

BETWEEN

**EO
APPLICANT**

AND

**UL LTD
RESPONDENT**

Date of Order:

17 November 2017

Referee:

Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the respondent, UL Ltd, is to pay the sum of \$5975.00 directly to EO on or before 8 December 2016.

Facts

[1] EO was driving his car city-bound on the [X] motorway at about 6.30am on Monday 11 January 2016 when he struck an object sitting in his lane. The object turned out to be a grey metal digger bucket.

[2] The bucket was the property of UL Ltd. EO contends that UL Ltd's driver was negligent in not securing his load that morning and that his negligence has resulted in damage to EO's car and associated losses to the value of \$8500.00.

[3] Mr A for UL Ltd contends that the digger bucket was stolen from its trailer outside a construction site the weekend before the incident on the motorway and that it was therefore not their driver that allowed it to fall onto the motorway.

[4] EO claims on the basis of vicarious liability in negligence as the driver is an employee of UL Ltd.

Issues

[5] The issues to determine are:

- a) Did the digger bucket fall from a vehicle/trailer driven by an employee of UL Ltd's on the morning of Monday 11 January 2016?
- b) If so, was UL Ltd's driver negligent in failing to secure his load?
- c) Was there contributory negligence on the part of EO, in hitting a stationary object on his motorway lane?
- d) What are EO's reasonable losses and is UL Ltd vicariously liable for them?

Did the digger bucket fall from a vehicle/trailer driven by an employee of UL Ltd on the morning of Monday 11 January 2016?

[6] I find that the digger bucket did fall off a trailer towed/driven by UL Ltd's employee, Mr B, on the morning of Monday 11 January 2016. I note that UL Ltd maintains that, on that date, the digger bucket was no longer in its possession, it having been stolen from the trailer the weekend immediately preceding the incident on the motorway.

[7] UL Ltd states that the theft was not reported to the police because previous stolen equipment was not followed up when reported and Mr A therefore considered reporting it to be a waste of time. I accept that not all thefts are reported and have taken no inference from the absence of a police report about the alleged theft, rather my finding that the digger bucket had not been stolen and was in the possession of UL Ltd's employee on the morning of the incident is based on the evidence presented by EO and a witness, Constable C, from the NZ Police.

[8] Constable C provided a detailed written statement about his attendance at the incident on the motorway on 11 January and his subsequent enquiries about the matter. The statement was presented by EO at the first hearing session. In it, Constable C wrote:

- a) That the police removed the digger bucket from the motorway and established ownership of the item via the supplier of the part using its serial number.
- b) That he visited EL Ltd at a construction site and spoke to Mr A and Mr B. They told him that the part had been stolen.
- c) That he took photos of a trailer, registration number (X), parked on the road by the construction site that had an area where digger parts were stored.
- d) That he returned to work and entered the trailer registration number into a database. He found that there were three incidents linked to that trailer from the location, date and approximate time of the incident that is the subject of this claim. The incident logs recorded that a machine part had fallen off the trailer, (X), on the motorway and vehicles had hit it.
- e) That he visited UL Ltd's employee, Mr B, at his home and noted the trailer, (X), in the driveway with digger parts visible in the front of the trailer. He showed Mr B the incident reports called in by members of the public and Mr B acknowledged being the driver of the truck on the day, but stated that the digger part had been stolen beforehand.
- f) That he issued Mr B an infringement notice for 'insecure load'.

[9] Mr A for UL Ltd wished to both challenge and question aspects of Constable C's written statement, so the matter was adjourned to allow for the Constable's attendance in person as well as any other evidence either party wished to present.

[10] At the second hearing session, Constable C went through his statement in person and provided copies of the three incident logs recorded that morning by police following phone calls from members of the public. He also clarified that he personally saw damage to two vehicles (including EO's) caused by collision with the digger bucket and understands that a third damaged vehicle had already been driven away by the time police arrived. He stated

that the three phone calls recorded by the incident logs were from other witnesses, none of whom had themselves hit the digger bucket. All three incident logs record that the respective callers had seen the digger bucket fall off a trailer with registration number (X).

