



Civil Resolution Tribunal

Date Issued: November 30, 2020

File: SC-2020-004390

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Richards v. Mario's Towing Ltd.*, 2020 BCCRT 1349

BETWEEN:

SCOTT RICHARDS

APPLICANT

AND:

MARIO'S TOWING LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION

1. This dispute is about vehicle damage. The applicant, Scott Richards, says the transfer case in his 2014 Grand Jeep Cherokee (jeep) was damaged after the respondent,

Mario's Towing Ltd. (MTL), improperly towed it following a motor vehicle accident. He seeks \$2,127.17 for the cost of replacing the transfer case.

2. MTL says it towed the jeep properly and denies it damaged the transfer case.
3. Mr. Richards is self-represented. MTL is represented by an employee, KB.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these.
6. Some of the evidence in this dispute amounts to a "he said, he said" scenario. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of who's personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT'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 CRT's process and found that oral hearings are not necessarily required where credibility is an issue.

7. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
8. Section 42 of the CRTA says the CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
9. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUES

10. The issues in this dispute are:
 - a. Whether MTL damaged the transfer case by negligently towing Mr. Richards's jeep, and
 - b. If so, the appropriate remedy.

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicant Mr. Richards bears the burden of proof on a balance of probabilities. I have reviewed the evidence and submissions but refer to them only as I find necessary to explain my decision.
12. Mr. Richards says his jeep was in a motor vehicle accident on December 13, 2019 while driven by his wife, Ms. Richards. In her testimony, Ms. Richards stated that the jeep's front end was damaged when she rear-ended the vehicle in front of her. She also stated she was able to drive the jeep home after the accident.

13. It is undisputed that Mr. Richards contacted the Insurance Corporation of British Columbia (ICBC) the same day and ICBC arranged for MTL to tow the jeep to one of ICBC's repair facilities. Mr. Richards says that MTL's tow truck driver, BC, hoisted the back of the jeep up with a lift, placed the jeep in neutral, secured the steering wheel, and then drove off. Mr. Richards says BC did not use a dolly for the jeep's front wheels and he saw it towed backwards with its front wheels on the road. The parties agree that MTL towed the jeep to its towing yard, and then to ICBC's facilities, and finally to Craftsman Collision where it was repaired. Mr. Richards says he picked up the jeep on January 9, 2020.
14. Mr. Richards says on February 24, 2020 he was driving the jeep on slippery roads and it was operating in the 4 wheel drive (4WD) high mode, which is the jeep's default mode. He says he tried to engage the 4WD in low mode for better traction but it did not "activate properly" and the message "Service 4WD System" appeared on the dashboard display. He says the jeep remained in 4WD low mode and he could not disengage it. Mr. Richards says this was the first time he tried to engage the low mode since the accident. Mr. Richards admits that he erroneously stated this occurred on February 20, 2020 in his application for dispute resolution. Although MTL says this brings Mr. Richards's credibility into question, I find the error is minor and does not affect Mr. Richards's credibility or the outcome of this decision.
15. Mr. Richards says he drove the jeep to Fountain Tire and the technician informed him that the transfer case was damaged. Based on the evidence before me, I infer that the transfer case transfers power from the transmission to the front and rear axels when the jeep shifts from high mode to low or neutral mode.
16. Mr. Richards says Fountain Tire replaced the damaged transfer case with a used one and he paid \$2,127.17 for parts and labour for the repairs. Mr. Richards says the transfer case was damaged because MTL did not properly tow the jeep.
17. ICBC denied Mr. Richards' claim for the transfer case repair because it determined that it was damaged while MTL was towing the jeep, and this type of damage was

not covered by the insurance policy. It also determined MTL was 100% responsible for the damage.

18. MTL says that it towed the jeep properly and there are several other explanations for how the transfer case could have been damaged, which are discussed below.

Was MTL negligent?

