



Civil Resolution Tribunal

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Type: Accident Claims

Category: Minor Injury Determination
and Fault & Damages

Civil Resolution Tribunal

Indexed as: *Kachouh v. van Heeswijk*, 2023 BCCRT 713

BETWEEN:

LOUAY KACHOUH

APPLICANT

AND:

GAIL ELIZABETH VAN HEESWIJK

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Andrea Ritchie, Vice Chair

INTRODUCTION

1. This decision is about a motor vehicle accident that took place on November 29, 2019 between the applicant, Louray Kachouh, and the respondent, Gail Elizabeth van Heeswijk.¹
2. Mr. Kachouh filed 3 related accident claims disputes with the Civil Resolution Tribunal (CRT): (1) a request for accident benefits from Mr. Kachouh's insurer, Insurance Corporation of British Columbia (ICBC) (dispute VI-2021-007939), (2) a request that the CRT determine whether Mr. Kachouh's injuries are "minor injuries" under the *Insurance (Vehicle) Act* (IVA) (dispute VI-2021-009744), and (3) a claim for personal injury damages (dispute VI-2021-009745). Liability for the accident is not disputed. The dispute about accident benefits is the subject of a separate CRT decision.
3. ICBC insures both parties. ICBC is not a party to either of the disputes that are the subject of this decision.
4. Mr. Kachouh argues his injuries are not minor, and seeks \$100,000 in personal injury damages, including \$50,000 in non-pecuniary (pain and suffering) damages and \$50,000 for future care costs. The CRT's monetary limit for liability and damages claims within its accident claims jurisdiction is \$50,000. Mr. Kachouh was informed about this limit, and I find that by continuing dispute VI-2021-009745 for damages, he agreed to abandon his claim over the monetary limit.
5. The respondent says Mr. Kachouh's injuries are "minor injuries" and argues his non-pecuniary damages are therefore limited to \$5,672, the "minor injury cap". The respondent also says Mr. Kachouh has not proven any entitlement to future care costs.

¹ 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, Gail Elizabeth van Heeswijk is represented by ICBC. ICBC did not provide their pronouns or title. Because of this, I will refer to Gail Elizabeth van Heeswijk as the respondent and will use gender neutral pronouns for them throughout this decision, intending no disrespect.

6. Mr. Kachouh represents himself. The respondent is represented by an authorized ICBC employee.

JURISDICTION AND PROCEDURE

7. These are the CRT's formal written reasons. 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 exclusive jurisdiction over the determination of whether an injury is a "minor injury" under the *Insurance (Vehicle) Act*. 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.
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. 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.

ISSUES

11. The issues in this dispute are:
 - a. Whether Mr. Kachouh's injuries are "minor injuries" as defined by section 101 of the IVA, and
 - b. To what extent Mr. Kachouh is entitled to his claimed damages.

BACKGROUND, EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the applicant Mr. Kachouh must prove his claims on a balance of probabilities, meaning "more likely than not". While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
13. As noted, Mr. Kachouh was injured in a motor vehicle accident on November 29, 2019. Mr. Kachouh's vehicle was in the aisle of a parking lot when the respondent reversed out of their parking stall and struck Mr. Kachouh's vehicle on the right side. The collision was undisputedly relatively minor, and ICBC says neither vehicle has been repaired.
14. The respondent was held 100% responsible for the accident, which is not disputed. It is also undisputed Mr. Kachouh was injured as a result of the accident. He argues his injuries are not minor and seeks \$50,000 in non-pecuniary damages and \$50,000 in future care costs. As noted, I find that by continuing his damages claim at the CRT, Mr. Kachouh agrees to limit his total claim to \$50,000.
15. The respondent says Mr. Kachouh's injuries fall within the definition of a "minor injury", and that Mr. Kachouh's non-pecuniary damages are limited to the applicable legislated "minor injury cap" of \$5,672. The respondent also argues Mr. Kachouh has not proven any entitlement to future care costs.

