

## Opinion No. 53-5858

December 4, 1953

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Rosendo Garcia, Director Driver's License Branch Bureau of Revenue Santa Fe, New Mexico

{\*280} In your letter dated November 24, 1953, you refer to § 68-2317 (a), 1941 Comp., 1953 Suppl., being § 54, Ch. 139, L. 1953, which provides as follows:

"It is unlawful and punishable as provided in paragraph (d) of this section for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state."

You request our opinion upon the meaning of the words "in actual physical control of any vehicle within this state."

The title of Ch. 139, L. 1953, provides, in part, as follows:

"An act providing for a code regulating traffic on highways and defining certain requirements in the use of highways and in the use and operation of vehicles operating on those highways; . . ."

Sec. 68-2111 (c), 1941 Comp., 1953 Suppl., defines "driver" as follows:

"Driver -- Every person who drives or is in actual physical control of a vehicle."

Under § 68-2124, 1941 Comp., 1953 Suppl., the provisions of §§ 68-2301 -- 68-2318, inclusive, are made applicable upon highways and elsewhere throughout the state.

It is apparent that if these sections are applicable in places throughout {\*281} the state other than on the public highways that the law exceeds the scope of the title of the act and would therefore be invalid. We shall assume then that the title of the act governs the scope of these sections and that § 68-2317 (a) is limited to driving or being in actual physical control of a vehicle upon the public highways of this state.

We come then to the meaning of the words "in actual physical control of any vehicle within this state". Similar language has been construed in some instances by other courts as referring to the actual physical handling of the controls of a vehicle. In a number of civil actions for damages a person has been held civilly liable even though he was not actually handling the controls where he permitted an incompetent and unqualified person, such as an unlicensed minor, to operate the car in which the owner was riding. The actual physical handling of the controls is clearly synonymous in meaning to the driving or operating of a motor vehicle and a person may be liable under

the act whether the vehicle is in motion on the highways or not depending upon the circumstances. For instance, a car stopped at an intersection waiting for the traffic signal to change would be in operation and under the physical control of the person handling the controls. Or a car may be at rest after a collision, or a disabled car might be towed while being steered and within the physical control of the person steering the towed vehicle. The primary test, which might vary with different facts, seems to depend upon whether the vehicle is being driven, operated or handled upon the public highways by an intoxicated person having charge of the controls of the vehicle.

Cases dealing with the question of driving and operating vehicles while under the influence of liquor are annotated in 42 ALR 1500, 49 ALR 1393, 68 ALR 1357, and 137 ALR 474.

Trusting this satisfactorily answers your inquiry.

By: C. C. McCulloh

Assist. Attorney General