



# Civil Resolution Tribunal

Date Issued: August 23, 2019

File: SC-2019-002783

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kusnierczyk v. ICBC et al*, 2019 BCCRT 1002

B E T W E E N :

DAVID KUSNIERCZYK

**APPLICANT**

A N D :

INSURANCE CORPORATION OF BRITISH COLUMBIA, Toyota Credit  
Canada Inc., William Ross, and Marian Ross

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Eric Regehr

## INTRODUCTION

1. This is a small claims dispute about a car accident that occurred on March 8, 2019 in a mall parking lot. The applicant, David Kusnierczyk, is the owner of a car, the make and model of which are not in evidence. The respondent, William Ross, struck the applicant's car's open driver-side door as he parked beside the applicant's car,

which was driven by his wife, Ingrid Kusnierczyk. The applicant was not present at the time of the collision.

2. The respondent, the Insurance Corporation of British Columbia (ICBC), is the applicant's insurer. ICBC internally concluded that Ms. Kusnierczyk was 100% at fault for the collision. The applicant disagrees. He claims \$1,000 as reimbursement of his insurance deductible. He also asks for orders that ICBC reverse their finding of fault and that there be no future impact on his insurance premiums.
3. The evidence does not explain the role of the other respondents, Toyota Credit Canada Inc. and Marian Ross, in this dispute. Presumably they are the owner and lessee or co-lessee of the car Mr. Ross was driving, but given my findings in this dispute, I decided that it was unnecessary for me to confirm their roles.
4. The applicant is self-represented. The respondents are represented by Colleen Souveryn, an ICBC adjuster.

## **JURISDICTION AND PROCEDURE**

5. 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* (CRTA). 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.
6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute brings into question the credibility of the parties. However, in the circumstances of this dispute, I find that it is not necessary for me to resolve the credibility issues that the parties raised. I therefore decided to hear this dispute through written submissions.

7. 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.
8. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA:
  - 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**

9. 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?

## **EVIDENCE AND ANALYSIS**

10. In a civil claim such as this, the applicant must prove his case on a balance of probabilities. I have read all of the parties' evidence and submissions but I will only refer to what is necessary to explain and give context to my decision.
11. Ms. Kusnierczyk and Mr. Ross both provided brief telephone statements to ICBC, which are in evidence. There is no other first-hand evidence before me about what happened, such as more detailed statements from Ms. Kusnierczyk or Mr. Ross, witness statements, or photographs.

12. In his submissions, the applicant appears to rely on conversations he has had with Ms. Kusnierczyk. While the tribunal may consider hearsay evidence, I place no weight on the applicant's description of what Ms. Kusnierczyk did or said because it is evidence that goes to the core of the dispute. The applicant does not explain why Ms. Kusnierczyk did not provide her own evidence, even though it should have been clear that her evidence was important. Furthermore, as Ms. Kusnierczyk is the applicant's spouse, without an explanation to the contrary I would expect that her evidence would be readily available to him.
13. As mentioned above, the accident occurred in a parking lot on March 8, 2019. According to Ms. Kusnierczyk's statement to ICBC, there was no car in the parking spot to her left when she parked. She stopped, turned off the car, and checked that there was no car next to her. She opened her door and reached for her purse on the front passenger seat. At that time, Mr. Ross's vehicle struck her open door and it slammed shut.
14. According to Mr. Ross, when he entered the parking stall, the door of Ms. Kusnierczyk's car was closed. He says he moved slowly straight into the parking stall. He says that without warning, Ms. Kusnierczyk opened her door into the path of his car and he struck it with his front right bumper.
15. ICBC assessed Ms. Kusnierczyk 100% at fault. ICBC relied on section 203 of the *Motor Vehicle Act* (MVA). Section 203(1) of the MVA says that a person must not open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so. Section 203(2) of the MVA says that a person must not leave a door open on the side of a vehicle available to moving traffic for longer than is necessary to load or unload passengers.

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

16. As noted above, the applicant wants an order that overturns ICBC's internal liability assessment. The applicant says that Mr. Ross was 100% liable. To succeed against

ICBC, the applicant must prove that ICBC breached its statutory obligations or its insurance contract with the applicant, or both. The issue against ICBC is whether ICBC acted “properly or reasonably” in assigning 100% fault to the applicant (see *Singh v. McHatten*, 2012 BCCA 286).

