



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

District Court

[2023] NZDT 369

**APPLICANT**      **TQ**

**RESPONDENT**    **UM**

**SECOND  
RESPONDENT**    **CM**

**THIRD  
RESPONDENT**    **HT**

**FOURTH  
RESPONDENT**    **N Limited**

**The Tribunal orders:**

The claim is dismissed.

**Reasons:**

1. TQ obtained a jetski from UM. It had been advertised as having a fully rebuilt engine.
2. Shortly after obtaining the jetski, he took it to SN for a service and check. SN discovered rust in the engine and TQ was advised that it will need to be fully rebuilt again. This has now been done at a cost of \$5,366.40.
3. UM said he had only had the jetski for 4 days. He had obtained it from CM, who in turn, had purchased it from HT. UM said that at the time he obtained the jet ski, it had been at N Ltd for repairs related to the earlier engine rebuilding that N Ltd had undertaken. That engine rebuilding only occurred around a month earlier, on the sale of the jetski from HT to CM.
4. TQ said that, in his view, the ultimate cause of failure was inadequate work done by N Ltd. He said he had been advised that as he did not have a contract with N Ltd, he could only bring a claim against UM. He asked the Tribunal to add N Ltd as a respondent, as well as CM and HT.
5. Those parties were added at TQ's request. In addition, HT considered that he had a claim against N Ltd for work done on the jetski. He filed a separate claim, which was heard at the same time as this claim.
6. The issues I have to consider are:

- a. Did UM make a misrepresentation that induced TQ into the contract?
- b. If so, what remedy is appropriate?
- c. Is there any legal connection between UM and CM and HT?
- d. Can UM or HT make a claim against N Ltd under the Consumer Guarantees Act 1993 or negligence?
- e. If so, was the work by N Ltd undertaken properly?
- f. If not, what remedy is available?

**Did UM make a misrepresentation that induced TQ into the contract?**

7. As this was a private sale, there are no implied warranties or conditions concerning the quality of the jetski. Contract law in New Zealand recognises that a buyer in a private sale has a responsibility to carry out due diligence before entering a contract – that principle is called “buyer beware”.
8. However, s 35 of the Contract and Commercial Law Act 2017 states that where a party is induced to enter into a contract by a misrepresentation, they are entitled to damages as if the representation was a term of the contract that had been breached. A misrepresentation is a false statement of fact.
9. TQ said that UM advertised the jetski as having been fully rebuilt.
10. I find that this does not amount to a misrepresentation. That is because the statement that the jetski had been fully rebuilt was true at the time UM made it. UM supplied the paperwork from N Ltd in support of this statement.
11. TQ said that a fully rebuilt jetski would usually include further repairs that had not been done on this jetski. However, TQ received a copy of the paperwork from N Ltd setting out the work that had been done as part of the rebuild. Given he had this information and knew what work had been done, there cannot have been a misrepresentation by UM on the basis that TQ’s expectation of what a full rebuild involved differed from what was actually done.
12. In addition, I do not think that UM’s statement that the jetski had been rebuilt can be interpreted to mean that UM was guaranteeing the rebuild had been properly carried out. There is no indication that UM knew, or ought to have known, that there was potentially any problem with the work. UM made a simple statement of fact that the jetski had been rebuilt, supported by paperwork that confirmed the work had been done. That was an accurate description of the status of the jetski.
13. For these reasons, the claim against UM is dismissed.

**Is there any legal connection between TQ and CM and HT?**

14. TQ did not have a contract with either CM or HT. Instead, they were previous owners of the jetski prior to TQ purchasing it from UM. Therefore, there cannot be a claim in contract against CM or HT.
15. TQ acknowledged that the presence of CM and HT was primarily for the purpose of establishing the “chain” of owners that existed between him and N Ltd, rather than because he considered them liable for the loss he suffered.
16. While I understand TQ’s reasoning, owners of goods “down the chain” do not owe any legal duties to new owners. That means that the claims against CM and HT are dismissed.
17. In addition, passing liability “down the chain” would only be possible in a situation where the first person in the chain was liable. As I have found there was no misrepresentation by UM (the first person in the chain), there is no liability to “pass down”.

**Can TQ or HT make a claim against N Ltd under the Consumer Guarantees Act 1993 or negligence?**

18. Where services are supplied to a consumer by a supplier, s 28 of the Consumer Guarantees Act 1993 (“CGA”) states that there is a guarantee that the service will be carried out with reasonable care and skill. As HT obtained services directly from N Ltd, he can make a claim against N Ltd under the CGA.
19. However, I consider the case is different for TQ. It cannot be said that he obtained services from N Ltd. He did not have any connection with the jetski at the time N Ltd undertook the repairs, was not involved in the rebuild process and only acquired the jetski after it had passed through two other owners. Therefore, TQ cannot make a claim against N Ltd under the CGA.
20. Alternatively, the law of negligence states that where parties owe a duty of care to others, they must take reasonable care when carrying out their obligations. N Ltd clearly owed a duty of care to HT as the owner of the jetski at the time the work was carried out.
21. When considering negligence, it is important to note that N Ltd does not owe a duty of care to everyone in the world. Rather, they only have a duty of care to people who are closely and proximately affected by their actions.
22. I find that N Ltd does not owe a duty of care to TQ. The jetski passed from HT to CM, and then to UM before TQ purchased it. In other words, there were two different owners between the time HT originally asked for the work to be done and TQ. While I accept that those transfers occurred in a relatively short time as TQ became the owner of the jetski seven or so months after the work was done by N Ltd, there is still a significant degree of separation between N Ltd’s work and TQ’s acquisition of the jetski.
23. In addition, the duty of care is characterised by the person who is closely and proximately affected. It is not a general duty to take care that lasts for some particular period of time. This means that the short amount of time between the work being undertaken and TQ’s ownership of the jetski is not a factor that can be taken into account when assessing whether N Ltd owed a duty of care to TQ.
24. N Ltd made the not unreasonable point that given the number of owners, it was not possible to accurately assess what had been done to the jetski since it left N Ltd’s premises, or the conditions it was stored in or used. This clearly points against a conclusion that N Ltd owes a duty of care to TQ.
25. I also consider a conclusion that N Ltd owed a duty of care to TQ would be inconsistent with the general approach of the law that when purchasing goods in a private sale the underlying principle is “buyer beware”. TQ knew that work had been undertaken on the jet ski. He could have arranged for a pre-purchase inspection but chose not to. The law has chosen to place the risk in this situation on the purchaser. Concluding that N Ltd owed TQ a duty of care would be contrary to this policy.
26. That means that although HT has a claim against N Ltd, TQ does not have a valid legal claim. The claim by TQ against N Ltd must be dismissed.

