



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1553

APPLICANT HM

**RESPONDENT B Ltd
 Attention: NN**

**RESPONDENT O Ltd
INSURER**

The Tribunal orders:

1. B Ltd is to pay to HM the sum of \$13,740.00 on or before Tuesday, 24 August 2021.
2. HM is to keep the damaged 2000 Ford Fairlane Ghia registration number [redacted].

REASONS

1. On 17 November 2020, HM was contacted by an associate, DE, who asked if he would pick up a trailer loaded with roofing materials for him from Ashburton and take it to Dunedin. HM agreed because, at the time, he happened to be driving from Nelson to Hampden (which is south of Oamaru) in his 2000 Ford Fairlane Ghia vehicle registration number [redacted] ("the Ford"). HM had bought the Ford from DE trading as [redacted] on 12 November 2020 for \$10,000.00.
2. Around 6pm on 17 November 2020, HM arrived in Ashburton and met with DE to pick up the Trailer, which was a dual axle trailer of about five metres long ("the Trailer"). DE told HM that he had hired the trailer from B Ltd trading as B Ltd ("B Ltd"). DE hitched the Trailer onto the Ford and put on the two safety chains.
3. Later that evening (around 10pm) HM had an accident while driving the Ford with the Trailer attached ("the Event"). The Event occurred on State Highway 1 between Palmerston and Wakawaiiti, about 100 metres south of Lee Road. HM says he was driving 60 to 70 km/hr at the time. The Ford ended up against the guard-rail of the Northbound lane facing North as it had crossed the centreline and spun around. HM says the Trailer was at a right-angle to the Ford and was facing towards the Southbound lane. The Ford suffered extensive damage to the rear quarter.
4. HM says that the Trailer and its coupling were not safe, roadworthy or fit for purpose, and this caused the accident. HM claims damages of \$15,377.00 from B Ltd (with storage fees continuing to accrue). HM did not have the Ford insured at the time of the Event.

5. Three hearings of the claim were held. HM attended the hearings in person at the Nelson Court. NN attended the first two hearings by teleconference on behalf of B Ltd and was appointed as its representative. TN attended the second and third hearings by teleconference on behalf of O Ltd and was appointed as its representative. O Ltd's assessor, SX of BK, attended the second hearing. I would like to assure the parties that all the evidence presented at the hearings has been considered, but this order refers only to essential evidence material to the issues and is not intended to be a full record of the hearings or of the evidence presented.

Issues

6. The issues I need to determine in relation to the claim are:
- (a) Did B Ltd owe HM a duty to take reasonable care to avoid the Trailer causing damage to the Ford?
 - (b) If so, did B Ltd breach the duty it owed HM by not taking reasonable care with the Trailer (ie was B Ltd negligent) and, if so, did B Ltd's negligence cause or contribute to the damage to the Ford?
 - (c) If so, is HM entitled to a remedy and is the amount claimed proved and reasonable?

Did B Ltd owe HM a duty to take reasonable care to avoid the Trailer causing damage to the Ford?

7. The relevant law is the law of negligence in tort (a tort being a civil wrong). Negligence concerns the legal duties that one person owes to another to take care. A party claiming that another party negligently caused damage to his or her property has the onus of proving on the balance of probabilities (that is, that it is more likely than not) that the other party breached a duty of care he or she owed the claimant, and this caused or contributed to the damage suffered by the claimant. A duty of care in tort arises where parties are in close proximity to each other and it is reasonably foreseeable that if a standard of care is not adhered to by a party while doing something, the other party will be harmed, unless there are policy considerations which negative a duty of care in the particular circumstances.
8. HM did not hire the Trailer from B Ltd, rather, it was hired by DE. This means that the law of contract does not apply to the claim because there is no contractual relationship between HM and B Ltd. Therefore, I have considered the claim under the law of negligence. For the avoidance of doubt, my findings and the outcome would have been no different if I had considered the claim under the law of contract and/or under the Consumer Guarantees Act 1993.
9. I am satisfied that B Ltd owed a duty of care to HM to take reasonable care to ensure that the Trailer did not cause damage to the Ford. When making this finding, I have taken into account that HM had DE's consent and authority to use the Trailer, and there has been no suggestion from B Ltd that a person hiring a trailer from B Ltd cannot allow others to use it. In fact, I would consider it quite usual for someone to hire a trailer and share that trailer with others. Therefore, HM was in close proximity to B Ltd and I am satisfied that it was reasonably foreseeable that if B Ltd did not take reasonable care with regard to the Trailer then HM might suffer harm. I am not aware of any policy considerations which would negative a duty of care in these circumstances.

