



Civil Resolution Tribunal

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File: SC-2021-006164

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Estate of Monika Rogers, deceased v. Trischuk*, 2022 BCCRT 694

B E T W E E N :

Estate of Monika Rogers, deceased

APPLICANT

A N D :

MARK TRISCHUK and INSURANCE CORPORATION OF BRITISH
COLUMBIA

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This small claims dispute is about an alleged motor vehicle accident that occurred on September 27, 2019 in Vancouver, BC.
2. This dispute was initially commenced by Monika Rogers, who is now deceased. The executor of Ms. Rogers' estate advised the CRT that they wished to continue this

dispute on Ms. Rogers' behalf, so the CRT agreed to amend the Dispute Notice to change the applicant's name from Monika Rogers to Estate of Monika Rogers, deceased. I will refer to the applicant as Ms. Rogers in these reasons.

3. At the time of the accident, Ms. Rogers was driving with a bicycle mounted on a rack at the rear of her vehicle. The respondent, Mark Trischuk, was a pedestrian. Mr. Trischuk reported to the respondent insurer, Insurance Corporation of British Columbia (ICBC), that Ms. Rogers struck him with the bicycle on her vehicle as she drove past him. Ms. Rogers denies that the bicycle hit Mr. Trischuk.
4. ICBC internally determined that a collision took place and assigned 25% fault to Ms. Rogers. Ms. Rogers says that ICBC failed to act fairly or reasonably in investigating and assigning fault for the accident. I infer it is Ms. Rogers' position that Mr. Trischuk made a false claim to ICBC, or alternatively, if the accident occurred, that Mr. Trischuk was fully responsible for the accident. Ms. Rogers claims \$1,260 for an expert report she obtained to show the accident could not have occurred as Mr. Trischuk alleged, plus various other dispute-related expenses.
5. Mr. Trischuk says the Civil Resolution Tribunal (CRT) is not the appropriate forum to decide liability for the accident because he has started an action in the BC Supreme Court (BCSC) for injuries from this accident (Court File No. M212749, Vancouver Registry). Mr. Trischuk says the BCSC will consider the same facts, issues, and law, so the claims against him in this CRT dispute should be dismissed or "stayed". In any event, Mr. Trischuk says that Ms. Rogers has not proven the bicycle on her car did not hit him.
6. ICBC says it properly assigned fault for the accident. ICBC denies that it breached any statutory or contractual duty to Ms. Rogers and says it dealt with Ms. Rogers appropriately, fairly, and in good faith at all times. ICBC says that Ms. Rogers' claims against it should be dismissed.
7. The applicant is represented by the executor of Ms. Rogers' estate, TR. Mr. Trischuk, who is a lawyer, represents himself. ICBC is represented by an employee.

JURISDICTION AND PROCEDURE

8. These are the CRT's formal written reasons. 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.
9. 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. In some respects, both parties to this dispute call into question the credibility, or truthfulness, of the other. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. I note the decision in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 28, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.
10. 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.
11. 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.

12. Ms. Rogers submitted one item of late evidence, which consisted of a screenshot from a video that was previously submitted as evidence on time. The respondents did not object and were provided with an opportunity to comment on the late evidence, so I find they are not prejudiced by it. I have allowed the late evidence, though nothing turns on it in my decision.

ISSUES

13. The issues in this dispute are:

- a. Should the CRT resolve Ms. Rogers' claims against Mr. Trischuk?
- b. If so, who is liable for the accident?
- c. Did ICBC breach its statutory or contractual obligations in investigating the accident and assessing fault?
- d. What is the appropriate remedy, if any?

EVIDENCE AND ANALYSIS

14. In a civil proceeding like this one, the applicant Ms. Rogers must prove her claims on a balance of probabilities (meaning "more likely than not"). I have read all of the parties' evidence and submissions, but I refer only to what I find is necessary to explain my decision.

15. It is undisputed that Ms. Rogers was driving her vehicle on September 27, 2019 with her bicycle on a rack at the rear of her vehicle. Ms. Rogers was exiting an underground parking lot for Robson Square in downtown Vancouver. She reported to ICBC that she had intended to take a different exit so she could travel south on Howe Street, but she mistakenly found herself exiting onto Smithe Street. This exit initially has a narrow lane that runs parallel with Howe Street and then requires drivers to turn right onto Smithe Street.

16. Ms. Rogers said she was driving in the middle of the exit lane, and she did not see any pedestrians on the sidewalk to her right. She said there was a green light for traffic on Howe Street, and she completed her right turn onto Smithe Street and then came to a stop for traffic. While she was stopped, she said Mr. Trischuk approached her vehicle and started taking photos of her and her vehicle. Ms. Rogers said Mr. Trischuk was also shouting that she had hit him, which she denied.
17. Mr. Trischuk reported to ICBC that he was walking on the sidewalk intending to cross Smithe Street. He stated that just as he was about to step off the curb to cross the parking lot exit lane, Ms. Rogers' vehicle cut in front of him to make a right turn onto Smithe Street. Mr. Trischuk reported that Ms. Rogers' bike wheel was sticking out past the width of her vehicle, and it hit his left shoulder and both arms as she passed by him.

Should the CRT resolve Ms. Rogers' claims against Mr. Trischuk?

