

14/83

SUPREME COURT OF VICTORIA — FULL COURT

TINK v FRANCIS; HUGHES v McFARLANE; HARRIS v BROADBENT

Young CJ, McInerney and Southwell JJ

13 December 1982 — [1983] VicRp 74; [1983] 2 VR 17

MOTOR TRAFFIC – MOTOR VEHICLE – "DRIVES" – MEANING OF CONSIDERED: MOTOR CAR ACT 1958, SS28(1), 81(1), 81A(1).

(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.

[Relevant extracts from the judgments are as follows:]

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. 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.

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* [1971] VicRp 31; (1971) VR 263. 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; (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 backwards 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*, and *Caise v Wright*, *Fox v Wright*. 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 *McDonagh'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"..."

APPEARANCES: Mr L Flanagan QC and Mr R Gorrie, counsel for the Crown. Mr SW Kaye for the defendant Harris.
