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Civil Resolution Tribunal

Indexed as: *De Paras v. ICBC*, 2024 BCCRT 106

B E T W E E N :

STEPHEN RAYNER DE PARAS and JEAN-MARK MONTREUIL

APPLICANT

A N D :

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr, Vice Chair

INTRODUCTION

1. This is a claim about who is responsible for a motor vehicle accident. The applicant driver, Jean-Mark Montreuil, was driving a truck west on South Fraser Perimeter Road, also known as Highway 17. The applicant driver was in an accident with a third party who was also driving west on Highway 17. The third party was driving a van.

The other applicant, Stephen Rayner de Paras, says that they own the truck in question. They were also a passenger in the truck when the accident happened. Stephen Rayner de Paras represents both applicants.

2. The applicants say that the respondent insurer, the Insurance Corporation of British Columbia (ICBC), incorrectly determined the applicant driver was 100% responsible for the accident. The applicants say the accident was entirely the third party's fault.

3. ICBC says that it properly and reasonably concluded that the applicant driver was fully responsible for the accident. It asks me to dismiss the applicants' claims. It is represented by an employee.

JURISDICTION AND PROCEDURE

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

5. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these.

6. As discussed below, I asked the parties about how to interpret a section of the ACR. As part of their response, the applicants requested a phone hearing. The applicants said they do not have a lawyer and wanted to explain themselves verbally. I reviewed the applicants' answers to my question, and they mostly focused on the details of how ICBC handled its investigation of the accident. My question was more generally about how to interpret the legal test in ACR section 10, which I appreciate is a technical legal question that would be difficult for a non-lawyer to answer. Given this, I decided not to have a phone hearing about the legal test because I did not believe it would be helpful.

7. The applicants did not request an oral hearing before I asked my follow-up question. The applicants' main submissions were detailed and clear. It is true that the applicants question the credibility, or truthfulness, of the third party. However, in *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary where credibility is in issue. In the circumstances of this dispute, I am properly able to assess and weigh the evidence and submissions before me and make the necessary credibility findings. There is no other compelling reason for an oral hearing, especially considering the CRT's mandate to provide proportional and speedy dispute resolution. I therefore decided to hear this dispute through written submissions.

8. CRTA section 42 says the CRT may accept as evidence any 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.

9. As noted in the introduction, Stephen de Paras says that they own the truck in question. The evidence indicates that their corporation owns the truck. So, it does not appear that Stephen de Paras is the truck's legal owner. However, since a driver or owner can request an accident responsibility determination under the CRTA, nothing turns on the fact that the actual owner is not an applicant in this dispute.

ISSUES

10. The issues in this dispute are:

    a. What legal test applies to accident responsibility claims?

    b. Was ICBC's responsibility determination unreasonable or improper?

    c. If not, have the applicants proven that the applicant driver is less than 100% responsible for the accident?

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicants must prove their claim on a balance of probabilities. This 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.

The Legal Test

12. Under ACR section 10, the applicants must first prove that ICBC acted "improperly or unreasonably in assigning responsibility for the accident". Then, the applicants must prove that they are less responsible for the accident than ICBC assessed.

13. Different CRT decisions have applied section 10 slightly differently. Other CRT decisions are not binding on me. Given the lack of clarity about the legal test, I asked the parties for submissions about this issue, and I will address it in some detail.

14. ICBC's primary argument is that the CRT's past decisions have set out the correct law, namely by relying on a BC Supreme Court case, *MacDonald v. Insurance Corporation of British Columbia*, 2012 BCSC 283, or two BC Court of Appeal cases, *Singh v. McHatten*, 2012 BCCA 286 and *Innes v. Bui*, 2010 BCCA 322. For the reasons that follow, I do not agree that these cases assist in determining the legal test that applies to accident responsibility claims under the CRTA.

15. I will first outline the significant changes to the motor vehicle insurance scheme in BC because those changes are relevant to my analysis of the cases ICBC relies on. Since May 2021, there has been a general ban on tort claims between drivers for vehicle damage, as set out in section 172 of the *Insurance (Vehicle) Act* (IVA). Previously, if an insured disagreed with ICBC's liability determination, they could sue the other driver in tort. ICBC would generally defend the other driver and assert the correctness of its liability determination in that capacity. The court (and, later, the CRT) owed no deference to ICBC's internal liability determination. The court cases referred to above were all decided under this previous scheme.