[11] Mr A questioned Constable C as to whether or not he or another officer had visited any of those witnesses and obtained a statement directly from them. Constable C replied that the witnesses had not been contacted further as police considered they had sufficient evidence of a link between the motorway incident and UL Ltd's driver for their purposes, taking into account the priority of the event.

[12] In addition to Constable C's written statement, the copies of the three incident logs linking UL Ltd's trailer to the incident on the motorway on 11 January 2016, are in my view compelling evidence that the digger bucket had not been stolen as UL Ltd contends, rather was in the possession of UL Ltd's driver, Mr B, that morning. The incident logs are a formal record taken by NZ Police of verbal statements given by phone not by one, but by three separate independent witnesses, immediately after the incident occurred. As it has never been UL Ltd's position that the trailer was also stolen, the logs linking the trailer and the digger bucket falling off it establish that the digger bucket had not been stolen and fell onto the motorway while being driven by UL Ltd's driver.

If so, was UL Ltd's driver negligent in failing to secure his load?

[13] I find that Mr B's failure to adequately secure his load and/or check that his load was secure is a breach of his duty of care to other drivers as it was reasonably foreseeable that a piece of metal equipment coming off the trailer would constitute a hazard on the road (and on the motorway in particular).

Was there contributory negligence on the part of EO, in hitting a stationary object on his motorway lane?

[14] I find that there is no contributory negligence on EO's part. I accept Mr A's point that a driver has to reasonably avoid any stationary object in his path and must drive at such a speed as to be able to stop in the length of the lane that is visible to the driver.

[15] However EO's speed is not at issue here and there is no suggestion that he was travelling at anything other than an ordinary motorway speed. In addition, in this situation it was not an object the size of a vehicle that was stationary on the motorway, which one might reasonably expect to see, rather a metal object, low to the ground and grey in colour. At

motorway speed, it would not be visible until a driver was too close to stop or to safely take other evasive action.

What are EO's reasonable losses and is UL Ltd vicariously liable for them?

[16] At the second hearing session, EO provided a pre-accident valuation for his vehicle of \$5995.00 which I accept as the reasonable pre-accident value. He was unable to obtain written evidence of a likely salvage value, but was told verbally \$200-\$300.00. Without written evidence, I set this amount at the higher figure in that range of \$300.00.

[17] In addition, EO went back to the towing company who took his car from the motorway (he was transported to hospital) and obtained a copy of the invoice for the towing cost incurred of \$280.00. Mr A has challenged that invoice and amount, noting that the invoice is dated on 10 January 2016, the day before the incident occurred, and noting that it has been obtained in retrospect.

[18] I do not find it unusual or suspicious for a party to obtain a copy of costs in retrospect and given that EO was taken away from the incident scene by ambulance, I do not doubt that he incurred a towing cost as a result of the incident. As the towing invoice records the tow location as being from "[X]" to EO's home address, that is, from the [X] section of the [X] motorway where the incident occurred, I am satisfied that the date appearing on the invoice of 10 January is simply a typo.

[19] On the matter of UL Ltd's vicarious liability, Mr A contends that Mr B, if he was the driver involved in the incident, was driving in a personal capacity at the time and not in his capacity as an employee of UL Ltd. He says that, because the incident occurred at 6.30am in the morning, and work at UL Ltd's construction site at the time in Suburb A did not start until 8am, Mr B could not have been driving at this time in a work capacity.

[20] However, Mr A, despite raising this issue at the first hearing session, did not bring any evidence to the second hearing session (consent conditions re time of work for example) to support his contention of an 8am start time. Even if that were established it is also possible that work for Mr B (who was not brought to the hearing as a witness by UL Ltd) involved collecting supplies prior to arriving at the construction site.

[21] In addition, I consider that Mr B was driving in his capacity as an employee at the time of the incident, because he was towing a trailer belonging to UL Ltd, carrying UL Ltd's work equipment and because the location of the incident was on a route that would be the usually-

taken route between the driver's home in [X] Auckland and UL Ltd's construction site at the time in Suburb A.

Conclusion

[22] For all the above reasons, I find UL Ltd to be vicariously liable for their driver's negligent actions and liable to pay EO's reasonable losses of \$5975.00.