



Civil Resolution Tribunal

Date Issued: May 17, 2021

File: VI-2020-003898

Type: Motor Vehicle Injury

Civil Resolution Tribunal

Indexed as: *Kim v. Malcolm*, 2021 BCCRT 527

BETWEEN:

BOSOOK KIM

APPLICANT

AND:

DEIDRE AMBER MALCOLM

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This dispute is about a motor vehicle collision that took place on January 23, 2020 in Port Coquitlam, British Columbia.
2. The parties' insurer, Insurance Corporation of British Columbia (ICBC), internally determined that the applicant, Bosook Kim, was 100% at fault for the collision.
3. Ms. Kim disagrees with ICBC's internal fault decision. According to Ms. Kim, the collision occurred when the respondent, Deidre Amber Malcolm, rear-ended Ms. Kim's vehicle. Ms. Malcolm denies this, and says that Ms. Kim struck her vehicle when changing lanes.
4. Ms. Kim is represented by a family member. The respondent is represented by an ICBC employee.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over motor vehicle injury disputes, or "accident claims", brought under section 133 of the *Civil Resolution Tribunal Act* (CRTA). Section 133(1)(c) of the CRTA and section 7 of the *Accident Claims Regulation* (ACR) give the CRT jurisdiction over the determination of liability and damages claims, up to \$50,000.
6. On March 2, 2021, the BC Supreme Court ordered that sections 133(1)(b) and 133(1)(c) of the CRTA were unconstitutional and no longer in effect. It also ordered that section 16.1 of the CRTA was unconstitutional to the extent it applied to these provisions. The BC Supreme Court's decision was appealed. The BC Court of Appeal granted a partial stay of the BC Supreme Court's order on April 8, 2021. This means that parts of the BC Supreme Court's order are suspended until the BC Court of Appeal makes its final decision. The partial stay allows the CRT to resolve claims under sections 133(1)(b) and (c) of the CRTA. It also allows a court to resolve these types of claims without needing to consider whether the claim should be heard by the CRT instead.

7. The CRT provided Ms. Kim with information about the BC Supreme Court's decision and the BC Court of Appeal's partial stay. The CRT asked Ms. Kim whether she wanted to continue with the CRT dispute or file a court proceeding instead. Ms. Kim chose to continue at the CRT.
8. Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
9. Section 39 of the CRTA says that the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a "she said, she said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.
10. Section 42 of the CRTA says that the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
11. Both parties provided evidence and submissions in support of their positions. Ms. Kim submitted some of her evidence after the deadline for providing evidence had passed.

As Ms. Malcolm had the opportunity to respond to this late evidence, I find there is no breach of procedural fairness in admitting the late evidence.

ISSUE

12. Initially, Ms. Kim made claims for wage loss and medical benefits, but she withdrew these claims during the CRT facilitation process. The parties have reached an agreement about Ms. Kim's claim for non-pecuniary damages, subject to the CRT's determination of fault. Ms. Kim does not claim any other damages.
13. The remaining issue in this dispute is whether Ms. Kim is liable for the collision.

BACKGROUND, EVIDENCE AND ANALYSIS

14. In a civil claim such as this, Ms. Kim, as the applicant, bears the burden of proof on a balance of probabilities. While I have read all of the parties' evidence and submissions, I refer to only what is relevant and necessary to provide context to my decision.
15. On January 23, 2020, both parties were driving westbound on Prairie Avenue in Port Coquitlam. Prairie Avenue consists of a single wide lane. When approaching the intersection with Oxford Street, this lane divides into a designated left-turn lane and a through lane. The left-turn lane is separated from the through lane by a solid white line.
16. Ms. Kim was ahead of Ms. Malcolm in the single lane as they approached Oxford Street. Both parties say they intended to travel straight through the intersection at Oxford Street and continue driving on Prairie Avenue and that the traffic light was green. In addition, both parties say they kept to the right to go around the left-turn lane. Although the parties agree that the collision occurred in the through lane, they disagree about how it occurred.
17. Ms. Kim says that she did not brake or change lanes, and that Ms. Malcolm rear-ended her vehicle approximately three car lengths away from the intersection. Ms.

Malcolm says that Ms. Kim drove into the left-turn lane and was “fully” in that lane when she suddenly swerved back into the through lane, causing the collision.