16. The new scheme is much different. Now, IVA section 174 says that ICBC must indemnify its insured for vehicle damage or loss but only to the extent the owner and driver are not responsible for the accident. Many CRT small claims decisions, including my own, have concluded that section 174 creates a contractual obligation for ICBC to indemnify an insured to the extent the insured is not responsible. It necessarily follows that ICBC has a contractual obligation to determine responsibility correctly, because if it does not, it has failed to fully indemnify its insured. See, for example, *Carriere v. ICBC*, 2023 BCCRT 963. With that context in mind, I turn to the cases ICBC relies on in this accident responsibility dispute.

17. ICBC relies on the court's statement in *MacDonald* that ICBC "is not expected to investigate a claim with the skill and forensic proficiency of a detective" or "assess the collected information using the rigorous standards employed by a judge". Instead, the court said that ICBC must "bring reasonable diligence, fairness, an appropriate level of skill, thoroughness and objectivity to the investigation, and the assessment of collected information". ICBC essentially argues that this statement sets out the standard ICBC must meet when investigating accidents and making responsibility determinations under the new scheme.

18. When making those statements, the court was describing the standard an insurer must achieve to meet its good faith obligations when making a coverage decision. The duty of good faith is a standalone legal obligation that exists separately from ICBC's obligations to its insured under section 174. So, I find that the court's comments in *MacDonald* do not describe the limits of the ICBC's contractual obligations when making responsibility determinations.

19. In *Innes*, the Court of Appeal considered whether a tort action for injuries from a motor vehicle accident was *res judicata*, which means "already decided". The defendant in that action, Ms. Bui, had previously brought a BC Provincial Court small claims action against ICBC. In that small claims case, Ms. Bui claimed damages for increased insurance premiums based on what she said was ICBC's incorrect liability assessment. As part of its *res judicata* analysis, the Court of Appeal described Ms.

Bui's pleadings in the small claims action as being about whether "ICBC acted properly or reasonably in administratively assigning responsibility" for an accident. In *Singh*, the Court of Appeal referred to this paragraph but only to distinguish it on its facts.

20. The Court of Appeal said nothing more about the nature of ICBC's obligations to its insured in *Innes* or *Singh*. Given that, I do not agree that the court's statement in *Innes* sets out a legal test about the nature of ICBC's obligations to its insured, even though the same language appears in section 10. The court was simply summarizing the pleadings in Ms. Bui's small claims case against ICBC as part of its *res judicata* analysis.

21. ICBC also argues that administrative law principles provide guidance, citing the leading Supreme Court of Canada case on standard of review *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. ICBC notes that in administrative law, there is a distinction between reasonableness and correctness when a court judicially reviews a decision. When a reviewing court applies the correctness standard, it simply substitutes its own judgment with no deference to the original decision-maker. When applying a reasonableness standard, the reviewing court's assessment is more deferential. ICBC says the same type of reasonableness standard should apply to section 10. ICBC argues that the CRT should not reassess the evidence and submissions, but instead should focus on ICBC's initial decision and decide if it is reasonable and proper, without considering whether the CRT would have reached a different conclusion. In short, ICBC argues that section 10 requires the CRT to give deference to ICBC's responsibility determinations, even if the CRT would have decided the case differently on its own assessment of the evidence. ICBC explicitly argues that the CRT can find an incorrect decision to be reasonable and proper.

22. I recognize that in the ACR the legislature chose the word "reasonable" instead of "correct", and created a two-step legal test that is inconsistent with the CRT reassessing the evidence and reaching its own independent decision at first instance.

If the legislature wanted the CRT to assess the correctness of ICBC's responsibility determination, it would have said that and created a simpler scheme.

23. That said, administrative law principles are not directly applicable. Judicial review is the court's constitutionally protected jurisdiction to review state action, and the principles that govern judicial review evolved in that specific context. Much of the court's reasoning in *Vavilov* is intertwined with the public context of administrative law which does not apply here. With that in mind, I agree with ICBC that *Vavilov* can provide some guidance for how to assess the reasonableness of ICBC's responsibility determinations in accident responsibility claims.

24. In particular, I find that the CRT should focus on ICBC's reasons for its decision similar to a reviewing court applying a reasonableness standard in a judicial review. In this context, ICBC's reasons are contained in its detailed responsibility assessment letter, also known as a CL722. This is apparent from ACR section 9, which says that ICBC issuing a CL722 triggers a 90-day limitation period to contest ICBC's responsibility finding at the CRT under CRTA section 133(1)(d).