17. As part of its obligation to act properly and reasonably in assigning fault, ICBC must reasonably investigate the claim. In doing so, ICBC is not expected to investigate with the “skill and forensic proficiency of a detective”. Rather, ICBC must bring “reasonable diligence, fairness, an appropriate level of skill, thoroughness and objectivity”. See *McDonald v. Insurance Corporation of British Columbia*, 2012 BCSC 283.
18. In reviewing the claims notes, one aspect of ICBC’s handling of the claim stands out. Ms. Kusnierczyk told an ICBC adjuster that there were “lots of witnesses” to the accident, some of whom she knew. The ICBC adjuster told her not to bother because a witness “cannot be anyone she knows”. While ICBC may reasonably consider bias in how it uses statements from non-party witnesses, I find that it was not reasonable or appropriate for the adjuster to refuse to consider such statements at all.
19. That said, despite that flaw in ICBC’s investigation, I find that ICBC did not breach its duty to reasonably investigate the accident. I make this finding because, as discussed below, Ms. Kusnierczyk’s and Mr. Ross’s statements both supported ICBC’s fault assessment. In other words, Ms. Kusnierczyk’s own statement supported the finding of fault against her, making it unlikely that further statements would be helpful. Furthermore, I find that the extent of ICBC’s obligation to reasonably investigate an accident varies with the severity of the accident. In this accident, there were no injuries and relatively little vehicle damage.
20. Furthermore, even if there was a breach of ICBC’s obligations, I find that the breach had no consequence because, as discussed below, I agree that Ms. Kusnierczyk was 100% at fault for the accident.

21. Therefore, I dismiss the applicant's claim against ICBC.

***Who is liable for the accident?***

22. As mentioned above, section 203 of the MVA sets out a person's duties when they open a car door into moving traffic. I find that section 203 of the MVA applies to this dispute.

23. According to the notes from an ICBC adjuster who spoke to Ms. Kusnierczyk on the telephone, Ms. Kusnierczyk admitted that she did not shoulder check before opening the door. The applicant says that Ms. Kusnierczyk did shoulder check. However, Ms. Kusnierczyk's statement to ICBC is silent about this issue.

24. I find that both drivers' descriptions of the collision support the conclusion that Ms. Kusnierczyk did not shoulder check or look in her side view mirror before opening her door. Because all Ms. Kusnierczyk had time to do after opening her door was reach for her purse, I find that the collision occurred very soon after Ms. Kusnierczyk opened her door. Therefore, I find that if Ms. Kusnierczyk had shoulder checked or looked in the sideview mirror, she would have seen Mr. Ross's car entering the parking stall. The fact that she did not see it means that she did not ensure that it was safe to open her door as required by section 203(1) of the MVA.

25. The applicant also argued that Ms. Kusnierczyk did not breach section 203(2) of the MVA because her door was not open for an unnecessary length of time. I agree that Ms. Kusnierczyk's door was open for a very short time and that she did not breach section 203(2) of the MVA. However, I find that her breach of section 203(1) is enough to establish that Ms. Kusnierczyk was at fault for the collision, subject to the applicant's other arguments, which I will address in turn.

26. The applicant says that Mr. Ross struck the car door by crossing into Ms. Kusnierczyk's parking space. Ms. Kusnierczyk does not say anything in her statement about where Mr. Ross's car was when it struck the door. Rather, the applicant relies on a mathematical calculation based on the size of the door and Ms.

Kusnierczyk's estimate of how open it was. However, even if I accepted the applicant's mathematical arguments, there is no evidence about where Ms. Kusnierczyk's car was relative to the line between the parking stalls. I find that the applicant has not proven that Mr. Ross crossed the line into Ms. Kusnierczyk's parking stall.

27. The applicant points out that if Ms. Kusnierczyk had exited the vehicle, her leg could have been seriously injured. He argues that it makes "absolutely no sense" that the injured person would be blamed for the injury. I find that whether a person might potentially be injured does not affect each party's legal obligations. I reject this argument.
28. The applicant also argues that a stationary vehicle cannot be responsible for an accident caused by a moving vehicle. However, both parts of section 203 of the MVA place duties on drivers of stationary vehicles to avoid collisions with moving vehicles. I reject this argument.
29. Finally, while Mr. Ross had an obligation to be aware of his surroundings and to react reasonably to hazards, I find that he had no time to avoid hitting Ms. Kusnierczyk's door. Therefore, I find that the evidence does not support a finding of contributory negligence against Mr. Ross.
30. I find that Ms. Kusnierczyk was 100% at fault for the collision.
31. Because the applicant has not been successful, I dismiss his claim for reimbursement of tribunal fees and dispute-related expenses. The respondents did not claim any dispute-related expenses.

## **ORDER**

32. I dismiss the applicant's claims, and this dispute.

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Eric Regehr, Tribunal Member