43A/76

SUPREME COURT OF VICTORIA

McGRATH v COOPER

Gillard J

15, 16 March 1976 — [1976] VicRp 54; [1976] VR 535

MOTOR TRAFFIC – DEFENDANT STEERING A MOTOR CAR BEING PUSHED BY ANOTHER PERSON – MEANING OF 'DRIVING' A MOTOR VEHICLE – WHETHER DEFENDANT WAS DRIVING A MOTOR VEHICLE – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

Defendant, with a breathalyser reading of .145% was steering a car being pushed by another vehicle. He fulfilled all requirements as to s81A except as to whether he was 'driving' the vehicle. Upon Order Nisi to review—

HELD: Order nisi discharged.
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] VicRp 78; [1968] VR 600, followed.**

GILLARD J: This is the return of an order nisi to review a decision of the Magistrates' Court at Ararat given on 16 July 1975, when an information charging William Thomas Cooper with an offence under s81A of the *Motor Car Act* 1958 was dismissed. The information charged Cooper that on 6 July 1975, at Ararat he did drive a motor car while the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per centum.

The facts giving rise to the charge are conveniently set out in the evidence of the informant. In his affidavit in support of the application for the order nisi he swore that at the hearing of the information, he gave evidence as follows:

> "As we approached the intersection of Queen Street I saw a vehicle travelling towards us on the incorrect side of the centre line of High Street. Senior Constable McPhan made a "U" turn and as he did I saw that one car was being pushed by another car from behind, these vehicles continued along High Street and then the vehicle being pushed turned left into Queen Street and the other car stopped at the corner. I approached the driver of the pushed car, a green Torana sedan registered number KLX 217, and said to him: 'Why was your car on the incorrect side of the road in High Street?'
>
> "He said: 'Because my car is buggered and was being pushed to get to Whirly Wilson's Garage. The timing gear is buggered'.
>
> "I noticed that the driver was slightly unsteady on his feet, his eyes were bloodshot and his breath smelt of intoxicating liquor."

Later at the police station, tests were taken of the defendant's blood and the certificate produced shows that the percentage was .145, which, of course, is much greater than .05 per centum.

The Magistrate, having heard that evidence and following the English decision of *Wallace v Major* [1946] 1 KB 473; [1946] 2 All ER 87 dismissed the information.

The order nisi to review that decision was obtained from Jenkinson J on 22 August 1975, on the following grounds:

> "1. The Magistrate should have held at the close of the informant's case, on the evidence then before him, that the defendant was driving the motor car referred to in the evidence of the informant in the period during which the said motor car was being pushed by another motor car.

2. The Magistrate should have held at the close of the informant's case, on the evidence then before him, that the defendant was driving the motor car referred to in the evidence of the informant after the period during which the said motor car was being pushed by another car and until the said motor car had stopped.

3. The Magistrate should have held at the close of the informant's case, on the evidence then before him that the defendant on 6 July 1975 at Ararat did drive a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per centum."

Mr Uren, who appeared for the informant to move the order absolute, submitted that on the evidence there were two periods which should be considered and referred to in the grounds just narrated. He said, first, there was the period when the defendant's motor car was being pushed by the force exerted by his brother's motor car, and, secondly, there was the period of time when under its own momentum, the defendant's motor car rolled on around the corner of the street after the pushing vehicle had ceased pushing.

Mr Kimm, who appeared for the defendant to show cause, challenged this analysis of the evidence and submitted there was no evidence of rolling at all. I must say that when I first read the affidavit out of Court, I had formed a similar impression to that which Mr Uren submitted; but having looked at the evidence more closely, there is undoubtedly an ambiguity in the way it was expressed. There was no evidence of rolling. It is true that it is suggested that the defendant's motor car finished up in a position around the corner from High Street, but nothing of the locality is known to this Court and when the witness says that the other motor car stopped at the corner, that can mean either around the corner, or in High Street. This was not made explicit and therefore, I think the defendant is quite entitled to say that one could not come to any conclusion, that is, beyond reasonable doubt, as to the facts.

