

BETWEEN

AGE

FIRST APPLICANT

AND

AGH

SECOND APPLICANT

AND

BR INSURANCE LTD

APPLICANT'S INSURER

AND

ZVR LTD

RESPONDENT

Date of Order:

23 November 2012

Referee:

Referee Eyre

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the claim by AGE and AGH against ZVR Ltd is dismissed.

Facts

[1] On 30 March 2011, AGE and AGH were driving from [a town] to Dunedin. AGE drove through an area of road construction work near [a road] and followed a line of slow moving traffic passing to the left of a road sweeper. AGE left a gap between the car in front and his car, so as to avoid gravel from the car in front hitting AGE's car. However, as he passed the road sweeper, AGE claims it showered stones and gravel onto their car.

[2] AGE and AGH claim this caused damage and that ZVR Ltd should pay for the repair costs of this damage. AGE and AGH are insured with BR Insurance Ltd and the damage to the car has been repaired. The sum claimed for the repairs is \$5,686.91.

Issues

[3] The issues are as follows:

- (i) Was ZVR Ltd negligent in its operation of its road sweeper?
- (ii) If so, was any damage caused and is ZVR Ltd liable to pay for the damage caused?
- (iii) If ZVR Ltd was not negligent, is there any other reason it should be required to pay for the damage?
- (iv) Was AGE careless in passing on the left?

Law

[4] The law relevant to this claim is the law of negligence, the law relating to vicarious liability and the Land Transport (Road User) Rule 2004.

[5] The law of negligence requires all road users, such as ZVR Ltd, to exercise a duty of care towards other road users. To assess whether ZVR Ltd has breached that duty, it is necessary to assess the way in which ZVR Ltd operated its road sweeper against the standard

of a reasonable operator in a similar situation to ZVR Ltd. In addition to the law of negligence, the specific obligations of road users are set out in the Land Transport Act 1988 (LTA) and the Land Transport (Road User) Rule 2004.

[6] This claim has been filed against ZVR Ltd, in respect of actions by its employee who was operating the road sweeper at the time. The law relating to vicarious liability allows an employer to be vicariously liable for its employee in certain situations.

[7] I am required to assess the evidence provided by the parties and to decide whether that evidence establishes the point that each party is making to the standard of the balance of probabilities. This means that I need to be satisfied that it is more probable than not that it happened as that party says it did.

[8] My findings are as follows.

Decision

Was ZVR Ltd negligent in its operation of its road sweeper?

[9] I find that ZVR Ltd was not negligent in its operation of its road sweeper.

[10] I accept the evidence that ZVR Ltd has provided which shows that ZVR Ltd operated this road sweeper to the standard of a reasonable and prudent operator of this type of equipment. This means that ZVR Ltd has not been negligent as it has not breached its duty of care towards other road users, specifically AGE and AGH.

[11] In particular, my finding is based on the following evidence:

- (i) The Transit New Zealand Code of Practice for Temporary Traffic Management (3rd edition, November 2004) (“the Code”) and the Traffic Management Plan Reference 700715-10/11, which were both presented as evidence of the reasonable industry standards by Mr MV, representative of ZVR Ltd. That evidence established that:

- i. The road sweeper was undertaking a mobile operation, as defined in the Code and as allowed by the Code, the road sweeper was operating in accordance with a Mobile Closure;
 - ii. In addition, the Traffic Management Plan specifically entitled the road sweeper to carry out this particular action on this particular stretch of road.
- (ii) The diary notes from Mr CN that indicated that the operator of the road sweeper was displaying the caution mode of lights on the back of the road sweeper, as allowed for in the Code. The Code states that caution mode lights are to be used when it is not safe for traffic to pass the road sweeper on either side.
- (iii) The evidence above is accepted by me. I have accepted the evidence of the Code and Traffic Management Plan as it was not disputed by AGE and AGH, it was clearly set out in each of those documents and it was clear that the road sweeper was entitled to operate as it did.
- (iv) AGE and AGH cannot recall what lights the road sweeper was showing when they passed it; therefore, they are unable to dispute the evidence of Mr CN and Mr MV regarding the lights being displayed.
- (v) I find that the evidence above establishes that the road sweeper was operating in accordance with the industry standards, as detailed in the Code and Traffic Management Plan. I also find that the operation of the road sweeper was to a reasonable standard and therefore, not negligent.

[12] I have had regard to AGE and AGH's evidence that the vehicle that they saw was different than the one that Mr MV states was operating that day. However, I find that it is more likely than not that the vehicle was the vehicle described by Mr MV. This is because Mr MV has provided photographs of both the back and front of the vehicle, which Mr MV has stated, is the "signs truck" referred to in the diary notes taken by Mr CN in the days immediately after the incident. I also consider that notwithstanding which vehicle was being

used, given the existence and compliance by ZVR Ltd with the relevant standards, it is likely I would still not find that ZVR Ltd were negligent even if it had been the other vehicle.

[13] I have also had regard to AGE's statement that even if ZVR Ltd had policies and procedures in place, this was essentially a rogue employee not doing what he should have as he started operating the road sweeper at the specific moment that AGE passed him. However, the law only allows me to hold ZVR Ltd liable in negligence if the road sweeper was not operated in accordance with a reasonable standard. In this instance, I have found that it did and that the road sweeper was entitled to be operating in the manner that it was, on that road at that time, even if vehicles were passing it.

[14] I record that I have also had regard to the case that Mr MV referred me to, which was the case of *Police v Fulton Hogan* DC Palmerston North CRI-2003-067-329, 26 May 2004. In that case, the Court accepted that the Code of Practice for Temporary Traffic Management is a best practice industry guideline.

If so, was any damage caused and is ZVR Ltd liable to pay for the damage caused?

[15] While it is clear there was some damage to AGE's car, I have found that ZVR Ltd was not negligent in its operation of the road sweeper and so is not liable to pay for any damage. I also record that I have not assessed whether the damage was caused by ZVR Ltd as it was not necessary to do so, given my finding above.

If ZVR Ltd was not negligent, is there any other reason it should be required to pay for the damage?

[16] There has been no evidence presented providing any other basis upon which I could hold ZVR Ltd liable to pay for the damage to AGE and AGH's car. Accordingly, I find that ZVR Ltd is not required to pay for the damage.

Was AGE careless in passing on the left?

[17] There was considerable discussion in the hearing regarding whether AGE's action was careless or not. AGE passed the road sweeper on the left and AGE has explained that he did so as that was what the other cars were doing. He states that although he left a large gap between him and the car in front he was committed to that line of driving and it was not safe to pass the road sweeper on the right.

[18] While it is not necessary for the resolution of this claim to determine this issue, having heard the evidence I find that the evidence does not establish that AGE was careless in passing on the left as r 2.8 of the Land Transport (Road User) Rule 2004, allows a driver to pass on the left if the overtaken vehicle is stationary. It is AGE's evidence that the road sweeper was stationary at the time he passed it; therefore he was entitled to pass it on the left. Despite this evidence being raised late in the hearing process, as it is not disputed by ZVR Ltd it is accepted on the balance of probabilities.