**If so, was the work by N Ltd undertaken properly?**

27. Although TQ does not have grounds for a claim against N Ltd, HT does. The relevant law is that when services are supplied to a consumer, s 28 of the CGA states that there is a guarantee that the service will be carried out with reasonable care and skill.
28. HT said that the work was not carried out with reasonable care and skill because the invoice listed parts and work that were not on this jet ski; that the hours of work charged were too high

and that the wrong spark plug was installed. However, the main concern was about the water in the engine which caused corrosion and required a new crankshaft and pistons to be installed. At the hearing evidence was heard from the mechanics at SN who assessed the jet ski once TQ had taken it to be serviced and found to have low compression, and who concluded that the water damage was most likely from a leaking exhaust gasket.

29. I find there was no breach of the guarantee of reasonable care and skill with regards to the invoice. N Ltd explained that the errors on the invoice were administrative, caused by a new administrator failing to delete fields that auto-populated on the invoice. I accept this explanation and note the CGA does not require a perfect service.
30. I also find there was no breach regarding the hours invoiced. As N Ltd said, the initial work was quoted for, and charged on the basis of that quote. There is nothing to indicate N Ltd failed to take reasonable care while carrying out this process.
31. While N Ltd said they put a different spark plug on, they did so purposefully by choosing one heat setting hotter. It said it did so on these type of jet skis to stop the engine from fouling the spark plugs. Although SN said it would normally install the standard type, there was no evidence that the installation of this spark plug caused any damage, or was a failure of reasonable care and skill.
32. I find, however, that it is more likely than not that N Ltd failed to take reasonable care and skill in the work on the exhaust gasket, which was the probable source of water in the engine.
33. I make that finding primarily in reliance on the evidence of SN at the hearing. SN said it was unable to say definitively where the water in the engine had come from, but that in its view, having seen the jet ski, the most likely cause was the gasket.
34. N Ltd raised a number of alternative explanations for water in the engine, including a failure to properly winterise the jet ski, the jet ski rolling and taking in water or the jet ski being incorrectly flushed.
35. SN accepted that those explanations were possible causes of water in the engine. However, it said that the majority of jet skis it saw were not properly winterised. It said that winterising this jet ski would have helped to reduce the damage, but that it was not likely to be the cause of this much water.
36. It also said that although it could not definitively say what had caused the water ingress, at the time it assessed the engine it considered the most likely source to be the exhaust gasket, and in particular, that it looked as if some of the old gasket had not been cleaned up enough or properly resurfaced by N Ltd.
37. N Ltd said that the discolouration SN referred to on the photograph of the exhaust gasket was not necessarily evidence of leaking, but rather was simply a result of cleaning the gasket. It also said that as the exhaust gasket was quite thick, it could take some imperfections.
38. I accept that it is not possible to definitively conclude what caused the water to get into the engine. However, the Tribunal does not need to be able to say with 100% certainty what happened.
39. The mechanics from SN were careful witnesses, who accepted there were alternative explanations for water in the engine and that they could not rule out those explanations. However, their firm view after considerable discussion at the hearing was that they stood by their initial conclusion that the water in the engine had most likely come from a leaking exhaust gasket. Given they saw the jet ski at the relevant time, I accept their evidence and find that it is more likely than not that the water in the engine was caused by N Ltd failing to properly clean the exhaust gasket.

**If not, what remedy is available?**

40. Section 32 of the CGA requires a consumer to approach the supplier first if the failure can be remedied. If remedying the failure does not occur within a reasonable time, further remedies are available, including for loss to the consumer.
41. As outlined above, as TQ does not have a legal claim against N Ltd, he is not entitled to a remedy from it, despite the fact that he incurred loss by having to fix the jet ski.
42. HT no longer owned the jet ski at the time the issues became apparent. Although TQ approached N Ltd, N Ltd did not consider that it owed any duty to TQ and consequently was not able to inspect the jet ski before it was repaired, as s 32 of the CGA envisages.
43. While HT said he had paid too much for a repair job that was not properly performed, it is hard to see that he has suffered any loss. At the time he sold the jet ski he knew N Ltd were repairing it, and he had accepted the quote for those repairs. Knowing these costs, he accepted an offer to purchase the jet ski from CM. CM has not brought a claim against HT regarding the repair work carried out by N Ltd and it is difficult to see how he could do so given CM no longer owns the jet ski either.
44. HT has not had to pay to get the jet ski repaired as he no longer owns it. He is not liable to TQ for any loss that TQ has suffered as there was no contract, or other source of legal obligation between them.
45. As HT is not out of pocket and has not suffered any financial loss, there is nothing for N Ltd to remedy. The claim must be dismissed.

**Referee:** Souness - DTR

**Date:** 2 August 2023