

ROAD TRAFFIC
OFFENCES
IN HONG KONG

Third Edition



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 LexisNexis®

From Jack: This work is, I confess, far from perfect. Much improvement could be made were I able to devote further time to it; alas, the clock on the dashboard waits for no editor. Readers are welcome to email me directly, offering comments, reviews, suggestions, or notifications of any errata within these pages.

Last but not least, all errors are entirely mine, and mine alone.

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charge of or assisting in the control of it and, in relation to a rickshaw, means any person pulling a rickshaw;

2.3 'Driver'

[1-22] The definition defined under the RTO implies that two individuals may simultaneously be considered drivers, eg, a driving instructor in a dual-control vehicle.

[1-23] In *Tyler v Whatmore*,²⁴ the front-seat passenger had both hands on the steering wheel, could reach the ignition and obstructed the view of the person in the driving seat. It was held that the passenger was driving and, therefore, a driver. It was further held that the act of the person in the driving seat controlling the car's motion, but not its direction, was also driving. See also, on similar facts, *Langman v Valentine*.²⁵

[1-24] However, in *Jones v Pratt*,²⁶ a front-seat passenger who briefly took hold of the wheel and caused the vehicle to go off the road was found not to be the driver in the ordinary sense of the word. In *Cawthorn v DPP*,²⁷ the appellant was convicted of being a driver, failing to stop and failing to report an accident. He had parked his car at the side of the road to post a letter, and while he was not present in the car, it rolled down the road and collided with a brick wall. He arrived at the scene of the accident within a few seconds and, when approached by a police officer, made off. On appeal, it was held that there was a distinction between 'driver' and 'driving'. Under such facts, the appellant was rightly regarded as the driver at the material time.

[1-25] A person seated in the driver's seat can be deemed a driver even without control over the vehicle's momentum, such as when it is propelled by an external source (eg, another person pushing it, a tow rope or gravity).²⁸

[1-26] The definition contemplates a scenario where two individuals control the same vehicle; however, merely having the ability to control a vehicle, without actually doing so, does not constitute being a driver.²⁹

24 *Tyler v Whatmore* [1976] RTR 83.

25 *Langman v Valentine* [1952] 2 All ER 803.

26 *Jones v Pratt* [1983] RTR 54.

27 *Cawthorn v DPP* [2000] RTR 45.

28 See *Saycell v Bool* [1948] 2 All ER 83; *R v Spindley* [1961] Crim LR 486; *McQuaid v Anderton* [1980] 3 All ER 540, [1980] RTR 371; *Fox v Wright*; *Caise v Wright* [1981] RTR 49; *Burgoyne v Phillips* [1983] RTR 49, (1983) 147 JP 375.

29 See *Marsh v Moores* [1949] 2 KB 208, [1949] 2 All ER 27; *R v Wilkins* (1951) 115 JP 443; *Langman v Valentine* [1952] 2 All ER 803; *Evans v Walkden* [1956] 3 All ER 64.

[1-27] A person can only be a driver if they are either in the driving seat or in control of the steering wheel and involved in propulsion. A vehicle allowed to run down a hill unattended is not driven by the person who released the handbrake.³⁰

[1-28] A person who substantially controls the movement or direction of a vehicle is a driver. The activity must fall within the ordinary meaning of 'driving', and the distinction between driving and pushing often hinges on the extent to which the defendant relies on the driver's controls.³¹ If a person has both feet on the road, is pushing the vehicle from outside, and only occasionally adjusts the steering wheel, they are not driving.³²

[1-29] The primary question is whether the defendant uses the driver's controls to direct the vehicle's movement, regardless of how that movement is produced. If so, the court must then consider whether the activity falls within the ordinary meaning of 'driving'. If both criteria are met, the court may conclude that the defendant was the driver.³³

[1-30] A person who assists the driver of a towing vehicle by applying the brakes of the towed vehicle is controlling, directing or retarding its movement, thereby driving it.³⁴

[1-31] Where a vehicle is not being driven, the driver remains the last person to have had sufficient control over it. An intervening act that does not constitute taking sufficient control (such as a passenger releasing the handbrake) does not absolve the original driver of their duties under this section.³⁵ A person who is in a position to control a vehicle and can propel it in a particular direction is considered the driver, regardless of whether the vehicle is moving.³⁶

