IN THE DISPUTES TRIBUNAL **[2014] NZDT 566**

BETWEEN	**DG** APPLICANT
AND	**YT LIMITED** RESPONDENT
Date of Order:	19 May 2014
Referee:	Referee Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the applicants' claim be dismissed

Facts

[1] On 23 February 2010, DG's daughter, BB, collided with a truck whilst performing a u-turn in her parent's Ford Focus outside her school at lunchtime.

[2] BB was responsible for the collision. The total loss suffered by the DGs exceeded $20,000.00. The DGs paid approximately $12,000.00 for repairs to the truck, and their car suffered damage of over $8,000.00.

[3] The DGs sought cover for this loss under their policy with YT. However, YT declined cover on the grounds that BB was in breach of her licence conditions at the time of the collision. Clause 4 of the policy excludes cover in these circumstances. However, the DGs consider that, despite clause 4, s11 of the Insurance Law Reform Act 1977 entitles them to cover on the grounds that BB's breach was not the cause of the loss.

[4] The DGs filed a claim seeking an order that they be indemnified under their policy. The parties agreed to extend the jurisdiction of the Tribunal to $20,000.00 to enable the dispute to be heard.

Issues

[5] By virtue of section 11 of the Insurance Law Reform Act, if a policy contains an exclusion limiting cover in circumstances that create risk, and an excluding event occurs, an insurance company cannot rely on its exclusion to decline cover where its customer can establish that the excluding event did not contribute to the loss. Section 11 provides:

> **Certain exclusions forbidden**: Where –
>
> (a) by the provisions of the contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurers to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and
>
> (b) In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring, -
>
> The insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance *if the insured proves on the balance of probability that*

> *the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances* (emphasis added).

[6] There is no dispute that the first paragraphs of s11 ((a) and (b)) apply in this case. The policy contains an exclusion for breach, and that exclusion has been included because drivers who are in breach of their licence are more likely to cause loss. There is also no dispute about the extent of the loss.

[7] The dispute lies in the italicised words in the final paragraph of s11. Are the DGs able to establish on the balance of probabilities that the collision was not caused or contributed to by BB's breach?

[8] I have broken this question down into three issues:

a. How was BB in breach of her licence?

b. How did the collision occur?

c. Did the breach cause or contribute to the collision?

[9] Each is considered in turn.

How was BB in breach of her licence?

[10] At the time of the collision, BB was in breach of her licence because she had two friends with her in the car. Under the terms of her restricted licence, she was not able to carry passengers (other than family) unless she had a "supervisor" next to her in the front seat. A supervisor is someone who has held a full licence for two years or more.

[11] BB would not have been in breach if she was driving alone, or if she had had a supervisor next to her in the front seat.

How did the collision occur?

[12] The collision occurred because BB started to perform a u-turn in front of an oncoming truck. BB failed to see the truck before she turned.

[13] BB provided a statement in which she recalled that prior to performing the u-turn, she had indicated and moved to the left, and stopped the car. She then looked in the rear vision

mirror, but cannot recall whether she indicated right, or looked over her shoulder. In her oral evidence, she said she was sure she looked both in her mirrors and over her shoulder, but that at that very moment, the truck was obscured by the side panel of the car. She could not recall whether she had indicated, but thought it likely she would have. Despite it being a fine day, and on a straight road, she did not see the truck before turning into the path of it.

[14] Both passengers also wrote statements in which they recalled that BB had been driving sensibly, and that they were eating biscuits, talking quietly or not at all and that the radio was not on. Each attended a hearing to confirm their statements. The passenger in the front seat thought that BB had turned to look over her shoulder, but had drifted out onto the road too far whilst waiting to turn. The passenger in the back seat thought that BB had put her foot on the accelerator to begin the manoeuvre when the collision occurred. Neither passenger could remember whether the indicator was used to the right, but in her statement at the time, the front seat passenger had stated that after the collision, it was still blinking on the left. Both recalled turning to see the truck a split second before it hit.

[15] Given the time that has elapsed and the differences in the statements, we cannot know every detail of the event. However, it is not in dispute that BB failed to see the truck, and was responsible for the collision.

Did the breach cause or contribute to the collision?

[16] The DGs have the onus of establishing that BB's decision to carry passengers without a supervisor probably did not cause or contribute to her error.

