



# Civil Resolution Tribunal

Date Issued: November 2, 2023

File: AR-2022-010295

Type: Accident Claims

Category: Accident Responsibility

Civil Resolution Tribunal

Indexed as: *Malakoane v. ICBC*, 2023 BCCRT 947

**B E T W E E N :**

PETER MALAKOANE

**APPLICANT**

**A N D :**

INSURANCE CORPORATION OF BRITISH COLUMBIA

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Peter Mennie

## **INTRODUCTION**

1. This dispute is about accident responsibility.
2. The applicant, Peter Malakoane, was involved in a motor vehicle accident while driving in Washington State, USA. Mr. Malakoane says that the respondent insurer,

Insurance Corporation of British Columbia (ICBC), incorrectly determined responsibility for the accident. ICBC held Mr. Malakoane 100% responsible for the accident, but Mr. Malakoane says he should be 0% responsible.

3. Mr. Malakoane represents himself. ICBC is represented by an authorized employee.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over accident claims brought under section 133 of the *Civil Resolution Tribunal Act* (CRTA). Section 133(1)(d) of the CRTA and Part 2 of the *Accident Claims Regulation* (ACR) give the CRT jurisdiction over accident responsibility determinations.
5. Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly.
6. 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.
7. 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 with evidence***

8. Mr. Malakoane submitted two videos as evidence by way of internet links. Submitting internet links as evidence, rather than the evidence itself, generally calls into question the reliability of the linked evidence. There is often no way of knowing whether the linked video has changed at any point in time, and whether all parties and the Tribunal

Member have seen the same video. I did not rely on these videos in coming to my decision. However, given my conclusions below, nothing turns on these videos.

## **ISSUES**

9. The issues in this dispute are:
  - a. Whether ICBC acted improperly or unreasonably in assigning responsibility for the accident, and
  - b. If so, to what extent, if any, is Mr. Malakoane responsible for the accident?

## **EVIDENCE AND ANALYSIS**

10. In a civil proceeding like this one, the applicant Mr. Malakoane 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.
11. It is undisputed that Mr. Malakoane was involved in an accident in Washington State, USA on November 20, 2022. Mr. Malakoane says he was driving in the right lane of a two-lane highway. Two third party vehicles were involved in an accident ahead of Mr. Malakoane and came to a stop in Mr. Malakoane’s lane. Mr. Malakoane says he saw the two stationary vehicles and swerved into the left lane, but the front passenger side of his vehicle collided with one of the vehicles.
12. Mr. Malakoane says that the vehicle he hit did not have its lights turned on. He says that the road was pitch black and he only saw the vehicle at the last moment. The police report in evidence confirms that the third party vehicle’s lights were off at the time of Mr. Malakoane’s accident.
13. On December 19, 2022, ICBC issued a CL722 finding Mr. Malakoane 100% responsible for the accident. ICBC cited section 144 of the *Motor Vehicle Act* (MVA) which states that a person must not drive on a highway without due care and

attention, without reasonable consideration for others using the highway, or at a speed excessive given the road, traffic, visibility, and weather conditions. ICBC stated that this section of the MVA applied to the accident but did not describe how Mr. Malakoane breached section 144.

14. In its submissions in this CRT dispute, ICBC agrees that Mr. Malakoane had to swerve to avoid colliding with a stationary vehicle on the highway. ICBC also agrees that the third party vehicle's lights were off, however it says there is no evidence that a third party did this and the lights may have been off because of the collision. ICBC says that Mr. Malakoane has not provided evidence of the third party vehicle's negligence which would have contributed to the accident. So, ICBC submits that it was reasonable in determining that Mr. Malakoane was 100% responsible for the accident.
15. The accident happened in Washington State and neither party made submissions on whether Washington State law should apply. Foreign laws must be proven by expert evidence, and if foreign law is not proven then it is assumed to be the same as the law of British Columbia (*Old North State Brewing Co. v. Newlands Services Inc.* (1998), 1998 CanLII 6512 (BC CA)). Without evidence and submissions on Washington State law, I will apply the law of British Columbia in this CRT dispute. In any event, I note that the *Revised Code of Washington* Chapter 46.61 (Rules of the Road) has similar provisions to British Columbia related to speeding, reckless driving, and stopping on highways.
16. Under the ACR, to succeed in his claim against ICBC, Mr. Malakoane must first prove that ICBC acted improperly or unreasonably in assigning responsibility for the accident. Second, Mr. Malakoane must prove that he is less responsible for the accident than ICBC assessed. Both parts of this test must be proven.

