



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 187

APPLICANT OS

RESPONDENT KS

SECOND RESPONDENT NS

**APPLICANT'S INSURER KB Limited
(if applicable)**

The Tribunal orders:

1. KS and NS are jointly and severally liable to pay KB Ltd \$3,178.40.

Reasons:

1. OS's car was parked on the road. A car hit OS's car and caused damage. NS was in the driver's seat of the car that hit OS's car (the second car). KS was in the front passenger seat of the second car. There is a video that shows that at the time of the collision NS was operating the brake and accelerator and KS was operating the steering wheel, and telling NS what to do.
2. OS and her insurer, KB Ltd seek an order that KS and/or NS are liable to pay for the damage to OS's car, which they say is \$3,224.27.
3. The hearing was held by teleconference. OS and her insurer KB Ltd attended. KS also attended with his father as a support person. I tried to ring NS several times, but all my calls went directly to voicemail. The hearing went ahead without NS.
4. The issues to be resolved are:
 - a. Was KS in control of the second car at the time of the collision?
 - b. If so, did KS fail to exercise reasonable care and skill while he was in control of the second car?
 - c. Was NS in control of the second car at the time of the collision?
 - d. If so, did NS fail to exercise reasonable care and skill while she was in control of the second car?
 - e. If NS was not in control of the second car, did NS fail to exercise reasonable care and skill so that she might nevertheless be liable for the damage to OS's car?
 - f. If both KS and NS are responsible, what is their respective liability?
 - g. Are the costs claimed proved?

Was KS in control of the second car at the time of the collision?

5. I find that KS was in control of the second car at the time of the collision because KS had taken control of the steering wheel from NS and was instructing NS about using the brake and accelerator pedals at the time of the collision and had also taken responsibility for keeping a look out for other vehicles.

6. The law that applies is the law of negligence. The law that applies is the law of negligence. Drivers of vehicles owe a duty to drive with reasonable care and are responsible for any reasonably foreseeable damage suffered as a result of a failure to do so. The duty to take reasonable care includes a duty to follow all relevant road rules and driver licencing requirements.
7. The obligation to drive with reasonable care and skill is owed by any person who is in control of the operation of a vehicle. Usually there is no question that a person in the driver's seat of a car is in control of the car. However, in some cases another person may take control of a car, and if that happens then that person will also owe a duty to operate the car with reasonable care and skill.
8. On 3 October 2023 OS's car was parked on the street in a cul de sac. OS was inside a house near where her car was parked. OS says she heard a loud bang and looked out the window. She says she saw a young man jump into the driver's seat of a car and drive away. OS says that neighbours told her that the car the man jumped into (referred to here as the second car) had been parked in the street for some time, before it reversed into OS's car, causing damage to her car.
9. After the collision OS made a post on Facebook for the driver of the car to come forward and take responsibility. KS contacted her and said that he had been in the car at the time of the collision.
10. At the hearing KS said that he had been driving his father's car with two passengers prior to the collision. KS and his passengers were all aged 16 or 17 at the time of the collision. KS had a restricted licence. It is not clear if NS had a licence, although at the hearing OS said that NS had told her in a Facebook message that NS did not have a licence at all (not even a learner licence).
11. KS said that prior to the collision he had been driving the car, and then he offered NS an opportunity to drive and she accepted. He said that NS drove around the corner into the cul de sac. There came a point where NS needed to reverse the car to get out of the cul de sac. KS said he felt that NS was not doing very well, and he thought she needed help.
12. The passenger in the back seat of the car took a video of what happened next. The video was provided to the Tribunal and was played at the hearing.
13. The video shows NS in the driver's seat of the car and KS in the passenger seat. KS releases the handbrake and tells NS to take her foot off the brake. KS then takes the steering wheel and turns it hard towards him. KS says "press your foot on the accelerator a little bit". There is some confusion and NS asks which pedal – KS says "no the other one, that's the brake". The car then starts to move. KS appears to be looking behind him over his left shoulder and NS is looking straight ahead. KS is controlling the steering wheel. KS then turns to look behind him over his right shoulder and says "stop, stop, stop". That is the end of the video. At that point I understand that the collision with OS's car happened.
14. At the hearing KS said he tried to get NS to stop the car immediately prior to the collision, but she did not do so. He said he pulled on the handbrake, but this was not enough to prevent the collision.
15. KS says that while he took control of the steering wheel, NS was controlling the brakes and accelerator, and that he was not therefore in control of the car at the time of the collision, because he could not sufficiently influence the movement of the car to prevent the collision.
16. I have had regard to this argument. However, I consider that KS had assumed control of the car at the time of the collision. This is because the video shows that in addition to having taken hold the steering wheel, KS was clearly directing NS on when to use the brake and accelerator and had also taken responsibility for keeping a look out for where the car was on the road in relation to other vehicles.
17. I consider that in these circumstances KS had assumed control of the car, even though he was in the passenger seat, and even though NS's feet were operating the brake and accelerator, because NS was clearly only doing what she was told to do by KS.