[17] In considering this issue, I have had the benefit of extensive research and thorough submissions on the matter provided by the DGs' solicitor. Having canvassed those submissions at length and understood the arguments put forward by both parties on how s11 should be applied, I accept it is possible that this happened solely because BB was inexperienced, and that her passengers were not a contributing factor, but I am unable to make a finding that this was probably so. This is so for the following reasons:

a. Restricted licences have always been subject to rules about passengers and supervisors to protect inexperienced drivers from the heightened risk of mistakes by those who breach them. Inexperienced drivers tend to be more easily distracted and teenagers are yet to develop full cognitive abilities that enable them to make appropriate judgments in certain situations. In this

setting, passengers heighten the risk in three ways. First, they could incite reckless behaviour. Secondly, they could be disruptive or noisy in the car. Thirdly, even if they are not being inciting or disruptive, their presence could be distracting to an inexperienced driver. Having an adult present mitigates these risks. Passengers are less likely to misbehave and the inexperienced driver is more likely to retain their focus and remember to follow appropriate procedures.

b. Having heard from BB and her passengers, and looking at the time of day and context in which this occurred, I accept that the passengers were probably not being inciting, noisy or disruptive in the car. Each recalled the fact that no one was talking and there was no music on. However, this still leaves opportunity for the third type of distraction: a loss of focus from the mere presence of passengers.

c. In cases where an inexperienced driver breaks the passenger rules and then has an accident, this causal link between the rules and the risk of loss creates an inference of contribution between the licence breach and the loss. An inference is not in itself proof of contribution, but it puts an onus on the insured, who is left having to prove the passengers were not a factor, and thus to produce some other explanation to displace the inference. This might be evidence, for example, about causative weather conditions, third party negligence, the nature of the mistake made or some other factor that enables the inference to be displaced.

d. In this case, BB stated that she was not distracted by her passengers, and that she failed to see the truck because of a blind spot created by the side panels of the car. This was not contained in her original statement, in which she stated that she could not remember whether she turned to look or not. However, accepting that she did look, and that she had the misfortune of coincidence between her turning and the placement of the truck behind a car panel, there remains a failure in her decisions that could have been contributed to by the fact that she had friends in the car. A blind spot does not establish the passengers did not contribute. This is so for three reasons.

   i. First, the passengers were not being disruptive, but it is not only what the passengers may be doing or saying in that moment, but what the

driver is turning her mind to. BB states that she was not distracted by her friends, but I cannot accept this as sufficient evidence of the fact, as she is unable to prove how her decision making processes were affected by her thoughts.

ii. Secondly, this was not BB's first u-turn, but she confirmed it was the first and only time she had taken friends without an adult whilst on a restricted licence, and the first and only time she had had a collision.

iii. Thirdly, there is nothing inherent in her mistake which rules out distraction. The collision could have been avoided if BB had checked her rear vision mirror adequately and turned to look at the road behind for long enough to account for any blind spots. The truck was not small, and could not have been in a blind spot for long. A lack of proper process is just the type of error that a loss of focus can create. BB lost her focus in that moment at a time when her friends were in the car, and thus at a time of heightened risk of this occurring.

[18] These considerations do not prove that the presence of BB's friends contributed. However, the DGs are left with the onus of proving that they did not. They are possibly right, but in the absence of any other explanation for the mistake, I cannot say they are probably right.

[19] In reaching this conclusion, I have followed the reasoning of the High Court in Allied Mutual Insurance Ltd v Crafts (1992) ANZ Insurance Cases 61-138. In that case, a driver with a restricted licence had an accident on a Friday night whilst driving with a passenger in breach of his licence conditions. The driver had been driving poorly, and at excessive speed, prior to losing control. The insurer denied its customer any cover on the grounds of a similar policy exclusion as clause 4. In that case, the Judge held that there was "no logical explanation" for the driver to have behaved in the way he did. He accepted the passenger's evidence that he had not been inciting or disruptive, but stated that it is "simply impossible to say whether he was encouraged to drive in this manner by the mere presence of the passenger or not". The Judge went on to say that "his *mere presence* may well have been sufficient and I am satisfied that it is one of the increases in risk for which the exemption in the policy was made (emphasis added)."

[20] The Crafts case is authority for the proposition that where passengers are not being inciting or disruptive, their mere presence can still create an inference of distraction that requires the applicant to provide some other explanation to displace. The DGs consider that this reasoning should only apply to the facts of that case, in which the driver was behaving recklessly prior to the crash. They consider that where a young driver is behaving recklessly, there is a closer inference of inherent distraction than where he or she makes a careless mistake. Their proposition is that where passengers are not being inciting or disruptive, carelessness is more likely to be caused by inexperience than by inherent distraction from passengers.

