvious distinction between a vehicle which is caused to coast on a highway and one which is merely moved a metre or so for the purpose, for example, of getting it to the kerb or clear of the entrance to a house or for some other such purpose. The vehicle which is caused to coast from the top of Mount Coot-tha would probably be described as being driven along that perilous course in an ordinary sense of the word. On the other hand a vehicle which is rolled a metre or so, albeit with the aid of gravity, would not be so described.

The agreed facts of this case have the respondent travelling at approximately 10 km/h along Barney Street of its own motion down a slight decline, the defendant seated side saddle, controlling the direction of travel of the cycle by means of the handle bars and able to apply the brakes, as he indeed did, to stop the motor cycle. In my opinion, on these facts, the defendant was driving the motor cycle at the time and place charged. The police did not see how the down hill motion of the cycle was initiated but the only conclusion which clearly arises on these facts was that the respondent had chosen to use the force of gravity as a means of having the motor cycle travel along the street.

The facts to which I have referred were stated by the prosecution and formally admitted by the respondent's solicitor. If the admission had merely been that the vehicle was seen moving I should have thought that the facts were insufficient to determine whether the respondent was driving in an ordinary sense of the word. On the admitted facts it seems to me that the respondent was, in truth, controlling the movement and direction of the vehicle in a substantial sense. The fact that the forward movement of the vehicle was limited by the momentum it could build up does not mean that it was not travelling forward at, it must be assumed, the choice of its rider who demonstrated his capacity to arrest the forward movement. Again the fact that the capacity to steer the motor cycle would not have extended to a turn of 90 degrees does not mean that there was not, in a substantial sense, a control of its direction. The point really is, in my judgment, that both the movement and direction of this motor cycle were under the control of no agency other than the respondent at the time when it was travelling down the street.

In my judgment this appeal should be allowed, the decision of the Stipendiary Magistrate set aside and the case should be remitted to him to enter up all necessary adjournments and to proceed according to law."

Per Williams J:

"The facts and relevant statutory provisions are fully set out in the judgment of Connolly J which I have had the advantage of reading. In my view the absence of a definition of "driving" in the legislation (a situation which appears to be common to comparable legislation throughout Australia) is deliberate. The legislature intended that the term should have its ordinary everyday meaning, and that it would be for the courts in each particular case to say whether the conduct in question constituted "driving". *The Shorter Oxford English Dictionary* provides the operative definition for the verb "drive": "to urge onward and direct the course of a vehicle ..." As Nelson J said in delivering the judgment of the Victorian Full Court in *Rowe v Hughes* [1974] VicRp 7; (1974) VR 60 at 62: "In its ordinary sense the word 'driving' would appear to involve the actual physical control over the operation and movement of the car ..."

The leading authorities (they are all referred to in the reasons of Connolly J) in my view are concerned primarily with setting the outer limits of what is encompassed by the concept of "driving" when used in a Statute regulating traffic, or with the question whether or not a particular set of facts comes within that concept. I do not regard any of the cases, including the decision of this Court in *MacNaughtan v Garland: ex parte MacNaughtan* (1979) Qd R 240, as laying down a definition of the term "driving". The passage from the judgment of Kelly J at p244 (quoted by Connolly J) in my view sets out the considerations which the tribunal of fact would have regard to in determining whether the acts in question constituted "driving".

But, of course, where the facts of a later case were the same the Court would be bound by its earlier decision: in consequence where the facts establish that the person was in the driver's seat of a vehicle being towed, and the other facts were essentially not different from those considered in *MacNaughtan's case*, it would follow that such person was not "driving" the vehicle for the purposes of the *Traffic Act.*

I agree with Connolly J that there is "an obvious distinction between a vehicle which is caused to coast on a highway and one which is merely moved a metre or so for the purpose, for example, of getting it to the kerb or clear of the entrance to a house or for some other such purpose". In my view that will be one of the facts which will be relevant in the determination whether what was done at the time in question constituted "driving" the motor vehicle. (cf. the reasoning of the Tasmanian Full Court in *Cooley v Lowe* (1984) 1 MVR 45; [1984] TASRp12; [1984] Tas R 107 and *Howe v Strickland* [1984] TASRp 6; [1984] Tas R 36; (1984) 1 MVR 415 at 417).

