



Civil Resolution Tribunal

Date Issued: December 6, 2019

File: SC-2019-006654

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Porter v. ICBC*, 2019 BCCRT 1377

B E T W E E N :

TRACY PORTER and JEREMY PORTER

APPLICANTS

A N D :

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Eric Regehr

INTRODUCTION

1. This is a dispute about insurance coverage. The applicants, Tracy Porter and Jeremy Porter, claim \$4,965.11 for brake repairs in their GMC pick-up truck. They say the repairs are covered by their insurance policy with the respondent Insurance Corporation of British Columbia (ICBC), because they were caused by “malicious mischief”.

2. ICBC denies that the brake repairs are covered by the applicants' policy.
3. The applicants are self-represented. ICBC is represented by Lynn Boutroy.

JURISDICTION AND PROCEDURE

4. 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.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
6. 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.
7. 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.

ISSUE

8. The issue in this dispute is whether the damage to the applicants' brakes was caused by "malicious mischief".

EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicants must prove their case on a balance of probabilities. I have read all the parties' evidence and submissions but I will only refer to what is necessary to explain and give context to my decision.
10. The applicants say that on June 24, 2019, while Mr. Porter was driving the truck, its wheels locked. He pulled over and the brakes were smoking. The applicants had their truck towed to a car dealership. ICBC does not dispute any of this, so I accept the applicants' evidence.
11. The next day, June 25, a mechanic at the dealership emailed the applicants to explain that the entire brake system needed to be replaced.
12. The mechanic said that an "oil other than brake fluid" was in the brake fluid. The mechanic said that under normal circumstances, the brake fluid should never need to be topped up. The mechanic said that the only way for a fluid to contaminate the brakes would be for someone to add it to the master cylinder fluid directly. In other words, there is no way for contaminants to leak or seep into the brakes. ICBC does not dispute any of this, so I accept the mechanic's explanations on these points.
13. On June 25, 2019, the applicants made a claim to ICBC. The relevant part of the policy reads, in part:

Loss or damage consisting of mechanical failure or breakdown of any part of a motor vehicle [is not covered] unless the loss or damage is coincidental with other loss or damage for which indemnity is provided or is caused by malicious mischief.

14. The applicants claimed that the damage consisted of mechanical failure of the brakes caused by malicious mischief. They say that an unknown vandal must have contaminated the brake fluid.
15. On June 26, 2019, the applicants' mechanic spoke to an ICBC adjuster. The mechanic said that there was no indication in their records that the dealership had ever replaced or topped up the brake fluid. From this statement I infer that the dealership had serviced the truck before.
16. On July 3, 2019, an ICBC estimator inspected the vehicle and did not find any evidence of "tampering to doors, hood, fenders or grille area". The estimator questioned how a person could open the hood without damaging it.
17. The applicants say that it is possible to open their truck's hood without damaging the hood or grille. They provided a photograph, which appears to show a latch that a person can reach through the grille. ICBC provided no evidence or submissions other than the estimator's brief note, which does not say that it would be impossible to open the hood without causing visible damage. Based on the photograph and the applicants' uncontested evidence, I accept the applicant's evidence that it is possible for a person to open the hood without causing visible damage.
18. On July 4, 2019, ICBC declined coverage for the brake repairs because there was no direct evidence of vandalism.
19. The total cost of the repairs was \$5,265.11, which were completed on July 15, 2019. In this dispute, the applicants have deducted \$300 as their deductible, which is why the applicants claim \$4,925.11.
20. ICBC did not provide submissions other than what it said in its Dispute Response filed at the outset of this proceeding, despite having the opportunity to do so. In the Dispute Response, ICBC relies on the fact that its estimator saw no evidence of tampering to the truck's doors, hood, fenders or grill area. ICBC says there is no evidence to support that the damage is "coincidental with other loss or damage for which coverage is provided". However, the applicants have never argued that they

are entitled to coverage because the brake failure was coincidental with other loss or damage. ICBC's Dispute Response does not address the applicants' arguments about "malicious mischief".

