



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2019] NZDT 1677

APPLICANT **BD**

RESPONDENT **ET**

APPLICANT'S **Insurance Company A**
INSURER
(if applicable)

RESPONDENT **Insurance Company B**
INSURER
(if applicable)

The Tribunal hereby orders:

The claim is dismissed.

Reasons

[1] As BD was getting his car out of his garage he collided with a car which had been parked by ET in a blind spot in his driveway. BD's car was damaged as a result. ET immediately accepted responsibility for her car having been in BD's driveway when it should not have been. She signed an acknowledgement of liability for the collision.

[2] Both BD and ET were insured but ET's insurer Insurance Company B considers BD to have been at fault with the result that his insurer (Insurance Company A) has required BD to pay the \$500.00 excess under his policy. BD claims \$500.00 from ET (representing the amount of his excess) plus a further \$45.00 for the Disputes Tribunal filing fee.

[3] I have to decide:

- (a) whether ET trespassed on BD's property by parking her car where she did;
- (b) if so, is ET as a consequence liable for the damage caused to BD's car;
- (c) whether the collision with ET's car was caused by BD taking insufficient care when reversing out of his garage; and
- (d) if ET is liable to pay the \$500.00 claimed by BD.

[4] The relevant law is the law of trespass and the law of negligence. Trespass occurs when a person voluntarily enters the land of another without authority from the owner or occupier of such land.

Negligence concerns the duty that a person owes another to be careful. A driver is negligent if they fail to be careful and another party suffers a loss as a result.

Did ET trespass on BD's property by parking her car where she did?

[5] ET did not attend the hearing but her insurer's representative (Mrs M) was present. It was agreed at the hearing that ET had trespassed on BD's property.

If ET did trespass on BD's property, is she as a consequence liable for the damage caused to BD's car?

[6] BD was of the view that as ET had trespassed on his property, he was entitled to right of way and should not therefore be liable for the damage suffered by his car. He said that the damage to his car had been caused by ET's trespass and that had she not trespassed her car would have not been there for him to hit. In other words, but for the actions of ET, the collision would not have occurred

[7] BD drew my attention to the case of *Thackwell v Barclays Bank plc* [1966] 1 All ER 678 (Thackwell) and the defence of *ex turpi causa non oritur actio*. Such defence rests on a public policy principle that the courts should not assist a plaintiff who has been guilty of illegal conduct. BD considered that as ET had trespassed on his property (thereby committing an illegal act), the decision in Thackwell provided a "shield" for him and that he should not be held liable for the loss by having to pay the excess under his insurance cover.

[8] I have given consideration to BD's argument in this regard and find that the decision in Thackwell does not have the effect of absolving a person in BD's situation from liability when that person has failed to exercise due care. I also note that the principle of *ex turpi causa non oritur actio* relates to a plaintiff not being able to benefit from an illegal activity. I therefore find that the finding in Thackwell does not provide for BD the shield of defence that he has argued it does.

[9] I also find that ET cannot be held liable for the damage caused to BD car by actions of his own by virtue of her having trespassed on BD's property.

Was the collision with ET's car caused by BD taking insufficient care when reversing out of his garage?

[10] In an email sent by BD to ET's insurer BD stated "*There has been a history of guests of tenants of the Adjoining Property unlawfully parking on/obstructing my property. This has resulted in warnings from the landlord: [Housing Company] to their tenants that no further parking or obstruction should be allowed to occur*". I therefore find that BD should have been aware of the possibility of a car being parked in his driveway and should have checked to ensure that that was not the case.

[11] I find that although ET had indisputably trespassed on BD's property, the collision would not have occurred if he had taken reasonable steps to ensure that the way was clear for him to reverse out of his garage and make his turn. I therefore find that the collision was caused by BD taking insufficient care when reversing out of his garage.

Is ET liable to pay the \$500.00 claimed by BD?

[12] Having made the finding in the preceding paragraph, it follows that I also find that ET is not liable to pay the amount claimed. I therefore dismiss BD's claim.

Referee: P Ferguson
Date: 21 November 2019



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 20 working 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 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, 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>.