Civil Resolution Tribunal

Date Issued: August 26, 2019

File: SC-2019-003620

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Logan v. ICBC et al*, 2019 BCCRT 1015

BETWEEN:

HOWARD LOGAN

APPLICANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA and KATHY BROCKLESBY

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 February 27, 2019 (accident). The applicant, Howard Logan, and a third party driver not named in this dispute, DT, were involved in a minor collision in a parking lot. The applicant alleges that DT is wholly responsible for the accident.

2. The respondent insurer, Insurance Corporation of British Columbia (ICBC), internally concluded that the applicant was 25% at fault for the accident and that DT was 75% at fault. The applicant carries only basic insurance through ICBC and the remainder of his auto insurance through Belair Insurance Company Inc. (Belair), who is not named in this dispute.

3. The respondent, Kathy Brocklesby, is an ICBC claims adjuster. The applicant seeks damages of $2,700 from Ms. Brocklesby personally, for stress and anxiety due to her alleged improper handling of his accident claim.

4. The applicant says ICBC should have found DT 100% responsible for the accident, and that ICBC and Ms. Brocklesby breached their statutory obligations in investigating the accident and assigning fault. He seeks a declaration that DT is 100% at fault for the accident and reimbursement of $75, the portion of his deductible he was required to pay.

5. ICBC says it is not a proper party to the claim, and that DT is the proper respondent. The applicant declined to make a claim against DT. ICBC says it assigned fault under the *Motor Vehicle Act* (MVA), and specifically that Ms. Brocklesby was at all times acting in her capacity and within her scope of authority as an ICBC employee.

6. The applicant is self-represented. ICBC and Ms. Brocklesby are both represented by Kimberly Halliday, an ICBC employee.

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* (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.

8. The tribunal 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 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, where permitted by 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

11. The issues in this dispute are:

    a. Whether the applicant is entitled to a reapportionment of fault for the accident and reimbursement of his $75 deductible, and

    b. Whether the applicant is entitled to compensation for stress and anxiety.

EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. While I have read all the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.

13. The details of the accident are as follows. The applicant was backing out of a parking stall into the aisle when he saw DT's vehicle approaching in the aisle. The parking lot aisle is one way. The applicant stopped reversing and waited for DT's vehicle to pass him, and he then continued to reverse into the aisle. It is undisputed that at some point, DT stopped his vehicle and began reversing through the aisle, back to a vacant parking stall he had driven past. When the applicant noticed DT was reversing down the aisle, he honked his horn, and then tried to drive forward, back into his parking stall, but the two vehicles collided.

14. Initially, Ms. Brocklesby assessed 75% fault to the applicant and 25% to DT. The matter was escalated to a manager who ultimately reassessed fault, assigning 25% to the applicant and 75% to DT. The applicant says DT should be found 100% at fault.

Is the applicant entitled to a reapportionment of fault for the accident and reimbursement of his $75 deductible?

15. As noted above, the applicant carries his basic auto insurance through ICBC and the remainder of his auto insurance through Belair. It is undisputed that the applicant paid his 25% portion of his deductible to Belair, not ICBC.

16. The applicant has brought this claim against ICBC only, and not the driver of the other vehicle involved in the accident, or his other insurer, Belair. In *Kristen v. ICBC*, 2018 BCPC 106, the court held that:

> The court cannot assess liability unless the other driver is given an opportunity to present his or her case on that issue. If the other driver is

> not served and given an opportunity to be heard the court would only have the version of evidence provided by the claimant to consider. The other driver has a right to notice that the court is being asked to consider the issue of liability and an opportunity to participate in the proceedings to present his or her version of the events.
>
> The proper way for the claimant to do that is to sue the other driver. The proper defendant in an action to determine liability in a motor vehicle accident is the other driver, not ICBC…

17. In *Kristen*, rather than dismissing the claim for not having named the other driver, the court allowed the claimant an opportunity to amend his notice of claim and add the other driver as a defendant. As noted, the tribunal gave the applicant this opportunity, but he declined.

18. In the case of *Morin v. ICBC, Clark & Berry*, 2011 BCPC 290, the claimant brought an action against both ICBC and the driver of the other vehicle involved in a collision. The court held that ICBC had incorrectly charged the claimant a deductible for a "hit and run", when it found the defendant driver's negligence had caused the accident. Therefore, the court determined the claimant was entitled to reimbursement for the deductible he paid, and although both ICBC and the other driver were named defendants, ordered the claimant was "entitled to recover from ICBC the entire amount of his damages".

19. As I stated in *Singh v. ICBC*, 2019 BCCRT 701, I find that the *Kristen* and *Morin* cases are not inconsistent. *Kristen* states that to properly assess liability, the other driver should be named to give them an opportunity to present their version of the accident events. I agree, as not doing so would likely be procedurally unfair. This is because a decision in the applicant's favour could impact the other driver's insurance premiums. However, there was no decision in *Kristen* on who would be responsible for paying damages, should they be awarded. In *Morin*, both ICBC and the other driver were named defendants, so the court assessed liability accordingly, and decided as the claimant had paid money to ICBC, ICBC was the proper party

for the claimant to recover that money from. The evidence of the defendant driver in *Morin* was used to help determine liability in that case.

