EXPERT GROUP MEETING ON SUSTAINABLE URBAN TRANSPORT: MODERNISING AND GREENING TAXI FLEETS IN LATIN AMERICAN CITIES

United Nations Department of Economic and Social Affairs (DESA)

Rio de Janeiro, 18 -19 May 2011

Motorcycle Taxi (*Mototaxi*) Service: liability in the case of traffic accidents

Eng. João Alencar Oliveira Júnior, D.Sc.

1. Genesis and Evolution of the *Mototaxi* Service

- ✓ **The use of motorbikes in public transport of passengers in Brazil is quite a recent phenomenon.**

- ✓ **This dates back to 1995, when Crateús, a city in the State of Ceará with a population of approximately 70,000 inhabitants, had no public urban bus transport system.**

- ✓ **The *mototaxi* service appeared informally, clandestinely and on the edge of the law.**

1. Genesis and Evolution of the *Mototaxi* Service

Table 1: Percentage of Municipalities with *Mototaxis* per Region

Regions	Number of Municipalities	Municipalities with *Mototaxi* Service (%)	
		2005	2007
North	449	72.2	75.9
Northeast	1,793	78.9	88.2
Southeast	1,668	23.1	28.5
South	1.188	14.2	16.9
Center-West	466	70.6	72.3
Brazil	5,564	47.1	52.7

Source: IBGE, 2006 and 2008

1. Genesis and Evolution of the *Mototaxi* Service

Table 2: Percentage of *Mototaxi* Services Regulated by the Municipalities and the Informal/Illegal Services by Region

Regions	Municipalities with *Mototaxi* Service (%)	
	% of the Service Regulated by the Municipalities	% of the Informal/ Illegal Service
North	29.6	70.4
Northeast	20.7	79.3
Southeast	49.8	50.2
South	36.3	63.9
Center-West	39.5	60.5
Brazil	29.5	70.5