[1-32] Proving the identity of a driver is a factual matter that should be established early in the case. It is the 'most material step' in building the prosecution's case. The failure to do so in a dangerous driving case is not merely a technicality. Consequently, Lord Goddard CJ held that the magistrate exercises discretion judicially when refusing to allow the prosecution to reopen its case.³⁷

30 See *R v Roberts* [1965] 1 QB 85, [1964] 2 All ER 541 (CA, Eng).

31 See *R v MacDonagh* [1974] QB 448, [1974] 2 All ER 257 (CA, Eng).

32 See *R v MacDonagh* [1974] QB 448, [1974] 2 All ER 257 (CA, Eng).

33 See *McKoen v Ellis* [1987] RTR 26, (1987) 151 JP 60.

34 See *R (Traves) v DPP* [2005] EWHC 1482 (Admin).

35 See *Jones v Prothero* [1952] 1 All ER 434; *Cawthorn v DPP* [2000] RTR 45, (2000) 164 JP 527.

36 See *Leach v DPP* [1993] RTR 161.

37 See *Middleton v Rowlett* [1954] 2 All ER 277.

2.4 'Driving'

[1-33] This term is not defined by the RTO. Each case will depend on its own facts to determine whether the defendant was driving.³⁸

[1-34] To determine the issue, the guidelines in the leading case of *R v MacDonagh*³⁹ should be applied to the facts:

- (1) the essence of driving is the use of the driver's controls to direct the movement of the vehicle;
- (2) an important factor is whether the defendant has deliberately set the vehicle in motion;
- (3) there is a difference between 'pushing' and 'driving', which depends on the extent to which the defendant is relying on the controls to manoeuvre the vehicle;
- (4) it does not matter whether the vehicle is moving under its own power, or under the force of gravity or others pushing.

Lord Widgery CJ stated:⁴⁰

There are an infinite number of ways in which a person may control the movement of a motor vehicle, apart from the orthodox one of sitting in the driving seat and using the engine for propulsion. He may be coasting down a hill with the gears in neutral and the engine switched off; he may be steering a vehicle which is being towed by another. As has already been pointed out, he may be sitting in the driving seat while others push, or half sitting in the driving seat but keeping one foot on the road in order to induce the car to move. Finally, as in the present case, he may be standing in the road and himself pushing the car with or without using the steering wheel to direct it. Although the word 'drive' must be given a wide meaning, the courts must be alert to see that the net is not thrown so widely that it includes activities which cannot be said to be driving a motor vehicle in any ordinary use of that word in the English language.

[1-35] However, a temporary stoppage of the vehicle does not necessarily mean the driver is not driving. The crucial factor is the intention before and the duration of the stoppage. This principle was highlighted in the case of *HKSAR v Cheung Wai Kwong*.⁴¹ An illustrative scenario is when a driver pauses before completing their journey; in such cases, they may still be considered 'driving', as noted in *Cheung Wai Kwong* at para 28, referencing *Edkins v Knowles*,⁴² an English case that encapsulated the

³⁸ See *Pinner v Everett* [1969] 3 All ER 257.

³⁹ *R v MacDonagh* [1974] QB 448, [1974] 2 All ER 257 (CA, Eng).

⁴⁰ *R v MacDonagh* [1974] QB 448 at 451, [1974] 2 All ER 257 (CA, Eng).

⁴¹ *HKSAR v Cheung Wai Kwong* (張惠光) (2017) 20 HKCFAR 524, [2017] HKCU 3283 (CFA) at paras 26–29 (obiter).

⁴² *Edkins v Knowles* [1973] QB 748, [1973] 2 All ER 503.

cumulative interpretation of prior English authorities regarding the concept of 'driving'.

[1-36] In *Poon Jing v R*,⁴³ there was a conflict in the evidence. The police officer stated that the appellant, a disqualified driver, seated in the driving seat, started the engine, turned the steering wheel left, and was about to exit the car when the officer approached. The appellant claimed he had been a passenger and had moved to the driving seat to use the key to turn on the car radio. The door was open, and he was about to exit when the officer approached. The magistrate did not resolve this conflict but held that as the appellant was 'in control' of the vehicle, he was driving. After considering *MacDonagh*, the court held that there was no finding of fact upon which it could be said the appellant was driving, and the appeal succeeded.

