Civil Resolution Tribunal

Date Issued: November 15, 2021

File: VI-2020-004058

Type: Motor Vehicle Injury

Civil Resolution Tribunal

Indexed as: *Hendy v. ICBC*, 2021 BCCRT 1204

B E T W E E N :

CHERYL-ANNE HENDY

APPLICANT

A N D :

INSURANCE CORPORATION OF BRITISH COLUMBIA, PRO-EX TRANSPORT SYSTEMS LTD. and ALFRED ALEX

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. This dispute is about a single vehicle motor vehicle accident that took place on August 22, 2019, on Highway 5 near Merritt, BC. The applicant, Cheryl-Anne Hendy, says

that she was driving in the left lane of the 2-lane highway behind another vehicle driven by an independent witness, AQ. Ms. Hendy says that a tractor trailer driven by the respondent Alfred Alex (Alex)[i] and owned by the respondent Pro-Ex Transport Systems Ltd. (Pro-Ex) was in the right lane. She says that Alex swerved into the left lane, causing AQ's vehicle to brake suddenly. Ms. Hendy says that she had to brake and swerve to avoid hitting AQ. She says that she ended up going off the highway and into the median, which was a deep ditch. She says that Alex's unsafe lane change was the sole cause of the accident. She was undisputedly injured in the accident.

2. The other respondent, the Insurance Corporation of British Columbia (ICBC), insures all parties. The respondents say that Ms. Hendy was following AQ too closely, which was the sole cause of the accident. The respondents ask me to dismiss Ms. Hendy's claims.

3. The parties agree that Ms. Hendy's non-pecuniary (pain and suffering) damages are $5,500, the maximum amount for "minor injuries" as defined by the *Insurance (Vehicle) Act* at the time of the accident. Ms. Hendy also claims $300 for the deductible she paid when her vehicle was written off and $1,285 for a rental car.

4. The applicant is self-represented. The respondents are 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* 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March 2, 2021, the BC Supreme Court ordered that sections 133(1)(b) and 133(1)(c) of the CRTA were unconstitutional and no longer in effect.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. Hendy with information about the BC Supreme Court's decision and the BC Court of Appeal's partial stay. The CRT asked Ms. Hendy whether she wanted to continue with the CRT dispute or file a court proceeding instead. She 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 the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. 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.

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.

ISSUES

11. The issues in this dispute are:

    a. Did ICBC reasonably investigate the accident?

    b. Who is liable for the accident?

    c. What are Ms. Hendy's damages?

BACKGROUND AND EVIDENCE

12. In a civil claim such as this, Ms. Hendy as the applicant must prove her case on a balance of probabilities, which means "more likely than not". While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

13. The accident occurred northbound on Highway 5 north of Merritt on August 22, 2019, at around 4:00 pm. The weather was clear. There are 2 lanes in each direction separated by a median. Ms. Hendy was in the left lane behind AQ. Alex was in the right lane. This much is undisputed.

14. Ms. Hendy promptly reported the accident to ICBC and provided a detailed statement on November 25, 2019. Based on her submissions, I find that she adopts that statement as part of her evidence in this dispute. Ms. Hendy says the following. She had 2 friends with her as passengers. She was going the speed limit. She had been following AQ for a short time and believed that they were going about the speed limit too. Just before the accident, AQ's vehicle was roughly parallel to the rear third of Alex's trailer. Alex signalled left and immediately started changing into the left lane. This caused AQ to brake hard to avoid hitting the trailer. Ms. Hendy reacted in turn by braking hard and turning her wheel slightly left. She hit some gravel, which caused her to skid over an embankment and into the median area, which was a significant drop. She says that her decision to swerve prevented her from hitting AQ's vehicle.

15. Ms. Hendy also says that she always follows the “2 second rule” when determining how far behind someone to travel. She says that at highway speeds she counts to 3 seconds “just to be safe”. While she does not specifically say so, I infer from these statements that she believes she was between 2 and 3 seconds back from AQ before the accident.

