



Civil Resolution Tribunal

Date Issued: June 14, 2019

File: SC-2019-000791

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Zuniga et al v. Van Geel et al*, 2019 BCCRT 728

BETWEEN:

ANTONIE ZUNIGA and SU HYUN KIM

APPLICANTS

AND:

ADRIANUS VAN GEEL and INSURANCE CORPORATION OF
BRITISH COLUMBIA

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Andrea Ritchie, Vice Chair

INTRODUCTION

1. This is a small claims dispute about a motor vehicle accident that occurred on July 13, 2018 (accident). The applicant, Su Hyun Kim, was driving a vehicle owned by the applicant, Antonie Zuniga, her husband. The respondent, Adrianus Van Geel,

was driving a motor vehicle owned by a third party, TEL, who is not named in this dispute.

2. This dispute turns on whether the respondent driver reversed into the applicant driver, or whether the applicant driver rear-ended the respondent driver, as concluded by the respondent insurer, Insurance Corporation of British Columbia (ICBC).
3. Before the accident, Ms. Kim and Mr. Van Geel were both traveling southbound on Vedder Road just past Luckakuck Way in Chilliwack, British Columbia. Mr. Van Geel turned right off Vedder Road, onto an unnamed road that services several businesses, including the Chilliwack Mall. Ms. Kim was in the vehicle behind Mr. Van Geel, and also turned right onto the unnamed road. Shortly after the vehicles turned, an impact occurred between the rear of Mr. Van Geel's vehicle and the front end of Ms. Kim's vehicle. The applicants allege Mr. Van Geel is wholly responsible for the accident because they say Mr. Van Geel reversed into Ms. Kim's vehicle.
4. The respondent insurer, Insurance Corporation of British Columbia (ICBC), internally concluded that the applicants, together as driver and registered owner, were 100% at fault for the accident.
5. The applicants say ICBC should have found Mr. Van Geel 100% responsible for the accident and alleges that ICBC breached its statutory obligations in investigating the accident and assigning fault. The applicants seek a declaration that Mr. Van Geel is 100% at fault for the accident and ask for \$5,000 in damages for mental distress and time spent pursuing this claim.
6. The applicants are both represented by Mr. Zuniga. The respondents are represented by Kimberly Halliday, an ICBC adjuster.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil*

Resolution Tribunal Act. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal 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.

8. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a “she said, he said” scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is an issue.
9. The tribunal 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 tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
10. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders:
 - a. Order a party to do or stop doing something;
 - b. Order a party to pay money;
 - c. Order any other terms or conditions the tribunal considers appropriate.

ISSUES

11. The issues in this dispute are:

- a. Did ICBC breach its statutory obligations in investigating the accident and assessing fault?
- b. Who is liable for the accident? If not the applicant driver, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the applicants bear the burden of proof on a balance of probabilities. 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.

Did ICBC breach its statutory obligations in investigating the accident and assessing fault?

13. As noted above, the applicants seek an order overturning ICBC's internal liability assessment and payment of \$5,000 in damages. To succeed against ICBC, the applicants must prove on a balance of probabilities that ICBC breached its statutory obligations or its contract of insurance, or both. The issue against ICBC is whether ICBC acted "properly or reasonably" in administratively assigning 100% responsibility for the accident to the applicants (see: *Singh v. McHatten*, 2012 BCCA 286).

14. The applicants say that ICBC failed in its duty to assess their liability under the insurance contract. The parties have not made any claim for injury, but the applicants seek, in addition to a reapportionment of fault, \$5,000 in damages and an order "[exonerating them] from any financial penalty", which I infer is a claim that the applicants are not required to pay any future premium increases as a result of the

accident. I do not have the amount of those future premiums before me in evidence, but given my conclusions below nothing turns on it.