19. The test for negligence is set out by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 3. In order to succeed in a negligence claim, Mr. Richards must prove MTL owed him a duty of care, MTL did not meet a standard of care when towing the jeep, it was reasonably foreseeable that failing to meet the standard of care would result in damages, and that the failure caused the damage claimed by Mr. Richards.
20. I accept that MTL owes a duty of care to follow industry standards when towing vehicles. Mr. Richards says since the jeep was all wheel drive, MTL should have either used a dolly or a flatbed tow truck to tow it. Mr. Richards says MTL did neither, which resulted in damage to the transfer case.
21. Industry standards for towing a jeep, and whether the method used can damage a jeep's transfer case are technical matters that are beyond common understanding, and expert evidence is required (see *Bergen v. Guliker*, 2015 BCCA 283, paragraphs 124 to 131).
22. Mr. Richards provided opinion evidence from 2 individuals, Mike Pearen and Matt Drost. MTL says their statements are unreliable because Mr. Richards asked them leading questions. A leading question is one that suggests a particular answer. I have reviewed the emails Mr. Richards sent to both witnesses and I find that some of the questions were leading. However, I find that since the leading questions were related to facts which were verified by other evidence, the reliability of the witness's responses was not affected.

23. Mr. Richards says Mr. Pearen is a tow truck operator. Turning to Mr. Pearen's statement, although he stated he worked in the towing industry for 31 years, he did not state in what capacity. Since MTL did not object to his qualifications, I accept that Mr. Pearen is a tow truck operator and qualified under CRT rule 8.3 to provide an expert opinion about whether a jeep's transfer case can be damaged if it is not towed properly.
24. Mr. Pearen stated he saw and heard of vehicle damage caused by not using a dolly when required, which included front differential and transfer case failure. Mr. Pearen also provided excerpts from the AAA/CAA 2016 Towing & Service Manual (manual) and a 2014 Jeep Grand Cherokee Guide (guide). Mr. Pearen stated the manual contained procedures for towing all makes of vehicles and is used as the standard in the towing industry. According to the manual, a dolly is required if a 2011 to 2016 Jeep Grand Cherokee is towed using a wheel-lift (instead of a flatbed truck) to prevent damage to the drivetrain. In Mr. Drost's statement, which is discussed below, he stated the transfer case is part of the drivetrain. The manual also showed that a jeep can be towed either forwards or backwards using a lift, so long as a dolly is used. Mr. Pearen also says photographs provided by Mr. Richards showed that the driver was securing the steering wheel with a rope, which would not be done if a dolly was used.
25. According to the guide, while a dolly can be used to tow the 2WD model, a flatbed truck must be used to tow the 4WD model. The guide also cautioned that failing to follow towing procedures could cause severe transmission and/or transfer case damage.
26. Based on Mr. Pearen's evidence, I find a transfer case can be damaged if a 4WD jeep is towed without a dolly.
27. MTL says it agrees with the "tow company's" statements about the proper towing method for the jeep". I infer this means it agreed with Mr. Pearen that since a flatbed truck was not used, a dolly was required to tow the jeep.

28. MTL says “the proper towing protocols were followed” and it used a dolly when it towed the jeep. It says Mr. Richards’s photographs showing there was no dolly under the front wheels were taken before the jeep was actually towed away. While it did not explicitly state it, MTL implied that a dolly was placed under the front wheels after the photographs were taken but before the tow truck left.
29. MTL did not provide evidence that a dolly was used to tow the jeep. While parties are under no obligation to provide evidence during the CRT decision process, failing to do so can lead to an adverse inference. I find that an adverse inference is appropriate in this case because I would have expected MTL to provide evidence from BC about whether he placed a dolly under the jeep’s front wheels before towing it. Without BC’s statement, I give no weight to MTL’s allegation that a dolly was used to tow the jeep. I find MTL breached the standard of care when BC towed the jeep without a dolly.
30. I turn now to causation. Mr. Drost is a licensed Red Seal Mechanic who works at Fountain Tire where the jeep’s transfer case was replaced. I accept that Mr. Drost is qualified under CRT rule 8.3 to provide an expert opinion about automotive repair. Mr. Drost stated the transfer case was locked on “4 low” and the fluid from the transfer case was discoloured and smelled burnt. However, he did not explain the significance of these observations. Also, although he stated that based on the jeep’s mileage a transfer case was not normally replaced on a 4 year to 5 year old vehicle, he did not provide an opinion about how the transfer case was damaged. I find Mr. Drost’s statement confirms that the transfer case was damaged. Aside from this, I find his statement is not particularly helpful.
31. MTL says the transfer case could have already been damaged before the accident from improper maintenance. It also says it could have been damaged by the accident, or after the jeep was returned to Mr. Richards. I will address each in turn.

Was the transfer case damaged before the accident?

32. Mr. Richards says the 4WD engaged and disengaged properly from high to low mode before the jeep was towed. He also says the difference between how the jeep

operates in high mode and low mode is “extremely” noticeable. He says when the jeep is in low mode, it produces more torque, higher RPMs, operates at “greatly” reduced speeds, and a “4WD Low” indicator is present on the instrument display.