[1-37] By way of further example:

(1) In *R v Roberts*,⁴⁴ it was held that the release of a lorry handbrake, causing the lorry to travel down the hill, was not 'driving'.

(2) See also *Tyler v Whatmore*⁴⁵ for a case involving a driver and a driving instructor, both held to be driving the same vehicle. This decision is in the context of a charge of 'taking and driving away' where the defendant was seen to get into the cab, do something, and get out, whereupon the vehicle rolled down the hill.

(3) In *McQuaid v Anderton*,⁴⁶ the defendant sat in the driving seat of a motor car while it was being towed by a rope connected to another vehicle; the defendant was held to be driving. The same decision was reached in *R v Challinor*.⁴⁷ In *Whitfield v DPP*,⁴⁸ the appellant was at the driver's seat of a tipper being towed by a lorry. The two vehicles were connected with a metal bar with a ball hitch and a shackle. Both ends of the bar were free to move. The appellant was held to be the driver since he had directional control even if he was not in control of the propulsive force from the towing vehicle and was not in a position to apply any braking force. The principles set out in *McQuaid v Anderton* were confirmed.

(4) In *Burgoyne v Phillips*,⁴⁹ the defendant, believing the keys were in the ignition, released the brake, allowing the car to roll

⁴³ *Poon Jing v R* [1985] HKLR 341.

⁴⁴ *R v Roberts* [1965] 1 QB 85, [1964] 2 All ER 541.

⁴⁵ *Tyler v Whatmore* [1976] RTR 83.

⁴⁶ *McQuaid v Anderton* [1980] 3 All ER 540.

⁴⁷ *R v Challinor* [1985] RTR 373, (1985) 149 JP 358.

⁴⁸ *Whitfield v DPP* [1998] Crim LR 349.

⁴⁹ *Burgoyne v Phillips* [1983] RTR 49, (1983) 147 JP 375.

forward. The key was not in the ignition, and he immediately applied the brake, but the car rolled forward and collided with another vehicle. The ignition was off, and the steering locked. The defendant was held to be driving. In *DPP v Alderton*,⁵⁰ the defendant, after an argument with his wife, went to his car parked on the verge outside their house. To release his anger, he engaged in wheel spinning, having the engine running, putting the vehicle in gear but keeping the handbrake on, and then using the accelerator, clutch, and steering wheel without intending to move the vehicle. It was held that keeping the handbrake on while using the accelerator and clutch was controlling the vehicle's movement and amounted to driving.

- (5) In *Rowan v Chief Constable of Merseyside*,⁵¹ a person who knelt on the driving seat, released, and then attempted to re-apply the handbrake to stop movement, was driving.
- (6) In *McKoen v Ellis*,⁵² the defendant was sitting astride a motorcycle, pushing and steering it. The ignition and lights were on, and he was wearing motorcycle clothing and a crash helmet. The Divisional Court held that he was driving. The driver in *Gunnell v DPP*⁵³ sat astride a moped and propelled it with his feet and was found to be driving.
- (7) In *R v Tang Kwong Wing*,⁵⁴ the driver was still in the driver's seat at the end of the journey. Although he was not intending to continue, he was held to be still 'driving' as he was still in control of the vehicle. In *Henderson v Hamilton*,⁵⁵ the defendant was found at 1.45 pm in the driving seat of a vehicle but slumped across the passenger seat. The vehicle keys were under the passenger seat, and the engine was warm. It was held that it could properly be inferred that the defendant had driven it to its position in the absence of any competing explanation of how it had got there. The convictions for driving whilst disqualified and using a vehicle without insurance were upheld.
- (8) In *R v Ma Wai-hung*,⁵⁶ the driver was convicted of careless driving after his car mounted a pavement and struck a policeman on duty. His explanation to the magistrate was that he had driven into a lay-by and was getting out of the car

50 *DPP v Alderton* [2003] EWHC 2917 (Admin).

51 *Rowan v Chief Constable of Merseyside* (1985) Times, 10 December.

52 *McKoen v Ellis* [1987] RTR 26, (1987) 151 JP 60.

53 *Gunnell v DPP* [1994] RTR 151.