Did B Ltd breach the duty it owed HM by not taking reasonable care with the Trailer (ie was B Ltd negligent) and, if so, did this cause or contribute to the damage to the Ford?

10. A party claiming that another party negligently caused damage to his or her property has the onus of proving on the balance of probabilities that the other party breached a duty of care he or she owed the claimant (ie that he or she was negligent) and that negligence caused or contributed to the damage suffered by the claimant. The standard of care expected is that of a

reasonable prudent person. This means that the standard of care that B Ltd was required to adhere to was that of a reasonable prudent supplier of trailers for hire.

11. B Ltd denies that it negligently caused damage to the Ford. B Ltd, O Ltd (B Ltd's insurer) and SX (O Ltd's assessor). NN of B Ltd says that the Trailer was registered and had been issued with a new WOF only five days before the Event, and that B Ltd prides itself on giving good service and having well-maintained equipment for hire. SX, provided a report dated 7 May 2021 which concludes that the damage is most consistent with a sudden shock loading force causing the bolts to break and the probable cause of the shear breakage is torsion stress forces between the loaded trailer and towing vehicle which has transferred the stress loading to the coupling and tow ball. SX accepts that two of the four bolts were not the recommended grade, that three of the bolts sheared off; that the bolts were worn; and that the holes were elongated and slightly off-centre to accommodate the new coupling when it was added, but he says these issues did not cause the Event, rather, he says that the bolts sheared off suddenly when the Trailer jack-knifed into the Trailer. SX concludes that although there were pre-existing issues with the Trailer, these did not cause or contribute to the Event, rather, the bolts sheared off when the Trailer jack-knifed into the Ford.
12. Having carefully considered the available evidence and information, I find that HM has proved, on the balance of probabilities, that B Ltd breached the duty it owed him by not taking reasonable care with the Trailer (ie B Ltd was negligent), and this caused the damage to the Ford. I make this finding for the following reasons:
 - (a) Based on the available evidence (including photographs of the Ford and the structural report that HM obtained from PI of BQ (undated)), I am satisfied that the Ford was seriously damaged in the Event and is not economic to repair. The Ford sustained heavy rear structural damage which is not repairable, and a repair would require a replacement body shell and all components changed over, and repair costs would exceed \$25,000.00. This is not disputed by B Ltd. The rear structural damage is consistent with the Ford being pushed sideways when the Trailer jack-knifed and pushed the Ford into the railings on either side of the road. I note that HM says that, immediately after the Event, the Trailer was still attached to the Ford by one bolt of the coupling. He says the coupling had detached from the frame and swivelled sideways on the one remaining bolt and the other three bolts from the coupling had sheared off. He found the three missing bolt heads on the road but could not find any of the nuts that would have held the bolts on to the drawbar, nor could he find the pieces of the bolts that had sheared off. One of the safety chains was still attached to the coupling and the other one had broken.
 - (b) There is no evidence to suggest that HM did or did not do anything to cause the Event and/or cause the Trailer to jack-knife into the Ford. I have taken into account that HM says he is a very experienced driver and trailer-user who regularly works as a truck driver. The Ford was registered and had a current WOF. All the damage to the Ford is to the rear and there is no damage forward of the back doors. HM says he did not hit anything to cause the Event and this is consistent with the lack of damage to the front of the Ford. HM says that, during the trip, he checked the strops that DE had used to secure the load on the Trailer. There is no suggestion that HM was speeding, and he says he was not speeding. While it is possible that HM fell asleep given that he does not recall the Event, there is no evidence to suggest this. HM believes he was knocked out during the Event and I consider it more likely than not that he lost consciousness when he hit his head during the Event, and I note that he is having ongoing medical treatment for concussion.
 - (c) I note that HM says the bolts used on the coupling were worn and two of the bolts were not of the recommended grade (D2 5.8 bolts rather than the recommended 8.8 bolts); three of the bolts sheared off, being the two D2 bolts and one 8.8; the holes in the drawbar had been re-drilled to accommodate a new coupling and the holes were oblongated (elongated) and distorted so that the bolts did not fit snugly and he says that new holes should have been drilled in the drawbar for the bolts rather than the old ones being re-drilled. He says that the coupling was not sitting square on the draw-bar because of the elongated holes which put the coupling at an angle. He says that all these problems with the Trailer would

have put stress on the bolts. He believes that the problems started with the changes made to the holes in the drawbar because the coupling was not square and could move around.

