IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M.149 & 172/80

Transport law
road user charges
(Reported [1981] 2 NZLR 354)

BETWEEN TAIERE DYNES HAULAGE LIMITED

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 22-23 September, 1980.

Counsel: A.P. Christiansen for Appellant
L.H. Moore for Respondent

Judgment: 3 MAR 1981

Reserve judgment delivered by me

DEPUTY REGISTRAR
HIGH COURT

JUDGMENT OF HARDIE BOYS J.

The appellant Company appeals against its conviction on five charges, each alleging a breach of s 5 of the Road User Charges Act 1977, in that a motor vehicle was operated when its gross weight exceeded the maximum gross weight specified in the distance licence displayed on the vehicle. The alleged offences occurred on three separate occasions and the charges were heard in two different District Courts, but as the question of law raised in each appeal is the same, the appeals were argued together.

The Road User Charges Act, described by Judge Graham in his Law of Transportation in terms of a statutory camel, provides a scheme for the taxation of operators of heavy motor vehicles by requiring licence fees to be paid in respect of distances to be travelled, the amount of the fees being calculated with reference to the gross weight of the vehicle in multiples of one tonne. Distance

licences are issued in multiples of 1000 km, and by reference to a distance recorder which is required to be fitted to the vehicle, it can be ascertained at any time whether or not the distance authorised by the licence or licences being carried has been exceeded. Thus on every journey the vehicle must carry its own licence or licences which at all times meet two requirements. First, they must specify a distance which exceeds that disclosed by the distance recorder. Secondly, they must specify a weight not less than the gross weight of the vehicle.

When it happens that a load is unexpectedly heavier than the current licence permits, a supplementary licence may be obtained, to cover the additional weight over whatever distance, in multiples of 50 km, is required. Supplementary licences are apparently quite readily ob in- able at post offices and other places along the way. o provide for emergencies or other unexpected contingc s, and perhaps in a more general way for the unavailabi .y of a licence in a particular case, s 23(3) provides a defence where the vehicle does not have the appropriate licence, if the Court is satisfied (the onus thus being on the defendant) that:

> "(a) It was not possible to obtain the licence at any time during the period between the time when the need for the licence was reasonably foreseeable and the time when the alleged offence was committed; and
>
> (b) ...an appropriate licence .... has subsequently been obtained...."

This defence was considered by Speight J in Stan Williamson Transport Ltd v Ministry of Transport (Rotorua, M.54/79, 7 August 1979). The vehicle there was carrying logs which had been loaded at a milling site. In such circumstances, actual weighing may be impossible, and there is an acknowledged difficulty in estimating weight because of the great variations that can occur due particularly to moisture content. The Magistrate

had found that in these circumstances, the driver concerned may well have believed the load was not over-weight. Mr Christiansen argued that appeal too, and contended that because of this difficulty, up to the time the traffic officer ascertained the actual weight, the need for the licence had not become reasonably foreseeable: and the defence under the section was thus available.

Speight J responded to this argument thus :

> "It appears from a practical point of view that licensed operators could cynically take the risk of having over-weight loads and then protest when this is detected that they had no prior need to have anticipated the call for an additional licence. If this can be established and if the fee is subsequently paid, then there will be great encouragement to operators to take the risk. Well the answer to that, of course, must be that the Act has been so drawn to permit this but each case will depend upon its circumstances. In the present shape of the provision, if in given cases operators can make out in defence that they had no real anticipati , that loads would be or are in excess, then persons operating just over the limit will probably be able to avail themselves from time to time of such defence."

However, Speight J held that the defence was not available to that appellant, because it had not discharged the evidentiary onus the subsection placed on it: for it was well aware of the likelihood of overweight, but had taken no steps to guard against it.

A vehicle operator may thus not just trust to luck. He has a duty to ensure compliance. But the Act provides that the duty is not absolute. It is a duty to exercise reasonable foresight. There is thus introduced the familiar concept of the reasonable man. He, whose thoughts and actions are the measure of the duty, will wish to comply with the law, and will take due steps to ensure that he does.

