Civil Resolution Tribunal

Date Issued: January 13, 2022

File: VI-2021-003802

Type: Motor Vehicle Injury

Civil Resolution Tribunal

Indexed as: *Johnson v. City of Salmon Arm*, 2022 BCCRT 51

B E T W E E N :

DIANE JOHNSON

**APPLICANT**

A N D :

CITY OF SALMON ARM

**RESPONDENT**

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**REASONS FOR DECISION**

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Tribunal Member: Kristin Gardner

## INTRODUCTION

1. This dispute is about a single vehicle accident that took place on September 29, 2020 in Salmon Arm, BC.

2. The applicant, Diane Johnson, says her vehicle was damaged and she was injured when she drove over a “break” in the road. The respondent, City of Salmon Arm

(Salmon Arm), was responsible for the road in question. Ms. Johnson says Salmon Arm was negligent in failing to post signs warning about the break. She seeks $5,627 in non-pecuniary (pain and suffering) damages, the maximum allowed for minor injuries at the time under the *Insurance (Vehicle) Act*. She also seeks an additional $1,500 for reimbursement of her $500 deductible and other alleged out-of-pocket expenses for vehicle repairs and treatment for her alleged injuries.

3. Salmon Arm argues that Ms. Johnson failed to provide written notice of her claim, as required under sections 735 and 736 of the *Local Government Act* (LGA), so her claim is out of time. Further, Salmon Arm says it is not legally responsible for Ms. Johnson's claimed damages because it conducted its road work project in accordance with a reasonable policy. Salmon Arm denies that it was negligent and asks that I dismiss this dispute.

4. Ms. Johnson is self-represented. Salmon Arm is represented by a lawyer appointed by its insurer.

## 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March 2, 2021, the BC Supreme Court ordered that sections 133(1)(b) and 133(1)(c) of the CRTA were unconstitutional and no longer in effect.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. Johnson with information about the BC Supreme Court's decision and the BC Court of Appeal's partial stay. The CRT asked Ms. Johnson 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.

11. Ms. Johnson submitted additional evidence after the parties completed their submissions. The evidence consisted of various receipts supporting Ms. Johnson's claimed damages, including her vehicle damage and ongoing treatment of her alleged injuries. I find the late evidence is relevant to this dispute. Salmon Arm does not object to the late evidence, and it had an opportunity to provide submissions in response. Considering the CRT's mandate for a flexible process and finding there is no actual prejudice to Salmon Arm, I admit Ms. Johnson's late evidence.

## ISSUES

12. The issues in this dispute are:
    a. Is Ms. Johnson's claim out of time under the LGA?
    b. Was Salmon Arm negligent in failing to post warning signs about the break in the road, and if so, what is the appropriate remedy?

## BACKGROUND, EVIDENCE AND ANALYSIS

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

14. Ms. Johnson says she was driving north on Auto Road SE in the early afternoon of September 29, 2020, when she drove over a "break" in the pavement, which she says severely jarred her vehicle and her back. Ms. Johnson says there were no construction signs or cones to mark the hazard on the roadway, which is undisputed. She says she had been travelling the posted speed limit of 60 kilometres per hour, and if there had been some warning, she would have slowed down and driven over the break carefully. She claims her vehicle sustained damage and she was injured.

15. Salmon Arm undisputedly excavated part of the roadway in question on September 24, 2020. Salmon Arm describes the excavated area as a "trench" and says the trench was properly filled and levelled with the roadway. It also says signs or cones were not required because the filled trench did not present a hazard, and vehicles could safely drive over it while going the speed limit. It is undisputed that Salmon Arm ultimately repaved the trench area on September 30, 2020.

### *Is Ms. Johnson's claim out of time under the LGA?*

16. As noted, Salmon Arm says Ms. Johnson's claim is out of time under the LGA. Section 736 of the LGA requires a person who intends to make a legal claim against a municipality to give the municipality written notice within 2 months of the alleged

damage. The written notice must include the time, place, and manner in which the damage was sustained. Section 736(3) of the LGA also says failure to give notice within 2 months is not a bar to the action if the applicant has a reasonable excuse and the municipality was not prejudiced by insufficient notice.

17. Ms. Johnson argues that she provided verbal notice of her potential claim on October 6, 2020 during telephone conversations with the Salmon Arm's Supervisor of Roads and Transportation, KG, and the Director of Corporate Services, EJ. Ms. Johnson says she also spoke with the Manager of Road and Transportation, DG, on October 7, 2020. Salmon Arm does not dispute any of this.

18. Ms. Johnson also provided evidence that on October 11, 2020, she completed an online form on Salmon Arm's website, inquiring about how to submit a claim for vehicle damage sustained while driving over a trench in the road. EJ responded to Ms. Johnson in an October 19, 2020 email that she should make a claim with her vehicle insurer. From EJ's email, I find Salmon Arm's utilities department was responsible for the road construction, and it was aware of Ms. Johnson's complaint.