15. The root of the applicants' claim is that they say Mr. Van Geel reversed when it was unsafe to do so, and collided with the front end of Ms. Kim's vehicle. Mr. Van Geel, on the other hand, states that he was stopped in his lane, waiting to turn left into a business's driveway, and was struck from behind by Ms. Kim. Although an independent witness came forward at the accident scene, ICBC submits attempts to contact that witness have been unsuccessful. The evidence indicates that the applicants had the witness's contact information at least by November 28, 2018. There is no evidence before me that the applicants have attempted to contact the witness. Given the onus on the applicants to prove their case, and the applicants' failure to follow up with the independent witness, I find an adverse inference is justified against the applicants.
16. ICBC owes the applicants a duty of good faith, which requires ICBC to act fairly, both in how it investigates and assesses the claim and in its decision about whether to pay the claim (see: *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 33, 55 and 93). As noted in the Continuing Legal Education Society of BC's '*BC Motor Vehicle Accident Claims Practice Manual*', an insurer is not expected to investigate a claim with the skill and forensic proficiency of a detective. An insurer must bring "reasonable diligence, fairness, an appropriate level of skill, thoroughness, and objectivity to the investigation and the assessment of the collected information" (see: *McDonald v. Insurance Corporation of British Columbia*, 2012 BCSC 283).
17. The applicants say that ICBC did an "extremely poor job" of assessing fault in this case. The applicants say that ICBC denied them the opportunity to submit photographic evidence, failed to produce relevant photographs to the applicants, failed to take into consideration changes in Mr. Van Geel's version of events, and failed to take a statement from a relevant witness, the applicants' son.
18. ICBC says the applicants did submit photographs and that all evidence that was submitted was reviewed and considered, and deemed not to be sufficient proof of

Ms. Kim's version of facts. ICBC further submits the requested photographs were produced to the applicants in November 2018 and that the allegation that Mr. Van Geel changed his version of events is untrue. I find the evidence supports ICBC's position, and will discuss Mr. Van Geel's version of events in more detail below. ICBC also states that the applicants' son was not interviewed as he was not an independent witness.

19. Given the overall evidence, I find that the applicant has not proved that ICBC breached its statutory obligations or its contract of insurance. I find ICBC acted reasonably in investigating the claim and administratively assigning the applicants 100% responsibility for the accident.
20. Having determined that ICBC acted reasonably in its examination of the accident, I turn now to my assessment of liability.

Who is liable for the accident?

21. For the reasons that follow, I dismiss the applicants' claim for a re-apportionment of liability and for damages as the applicants have not proved on a balance of probabilities that Mr. Van Geel was 100% at fault for the accident.
22. As noted above, the applicants say that Mr. Van Geel unsafely reversed into the front of Ms. Kim's vehicle. Mr. Van Geel provided 2 statements to ICBC, which the applicants argue are inconsistent and therefore show that Mr. Van Geel's version of events cannot be trusted.
23. In Mr. Van Geel's first oral statement, on July 16, 2018, ICBC recorded that Mr. Van Geel was southbound on Vedder Road with Ms. Kim directly behind him. Mr. Van Geel advised he turned right into the mall area and had stopped to turn left when he was rear ended by Ms. Kim.
24. In a subsequent statement, on July 25, 2018, Mr. Van Geel provided additional details about the accident. He stated he made a right turn off Vedder Road into the mall area and was looking to make a "quick left" in the first aisle in the parking lot to

get to the nearby bank. He advised he was stopped for about 20 seconds when he was rear ended by Ms. Kim. The applicants say Mr. Van Geel changed his version of facts to the extent that he originally said Ms. Kim was directly behind him and subsequently stated he had been stopped for 20 seconds before the accident occurred. I am satisfied a vehicle can be “directly behind” another, meaning there was no third vehicle between them, while also traveling at a distance behind. I find Mr. Van Geel’s statements are not inconsistent, and I find them credible.