54 *R v Tang Kwong Wing* (unreported, HCMA 241/1988, 3 June 1988) (SC).

55 *Henderson v Hamilton* 1995 SLT 968.

56 *R v Ma Wai-hung* [1991] 1 HKLR 174.

when it suddenly dashed forward. The defendant's evidence that he had one foot on the ground and was getting out of the car to hand it over to a parking attendant was accepted. He submitted that he was not driving. On appeal, it was held that it was immaterial that he did not intend to put the car into gear and press the accelerator.

- (9) Compare, however, *DPP v Hastings*,⁵⁷ where the front-seat passenger leaned across the driver and deliberately pulled the steering wheel to make the vehicle veer towards the pavement to frighten a pedestrian friend. The friend was injured when the stunt misfired. The defendant was convicted of reckless driving, but the conviction was quashed, the Divisional Court holding that his actions constituted interfering with the driving of the vehicle and not actually driving it.

[1-38] Once driving has commenced, it is considered a continuous act until it terminates. This issue may arise concerning a police officer's right to require a breath or blood sample from a 'person driving or attempting to drive'.⁵⁸ In *Pinner v Everett*,⁵⁹ police officers followed the defendant without criticising his driving. However, they noticed his number plate was dirty and the number plate light was not functioning. He was stopped, and during the discussion, the officers smelt alcohol on his breath. He was tested and subsequently convicted. The House of Lords, overruling the Divisional Court, held that at the time the police officer smelt alcohol, ie, when he formed his suspicion of alcohol involvement, the defendant was not driving. Lord Reid stated:⁶⁰

I must therefore consider in what circumstances a person can, by the ordinary use of English language, properly be said to be driving a car. Clearly the term cannot be limited to periods during which the car is in motion. Suppose the car is held up in a traffic jam and is stationary for five or ten minutes. No one would say that the driver is not driving during that period. He may have switched off the engine and be reading a book or a map; or he may have got out to clean the windscreen; and I do not think that it would make any difference if he got out to buy a paper from a newsvendor on the pavement. But, on the other hand, suppose the driver pulls up at the kerb and leaves his car to go shopping. I do not think that it could be said that he is driving the car while he is buying groceries. And I do not think that it would make any difference if he remained in the car while his passenger was doing the shopping; he would not then be driving but waiting for his passenger.

57 *DPP v Hastings* [1993] RTR 205.

58 See Chapter 3.

59 *Pinner v Everett* [1969] 3 All ER 257.

60 *Pinner v Everett* [1969] 3 All ER 257 at 259.

Can it, then, be said that to give this ordinary meaning to these words would defeat the manifest intention of Parliament? I do not think so. If a man stopped in a traffic jam is still driving so also he is still driving if stopped by a policeman, and it must then be a question of degree and of circumstances for how long thereafter he can properly be said to be still driving. The mere fact that he has got out of the car would not be enough.

[1-39] By a majority, the House of Lords found that the period that had elapsed since the driver was stopped and the police officer smelt the alcohol was such that, at that time, the defendant was not driving. This decision was followed in *Stevens v Thornborrow*,⁶¹ where the driver had stopped, applied the handbrake, switched off the engine, and sat talking to a passenger for 15 minutes. When approached by the police officer, he was held not to be driving. It should be noted that under Hong Kong blood alcohol law, the reasonable cause to suspect need not arise when the suspect is 'driving or attempting to drive', but may arise after the driver has stopped driving.⁶²

[1-40] The usual principles of the law of attempt apply to attempted driving. For example, in *Kelly v Hogan*,⁶³ the defendant, unfit to drive and without an ignition key, sat in the driving seat and tried to insert other keys into the ignition. The defendant was found guilty of attempting to drive. Merely asking for the car keys does not constitute attempting to drive. In *Harman v Wardrop*,⁶⁴ a motorist gave his keys to a person he mistakenly thought was a police officer. He realised his mistake and asked for the keys back but was refused. This was held not to be attempting to drive. It does not matter that the vehicle could not be driven due to a mechanical defect. In *R v Farrance*,⁶⁵ the defendant was sitting in the vehicle, revving the engine of a car that was incapable of being driven as the clutch had burnt out. He was found to be attempting to drive, the difference between 'driving' and 'attempting to drive' being whether or not the vehicle was actually put in motion.