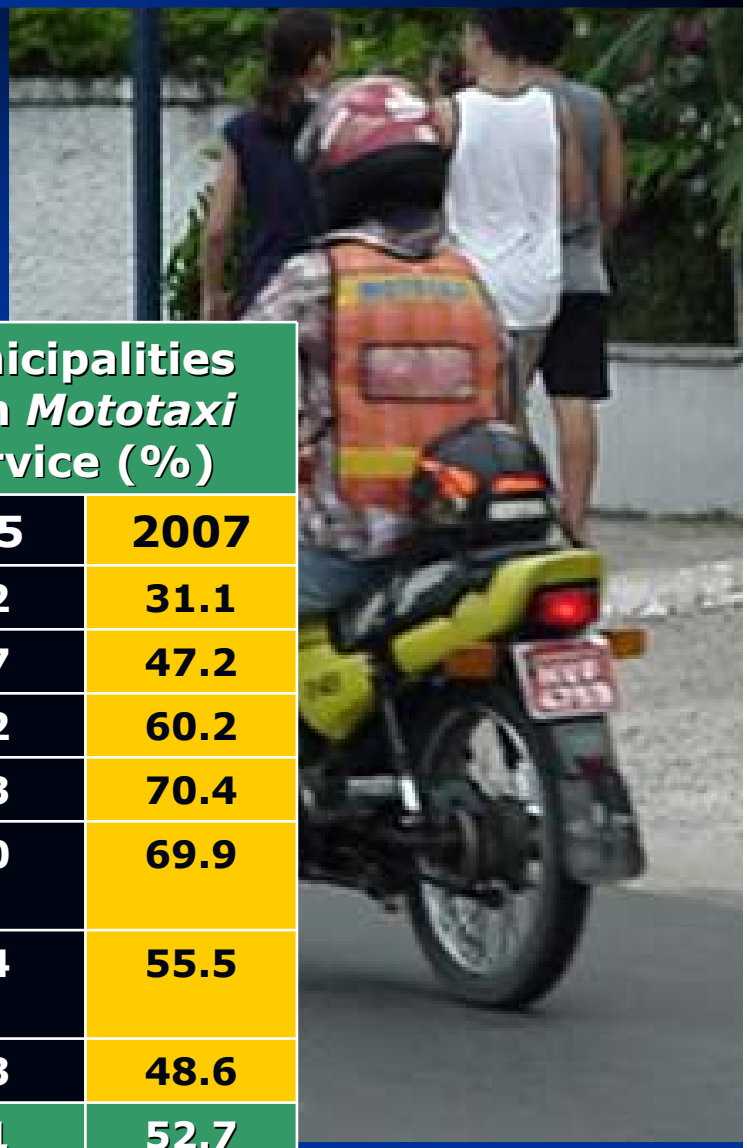
Source: Prepared based on IBGE, 2006

1. Genesis and Evolution of the *Mototaxi* Service

Table 3: Percentage of *Mototaxi* Services by Size of the Municipality

Size of the population of the municipalities	Number of municipalities		Municipalities with *Mototaxi* Service (%)	
	2005	2007	2005	2007
Up to 5,000	1,362	1,267	27.2	31.1
From 5,001 to 10,000	1,310	1,290	39.7	47.2
From 10,001 to 20,000	1,298	1,385	56.2	60.2
From 20,001 to 50,000	1,026	1,037	64.3	70.4
From 50,001 to 100,000	313	319	69.0	69.9
From 100,001 to 500,000	220	229	51.4	55.5
Over 500,000	35	37	34.3	48.6
Brazil	5,564	5,564	47.1	52.7

Fonte: Elaboração com base em IBGE, 2006 e 2008



2. Legal Nature of the *Mototaxi* Service

- ✓ **The Constitution of the Federative Republic of Brazil establishes municipal autonomy to legislate and regulate the activities involving public transport of passengers in their cities, this being a matter of local interest (CF, art. 30, I) .**

- ✓ **Associated with clause V, which defines collective transport as an essential public service of local interest and that can only be exploited by private initiative directly or delegated by concession.**

Art. 30 – Cities are responsible for:

I – legislating on matters of local interest;

V – organizing and providing directly or by concession or permission public services of local interest, including collective transport, which is considered an essential service.

3. Liability (civil responsibility) in *mototaxi* service via permission.

✓ **Liability is for the purpose of repairing damage to third parties.**

Scenario:

Informality is predominant in 70.5% of the cities where the *mototaxi* service exists, without any action on the part of public government to prohibit or regulate the situation.

The question is:

How to consider making provision of the service responsible for an accident that causes damage to third parties (users and non-users) when dealing with a service that is granted a permit or an informal service provided with total omission of the municipal public government?

There are two legal situations to analyze: one deals with a service permitted by law and the other with a "*de facto* permit-holder".

Who is responsible for the damage caused?

What is the responsibility of the public government in such an action (legally permitted) and in omission (*de facto* permit-holder)?

Liability in Risk Activities

Average common sense can analyze objectively that a motorbike represents a greater risk potential when compared with other motorized means of transportation.

It would be sufficient to understand that traveling by motorbike is a risk activity, regardless of whether it is being used for exclusively private ends to transport passengers or as a public service.

CAVALIERI (2007) considers art. 927 of the Civil Code – CC (Law nº 10.406/2002) as the first general clause of objective liability, together with art. 187 of the CC, which defines the scope of abuse of law, implying an illicit act liable for reparation. Single paragraph of art. 927 of the CC is in turn the second general clause of objective liability.

The Brazilian Civil Code (Law nº 10.406/2002)

Art. 927. The person who through an illicit act (articles 186 and 187) causes damage to another person is obliged to repair this damage.

Single paragraph: The damage must be repaired, regardless of guilt, in the cases specified by law or when the activity normally practiced by the author of the damage implies, by its very nature, a risk to the rights of others.

Art. 186. The person who by action or voluntary omission, negligence or imprudence, directly violates and causes damage to another person, even if of an exclusively moral nature, commits an illicit act.

Art. 187. An illicit act is also committed by the holder of a right that when exercised, manifestly exceeds the limits imposed by its economic or social end, good faith or the accepted moral code.

Inherent Risk *versus* Acquired Risk – Risk Theory

According to CAVALIERI (2007):

- ✓ **The theory of created risk is authorized and adopted;**
- ✓ **The development of an activity that offers a risk to society is tolerated;**
- ✓ **By reason of the need for it to exist and the benefits of economic nature;**
- ✓ **Compensation is assumed, regardless of guilt and the cases specified by law, with the obligation to repair damage;**
- ✓ **When the activity normally practiced by the author of the damage implies by its very nature a risk to the rights of others.**

The potential risk is compensated by objective *responsibilization* and the duty to indemnify resulting from damage caused by the activity practiced.

Inherent Risk: **not sustained by the provider of the service, at the risk of making the activity unviable.**

Acquired Risk: **resulting from poor execution of the service provided.**

Acquired Risk:

When goods and services present no risks higher than those legitimately expected, but become dangerous by presenting some defect.