In almost every case, the first obligation this duty of compliance will dictate will be that the operator inform himself, as fully as is reasonably practicable in the circumstances, of all relevant factors. Thus reasonable steps must be taken to ascertain the weight of the load, or when it cannot be ascertained, to gauge or assess it, so that the decision which the operator takes as to whether or not a licence is required is an informed one. It may not be necessary to go any further than this in straightforward cases, for example, where on the one hand the load is to be of a stated volume and the unit weight is not variable; and on the other where the exact nature of the load is not known in advance. But where the load is one the unit weight of which varies according to extraneous factors, not themselves measurable, it becomes necessary to resort to and to apply further definition: namely the degree of probability of the load being overweight for which the operator must provide.

This is the kind of question, in a very different context of course, to which their Lordships addressed themselves in C. Czarnikow Ltd v Koufos (The Heron II) /1969/ 1 AC 350. Lord Reid in particular discussed the various constructions which can be placed on the words "reasonably foreseeable". If they are construed strictly, there may well be few situations in which the defence will be available. As Lord Reid said "A great many extremely unlikely results are reasonably foreseeable." However, I respectfully agree with Speight J when he said in the Williamson case that the Act does not "require in advance licensing for extra heavy loads just to cover the exceptional case." The latter words "the exceptional case" are almost synonymous with the phrase "a small minority of cases" which Lord Reid used (p 385) with reference to the words of Alderson B in his famous judgment in Hadley v Baxendale 9 Exch. 341, - "the parties are not supposed to contemplate as grounds for the recovery of damage any type of loss or damage which on the knowledge

available to the defendant would appear to him as only likely to occur in a small minority of cases." Lord Reid then went on (p.388) to discuss R. & H. Hall Ltd v W.H. Pim (Junior) & Co Ltd (1928) 33 Com.Cas. 324, which established that "damages are not to be regarded as too remote merely because, on the knowledge available to the defendant when the contract was made, the chance of the occurrence of the event which caused the damage would have appeared to him to be rather less than an even chance." He then said "But I do not find in that case or in cases which preceded it any warrant for regarding as within the contemplation of the parties any event which would not have appeared to the defendant had he thought about it, to have a very substantial degree of probability."

In these passages is to be found a range of degrees of probability and the range is not confined to the kind of legal relationship under consideration in these cases. If, as I think, a transport operator does not have to cover the exceptional case, then he complies with his obligations if the measures he takes are such as to ensure that he guards against all but the small minority of cases. At the other end of the scale, it is not enough for him to take steps which are likely to result in no better than a rather more than an even chance of compliance, for then he is really taking pot-luck. I would put the duty in these terms, that if there is a substantial probability (I think it obscures the issue in what is essentially a practical matter to refine this further by speaking of "a very substantial degree of probability") that a licence will be needed, it is the operator's obligation to obtain one and thus to ensure that if the probability becomes actuality, the law is complied with.

That I think is as far as I can and should go in attempting to define the nature of the obligation which the section imposes. Whilst the definition must necessarily be in somewhat abstract terms, its application to

individual cases will not I apprehend be difficult. The Court is to look through the eyes of the reasonable man who will have taken all reasonable and practicable steps to inform himself of the circumstances of the particular load and will then obtain the kind of licence which there is a substantial probability the load will require.

In the Williamson case, Speight J suggested that the margin of error contemplated by the section could be only a slight one. That ought not, I think, to be taken as a generalisation. The extent of the margin may of course be an indication of foreseeability, although I at once acknowledge that that can be an ex post facto judgment, and it might also amount to an over-simplification when the load is of a water-absorbent kind where the degree of moisture is not apparent.

I now turn to the facts in the two present appeals, to apply to them the test I have endeavoured to formulate.

