



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cohen v. Miller Capilano Highway Services Ltd.*, 2020 BCCRT 524

B E T W E E N :

RICHARD COHEN

APPLICANT

A N D :

MILLER CAPILANO HIGHWAY SERVICES LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This dispute is about liability for vehicle damage caused by a pothole.
2. The applicant, Richard Cohen, says his car hit a big pothole on a BC provincial highway bridge maintained by the respondent, Miller Capilano Highway Services

Ltd. The applicant says the respondent owes him \$1,256.22 in car repair costs for damage caused by the pothole. The respondent does not deny repairing a pothole on the bridge shortly after the applicant says he hit it. The respondent says it cannot confirm that the pothole damaged the applicant's car, and in any event, it adequately maintained the road in accordance with its agreement with the Province of BC. The respondent denies the claim.

3. The applicant is self-represented. The respondent is represented by an employee.

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 only, as 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. 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.

ISSUE

8. The issue in this dispute is whether the respondent had a duty to the applicant to prevent and repair potholes, and if it breached such a duty, how much does the respondent owe for car repairs?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, the applicant must prove his claim on a balance of probabilities. I have read all the submitted evidence, but I refer only to the evidence I find relevant to provide context for my decision.
10. The applicant says that at approximately 9:45 a.m. on November 24, 2019, his car hit a big pothole in the right lane of a BC highway, on a bridge over a river. He says he was travelling approximately 80 kilometres per hour when he saw the pothole, and was unable to swerve to miss it. The applicant says hitting the pothole damaged the car's right front tire, right front wheel, and "steering alignment." He also says several other vehicles were damaged by the pothole at the same time, but provided no evidence of this, such as photographs or witness statements.
11. There are no photographs of the applicant's damaged vehicle in evidence. The respondent says it did not witness the incident and cannot confirm the applicant's version of events. However, the applicant submitted a November 27, 2019 invoice of \$1,021.43 for a new tire and straightening a bent wheel rim, and a November 28, 2019 invoice of \$234.79 for a basic wheel alignment he ordered. These invoices show the applicant obtained car repairs shortly after he says his car hit the pothole. I find the invoiced repairs are consistent with damage from a pothole. On balance, I find the applicant's right front tire and wheel were damaged by a pothole as alleged. However, nothing turns on this finding, because I dismiss the applicant's claim for other reasons, as described below.
12. It is undisputed that the respondent contracts with the BC Ministry of Transportation and Infrastructure (MOTI) to provide road maintenance services, including pothole

repair, on the class 1 highway where the pothole incident occurred, under a Highway Maintenance Agreement (HMA). There is no evidence that the applicant was a party to the HMA, so the respondent cannot be liable to the applicant for a breach of the HMA contract.

13. The applicant says that the respondent failed to repair the pothole, and failed to prevent the pothole through proper highway maintenance, as required under the HMA. I consider the applicant's claim to be that the respondent was negligent in preventing and repairing the pothole.
14. To show the respondent was negligent, the applicant must prove each of the following on a balance of probabilities:
 - a. The respondent owed the applicant a duty of care;
 - b. The respondent breached the standard of care;
 - c. The applicant sustained a loss; and
 - d. The respondent's breach caused the applicant's loss.

Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 at paragraph 3

15. As the respondent was contracted to maintain and repair the highway, including repairing potholes, I find it is reasonably foreseeable that failing to do so could result in vehicle damage. Therefore, I find the respondent owed the applicant a duty of care to prevent and repair potholes.
16. The key question here is, to what standard of care was the respondent required to prevent and repair potholes? The applicant does not say exactly how the respondent's maintenance activities were deficient, apart from saying the presence of the large pothole and previous road surface repairs shows inadequate maintenance. The applicant also does not specifically say how the respondent should have maintained the road differently, but suggests the respondent should have repaired the pothole before his car hit it.