19. There is no evidence before me that EJ, or any other Salmon Arm employee advised Ms. Johnson that she had to provide Salmon Arm with further written notice of her claim within a certain time. Ms. Johnson provided Salmon Arm with formal written notice of her claims for personal injury and vehicle damage in a letter dated December 16, 2020.

20. While Ms. Johnson did not specifically say so, I find she was likely unaware of the requirement to provide written notice of her claims under section 736 of the LGA. The courts have found that ignorance of that requirement, alone, does not constitute a reasonable excuse, though it may be a factor to consider (see *Lapshinoff v. Wray*, 2018 BCSC 2315).

21. However, given that Ms. Johnson spoke with several Salmon Arm employees about her claim within a few days of the alleged incident, and she had received written confirmation in EJ's October 19, 2020 email that Salmon Arm was aware of the time,

place, and manner in which her alleged damage was sustained, I find Ms. Johnson reasonably believed she had provided adequate notice. I find this is a reasonable excuse for Ms. Johnson's failure to provide formal written notice within 2 months of her alleged damage. Further, I find there is no evidence that Salmon Arm was prejudiced by any delay in Ms. Johnson providing formal written notice of her claim. I find Ms. Johnson is not barred from bringing this dispute under section 736 of the LGA, so her claim is not out of time.

### *Was Salmon Arm negligent?*

22. To show Salmon Arm was negligent, Ms. Johnson must prove each of the following on a balance of probabilities: (a) Salmon Arm owed her a duty of care, (b) Salmon Arm breached the standard of care, (c) Ms. Johnson sustained a loss, and (d) Salmon Arm's breach of the standard of care caused Ms. Johnson's loss (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 3).

23. Salmon Arm relies first upon a policy defence, which provides that government bodies, including municipalities, cannot be held liable in negligence for true policy decisions, unless they are made in bad faith or are so irrational or unreasonable that they are not a proper exercise of discretion (see *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420).

24. While the exercise of policy decisions may exempt a municipality from liability, the same does not apply to operational decisions. Operational decision are those involving the implementation of policies and are generally made based on administrative direction, professional opinion, technical standards, or general standards of reasonableness. The Supreme Court of Canada recently revisited this distinction between policy decisions and operational implementation of policies, in *Nelson (City) v. Marchi*, 2021 SCC 41.

25. Salmon Arm says it had an unwritten policy in place that it would only place signs, cones, or pylons around work projects on its roadways if those projects posed a danger or hazard to the public using the road. Salmon Arm provided statements from

DG and its Supervisor of Utilities, LK, both of whom confirmed that Salmon Arm has such an unwritten policy not to place signs around work projects that pose no hazard. I accept Salmon Arm's submissions that it had the unwritten policy about placing signs around road projects, as described.

26. Ms. Johnson argues the policy is unreasonable because it allows for "inconsistency and error". She says the policy should be that any time there is a "cut" made in the road, warning signage should be placed because the travelling public is potentially endangered. I disagree. I find municipalities do not have unlimited resources, and it would be inefficient and largely unnecessary to place warning signs when there is no reasonable apprehension of danger. On balance, I find Salmon Arm's policy to only place signs around potentially hazardous road projects was reasonable.

27. In any event, I find Salmon Arm's policy is not directly in issue in this dispute. Rather, I find Ms. Johnson's main position is that Salmon Arm was negligent because she says the road project posed a danger or hazard, so Salmon Arm should have placed signage to warn of the danger. In other words, I find Ms. Johnson alleges Salmon Arm was negligent in its implementation of the policy.

28. I find Salmon Arm's decision about whether to place signs at this particular "break" in the roadway was an operational decision. So, I find Salmon Arm is not entitled to rely on a "policy defence", and I find Salmon Arm owed Ms. Johnson a duty of care to take reasonable steps to ensure the roadway was not hazardous for users.

29. The next question is whether Salmon Arm met the required standard of care. The standard is what would be expected of an ordinary, reasonable, and prudent person (or municipality) in the same circumstances. The test is one reasonableness, not perfection (see *Ryan v. Victoria (City)*, [1999] 1 SCR 201).

30. Ms. Johnson says the standard of care required Salmon Arm to place signs or otherwise warn drivers about the "break" in the road. Salmon Arm disagrees. It says that following the excavation, it immediately filled the trench with road crush and gravel and finished it with 3 to 4 inches of asphalt millings. Salmon Arm says this

filling is strong enough to withstand vehicles driving over it at the 60 kilometres per hour speed limit. It also says the filling was flush and level with the rest of the roadway, so it did not require any signs, cones, or pylons to warn drivers.

31. Salmon Arm provided a statement from its Sub Foreman of Utilities, MA, who was involved with excavating and filling the road in question on September 24, 2020. MA says he returned to the site on September 25, 2020 and noticed some of the millings had been displaced, so he and other employees re-filled the trench. MA states that after re-filling the trench, it was smooth and level with the roadway. He says he observed at least 50 vehicles travel over the re-filled trench and says none of the vehicles had any visible issues travelling over the site.

