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SUPREME COURT OF QUEENSLAND — FULL COURT

ALLAN v QUINLAN, ex parte ALLAN

Connolly, Williams and Ambrose JJ

4 July 1986 — [1987] 1 Qd R 213; (1986) 3 MVR 343

MOTOR TRAFFIC – MOTOR CYCLE COASTING DOWNHILL – ENGINE NOT RUNNING – RIDER SEATED SIDE SADDLE – WHETHER DRIVING.

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.

CONNOLLY J: **[1]** The respondent was charged with driving a Yamaha motor cycle on Barney Street, Gladstone, not being at the time the holder of a driver's licence authorizing him to drive that vehicle on that road and being disqualified from holding or obtaining such a licence. The following were stated by the police prosecutor to be relevant facts:-

"At about 4.20 pm on 5th December, 1985 Constable Tucker was riding an unmarked Police Trail Bike southerly along Barney Street, Gladstone. At the same time, date and place the defendant now before the Court was observed by Constable Tucker travelling in a northerly direction along Barney Street on a white coloured 'Yamaha' motor cycle. It is alleged –

(a) the engine of the defendant's motor cycle was not in operation;
(b) the defendant was seated on the motor cycle in a 'side saddle' fashion;
(c) the motor cycle was travelling of its own motion down a slight decline at a speed estimated to be 10 km/h;
(d) the defendant had hold of the handlebars with both hands controlling the direction of travel of the cycle;
(e) The defendant applied the brakes of the motor cycle to stop the cycle."

The respondent's solicitor then formally admitted those facts. The Stipendiary Magistrate dismissed the complaint on the authority of the decision of this Court in *MacNaughtan v Garland* [1979] Qd R 240 holding that it must be shown that the respondent was "in a substantial sense controlling the movement and direction of the vehicle". The magistrate concluded, as I read his reasons, from the facts that the momentum of propulsion was acquired by gravity and that the respondent's **[2]** capacity to control the path of travel of the cycle was limited in that he would have been unable to turn his cycle at any 90 degree angle that he was not in a substantial sense controlling the movement and direction of that cycle.

The complainant appeals by way of order to review contending that the Stipendiary Magistrate was wrong in law in holding that the respondent did not drive the motor cycle at the relevant time.

The word "drive" is not defined in the *Traffic Act*. Section 9 contains a definition of "driver" being "the person driving or in charge of any vehicle ..." In my opinion it is not really helpful here for the Act evinces an intention where it intends an offence to be constituted by being in charge of a motor vehicle to say so. See s16(1)(a) for an example. Section 15(1), under which this charge is laid, deals with driving. Accordingly, it is the ordinary and natural meaning of the word "drive" in this context with which the Court is concerned. Moreover we should bear in mind that the *Traffic Act* is a penal statute and must be strictly construed: *Wornes v Rankmore* (1976) Qd R 85 at p88. "We have to remember that this is a penal Act and we are bound to construe it strictly

and ought not to stretch the language in any way": *Wallace v Major* (1946) KB 473 at p477 per Lord Goddard CJ; [1946] 2 All ER 87.

In *MacNaughtan v Garland* (*supra*) it was held that the person at the wheel of a vehicle under tow was not driving that vehicle. At p244 Kelly J, delivering what was, in effect, the judgment of the Full Court said:-

> "In my view it follows from a consideration of the various judicial definitions or explanations of 'driving' to which I have referred that it is not sufficient to constitute 'driving' that there should merely be the limited type of control over direction and speed which is exercised by a person in charge of a vehicle that is being towed. It could not be said that such a person was 'in a substantial sense controlling the movement and direction' of the vehicle as those matters are necessarily dictated by the towing vehicle. I would not consider that it could properly be said that such a person was 'driving' in any ordinary sense of that word."

The notion of driving as being the controlling of the movement and direction of the vehicle in a substantial sense derives from *Ames v MacLeod* (1969) SC 1. The reference to driving in any ordinary sense of the word echoes the language of Lord Parker CJ in *R v Roberts* (1965) 1 QB 85 at p88; [1964] 2 All ER 541:–

> "It seems quite clear to this court that taking and driving away are two elements which in every case must be proved, and that, on the authorities, a man cannot be said to be a driver unless he is in the driving seat or in control of the steering wheel and also has something to do with the propulsion. Thus it has been held that a man who, without starting the engine, steers a motor lorry down a hill when it has run out of petrol is a driver because he has been responsible for the motion. On the other hand, it has been held that somebody sitting in the driving seat in a vehicle which is being towed is not driving, because he himself has nothing to do with the propulsion. There are no cases, so far as this court knows, where a man has been held to be guilty of taking and driving away if, although he has something to do with the movement and the propulsion, he is not driving in any ordinary sense of the word."

[3] 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* (*supra*) following *Wallace v Major* (*supra*) which in turn had been followed in *Caughey v Spacek* [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.
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> (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.
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> (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.
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> (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 **[5]** 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.

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 415 at 417; [1984] Tas R 36).

[6] 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.

AMBROSE J concurred.

[Judgment supplied courtesy of CSM Queensland]