[1-41] From time to time, drivers have attempted to argue that they drove in a state of automatism; however, the courts seem reluctant to accept such a defence. The onus is on a person sitting in the driving seat when a car is in motion to show that they were incapable of controlling the vehicle, eg, by virtue of a coma or an epileptic fit. In *R v Isitt*,⁶⁶ the defendant was a diabetic who continued to drive despite feeling a diabetic coma coming on.

61 *Stevens v Thornborrow* [1969] 3 All ER 1487.

62 See RTO, s 39B(1).

63 *Kelly v Hogan* [1982] RTR 352.

64 *Harman v Wardrop* (1971) 135 JP 255.

65 *R v Farrance* [1978] Crim LR 496.

66 *R v Isitt* [1978] RTR 211, (1978) 67 Cr App R 44.

The approach adopted by the courts is seen in *R v Quick*,⁶⁷ where Lawton LJ stated:

A self-induced incapacity will not excuse ... nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals while taking insulin. From time to time, difficult border line cases are likely to arise.

[1-42] In *R v Marison*,⁶⁸ the appellant, a diabetic, had a hypoglycemic episode while driving his car, resulting in an accident causing a fatality. Ten days prior, a doctor had been called to see him and found him to be hypoglycemic. He was treated and advised to contact his doctor's surgery for review. The driver was, on the evidence, in a dangerously defective state due to diabetes. It was certainly, on the facts of this case, an attack which he could have reasonably foreseen. The appellant was thus unable to rely on the defence of automatism arising from his diabetes.

[1-43] A limited liability company cannot be convicted of driving. In *Richmond upon Thames LBC v Pinn & Wheeler Ltd*,⁶⁹ the Divisional Court held that the act of driving a lorry was a physical act which could only be performed by a natural person.

driver operated village vehicle (司機操作的鄉村車輛) means a motor vehicle having an overall length not exceeding 3.2 m and an overall width not exceeding 1.2 m constructed or adapted primarily for the carriage of goods on roads in rural areas or areas inaccessible or closed to other motor vehicles, in addition to the carriage of a driver only, but does not include one that is an AV;

driving improvement course (駕駛改進課程) means a driving improvement course provided by a driving improvement school under section 102B(3)(a);

driving improvement school (駕駛改進學校) means a place designated by the Commissioner as a driving improvement school under section 102B(1) and in respect of which the designation is for the time being in force;

driving licence (駕駛執照) means a driving licence issued under this Ordinance;

drug (藥物) means—

(a) a substance specified in Schedule 1A; or

67 *R v Quick* [1973] QB 910 at 922, [1973] 3 All ER 347.

68 *R v Marison* [1997] RTR 457.

69 *Richmond upon Thames LBC v Pinn & Wheeler Ltd* [1989] RTR 354.

- (b) any substance (other than alcohol or a substance referred to in paragraph (a)) which, when consumed or used by a person, deprives a person (temporarily or permanently) of any of his or her normal mental or physical faculties;

Drug Influence Recognition Observation (識認藥物影響觀測) means a test carried out by an authorized police officer on a person, to detect signs that indicate the effect on the human body of the consumption or use of drugs, so as to assist the police officer to form an opinion as to whether or not the person is under the influence of a drug;

e-contact means (電子聯絡方式), in relation to a person, means—

- (a) an electronic mail address through which the person can be contacted by an electronic mail; or
 (b) a telephone number in the numbering plan as defined by section 2(1) of the Telecommunications Ordinance (Cap. 106) through which the person can be contacted by an SMS message;

