



Civil Resolution Tribunal

Date Issued: August 10, 2021

File: VI-2021-000104

VI-2021-000179

Type: Motor Vehicle Injury

Civil Resolution Tribunal

Indexed as: *Kang v. Nielsen*, 2021 BCCRT 879

BETWEEN:

HYUNMIN KANG

APPLICANT

AND:

ALLAN BELTOFT NIELSEN

RESPONDENT

REASONS FOR PRELIMINARY DECISION

Tribunal Member:

Eric Regehr

Date of Hearing:

August 6, 2021

INTRODUCTION

1. This is a preliminary decision of the Civil Resolution Tribunal (CRT). These linked disputes are about a motor vehicle accident that took place on October 29, 2019, in Surrey, BC.
2. The applicant, Hyunmin Kang, says that the respondent, Allan Beltoft Nielsen, rear-ended him while they were both travelling eastbound on Highway 1 through Surrey. In contrast, Mr. Nielsen says that Mr. Kang cut him off as Mr. Kang changed lanes. Both parties say that the accident was entirely the other's fault.
3. Mr. Kang says that he was injured in the accident. The parties dispute whether Mr. Kang's injuries are "minor injuries" under the *Insurance (Vehicle) Act* (IVA). In dispute VI-2021-000104, Mr. Kang asks for a determination of whether his injuries are minor injuries. In dispute VI-2021-000179, Mr. Kang asks for a determination of who was liable for the accident, and for \$20,000 in pain and suffering (non-pecuniary) damages.
4. I have been asked to determine liability for the accident. This is because if I find that Mr. Nielsen was not responsible for the accident, Mr. Kang would not be entitled to compensation so both disputes will be dismissed. If I find that Mr. Nielsen was fully or partially responsible for the accident, the 2 disputes will continue through the CRT's process. The issues of whether Mr. Kang's injuries are minor and what damages he may be entitled to are not before me.
5. Mr. Kang is self-represented. Mr. Nielsen is represented by an Insurance Corporation of British Columbia (ICBC) employee.

JURISDICTION AND PROCEDURE

6. These are the CRT's formal written reasons for this preliminary decision about liability. 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)(b) of the CRTA gives the CRT jurisdiction over the determination of

whether an injury is a “minor injury” under the IVA. 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.

7. 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.
8. The CRT provided the applicant with information about the BC Supreme Court’s decision and the BC Court of Appeal’s partial stay. The CRT asked Mr. Kang whether he wanted to continue with the CRT dispute or file a court proceeding instead. He chose to continue at the CRT.
9. 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.
10. 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. In some respects, this dispute turns on the credibility of the parties’ evidence. In the circumstances of this dispute, I determined that an oral hearing was appropriate because I found I had questions not answered in the written materials, and I found that it was proportional to do so given the value of Mr. Kang’s claim. So, the parties both gave evidence in a video hearing about the liability issue.

11. 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.

ISSUE

12. The issue in this preliminary decision is who is liable for the accident.

BACKGROUND AND EVIDENCE

13. In a civil claim such as this, Mr. Kang as the applicant must prove his claims on a balance of probabilities. While I have read and considered all of the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

14. The following is undisputed. Mr. Kang and Mr. Nielsen were both driving eastbound on Highway 1 in Surrey. It was mid-afternoon on October 29, 2019. The weather was clear. Mr. Kang was driving a sedan and Mr. Nielsen was driving a pickup truck.

15. The accident occurred shortly after the Port Mann Bridge, where the highway expands from 2 lanes to 3 lanes. At that point, the 2 existing lanes continue straight while a third lane gradually emerges to the right. The next exit is 152nd Street. The right lane must exit at 152nd Street and the left lane must continue on the highway. The middle lane can go either way.

16. The parties give different accounts of how the accident happened.

The Parties' Accounts

17. Mr. Kang says that he intended to exit on 152nd Street. Mr. Kang says that he was going between 80 and 90 km/h. He says that when the highway expanded to 3 lanes, he changed into the new right lane. He says that he moved into this lane around where the new set of broken white lines started and signalled as he did so. He says that he shoulder checked to his right, but did not see Mr. Nielsen's truck. He says that

immediately after moving into the right lane, he felt himself get hit from behind. After the impact, he says that he slowly pulled over to the shoulder. He did not see Mr. Nielsen's truck before the accident.

