

**BETWEEN**

**ACJ**

APPLICANT

**AND**

**GF Insurance Ltd**

APPLICANT'S INSURER

**ZXV**

RESPONDENT

Date of Order:

5 June 2013

Referee:

Referee Robertshawe

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that ZXV is to pay to GF Insurance Ltd the sum of \$3,130.40 on or before 3 July 2013.**

## **Facts**

[1] At approximately 12.20 a.m. on 3 November 2012, ZXV was driving home from a friend's place when he suffered a "blackout" at the wheel caused by an epileptic seizure. As a result, he lost control of his vehicle, and hit a parked car belonging to ACJ.

[2] The damage to ACJ's vehicle cost approximately \$3,264.20 to repair.

[3] ACJ and his insurer, GF Insurance Ltd, filed a claim seeking repayment of this sum from ZXV. ZXV also filed a claim seeking a declaration that he was not liable for the costs.

[4] ZXV did not dispute that the incident occurred, but defended the claim on the basis that he should not be held responsible for the sudden onset of an epileptic seizure, over which he had no control. He was also concerned at the level of costs being claimed.

## **Issues**

[5] Every driver has a duty to act with reasonable care and with due consideration for others. Generally, if a driver hits a parked car, there is an inference that he or she has breached this duty. However, where this occurs as a result of a medical emergency that the driver cannot control, the driver is not necessarily at fault. In those circumstances, to establish liability, the applicant has the onus of establishing that the driver has failed to take care in deciding to drive.

[6] In this case, the collision was caused by an epileptic seizure. To succeed in the claim, the Applicants therefore have the onus of establishing that:

- (i) ZXV's decision to drive was a breach of duty of care;
- (ii) That the damage was caused by ZXV's decision to drive;
- (iii) That the costs were established.

## **Decision**

*Was ZXV's decision to drive a breach of duty of care?*

[7] Having considered all the evidence presented by the parties, I find that a prudent person in ZXV's position would not have been driving that night, and that his decision to do so was therefore a breach of duty of care.

[8] I have reached this conclusion for the following reasons.

[9] Firstly, ZXV advised both ACJ and the police officer at the time of the collision that he had a blackout caused by his epilepsy. ZXV therefore knew he had the condition prior to that night.

[10] Secondly, and more particularly, ZXV stated to the police officer that, whilst he had had epilepsy as a child that he had grown out of, in the month prior to the collision, he had one to two "blackouts" a week. He also told the police officer that he had been meaning to go and see the doctor about it, but that he had not wanted to have his licence revoked. He also said that he had only been getting 5-10 seconds warning of a blackout, and that sometimes it just caused him to "zone out" like he was staring into space, or at other times, as in this case, it caused his body to "freeze up". Finally, he stated that the seizures didn't happen during the day, just at night. The Police Report records him saying that "If I have a real late night, then the next day it will happen, usually in the small hours of the morning".

[11] I am satisfied that these statements establish that: ZXV knew that he had had a reoccurrence of his childhood epilepsy; he had had regular seizures over the preceding month; that whilst these seizures were of differing degrees, they altered his state of consciousness, and would therefore affect his ability to control a vehicle; the riskiest time for him was late at night; and that if he had gone to see a doctor about it that there was a good chance he could lose his licence.

[12] I note that the NZ Transport Agency website urges anyone that has one seizure to check with their doctor before driving (Fact sheet 17, March 2012), and that a single seizure will generally result in a six to 12-month stand down period. Whilst this in itself is not a legal rule, it does show the seriousness with which the risk of epilepsy is taken in terms of risks to other drivers. In this case, ZXV had had between four and eight seizures, had not yet sought medical advice to control his condition, and chose to drive home during a heightened period of risk, late at night. In these circumstances, I find that it was unwise for ZXV to be driving that night, and that a prudent person in his position would not have done so.

[13] I have had regard to any unfairness that might be caused by giving weight to statements made by ZXV that are prejudicial to his defence given the circumstances in which those statements were made. GF Insurance Ltd's key evidence was the contents of the Police Report. The police officer who attended the scene interviewed ZXV after the collision, at approximately 1.30 a.m. Sometimes, people make statements when they are in shock or are upset by what has happened that appear to be admissions, but which are in fact distortions or exaggerations that it would be unfair to hold against them in later proceedings because of the circumstances in which they are said. A second hearing was therefore held to consider what weight could be given to the contents of the Police Report. Having considered the evidence presented at the second hearing, I am satisfied that, despite the circumstances in which it was recorded, the Police Report is a relevant and probative document, and cannot be disregarded in considering what ZXV knew about his condition. This is so for the following reasons.