25. I find that a focus on ICBC's decision and its stated rationale as set out in the CL722 is consistent with the scheme of section 10, which directs the CRT to first assess whether ICBC's responsibility decision was reasonable and proper before undertaking its own analysis. Implicit in that task is assessing the reasons for ICBC's decision, not just the outcome. Unlike a tort claim in which ICBC's initial determination had no evidentiary value, now ICBC's decision and stated rationale are the focus of the inquiry.

26. As stated in *Vavilov*, this focus on the initial decision is one way the reasonableness standard shows respect to the original decision maker. It also generally constrains the analysis to the information the decision maker had, and it does not permit the introduction of new evidence. I find this approach is also implied by the scheme of section 10, subject to my comments below about what makes a decision "proper".

27. What does a reasonableness analysis require in accident responsibility claims? I do not suggest that ICBC's CL722 should be scrutinized as if it was a formal legal determination with expansive written reasons. These are typically short letters that ICBC must produce at a high volume, and the CRT should be sensitive to that context. The CRT should not expect ICBC to describe and assess every piece of evidence or provide a detailed legal analysis. Instead, the CL722 should be reviewed alongside the evidence ICBC had when it made its responsibility determination. That said, it is impossible to determine whether a decision was reasonable if ICBC did not explain it. In short, the CL722's reasons must logically justify ICBC's decision and must be supported by the available evidence and the applicable law.

28. While this approach necessarily provides some deference because of its focus on ICBC's decision and the evidence available at that time, I do not consider it appropriate to defer to ICBC's substantive assessment of the law or its application to given facts. I say this for two key reasons.

29. First, a traditional justification for the reasonableness standard in administrative law is that administrative decision makers have specialized expertise relative to generalist judges in the court system. Here, ICBC employees will clearly be well-versed in responsibility determinations, but the legislature has recognized that the CRT has specialized expertise in this area in CRTA section 133(2)(b). So, there is no reason to defer to ICBC because of expertise.

30. Second, even within administrative law the reasonableness standard operates differently depending on the decision's legal context. Administrative law decisions involve the state. Accident responsibility claims are essentially contractual disputes between an insured and their insurer. ICBC has a direct financial stake in the responsibility determination as a party to a contract. This can arise in several ways. First, there may be different repair costs between two vehicles, such that ICBC would pay less overall by assigning greater responsibility to the driver of the vehicle with more expensive damage. Second, an accident's effect on an insured's premiums depends in part on their degree of responsibility, such that splitting responsibility may

allow ICBC to increase both drivers' premiums instead of just one. Third, there may be differences in the amount of coverage each owner has because ICBC offers optional coverage for at-fault accidents. I find that deferring to ICBC's assessment of its own contractual and statutory obligations in this context is much different than deferring to a public agency carrying out its mandate, even though I recognize that public agencies sometimes have financial stakes in their decisions.

31. Section 10 also allows the CRT to review ICBC's responsibility determination if ICBC acted improperly. I find that this term refers to ICBC's investigation and process, rather than the outcome. Here, I note that a proper investigation does not require ICBC to endlessly investigate all accidents. A proper investigation is proportional. Still, this will generally require ICBC to at least interview available witnesses and consider the damage to each vehicle.

32. Above, I said that the CRT's assessment of whether ICBC's decision was reasonable should be based only on the information ICBC obtained from its investigation. The requirement for a proper determination means that ICBC cannot benefit from an incomplete investigation. A decision might appear reasonable based on the information ICBC had, but it might also be improper if ICBC failed to adequately investigate. In other words, if a decision is reasonable but not proper, the applicant will satisfy the first part of the section 10 test and the CRT will proceed to review all the evidence before it to come to its own liability decision.

33. With that, I turn to the applicants' claim.

Was ICBC's decision unreasonable or improper?

34. As mentioned above, the accident occurred in the late morning on December 31, 2021, on Highway 17. Highway 17 has two lanes in each direction. The applicant drivers were both driving westbound in the right lane. The applicant driver was ahead of the third party. The applicant driver hit ice and lost control of their vehicle, eventually hitting the center meridian while perpendicular to traffic. After that, the

vehicles collided. Stephen de Paras and another person were passengers in the truck. This much is undisputed.