- (d) I have taken into account the oral evidence of NC of XF who saw the Trailer after the Event and was asked by HM to fit a coupling onto the Trailer but refused due to his concerns about the Trailer. I note that NC is an engineer with 30 years' experience in mechanical and machinery repairs and builds trailers. He confirms HM's evidence. NC says he thought the Trailer coupling did not look right and noticed that the coupling had been changed at some point and holes had been re-drilled to accommodate the new coupling and, rather than there being snug holes for the bolts, they were bigger and oblongated and the coupling was at an angle. I note NC's comment that, regardless of bolt fatigue, the holes on the coupling and the draw-bar must match so that the load is spread evenly over the four bolts, or otherwise too much pressure will be placed on the fewer working bolts and this will cause the working bolts to fail one by one. He says that if two bolts were taking the weight it probably would not cause a trailer to jack-knife but would affect the handling, however, if the trailer was down to one bolt it would be dangerous and could cause an accident. He says that bolts do not usually shear off as they can take a lot of pressure and he has never seen a coupling/bolts shear off before if the spacing is right. He says that the spacing of the holes is more important than the grade of bolts used. He says that he is 100 percent sure that the coupling plate was not right for that coupling, however, he says he is not sure what lead to the Event. He also says that there was grease between the coupling and the mounting plate, and this lubricant would put more load on the bolts and may have been the final straw when combined with the other issues with the coupling.
- (e) I note SX's comments that although there were problems with the bolts and the coupling, it does not mean that they caused the Trailer to fail. However, I am convinced by NC's evidence about the likely result of the various problems and, although NC stopped short of confirming that the problems caused the Event, I am satisfied after weighing up all the available evidence that it is more likely than not that the problems with the bolts and the coupling caused the bolts to shear off and the Trailer to jack-knife into the Ford once the Trailer was only being held by one bolt. I have taken into account SX's comments that he looked at the elongated holes on the coupling and found no evidence of movement on any of the holes. He says that it is common practice to elongate holes to fit a new coupler. He notes that the Trailer had been issued with a WOF the week prior to the Event, and the coupling is checked during a WOF inspection. He says that NN has confirmed that it checked the coupling when it carried out the WOF inspection of the Trailer. He also says that the 8.8 bolts were the recommended grade, but it is not essential that they be used. However, this does not convince me that the Trailer did not cause the Event.
- (f) I am persuaded by the report of a metallurgist, KN of S Ltd, who analysed the bolts and provided a report dated 22 June 2021 ("the Metallurgist Report"). The Metallurgist Report comments that two grades of bolts were used and three bolts failed by shearing. Two of the bolts were the recommended grade (8.8) and two were under the recommended standard (5.8). The report concluded that the bolt failure was a rapid shear type failure. The report also noted that the bolts had well flattened threats which was historical. The conclusion in the Metallurgist Report was that the Trailer detached from the coupling partly because of using a mixture of grades of bolts and the loose joint which distorted the bolts until there was sufficient applied stress to cause the bolts to shear, and the failure occurred over an extended period.
- (g) While I note that SX did not agree with the conclusion in the Metallurgist Report and felt that KN had gone outside his remit by reaching such a conclusion when he was meant to be analysing the bolts only, I favour the conclusion of KN. I am also persuaded by the fact that HM was unable to find the bolt shanks that had sheared off those bolts or the nuts at the site of the Event which satisfies me that it is more likely than not that the bolts sheared off before the site of the Event due to stress rather than when the Trailer Jack-knifed which put more pressure on the other bolts and the coupling finally failed when only one bolt was left and this caused the Event. Therefore, I favour KN's view that the bolts sheared off due to stress and this caused the Trailer to jack-knife once three of the four bolts failed, which is

counter to SX's view that the bolts sheared off because the Trailer jack-knifed. In this regard, I have not been presented with any evidence to establish why the Trailer would have jack-knifed.