It is that matter which has caused me some concern in this particular case. The admitted facts on which the determination must be made do not indicate the distance travelled by the motor cycle at the time in question. The facts, however, contain the following: ... the defendant ... was observed ... travelling in a northerly direction along Barney Street ... travelling of its own motion down a slight decline at a speed estimated to be 10 km/h ... . Those facts would, in my opinion, support the inference that the motor cycle travelled for some distance down the road, and that this was not a case of a vehicle being moved in such circumstances as to lead to the conclusion that the person having physical contact with it was not driving it.

The Magistrate concluded that the prosecution had not established that the respondent was "driving" the motor cycle because he was "bound by the authority of *MacNaughtan v Garland*". For the reasons given above (and for those given by Connolly J with which I agree) the Magistrate was wrong in so holding. The facts clearly are distinguishable from those in *MacNaughtan's case*, and are clearly capable (particularly if the inference I have referred to above is drawn) of supporting a finding that the respondent was "driving" at the material time.

I agree with the orders proposed by Connolly J."

Per Connolly, Williams and Ambrose JJ in *Allan v Quinlan, Ex Parte Allan* [1987] 1 Qd R 213; (1986) 3 MVR 343; MC 40/1986, 4 July 1986.

(f) Passenger holding steering wheel whilst vehicle in motion – whether "driving."

1. The notion of "driving" involves in a substantial sense controlling the movement and direction of a vehicle and also having some control of its propulsion.

Tink v Francis [1983] VicRp 74; [1983] 2 VR 17;
MacNaughtan v Garland (1979) Qd R 240; and
Allan v Quinlan; ex parte Allan [1987] 1 Qd R 213; [1986] 3 MVR 343, followed.

2. Where a passenger took hold of the steering wheel for approximately 150 metres, he was controlling the direction of the vehicle. However, it could not be said that he had any control of the propulsion of the vehicle and accordingly, was not "driving".

Per Kelly SPJ (with McPherson and Dowsett JJ agreeing):

"The appellant was convicted in the Magistrates' Court at Proserpine on 2nd July 1986 of dangerous driving of a motor vehicle. The appellant was a passenger in a vehicle driven by a Miss Lyon. The Stipendiary Magistrate found that he took hold of the steering wheel and at that instant Miss Lyon "froze", taking her hands off the wheel. The vehicle was then steered in a veering manner solely by the appellant for a distance of about 150 metres at a speed of between 90 and 100 km/h. The appellant caused the vehicle to "fishtail" a number of times. Miss Lyon then resumed control of the steering but the vehicle went completely out of control and rolled over. The Stipendiary Magistrate held that the actions of the appellant constituted "driving" the vehicle. ...

The question of what constitutes "driving" a motor vehicle has been considered in a number of cases in Australia, in England and Scotland and also in Canada. It has been dealt with in two cases in this

Court, *MacNaughtan v Garland, ex parte MacNaughtan* (1979) Qd R 240 and *Allan v Quinlan, ex parte Allan* [1987] 1 Qd R 213; [1986] 3 MVR 343 and there is a comprehensive review of the authorities by the Full Court of Victoria in *Tink v Francis* [1983] VicRp 74; (1983) 2 VR 17. As is pointed out in that case by Young CJ at p19:

> the question is largely one of fact and the courts have not attempted to give an exhaustive definition of the word "drives" but rather have said whether in the circumstances of the particular case the defendant was driving the vehicle within the ordinary meaning of the verb.

The proposition which emerges from *MacNaughtan v Garland* (*supra*) and *Allan v Quinlan* (*supra*) is that the notion of driving involves in a substantial sense controlling the movement and direction of the vehicle and also having some control of its propulsion. This accords with the conclusion reached in *Tink v Francis* (*supra*), is in conformity with a substantial body of authority and is that which should be adopted. Young CJ in *Tink v Francis* considered that it is a mistake to regard the authorities as laying down a test and I would, with respect, agree with that view. However, at the same time it is desirable so far as this Court is concerned that there should be an authoritative statement of the proper approach to the question and I would hope that this has now been achieved.

It follows from what I have said that the view of the majority of the Supreme Court of Canada in *Belanger v R* (1970) 2 CCC 206 in which the Court was constituted by nine judges, relying upon control over the direction of the vehicle alone as being sufficient to constitute "driving" the vehicle, is inconsistent with the line of authority to which I have referred and should not be followed. In seeking to uphold the conviction the Crown submitted that the appellant by his actions substantially put himself in the position of the original driver and that, for the limited period found by the Stipendiary Magistrate, he had harnessed the propulsive capacities of the vehicle in executing the series of veering movements described as "fishtailing".