educational institution (教育機構) means—

- (a) any institution, organization or place which provides, or where there is provided, for 10 or more persons during any one day, whether or not at the same time, kindergarten, primary, secondary or post secondary education or any other educational course which is either—
- (i) registered as a school under the Education Ordinance (Cap. 279); or
 (ii) exempted from registration as a school under the Education Ordinance (Cap. 279);
- (b) any post secondary college registered under the Post Secondary Colleges Ordinance (Cap. 320);
 (c) the University of Hong Kong referred to in the University of Hong Kong Ordinance (Cap. 1053);
 (d) The Chinese University of Hong Kong established under The Chinese University of Hong Kong Ordinance (Cap. 1109);
 (e) The Hong Kong Polytechnic University established under the Hong Kong Polytechnic University Ordinance (Cap. 1075);
 (f) the Hong Kong Baptist University established by the Hong Kong Baptist University Ordinance (Cap. 1126);
 (g) the City University of Hong Kong established by the City University of Hong Kong Ordinance (Cap. 1132);
 (h) The Hong Kong Academy for Performing Arts established by The Hong Kong Academy for Performing Arts Ordinance (Cap. 1135);
 (i) The Hong Kong University of Science and Technology established by The Hong Kong University of Science and Technology Ordinance (Cap. 1141);
 (j) the Hong Kong Metropolitan University established by the Hong Kong Metropolitan University Ordinance (Cap. 1145);

- (k) Lingnan University established by the Lingnan University Ordinance (Cap. 1165);
 (l) The Education University of Hong Kong established by The Education University of Hong Kong Ordinance (Cap. 444);

fail (沒有), for the purposes of sections 39B, 39C, 39O and 39S, includes refuse;

franchised bus (專利巴士) has the meaning given to it by regulation 2(1) of the Road Traffic (Traffic Control) Regulations (Cap. 374 sub. leg. G);

golf cart (高爾夫球車) means a motor vehicle having an overall length not exceeding 3.2 m and an overall width not exceeding 1.2 m constructed or intended for use for the carriage of passengers on golf courses, in addition to the carriage of a driver, but does not include one that is an AV;

[1-44] An issue may arise when a vehicle, although not explicitly labeled as a 'golf cart', shares the same or a similar function and design as a golf cart. In the case of *The Jockey Club Kau Sai Chau Public Golf Course Ltd v HKSAR*,⁷⁰ the court was tasked with determining whether a 'light utility vehicle' exclusively used within the golf course to transport golfers qualified as a motor vehicle under the MVI(TPR)O. Notably, this 'light utility vehicle' was not named as a golf cart and exceeded the statutory width limit of 1.2m, measuring 1.5m. Consequently, the court could not rely on section 2 of the RTO to resolve the matter.

[1-45] Nonetheless, irrespective of whether a vehicle falls under the category of a motor vehicle, the case of *Burns v Currell*⁷¹ introduced an objective test. This test assesses whether a reasonable person, looking at the vehicle, would say that one of its users would be a road user. This objective test has been consistently applied in Hong Kong courts, including the case at hand. Following the application of the *Burns* test, the court in *Jockey Club* determined that the 'light utility vehicle' qualified as a motor vehicle under the MVI(TPR)O. The court's rationale was based on the viewpoint that a reasonable person would consider one of the vehicle's intended uses to be transportation on roads, specifically for ferrying golfers around the golf course. The absence of doors or certain features present in other motor vehicles was not deemed conclusive in this assessment.

goods (貨、貨物) includes burden of any description;

goods vehicle (貨車) means a motor vehicle, or trailer, which is constructed or adapted for use primarily for the carriage of goods, but does not include—

70 *The Jockey Club Kau Sai Chau Public Golf Course Ltd v HKSAR* (2013) 16 HKCFAR 908, [2013] HKCU 2854 (CFA).

71 *Burns v Currell* [1963] 2 QB 433, [1963] 2 All ER 297.

- (a) a motor tricycle or a motor cycle with or without a sidecar attached thereto; or
- (b) a village vehicle;

gross vehicle weight (車輛總重), in relation to a vehicle, means the sum of the weights transmitted to the road surface by all the wheels of the vehicle and includes, in the case of a trailer, any weight of the trailer imposed on the drawing vehicle, and the **permitted gross vehicle weight** (許可車輛總重) of a vehicle means the maximum gross vehicle weight assigned or determined in respect of the vehicle in accordance with regulations made under this Ordinance;

heavy goods vehicle (重型貨車) means a goods vehicle having a permitted gross vehicle weight exceeding 24 tonnes but not exceeding 38 tonnes;

hire car permit (出租汽車許可證) means a permit issued in accordance with this Ordinance authorizing the use of a private car for the carriage of passengers for hire or reward;

[1-46] The legislative purpose of the hire car permit and its effect has been extensively dealt with in the case of *HKSAR v Yuong Ho Cheung & Ors*,⁷² the classic Uber case. In 2018, a group of Uber drivers were convicted in the magistracy of carrying passengers for hire or reward without hire car permits, contrary to section 52(3) of the RTO.