20. Here, I find the applicant is not able to recover the money paid for his $75 deductible from ICBC. He did not pay the $75 to ICBC, he paid it to a third party, Belair. Additionally, the applicant refused to add DT as a party to the dispute, despite being told by tribunal staff that it may result in a dismissal of his claims. DT is not insured by ICBC and ICBC has been unable to obtain a statement or any evidence from DT. It is undisputed that ICBC also advised the applicant on several occasions to add or substitute DT as a respondent. The applicant declined to do so, stating his "beef" is with ICBC. I dismiss the applicant's claim for $75.

21. I turn then to the applicant's requested remedy of a declaration that he is not responsible for the accident. I find I am unable to determine liability for the accident without the evidence of DT, the other driver involved. As the applicant was provided the opportunity to add DT to the claim and refused, I find this situation is different from that in *Kristen*, and I decline to allow a further opportunity for the applicant to add DT to the dispute. Additionally, the tribunal does not have the authority to grant declaratory relief (such as the fault reapportionment remedy sought here), but given the reasons above, the applicant's claims about liability for the accident are dismissed.

Is the applicant entitled to compensation for stress and anxiety?

22. The applicant claims for $2,700 in compensation from Ms. Brocklesby personally for stress and anxiety because of what he says was her poor decision-making about liability for the accident. The applicant submits that Ms. Brocklesby's initial assessment of 75% fault against him was unfair and generally that she did not perform her duties in good faith, or according to ICBC policies. As noted above, ICBC later lowered its assessment of the applicant's fault from 75% to 25%.

23. The applicant says that Ms. Brocklesby did not take him at his word, and that she was unreasonably skeptical about his version of the accident. ICBC says Ms.

Brocklesby made her initial fault determination based on the relevant provisions of the MVA and in accordance with ICBC fault assessment policy. ICBC says that when additional information was received, including a statement from an internal damage estimator, an ICBC manager reassessed fault in the applicant's favour.

24. To succeed in a claim that ICBC, or its employee, did not properly investigate the accident, the applicant must prove on a balance of probabilities that ICBC, or Ms. Brocklesby, breached its statutory obligations or its contract of insurance, or both. The issue is whether the respondents acted "properly or reasonably" in administratively assigning responsibility to the applicant (see: *Singh v. McHatten*, 2012 BCCA 286).

25. ICBC owes the applicant 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).

26. Given the overall evidence, I find that Ms. Brocklesby did not act unreasonably in initially assigning 75% fault to the applicant. I am satisfied her decision was made based on the information available to her at the time and on a reasonable weighing of that available information. Additionally, I find ICBC was reasonable in reassessing fault when additional information became available. Therefore, I find that neither Ms. Brocklesby nor ICBC breached their statutory obligations or the contract of insurance.

27. Under the law, an employer is generally liable for the actions by employees committed in the course of their employment. This is known in law as "vicarious liability" and it means that if Ms. Brocklesby was negligent in the handling of the

applicant's case, ICBC would be responsible for any damages. As noted above, ICBC submits that at all times Ms. Brocklesby was acting with the scope of her authority in the course of her employment with ICBC. Given the circumstances, and my findings above, I find there is no legal basis for an order against Ms. Brocklesby personally.

28. Even if I had found that Ms. Brocklesby, or ICBC, had breached their statutory obligations to the applicant, I would not have awarded the damages claimed. The applicant bears the burden of establishing his claim for stress and anxiety. The applicant did not provide any evidence in support of his claim for mental distress.

29. There are some situations, known as "peace of mind" contracts, where damages are allowed for disappointment, mental distress, inconvenience or upset, such as a lost holiday or for damaged wedding photography. However, this is not one of those situations. While I accept that the applicant was frustrated with the handling of his claim, I find that is insufficient to warrant compensation. Similar to *Talbot v. Gill dba Lloyd's Drycleaners*, 2019 BCCRT 366, a decision not binding on me but which I find persuasive, I find the applicant's mental distress in this case was minor and not serious or prolonged. As the applicant noted in an email to ICBC on July 8, 2019, he was upset that he was not "believed" about his version of events (before the statement of the damage estimator was available) and this dispute is about principle for him. Given the overall evidence, including the lack of evidence supporting the applicant's claim for mental distress, I find the applicant is not entitled to compensation for stress and anxiety.

30. Under section 49 of the CRTA, and the tribunal rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses. I see no reason to deviate from that general rule. As the applicant was not successful, I find that he is not entitled to reimbursement of his tribunal fees. No dispute-related expenses were claimed.

ORDER

31. I order the applicant's claims, and this dispute, dismissed.

Andrea Ritchie, Vice Chair