I am unable to accept this submission. I would not consider that it could properly be said that when the only mechanism over which the appellant was exercising any control was the steering he had any control of the propulsion of the vehicle. The appellant was controlling its direction and that was all and in these circumstances it would not be correct to say that he was "driving" the vehicle.

I would allow the appeal, quash the conviction and direct that a judgment of acquittal be entered. In my view it would not be appropriate to order a new trial on the charge brought against the appellant."

Per Kelly SPJ (with McPherson and Dowsett JJ agreeing) in *R v Murray* (1986) 4 MVR 331; MC 05/1987, 19 December 1986.

(g) Driver put his arm though car window and turned engine on – as car in gear, vehicle moved forward injuring the employee who was charging a battery

The real question was whether or not Shepley was the driver of the vehicle at the time of the injury. Then, if he was, was his action a use of the motor vehicle in the relevant sense? There was no doubt that he was the driver of the motor vehicle. He was the man whose action drove the motor vehicle forward. He was not in the driver's seat but that cannot be the test. He did not have the intention of driving the vehicle but again that cannot be a conclusive test of whether in fact he was the driver or not. He had control of the means of propulsion forward of that vehicle in the same way as if he had intentionally driven it forward, so with that means of propulsion of the motor vehicle under his control he inadvertently drove the motor vehicle forward. He did not steer it but that again was merely incidental.

Pullin v Insurance Commissioner [1970] VicSC 62; [1971] VicRp 31; (1971) VR 263, and *Insurance Commissioner of State Motor Car Insurance Office v Pullin* [1972] ALR 399; (1971) 45 ALJR 176, followed.

Per Jacobs P (with Hardie and Bowen JJA agreeing):

"The question is whether when Mr Shepley put his arm through the window on the driver's side and turned the engine on so that the car went forward because it was in gear he could be described as the driver of the motor vehicle. If he could not then the application for judgment under s15 fails. If he could, the question still remains whether the injury in a relevant way arose out of the use of the motor vehicle. Collins J came to the conclusion that Mr Shepley was the driver of the vehicle at the relevant time and by inference that what he did was a use of the motor vehicle. I respectfully agree with him. Upon the view which I take of the action of Mr Shepley I do not think that the further evidence of the circumstances leading up to that action gives a great deal as assistance. However, I shall refer to them.

The usual driver of the motor vehicle was Mr Shepley and he drove it in connection with the Council's business. The vehicle had been taken into the garage section in order to have the battery charged.

> This was the work of Mr Blackeby. After the battery was charged he reconnected the leads to the terminals of the battery. At that stage Mr Shepley was standing nearby waiting to take the vehicle away. Mr Blackeby asked him to start the motor to see that the battery was fully charged and that it was connected properly. It was then that Mr Shepley placed his arm through the window and turned the key, starting the engine so that the vehicle being in gear went forward and struck Mr Blackeby.
>
> I do not think it is relevant that Mr Shepley was the usual driver of the vehicle. The real question is whether or not he was the driver of the vehicle in his actions which I have described. Then, if he was, was his action a use of the motor vehicle in the relevant sense? I feel no doubt that he was the driver of the motor vehicle. He was the man whose action drove the motor vehicle forward. He was not in the driver's seat but that cannot be the test. He did not have the intention of driving the vehicle but again that cannot be a conclusive test of whether in fact he was the driver or not. He had control of the means of propulsion forward of that vehicle in the same way as if he had intentionally driven it forward, so with that means of propulsion of the motor vehicle under his control he inadvertently drove the motor vehicle forward. He did not steer it but that again is merely incidental.
>
> I respectfully agree with the Full Court of the Supreme Court of Victoria in their conclusion in *Pullin v Insurance Commissioner* [1970] VicSC 62; [1971] VicRp 31; (1971) VR 263 that intention to drive is not the material test. This conclusion was affirmed in the High Court on appeal *Insurance Commissioner of State Motor Car Insurance Office v Pullin* [1972] ALR 399; (1971) 45 ALJR 176. ..."

Per Jacobs P (with Hardie and Bowen JJA agreeing) in *Shortland City Council v Government Insurance Office of NSW* [1973] 2 NSWLR 257; MC 14/1974, 9 November 1973.

Patrick Street LL B, Dip Crim
19 March 2014