***Did ICBC act improperly or unreasonably in assigning responsibility for the accident?***

17. Section 10(a) of the ACR essentially codifies the existing case law about whether ICBC acted “properly or reasonably” in administratively assigning responsibility for accidents (*Singh v. McHatten*, 2012 BCCA 286, referring to *Innes v. Bui*, 2010 BCCA 322). Merely disagreeing with ICBC’s decision does not mean ICBC acted improperly or unreasonably.
18. While not stated in the CL722, ICBC’s submission in this CRT dispute is essentially that negligence must be apportioned between Mr. Malakoane and the third party vehicle involved in the collision. ICBC says it has not received any evidence to find the third party vehicle negligent. ICBC submits that it reasonably applied section 144 of the MVA and correctly determined liability.
19. It is common ground that the third party vehicle was stationary on a dark highway with no lights turned on. Section 187 of the MVA states that a person must not park a vehicle on a highway so as to obstruct the free passage of traffic. While there is an exception if the vehicle is inoperable, there is no evidence that the third party vehicle was inoperable in this case. The third party driver may also have been negligent for failing to activate its emergency flashers after the collision (*Langille v. Nguyen*, 2013 BCSC 1460 at paragraph 113).
20. As noted above, ICBC determined that there was no evidence of negligence by the third party vehicle. It appears that ICBC did not consider whether the third party vehicle could have been negligent under section 187 of the MVA or because their emergency flashers were off. I find that ICBC’s failure to consider these issues was unreasonable and that ICBC acted improperly in assigning Mr. Malakoane 100% responsibility for the accident.
21. So, I find Mr. Malakoane has satisfied the first part of the 2-part test. I turn to part 2.

***Who is responsible for the November 20, 2022 accident?***

22. Section 10(b) of the ACR says that Mr. Malakoane must show that he is less responsible for the November 20, 2022 accident than ICBC assigned him. As noted,

ICBC held Mr. Malakoane 100% responsible and Mr. Malakoane argues he should be held 0% responsible.

23. As noted above, Mr. Malakoane struck the third party's vehicle that was stationary in Mr. Malakoane's lane of travel. This is, in essence, a rear-end collision. In assessing the rear driver's conduct, four factors are considered (*Biggar v. Enns*, 2017 BCSC 2290 at paragraph 46):
  - a. The speed of the rear vehicle,
  - b. The distance between the two vehicles as they were driving along,
  - c. What the driver of the rear vehicle was doing as they were driving along, and
  - d. As the emergency arose, how the rear driver responded.
24. Drivers must exercise due care and caution to avoid colliding into vehicles in front of them, however they are not required to foresee the unforeseeable. The standard of care is met by reasonable prudence, not perfection (*Chauhan v Welock*, 2020 BCSC 1125 at paragraph 70).
25. It is a well-established legal principle that a driver is not negligent if, in the "agony of the moment", the evasive action they took may not have been as good as some other course of action they might have taken (*Graham v. Carson*, 2015 BCCA 310, citing *Neufeld v. Landry* (1974), 1974 CanLII 1271). That is, more latitude is given to a driver who takes evasive action because of an emergency caused by a third party.
26. In this case, it is undisputed that the third party vehicle had no lights on and was stationary on the highway. Washington State police did not issue a ticket to Mr. Malakoane and there is no evidence that Mr. Malakoane breached section 144 of the MVA by speeding or driving in a careless manner. Faced with an unexpected hazard, Mr. Malakoane took evasive action but was unable to avoid the collision entirely. Under the four factors in *Biggar v. Enns* noted above, I find that Mr. Malakoane acted appropriately given the emergency created by two other vehicles. So, I find that Mr. Malakoane is 0% responsible for the accident.

### ***CRT fees and expenses***

27. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to the recovery of their CRT fees and dispute-related expenses. I find Mr. Malakoane is entitled to reimbursement of the \$125 in CRT fees he paid. ICBC was unsuccessful and is not entitled to reimbursement of its CRT fees. Neither party claimed any dispute-related expenses.

### **ORDERS**

28. Within 14 days of this decision, I order ICBC to amend its internal responsibility assessment to reflect that Mr. Malakoane is 0% responsible for the November 20, 2022 accident.

29. Within 21 days of this decision, I order ICBC to pay Mr. Malakoane \$125 as reimbursement for CRT fees.

30. Mr. Malakoane is entitled to post-judgment interest under the *Court Order Interest Act*.

31. 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.

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Peter Mennie, Tribunal Member