

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Hayden v Kim* [2020] QCATA 85

PARTIES: **MAREE HAYDEN**
(appellant)

v

JAEHONG KIM
(respondent)

APPLICATION NO/S: APL356-19

ORIGINATING APPLICATION NO/S: MCDO 1816/18 (Brisbane)

MATTER TYPE: Appeals

DELIVERED ON: 10 June 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Gordon

ORDERS: **1. The application made on 19 February 2020 by Maree Hayden to put fresh evidence before the Appeal Tribunal is refused.**

2. Leave to appeal is refused. This means that the appeal fails.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN NO APPEAL LIES – where a Member found against the appellant in a vehicle damage claim – where in the appeal the appellant largely repeats her case before the Member – where the appellant submits ‘fresh’ evidence which would only be of value if there were to be a rehearing – where the appellant makes some other points which are capable of amounting to proper grounds of appeal – whether they are reasonably arguable – whether leave to appeal should be given

REPRESENTATION:

Appellant: Self-represented

Respondent: Self-represented

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] This is an appeal from a decision of a Member hearing a damage-only claim arising from a collision between a car and a motorcycle.
- [2] The rider of the motorcycle, Jaehong Kim, brought a claim against the driver of the car, Maree Hayden. Both vehicles were travelling north on the M3 near Buranda at about 8.40 am on a weekday. The right hand lane of the M3 just north of that point becomes a trapped exit lane leading to the Clem Jones tunnel. As you approach the trapped exit lane the road markings between the M3 and the exit lane start as a broken line, then become a single continuous line, then become an area of chevron markings. Finally the two lanes are separated by a concrete barrier.
- [3] Both sides agree that as Mr Kim approached the Clem Jones tunnel exit on his motorcycle he was edge filtering. He was overtaking the slower moving traffic to his left hand side in the right hand lane of the M3. This meant that as he approached the Clem Jones tunnel exit he drove his motorcycle on the area of chevron markings. Since he did not wish to take the Clem Jones tunnel exit, as he approached that exit he needed to move to his left into the right hand lane of the M3 and to join the traffic in that lane.
- [4] It was at that point that the collision occurred. Mr Kim alleged that Ms Hayden was driving in the right hand lane of the M3 and unexpectedly moved to the right into the area of chevron markings in front of him causing him to collide with her car. On that basis, Ms Hayden would be at fault for the accident because she drove into Mr Kim's path. Ms Hayden however, said that she was driving in the right hand lane of the M3 having just moved into that lane from the middle lane, when Mr Kim moved into the lane from her right and collided with her car. On that basis, Mr Kim would be at fault for the accident because he moved into Ms Hayden's lane and collided with her car.
- [5] The matter came up for hearing on 26 November 2019. The Appeal Tribunal has obtained a transcript of that hearing. Both parties attended and put their respective cases to the Member. The Member preferred Mr Kim's description of how the accident happened. On that basis, in detailed reasons given at the end of the hearing, the Member found Ms Hayden responsible for the accident.¹ The Member considered that Ms Hayden probably decided at the last minute to take the Clem Jones tunnel which is why she drove into the area of chevron markings and into Mr Kim's path. The Member ordered Ms Hayden to pay to Mr Kim a total of \$6,163.05 for the damage to his motorcycle, towing fees and tribunal filing fee.
- [6] The main reason why the Member preferred Mr Kim's description of how the accident happened was because of a photograph taken by Mr Kim showing the two vehicles at a standstill after the accident. The photograph showed the car well into the area of chevron markings and at a standstill. The motorcycle was in an upright position and adjacent to the driver's door of the car as if it had collided with the door, glanced off and run parallel with a car for a short distance. Mr Kim's evidence was that the car was moving at a very slow speed so that when the collision occurred

¹ Transcript 1-18 line 18 to 1-31 line 45.

it stopped abruptly and did not move much further, which is why the motorcycle was still upright. He said he left his motorcycle where it was and moved away to take the photograph. Ms Hayden was still in the driver's seat when the photograph was taken. On Mr Kim's case, the photograph showed that Ms Hayden had driven the car into the area of chevron markings in his path as he said.

- [7] Ms Hayden's explanation for the photograph was that the collision occurred on the right hand lane of the M3, and therefore to the left of the area of chevron markings. She said that after the collision, she had driven the car onto the area of chevron markings to get it out of the way of other traffic. She agreed she was still in the car when the photograph was taken. Her explanation for how the motorcycle also moved into the area of chevron markings was that it must have moved with the car when she drove it into that area.
- [8] As the Member said in the hearing, the difficulty was that it would have been almost impossible after the collision to drive the car into the area of chevron markings with the motorcycle still attached to it and remaining upright as Ms Hayden said. Instead, the only other explanation for the photograph showing both vehicles in the area of chevron markings could have been that after the accident Ms Hayden drove her car there as she said and Mr Kim lent his motorcycle against the driver's door. However, this would have meant that he had deliberately pinned her into the vehicle. There was no suggestion that anything like that had happened.
- [9] Ms Hayden now appeals against the decision. In her appeal, she largely seeks to reargue the points she made before the Member. The difficulty with that approach is that an appeal to the Appeal Tribunal does not give a party a second opportunity to win a case which they have previously lost. Generally it is necessary to show that the decision maker was in error on the information available at the original hearing in a manner which needs to be corrected on appeal.
- [10] Ms Hayden also seeks to put 'fresh' evidence before the Appeal Tribunal and that application is before me for decision in this appeal. The fresh evidence is a further written statement from her explaining how the accident happened, which is the same explanation as before, a different quote for the repairs to the car, and a photograph of the road near where the accident occurred annotated to show the position of vehicles consistent with her case. There are other documents submitted by Ms Hayden in the application to put fresh evidence before the Appeal Tribunal but these documents were before the Member at the original hearing.²
- [11] Most of the fresh evidence therefore is not new evidence, and the material which is new simply repeats Ms Hayden's case as it was before the Member, and therefore has no value in the appeal which is not a rehearing. I refuse leave to appeal to put the fresh evidence before the Appeal Tribunal. Mr Kim has also submitted quite a lot of fresh evidence to the Appeal Tribunal, but no formal application has been made for the Appeal Tribunal to look at this as required by the directions.³ I decline to look at this fresh evidence.