17. The applicant relies on a draft version of a May 2004 Highway Maintenance Specifications document about bridge deck maintenance (section 6-500). I place little weight on this document, as it is merely a draft, and there is no evidence its terms form part of the respondent's HMA. However, sections of the draft document highlighted by the applicant are similar to the highway maintenance specifications provided by the respondent, which it says are the HMA specifications. On balance, I find the respondent's submitted specifications were part of its HMA obligations.
18. Under the HMA specifications, bridge deck maintenance should provide safe, uniform, and durable surfaces. I find the HMA required the respondent to temporarily repair potholes on the highway bridge deck within 4 hours. I also find the HMA required the respondent to continuously perform safety patrols of the highway every 24 hours on November 24, 2019.
19. I note that public authorities such as the MOTI do not owe a duty of care for properly-exercised policy decisions such as allotting budgets. But they can be liable for operational decisions that implement and perform policy decisions, including those based on administrative directions, professional opinion, or technical standards: *Lowe v. Sidney (Town of)*, 2020 BCSC 335 at paragraphs 23 to 28. I find the respondent was hired to carry out the MOTI's operational decisions, as set out in the HMA specifications.
20. I find the MOTI made a policy decision to patrol the highway every 24 hours, and to temporarily repair potholes within 4 hours. The question, then, is whether the respondent adequately implemented and performed that policy on the MOTI's behalf, as it agreed to do under the HMA.
21. The respondent says it repaired the pothole within 4 hours of learning of it, as required. As discussed below, I find there is no evidence that the pothole had existed for more than several minutes before the applicant struck it. The applicant acknowledges that when he returned to the site of the pothole a few hours after the incident, it had been repaired. So, I find the respondent repaired the pothole as required by the HMA.

22. The applicant does not refute the respondent's evidence, supported by vehicle GPS records and work logs, that an employee with 30 years of road maintenance experience patrolled the pothole site several times in the 24 hours before the applicant hit the pothole, and noted no potholes. The applicant says the respondent's employee may have missed the pothole due to darkness. I find this is speculative, and it also does not explain how no potholes were discovered during the multiple daylight patrols of the pothole site on November 23 and 24, 2019.
23. The respondent says a large vehicle impact may have created the pothole between the time of its 9:28 a.m. patrol and the applicant's encounter with the pothole at approximately 9:45 a.m. The applicant says this is speculative, and I agree. However, multiple safety patrols on November 23 and 24, 2019 found no potholes, and there is no evidence showing the pothole had existed for more than about 15 minutes before the applicant struck it. As a result, I find it likely that some sort of event created the pothole shortly before the applicant's car struck it. On balance, I find the applicant has not proven it failed to adequately patrol the highway every 24 hours or repair the pothole within 4 hours of discovering it.
24. The applicant appears to allege the bridge deck was not well maintained based on the presence of previous repairs and the single pothole he hit, which he says shows a chronic state of disrepair. I find this allegation is speculative, as there is no specific evidence of longer-term poor maintenance, including expert evidence which I find would be required to demonstrate such deficiencies. I find there is no evidence to show the respondent's bridge deck maintenance was generally deficient, or that lack of maintenance led to the pothole that damaged the applicant's car.
25. The applicant says he requested evidence from the respondent, which it failed to provide. However, the applicant submitted no evidence of this request, and did not say when he first made it. The allegedly requested evidence includes:
 - a. Records of an alleged call by police alerting the respondent to the presence of the pothole.

- b. A copy of a letter sent by the respondent to the applicant after being notified of the pothole damage to the car.
 - c. Details of the November 24, 2019 pothole repairs.
 - d. “Details of all preventative and routine maintenance services” performed on the highway bridge since the respondent’s HMA began.
26. I find it unlikely that records of a police call about the pothole after the applicant hit it, if any, would help to prove or disprove negligent road maintenance. As the recipient of the letter sent by the respondent, I find the applicant should already have a copy of it. I find the details of the November 24, 2019 pothole repair are not proof that the respondent’s road maintenance was negligent before the applicant’s car hit the pothole. Finally, given my finding above that the applicant’s allegations of poor preventative and routine maintenance are speculative, I find the principle of proportionality, and the tribunal’s mandate of speed and economy, outweigh the applicant’s interest in obtaining the presumably large volume of requested preventative and routine maintenance documents.
27. I find the applicant has not shown the respondent failed to submit evidence that may have proven or disproven an issue, as required by tribunal rule 8.1. Further, the evidence does not show the applicant followed the tribunal rule 8.2 procedure for requesting such evidence, which includes requesting it in writing before completing a Summons Form in consultation with a case manager and following the required directions. Keeping in mind the tribunal’s goals of speed, economy, proportionality, and fairness, I find the applicant is not now entitled to seek further evidence from the respondent at this late stage, and I am not persuaded that such evidence, allegedly in the respondent’s possession, would prove its negligence.
28. On balance, I find the applicant has not established that the respondent was negligent in preventing or failing to repair the pothole that the applicant hit. I dismiss the applicant’s claim.

TRIBUNAL FEES AND EXPENSES

29. 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. The applicant was unsuccessful, so I order no reimbursement for his tribunal fees. No dispute-related expenses were claimed. The successful respondent did not pay fees.

ORDER

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

Chad McCarthy, Tribunal Member