- (h) I have taken into account that SX is an experienced panel-beater and insurance assessor. However, NC is an experienced engineer and KN is an experienced metallurgist. With all due respect, I favour the evidence of NC and KN in the circumstances.
- (i) While I accept that there was contact between the Ford and the railings at the side of the road, there is nothing to convince me that this caused the Trailer to jack-knife rather than being caused after the Trailer jack-knifed.
- (j) O Ltd has presented a report from CN of LL dated 19 May 2021 about the trailer and coupling ("the LL Report"). LL gave the Trailer a Warrant of Fitness ("WOF") on 12 November 2020. The LL Report confirms that the coupler is a new multi-fit type so it looks like the coupler was replaced at some stage, and often the mounting holes in the new coupler do not align with the holes in the draw-bar so the holes need re-drilling. With regard to the mounting holes being elongated, the report says that the elongated mounting holes in the draw-bar had small humps on the middle of the long edge which would have been smooth if the bolts had been moving back and forth in the hole. It also says that if the coupler were loose, the metal where it mounts on the drawbar would be shiny but this is not the case. However, I note HM's comment that NC says there was grease on the coupling and this undermines the comment in the LL Report that there was no sign of movement on the mounting holes because the grease/lubrication would make it difficult to identify bolt movement.
- (k) I have taken into account that the LL Report also notes that the part of the highway where HM crashed was on a very gentle bend and to shear the bolts off there would have to be a large twisting force, more like a jack-knifing of the Trailer not a direct straight pull from the Ford to the trailer. However, as noted above, I am persuaded by the fact that HM was not able to find the bolt shanks or the nuts at the site of the Event which suggests that the bolts sheared off before the site and this put more pressure on the other bolts and the coupling finally failed and caused the Event. While I note that the WOF check-sheet from LL about the Trailer dated 12 November 2020 shows that one of the WOF items checked was "towing connections" (item E3) and the Trailer did not fail this item, however, I am satisfied from the other evidence available that there were problems with the Trailer's towing connections and it is unnecessary for me to determine whether these problems were issues which should or could have been identified at a WOF inspection.
- (l) B Ltd has presented a short report from QN of I Ltd (undated) regarding the Trailer ("the I Report"). I Ltd manufactured the Trailer and inspected it after the Event. The I Report concluded that the Trailer was structurally sound and fit for purpose and there was no evidence of movement between the coupling and the drawbar. I note that QN was not available to give evidence at the hearings because he did not wish to be involved in the dispute. In the circumstances, I favour the evidence of NC and KN for the reasons noted above.
- (m) I note that NN of B Ltd says that the Trailer had been issued with a WOF the week before the Event and each time a trailer is hired it is checked by B Ltd before it is hired to the next person to make sure that it is safe and legal. However, I am satisfied that there was a combination of problems with the Trailer which caused the damage to the Ford, and B Ltd is liable for this damage under the law of negligence by failing to ensure that the Trailer was safe and fit for purpose before it was rented out. The fact that the Trailer had a WOF, or that B Ltd did not know that the Trailer was unsafe or not fit for purpose, does not negate its obligations under the law of negligence.
- (n) Based on the available evidence (including photographs, the various reports and oral evidence given at the hearings), I am satisfied that it is more likely than not that the three bolts failed and sheared off at different times while HM was towing the Trailer due to a

combination of the issues with the bolts, the coupling and the drawbar which then put stress on the remaining bolts until the coupling could no longer hold and caused the Trailer to jack-knife into the rear of the Ford. I prefer this conclusion over SX's conclusion that the various issues with the bolts, coupling and drawbar did not cause the Event but, rather, the bolts sheared off when the Trailer jack-knifed.

Is HM entitled to a remedy and is the amount claimed proved and reasonable?