16. AQ provided an email statement to Ms. Hendy on May 3, 2021. AQ said the following. They were travelling in the left lane when suddenly a tractor trailer merged into their lane. AQ had to come to a complete stop to avoid hitting the trailer. Once stopped, AQ looked into their rear-view mirror and saw Ms. Hendy travelling towards them. At the “last moment”, Ms. Hendy swerved into the median. AQ believed that if she had not done so, she would have hit AQ’s vehicle. Alex did not stay at the accident scene so AQ followed Alex and flagged them down.

17. Alex provided ICBC with a phone statement on October 3, 2019. Alex said that they were travelling in the right lane and had to change into the left lane because there was road work ahead. Alex said that they checked their mirrors and felt it was safe to change lanes. They said that when they were nearly done their lane change, they saw a vehicle, which I find was AQ’s, near the middle of the left side of the trailer’s tires. Alex said that they did not know where this vehicle came from. Alex said that they stuck their hand out to tell that vehicle to stop, and then carried on. Alex denied seeing or causing an accident. I find it unsurprising that Alex did not see that Ms. Hendy’s vehicle ended up in the median, and do not find that he knowingly left the accident scene.

18. I note that an RCMP report about the accident said that Ms. Hendy was inattentive and following AQ too closely. The respondents rely on this evidence. However, as Ms. Hendy points out, the RCMP officer who wrote the report did not witness the accident, so it is unclear how they drew these conclusions. I place no weight on these statements in the RCMP report.

ANALYSIS

Did ICBC reasonably investigate the accident?

19. Ms. Hendy takes issue with how ICBC investigated the accident. It is well-established that ICBC must act properly and reasonably in assigning fault (*Singh v. McHatten*, 2012 BCCA 286, referring to *Innes v. Bui*, 2010 BCCA 322). As part of this obligation, ICBC must reasonably investigate a claim. In doing so, ICBC is not expected to investigate with the "skill and forensic proficiency of a detective". Rather, ICBC must bring "reasonable diligence, fairness, an appropriate level of skill, diligence and objectivity" (*McDonald v. Insurance Corporation of British Columbia*, 2012 BCSC 283).

20. Ms. Hendy says that ICBC should have got a statement from AQ. She says that if ICBC had spoken to AQ, it would not have found her liable. However, based on ICBC's file notes, ICBC did contact AQ on December 17, 2019. According to those notes, AQ explained how the accident happened, although apparently not in great detail. That said, I find that ICBC was aware of AQ's evidence relatively soon after the accident. ICBC has also maintained its position that Ms. Hendy was fully liable even after receiving AQ's more detailed statement in this dispute. This suggests that ICBC did consider AQ's evidence, but still disagrees with Ms. Hendy about liability.

21. With that, I find that ICBC met its obligation to act reasonably in the circumstances. Ms. Hendy did not identify any other reason why she claimed against ICBC in this dispute. I find that her claims for damages are properly against Alex and Pro-Ex as the driver and owner of the other vehicle in question, not ICBC. See *Kristen v. ICBC*, 2018 BCPC 106. With that, I dismiss Ms. Hendy's claim against ICBC.

22. Even though I have concluded that ICBC acted reasonably in its investigation of the accident, ICBC's liability assessment is not binding on me. I turn then to my own analysis of liability.

Who was liable for the accident?

23. The respondents do not specifically deny that Alex made an unsafe lane change. Alex's statement is that they did not see a vehicle in their mirror when they started their lane change, which is consistent with AQ's and Ms. Hendy's evidence. I find that Alex changed lanes directly into AQ's path, causing them to brake suddenly to avoid a collision. I find that Alex breached section 151(a) of the *Motor Vehicle Act* (MVA), which prohibits unsafe lane changes.