[14] Firstly, the officer who wrote the report attended the hearing and confirmed that it contained an accurate record of what ZXV actually said. ZXV did not dispute this. The Police Officer also confirmed that ZXV appeared lucid and unaffected by the seizure at the time of the interview, noting that he has a family member with epilepsy and would have noticed if this was not the case. ZXV also did not dispute this.

[15] Secondly, ZXV was given an opportunity to bring medical evidence that might tend to suggest that any statements made following such an event could not be fairly relied upon. He elected not to obtain medical evidence on this or any other matter.

[16] Thirdly, ZXV and his mother both pointed out that ZXV gave the answers in the interview with honesty. ZXV's mother considered there to be some unfairness in them now being held against him. However, whilst those answers – which I fully accept were honestly given – may well have avoided the imposition of any traffic offence, they are sufficient to establish civil responsibility. Given that there is no dispute about the answers given, the setting in which those answers were given cannot be said to have prejudiced the outcome unfairly. On the contrary, unlike statements that might exaggerate or distort the true picture because of the heat of the moment, the statements relate to specific facts which are not in dispute, and cannot therefore be disregarded.

[17] I have had regard to ZXV's evidence that he did not know the extent of his condition; that the blackout he had on the night of this incident was by far the worst he had experienced; that it can take more than one seizure for epilepsy to be diagnosed, and that there are different types of epilepsy that affect different parts of the brain and can impact in varying ways. I accept that the condition is not able to be controlled or predicted, and I also accept that ZXV's use of the word "blackout" in his statement to the Police should not be read to mean "total loss of consciousness", as his experience was often to be no more than "zoned out" or "frozen". However, in ZXV's case, he had had epilepsy as a child, and therefore had knowledge that his condition was likely to be epilepsy. He identified it as such to ACJ and the police officer on the night before he had seen a doctor. His condition was then confirmed by a doctor shortly after the collision, and his licence was revoked. Also, even though ZXV did not tend to "black out" in the sense of losing consciousness, his description of how the seizures affected his body should have put him on notice that he would be unsafe behind the wheel of a car. In these circumstances, ZXV had a duty to get medical advice and/or stop driving until he had his condition under control.

*Was the damage caused by ZXV's decision to drive?*

[18] It was not in dispute that this incident was caused by an epileptic seizure.

[19] Given the finding above that ZXV had a duty not to drive because of condition, ZXV's decision to do so was the effective cause of the damage.

*Were costs established?*

[20] GF Insurance Ltd presented an assessor's report of the damage to ACJ's car. There was damage to both the front and rear of ACJ's car, as the force of the collision pushed the parked vehicle back into a fence. The initial assessment sheet dated 16 November 2012 for \$3,130.40 records damage that was consistent with this event. GWD Automotive completed this work on 20 November 2012. It was this sum for which ZXV was initially held liable by GF Insurance Ltd. However, a subsequent assessment sheet recording a further repair of a fault in the driving lamp for \$133.80 was completed on 29 January 2013, and was later included in GF Insurance Ltd's claim, increasing the sum claimed to \$3,264.20.

[21] The work in the initial assessment sheet relates to car parts that ACJ confirmed were damaged in the collision, and are consistent with how the car was likely to have been damaged due to the nature of the event. However, whilst the second assessment for a headlamp fault was in the same area of the car, it is not possible for GF Insurance Ltd to establish now whether that fault was caused by the accident, or the initial repair, or otherwise. The award is therefore limited to the original assessment.

[22] I have had regard to ZXV's concern that he did not get an opportunity to view the vehicle, or to provide an alternative quote at the time. It was open to him at the time to take photographs or get quotes in case he was later held liable, and he could have obtained alternative repair costs based on the assessor's report for the second hearing. However, ZXV did not pursue this matter either prior to or at the hearings. I can understand that he was initially surprised by the level of damage given that his vehicle was comparatively unharmed, but I am satisfied that the costs claimed are for repairs to the parts of the car that ACJ confirmed were damaged in the collision, that the assessor personally viewed the car when he made his assessment, and that the costs are reasonable for the nature of the damage described.

[23] For these reasons, I find that ZXV is liable to pay GF Insurance Ltd the sum of \$3,130.40 by the date stated in the order.