



# Civil Resolution Tribunal

Date Issued: April 28, 2020

File: SC-2019-006990

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Nowak v. ICBC*, 2020 BCCRT 461

BETWEEN:

MATTHEW NOWAK and DIANA NOWAK

**APPLICANTS**

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

**RESPONDENT**

AND:

MATTHEW NOWAK

**RESPONDENT BY COUNTERCLAIM**

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**REASONS FOR DECISION**

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Tribunal Member:

Kathleen Mell

## INTRODUCTION

1. This small claims dispute is about a March 16, 2019 accident between a vehicle and a motorcyclist, Mr. O. Mr. O is not a party to this dispute. The applicants, Matthew Nowak and Diana Nowak, say that the respondent insurer, Insurance Corporation of British Columbia (ICBC) did not investigate the accident thoroughly. The applicants say that ICBC's internal determination that Ms. Nowak was 100% at fault was incorrect.
2. The applicants request reimbursement of their \$500 deductible and an order that ICBC's decision be reversed. The applicants also request \$1,000 for future insurance premium increases. Mr. Nowak represents the applicants.
3. ICBC says that it is not the correct respondent and states that Mr. O is the correct respondent. ICBC says that Mr. Nowak reported that Ms. Nowak was adjusting her position in a parking stall and reversed into Mr. O's motorcycle. ICBC says that it carried out a proper investigation and determined that Ms. Nowak was 100% responsible for the accident.
4. After ICBC decided that the applicants were liable for the accident and the applicants filed this dispute, the applicants provided a statement from a witness, Mr. B, that said there was no accident and that Mr. O got off his motorcycle and hit the bumper of the Nowaks' car with his hand.
5. In ICBC's counterclaim against Mr. Nowak, ICBC says that prior to receiving Mr. B's witness statement the Nowaks repaired their vehicle and ICBC paid for that damage because it believed the damage was linked to contact between the vehicle and the motorcycle. ICBC says it decided the damage was not consistent with Mr. O hitting the car with his hand. ICBC requests \$1,420.22, the amount they paid to repair the Nowaks' vehicle. ICBC is represented by an organizational contact.
6. Mr. Nowak's submissions are inconsistent about whether there was vehicle-to-vehicle contact, but regardless he says Mr. O caused the damage to their vehicle.

## **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. In some respects, this dispute amounts to a "they said, it said" scenario with both sides calling into question the credibility of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the 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 the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.
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. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any 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. Are the applicants responsible for the incident and if not, what is the appropriate remedy?
- c. Must the applicants reimburse ICBC for their car's repair costs?

## **EVIDENCE AND ANALYSIS**

12. In a civil dispute such as this, the Nowaks must prove their claim on a balance of probabilities. Similarly, ICBC must prove its counterclaim on a balance of probabilities.
13. I will not refer to all of the evidence or deal with each point raised in the parties' submissions. I will refer only to the evidence and submissions that are relevant to my determination, or to the extent necessary to give context to these reasons.
14. Ms. Nowak was attempting to park Mr. Nowak's car in a narrow space. Mr. O told ICBC that Ms. Nowak backed into his motorcycle. Mr. Nowak was not present and gave differing accounts of what he thought happened to ICBC. After ICBC finished its initial investigation and found Ms. Nowak liable, Ms. Nowak gave a statement indicating that Mr. O came up too close behind her so she could not continue backing up. Ms. Nowak stated that she did not see what happened, but she was stopped when she heard a bang on the back of her vehicle. The witness, Mr. B, told ICBC that there was no contact between the vehicles and that Mr. O struck Ms. Nowak's car with his hand.

### ***Did the respondent breach its statutory obligations in investigating the incident and assessing fault?***

15. As noted above, the incident occurred on March 16, 2019. The respondent paid the July 17, 2019 repair bill for \$1,420.22. ICBC found Ms. Nowak liable and charged

Mr. Nowak a \$500 deductible. The Nowaks say they were not responsible for the incident and that ICBC did not conduct a proper investigation.