25. The applicants also say Mr. Van Geel’s version of facts is false because he initially stated the accident occurred in an intersection, when in reality it occurred mid-way through a block. I disagree. Both Mr. Van Geel and the applicants provided their own drawn maps of the accident location to ICBC, which are also in evidence. Both parties indicated on the maps that the accident occurred in the same location. I am not satisfied that Mr. Van Geel has provided false statements to ICBC as alleged by the applicants.
26. The applicants submit that photographs taken by Ms. Kim at the scene of the accident show no damage to Mr. Van Geel’s vehicle, and state that Mr. Van Geel later fraudulently caused damage to his own rear bumper to further his claim. I have reviewed the photographs, and I disagree. The photograph taken by Ms. Kim on the date of the accident does not show Mr. Van Geel’s complete bumper, but only the license plate and an area immediately surrounding the license plate. The photo provided by ICBC shows damage on the far left side of Mr. Van Geel’s bumper, an area which I am satisfied is not shown on Ms. Kim’s photograph. As a result, I find the applicants’ allegation that Mr. Van Geel fabricated evidence to further his claim is speculative and I give it no weight.
27. The applicants’ son, C, provided a statement in evidence. In his statement, C states that on July 13, 2018, he was the front seat passenger in Ms. Kim’s vehicle. He said their vehicle was following Mr. Van Geel’s as they both turned right off Vedder Road. He stated after the turn, Mr. Van Geel stopped his vehicle and that they waited there for a “couple seconds”, waiting for Mr. Van Geel to either turn or go

forward. He stated Mr. Van Geel then reversed his vehicle at least 2 meters until the accident occurred.

28. The applicants argue that the evidence of their son, C, corroborates Ms. Kim's version of events. The respondents say that C has a vested interest to report the same facts as the applicants, and therefore his evidence should not be relied upon.
29. Although I find C likely gave his statement to the best of his ability, stating what he believed to be true, I have reservations about the credibility and reliability of C's testimony because he is the applicants' 14-year-old son and is obviously an interested witness and not truly independent. Additionally, the statement he provided was made over 9 months after the accident. Given his age, his relationship with the applicants and the passage of time, I give C's statement little weight.
30. I turn now to the relevant provision of the *Motor Vehicle Act* (MVA). Section 162(1) of the MVA states that:

A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

31. According to section 162, there was an obligation on Ms. Kim to ensure she kept her vehicle a safe distance behind Mr. Van Geel's vehicle. I find that she did not do so in this case.
32. In *Nelecpu v. Bartel*, 2001 BCPC 55, the claimant sought compensation for damage to his vehicle as a result of a rear-end collision with the defendant. Mr. Nelecpu was the rear driver, while Mr. Bartel was the lead vehicle. The court in *Nelecpu* stated that:

In the usual case of a rear-end collision, the party who has rear-ended another's vehicle is required to defend against a claim for damages. The usual case is a difficult one to defend because of the presumption of fault.

33. Faced with conflicting evidence from the parties, in the circumstances here it is impossible to know with certainty how the accident happened. As noted above, the burden is on the applicants to prove on a balance of probabilities that Mr. Van Geel was solely responsible for the accident. On balance, I find the applicants have not established that it is more likely than not that Mr. Van Geel caused the accident.
34. As a result, I find the applicants are not entitled to a different liability assessment for the accident, and are therefore not entitled to damages. For these reasons, I dismiss the applicants' claims. Given my conclusion that the applicants have not proved their claims, I find I do not need to address in any detail the fact that the tribunal does not have jurisdiction in a small claims dispute to grant declaratory relief or injunctive relief, other than what is set out in section 118 of the Act.
35. Further, even if I had found Mr. Van Geel was 100% at fault for the accident, I would not have allowed the applicant's damages as claimed. The applicants claimed \$5,000 for emotional distress and time spent dealing with this dispute.
36. The applicants did not provide any evidence in support of their claim for emotional distress. Although not binding upon me, I note the decision of *Eggberry v. Horn et al*, 2018 BCCRT 224, which states that where there is no evidence of mental distress, the claim must be dismissed.
37. Regarding the claim for damages for 'time spent', this is not the sort of expense that the tribunal would typically order the respondents to pay. Unless it is an extraordinary case, the tribunal does not usually allow parties to recover legal fees, nor does it award compensation for a party's time spent trying to resolve the dispute. This is not an extraordinary case.
38. Under the tribunal rules, the successful party is generally entitled to the recovery of their fees. I see no reason to deviate from that general rule. As the applicants were not successful, I find that they are not entitled to reimbursement of their tribunal fees. No dispute-related expenses were claimed.

ORDER

39. I order the applicants' claims, and this dispute, dismissed.

Andrea Ritchie, Vice Chair