35. Photos from the accident site show that it was sunny with snow on the shoulder. The right lane roadway appears wet. The photos also show that the third party's vehicle was primarily damaged on the applicant driver's side around the front wheel well. The photo of the truck from the accident site shows that its front bumper was dislodged from the impact with the meridian. The applicants also provided two later photos of the rear driver's side of the truck, which they say show damage. There is a bent screw at the top of a mud flap behind the rear wheel, but the truck is rusty so I cannot tell what other damage exists.

36. Stephen de Paras reported the accident the day it occurred. According to ICBC's records, they said they hit black ice and started spinning, hitting the center meridian. They said the third party could not stop and hit the truck's box.

37. The third party reported the claim to ICBC on January 4, 2022. According to ICBC's records, the third party's report was similar to Stephen de Paras's, except the third party said the truck hit the third party's van, not the other way around.

38. The applicant driver gave a telephone statement to ICBC on January 6. They said they were going less than 60 km/h and that the road conditions were "not great". They said that on the straight stretch after the Golden Ears Bridge, they saw around four accidents. Suddenly, they hit black ice and the vehicle's back end slipped to the right. They tried to steer themselves into control but ended up hitting the meridian before coming to a stop perpendicular to the road, blocking both lanes. A large truck in the left lane was able to stop, but the third party ran into the side of the driver's vehicle.

39. As ICBC acknowledges, these notes are all hearsay. However, the CRT routinely accepts adjusters' notes of phone calls because they are sufficiently reliable. I take the same approach here. See *Medel v. Grewal*, 2019 BCCRT 596.

40. According to ICBC's records, they tried calling the large truck's employer twice on February 1 and left a voicemail. ICBC says it never heard back. The same day, ICBC

told the applicants it had held them fully responsible for the accident, but ICBC did not make a formal responsibility determination at that time.

41. The applicant driver wrote a more detailed written statement on July 26, 2022, which they gave to ICBC. They said the weather was around -5 degrees. The applicant driver said they saw evidence of other collisions so they slowed down to account for poor road conditions, to about 55 km/h in an 80 km/h zone. When they hit the black ice, the truck veered left until they were sliding sideways on the ice. The truck then hit the meridian. The applicant driver thought that anyone behind them should have had time to slow and stop by the time the truck stopped. The applicant driver said the third party should have been aware of the poor road conditions and "expected the unexpected". The applicants also provided ICBC with a series of diagrams to illustrate how the accident happened.

42. ICBC issued a CL722 on September 16, 2022. In it, ICBC set out both drivers' initial reports of the accident. For reasons that are not explained, the third party's account is more detailed than ICBC's original notes even though there is no indication ICBC ever talked to the third party again after the initial report. In the CL722, ICBC said that the third party reported going 60 km/h and travelling three car lengths behind truck. These details are consistent with the applicants' evidence, so I accept them.

43. The only part of the *Motor Vehicle Act* (MVA) ICBC referred to in the CL722 is section 144(1)(c), which prohibits driving at a speed that is excessive relative to the road, traffic, visibility, or weather conditions. Although ICBC did not say this explicitly, the obvious inference is that ICBC thought that the applicant driver was going too fast for the weather conditions. However, the evidence was that the applicant driver and third party were driving the same speed. ICBC did not say why the applicant driver's speed was excessive but the third party's was not. I find this illogical. It also does not appear that ICBC ever considered MVA section 162, which prohibits following "more closely than is reasonable and prudent". As discussed below, this section creates a presumption that in rear-end accidents, the following driver is at least partially responsible. Even though this was not the usual "rear end" accident because the truck

had spun and the impact was on the side, I find the presumption of liability still applies because it is about the conduct of a following driver. I find that ICBC should have considered this principle when assessing whether the third party bore any responsibility for the accident.

44. I conclude that ICBC's liability determination was unreasonable for these reasons. Given my conclusion, I do not need to consider the applicants' arguments about the sufficiency of ICBC's investigation, including their arguments about ICBC's alleged failure to take statements from all available witnesses.

Have the applicants proven that the applicant driver is less than 100% responsible for the accident?

45. To start, I do not agree with the applicants that the parties' accounts of the accident are significantly different. Most of the details the applicants dispute, such as whether their truck had fully stopped before impact and "who hit who", are not relevant. I find that the parties essentially agree on the important details: they were each travelling roughly 60 km/h, the applicant driver lost control and hit the meridian, the third party did not stop in time, and the vehicles collided. There is one exception. The applicants say that about six seconds passed after their truck stopped before the impact. They also provided numerous diagrams of the lead up to the accident they say are to scale, which are consistent with the third party's account that they were about three car lengths behind the applicant driver when the truck started sliding. It is obvious that it would take less than six seconds between the truck's collision with the meridian and the vehicles' collision. So, I do not accept this aspect of the applicants' evidence. I find that the accident happened more quickly than they say.