Since it is of great importance to consider whether the vehicle being pushed was being driven at the material time, I am content to discuss this case on the basis that at all times material, the motor car was being pushed. It seems to me that if the vehicle pushing had ceased to push, it makes no difference between the steering of the vehicle moving by the momentum created by the force exerted by the vehicle pushing and the steering of the motor vehicle whilst actually being pushed. In the end, I have come to the conclusion that in the circumstances of this case, it should make no difference to one's decision whether the defendant was steering the motor vehicle whilst being pushed, and steering the motor car after the pushing had ceased. On the facts, on the evidence in the way it was given, in my opinion, there should be no distinction drawn between the two periods of control. In all the circumstances, was the steering of the vehicle by the defendant "driving" the vehicle in the relevant sense?

The defendant was charged with a breach of s81A of the *Motor Car Act* 1958, which reads:

"Any person who drives a motor car while the percentage of alcohol in his blood expressed in grams per one hundred millilitres of blood is more than .05 per centum shall be guilty of an offence..."

It will be seen that reference is made to the personal act of an individual. It is the person who "drives a motor car" upon whom is imposed the implied obligation. In order to discover the nature of the act which constitutes driving it is useful to consider what "a motor car" is for the purpose of the Act.

In s3 of the Act it is defined as follows: "'Motor car' or 'car' means any vehicle propelled by internal combustion steam gas oil electricity or any other power and used or intended for use on any highway," and then there are extensive inclusions which are immaterial to this case.

I agree with Mr Uren's interpretation that the vehicle does not necessarily have to be propelled at the time of any particular so-called "driving". I agree with him that the definition of "motor car" impliedly has the words "capable of being" before the word "propelled". At the same time the definition does give an indication of the kind of activity which would constitute "driving a motor car". The operative words in s81A are "drive a motor car": see *Rowe v Hughes* [1974] VicRp 7; [1974] VR 60, at p62. In that case, the Full Court had to consider the provisions of s81A in relation to a person teaching a learner-driver, and it was there emphasized that since these were penal provisions, s81A should be strictly construed. It should also be noticed that in the *Motor Car*

Act 1958 the words "motor car" are not mere words of description or classification. The words as used in the Act have been defined by the statutory definition. The importance of this distinction is brought out very well by the author of an article in (1963) Mod LR 202.

Before me the discussion of counsel revolved around the meaning of the verb "to drive". It is not defined in the Act, but having regard to the use of various expressions in the Act it does not mean "to control" a motor car (cf. *Cornelius v Jones* (1935) 38 WALR 62) or being "in charge of" a motor car (cf. *Doyle v Harvey* [1923] VicLawRp 39; [1923] VLR 271, at p275; 29 ALR 180; 44 ALT 179; see also s82 of the *Motor Car Act* 1958). In the part of the Act dealing with compulsory third party insurance, in s38 there is, for the purposes of that division, a definition of "driver". It is an extensive definition in these terms:

> "'Driver' in relation to a motor car includes any person who is in charge of a motor car and 'drive' and 'driving' have a corresponding meaning."

That extensive definition of "driver" is inserted in the Act only for the purposes of compulsory third party insurance, but it is significant that it extends the notion of who, *prima facie*, would be a driver to include a person who is in charge of a motor car. When one comes to consider s81A, no such connotation is permissible.

Mr Uren has been good enough to draw my attention to a number of English cases dealing with the question of whether a person was at the material time driving a motor vehicle in the relevant sense. To say the least, the cases are difficult of reconciliation and one finds some difficulty in discovering any thread of rationale running through the cases which can be said to afford a principle or rule governing the various cases so as to be applied in these proceedings.

This appears also to have been appreciated in England, because in 1974, a special Court of Appeal of five judges was assembled to consider this important question: see *R v MacDonagh* [1974] QB 448; [1974] 2 All ER 257. In my respectful submission *MacDonagh's Case* is not a very satisfactory decision. It does not remove the difficulties of attempting to define the legal obligation imposed by law.