Appeal M.172/80 comes from the District Court at Morrinsville. The vehicle, with a trailer, was taking a load of wood chips from Pokeno to Mount Manganui i January 1980. The licence being carried on the truck was for 18 tonnes, whilst the gross weight was a little under 20 tonnes, the discrepancy being 9.2%. The licence for the trailer was in excess of what was required. Evidence was given by the appellant's manager that the weight of wood chips varies by up to 30% according to the moisture content of the logs from which they have come and also according to whether the chips themselves while in stock-pile dry out or become wet. The weight of a load can be accurately assessed only by actual weighing; and there were no weighing devices at the mills, the loading point. The company's trucks are marked at a level which has been calculated for each truck. The calculation has been made so as to ensure that if the truck is loaded to the mark, the average load will be a little under the weight

for which its normal distance licences are purchased. The evidence did not disclose how the calculation was made or the average load ascertained. All drivers are shown how to load to this mark. If the load appears wet, they are instructed to load to somewhat below the mark. The manager conceded that this procedure meant that at times trucks loaded to the mark would be overweight, but pointed out that there was no means of telling whether any particular load would be.

The driver of the vehicle in question gave evidence that he had complied with his employer's instructions with regard to loading. He had a rough idea of the wet and dry weights of chips: the chips in question were extracted from the middle of a pile that was out in the open, but they "looked good" and so were loaded to the mark. The driver did not know of the 30% variation I have referred to. The transcript of his evidence suggests that he was not quite clear as to the significance of the mark, indeed that he thought it w. the .vel to which wet chips could be loaded, whilst dry chips could be loaded to the top. However, this latter part of the evidence is so susceptible to misunderstanding when read from the transcript that I intend to disregard it for present purposes.

The learned District Court Judge pointed out (as the manager had really acknowledged) that by settling on the average as the level slightly below which its loads were carried unless the driver acting on his own observations and initiative decided otherwise, the appellant was "operating on the basis that sometimes it will be over and sometimes it will be under". That, he held, was not consistent with its obligation to "carry a licence which will cover all reasonably foreseeable circumstances".

If every load were filled up to a mark set by reference to the average, the chances are surely that one out of every two loads will be over the average. Whilst it may be reasonably foreseeable that an individual load may not require a licence for a weight greater than the

the average, it is equally foreseeable that an individual load may require one. There is a substantial probability - a 50/50 chance in fact - that the average will be exceeded. The appellant of course fixed its licence level at a little over the average. How much over, the Court was not told. With a 30% variation, I would imagine there must be a substantial probability that a load will exceed the average by 15% especially if weather or other conditions render it likely that the load will have a high moisture content. The driver of course is instructed to load less than the average if the load appears to require that, but that is a very rough and ready method, reliant upon visual or tactile observation of something which may not be apparent to that kind of observation, and is particularly susceptible to error where the driver is unaware of the extent of weight variation which can be caused by the moisture content: as this case itself demonstrated.

In my view, even though it was summer on this occasion, it was a substantial probability, and it was thus reasonably foreseeable, that if the load should be taken up to the level of the average it might well be too heavy for a licence based on that average.

Not only was the requisite degree of foresight not exercised, but also the evidence was to my mind inadequate as to the measures taken by the appellant to inform itself of the factors relevant to the particular load in issue. I have already mentioned the absence of evidence as to the method by which the average load was determined. It is impossible to say whether a true average was struck or not. The appellant's whole case assumes that it was. There is also no evidence of the margin allowed between that average and the weight for which a licence was obtained. On these grounds alone, I do not think the appellant discharged the evidentiary burden which lay upon it in order to rely on the statutory defence.

