



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1333

APPLICANT **BD**

APPLICANT **ABC New Zealand Limited**
INSURER

RESPONDENT **AN**

RESPONDENT **XYZ Insurance Limited**
INSURER

The Tribunal orders:

1. AN is to pay to ABC New Zealand Limited the sum of \$3,934.06 on or before 20 July 2020.

Reasons

1. On 18 August 2018, Mr D was turning right from SH2 on River Road, Upper Hutt, into Moonshine Hill Road at the entrance to [Redacted]. There is a turning bay for cars to wait in to make this turn. After Mr D turned onto Moonshine Hill Road, he was hit from behind by Mr N. Mr N had also turned across from the same turning bay on SH2.
2. The damage to rear of Mr D's car cost \$3,934.06 to repair. The damage to the front of Mr N's car cost \$3,139.20 to repair. Each party, with their insurer, has filed a claim seeking the cost of repair from the other. There was no dispute that Mr N was behind Mr D at the time of the collision. There was also no dispute regarding the repair costs. However, there was a dispute over who was at fault.
3. The issues to be resolved are: (a) As the following driver, is there an inference that Mr N is at fault?
(b) Did Mr D drive in an unsafe manner that created a situation on the road?

As the following driver, is there an inference that Mr N is at fault?

4. A driver has a duty to keep a proper look out for cars ahead, and ensure that they are always able to stop short of the car ahead of them, even if that car stops suddenly (Rule 5.9(3) Land Transport (Road User) Rule 2004 (RUR)).
5. It was established that Mr D turned first, and was already on Moonshine Road before the collision occurred. Mr N explained that he had turned a short time after Mr D, and hit the back of Mr D. He recalls that this occurred because he had to avoid being hit by a truck coming along River Road towards him. The presence of this oncoming truck required Mr N to keep moving to get out of its path. After entering Moonshine Road, he struck Mr D.
6. As the following driver, Mr N would generally be responsible either for failing to see Mr D, failing to keep a proper distance, or failing to stop short of him. However, this is only an inference from the parties' respective positions on the road. This inference is open to being displaced by evidence that places the liability on Mr D.
7. I therefore turn now to consider the defence raised to the claim.

Did Mr D drive in an unsafe manner that created a situation on the road?

8. The RUR provides that it is a defence to a breach of the Rules if it can be shown that a driver was responding to a situation on the road that was not of their own making, and they had no choice but to act as they did to avoid another crash. Rule 1.8 provides:

1.8 General exceptions

- (1) A person is not in breach of this rule if that person proves that—
 - (a) the act or omission complained of took place in response to a situation on a road; and
 - (b) the situation was not of the person's own making; and
 - (c) the act or omission was taken—
 - (i) to avoid the death or injury of a person; or
 - (ii) if the act or omission did not create a risk of death or injury or greater damage to any property, to avoid damage to any property.

9. The photo below shows the area in which the collision took place. It is a screen shot from Google Maps taken looking to the north, with the turning bay on the right, and Moonshine Hill Road on the left. It can be seen from this photo that shortly after the turn onto Moonshine Hill Road there is a give way on the left for vehicles entering the road from the northbound lane of River Road. Mr N has measured the relevant distances. He states that the distance from the turning bay to Moonshine Hill Road is approximately 25m and distance from the start of Moonshine Hill Road to the give way is approximately 11m (the "11m zone").



10. Mr N recalls turning across River Road only to find that Mr D had stopped in that 11m zone to allow a car to proceed from the Give Way on the left. He notes that Mr D has a requirement on his licence to have extended rear vision mirrors. None were fitted on the car. Mr D confirmed that he never saw Mr N until he was hit. Mr N and his insurer consider that this leads to the conclusion that

Mr D, who was unaware there was a car behind him, decided to stop to let a car go ahead of him at the Give Way. If he had done so, then this would have caused a "situation" for the purposes of Rule 1.8. Mr D has the right of way, and should not stop for cars on the Give Way, as this can cause an unexpected situation for a car behind. Mr N stated he had nowhere to go other than to run into the back of Mr D, or be hit by oncoming traffic on River Road. He recalls that a truck was approaching at the time, and Mr N could not afford to stop on River Road behind Mr D.