16. To succeed against ICBC, the Nowaks must prove on a balance of probabilities that ICBC breached its statutory obligations or its contract of insurance, or both. The question is whether the respondent acted “properly or reasonably” in administratively assigning liability to the applicants (see: *Singh v. McHatten*, 2012 BCCA 286).
17. The respondent owes an applicant insured a duty of good faith, which requires the respondent 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).
18. In the course of its investigation, ICBC’s employee spoke with Mr. Nowak who owns the applicants’ car but, as noted, was not present when the incident happened. Mr. Nowak told ICBC that Ms. Nowak was backing out of her parking stall when she heard Mr. O yelling at her. He says Ms. Nowak left her vehicle and Mr. O kept saying that an accident occurred and that Mr. O then became verbally abusive, so Ms. Nowak walked away. Mr. Nowak told ICBC there was a witness. He also said that the police attended but there was no report. Mr. Nowak stated that Ms. Nowak did not notice any damage at first but that he saw some damage on the car’s tailgate when she brought the car home. ICBC did not speak with Ms. Nowak.
19. Mr. O told ICBC that he was stopped in the laneway because there were other vehicles in front of him and he could not go anywhere. He stated he saw Ms. Nowak

start to back up from her parking spot so he yelled at her to stop but Ms. Nowak continued to back up and hit Mr. O's motorcycle. He said that he called the police.

20. When ICBC first estimated the claim, it stated that it viewed photos of the vehicles in November 2019 and noted that there were 3 different marks on the Nowaks' car's rear bumper. The origin of two were unclear, but there was a dent which the estimator said was a sharp direct type impact mark from a direct contact. The estimator said that there was scraping on the motorcycle's right side, but he could not tell when this occurred. He said he did not see any vehicle type impact on the motorcycle.
21. ICBC initially determined that Ms. Nowak was responsible for the accident under section 193 of the *Motor Vehicle Act*, which states that a vehicle's driver must not cause the vehicle to move backwards into an intersection or over a crosswalk and in any event must not cause a vehicle to move backwards unless the movement can be made in safety.
22. Mr. Nowak unsuccessfully internally appealed ICBC's decision. Mr. Nowak requested that ICBC contact the witness, Mr. B. ICBC again attempted to do so, but Mr. B did not respond to ICBC's messages.
23. Mr. Nowak states that ICBC did not conduct a proper investigation because it did not get a statement from Ms. Nowak and that it did not contact the independent witness, Mr. B. ICBC states that it attempted to contact Mr. B. and also that Ms. Nowak did not suggest that she wanted to make an independent statement. In the ICBC reports there are no suggestions that Mr. Nowak asked ICBC to obtain a statement from Ms. Nowak and there is no explanation as to why Ms. Nowak did not provide one if the applicants thought it was relevant. After the tribunal dispute was underway, Mr. Nowak obtained a statement from both Mr. B and Ms. Nowak and shared these with ICBC.
24. In her statement, Ms. Nowak said that she was backing out of the parking stall when suddenly she saw a motorcycle right behind her car. She indicated that she stopped

immediately and honked, but Mr. O refused to move. She said that there were other people driving around the parking lot who could not go anywhere because of Mr. O so they began to yell at him. Ms. Nowak stated that she was not moving and then she heard something bang into the back of her car, so she got out. She indicated that Mr. O started yelling that this was an accident and insulted her in an “aggressive way” so she got back into her vehicle. She stated that she called her husband who told her to call the police and Mr. O was banging on her window and taking pictures of her. Ms. Nowak stated that Mr. O then moved his motorcycle and sat on the ground next to it waiting for the police to arrive.