² A plan of the road where the accident occurred, photographs, excerpts from the police report, repair quote for the motorcycle, repair quote for the car, and a statement from a mechanic.

³ Directions of 14 January 2020.

- [12] There are some points made in this appeal by Ms Hayden however, which could form the basis of an appeal.
- [13] It is said in the application for leave to appeal and appeal that the hearing was ‘unfair, unreasonable and unjust as I was not given a fair hearing’. She says that the Member ‘had not read my application’. She says ‘I was also not given any time to respond or give my side of the story and felt bullied within the process of the hearing’. It is also said that ‘it was a conflict of interest on the Member’s behalf when speaking to the applicant in his native language’.
- [14] Reading the transcript with these points in mind, there is nothing to show that the Member spoke to anyone in any language other than in English. The Member resolved the dispute in the usual way for minor civil disputes by hearing from both parties, looking at their documentation, and asking them questions to understand their case and asking them to comment on the other side’s case.
- [15] It can be seen from the transcript that the Member approached the dispute in a logical sequence – examining with the parties the issues in the following order:
- (a) Identifying the amount claimed by Mr Kim and the heads of claim.⁴
 - (b) Considering how the accident happened and who appeared to be primarily responsible.⁵
 - (c) Having decided that the accident happened as described by Mr Kim (so that Ms Hayden was primarily responsible), considering whether Mr Kim was also negligent in any way which contributed to the accident.⁶
 - (d) Considering whether Mr Kim was entitled to the amount of compensation he was seeking.⁷
 - (e) Considering whether Ms Hayden had made a counterclaim for repairs to her car and if so, its quantum.⁸
- [16] It is incorrect to say that Ms Hayden was not given time to respond or to present her case at any time. Prior to the hearing she had explained her case in a statement which she had lodged with the tribunal and which had accompanying documents. In particular, she had lodged a plan which clearly showed how the accident happened, on her case. Then at the hearing she was able to explain her case on all the issues (a) to (e), and to address the Member freely in final submissions just before the Member made the final decision.⁹
- [17] With respect to the Member not having read her ‘application’ this appears to be a reference to a counterclaim. This counterclaim had not been made formally, but was allowed by the Member at the hearing. In doing this it can be seen from the transcript that the Member required confirmation of the amount of the claim and the

⁴ Transcript 1-2 line 35 to 1-3 line 34.

⁵ Transcript 1-3 line 36 to 1-16 line 20.

⁶ Transcript 1-16 line 21 to 1-18 line 9.

⁷ Transcript 1-18 line 11 to 1-23 line 12.

⁸ Transcript 1-23 line 28 to 1-26 line 3.

⁹ Transcript 1-28.

supporting evidence.¹⁰ Because of this, it might have appeared that the Member had not read Ms Hayden's application, but the fact is there was no application.

- [18] It is true that the Member did ask Ms Hayden for an explanation how the motorcycle could have remained upright as shown in the photograph if the accident had occurred in the way she described. Ms Hayden said that her car had dragged the motorcycle into the area of chevrons and it remained upright because it was stuck to her car. She accepted that it did not sound very believable.¹¹ It might be said in this appeal that the Member should have given Ms Hayden more time to give a better explanation for the photograph than this, but the difficulty is that Mr Kim had provided the photograph to her in his application and so she had had plenty of time to think of a better explanation. In this respect, it is notable that Ms Hayden does not suggest in the appeal that she has a better explanation for the photograph which, given more time, she could have offered to the Member at the hearing.
- [19] It is true that soon after hearing Ms Hayden's explanation for the photograph, the Member declared the conclusion that it was unlikely that this happened and found that the accident had occurred as Mr Kim described it.¹² This was in issue (b). If it is being suggested in this appeal that the Member should not have reached this conclusion so rapidly, it really was the only conclusion that could be reached on what the Member had heard from the parties.
- [20] It is true that from that point in the hearing Ms Hayden would probably have realised that she was in difficulty in her defence to the claim, but there is nothing which suggests she was justified in feeling bullied. It was convenient for the Member to give his conclusion in issue (b) during the hearing in this way because it was on that basis that the remaining issues needed to be determined. The Member then went on to consider with the parties whether Mr Kim was partly to blame for the accident and to consider Ms Hayden's counterclaim. He was perfectly polite to Ms Hayden in so doing, did not interrupt her, left her free to say what she wanted, and did not put her under any untoward pressure.
- [21] On my analysis of the transcript in the light of the admissible grounds of appeal, there is nothing to show that the dispute was determined unfairly.

Conclusion in the appeal

- [22] In matters such as this, leave to appeal can only be given if there is a reasonably arguable ground of appeal. In this appeal there is no reasonably arguable ground of appeal and so leave to appeal should not be given. This means that the appeal fails.

¹⁰ The Member went through all this evidence at transcript 1-25 line 1 to 1-26 line 11 - there were two quotes for repair and a comment from a mechanic about the strength of the impact which the Member read out loud.

¹¹ Transcript 1-16 line 9.

¹² Transcript 1-15 line 43 to 1-16 line 20.