33. Mr. Richards also says he followed the manufacturer’s maintenance recommendations. He submitted maintenance records that showed the oil was changed in accordance with the jeep’s recommended maintenance schedule and all fluids were topped up at that time.
34. MTL submitted an article written by Stephen Fogel entitled “Signs of a Bad Transfer Case” from the internet. The article described Mr. Fogel as an “automotive enthusiast”. Mr. Richards says the article should not be given any weight since Mr. Fogel is not a mechanic or automotive expert and his qualifications are unknown. I find Mr. Fogel is not qualified to give opinion evidence about transfer cases and so I give the article no weight.
35. Even if Mr. Fogel was qualified, I find the article does not help MTL. It stated that a bad transfer case can cause low fluid levels and will result in a very noticeable burnt fluid smell. MTL says that since Mr. Drost noted a burnt smell, the transfer case’s fluids were low. However, Mr. Drost did not inspect the transfer case until after February 24, 2020. I find there is no evidence of a burnt smell before the accident or when the accident damage was repaired.
36. Aside from the article, MTL did not provide any other evidence to support its allegation. Based on Mr. Richards’ evidence, I find it unlikely the transfer case was damaged before the accident.

Was the transfer case damaged in the accident?

37. MTL says Mr. Richards admitted the road was slippery and the jeep was in low mode when the accident occurred. It says the jeep locked in low mode due to the accident. It also says Mr. Drost noticed the jeep was “locked” in low mode which was caused by the accident.

38. I find the evidence does not support MTL's allegation based on the following:
- a. Mrs. Richards, not Mr. Richards, was driving the jeep at the time of the accident and while she agreed the road was slippery, she stated in her testimony that the jeep was in all wheel drive and not low mode when the accident occurred,
 - b. Mr. Drost would not have directly known if the jeep was locked in low mode after the accident since he did not inspect it until after the accident damage was repaired,
 - c. According to Craftsman Collision's manager, BD, there was no apparent damage to the jeep's undercarriage/transfer case when it was repaired, and
 - d. There is no evidence the jeep was locked in low mode before February 24, 2020.
39. Based on the above, I find there is no evidence that the jeep was locked in low mode when the accident occurred or that the transfer case was damaged by the accident.

Was the transfer case damaged after the jeep was returned to Mr. Richards?

40. Mr. Richards says the jeep was operating in 4WD high mode, which is the default setting, when he picked it up on January 9, 2020 and was driving normally without any indication that it was in low mode until he first tried to engage it in low mode on February 24, 2020.
41. MTL has not submitted any evidence to explain how the transfer case could have been damaged between January 9 and February 24. Also, there is no evidence of an intervening event that could have damaged the transfer case. I find MTL's allegation the transfer case was damaged after January 9, 2020 is speculative and give it no weight.
42. Based on the expert witnesses' statements, I find that on a balance of probabilities, the transfer case was damaged when MTL towed the jeep without a dolly on

December 13, 2019. I also find the damage was not discovered until after Mr. Richards tried to engage the 4WD low mode setting on February 24, 2020, after which the jeep was locked in low mode and a burnt smell was discovered. Mr. Richards provided an invoice showing the cost of replacing the transfer case was \$2,127.17 and so I award \$2,127.17 to Mr. Richards for damages.

CRT FEES, EXPENSES, AND INTEREST

43. The *Court Order Interest Act* applies to the CRT. Mr. Richards is entitled to pre-judgment interest on \$2,127.17 from February 29, 2020, the date Mr. Richards paid for the transfer case repair, to the date of this decision. This equals \$17.94.
44. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find Mr. Richards is entitled to reimbursement of \$125 in CRT fees. Mr. Richards also submitted a \$40.61 invoice for a BC Registry Search. I find this cost was reasonable and I find Mr. Richards is entitled to \$40.61 in dispute-related expenses.

ORDERS

45. Within 14 days of the date of this order, I order MTL to pay Mr. Richards a total of \$2,310.72, broken down as follows:
 - a. \$2,127.17 in damages for repair costs,
 - b. \$17.94 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$165.61, for \$125 in CRT fees and \$40.61 for dispute-related expenses.
46. The applicant is entitled to post-judgment interest, as applicable.
47. Under section 48 of the CRTA, the CRT 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 CRT's final decision. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

48. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT 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 CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Rama Sood, Tribunal Member