[21] The point is well made, and is an issue upon which this case turns. I have given it much consideration. However, I have two difficulties with the DG's position on it. The first is that it is not clear from Crafts that the Judge intended his application of the onus of proof to apply only to cases where the driver is reckless. He did not state that the mere presence of a passenger ended the insured's claim only because of the recklessness and I do not consider that it should be so limited. The mere presence of passengers could also affect judgment in undertaking lawful manoeuvres without due care. Secondly, the Judge states that, without a "logical explanation" from the driver as to how the loss occurred, it is simply impossible for the insured to discharge the onus of proof where a passenger is in the car. I agree with this approach, and see Crafts as authority for this principle to be applied, whether the loss is caused by reckless or careless driving. A defence always remains where there is another logical explanation, or external factor, but in BB's case, there was none.

[22] The DGs also asked me to apply the findings of the District Court in Flight v State Insurance [1992] DCR 781. In that case, a driver on a restricted licence lost control of her car and crashed it whilst carrying two passengers in breach of her licence. As in this case, the owner of the car sought cover for their loss, relying on s11. In finding in favour of the insured, the Judge took the view that he was only required to consider whether the presence of passengers contributed to the loss, not the lack of a supervisor. The Judge made a finding of fact that the passengers had not distracted the driver at all, and stated that:

> "Even though the evidence is little enough there is no basis upon which I may discount the driver's evidence which may be described as being generally to the effect that the presence and behaviour of the passengers had no bearing on her standard of driving ….the existence of the relevant circumstance, that is the presence of passengers, did not of itself increase the risk of loss and there is no justification for denying the insured the protection of the cover."

[23] The District Court Judge in Flight has taken a different approach in principle to the later High Court decision in Crafts. In both cases, as in this one, a finding was made that the passengers did not actively distract the driver. In Flight, that was considered enough for the insured to succeed in the claim. In Crafts, it was not, without some additional factor to prove there was no contribution. I have followed the approach in Crafts, which is a later and higher authority on the matter. In my view, section 11 puts an onus of proof on the insured that cannot be discharged without some additional factor that proves that the driver was not affected by any inherent distraction from the presence of passengers.

[24] YT took the view that, regardless of inherent distraction, the lack of a supervisor in the car, which also is part of BB's breach, left the DGs unable to establish their case. However, I do not consider this is the case. The DGs point to the Judge's view in Flight that the lack of a supervisor is irrelevant in considering the contribution of passengers. I also note that none of other cases mention that the lack of a supervisor in itself as being prejudicial to the insured's position. In my view, the lack of a supervisor is not a determining factor for the following reasons:

a. Section 11 requires the insured to prove on the balance of probabilities that the loss was not contributed to by the breach of the licence. The breach of the licence is either not travelling alone, or not travelling with a supervisor. BB would not have gone out at lunchtime at all had she elected to travel with a supervisor, as there was none to go with her in that context. In that sense, had she had a supervisor with her, she would not have suffered the loss at all. However, the Court of Appeal has determined that this simplistic "but/for" test cannot be used to establish contribution, as it would deny the application of s11 in too many cases (NZ Insurance Co Ltd v Harris [1990] 1 NZLR 10 (CA)).

b. YT points out that a supervisor could have looked in their own wing mirror to check behind, or turned to check over their shoulder themselves, or prompted BB to do so. I accept that even if the supervisor had not actively assisted BB at the time, their presence could have sharpened her focus. That is the point of the rule that a supervisor be in the car when there are passengers. However, whilst the absence of a supervisor is relevant in the sense that the onus remains on the insured to come up with some factor to disprove a loss of focus from the presence of passengers that a supervisor may have

mitigated, the cases establish that the lack of a supervisor does not prevent a successful claim under s11 where some other factor is provided to prove there was no loss of focus from the presence of passengers. The Judge in Flight expressly stated that the absence of a supervisor was not a factor that should be considered. No other case mentions it as a factor. Thus, if the insured establishes through some other factor that established that the passengers played no part in mistake, then the lack of a supervisor, whose potential involvement in the absence of distraction becomes supposition only, could not be used to deny the insured cover. However, the difficulty for the DGs in this case was that there was no other factor. Thus, whilst the lack of a supervisor on its own does not end their claim, the risk of inherent distraction, along with driver error, does.

[25] The DGs also cited the above Court of Appeal case of Harris (supra) in support of their claim. In that case, a tractor was destroyed by arson one night when parked out on a farm. It was out on hire at the time. The insurance policy excluded loss whilst on hire. The Court of Appeal held that where there is loss in circumstances that fall within a policy exclusion, there is a presumption of a causal link between the two. However, in this case, whilst the tractor would not have been destroyed had it not been on hire (creating causation in the "but/for" sense), the Court determined that the insured could succeed because it is commonplace for tractors to be left outside at night whether they are on hire or not, and there was nothing about the circumstances in which the tractor was parked that increased the risk of loss to the insured. The DGs consider that in this case, just as the tractor was inherently vulnerable to arson whether it was on hire or not, BB was inherently vulnerable as an inexperienced driver whether she had passengers or not. Again, the point is well made, but in the Harris case, there is no predicted link between the breach (hire) and the likelihood of loss (arson). In this case, there is a predicted link between the breach (carrying passengers whilst on a restricted licence) and the loss (driver error). I therefore could not say, as the Court of Appeal could, that there was nothing about the circumstances in which BB was driving that increased the risk of loss. Further, the Court identified that s11 begins with a "presumption" of a causal link, which in principle simply leaves the matter in balance, as Crafts determined, where the risk factors being excluded cause the very type of loss predicted.