[1-47] Section 52(3) of the RTO states that:

No person shall—

- (a) drive or use a motor vehicle; or
- (b) suffer or permit a motor vehicle to be driven or used,

for the carriage of passengers for hire or reward unless—

- (i) the vehicle is licensed as a public bus, public light bus or taxi;
- (ii) the vehicle is licensed as a private bus and the passengers are students, teachers or employees of an educational institution, disabled persons, or persons employed to assist disabled persons;
- (iia) the vehicle is licensed as a private light bus and is used—
 - (A) as a school private light bus; or
 - (B) exclusively for the carriage of persons who are disabled persons and persons assisting them; or
- (iii) a hire car permit is in force in respect of the vehicle.

[1-48] The defendants appealed their convictions to the Court of First Instance, where the judge dismissed their appeals. In 2020, the Appeal Committee granted the appellants (defendants) leave to appeal to the

⁷² *HKSAR v Yuong Ho Cheung & Ors* (2020) 23 HKCFAR 311, [2020] HKCU 3358, [2020] HKCFA 29.

Court of Final Appeal about the proper construction of 'for the carriage of passengers for hire or reward' under section 52(3) of the RTO.

[1-49] The fact of the case is that, on or before 2018, the respective appellants accepted passengers' ride orders through the Uber app using their own vehicles that were without a hire car permit. After each ride, the passengers paid a fare via credit card to the Uber entity. The Uber entity then remunerated the appellants with fees. There were no direct payments from the passengers to the appellants.

[1-50] Charged under section 52(3) of the RTO, the appellants argued that the Uber model was not envisioned when the section was enacted, asserting that their actions did not fall within the intended scope of the statutory scheme. They contended that a direct contractual relationship between the appellants and passengers was a prerequisite for the application of section 52(3) of the RTO, positing that the phrase 'for the carriage of passengers for hire or reward' implied a direct contractual obligation between them.

[1-51] The court rejected the appellants' arguments. Through a purposive interpretation of the entire RTO and related legislative frameworks governing road traffic, the court determined that the legislative intent behind section 52(3) of the RTO was to employ a licensing system to oversee transport service businesses in Hong Kong. Consequently, the phrase 'for hire or reward' in section 52(3) of the RTO should be interpreted in relation to the nature and context of the commercial carriage, rather than mandating a direct agreement as contended by the appellants. Therefore, section 52(3) of the RTO applied in this instance, and the appellants were found to have violated the provisions by not obtaining hire car permits before transporting passengers for commercial purposes.

[1-52] See also *Chen Hai Tao & Anor v Transport Tribunal*⁷³ for a successful judicial review application by two Uber drivers against the Transport Tribunal's dismissal of the reviews of the Commissioner's refusal to grant them hire car permits.

hospital (醫院) means an institution which provides medical or surgical treatment for in-patients or out-patients;

Impairment Test (損害測試) means a combination of any or all of the tests specified by the Commissioner of Police under section 39T(1), carried out by an authorized police officer on a person, so as to assist the police officer to form an opinion as to whether or not the person's ability to drive properly is impaired by the consumption or use of drugs;

⁷³ *Chen Hai Tao & Anor v Transport Tribunal* [2025] HKCU 3368, [2025] HKCFI 2686.

[1-53] 'In charge'. A drink-driving offence may be committed by a person who is 'in charge' of a vehicle. The expression is not defined by the RTO. It will be a question of fact in each case whether a person is 'in charge'.⁷⁴ The relevant factors are set out in the leading case of *DPP v Watkins*,⁷⁵ where Taylor LJ said:

Broadly there are two distinct classes of case. (1) If the defendant is the owner or lawful possessor of the vehicle or has recently driven it, he will have been in charge of it, and the question for the court will be whether he is still in charge or whether he has relinquished his charge. That is the class to which the rule in *Haines v. Roberts* [1953] 1 W.L.R. 309 was directed. Usually such a defendant will be prima facie in charge unless he has put the vehicle in someone else's charge. However he would not be so if in all the circumstances he has ceased to be in actual control and there is no realistic possibility of his resuming actual control while unfit, e.g. if he is at home in bed for the night, if he is a great distance from the car or it is taken by another.