46. In their initial reports to ICBC, the parties all referred to "black ice", which typically refers to ice that is difficult or impossible to see. I accept this is an accurate description of the ice, based on these reports and the photos of the accident scene, which show wet but not obviously icy roads. Still, the applicant driver said in their statement that they saw around four accidents shortly before losing control. They also said that Stephen de Paras told them to slow down. The obvious conclusion from seeing

multiple accidents on a visibly wet road when the temperature is below freezing is that black ice is present and a hazard. The applicants both knew the road conditions were poor. Given that information, and while I recognize that 60 km/h was under the speed limit, I find that the applicant driver was still driving too fast for the conditions. I agree with ICBC that the applicant driver was negligent for that reason.

47. As mentioned above, the difficulty with ICBC's position is that it ignores that the third party was going about the same speed. The fact that the third party was also driving 60 km/h shows that they also knew the road conditions were poor. It cannot be that when two drivers are going the same speed in the same conditions at almost the same time, only one is going too fast for the circumstances. For the same reasons I found the applicant driver was driving too fast, I find that the third party was driving too fast. Since the third party was unable to stop in time to avoid the accident, I find that their speed was a factor in the accident. In other words, the accident between the vehicles would not have happened if the third party was driving an appropriate speed.

48. Also, as noted above, MVA section 162 creates a general presumption that rear drivers are at fault for rear-end accidents. This is because rear drivers must leave enough room so that they can safely react to unexpected stops or events.

49. The presumption does not mean that rear drivers are automatically liable. ICBC relies on *Biggar v. Ens*, 2017 BCSC 2290. That was a case where the rear driver was not responsible for an accident. There, two motorcyclists were going around a right turn. The front driver lost control and veered into the oncoming lane of traffic. Once he regained control, he steered sharply back to his side of traffic. The rear driver did not see any of this happen because it was obscured by the road's curve. By the time the rear driver saw the front driver, the front driver was 15 to 20 feet in front of him driving straight across the lane. The two collided.

50. The key difference is that in that case, the front driver's erratic action was unobservable and unforeseeable. The rear driver had no reason to slow down. The rear driver also had no time to react to the sudden appearance of the front driver.

Here, the third party was following fairly closely despite knowing the driving conditions were poor. The law expects drivers in the third party's position to leave more space in poor driving conditions.

51. This dispute is similar to *Vo v. Michl*, 2012 BCSC 1417. In that case, the court found the rear driver fully at fault for an accident when he braked 4 or 5 seconds before an accident but could not stop because of ice. The court noted that the rear driver knew the road conditions were poor, so the ice did not excuse him. He should have left more space to account for the road conditions.

52. I find that the same reasoning applies here. The third party should have known that the applicant driver might lose control on the ice and planned accordingly by giving extra room. I find that the third party's decision to follow so close behind, combined with their speed, was a cause of the accident. This means that the third party was also negligent.

53. In reply submissions, the applicants suggest the third party could have avoided the accident altogether if they had driven onto the shoulder. I do not agree. Even though there may have been enough room on the shoulder to avoid the collision even with the built-up snow, I agree with ICBC that swerving into the snow-banked shoulder was not a realistic option based on the photos.

54. When two drivers are both negligent, their responsibility is split based on their relative fault or blameworthiness. This requires an assessment of how much each person's driving fell below a reasonable standard. See *Chambers v. Goertz*, 2009 BCCA 358. Here, the drivers were both driving too fast for the conditions, but the third party also was following too closely. I find that the third party's conduct was more blameworthy.

55. I find that the applicant driver is 40% responsible for the accident.

56. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. The applicants paid $50 and ICBC paid $25 in CRT fees. Since the parties were each partially successful and the parties paid close to the

same CRT fees, I decline to award any reimbursement. Neither party claimed any dispute-related expenses.

ORDER

57. I order ICBC to amend its internal responsibility assessment to reflect that the applicant driver is 40% responsible for the December 31, 2021 accident.

58. I dismiss the parties' claims for CRT fees.

59. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Once filed, a CRT order has the same force and effect as a court order.

Eric Regehr, Vice Chair