



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

District Court

[2023] NZDT 236

**APPLICANT** QN

**RESPONDENT** HO

**APPLICANT'S** B Ltd  
**INSURER**

**The Tribunal orders:**

HO is to pay the sum of \$1,060.00 to B Ltd on or before Monday, 12 June 2023.

**REASONS**

1. QN owns a rental property at [address 1] ("the Property"). There was previously a low fence at the front of the Property made of Summerhill stone bricks which were five bricks high ("the Fence"). The Fence was divided in two by the driveway of the Property: there was a small fence (five bricks high and three bricks wide) to the right of the driveway, between the driveway and the neighbour's fence on that side, with the letterbox standing behind it; and a long fence to the left of the driveway which ran the width of the Property between the driveway and the neighbour's fence on that side QN had the Property insured with B Ltd.
2. On 30 April 2020, QN was informed by a tenant at the Property that there had been an incident the night before when someone crashed through the Fence and damaged it.
3. QN lodged an insurance claim with B Ltd regarding the damage to the Fence. B Ltd paid out QN for the repair of the Fence, based on a 'revised pricing' from U Ltd dated 3 June 2020 which included two options to repair/replace the Fence: a price to replace the Fence with red brick at \$4,554.00 (incl GST); and a price to replace the Fence with grey brick for \$4,240.28 (incl GST) ("the Pricing").
4. B Ltd paid out the sum of \$4,554.00 to QN based on the first option set out in the Pricing.
5. QN and B Ltd bring a claim against HO seeking damages of \$2,120.00, reduced from \$4,554.00 at the hearing, for the damage to the Fence.
6. I held a hearing of the claim with the parties on 15 May 2023. HO attended the hearing in person at the [Redacted]. QN attended for part of the hearing by teleconference. KN attended the hearing on behalf of B Ltd and was appointed as its representative.

## Issues

7. The issues for the Tribunal to determine are:
  - (a) Did HO owe a duty to QN to take reasonable care not to damage the Fence?
  - (b) If so, did HO breach the duty of care owed to QN by damaging the Fence (ie was he negligent)?
  - (c) If so, should HO pay the cost of putting right the damage and, if so, how much should be pay to QN/B Ltd?

### **Did HO owe a duty to QN to take reasonable care not to damage the Fence?**

8. The relevant law is the law of negligence in tort (a tort being a civil wrong). For a claim in negligence to succeed, the wrong-doer must have owed a legal duty to take care to the person who suffered damage; the wrong-doer must have breached that duty of care (ie been negligent); the damage suffered must have been caused by that breach of duty; and the damage must have been reasonably foreseeable (that is, not too remote).
9. Under the law of negligence, drivers have a duty of care to other drivers and to property owners to take reasonable care to avoid damaging property near to where they are driving. HO was driving on a public road on the evening of 29 April 2020, and he owed a duty under the law of negligence to QN, as the owner of the Property, to take reasonable care to avoid causing damage to the Fence.

### **Did HO breach the duty of care owed to QN by damaging the Fence (ie was he negligent)?**

10. A property owner claiming that another person caused damage to their property has the onus of proving on the balance of probabilities (that is, that it is more likely than not) that the person breached a duty of care they owed the property owner, and that breach resulted in the damage to the applicant's property. The standard of care expected of a driver is that of a reasonable prudent driver.
11. HO says that he did not damage the Fence. Rather, he believes that it is a tenant/landlord issue and the tenant has blamed him for damaging the Fence when they did it themselves. He says that the tenants at the Property knew of him, so blamed him. He says that he lives at [address 2] which is quite nearby to the Property. On the evening of 29 April 2020, he was visiting a friend's house on [address 3]. He left his friend's house in his [car] and when he reached the intersection between [address 3] and [address 1], the Property was directly in front of him. HO says that he turned right into [address 1] and drove along, veered across the street, and hit a parked car which then shunted into another parked car. The Police attended the scene and took a blood-test which confirmed later that he was under the influence of a Class C drug but had no alcohol in his system. HO was injured and taken to hospital, and does not recall the collision.
12. HO says that he was convicted of careless driving for damaging the two cars and paid the reparations that he was ordered to pay. He says that, although the Police stated on the Traffic Crash Report that he had damaged the Fence and left behind his back bumper, he was not charged with crashing into the Fence; he does not recall crashing into the Fence; there are no witnesses; there are no photos of the bumper he supposedly left behind at the Property; and no photos of skid marks or damage to the grass. He says that he does not remember crashing into the Fence, and he was taken to hospital and his Honda was returned to his home, including the back bumper. He says it is unclear how he would have missed the turn into [address 1], crashed into the Fence on both sides of the driveway, then kept driving. He says that his Honda was written off and was badly damaged to the front and rear when he hit the parked car and was spun around.