18. Both vehicles were damaged, but no emergency personnel attended the scene of the collision. The evidence does not contain any video footage or statements from independent witnesses.
19. Ms. Kim says that, as the rear driver, Ms. Malcolm has the onus to show the collision was not her fault. She also says that Ms. Malcolm was following too closely in violation of section 162(1) of the *Motor Vehicle Act* (MVA) and driving without due care and attention contrary to section 144(1) of the MVA. She also suggests that Ms. Malcolm may have been speeding.
20. For her part, Ms. Malcolm says that Ms. Kim made an unsafe lane change in contravention of section 151 of the MVA. This section says that a driver must not drive a vehicle from one lane to another unless the driver has ascertained that the movement can be made safely and will in no way affect another vehicle’s travel, and must not drive a vehicle from one lane to another if that action necessitates crossing a solid line.
21. Given that the parties have opposing views about how the collision occurred and there are no independent witnesses, I find that the damage to the parties’ vehicles is of significant importance in determining what happened.
22. Photos of Ms. Kim’s vehicle show damage on the right (or passenger) side of the rear bumper. Photos show that the damage to Ms. Malcolm’s vehicle is on the left (or driver’s) side of the front bumper and headlight. I find that the question of whether this damage is consistent with a collision that occurred from the rear or during a lane change is not within ordinary knowledge and must be answered with reference to expert evidence (see *Bergen v. Guliker*, 2015 BCCA 283).
23. Drew White, a Manager of Estimating Services in ICBC’s material damage estimating department, reviewed the parties’ vehicle damage. In a March 2, 2020 internal memorandum titled “MD Manager Note”, Mr. White stated that a “lane change

scenario would explain area of damages sustained”, although he said he could not determine whether Ms. Kim was moving to the right or Ms. Malcolm was moving to the left at the time of the collision.

24. Ms. Malcolm submits that Mr. White’s opinion should be accepted as expert evidence as he has “extensive experience” in the automotive repair industry. Mr. White’s curriculum vitae shows that he began working in the automotive industry in 1986 and joined ICBC as an estimator in 1997, working on various projects before becoming a Manager of Estimating Services in 2018. I find that Mr. White’s statement meets the requirements for expert evidence set out in CRT rule 8.3, and I accept it as such.
25. I note that Ms. Kim did not provide any response to Mr. White’s statement in her submissions. There is no other evidence before me that comments on the mechanism that would cause the damage shown on the parties’ vehicles. In the absence of another expert opinion that offers a differing view of how the collision occurred, I give Mr. White’s opinion significant weight, and find that the collision occurred as a result of a lane change.
26. However, Mr. White’s opinion does not assist me in establishing which party was moving in which direction at the time of the collision. Based on the location of the damage, the collision either occurred when Ms. Kim was moving left to right, or when Ms. Malcolm was moving right to left. I find that the geography of the area guides this determination.
27. As noted, Prairie Avenue has one wide lane that divides into the left-turn and through lanes near the intersection with Oxford Street. I find that the through lane is not wide enough for two cars to be driving in a parallel fashion. Therefore, it would not be possible for Ms. Malcolm to be moving from right to left. I find that the more likely scenario is that Ms. Kim moved from left to right, from the left-turn lane to the through lane. I find that the evidence supports the conclusion that the collision occurred as a result of Ms. Kim’s lane change.

28. Having determined that the collision occurred while Ms. Kim was making a lane change, the next consideration is who is liable. Ms. Kim's position is that liability should be shared between the parties, while Ms. Malcolm says Ms. Kim is solely responsible.
29. I find that Ms. Kim has not established that Ms. Malcolm was following too closely, speeding, or not paying attention to her surroundings before the collision. Even if these claims were proven, Ms. Kim still had the responsibility under section 151 of the MVA to ensure that she could safely change lanes without affecting the travel of other vehicles. In addition, based on the evidence before me, I find that Ms. Kim's lane change involved crossing a solid line, which is also a contravention of section 151.
30. While breaching the MVA does not automatically mean that a person is liable for a collision, in the circumstances of this dispute, I find that the lane change breached the standard of a reasonable driver, as contemplated in *Salaam v. Abramovic*, 20210 BCCA 212 at paragraph 21. No matter what Ms. Malcolm was doing, I find that the sole cause of the collision was Ms. Kim's lane change. Therefore, Ms. Kim alone was responsible for the collision with Ms. Malcolm.
31. I dismiss Ms. Kim's claim for damages.

FEES AND EXPENSES

32. Under section 49 of the CRTA, and the CRT rules, a successful party generally is entitled to the recovery of their tribunal fees and dispute-related expenses. As Ms. Kim was not successful, I find that she is not entitled to reimbursement of her CRT fees.
33. Ms. Malcolm asks for the reimbursement her CRT fees. As she was successful, I find that she is entitled to reimbursement of \$50 in CRT fees.

34. Ms. Kim did not claim any dispute-related expenses. Ms. Malcolm stated that she wished to recover dispute-related expenses, but did not identify any. Accordingly, I make no order in this regard.

ORDERS

35. Within 30 days of the date of this decision, I order Ms. Kim to reimburse Ms. Malcolm \$50 for CRT fees.

36. I dismiss Ms. Kim's claims and this dispute.

Lynn Scrivener, Tribunal Member