Decision No. AK 86/92

Reference No. MVD 129/92

IN THE MATTER of the Motor Vehicle Dealers Act 1975

AND

IN THE MATTER of a dispute

BETWEEN [redacted]

Purchaser

AND [redacted]

Dealer

BEFORE THE AUCKLAND MOTOR VEHICLE DISPUTES TRIBUNAL

Mr H.T.D. Knight Chairman
Mr R.G. Lewis Member
Mr A.E. Enting Member

HEARING at AUCKLAND on the 16th day of July 1992

APPEARANCES

Mr [redacted] in person
Mr [redacted] for the dealer

DECISION

This dispute arises out of the sale and purchase of a 1989 Toyota Vista motor vehicle which was incorrectly described on the statutory window notice as Category A and it was in fact, for the purposes of this Act, a Category D motor vehicle. It was purchased on 25 May 1989 for the sum of $14,000.

The purchaser's evidence was that the seat belts did not comply with the New Zealand standards but this was not brought to his attention until he went for a warrant of fitness in December 1991. The purchaser stated that he was then given a handout and it was explained to him that the seat belts did not comply with the New Zealand standards and he therefore obviously laid his complaint and since that time he has attempted to obtain a warrant of fitness but the vehicle was rejected on 22 June 1992 for a warrant. The rejection slip showed that the front seat belts did not comply with New Zealand regulations.

The purchaser stated that it was explained to him that the belts were not correctly labelled and in addition, they were not dual sensitive belts and he was able to explain that from having tested them himself.

In these circumstances it is clear that the belts do not comply with the New Zealand standards and it is the same sort of issue which was involved when the Wellington High Court issued a decision in favour of the purchaser in this type of situation. The purchaser produced a quotation to replace the belts at a cost of $200 plus G.S.T., that would be a total amount of $225.

The complaint has been made out of time, however this is not uncommon in seat belt cases where in fact it is not until the purchaser has actually received a rejection for a warrant of fitness that the complaint is brought. This, in the Tribunal's view, is a justifiable reason for not bringing the complaint earlier, because, effectively, it is often not appreciated by purchasers that a problem does exist until the vehicle is actually rejected as being unsuitable for a warrant.

The Tribunal's jurisdiction to hear such a complaint is limited by the provisions of section 98 of the Act. Section 98(3) of the Act provides that the Tribunal shall not exercise its jurisdiction in respect of a Category D vehicle unless the complaint is laid within six months after the date of sale.

However, section 98(4) provides that the Tribunal is able to hear such a dispute if it is satisfied:

> "... that a party to the dispute was justified in not making a complaint to the Institute in accordance with section 96(1) of the Act ... and that, having regard to the interests of the other party to the dispute, it is just and reasonable that the dispute should be considered ... The Disputes Tribunal may inquire into and deal with the dispute in all respects as if such a complaint had been properly made within the prescribed period."

Because of the inherent nature of the seat belt problems, including the fact that the Ministry of Transport has issued several temporary exemption notices giving issuing authorities discretion to issue the warrants, the problems do not surface until a considerable time has elapsed from the time of sale.

The Tribunal is of the view that all of these complaints ought to be heard unless there is evidence before it of some injustice to the licensee.

The licensee in this case is apparently no longer in business. In this economic climate that alone should not, in the Tribunal's view, be a reason for not proceeding with purchasers' complaints. It may be that it is an appropriate claim to be met by the Fidelity Fund. That is a matter that will have to be decided away from this actual decision by the Tribunal.

Regulation 87A of the Transport Regulations requires that all vehicles registered on or after the 1st day of November 1979 required dual sensitive belts. This vehicle was purchased on 25 May 1989. At that time there was no temporary exemption in force but later (which would explain the issuing of later warrants of fitness to the purchaser) there were Gazette notices issued by the Ministry of Transport issuing exemption notice in respect of seat belts when issuing authorities were issuing warrants of fitness.

There were two actual exemption notices issued: one in respect of pre-1979 vehicles, and in this case, one for post-1979 vehicles. It does not apply to vehicles first registered in New Zealand on or after 1 October 1990. It therefore did not apply, hence the warrant of fitness issued at the time of purchase was not correctly issued to this vehicle because it was first registered in June 1990. The temporary exemption provided that so long as the seat belt inspection procedures - post-1979 vehicles only - was complied with, and the vehicle's retractor mechanism of any non-complying seat belt operated smoothly and consistently, the warrant of fitness could be issued. Paragraph 4 of that exemption notice provides:

> "... This temporary exemption does not affect any legal rights of redress."

It was dated 28 June 1990 and was published in the New Zealand Gazette issue of 5 July 1990. It had a number under the Ministry of Transport reference of 7342. The pre-1979 exemption notice has a number of 7343. There is a further temporary exemption from seat belt requirements published dated 27 August 1990. It has a number of 9561. This Gazette notice was stated to be a clarification, and it stated, in part, as follows:

> "These conditions (4, notice 7342 and 6, notice 7343) have the effect of maintaining in full any rights of legal redress a person might have had prior to the gazetting of notices 7342 and 7343. This includes rights under the Motor Vehicle Dealers Act 1975, so that for the purposes of section 93(2)(a) of the Motor Vehicle Dealers Act 1975 a warrant of fitness issued under gazette notices 7342 or 7343 is not a properly issued warrant of fitness."

It is clear that section 78A and the requirements of the Ministry of Transport prohibited the use of this type of belt, except for the temporary exemption notices which allowed warrants of fitness to be obtained for these vehicles between 13 March 1990 and 1 October 1991. Those exemptions were issued on the basis that they did not affect the purchaser's rights under section 93(2)(a) of the Motor Vehicle Dealers Act 1975 which the Act in respect of which this Tribunal has jurisdiction to deal with these matters.