[26] I have also had regard to a claim that was filed against YT in the Disputes Tribunal in Queenstown. The DGs established that YT had, by settlement, paid an insured for a $4,500.00 loss suffered where a car had been written off by a driver on a restricted licence that was carrying a passenger. The driver had not been distracted by the passenger, but had failed to negotiate a corner in bad weather. The applicants cited Flight in support of their claim. I cannot treat YT's settlement of that matter as proof of liability in this claim for two reasons. First, YT could have reached a settlement on what was a much smaller claim for other reasons than acceptance of legal responsibility. Secondly, there was an external factor in that claim that was not present in this case. The insured was caught in very bad weather, potentially making it easier to establish that it was probably her inexperience, rather than any contribution from her passenger, that caused the loss. In BB's case, she was simply turning across the road in ordinary conditions.

[27] The DG's submission also referred to Sampson v Gold Star Insurance Co Ltd [1980] 2 NZLR 742, which gave two examples of where s11 would come to the assistance of an insured. These are:

a. an intoxicated person with a personal injury policy which includes "while intoxicated", and through no fault of his own, is injured while a passenger in a car; and

b. a car with bald tyres driving safely in fine conditions that is hit by another car.

[28] I agree that an insured would be able to set aside the presumption of any causal link in these cases as there is no link between the exclusion and the loss. In this case, there is. The breach created conditions that affect decision making, even in the absence of active distraction.

[29] In undertaking further research on these cases, I came across one other case that has considered s11 where a restricted driver was carrying a passenger (Archdiocesan Car Fund v Seng Heng & State Insurance Ltd (unreported, District Court, Lower Hutt, 15 October 1997, Keane DCJ). In that case, a driver on a restricted licence ran into the back of a car at the lights after starting to change lanes, then changing his mind. In that case, the Judge was satisfied that the passenger had not contributed to the collision, and considered that the driver was simply inexperienced and had miscalculated his speed and stopping distance. However, in that case, the Judge found that the passenger had warned the driver to look before changing lanes, and had warned the driver to look ahead before he collided, and that

he had therefore not contributed to the collision. Every case must turn on its own facts, to look for any factor that displaces the inference that the presence of a passenger contributed. In that case, the passenger had assisted the driver with advice. In this case, the passengers said nothing. I could not find a factor in this case to suggest the presence of friends had not contributed.

[30] Finally, the DGs cited the case of Infrapulse Distributors New Zealand Ltd v State Insurance Ltd [2000] DCR 170, in which the Judge stated:

> Section 11 is remedial. It has generally received a construction consonant with its underlying objective - to ensure that an indemnifier cannot rely for avoidance on some act or omission of the insured which is shown to have nothing logically to do with the loss.

[31] In the absence of any recklessness on BB's part, the DGs state that there is no logical connection between her failing to see the truck and the fact she had two passengers in the car. There may not in fact have been a connection. However, because there is a logical connection between the presence of passengers and loss, which is why the policy exclusion exists, the DGs cannot prove that this is the case without evidence of some other factor which established this was caused by nothing more than driver inexperience.

Conclusion

[32] I appreciate the clear submissions and arguments made by both parties on what has been a complicated case to present and consider. I also appreciate the time and cost occasioned by the DGs attending from overseas and arranging witnesses from a distance. This has not been an easy case to determine, and I accept that it is open to well reasoned debate from both sides.

[33] In the end, this case boils down to whether, in the absence of reckless behaviour, I can be satisfied that the presumption of a causal link between loss and breach can be displaced by simply establishing the passengers were not actively distracting the driver. Flight suggests it can, and the later case of Crafts suggests it cannot. I understand the argument that the reasoning in Crafts should apply only to cases of reckless behaviour, but the distraction caused by the presence of passengers can lead to recklessness or carelessness.

[34] For these reasons, whilst it is possible that BB was simply inexperienced, and not affected in any way by her passengers, I cannot say it is probable. To make such a finding

would be to give the benefit of cover to the DGs in circumstances that were specifically excluded from what they purchased, that increased the risk of what actually eventuated and that could not be discounted as a contributing factor.

[35] Accordingly, I have dismissed the claim.