It would appear that most of the difficulty in England arose from the fact that neither the expression "motor car" nor "motor vehicle" was defined. This was pointed out in *Lawrence v Howlett* [1952] 2 All ER 74. The words in England are words of description or classification, not of definition. In England, the description is "a vehicle that is mechanically propelled" by certain forms of propulsion. In Victoria, on the other hand, we do have a definition of "motor car", to which attention has already been drawn, and we have had a line of authority which, in my view, does establish an underlying principle of what is "driving" in the relevant sense.

In *Doyle v Harvey*, *supra*, Macfarlan J at (VLR) p274 had this to say:

> "For the defendant it was contended that a person cannot be said to be driving a motor-car unless the car is in motion. For the informant it was contended that if a person is doing the acts preliminary to putting the car in motion, at any rate with the intention of propelling it, he is driving the car. In my opinion neither of those contentions is correct. A person may be driving a motor-car when the car is not actually in motion. The driving consists in propelling or causing the vehicle to be propelled, the guiding and the stopping of the vehicle. Those are all important steps in the process or act of driving."

I respectively adopt that test as indicative of the nature of driving. 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.

I believe this can be best illustrated if we go back to the horse and buggy days. When a person drove a horse and buggy, it was accepted as an accurate description that the person

driving was travelling in the buggy but was driving the horse; that is to say the driving consisted in urging the horse forward by voice or whip, in order to move the buggy. It was only when the horse was put into the shafts of the buggy and the person in the seat of the buggy urged that horse to pull could it be said that the person was driving the buggy. "To drive", it was necessary for him to have complete control of the means of propulsion. True it is, that by the control of the reins, the person could guide the horse and so determine the course of the vehicle, but that was only one aspect of the whole operation of driving, and in itself, would not constitute driving. Similarly, by use of the reins, the person could start and stop the horse and the buggy, but again the essential feature to constitute the driving of the horse and buggy was the control over the horse by the person in the vehicle.

The *Shorter Oxford Dictionary* gives as one meaning for the word "drive", "to urge onward and direct the course of a vehicle or the animal which draws it, a railway train, etc.". This meaning seems to have been the one that was taken by Lord Goddard CJ in *Wallace v Major supra*. A passage from that judgment was cited with approval by the former Chief Justice, Winneke CJ in *Caughey v Spacek* [1968] VicRp 78; [1968] VR 600. In that case, the former Chief Justice was concerned to determine for the purposes of s81A whether a person who was steering a broken-down motor-vehicle that was being towed by another motor-vehicle, was driving the broken-down vehicle. His Honour, adopting what he called the robust common sense expressed by Lord Goddard CJ in *Wallace v Major*, *supra*, held that the person steering the towed vehicle was not driving in the relevant sense.

Mr Uren, however, sought to get some comfort from what Sir Henry Winneke said at p604, where his Honour was dealing with the word "drive" in s81A. He said: -

> "In performing this task of interpretation, I must confess, if I may so with the utmost respect, that what appears to me to be the robust common sense expressed by the Lord Chief Justice in *Wallace v Major*, *supra*, appeals strongly to me, and I see no valid reason to justify or require me to depart in this case from the decision actually given by the Divisional Court in that case. The present respondent's control over the operation and movement of the car was severely limited in degree. He possessed no power to set it in motion or otherwise operate its propulsive mechanism. He had, it is true, a limited power to control its direction, but only to the extent permitted by a 12-foot tow rope. He had, it is also true, power to decrease its speed by the brakes, or on a decline to allow its speed to increase, but, again, only to the extent permitted by the tow. He had no power, by virtue of his occupancy of the car, to determine the route to be taken or even the ultimate destination of the car in which he was travelling, for these were clearly in the power of the driver of the towing car. The car was being propelled, not by its own motive power or any act on the part of the respondent, but solely by the force exerted by the tow. It might, I think, be said with truth that 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. What Macfarlan J, in *Doyle v Harvey*, *supra*, called the important steps in the act or process of driving were either non-existent or drastically curtailed."

The passage that Mr Uren particularly relied on, was where his Honour said, "The present respondent's control over the operation and movement of the car was severely limited in degree." Mr Uren also sought to rely upon what was said by the Full Court of Appeal in *MacDonagh's Case*, *supra*, where the correctness of the decision in *Wallace v Major*, supra, was doubted. Mr Uren submitted it was a matter of the degree of control which determined whether a person was driving in the relevant sense.