Section 93(2)(a) of the Act provides:

> "Where, after the commencement of this section, any licensee sells a category D motor vehicle to any person who does not by reason of the sale become the trade owner of the vehicle there shall be implied in the contract of sale a term... that the licensee warrants-
>
> (a) That the motor vehicle has a current warrant of fitness properly issued under the Transport Act 1962; ..."

The vehicle has to have not only a current warrant of fitness, but a warrant of fitness that has in fact been properly issued, and the exemption notices which the Transport Department issued allowing warrants to be issued despite the provisions of regulation 78A of the Traffic Regulations make it quite clear that they did not ever intend the temporary exemptions to remove the purchaser's rights. It was their intention that the responsibility under the implied contractual term imposed by section 93(2)(a) of the Motor Vehicle Dealers Act should continue to apply.

In the judgment of Judge J E McDonald in the case of Denz -v-Hatchback Autos Limited, although apparently a lawyer represented the appellant, the case apparently proceeded on the basis that it was sufficient for the vehicle to have a current warrant of fitness at the time that it was sold.

The Judge stated in that decision that the responsibility for ensuring that that warrant of fitness complied with the provisions of the law was the responsibility of the issuing authority, and he stated:

> "As a matter of law I fail to see (and I have not been pointed to any provisions of the Motor Vehicle Dealers Act to the contrary) that liability can suddenly revert to the motor vehicle dealer." (Emphasis added.)

It does seem unfortunate that the person representing the appellant did not in fact point the Judge to the clear provisions of section 93(2)(a) of the Act, nor to the temporary exemption notices which have been issued. Both of those matters have been referred to on numerous occasions by this Tribunal when issuing its decisions. The matter was not specifically referred to in the Denz decision, because in that case the Tribunal referred to the fact that the Institute itself had explained to licensees that it was their responsibility to replace the seat belts. It was because of the direction from the Institute that the Tribunal in that case awarded costs against the licensee in respect of a claim which was for an amount of only $95.

The Tribunal is convinced that had he been referred to the appropriate section, then the Judge would have applied it.

In these circumstances, because of that specific proviso in the judgment, the Tribunal considers that it is able to follow the provisions of the Act rather than the decision.

The Tribunal therefore finds that the warrant of fitness placed on the vehicle at the time of sale (whether or not pursuant to a temporary exemption) was not a properly issued warrant because the seat belts did not comply with New Zealand safety standards.

The Tribunal is conscious that this is a Category D motor vehicle. Section 102A of the Act provides that various orders can be made in respect of Category D vehicles which are not available to be made in respect of A, B and C vehicle. The order that the Tribunal is about to make in this matter will be an order for payment of the sum necessary to rectify the seat belt problems by way of compensation in accordance with section 102A. The Tribunal is aware that in many of these seat belt decisions the purchaser may well not have given the written notice required by the Act in respect of Category A, B and C vehicles. Failure to give a notice would, in the instance of A, B and C vehicles, prevent the Tribunal from making any order at all because it would not have the jurisdiction to do so. However, the decision of Cameron -v- Lawrence Motors, 1990 DCR 289, is authority for the proposition that the Tribunal is not prohibited from making an order in respect of Category D motor vehicles merely because the written notice has not been given, which is a relevant provision in respect of A, B and C vehicles.

The fact that seat belts in New Zealand are required to be dual sensitive seat belts and to be correctly labelled has been put beyond doubt by an unreported decision of Mr Justice Heron in the Wellington High Court, Motor Vehicle Dealers Institute -v- The Attorney General. It was delivered on 23 December 1991 following a hearing on 2 December.

The Motor Vehicle Dealers Institute had applied under the Declaratory Judgments Act for a declaration to determine where the responsibility for compliance with the seat belt provisions lay in the first instance.

The particular case had been brought because of the Ministry of Transport's interpretation of the regulations. If in fact the Ministry's interpretation was to be preferred by the judge (as it was) then such an interpretation was going to render the Institute members initially liable for the compliance and therefore vulnerable to claim by purchasers. If the Institute's view had been preferred then the responsibility would have been with the individual purchasers to ensure that seat belt requirements were met.

At Page 2 of his Justice Heron said:

> "It should not be understood that the general requirements of the seat belt law are recent. They are

not. What is recent is the elevation of seat belt compliance to a warrant of fitness consideration and the number of second hand cars imported from Japan, which country has only recently been the subject of a Japanese seat belt standard applied by the Ministry of Transport. The seat belts law is contained in Traffic Regulations 1976, Amendment 11 SR 1984/169. It provides ..."

The Judge then quoted at length from Regulation 78A and again from the Child (Child Restraints and Seat Belts Approval Notice 1984). So the legality otherwise with particular seat belts has its origin in those particular regulations dating back to 1976, certainly well prior to the date of purchase of this motor vehicle.

The Judge held in favour of the Ministry of Transport's interpretation of the Regulations, that the seat belts have to be dual sensitive and correctly labelled. If not correctly labelled, a warrant of fitness should not be issued for the vehicle.

There will therefore be an order that the licensee pay to the purchaser for the breach of the term implied in the contract by virtue of section 93(2)(a) the sum of $225.00 inclusive of G.S.T.

Should the purchaser be unable to recover from the licensee this sum, he should approach the Auckland Motor Vehicle Dealers Institute to initiate a claim on the Fidelity Fund. There is a time limit involved, so the purchaser is advised to act promptly in this instance.

DATED at AUCKLAND this 25th day of August 1992

H T D Knight	R G Lewis	A E Enting
Chairman	Member	Member

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