18. Mr. Nielsen says that he was in the right lane as he came off the Port Mann Bridge and did not change lanes into the new right lane, because he had no reason to. He says that he intended to take the exit to 152nd Street from the middle lane. He says that the accident happened in the middle lane, not the right lane. He says he was going 85 km/h.
19. Mr. Nielsen says that Mr. Kang was in the left lane and began changing lanes right in front of him. He says that he did not see Mr. Kang's car until he started this lane change. Mr. Nielsen says that shortly after Mr. Kang started entering Mr. Nielsen's lane, he hit the brakes. Mr. Nielsen says that he had no time to brake or swerve and so he hit Mr. Kang's car. He says that they both pulled over to the right shoulder and exchanged information. He says that the accident happened about 100 to 150 feet after the third lane emerged.

The Vehicle Damage and Ron Klymchuk's Evidence

20. According to the photos in evidence, the damage to Mr. Nielsen's truck was on the far left side of its front bumper. There does not appear to be any damage to the side of the bumper. The damage to Mr. Kang's car is on the far right side and right corner of its rear bumper.
21. An ICBC employee, Ron Klymchuk, reviewed the damage to both vehicles. He provided an opinion about the likely mechanics of the collision and whose account the damage is more consistent with. ICBC provided Mr. Klymchuk's qualifications in accident reconstruction, so I infer that Mr. Nielsen wishes to rely on Mr. Klymchuk's opinion as expert evidence. Mr. Kang does not dispute Mr. Klymchuk's qualifications, and I accept that under the CRT's rules he has the necessary training and experience to give an expert opinion about collision reconstruction based on vehicle damage patterns.

22. CRT rule 8.3(7) requires experts to be neutral, although the CRT has the ability to waive the application of a rule under CRT rule 1.2(2). I considered ICBC's practice of providing an employee's opinion as expert evidence in *Wadhera v. ICBC*, 2021 BCCRT 645, which also involved an opinion from Mr. Klymchuk. There, I found that whether an ICBC employee is neutral enough to give an expert opinion in a dispute involving ICBC will depend on the circumstances. In that dispute, ICBC insured both parties for collision coverage, so ICBC had no real stake in the dispute's outcome.
23. Here, Mr. Kang claims damages for personal injuries. There is no suggestion in the evidence that Mr. Nielsen was hurt. Based on the evidence before me, it appears that ICBC has a financial interest in Mr. Nielsen succeeding. That said, Mr. Klymchuk provided his opinion in the course of his regular employment and there is no suggestion that he had any personal interest in the outcome in this dispute.
24. I also bear in mind that in *Wadhera*, the claim was over a \$300 deductible. In this dispute, Mr. Kang claims \$20,000 in damages. Given that the CRT's mandate includes proportionality, I find that whether it is appropriate to waive strict application of the neutrality may depend in part on how much is at stake.
25. On balance, I accept Mr. Klymchuk's opinion as expert evidence, but in light of the above neutrality concerns, I place limited weight on some aspects of it. I accept Mr. Klymchuk's opinion evidence about the mechanics and direction of the impact, as outlined below. However, I place little weight on Mr. Klymchuk's assessment of whose statement the damage is more consistent with. I find that this evidence could reasonably be perceived as advocacy, even if Mr. Klymchuk did not intend it that way.
26. Turning to Mr. Klymchuk's opinion, he primarily relies on the pattern of denting on Mr. Kang's rear bumper and underlying car frame. He concludes that there was "a lateral component" to the impact. Mr. Klymchuk says that the direction of the damage means that either Mr. Kang was moving right to left or Mr. Nielsen was moving from left to right at the time of impact. I accept this evidence. He then said that this was more consistent with Mr. Nielsen's statement than Mr. Kang's. I place little weight on this evidence.

ANALYSIS

27. Mr. Kang makes 2 arguments about why I should accept his evidence over Mr. Nielsen's. First, he argues that Mr. Nielsen's evidence is not credible because his evidence in the video hearing was significantly different than his previous statement to ICBC. Second, he argues that Mr. Nielsen's account is inconsistent with the photos of where they pulled over after the collision.
28. Mr. Nielsen agrees that his account in the oral hearing was different than the account recorded in his ICBC statement. According to ICBC's internal notes, the statement is from October 31, 2019. It appears to be a transcript of what Mr. Nielsen told an ICBC adjuster, since it is written in the first person.
29. According to that statement, Mr. Nielsen said that when the right lane emerged, he moved into that lane. He said that he was well-established in that lane when Mr. Kang drove up from behind him in the middle lane and cut him off.
30. In the video hearing, Mr. Nielsen said that the statement was over the phone and the conversation was "misguided". I take this to mean that Mr. Nielsen says that the adjuster did not accurately record what Mr. Nielsen said. I note that the statement is unsigned and there is no evidence that it was read back to Mr. Nielsen.
31. I agree with Mr. Kang that Mr. Nielsen appears to have changed his account of what happened, which impacts the credibility of his evidence. I say this because the ICBC statement included multiple detailed references to which lane Mr. Nielsen said he and Mr. Kang were in, which makes it unlikely that the adjuster repeatedly misheard Mr. Nielsen. For example, after referring to the fact that the highway widens from 2 to 3 lanes, the statement said that Mr. Nielsen "took the lane into the turn off and was going up that lane". Later, the statement said that Mr. Nielsen was "well-established" in the right lane, which I find suggests that Mr. Nielsen said he had changed lanes. I therefore find that Mr. Nielsen told the ICBC adjuster that the accident occurred in the right lane.