24. The respondents' main argument is that regardless of whether Alex's lane change was unsafe, it did not cause the accident because Ms. Hendy was following AQ too closely. I disagree with the respondents that Alex's unsafe lane change was not a cause of the accident and disagree that they bear no responsibility for the accident. To establish causation, it is not necessary for Ms. Hendy to prove that Alex's unsafe lane change was the sole cause of the accident. She only needs to prove that the accident would not have occurred without Alex's lane change. I find this situation somewhat similar to *Graham v. Carson*, 2014 BCSC 726, affirmed 2015 BCCA 310. In that case, the defendant turned from an alley into traffic, which caused an SUV to suddenly brake, which in turn caused the plaintiff cyclist to swerve and fall. The court found that the defendant's turn onto the street was negligent and caused the cyclist's fall, even though there were intervening events.

25. I find the same reasoning applies here. I find that if Alex had not changed lanes into AQ's path of travel, AQ would not have braked hard, and Ms. Hendy would not have taken evasive action. I find that the accident would not have happened if Alex had not made an unsafe lane change. I therefore find that Alex was negligent, and that their negligence was one cause of the accident.

26. I turn then to whether Ms. Hendy was also negligent. Section 162(1) of the MVA says that a driver must not follow another vehicle too closely. This places a heavy burden on a following driver to leave enough space to react to unexpected events in front of them, including other drivers' negligence. So, in a rear-end accident, the burden is generally on the following driver to show that they were not negligent. See *Varga v.*

Kondola, 2016 BCSC 2406. I find that these principles apply to this dispute even though Ms. Hendy did not hit AQ, but rather went into the median trying to avoid AQ.

27. The respondents say that if Ms. Hendy was a safe distance behind AQ for the circumstances, she would not have faced the difficult decision to steer left to avoid hitting AQ. She could have instead safely stopped on the roadway. I agree in part with the respondents. I rely on AQ's statement that Ms. Hendy swerved off the roadway at the last second and that it still took her "a while to stop". I find that this shows that Ms. Hendy was still travelling at a considerable speed when she passed AQ's vehicle. I therefore find that she was either driving too close behind AQ than was safe in the circumstances or was inattentive and failed to start braking soon enough (or both). If she had been following far enough behind and paying close enough attention, she would have been able to stop her vehicle before hitting AQ without swerving off the road.

28. Ms. Hendy relies on the legal doctrine called the "agony of collision". Under this doctrine, when a driver is faced with an emergency situation created by another driver's negligence, the court (or CRT) will not scrutinize their reaction too closely. In other words, the doctrine gives innocent drivers some latitude in what will be considered a reasonable course of action in an emergency. However, the doctrine does not apply when a driver brings the emergency on themselves through their own negligence. See *Davies v. Elston*, 2014 BCSC 2435, at paragraphs 216 and 217. Because I have found that Ms. Hendy was partly to blame, I find that this doctrine does not apply. I also find that this doctrine does not apply because I have not found Ms. Hendy's reaction to the emergency to be negligent. Facing the prospect of rear-ending AQ, I find that swerving was a reasonable decision. Yet, Ms. Hendy would not have had to make this decision if she had been following far enough behind AQ and paying close enough attention to the road.

29. I therefore find that Ms. Hendy and Alex were both negligent. The next question is the apportionment of liability. When 2 people are both at fault for an accident, their liability is divided based on fault or blameworthiness. This requires an assessment of

how much each person's conduct fell below a reasonable standard. See *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505, at paragraph 46.

30. In *Chambers v. Goertz*, 2009 BCCA 358, the court set out a non-exhaustive list of 9 factors to consider when apportioning fault. I find that the factors most relevant to this dispute are:

    a. The timing of the negligent acts, in that a driver who commits the first negligent act will generally be more at fault than a driver whose negligence comes as a result of the initial fault.

    b. The nature of the conduct.

    c. The gravity of the risk of harm the conduct created.

31. I find that the most significant factor is the timing of the parties' negligent acts. It was Alex's initial negligence that set the events in motion that ultimately led to the accident. In terms of the nature of the negligent conduct, Alex was a professional driver of a large and heavy commercial vehicle, and so they should have known that they were capable of causing serious harm if they did not take reasonable care. See *MacEachern v. Rennie*, 2010 BCSC 625, at paragraph 653. I find that making an unsafe lane change at highway speeds created a grave risk of harm. I also find that but for AQ's quick reaction, Alex would have hit AQ and caused a very serious accident. I find that Alex's conduct was a significant departure from the standard of care.