Minor Injury Determination

16. Section 101 of the IVA and section 2 of the *Minor Injury Regulation* (MIR) define a “minor injury” as including, among other things, sprains or strains, pain syndromes, a concussion that does not result in an incapacity, and whiplash-associated disorder (WAD) injuries.
17. Section 101 of the IVA further says that a “minor injury” includes a physical or mental injury that does not result in a “serious impairment” or a “permanent serious disfigurement”.
18. A “permanent serious disfigurement” means something that significantly detracts from the injured person’s physical appearance. There is no indication Mr. Kachouh claims a permanent serious disfigurement from the November 29, 2019 accident.
19. A “serious impairment” means a physical or mental impairment that is not resolved within 12 months of the date of the accident **and** “meets prescribed criteria”.
20. MIR section 3 sets out the “prescribed criteria” for a serious impairment. It says that the impairment must result in a “substantial inability” to perform the essential tasks of the injured person’s regular employment or education program, or their activities of daily living. The impairment must be caused by the accident, be ongoing since the accident, and not be expected to improve substantially.
21. As a result of the accident, Mr. Kachouh says he suffered a lot of pain and discomfort in the neck, shoulders, and back. He says he experiences sleep disturbances, severe headaches, and numbness and tingling into his left arm. He also argues a suspected thyroid cartilage fracture and degenerative changes in his cervical spine are a result of the accident, and continue to cause him pain over 3.5 years since the accident. He says his injuries affect his day-to-day activities and his social and psychological life.
22. The parties provided various clinical records from Mr. Kachouh’s health practitioners, including his family doctor, Dr. Paul Beveridge, his otolaryngologist (ENT), Dr. Heitham Gheriani, and his physiotherapists, massage therapists, and kinesiologist.

23. The respondent also provided a medical legal report from Dr. Hernish Acharya, a physiatrist, who produced the report based on a review of Mr. Kachouh's medical records.
24. First, although Mr. Kachouh argues a suspected thyroid cartilage fracture noted on a February 13, 2021 CT scan is a result of the accident, I find that is not supported by the evidence. I find nothing in the medical evidence from Mr. Kachouh's treating practitioners provides an opinion that the fracture was related to the accident. Instead, it is commonly referred to as an "incidental" finding.
25. Additionally, in their medical report, Dr. Acharya reviewed Mr. Kachouh's relevant medical records and was asked to provide an opinion about the diagnosis and prognosis of his injuries. Specifically in relation to the thyroid cartilage fracture, Dr. Acharya noted that it was an incidental finding when doing cervical spine imaging relating to Mr. Kachouh's ongoing neck pain. Dr. Acharya noted it is a "laryngeal-type injury" and injury to this structure would typically require high forces, which were undisputedly not present in this accident.
26. According to Dr. Acharya's CV, he is a medical doctor in the specialty of Physical Medicine and Rehabilitation (physiatry), and has been licensed to practice medicine in both BC and Alberta since 2007. I am satisfied Dr. Acharya is qualified by both training and experience to give expert evidence on the diagnosis and prognosis of accident injuries.
27. Although Mr. Kachouh argues Dr. Acharya is biased and his report is not consistent with the medical imaging, I disagree. I find there is no evidence to indicate any bias by Dr. Acharya, and I find his interpretation and explanation of Mr. Kachouh's injuries is consistent with the other medical evidence.
28. On balance, I find Mr. Kachouh has not proven the thyroid cartilage fracture is related to the November 29, 2019 accident.
29. Next, the degenerative changes in his cervical spine. As noted, Mr. Kachouh says these were caused by the accident and have gotten worse over time. However, I find

this is not consistent with the medical evidence and imaging reports. In the most recent MRI of his neck on September 6, 2022, the report noted that focal thickening of the median thyroid ligament was present on a previous CT scan in 2018, which pre-dated the accident, and was unchanged. Similarly, a September 16, 2020 cervical x-ray showed some degenerative changes, but noted they were similar to previous imaging in 2018 and 2017, before the accident.

30. In their medical legal report Dr. Acharya also explained the records indicated “significant pre-existing issues”, particularly left arm symptoms of numbness and tingling that led to shoulder surgery in 2018. Dr. Acharya noted Mr. Kachouh had neurologic complaints before the November 2019 accident. Notably, Mr. Kachouh did not explain his pre-existing complaints at all. Although these were raised by the respondent in argument, Mr. Kachouh chose not to provide a final reply, despite having the opportunity to do so. Given this, I find Mr. Kachouh was suffering from some level of ongoing pain and discomfort in his neck and left shoulder before the accident, dating back to at least September 2017.
31. Based on the records in evidence, I find Mr. Kachouh suffered a grade 2 whiplash associated disorder-type (WAD II) injury to his neck, upper back, and shoulder, as a result of the accident. For example, Dr. Beveridge diagnosed him with WAD grade 2 on December 3, 2019, at his first appointment following the accident, as well as on July 29, 2020, and May 24, 2021, as did his physiotherapist on December 4, 2019. Dr. Acharya also gives the opinion that Mr. Kachouh’s complaints and medical records are consistent with a diagnosis of WAD II. I find Mr. Kachouh’s accident injuries are a WAD-type injury, which falls within the injuries listed in the IVA and MIR.
32. Although Mr. Kachouh alleges his injuries affect his day-to-day life, the medical evidence indicates by December 4, 2019 he had returned to his “activities of daily living” but that they were painful. By July 2020, Dr. Beveridge noted Mr. Kachouh had returned to full functional status. I find there is no evidence Mr. Kachouh is substantially unable to perform his activities of daily living as they are defined in section 1 of the IVA.