32. LK (Supervisor of Utilities) stated that he attended the trench site on September 28, 2020, and he observed that the millings were still level with the road at that time. He specifically stated that he observed no potholes, lumps, or humps across the millings-filled trench. He also stated he did not believe the trench was a hazard to drivers and deemed that warning signs were unnecessary.

33. Ms. Johnson says when she drove over the trench on September 29, 2020, it felt like she had hit a 2 to 3-inch vertical cut in the road. She says a reasonable person would agree that warning signs should have been in place. However, she provided no other evidence about the state of the trench at the time she drove over it, such as photographs or any description based on visual observation. I infer that Ms. Johnson continued driving and did not return to the site until after it had been repaved.

34. Ms. Johnson provided photographs of 2 trenches in other locations around the city that she says Salmon Arm had excavated and filled. I find these photographs are not relevant to this dispute because they have no bearing on whether the trench at issue was dangerous and required warning signs. So, I place no weight on the photographs of other alleged trenches.

35. Ms. Johnson also relies on her vehicle damage to support her position that the trench posed a danger. I find that determining the likely cause of vehicle damage is a matter

outside ordinary knowledge requiring expert evidence to prove (see *Bergen v. Guliker*, 2015 BCCA 283).

36. Ms. Johnson provided an October 5, 2020 invoice from a vehicle repair shop, which shows she took her car in to investigate "a vibration". The invoice noted the wheels were bent, so it rebalanced them. A later June 15, 2021 invoice from the same shop, for an unrelated issue, notes that the recent "bent rim" damage was "consistent with hitting a large trench" in the road, as the damage was the same on all 4 wheels.

37. I infer that Ms. Johnson asked the repair shop to provide a statement about the likely cause of her vehicle's bent wheels or rims for the purpose of this dispute, as there would be no other reason to include the comment on the later unrelated invoice. In any event, I do not accept the statement on the repair shop invoice as expert evidence under the CRT rules. This is because the invoice provides only the first name of the "tech" who made the comments, and I have no evidence before me about the tech's qualifications to determine the likely cause of the vehicle damage. So, I find there is no expert evidence about the cause of Ms. Johnson's vehicle damage before me.

38. However, even if I accepted that Ms. Johnson's alleged vehicle damage was "consistent" with driving over a large trench in the road, I find that is insufficient to prove Salmon Arm was negligent. The repair shop statement does not define "large trench" and given Ms. Johnson says she did not see the trench before she drove over it, I find there is insufficient evidence to conclude that the trench in question caused Ms. Johnson's alleged vehicle damage. Further, the statement does not address whether other factors may have contributed to the alleged damage from driving over a trench, such as speed, or whether the damage could have resulted from some other cause. Overall, I find the repair shop's comments about the cause of Ms. Johnson's vehicle damage unhelpful, and I place no weight on them.

39. Salmon Arm says it received no other complaints about the trench, either before or after Ms. Johnson drove over it. This was confirmed in DG's statement, and I accept it as true. Further, given MA's statement about the number of vehicles he observed driving over the trench on September 25, 2020, I find Auto Road SE was likely

regularly travelled. While not determinative, I find the lack of other complaints is some evidence that other drivers did not experience any significant trouble driving over the trench before it was repaved.

40. Based on the various statements from Salmon Arm employees that the trench was filled and level with the road and that vehicles were driving over the trench safely as of September 25, I find there is no evidence that the trench constituted a hazard that required Salmon Arm to place warning signs in accordance with its policy.

41. I also find Salmon Arm reasonably checked on the trench's condition on September 28, 2020, and I accept that the trench remained safe at that time. I find there is no evidence before me that Salmon Arm should have reasonably believed the trench's condition would deteriorate significantly in the following 2 days before it was repaved. Again, the standard is not perfection. Specifically, I find the standard of care did not require Salmon Arm to check on the trench daily, or more often. So, even if the trench did deteriorate on September 29, 2020, as Ms. Johnson alleges, I find that is insufficient to prove negligence.

42. On balance, I find Ms. Johnson has not met her burden to prove Salmon Arm breached the standard of care by failing to place warning signs about the trench. So, I find Ms. Johnson has not established that Salmon Arm was negligent.

43. Given my conclusion, I find I do not need to address Ms. Johnson's claimed damages. I dismiss Ms. Johnson's claims.

## FEES AND EXPENSES

44. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to the recovery of their CRT fees and dispute-related expenses. As Ms. Johnson was not successful, I find she is not entitled to reimbursement of her CRT fees. Salmon Arm was the successful party, so I find Ms. Johnson must reimburse Salmon Arm $25 for its paid CRT fees.

45. Salmon Arm also submits that it is entitled to reimbursement of its disbursements incurred in defending Ms. Johnson's claims. However, it provided no evidence or submissions of any dispute-related expenses, so I make no order.

## ORDERS

46. Within 30 days of the date of this decision, I order Ms. Johnson to pay Salmon Arm a total of $25 in CRT fees.

47. I dismiss Ms. Johnson's claims.

48. 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.

Kristin Gardner, Tribunal Member