32. While serious, I find that Ms. Hendy's negligence was less blameworthy. I find that following too closely on a highway or having a momentary lapse in attention is a less serious departure from the standard of care than Alex's unsafe lane change. I apportion liability 80% to Alex and 20% to Ms. Hendy. I turn then to damages.

What are Ms. Hendy's damages?

33. As mentioned above, the parties agree that Ms. Hendy's non-pecuniary damages are $5,500. Based on my liability decision, Ms. Hendy is entitled to receive 80% of this amount, which is $4,400.

34. Ms. Hendy also claims $300, which ICBC undisputedly deducted from the amount she received for her vehicle, which was a total loss. I find that Ms. Hendy is entitled to be reimbursed 80% of this deductible, which is $240.

35. Finally, she claims $1,285 in rental car costs. According to the invoice for the rental, Ms. Hendy rented a vehicle for 3 weeks. ICBC says that Ms. Hendy does not have car rental coverage, which I find is irrelevant to whether Alex and Pro-Ex must pay this amount as damages. The only other thing the respondents say about this claim is that it should "follow the responsibility assessment for the accident", which implies that they do not dispute the reasonableness of the expense. In the absence of any argument to the contrary, I find that Ms. Hendy's car rental claim is reasonable. Again, she is entitled to 80% of $1,285, which is $1,028.

36. In summary, I find that Ms. Hendy is entitled to a total of $5,668 in damages. There is no suggestion that Alex was driving the tractor trailer without Pro-Ex's consent, so I find that Pro-Ex is vicariously liable for Alex's negligence under section 86 of the MVA.

FEES, EXPENSES AND INTEREST

37. Section 2 of the *Court Order Interest Act* (COIA) says that prejudgment interest must not be awarded on non-pecuniary damages resulting from personal injury. Ms. Hendy is therefore only entitled to prejudgment interest on the deductible and rental car. She says that she received the cheque for her written off vehicle on September 13, 2019, which was also the last day she rented a car. I award prejudgment interest on both amounts from September 13, 2019, to the date of this decision. This equals $27.56.

38. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to be reimbursed for their CRT fees and dispute-related expenses. While I found her contributorily negligent, I find that Ms. Hendy was substantially successful in her damages claim against Alex and Pro-Ex. I find that Alex and Pro-Ex must reimburse her $175 in CRT fees and dismiss Alex and Pro-Ex's claims for reimbursement of their CRT fees. ICBC was successful, so I order Ms. Hendy to reimburse ICBC $25 in CRT fees. None of the parties claimed any dispute-related expenses.

ORDERS

39. Within 30 days of the date of this order, I order Alex and Pro-Ex to pay Ms. Hendy a total of $5,870.65, broken down as follows:

    a. $5,668 in damages,

    b. $27.56 in prejudgment interest under the COIA, and

    c. $175 in CRT fees.

40. Within 30 days of the date of this order, I order Ms. Hendy to pay ICBC $25 for CRT fees.

41. Ms. Hendy and ICBC are also entitled to post-judgment interest under the COIA.

42. Under section 57 and 58 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia or the Provincial Court of British Columbia if it is under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Eric Regehr, Tribunal Member

[i] The CRT has a policy to use inclusive language that does not make assumptions about a person's gender. As part of that commitment, the CRT asks parties to identify their pronouns and titles to ensure that the CRT respectfully addresses them throughout the process, including in published decisions. As mentioned above, Alfred Alex is represented by ICBC. ICBC has refused to ask its insureds' pronouns and titles, citing their privacy. I will therefore refer to Alfred Alex by just their last name throughout this decision and use gender neutral pronouns, intending no disrespect. However, I note that the CRT's process is no different than the BC Supreme Court's and BC Provincial Court's processes, which require counsel to provide a party's pronoun and title, including in ICBC cases.