



# Civil Resolution Tribunal

Date Issued: February 24, 2020

File: SC-2019-008180

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mermelstein v. ICBC*, 2020 BCCRT 211

BETWEEN:

ILONA MERMELSTEIN

**APPLICANT**

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Shelley Lopez, Vice Chair

## INTRODUCTION

1. In this small claims dispute about motor vehicle collision damage, the applicant, Ilona Mermelstein, disputes a finding of fault made by the respondent insurer,

Insurance Corporation of British Columbia (ICBC). The applicant says the respondent treated her unprofessionally. She also says the respondent incorrectly found her at fault for a collision, because the applicant says she did not cause the claimed damage to the other vehicle. The applicant wants an order that ICBC reverse the finding of fault against her and she wants ICBC to apologize to her. She also claims \$3,461.55, which is the amount the applicant says was ICBC's calculation of the "total loss". Finally, the applicant wants an order her insurance premiums will not increase, or should not have increased.

2. The respondent says it is not the proper respondent, and that the applicant should have named SK, the other driver involved in the collision. The applicant chose not to name SK as a party to this dispute.
3. The applicant is represented by a family member. The respondent is represented by an employee.

## **JURISDICTION AND PROCEDURE**

4. These are the tribunal's formal written reasons. 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. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me.
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. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

8. The issues in this dispute are:
  - a. whether the respondent insurer properly investigated and assessed a claim against the applicant, and
  - b. whether the applicant should be held responsible for the collision at issue, and if not, what are the appropriate remedies.

## **EVIDENCE AND ANALYSIS**

9. In a civil claim such as this, the applicant must prove her claim, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision. I note that ICBC chose not to provide submissions, despite the opportunity to do so.
10. Briefly, ICBC held the applicant responsible for an October 2018 collision. While the applicant says she does not recall backing up into SK's parked car, she also admits she was at the scene and that this could have happened. The applicant's fundamental point about the collision is that because there was no damage to her less expensive Toyota Corolla's bumper, it was unlikely her backing up into SK's more expensive Jeep could have caused \$3,461.55 in damage to SK's bumper. The applicant submits that the "crunch" sound SK heard was more likely his fog light breaking, and not the claimed bumper damage.

11. ICBC says the applicant admitted to being at the scene but denied causing the damage. Both the applicant's and SK's vehicles were inspected by an ICBC Material Damage estimator, who determined that there was a match between the impression on the applicant's rear bumper and damage to SK's bumper.
12. As noted above, the applicant says ICBC handled her file "very unprofessionally". For the reasons set out above, the applicant also wants the tribunal to "review" ICBC's finding of fault and its "unsatisfactory" handling of her claim.
13. First, what is ICBC's duty to the applicant insured? 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 as to 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). I find ICBC has done so, as discussed further below.
14. The applicant's argument is that ICBC's employees were rude, yelled at her, and failed to reasonably communicate and explain their decision to her when she asked them to do so.
15. As noted above, ICBC chose not to provide any submissions, despite being given the opportunity to do so. ICBC had only stated in its Dispute Response filed at the outset that the other driver, SK, should be named as respondent and not ICBC. There is nothing in the claim file notes or other evidence submitted by the parties that refutes the applicant's assertions, though I do not agree with the applicant that the ICBC adjuster's emails were rude. They may have been somewhat terse, but they were not unprofessional.

16. However, I also note the parties consented to the disclosure of the tribunal's facilitation discussions, in which the respondent's representative apologized to the applicant's representative for ICBC's overall handling of the claim. Given the above, I find ICBC was unprofessional.
17. I note there is no specific allegation that ICBC failed to properly investigate the facts. Rather, the issue is that ICBC was rude and non-communicative with the applicant at times. So, in the circumstances here I find that unprofessional behaviour, while regrettable, does not mean ICBC breached its insurance contract with the applicant or its duty to act in good faith and fairly. I will address below the applicant's argument that ICBC drew the wrong conclusion on the bumper damage evidence.
18. In any event, the applicant's requested remedy for the unprofessional behaviour is that ICBC apologize directly to her, not just to her representative. I decline to grant this remedy. First, it is an order to do something, which in law is known as injunctive relief. Apart from specific exceptions that I find do not apply here, section 118 of the CRTA does not give me the authority to order an apology. Further, I find a forced apology would be unproductive and unhelpful.
19. So, what about the applicant's request for the tribunal's "review" of the finding of fault against her? I take this request to mean she wants the tribunal to make its own finding about whether the applicant caused the damage to SK's vehicle.
20. As noted above, ICBC says it is not a proper respondent to the applicant's claim about whether she is liable for the collision damage. The respondent submits that SK, as owner and driver of the other vehicle involved in the collision, is the proper respondent. I agree, for this question of whether the applicant is liable for the collision damage. The difficulty here is that the applicant chose not to name SK as a party to this dispute. In *Kristen v. ICBC*, 2018 BCPC 106, the court concluded that "the proper defendant in an action to determine liability in a motor vehicle accident is the other driver, not ICBC".

21. However, in the circumstances here I find nothing turns on the applicant's failure to add SK as a party. I say this because I find the applicant has failed to prove she is not responsible for SK's vehicle damage.
22. While the applicant first told ICBC that she did not back into SK's car, it is undisputed she was at the scene. The evidence shows SK witnessed the collision, and ran after the applicant's car after she left, to note her license plate. In submissions, the applicant's argument rests on the assertion that because her "weaker" or less expensive Toyota Corolla had no damage, it is impossible that it could have caused the claimed damage to SK's "stronger" Jeep.
23. The applicant however did not provide any expert evidence about the collision damage. In particular, she did not provide any evidence that there would have had to have been bumper damage on her car in order for her to have caused the claimed bumper damage on SK's car. As noted above, the applicant bears the burden of proof.
24. What I do have is ICBC's file notes that refer to their Material Damage team's assessment that the impression of the license plate and bolt on the applicant's vehicle matched the height of the license plate and bolt on SK's vehicle, and that this was the point of impact. The ICBC Material Damage assessment evidence is not expert opinion evidence under the tribunal's rules, as I do not have the assessor's qualifications before me. However, I find it is the best evidence about the cause of SK's vehicle damage, given that team's role and experience. I have also reviewed the photos in evidence myself and I find they are consistent with ICBC's conclusions. I also disagree with the applicant's assertion that her vehicle had "no damage" at all. I say this because in the photos I can see the marking from what appears to be an outline and bolt from a license plate.
25. For the reasons above, I dismiss the applicant's claims. I note that even if I had found the applicant not responsible for the collision, I would not have awarded \$3,461.55 as claimed. The applicant did not pay this sum (which was the cost of SK's vehicle repairs), as ICBC required only a \$300 deductible. At most, if the

applicant had been successful, she would be entitled to the \$300, if she had paid it, plus \$2,841 (her estimated future premium increases for the next 3 years).

26. The applicant submitted she withdrew her claim for reimbursement of tribunal fees and dispute-related expenses. As she was unsuccessful in this dispute, I would not have awarded reimbursement in any event. The successful respondent did not pay fees or claim dispute-related expenses.

## **ORDER**

27. I dismiss the applicant's claims and this dispute.

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Shelley Lopez, Vice Chair