Definition of "Motor Vehicle Accident" revisited

Transport Accident Commission v Lauren Louise Ball

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Introduction

The Supreme Court of Victoria, Court of Appeal has determined what is a 'motor vehicle' within the meaning of the **Road Safety Act 1986** *and the* **Transport Accident Act 1986**.

Facts

In mid-March 1994 the Respondent ("Ball") had gone with a school friend to that friend's country property at 'Whiskey Flat', Howqua Hills near Mansfield in Victoria. The Respondent and one of her friends had been riding a Honda motor cycle when the Respondent was involved in an accident and suffered injury.

The motor cycle was a Honda ST70 and had been in possession of the current owner since about 1989 or 1990. It was in a good state of repair when he received it but, by use, had fallen into disrepair. The motor cycle was unregistered and had been so for over 20 years.

What is a motor vehicle?

The major issue before the Administrative Appeals Tribunal ("AAT") related to whether the motor cycle involved fell within the ambit of the *Road Safety Act*.

At first instance the Transport Accident Commission ("TAC") claimed that the motor cycle that the Respondent had been riding at the time of the accident did not satisfy the definitions of "motor car" or "motor vehicle" respectively as the motor cycle was neither used, nor intended for use on a highway or in a public place.

Refusal of Liability

The TAC's refusal to accept liability was based on the assertion that the incident in which the Respondent was injured was not a transport accident.

A "Transport Accident" is defined in S.3(1) of the *Transport Accident Act* as "an incident directly caused by or directly arising out of the driving of a motor car or motor vehicle, a railway train or a tram".

"Motor vehicle" is defined in the *Road Safety Act* as meaning a "vehicle which is used or intended to be used on a highway or in a public place and which has its own motive power (other than human or animal power),..."

Decision of the Administrative Appeals Tribunal

Deputy President Macnamara held the view that the objective factors outweighed the subjective factors except for the fact that the motor cycle was not in a roadworthy condition at the time of the incident. This however was a result of default rather than deliberate action taken by any person to make it that way. The motor cycle was clearly in working order in the sense of being mobile. It was able to be moved under its own power and to carry a rider. The motor cycle, no matter what degradation it may have undergone, was a standard road vehicle. None of the other vehicles mentioned in the cases referred to above were in that category.

Deputy President Macnamara noted that from 1 January 1995 pursuant to Section 41A of the *Transport Accident Act* a transport accident could occur where a motor vehicle has never been registered as such under the *Road Safety Act*.

On 10 June 1997 Deputy President Macnamara set aside the Appellant's decision to deny compensation as injuries suffered by the Respondent were suffered in the course of a transport accident.

Appeal to the Court of Appeal

The TAC appealed to the Court of Appeal on a number of grounds.

On appeal Buchanan, J. gave the Judgement, Callaway and Batt, JJ agreed with him.

Decision to the Court of Appeal

It was Buchanan, J.'s view that it was not appropriate to rely upon the evidence of facts such as the place at which the motor cycle was kept or the use to which it was put for the purpose of revealing the owner's state of mind. He turned to the characteristics of the motor cycle itself. He referred to *Newton v Incorporated Nominal defendant supra* where Newton J. at 262 stated that in his opinion a sufficient test of whether a reasonable man looking at the vehicle with full knowledge of its characteristics would say that one of its uses was use on a "highway" defined in Section 3 of the *Motor Car Act 1958* that is, "any street, road, lane, bridge, thoroughfare or place open to or used by the public for such passage with vehicles." Or perhaps whether it was suitable or apt for such use.

The case of *Transport Accident Commission v Serbec supra* was also relied upon. Marks J at 156 stated that there was, in any event sufficient evidence to justify a conclusion that the dune buggy met the objective criteria of a vehicle "intended to be used" in a public place. It was a home made vehicle with all the attributes of one built for the purposes of enjoyment in such places as beaches and other areas to which members of the public legally have access for enjoyment in the use of such vehicles.

In *Burns v Currell* [1963] 2 All ER 297 at 300 the Court of Appeal took the same view of a similar definition. The question was whether a go-kart came within the description of a "mechanically propelled vehicle intended or adapted for use on roads". Lord Parker, CJ with whom the other members of the Court agreed, said at 440 "I think that 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 it means the intention of the manufacturer or the wholesaler or the retailer;...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".

Buchanan, J. stated that in his view

the word "intended" in the used sense of "suitable or apt". Characteristics or attributes of the motor cycle were those of a road going vehicle. It was fitted for use on the smooth surface of a highway shared with other vehicles. The motor cycle has not been modified to adapt it for use as a paddock bike.