11. However, Mr D defends this allegation on the basis that he never stopped in the 11m zone, has never stopped to let a car go at the Give Way for the reasons outlined above, and has lived in [Redacted] for a long time, so would know not to do so. He recalls the collision occurring further around the bend (more in the vicinity of where the two cars are in the above photo).
12. In trying to determine what most probably happened, I did not have the benefit of any footage, or independent witness. I have therefore had to determine what can be inferred from the recollections of the parties and the placement of the damage on the cars.
13. In weighing up this evidence, I find as follows:
 - (a) There was insufficient evidence for me to make a finding on the basis of where the damage occurred that the collision occurred in the 11m zone. The placement of the damage indicated that the collision happened on a curve of the road, rather than straight on. Mr D's car was damaged more from the centre to the left hand side, and Mr N's vehicle was damaged more from the centre to the right hand side. However, this damage was consistent with either recollection of where the incident occurred. If the incident occurred in the 11m zone, this zone sweeps slightly to the right in preparation for the corner ahead. Also, Mr N could have pulled slightly to the left to try and avoid the collision at the last minute, as there is a traffic island that he did not use, but that was at least vacant space to pull towards. On the other hand, if the incident happened further up the road, this is also on a bend. The placement of the damage therefore did not assist.
 - (b) However, I have grounds to find that the incident occurred shortly after the Give Way, and therefore in or just after the end of the 11m zone. It is hard to imagine a scenario where a following vehicle would drive on and collide with a car further around the bend by simply speeding up and driving into the back of it. Also, Mr D was in breach of his licence, and had not seen Mr N. He was evasive about this licence condition in the hearing, and appeared to know nothing about it. He and his insurer were given an opportunity after the hearing to provide any evidence to show that it was not applicable, but this was not forthcoming. I do not accept that Mr D could have been unaware of it. In any event, he could not provide evidence that he was run into from behind further on up the road as a result of speed only, as he had not seen this occur.
 - (c) However, Mr N recalled that the driver who was at the Give Way drove around and past *after* the incident and called out something to them as he passed. If this occurred, then it is likely that Mr D either did not plan to "Give Way", or in the process of doing so, he was hit hard enough or moved forward afterwards in such a way that the car on the Give Way did not consider it could proceed. This therefore puts Mr D somewhere in the 11m zone as Mr N is turning across. Mr N confirmed that Mr D had turned just a few seconds ahead of him, and I agree, having reviewed the evidence, that this is most likely.
 - (d) Nonetheless, whilst I prefer the evidence of Mr N as to the where the collision occurred, I cannot infer from this that Mr D actually stopped. There would be no reason to stop and I have insufficient evidence of any intention to stop. A car travelling at 50km/h travels at approximately 13m per second. Turning across from a stationary position, Mr D would have been going at far less than this speed, and would have therefore only covered the 25m and 11m (as measured by Mr N) over several seconds (at more like 15-20km/h, which average to more like 4m every second). It would take Mr D perhaps 9 seconds, on the basis of this maths, to get beyond the 11m zone. Mr N states that he left a few seconds after Mr D, which I accept. He recalls an oncoming truck. He saw the truck, and must have decided he had time to get across in front of

it. Part way across, he has realised this is not the case, and he has had to speed up to get into the 11m zone. Mr D is still in that zone, as he had no need to rush.

- (e) I accept that this analysis requires Mr D to be only just in the 11m zone as Mr N turned. If he was proceeding through it, there would have been room for Mr N to fit behind him. However, this is possible on the timings explained by Mr N. Also, I can understand how it might have appeared to Mr N that Mr D was stopped. He would have appeared as an obstruction on the road to a person needing to get across in a hurry. However, the onus was on Mr N to prove the exact timing of events to establish it was most likely that Mr D had in fact stopped. Without better evidence, it simply appeared equally possible that Mr D had simply not gone fast enough to get out of Mr N's way once Mr N realised he had to speed across to avoid being hit by the truck. Mr D did not have a duty to consider this possibility and speed up himself, despite not having seen him, as it was entirely Mr N's decision to proceed ahead of the oncoming truck.
- (f) Give these two possibilities, I was unable to find that Mr D was at fault. It was a possibility he had stopped, but not a probability.
- (g) I have had regard to whether the credibility issue by the licence breach was sufficient for me to find he had stopped. Whilst this assisted Mr N in part, at least to establish the significance of the 11m zone, it was not enough on its own to make a finding that Mr D had stopped. Whether there was a car behind or not, there was no reason to stop, and if he did not stop, Mr D had no duty to ascertain the presence of Mr N behind him, and speed up to accommodate the situation Mr N found himself in.

Conclusion

- 14. The exact events remain a mystery. Based on the evidence presented at the hearing, whilst I consider the placement of the collision is closer to that recalled by Mr N, and whilst I can understand how it may have appeared to him that Mr D had stopped, I was not able to make a finding that he had done so.
- 15. For these reasons, the claim is awarded in full, but the counterclaim is unable to succeed.

Referee:

J Robertshawe

Date: 22 June 2020



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available or a mistake was made.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 28 days of the decision having been made. If you are outside of time, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside of 28 days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, and serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.