SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Forklift truck's 3rd party insurance?

Does the law require forklift trucks to have the third party insurance of motor vehicles? The Hong Kong High Court's Judgment [Magistracy Appeal No 241 of 1996] dated 2/5/1996 explained the legal principles to answer this question.

This was a case stated by a magistrate sitting at Tsuen Wan. On 8/7/1995 at about 4.30pm a police officer on mobile patrol saw a forklift truck moving very slowly along Cheung Fei Road, Tsing Yi at about 10 kph. He stopped the forklift truck and found the forklift truck diver having no driving licence to drive the forklift truck and neither was the truck licensed. The forklift truck driver was arrested and charged with three offences. The first charge alleged that he drove a motor vehicle namely a forklift truck, on a road without a valid driving licence, contrary to s.42(1) and (4) of the Road Traffic Ordinance (Cap 374); the second charge alleged that he drove a vehicle, namely a forklift truck, on a road when that vehicle was not licensed, contrary to s 52(1), (10) of the Road Traffic Ordinance (Cap 374); the third charge alleged that he used a motor vehicle, namely a forklift truck, on a road where there was no third party insurance in relation to that user, contrary to s 4(1), (2) of the Motor Vehicle Insurance (Third Party Risk) Ordinance (Cap 272). The forklift truck driver pleaded guilty to all three charges and was fined. In addition, in respect of the conviction on the third charge, he was disqualified from holding a driving licence in any form for 12 months. On 16/8/1995, the forklift truck driver applied for a review, and the magistrate set aside the conviction on the third charge and dismissed that charge. Against that dismissal the Attorney General appealed by way of case stated.

At the review hearing, the forklift truck driver argued that the prosecution had not proved that the forklift truck was a motor vehicle within the definition of that term in s 2 of the Motor Vehicle Third Party Risk) Ordinance, ie to prove that the vehicle was 'intended or adapted for use on roads' and he could not be convicted under s 4 of that Ordinance. Relying on *Burns v Currell* [1963] 2 QB 433 where a gokart was held not to be a motor vehicle, the forklift truck driver contended that the forklift truck was not a motor vehicle. The Attorney General argued at that hearing that the test was whether the vehicle was 'apt or fit' for use on roads and that was an objective test. The forklift truck having all the attributes of a motor vehicle was found travelling on the road. It was a motor vehicle within the meaning of that term in s 2 of the Ordinance.

The relevant part of the definition of 'motor vehicle' in s 2 is as follows:

> … a vehicle intended or adapted for use on roads and propelled by any form of mechanical power and includes a motor bicycle … but not a vehicle drawn by any other motor vehicle nor any conveyance for use solely on railways or tramways.

The magistrate found that the forklift truck was not any more adapted or intended for use on a road than a gokart or motorised lawnmower, which might be capable of being used on a road but that was not its intended purpose nor was there any evidence that it had been so intended or adapted. He found the forklift truck not a motor vehicle and dismissed the charge.

The question was whether on the facts found by the magistrate, the forklift truck was a motor vehicle, ie it was a vehicle 'intended or adapted for use on roads'. The meaning of these words 'intended or adapted for use on roads' and the test to be applied had been considered in a number of cases.

The first case was *Daley v Hargreaves* [1961] 1 All ER 552. In this case, a dump truck was seen being used on one occasion on a short stretch of road in the immediate vicinity of a construction site. There was no evidence to indicate it was suitable to be driven on the road and how it reached the site. The maximum speed it was capable of attaining was 5 mph. The Divisional Court found the words 'intended or adapted for use on roads' mean no more than 'suitable or apt for use'. However, following *MacDonald v Carmichael* 1941 SC (J) 27, the court came to the conclusion that the evidence of limited use of the dumper was insufficient to establish that the dumper was intended or adapted for use on roads.

The next case was *Burns v Currell* [1963] 2 QB 433. The vehicle involved was a gokart which was a self propelled vehicle mounted on four wheels having the attributes of a motor car, ie having a steering wheel, steering column, silencer etc. The driver was found sitting on it on a public road. On a case stated, Lord Parker CJ said this in respect of the meaning of the word 'intended':

> For my part, the expression 'intended' to take that word first, does not mean intended by the user of the vehicle either at the moment of the alleged offence or for the future. I do not think that it means the intention of the manufacturer the wholesaler of the retailer ….
> Salmon J suggested that the word 'intended' might be paraphrased as 'suitable or apt'…. But I prefer to make the test whether a reasonable person looking at the vehicle would say that one of its users would be a road user. In deciding that question, the reasonable man would not, as I conceive, have to envisage what some man losing his senses would do with a vehicle, nor an isolated user or a user in an emergency, The real question is: is some general use on the roads contemplated as one of the users?