18. For these reasons I find that KS was in control of the second car at the time of the collision.

Did KS fail to exercise reasonable care and skill while he was in control of the second car?

19. I find that KS failed to exercise reasonable care and skill while he was in control of the second car.
20. I find that a reasonably prudent driver would not have tried to undertake the manoeuvre that KS attempted. I consider that a reasonably prudent driver would not have allowed NS to drive the car at all. However, at least when it became clear that NS was having difficulty reversing the car a reasonably prudent driver would have exchanged seats and taken over properly, rather than trying to control the car from the passenger seat.
21. This is particularly so when it was clear that NS was not a confident driver – as illustrated in the video when she could not readily distinguish the brake and accelerator. At least at this point, if not much earlier, a reasonable driver would have swapped places with NS so the reversing manoeuvre could be completed safely.
22. For these reasons, I find that KS failed to exercise reasonable care and skill while in control of the car.

Was NS in control of the second car at the time of the collision?

23. I have found that KS had taken control of the car at the time of the collision and so I find that NS was not in control of the second car at the time of the collision.

If NS was not in control of the second car, did NS fail to exercise reasonable care and skill so that she might nevertheless be liable for the damage to OS's car?

24. I find that even though she was not in control of the car at the time of the collision NS nevertheless also owed a duty of care to ensure that the car was operated safely at the time of the collision.
25. Even though KS took control of the car from NS, I consider that as the person in the driver's seat, with her feet on the brake and accelerator pedals, NS owed a duty of care to ensure that the car was operated safely.
26. I consider that a reasonable person in NS's position would have refused to operate the brake and accelerator as instructed by KS and would instead have insisted on getting out of the driver's seat so that KS could reverse the car safely. It is likely that if NS had done that, then the collision could have been avoided.
27. For these reasons I find that NS's actions failed to meet the standard of care required of a person in the driver's seat of a car and were also a cause of the collision.

If both KS and NS are responsible, what is their respective liability?

28. I find that KS and NS are each jointly and severally liable for the entire amount of the damage caused by the collision.
29. I have found that both KS and NS owed a duty of care to ensure that the car was operated safely, and that both of them breached their respective duties. KS and NS have both therefore caused the loss that resulted from the collision. In this case the loss caused cannot be divided or apportioned between KS and NS and so both will be liable for the full extent of the loss that resulted.
30. This means that each of KS and NS are liable to pay the full amount ordered in this decision to KB Ltd. However, if either KS or NS ends up paying more than half of the amount ordered to KB Ltd, that person will have a claim against the other for their share of the amount paid.

Are the costs claimed proved?

31. OS's car was written off after the collision because it was not economic to repair. The pre accident value of OS's car, tow fees, assessors fee, storage cost and the salvage amount have all been proved with appropriate documents and I am satisfied that they are the reasonable in this case. The total of these amounts is \$2,563.74.
32. There is also a claim for some uninsured costs. After the collision OS hired a rental car because her car was not drivable. The cost of this was \$315.00 and I am satisfied this cost is proved. OS also got her own assessment of the damage to her car, which cost \$195.00. I am satisfied this cost is proved.
33. OS also claimed for \$75.42 of petrol which she says was in her car at the time of the collision, and for \$73.11 of petrol which she had to pay to fill up the rental car when she returned it. She said that most of this second lot of petrol was spent on trips to car yards to try to find a replacement car, which she would not have had to do if the collision had not happened. She acknowledged at the hearing that some of this petrol was used for her regular day to day trips. She would have had to pay for petrol for these trips even if the collision had not occurred, and so the Respondents are not liable to pay for this petrol. It is not possible to accurately assess the amount that should be deducted, but I consider that a reduction of 40% of the second petrol claim is reasonable – which is \$29.25 (40% of \$73.11). This means that \$104.66 is payable for petrol. This means the total damages payable are \$3,178.40 which is made up as follows:

Proved insured losses	\$2,563.74
Rental car	\$315.00
Inspection report	\$195.00
<u>Petrol</u>	<u>\$104.66</u>
Total	\$3,178.40

Referee: L Trevelyan
Date: 18 April 2023



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 at the time.

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 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, 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.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, 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. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working 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, then 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>.