32. Mr. Kang asked Mr. Nielsen in cross examination why his evidence changed, but Mr. Nielsen did not provide an explanation. I find that Mr. Nielsen's change in evidence is self-serving. I say this because Mr. Nielsen argues that Mr. Kang cut in front of him because he realized that he needed to change lanes to take the 152nd Street exit. If the accident had taken place in the right lane as Mr. Nielsen initially said, there would have been no reason for Mr. Kang to change lanes. For these reasons, I find that Mr. Nielsen changed his evidence. I agree with Mr. Kang that this negatively impacts Mr. Nielsen's credibility.
33. Mr. Kang also argues that Mr. Nielsen's account is inconsistent with the accident scene photos. Mr. Kang took photos of the vehicles pulled over at the right shoulder. Both parties said that they pulled over immediately after the accident. Mr. Kang said that the accident occurred right after the right lane started while Mr. Nielsen said it was 100 to 150 feet after this point. While it is impossible to know with precision, I agree with Mr. Kang that it appears that the parties' vehicles were stopped too close to the beginning of the right lane to account for 100 to 150 feet of driving at roughly 85 km/h, plus the distance to pull over. While I do not put significant weight on this argument because it is somewhat speculative, I do find that the accident scene photos likely support Mr. Kang's account.
34. Mr. Nielsen's submissions focus on Mr. Klymchuk's opinion. He argues that Mr. Klymchuk's conclusion that the accident included a "lateral component" means that Mr. Kang's car was to the left of Mr. Nielsen's truck, not in front of it. Mr. Nielsen argues that given the damage's lateral component, it is more likely that the accident took place while Mr. Kang was changing lanes left to right than Mr. Nielsen rear-ending Mr. Kang.
35. I agree with Mr. Nielsen that his account provides a simpler explanation for the vehicle damage pattern. However, as Mr. Nielsen admits, the damage pattern would be consistent with Mr. Nielsen rear-ending Mr. Kang if Mr. Nielsen was accelerating and moving left to right, as Mr. Klymchuk said in his report. Mr. Kang did not see Mr. Nielsen's truck before the impact, but he provided a diagram that he says shows how

Mr. Nielsen could have hit him with lateral right to left movement. This diagram depicts Mr. Nielsen entering the right lane behind Mr. Kang at a sharper angle than Mr. Kang such that the front left of Mr. Nielsen's truck struck the right rear of Mr. Kang's car. If the accident happened this way and Mr. Nielsen was accelerating and straightening out his truck, I find that there would have been lateral movement consistent with Mr. Klymchuk's opinion.

36. Mr. Nielsen also argues that Mr. Kang's evidence has been inconsistent over time. Mr. Nielsen says that at times Mr. Kang said he "changed" lanes while at other times he said that he moved into the right lane as the right lane emerged. While Mr. Kang does not use identical language, I find that these descriptions are essentially the same. I find that Mr. Kang's evidence has been reasonably consistent. I find no reason to doubt the credibility of his evidence.
37. Given the parties' contradictory evidence, it is impossible to know with certainty how the accident happened. On balance, I find that the location where the vehicles pulled over and my findings about Mr. Nielsen's credibility outweigh the fact that Mr. Nielsen's account provides a simpler explanation for the vehicle damage pattern. I therefore accept Mr. Kang's evidence of how the accident happened.
38. With that, I find that Mr. Kang should have checked to the right before beginning the lane change. I find that Mr. Nielsen's truck had not yet moved into the right lane so he was not there to be seen. I therefore find that Mr. Kang safely began his lane change in compliance with section 151(a) of the *Motor Vehicle Act*. I find that Mr. Kang had nearly completed his lane change into the right lane when Mr. Nielsen made impact. I find that Mr. Nielsen accelerated into the back of Mr. Kang's car. I find that Mr. Nielsen's driving fell below the standard of care of a reasonably prudent driver and that he is fully responsible for the accident.

DECISION

39. In conclusion, I find that Mr. Nielsen was 100% liable for the accident. This dispute will continue through the CRT process.

40. I am not seized of this dispute.

Eric Regehr, Tribunal Member