33. Additionally, Mr. Kachouh says he was off work for 7 months as a result of his accident injuries, but provided no evidence supporting this, such as employment records. In any event, in July 2020, Dr. Beveridge noted that Mr. Kachouh had full work hours and duties. So, I find there is insufficient evidence to show that Mr. Kachouh was substantially unable to perform the essential tasks of his regular employment after that date.
34. In summary, based on the evidence before me, I find Mr. Kachouh's injuries are "minor injuries" as defined by section 101 of the IVA and the MIR.

Damages

35. As noted, in dispute VI-2021-009745, Mr. Kachouh claims \$50,000 for non-pecuniary damages and \$50,000 for future care costs. As I have found Mr. Kachouh's injuries were minor, section 103(1) of the IVA and section 6 of the MIR say any non-pecuniary damages are limited. For accidents between April 1, 2019 and March 31, 2020, which includes this accident, the applicable limit is \$5,500. So, I find Mr. Kachouh's claim for non-pecuniary damages is limited to that "minor injury cap".
36. The respondent agrees Mr. Kachouh is entitled to the cap, so I award him that amount.
37. Mr. Kachouh also claims for future care costs. An award for cost of future care is usually based on evidence about the various anticipated costs of providing adequate care for an injured party over their lifetime (see: *Townsend v. Kroppmanns & Currie*, 2002 BCCA 365 at paragraph 33). Mr. Kachouh does not explain what future care he believes he is entitled to, other than explaining Dr. Beveridge has recommended further physiotherapy and massage therapy, which ICBC has already agreed to fund, as explained in a separate, but related, CRT decision on accident benefits.
38. There is nothing in the medical evidence to indicate any other treatment or investigations have been recommended for Mr. Kachouh. In order to receive an award for future care costs, Mr. Kachouh must establish what costs are reasonably necessary, and must provide medical evidence to support his claim (see: *Aberdeen*

v. *Zanatta*, 2008 BCCA 420 at paragraphs 41 and 42). I find Mr. Kachouh has not proven he is entitled to any award for future care costs. I dismiss this aspect of his claim.

FEES, EXPENSES AND INTEREST

39. Further to section 2 of the *Court Order Interest Act*, pre-judgment interest must not be awarded on non-pecuniary damages resulting from personal injury, or on costs (CRT fees and dispute-related expenses). So, I make no award for pre-judgment interest.
40. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses.
41. ICBC, on the respondent's behalf, submitted Mr. Kachouh was entitled to the maximum "minor injury cap" for non-pecuniary damages, and undisputedly offered Mr. Kachouh at least that amount before he started this CRT dispute. So, I find Mr. Kachouh was ultimately unsuccessful in his claims for a minor injury determination and for damages. As a result, I dismiss his claim for reimbursement of tribunal fees and dispute-related expenses.
42. As the respondent was successful, I find Mr. Kachouh must reimburse them \$25 in tribunal fees and proven dispute-related expenses.
43. The respondent also claims reimbursement for Dr. Acharya's report. Under section 5 of the *Accident Claims Regulation*, recovery of expenses and charges payable for expert reports is limited to \$2,000 per expert. ICBC, on the respondent's behalf, paid \$5,880, but claims the maximum of \$2,000. I find Mr. Kachouh must reimburse the respondent the claimed \$2,000.

SUMMARY

44. In summary, I find Mr. Kachouh's accident injuries are "minor injuries" as defined by section 101 of the IVA.

45. I award Mr. Kachouh \$5,500 in non-pecuniary damages. I dismiss Mr. Kachouh's claim for cost of future care.
46. I find the respondent is entitled to reimbursement of \$2,025 for tribunal fees and dispute-related expenses.
47. This means Mr. Kachouh is entitled to a net award of \$3,475 in damages.

ORDERS

48. Within 21 days of the date of this decision, I order the respondent to pay Mr. Kachouh a net total of \$3,475 in damages.
49. Mr. Kachouh is also entitled to post-judgment interest under the *Court Order Interest Act*.
50. 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.

Andrea Ritchie, Vice Chair