25. Mr. B stated that Ms. Nowak was attempting to leave her parking stall when Mr. O came right up behind her and did not leave enough room for Ms. Nowak to back up. Mr. B stated that Ms. Nowak honked once to tell Mr. O to move so she could get out. Mr. B indicated that people yelled at Mr. O to get out of the way or move aside but he refused. Mr. B stated that this went on for 30 seconds and then Mr. O laid down his motorcycle in the path of Ms. Nowak and went up to her bumper and slapped it with his right hand and then he sat down beside his motorcycle saying that Ms. Nowak hit his motorcycle with his car. Mr. B stated that Mr. O waited for the police to arrive and that there was no accident between the vehicles.
26. After receiving the statements, ICBC then referred the claim to its Special Investigation Unit (SIU). The SIU said it found Mr. B reliable in his statement that there was no contact between the vehicle and the motorcycle because Mr. B was an independent witness with no previous connection to the parties. ICBC also noted that Ms. Nowak did not show up for her appointment with the SIU investigator and declined to cooperate with the investigation.
27. Also, after receiving Mr. B’s statement in January 2020, ICBC again reviewed the Nowak’s vehicle’s damages because Mr. Nowak stated that Mr. O hit his vehicle with a gloved hand. The estimator noted that the rear bumper had horizontal scratch marks and that this would be caused by a vehicle backing into a post or corner of a wall. The other two areas of damage were also not consistent with being hit by a

gloved hand as one was too low to be hit by a hand. The third damaged area was on the car's tailgate where there was evidence of a sharp ding with paint missing on the ridged part. The estimator did not think that this third damaged area could be done by a glove or a hand. The estimator stated that hitting the plastic bumper with a gloved hand would result in very minor scuffing. He added that, if the soft metal area was hit this way, it also would result in a soft dent with minor scuffing. He noted that he did not see any of this on the Nowaks' car. ICBC then determined that there was no compensable incident that caused damage to the Nowaks' car.

28. Given the overall evidence, I find that the respondent did not breach its statutory obligations or its contract of insurance. ICBC thoroughly investigated the incident. It originally attempted to contact Mr. B who did not respond. Once Mr. B became available, ICBC conducted an interview with him. Mr. Nowak also states that ICBC did not properly conduct an interview with Ms. Nowak. However, Mr. Nowak does not dispute ICBC's evidence that it asked Ms. Nowak for an interview, but she declined. I find the Nowaks have not proven ICBC's investigation was unreasonable. I find ICBC acted reasonably in initially administratively assigning Ms. Nowak responsibility for the accident. I also find that it acted reasonably in determining that no accident actually occurred once it received additional information.
29. Having determined that the ICBC acted reasonably in its examination of the accident, I turn now to my assessment of liability.

***Are the applicants responsible for the accident?***

30. As noted above, the Nowaks filed their claim against ICBC only, and not Mr. O, the owner of the motorcycle. In *Kristen v. ICBC*, 2018 BCPC 106 the court said that the proper defendant in an action to determine liability in a motor vehicle accident is the other driver and not ICBC. However, 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. I note that ICBC stated in its Dispute Response that Mr. O should be added as a party. I find the Nowaks had



the opportunity to add Mr. O as a respondent but did not take steps to do so. The Nowaks also did not indicate why they did not name Mr. O at the outset, particularly when the Nowaks alleged that Mr. O was making a fraudulent claim.

31. I also note a recent non-binding decision from this tribunal, *Singh v. Insurance Corporation of British Columbia*, 2019 BCCRT 701, where a vice chair stated that because the applicant had not proved his claim, nothing turned on the fact that the applicant did not name the other driver. I have reached a similar conclusion on the facts of this dispute. As discussed below, I find that the applicants have not proved on a balance of probabilities that Mr. O made a fraudulent claim and I agree with ICBC's original apportionment of liability to the applicants. Because I find there is no change in the initial decision on liability, I ultimately do not need to determine who would have been the proper party for the applicants to recover damages from, whether ICBC or Mr. O.
32. I note that Mr. Nowak made submissions about Mr. O passing on the right or following too closely and therefore states that Mr. O is responsible for the vehicle contact, if any occurred. I do not accept this submission. It is undisputed by all parties that Ms. Nowak was backing up. There is insufficient evidence to support a claim that Mr. O was trying to pass her on the right or following too closely. Ms. Nowak stated she was at a stop and so was Mr. O.
33. I also note that Ms. Nowak's description of what happened is not consistent with Mr. B's. Ms. Nowak says that Mr. O was yelling this was an accident, so she got in her car and Mr. O followed her taking pictures through her window. Mr. B does not mention this in his statement. I find Ms. Nowak's statement more detailed and prefer it to Mr. B's.
34. Mr. Nowak also stated that people were yelling at Mr. O to get out of the way, but he refused to and then laid his motorcycle down and slapped the bumper of the Nowaks' car. Mr. Nowak sometimes suggests that this was a fraudulent claim and not an accident at all, which Mr. B's statement seems to support. I do not find that this allegation makes sense. Given that both Ms. Nowak and Mr. B say that