I do not find anything in that passage which I cited from the judgment of the Chief Justice which would lead me to believe that he doubted the correctness of the decision in *Wallace v Major*, *supra*. On the contrary, the whole tenor of his remarks is that he was captivated by what he called the robust common sense of what the Lord Chief Justice said. It is a decision which I believe is binding upon me. If one cares to substitute instead of the word "tow" the word "push", *mutatis mutandis*, throughout that *dictum*, everything his Honour said, with possibly one or two exceptions, could be applied to the circumstances of this case as I shall, in a few moments, point out.

I am further constrained by the fact that the Full Court on at least two occasions has accepted the correctness of *Wallace v Major*, *supra*. In *Rowe v Hughes*, *supra*, where the Court was concerned with construing the provisions of s81A, it accepted, in passing, the correctness of *Wallace v Major*, *supra*. Similarly, in *Pullin v Insurance Commissioner* [1971] VicRp 31; [1971] VR 263, the correctness of the decision was accepted without any qualification. Even, therefore, if

the Court of Appeal did doubt the correctness of the decision in *Wallace v Major*, *supra*, I believe that I am bound in this State of Victoria to follow the line of Victorian authorities which accepted *Wallace v Major*, *supra*, as a correct statement of law.

I would like then to come to deal with the matter that I have just adumbrated, namely to consider the above *dictum* of the former Chief Justice and apply it to the present circumstances. Despite Mr Uren's earnest argument, in my opinion in relation to a motor car which has broken-down no distinction can be drawn between the vehicle which is being towed and a vehicle which is being pushed. In each case, when one is considering whether the broken-down vehicle was being "driven", the man behind the wheel would be properly and accurately described as "steering" the broken-down vehicle and not driving it. He is not in control of any propulsion, having no engine to provide the power. It is true he can use the brake; he can use the steering wheel. If he should use the brake, then in either case, the towing or pushing vehicle can continue to exert pressure, and if the engine of the vehicle is strong enough, the broken-down vehicle would continue to be moved and the action of the steerman in braking completely frustrated. If in either case, he attempted to steer away from the towing or pushing vehicle, then the vehicle thus steered would lose the benefit of the tow or the push. Of course, the steerman can choose the course of his vehicle if he is in front of the pushing vehicle. But in order to get the benefit of the push, he must accommodate his steering to the position of the vehicle pushing. He is in precisely the same situation, really, as a broken-down vehicle being towed. His vehicle will cease to move to its destination if he steers away from the position of propulsion.

To adopt the verbiage of the former Chief Justice in *Caughey v Spacek*, *supra*, the steerman would have a limited power to control the direction, but only to the extent permitted by the momentum which his vehicle has gained by being pushed. He has the power to decrease its speed by the brakes, that is very true, but that, as I said, could have been completely frustrated. On a decline, he could allow its speed to increase. Again, that could be applicable to a broken-down car being pulled or pushed. But if the broken-down vehicle has a destination and it had to leave the decline it would require the pushing vehicle to continue to be close to the broken-down vehicle, even on the decline, in order to propel it from the decline to its destination.

His Honour continued (at p604):

> "He had no power, by virtue of his occupancy of the car, to determine the route to be taken or even the ultimate destination of the car in which he was driving, for these were clearly in the power of the driver of the towing car."

As to the first of those two matters, it might be said, as Mr Uren pointed out, that the car being pushed would have the power to determine the route, but unless he was going downhill, he would still require the pushing vehicle to be behind him to get to his destination and it is the pushing vehicle which really determines the movement to enable the course of the movement to be followed to the destination.

His Honour continued, *ibid.*:

> "The car was being propelled, not by its own motive power or any act on the part of the respondent, but solely by the force exerted by the tow."

That *dictum* can be applied strictly to the facts of this case. 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.

His Honour finally said:

> "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."

Mutatis mutandis, those words can be applied directly to the facts of this case.

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*, *supra*.

In my view, this order nisi should be discharged with the usual order as to costs. Orders accordingly.

Solicitor for the informant: John Downey, Crown Solicitor. Solicitors for the defendant: D and A Aronson.