13. However, having heard from the parties, and having carefully considered the available evidence and information, I find that QN and B Ltd have proved, on the balance of probabilities, that HO damaged the Fence. I make this finding for the following reasons:

(a) As explained to the parties at the hearing, to prove a civil claim the standard of proof is the balance of probabilities (that is, more likely than not) which is a lower threshold than the standard of proof required for a criminal conviction which is beyond reasonable doubt. Therefore, it is understandable that the Police did not press charges against HO regarding the Fence because it could not be proved beyond reasonable doubt that he had damaged the Fence. However, this does not mean that I cannot make a finding that QN and B Ltd have proved on the balance of probabilities that he damaged the Fence.

(b) I am satisfied that QN and B Ltd have proved their claim against HO on the balance of probabilities. I acknowledge that the available evidence is circumstantial, however, when the evidence is looked at in its totality, that evidence is sufficient to persuade me that it is more likely than not that HO damaged the Fence.

(c) QN received an email from the tenant of the Property (along with photos of the damage to the Fence) on 30 April 2020 which stated that:

*"...we had an incident last night we had someone crash through the fence out the front I called the police and they told us it was an old man with health conditions they found him up the road were (sic) he had crashed into another couple of cars I have attached some photos of the fence the officers name who came to the incident and the report number for you."*

I accept this email and its accompanying photos as evidence that the Fence was damaged on the evening of 29 April 2023. HO crashed into the parked car on [address 1] at 9.06pm on 29 April 2023. This places HO at the correct time and place to have also caused the damage to the Fence.

(d) While there are no witnesses to HO turning from [address 3] into [address 1], missing the corner, and colliding with the Fence on the other side of the road, this is a reasonable conclusion given that HO does not recall the time prior to colliding with the parked car further up the street, the Police confirm that he was under the influence of a Class C drug (which had not been prescribed to him) when he was driving at that time, and he drove past the Property prior to crashing into the parked car.

(e) I do not consider it necessary for there to be photographs of skid marks or of the bumper bar, given that I have the benefit of the conclusions set out in the Traffic Crash Report and the Summary of Facts that HO collided with the Fence. Further, it seems unlikely that someone else would have damaged the Fence on the same evening as HO drove past the Property and collided with a parked car.

(f) I am satisfied that it is more likely than not that HO damaged the Fence on both sides of the driveway, by either colliding with the Fence side on or by hitting one side and then manoeuvring to get out of the driveway and hitting the other side.

(g) There is no evidence available to persuade me that the tenants of the Property damaged the Fence and blamed HO.

**Should HO pay the cost of putting right the damage and, if so, how much should be pay to QN/B LTD?**

14. A person who has caused damage to another's property due to their negligence is liable to pay damages for the reasonable costs or losses flowing from that negligence. Before the Tribunal awards damages to a successful applicant, it must be satisfied that the amount claimed is proved and reasonable.

15. QN and B LTD bring a claim against HO seeking damages of \$2,120.00, reduced from \$4,554.00 at the hearing, for the damage to the Fence.
16. I agree with KN that the Pricing seems high and appears to be a price to replace the whole of the Fence, rather than replacing and repairing only the small number of bricks damaged on either side of the driveway. I also note that there are two bricks missing in the middle of the Fence which cannot be related to any damage that occurred on 29 April 2020.
17. While I acknowledge that KN has offered a 50 percent discount to HO on the amount claimed, I am satisfied that the sum of \$2,120.00 is still too high based on the photographs of the damage that I have viewed. The Fence was old, and the majority of the Fence was still in working order despite the damage to the part either side of the driveway. There is therefore betterment given that QN received \$4,554.00 from B Ltd which he appears to have used to build a new picket fence. I therefore reduce the claim by a further 50 percent to \$1,060.00. I consider this fair and reasonable in the circumstances, taking into account the merits and justice, and the betterment received. In this way, HO makes a contribution towards the cost incurred by B Ltd regarding the damage to the Fence.
18. For these reasons, HO is to pay the sum of \$1,060.00 to B Ltd by the date set out in the order.

**Referee: D. Brennan DTR**

**Date: 22 May 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>.