21. Turning to the policy's language, I find that if an unknown person put a foreign substance into the brake fluid, it would be malicious mischief because it shows an intent to damage or destroy property: see *Reliable Distributors Ltd. v. Royal Insurance Co. of Canada*, 1986 CanLII 959 (BC CA). ICBC does not dispute this. I also find that the brakes' failure is a "mechanical failure" of a part of the applicants' truck. Again, ICBC does not dispute this.
22. Therefore, the sole question is whether the applicants have proven that an unknown person put the contaminant into the applicants' brakes.
23. The applicants do not dispute that they have no objective evidence to support their claim. They say that the level of proof that ICBC required of them during the claims process, such as video evidence or a witness statement, was unreasonable and unrealistic given the nature of the alleged act.
24. There are 2 cases from the Provincial Court of British Columbia in which an ICBC insured person believed that a vandal had caused damage to their vehicle by malicious mischief, but did not have clear proof of vandalism.
25. In *Pfleger v. I.C.B.C. and Gillespie*, 2005 BCPC 524, the claimant's truck broke down because there was water in the fuel. The claimant suspected that a person he knew had contaminated his gas, because they had recently had a disagreement. There was no objective proof of this, and it does not appear that this person was called to give evidence. The Court found that there was "a certain amount of speculation about how the water came to be in the fuel, but nothing beyond that", adding that "suspicion does not meet the standard of proof".
26. The Court considered a similar situation in *Stony Lake Logging Ltd. v. I.C.B.C.*, 2015 BCPC 385, but came to the opposite conclusion. As in *Pfleger*, the claimant's truck broke down because there was water in the fuel. However, in this case the

Court detailed ICBC's multiple alternative explanations about how the water could have ended up in the fuel tank. The Court found that the evidence ruled out each of ICBC's explanations. The Court concluded that the claimant had proven malicious mischief because "the other possible sources or causes of the contaminated fuel suggested by [ICBC] have been discounted".

27. Taken together, I find that these 2 cases mean that while a genuinely held suspicion of malicious mischief is not enough, the applicants can prove malicious mischief without direct evidence if they have disproven any alternative explanation. On the evidence in this dispute, I find that the applicants have done so.
28. As mentioned above, there was no way for any fluid to end up in the brakes except by someone intentionally putting fluid in. I find that the evidence leaves 3 possible explanations: a person who worked on the truck, one of the applicants, or an unknown vandal. I will address each of these possible explanations in turn.
29. First, the applicants provided an invoice from a Mr. Lube dated March 22, 2019, for an oil change, tune-up and "courtesy inspection". The applicants say that this was the last time they had any work done on the truck before the brakes froze in June 2019. The Mr. Lube invoice includes a comprehensive list of what services Mr. Lube provided. There is no mention of any inspection, replacement or top-up of the brake fluids. I find that it is unlikely that Mr. Lube did any work on the applicants' brakes without taking credit for it.
30. Along the same lines, the mechanic said that the dealership had never put brake fluid into the brakes. The evidence suggests that the dealership had serviced the applicants' truck before June 2019. Also, as mentioned above, the applicants' mechanic said that it is generally unnecessary to ever top up or replace brake fluids.
31. Therefore, I find that neither Mr. Lube nor the applicants' mechanic put any fluid into the applicants' brakes.
32. As for the applicants, they say that they do not maintain their own truck. The Mr. Lube invoice and the mechanic's comments both support this evidence, which I

accept. This rules out the possibility that one of the applicants tried to do work on the truck and accidentally added a contaminant to the brake fluid.

33. ICBC has never suggested that the applicants put the fluid into the brakes, either in its internal review of the claim or in this dispute. ICBC has never suggested that the applicants were untruthful in their description of what happened. I find that there is no plausible reason why the applicants would sabotage their own brakes. Therefore, I find that the applicants did not put the fluid into the brakes.
34. That leaves the unknown vandal. ICBC does not provide any other alternative explanation, nor is one apparent in the evidence. ICBC's denial rested solely on the absence of any physical evidence of vandalism. I find that the applicants have disproven the plausible alternative explanations. I therefore find that the applicants have proven on a balance of probabilities that the fluid in their brakes was caused by malicious mischief.
35. As for damages, I find that the applicants' requested remedy is appropriate, as it accounts for their deductible. ICBC did not challenge the amount in its Dispute response. I therefore order ICBC to pay the applicants \$4,925.11.
36. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgement interest on the repair costs from July 15, 2019, the date of the invoice from the mechanic, to the date of this decision. This equals \$37.89.
37. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicant is entitled to reimbursement of \$175 in tribunal fees. The applicants did not claim any dispute-related expenses.

ORDERS

38. Within 14 days of the date of this order, I order ICBC to pay the applicant a total of \$5,138.00, broken down as follows:

- a. \$4,925.11 as reimbursement for the repair costs,
- b. \$37.89 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$175 in tribunal fees.

39. The applicant is entitled to post-judgment interest, as applicable.

40. Under section 48 of the CRTA, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

41. Under section 58.1 of the CRTA, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Eric Regehr, Tribunal Member