Unpredictability and abnormality are the characteristics of acquired risk.

The Duty of Safety in Risk Activities

One main characteristic of the provision of a public passenger transport service is the contractual obligation assumed with a certain determined result.

The transporter must convey the passenger to his/her destination safe and sound, after which the service is considered to be terminated.

CAVALIERI (2007) understands that in dealing with a service with the obligation of a result, the responsibility will always be objective.

Providing public transport passenger services involves risks, with the (greater or less) probability of causing damage, so the occurrence of accident is not deterministic, and far less so of damage,.

The characteristic of risk activity (inherent risk) is not sufficient to produce the obligation to indemnify.

CAVALIERI (2007, p. 158) claims that :

No-one violates legal duty because they exercise a dangerous activity, especially when this is socially admitted and necessary. Millions do this without having to answer juridically.

Liability arises when the exercise of a dangerous activity causes damage to others.

Producing the obligation of repairing damage and the duty to indemnify are based on violation of a legal duty, not just on the risk.

As individual persons, permit-holders for the *mototaxi* service are qualified in art. 927, single paragraph, of the Civil Code, on account of:

- ✓ **This being an activity of risk to the rights of others;**
- ✓ **Together with the regulations of the Code of Consumers' Rights (CDC), due to the fact that it is a public service provided in the consumer market (art. 14, §§ 1st to 3rd, Law nº 8.078/1990)**
- ✓ **Subsidiary character of the CDC defined in art. 7º, *caput*, of Law nº 8.987/1995 and the prevision of art. 40, single paragraph ("*the provisions of this Law apply to permits*") of the above-mentioned law of concessions and permissions.**

Liability (Civil Responsibility) of the Permit-granting Municipal Public Government

CAVALIERI (2007) argues that State responsibility, as a permit-granting power, is subsidiary rather than solidary.

CAVALIERI (2007) concludes by stating that the State only answers as a subsidiary when "the recourses of the entity that provides the public service are exhausted. If the State chose badly those who exercised the public service, it must answer as a subsidiary if this becomes insolvent".

MELLO (2003) concludes by affirming that "the damage of an activity that directly constitutes the performance of the service, even when fulfilled defectively, involves, in the case of insolvency on the part of the concessionaire, subsidiary liability of the conceding power".

The correspondence between concession and permission sustained by Brazilian jurisprudence and doctrine must be modulated in respect to the legal definition of the permit-holder. If this is a legal person under private law, the correspondence is total and subject to objective liability.

CONCLUSIONS:

It is understood that the duty to indemnify the victim of an accident involving *mototaxi* services applies to both the user and the non-user, since both are subject to the risk of the activity of the public transport service operating on public streets.

The permit-granting entity acts as insurer (objective and subsidiary liability) for the public services delegated by it to private providers (individual or corporate persons).

Indemnity is measured by the extension of the damage (art. 944, caput, CC), with the victim being compensated directly by the State to "settle commitments resulting from the exercise for which it is responsible" because of damage suffered, and not indemnified by whoever was the direct and immediate cause.

Interruption of the causality connection does not apply since the employee acts on behalf of and as substitute for the State up to the limit of his own resources to indemnify the damage caused to the victim.

The State answers as subsidiary also for omission in the case of not having reprehended the existence of the service and this coming to cause an accident and damage to the victim.

CONCLUSIONS:

Liability is objective for risk activities and services offered on the consumer market, as well as for doctrinaire positioning when dealing with activities with the obligation of yielding results, as is the case of public transport of passengers (Civil Code and Code of Consumers' Rights).

The phenomenon of the *mototaxi* service is seen in other Latin American countries, where it comes under the same legal basis inherited from Roman law: Civil Law.

The analyses on liability (civil responsibility) as applied to public transport services for passengers on motorcycles in Brazil can be applied all over Latin America.

Thank you for your kind attention

Eng. João Alencar Oliveira Júnior, D.Sc.
Infrastructure Analyst / Projects Manager
DEREG/SEMOB/MCIDADES
joao.alencar@cidades.gov.br
Tel.: (+55 61) 2108 1136

João Alencar Oliveira Júnior
Civil Engineer (UNIFOR, 1989)
Master (1992) and PhD (2005)
in Transport Engineering (COPPE/UFRJ)
B.A. in Law (UniCEUB, 2010)
jalencarjr@yahoo.com
Mobile: ((+55 61) 8162 3200

Note:

The opinions expressed in this presentation do not represent the opinion of the Ministry of Cities.