Newton J in *Newton v Incorporated Nominal Defendant supra*, had regard to the evidence of its use. The excavator was always transported to and from construction sites by a low-loader and when it was in operation on the road the area in which it was operating was always closed to the public.

Buchanan J.'s opinion was that the evidence of use may throw light on or reinforce or demonstrate what a particular vehicle is suitable or meant for.

The Appellant pointed to the fact that the motor cycle was situated in a place remote from the nearest road, it was currently only used on rough ground and had last been used on a highway some 20 years before. Those circumstances may warrant the conclusion that the owner had no intention of using the motor cycle on a highway.

Buchanan, J.'s opinion was that this was not the test. The use in fact being made of the motor cycle was not dictated by the nature of the motor cycle and threw no light on the question of the use or uses for which the vehicle with its particular physical attributes was suitable for, apt or meant for. Rather this was an eccentric use of a vehicle that remained once suitable or meant for the highway.

The Appeal was dismissed.

Summary

It has this been decided that if a motor vehicle is intended to be used on a highway, that is, manufactured for that purpose then it is a motor vehicle within the meaning of the legislation and capable of taking part in a transport accident in accordance with the legislation. ■

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WA canola farmers in class action over seeds

Cathy Bolt

A farmer in Western Australia has launched representative legal proceedings against a major seed company in a further reflection of the growing use of class actions and no-win, no-pay legal fee arrangements to resolve product disputes in Australia.

The test case — which involves alleged weed contamination in canola seed — is the latest to be run by Peter Long and Co, a law firm from Gunnedah in rural NSW which is rapidly assuming the mantle of the Slater & Gordon of the bush.

In the first major resolution of a rural class action, Mr Long in 1997 successfully sued chemical giant ICI, now Orica in Australia, on behalf of 470 cattle producers hit by a major residue scare three years earlier involving its cotton pesticide Helix.

Including that case — for which individual damages claims totalling around $120 million are still being processed — his firm now has half a dozen class actions on the go against agri-chemical companies, a machinery manufacturer and NSW's Tamworth City Council.

The applicant in the canola seed action, which Mr Long is handling jointly with a Perth law firm, Healy Pynt, is Mr Trevor Wilkins, who farmed at Kondinin at the time of the events leading to the dispute.

Mr Wilkins is claiming damages and compensation for himself and all growers who bought and seeded about 70 tonnes of Karoo canola seed in 1996 which was supplied to WA distributors by Dovuro Pty Ltd, a seed merchant based in Tamworth.

It is alleged that the product, used by around 250 farmers, also contained the seeds of three weeds — cleavers, redshank and field madder — which was evident from results of sample analyses that farmers were not aware of when they planted.

The weeds were subsequently declared prohibited by the Department of Agriculture and an eradication program introduced which included chemical applications, crop inspections, and restrictions on stock being allowed to graze the stubble after crop harvest.

To date, the program appears to have been successful, with none of the weeds yet sighted in the field.

Mr Long said the farmers were claiming both expenses and loss of income and he expected the average claim would be around $20,000. He said Dovuro was being sued both for negligence under common law and for false and misleading conduct under section 52 of the Trade Practice Act.

A New Zealand company, Cropmark New Zealand, which Dovuro contracted to grow the seed, has also been joined in the action.

But the managing director of Dovuro, Mr Bill Tapp, said parts of the seed industry would be devastated if the action was successful, with a flow-on impact for farmers, who would face reduced supplies.

Mr Tapp acknowledged that the three weeds were in the Karoo seed, but said it was imported legally, the weeds were already present in Australia and none of the three was prohibited in WA at the time.

"They have been coming into the country for years in pasture seeds," he said.

Further, not one of the weeds had been identified growing in all the canola that had been planted before or after the control program was implemented. Mr Tapp said it appeared that they did not survive in the WA grainbelt, preferring a cooler climate.

He said Dovuro had only used the New Zealand company to bulk up seed in this one instance because of the huge local demand for canola seed, reflecting the boom in the crop in Australia over the past three years. In NZ, canola could be grown in summer, allowing seed to be supplied to WA farmers 12 months earlier than it otherwise would have been available.

Mr Long said he had a good relationship with Slater & Gordon, the Melbourne-based law firm which has run a number of aggressive class actions, including that against Kraft last year on behalf of people made ill by its peanut paste; and against BHP on behalf of 30,000 indigenous people affected by its Ok Tedi mine in New Guinea.

Mr Long said he tended to refer urban-based matters to Slater and Gordon, while the Melbourne-based firm sometimes referred rural matters to him.

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