13. A person who has caused damage to another's property due to his or her negligence is liable to pay damages for the reasonable costs or losses that flow from that negligence. The purpose of an award of damages is to put the wronged party back to the position he or she was in before the negligence occurred by compensating the successful applicant for reasonably foreseeable losses suffered as a result of the negligence. Before the Tribunal awards damages to a successful applicant, it must be satisfied that the amount claimed is proved and reasonable.
14. HM claims damages of \$15,377.00 from B Ltd as at 13 May 2021, calculated as follows:
 - \$10,000.00, being the value of the Ford
 - \$3,540.00, for storage fees at \$20.00 per day from 18.11.20 to 13.05.21 (continuing to accrue)
 - \$1,650.00 for towing costs
 - \$100.00 for two trips to hospital
 - \$87.00 for Doctor's fees.
15. As I have found that B Ltd breached the duty of care it owed to HM and he has suffered loss as a result, he is entitled to damages for his reasonably foreseeable losses that he has suffered as a result of B Ltd's negligence.
16. HM claims \$10,000.00 for the value of the Ford which is not economic to repair. parties agree that the Ford is not economic to repair because the cost of repairing it would be higher than its value before the Event. In this regard, I note the structural report from BQ (undated) that HM presented which confirms that the Ford is uneconomic to repair, and repair costs would exceed \$25,000.00. I have taken into account that O Ltd obtained a pre-accident valuation for the Ford of \$8,000.00 from NZ Vehicle Valuations dated 10 June 2021. However, I have also taken into account that HM says that the Ford is a rare and collectable vehicle and the market price is therefore difficult to assess and he purchased the Ford for \$10,000.00 from DE on 12 November 2020 which was 5 days prior to the Event (HM has provided a receipt from DE confirming the purchase price of \$10,000.00 and confirming that the Ford was registered and warranted). In the circumstances, I consider the purchase price that HM paid for the Ford to be a better representation of the market value immediately prior to the Event than the recent pre-accident valuation provided by NZ Vehicle Valuations. Therefore, I estimate the value of the Ford immediately prior to the Event to be \$10,000.00.
17. HM wishes to keep the Ford, despite its damaged state. It is therefore necessary for me to deduct from the estimate of the value of the Ford (\$10,000.00) a reasonable amount for the likely resale (residual) value of the Ford in its damaged state. At the final hearing, two wreckers were telephoned, and they were prepared to pay \$200.00 and \$500.00 respectively for the Ford. I have taken into account that one wrecker in particular showed interest in purchasing the Ford which reinforces HM's view that it is rare and collectable. In the circumstances, and in the absence of any clear evidence about current value, I consider a reasonable residual value of the Ford to be \$500.00 and I deduct this amount from the estimate of the value of the Ford immediately prior to the Event. For these reasons, I award damages of \$9,500.00 to HM for the Ford. I also order that HM is to keep the Ford.
18. HM claims storage costs of \$20.00 per day for storing the Ford in Hampden from 9 March 2021, based on an invoice from DI dated 13 May 2021 (which also includes towing costs). The invoice shows a daily charge from 18 November 2021 to the date of the first hearing on 13 May 2021 of \$3,540.00, with storage costs continuing to accrue. HM says he has been moving around since the Event and has been unable to store the Ford with him pending the resolution of this dispute,

so he has stored it with DI at his property. DI stated at the second hearing that he considered \$20.00 a day (which is \$140.00 per week) to be a reasonable storage fee to charge HM in the circumstances. However, there is no evidence that HM has paid the amount charged in DI's invoice, or whether further costs are payable by him, and I note that DI is a friend of HM. Also, I note that HM wishes to keep the Ford, so he would be having to pay to store the Ford regardless of this dispute given that he has had nowhere to store it at the moment. On balance, I consider that the amount HM has claimed for storage costs to not be proved or reasonable. I am satisfied that a reasonable contribution from B Ltd towards HM's storage costs to be \$70.00 per week for 37 weeks (from 18 November 2020 to the date of this order) which is a total of \$2,590.00.

19. HM claims \$1,650.00 for towing costs based on the invoice of DI dated 13 May 2021. The invoice notes that the cost is for attending the accident site and removing the trailer and Ford, towing the Ford to storage, delivering material to Dunedin from the Trailer, fixing the Trailer temporarily and taking it to Oamaru for repair. I am satisfied that it was necessary for HM to tow the Ford, arrange for the contents of the Trailer to be delivered to Dunedin, and get the Trailer returned to B Ltd, and I am satisfied that the amount claimed is proved and reasonable despite there being no confirmation that HM has paid DI on the invoice. I therefore award damages of \$1,650.00 for HM's towing costs.

20. HM claims \$100.00 for two trips to hospital and \$87.00 for Doctor's fees. I dismiss HM's claim for these costs because the Tribunal is not permitted under the Disputes Tribunal Act 1988 to award damages for personal injury.

Conclusion

21. For these reasons, I award total damages of \$13,740.00 to HM. These damages are to be paid by B Ltd by the date set out in the order. In addition, HM is to keep the Ford as set out in the order.

Referee: D. Brennan
Date: 3 August 2021



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>.