(2) If the defendant is not the owner, the lawful possessor or recent driver, but is sitting in the vehicle or is otherwise involved with it, the question for the court is, as here, whether he has assumed being in charge of it. In this class of case the defendant will be in charge if, whilst unfit, he is voluntarily in de facto control of the vehicle or if, in the circumstances, including his position, his intentions and his actions, he may be expected imminently to assume control. Usually this will involve his having gained entry to the car and evinced an intention to take control of it. But gaining entry may not be necessary if he has manifested that intention some other way, e.g., by stealing the keys of a car in circumstances which show he means presently to drive it.

[1-54] His Lordship went on to say that the circumstances that would be taken into account would vary infinitely but the following would be relevant:

- (1) whether, and where, he is in the vehicle or how far he is from it;
- (2) what he is doing at the relevant time;
- (3) whether he is in possession of a key that fits the ignition;
- (4) whether there is any evidence of intention to take, or assert control of, the car by driving or otherwise; and
- (5) whether any other person is in, at or near the vehicle and, if so, the like particulars in respect of that person.

[1-55] In *Leach v Evans*,⁷⁶ the defendant was seen by a police officer approaching a motor van which was stationary at the side of the road. When he was three yards away, he told the police officer that the van was

74 See *R v Harnett* [1955] Crim LR 793; and *DPP v Webb* [1988] RTR 374.

75 *DPP v Watkins* [1989] QB 821 at 831, [1989] 1 All ER 1126.

76 *Leach v Evans* [1952] 2 All ER 264.

his and he was going home. He was under the influence of drink at the time. He was held to be 'in charge' of the van at the material time and was convicted of being in charge of a motor vehicle on a road while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. Had the driver in *Poon Jing v R* been charged with drunk in charge, it is likely that he would have been convicted. In *Woodage v Jones (No 2)*,⁷⁷ a driver was stopped by another motorist and pulled into a garage forecourt. He was told that the police had been called and he walked away being arrested half a mile away. He was held to be 'in charge' as he had not given the keys to the vehicle to anyone else. If the defendant is not the owner or possessor and has not recently driven the vehicle but is found sitting in the vehicle or is otherwise involved with it, the issue is whether he has assumed charge of it. It was held in *DPP v Watkins*⁷⁸ that there must be a close connection between the defendant and the control of the vehicle but that did not necessitate proof of the likelihood of the defendant driving the vehicle. In *Crown Prosecution Service v Bate*,⁷⁹ the defendant was charged with 'being in charge of a motor vehicle after consuming alcohol'. The question was whether an intention to drive was relevant. The defendant had left a public house after consuming alcohol. He walked to his car, opened it and sat in the driver's seat, closing the door. The keys were in his hand. The engine was not running. It was accepted that the defendant had intended to telephone his wife to arrange a taxi home. It was held that the defendant, by entering and sitting in the vehicle, had reasserted his charge of the vehicle and it was not necessary for the prosecution to establish that the defendant had an intention to drive in order to prove the offence, when there was other evidence that established that the defendant was in charge of the vehicle in question. It was further held that the intention would only have become material upon an examination of the statutory defence under section 5(2) of the Road Traffic Act 1988 (UK) (which is similar to the defence under section 39A(4) of the RTO). In *Crown Prosecution Service v Thompson*,⁸⁰ the defendant was charged with 'being in charge of a vehicle when unfit to drive through drink'. At the material time, the reverse lights of the vehicle were illuminated but the engine was not running. The defendant was found in the vehicle, asleep across the front seat. The keys were in the ignition and the heater fan was working. The gear stick was in the reverse position. An opened bottle of wine was on the front passenger seat. When asked, he got out of the vehicle and was unsteady on his feet and smelled of alcohol. He gave evidence that it was a company van and he often slept in the vehicle. He had no intention

77 *Woodage v Jones (No 2)* [1975] RTR 119, (1974) 60 Cr App R 260.

78 *DPP v Watkins* [1989] QB 821, [1989] 1 All ER 1126.

79 *Crown Prosecution Service v Bate* [2004] EWHC 2811 (Admin).

80 *Crown Prosecution Service v Thompson* [2007] EWHC 1841 (Admin).