Salmon J considered this case similar to *Daley v Hargreaves* and found on the evidence that the prosecution had not proved that the gokart was fit and apt for use on the road. He added this:

> This again, in my view is a case similar to *Daley v Hargreaves*, where the prosecution have not proved their case, …

It would appear from both the case of *Burns* and the case of *Daley*, whether a vehicle is a motor vehicle for the purpose in question depends very much on the facts of the particular case and whether by applying the test in *Burns*, it has been proved that one of the users of the vehicle is a road user.

In *Percy & Anor v Smith* [1989] RTR 252, a forklift truck was licensed as a works truck to enable it to go on the road and it was sometimes driven on a public road when being moved between the defendant company's premises. Except that the driver's visibility was poor because of machinery in front of the windscreen, the vehicle had all the attributes of a motor vehicle, being equipped with a windscreen, a cab with two doors, wings with indicators, body panels, lights, horns and a reverse light. The justices found it to be a motor vehicle. On appeal, the Divisional Court held that the justices were entitled on the evidence to come to that conclusion, after they applied the test in *Burns* and in applying the test, the justices were entitled to have regard to the actual use by the defendant company and the previous owner of the vehicle. Again *Percy* is another case decided on the evidence and it did not really set down that a forklift truck was necessarily a motor vehicle.

A further case cited was *Childs v Coghlan* (1968) 112 SJ 175. In this case a scraper, the primary function of which was for use on building sites, to dig, carry and dump earth on a construction site, because of its size, was not transportable and had to go on its own power on the road to move from one site to the other. Travelling between 20 to 45 mph on the road, it collided with another vehicle. It was held by the justices not a motor vehicle. On appeal by the prosecution, Lord Parker CJ, applying the reasonable person test, held it was a motor vehicle. He said:

> The real question is: 'is some general use on the road contemplated as one of the users?' In the present case, if a reasonable person looked at the vehicle with the knowledge that it had to go from site to site

> and to use the roads in so doing and was capable of speeds of up to 45 mph, it seemed clear that such person would have said that one of the users of the vehicle would be a road user.

The appeal was allowed.

The Hong Kong case of *Lai Tung Sang c*oncerns a crane truck and there was evidence that it had to be driven on the road to reach construction sites and in fact had been driven on the road for a number of times. The argument on appeal that it was not a motor vehicle failed.

Once again, these cases were decided on the evidence of the need to use the vehicle on the road and the speed which it was able to attain when being driven on the road. These are matters to be taken into account. The fact that a vehicle is of a particular type is not conclusive evidence to show whether it is or is not a motor vehicle. All the circumstances should be taken into consideration in applying the test in *Burns v Currell.*

The Attorney General submitted that the section in the Motor Vehicle (Third Party Risk) Ordinance, having regard to s 19 of the Interpretation and General Clauses Ordinance (Cap 1), should be construed in such a manner as to bring a forklift truck within the meaning of a motor vehicle, otherwise, there would be no protection to the public on the road if a forklift truck was brought on to the road.

The intention of the legislature with regard to the Ordinance is clear, ie to ensure protection to a third party from risk arising from the use of 'motor vehicles'. It is not intended to cover all risks arising out of any form of road user. It cannot extend to any vehicle other than a motor vehicle, in which case, there is other legislation which can provide protection.

In the case in question, the only evidence of the user of the forklift truck on the road was the isolated incident in which it was seen being driven at a speed which was unrealistically slow for motor traffic on a road. The Attorney General had argued before the magistrate that it had all the attributes of a motor car. The evidence was the photographs of the forklift truck. They showed no more than an ordinary forklift truck. There were no such parts as cab or doors or lights as one would expect to find on a motor vehicle on a road. In any case, attributes alone do not prove that it is a vehicle intended or adapted for use on roads. They are merely some of the materials that should be considered in conjunction with such matters as the primary purpose and secondary purpose, whether it is licensed and if so, licensed as what vehicle, and whether it has been used on a road. There was no evidence in the case in question of previous user or repeated user on the road. On the limited evidence, the prosecution had failed to prove it was a motor vehicle. The magistrate was right in concluding it was not proved that the forklift truck was intended or adapted for use on roads and therefore it was not a motor vehicle. The offence under s 4 of the Ordinance was not proved. The magistrate was right in dismissing the third charge and acquitting the forklift truck driver.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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