I must confess to some surprise that it is not possible, even in a fairly rough and ready way, to measure or assess the extent of moisture content, or the weight of the material by sample, and it could be that evidence along those lines, or to the effect that it cannot be done, might be required before a defence can be made out in a case involving this kind of load. That however is another matter upon which I express no firm view at all. I am also far from convinced that it is not reasonable and practicable for each vehicle to have its own weighing device. That topic was not canvassed in the Morrinsville case but it was in the Taupo cases, where a cost of $1,000 for a weighing scale was given. In relation to the cost of licences, fines and penalties, that may not be an unreasonable outlay, but again I do not think the present is the time to pursue the topic.

Appeal M 149/80 comes from Taupo, and concerns two different truck and trailer units, stopped on separate days in March 1980 at Turangi en route from Kopu to Karioi. On each occasion both the truck and the trailer were carrying wood chips and exceeded the licensed loading weight, by 10.3% and 15.38% respectively on the one occasion and by 14.11% and 6.54% respectively on the other. The manager and one of the drivers were called for the defence. The evidence was similar to that given in the Morrinsville case, but it was much less detailed. There was no reference to any levels marked on the trucks. The driver's evidence really amounted to this, that although he and his colleagues were instructed to load as accurately as possible, the variations in weight, not perceptible to the eye, meant that they had to engage in guess work. For what it was worth (very little I think) he acknowledged that the need for a supplementary licence was reasonably foreseeable at the time he took on his load. The manager said he had worked out the "optimum sticker arrangement" that would best suit each truck, by running each one over the weigh bridge empty and then full. Apart from that, he said

there was nothing the company could do other than rely on the experience and judgment of its drivers. It could of course have increased the weights specified in the licenses. Indeed, the trucks had been licensed for heavier weights until this manager arrived, and he had cut them down because he thought the trucks were over-licensed, rarely carrying the loads for which they were licensed.

The learned Judge had considerable sympathy for the appellant, acknowledging the great difficulties in weighing or assessing the weight of loads of wood chips. He held, however, that the statutory defence was not available. "It is clear from the evidence," he said, "that the need for a licence was reasonably foreseeable for the simple reason that there is always a difficulty in determining exactly the weight to be carried." He imposed a nominal fine of $25 on each charge and encouraged an appeal.

With respect, I am not sure that the inherent difficulty in determining the weight of the load in itself shows that overweight was reasonably foreseeable. Where that difficulty exists, reasonable foreseeability of overweight depends on the measures taken, so that the risk of overweight is reduced so as to be no longer a substantial probability. In the instant cases, there was no evidence of any significant measures having been taken at all: the chances of overweight were still 50/50. Thus I think the appellant was rightly convicted on these charges too.

It may be that the legislation is unsatisfactory, even oppressive. On the other hand, there may, as I have suggested, be ways in which operators can better help themselves. Until that is known, it may perhaps be inappropriate to give effect to a critical view of the legislation by imposing only nominal fines except of course in such cases as where the operator has made a genuine effort which the Court rules is insufficient, or where the operator

comes up against the problem for the first time. Fines should not be fixed at a general level that makes them a more attractive proposition than the payment of proper licence fees.

In the Morrinsville case, there was also an appeal against sentence. The learned Judge imposed a fine of $200, treating the appellant as a first offender who had taken some, though inadequate, steps to comply. The maximum fine was increased in 1979 from $5,000 to $15,000. I was referred to the decision of Prichard J in New Zealand Lumber Co Ltd v Ministry of Transport (Rotorua M.84/80, 11 July 1980) in which the learned Judge imposed on a company which had had many previous convictions for similar offences, and had now committed 17 more, a range of fines related both to its past history and to the extent of each individual infringement. The infringements in that case had occurred before the increase in fines took place but even so indicate to me that the fine imposed by the District Court Judge here was not out of line. Although this was to be treated as a first offence, the company was aware of the problem and knew the risk. I am not persuaded that in all the circumstances the fine was manifestly excessive, so that I would be entitled to interfere with it.

The result is that all the appeals are dismissed; with costs to the respondent of $200.

Solicitors: Hole, Christiansen & Royfee, TAUPO, for Appellant
Crown Solicitor, ROTORUA, for Respondent.

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