numerous people were observing the scene and yelling at Mr. O to move it does not ring true that he would think he could get away with pretending an accident occurred in front of a watching crowd. I also note that Mr. Nowak backs away from this allegation in his counterclaim submissions and says that maybe Mr. B was not in a position to see the minor contact. ICBC also says that Mr. O ultimately did not make a claim for injury or damage to his motorcycle. I find the evidence does not support a finding that Mr. O made a fraudulent claim.

35. Mr. Nowak also states that Mr. O hit his car's bumper with a gloved hand. The ICBC estimator noted that the damage could not be attributed to this and that it was impact damage. I do not accept the estimator's evidence as expert evidence under the tribunal's rules as their qualifications are not before me. However, given the estimator's role and experience, I do accept his evidence about it being unlikely that Mr. O striking the car with his hand would have caused the vehicle's damage. Notably, I have no contrary estimator or expert evidence before me from the Nowaks.
36. Further, it is unclear where Mr. Nowak got any information about Mr. O's motorcycle gloves being capable of causing this kind of damage or even that Mr. O was wearing motorcycle gloves. Mr. Nowak was not at the scene. Neither Ms. Nowak or Mr. B made any statement about motorcycle gloves Mr. Nowak claims Mr. O was wearing. I do not accept Mr. Nowak's allegation that this is how his vehicle was damaged.
37. ICBC ultimately decided that because there was no vehicle-to-vehicle contact that the damage was caused from something other than the incident. ICBC's ultimate determination on liability rested on their finding that Mr. B was the only independent witness and therefore the most credible. ICBC stated that the SIU conducted an interview with Mr. B, but it did not provide any notes of what occurred in that interview. ICBC just said that they found Mr. B credible. I do not accept ICBC's conclusion that there was no vehicle-to-vehicle contact just because Mr. B stated he did not see any, especially when I have no details of the interview.

38. I have already pointed out that I find Mr. B's statement inconsistent with Ms. Nowak's and Mr. O's statements. Further, even Mr. Nowak stated that perhaps Mr. B did not see the "minor" contact between the vehicles. I also have found that the evidence does not support that Mr. O made a fraudulent claim and therefore I see no reason to dismiss his statement as to what happened. Further, ICBC's determination ignores the estimator's evidence that the rear bumper did have impact damage.
39. I find that ICBC has not established on its counterclaim that the Nowaks have to reimburse it the money spent on repairs because it decided that there was no contact between the vehicles. The evidence before me does not establish that there was no contact between the vehicles.
40. Based on the evidence, I find it most likely that Ms. Nowak caused the accident when she backed up into Mr. O's motorcycle. This was Mr. O's description of what occurred. The other description of Mr. O laying his motorcycle down and then slapping the Nowaks' vehicle with a gloved hand seems less likely and I do not accept it. Therefore, I find ICBC was entitled to charge the Nowaks the \$500 deductible. To be clear, I am not reversing the original at-fault decision as this would be injunctive or declaratory relief which is outside my jurisdiction. I make no decision about a future premium increase as there is no evidence before me showing that ICBC will charge a premium increase or what amount might be charged.
41. 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. As neither the Nowaks or ICBC were successful in their claims, I find that neither party is entitled to have their tribunal fees reimbursed. There were no dispute-related expenses claimed.

## **ORDER**

42. I dismiss the Nowaks' claim and ICBC's counterclaim.

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Kathleen Mell, Tribunal Member