18. For her claims against Mr. Trischuk, I find that Ms. Rogers is asking the CRT to determine whether a collision occurred, and if so, who is liable for the accident.
19. As noted, Mr. Trischuk filed an action in the BCSC against Ms. Rogers, claiming damages for injuries he says he suffered from the collision with Ms. Rogers' bicycle (BCSC action). In the Notice of Civil Claim for the BCSC action, Mr. Trischuk alleges that Ms. Rogers was negligent and caused the accident. The evidence shows that ICBC appointed a lawyer to defend Ms. Rogers against Mr. Trischuk's BCSC action. In the Response to Civil Claim that ICBC filed on Ms. Rogers' behalf, liability is denied.
20. The ICBC file notes in evidence also show that ICBC has taken the position that Mr. Trischuk bears the majority of responsibility for the collision. As noted, ICBC internally determined that he was 75% responsible. So, on the evidence before me, I find that liability for this accident is a live issue to be determined in the BCSC action.
21. Section 11(1)(a) of the CRTA says that the CRT may refuse to resolve a claim or dispute within its jurisdiction if it considers that the claim or dispute would be more

appropriate for another legally binding process or dispute resolution process. One of the factors in deciding issues of this sort is avoiding multiple proceedings and inconsistent findings on the same issues between the CRT and the courts.

22. The parties are the same in the BCSC action and this CRT dispute, and the same liability issue is raised in both. I am satisfied that both proceedings will have to consider the same facts, evidence, and law. I find it would not be appropriate or fair for the CRT to concurrently make findings about the same set of facts, and that this duplication of process could lead to confusing or conflicting results.
23. Further, I note that Mr. Trischuk has provided limited evidence about the accident circumstances in the context of this dispute. He confirmed in a March 4, 2020 letter to ICBC that he did not intend to provide any further statements, as he had provided everything required to comply with his statutory obligations. The BCSC process will include examinations for discovery, as well as oral testimony and cross-examinations at trial. So, I find the BCSC will likely have additional relevant evidence available when making a liability determination, that is not available in these CRT proceedings.
24. I acknowledge that the BCSC action will likely take significantly longer than the CRT process to conclude, and Mr. Trischuk could settle the BCSC action before the court determines liability. However, on balance, I find these considerations are outweighed by the other factors in favour of the BCSC deciding liability.
25. In the circumstances, I find it is appropriate to exercise my discretion to refuse to resolve Ms. Rogers' claims against Mr. Trischuk under section 11(1)(a) of the CRTA because they are more appropriate for resolution at the BCSC.
26. I note that Mr. Trischuk also argued that Ms. Rogers brought this CRT dispute as a collateral attack against the BCSC action, and so this dispute should be dismissed as an abuse of process. Ms. Rogers denied any knowledge of the BCSC action before she applied for CRT dispute resolution. Given my finding that the BCSC is a more appropriate forum in any event, I find it is unnecessary to consider this argument.
27. I turn to Ms. Rogers' claims against ICBC.

Did ICBC breach its statutory or contractual obligations in investigating the accident and assessing fault?

28. To succeed against ICBC, Ms. Rogers must prove on a balance of probabilities that ICBC breached its statutory obligations or its contract of insurance, or both. The issue is whether ICBC acted “properly or reasonably” in administratively assigning Ms. Rogers 25% responsibility for the accident: see *Singh v. McHatten*, 2012 BCCA 286, referring to *Innes v. Bui*, 2010 BCCA 322.
29. ICBC owes Ms. Rogers of duty of good faith, which requires ICBC 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 paragraphs 22, 55 and 93. As noted in the Continuing Legal Education 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 *MacDonald v. Insurance Corporation of British Columbia*, 2012 BCSC 283.
30. First, Ms. Rogers suggests that ICBC’s liability decision was improperly influenced by a perceived threat from Mr. Trischuk. The evidence shows an ICBC claims specialist, KF, asked an ICBC manager, MB, to review the claim on January 29, 2020 in light of an undated email from Mr. Trischuk that stated he would seek special costs and punitive damages if ICBC denied his injury claim.
31. MB’s file review notes show Ms. Rogers suggested in an October 8, 2019 report to ICBC that Mr. Trischuk may not have been paying attention and walked into her bike rack. MB’s notes also show he considered both parties’ reports about the alleged accident circumstances and reviewed a Google Map of the scene. MB recommended hiring an independent adjuster to conduct further investigations before determining how to proceed.

32. I find it unproven that ICBC was improperly influenced by any threat in its investigation. I find Mr. Trischuk put ICBC on notice about what steps he would take if ICBC denied his claim, and there is insufficient evidence to conclude that this impacted ICBC's ability to objectively investigate the claim. I also find ICBC acted fairly and reasonably in response by considering both parties' versions and obtaining more information before determining liability.
33. Next, Ms. Rogers argues that ICBC did not treat her fairly because it did not require Mr. Trischuk to provide additional evidence to clarify his version of the accident. Ms. Rogers says she cooperated fully with ICBC's investigation, including meeting with an independent adjuster in August 2020 and providing additional photographs and videos, but that ICBC simply accepted Mr. Trischuk's March 4, 2020 letter stating he would not submit any further evidence because he was not required to do so.
34. As noted above, I find Mr. Trischuk provided ICBC with a statement about the accident circumstances, as required to meet his statutory and contractual obligations. I find ICBC had no authority to force Mr. Trischuk to provide additional evidence, and ICBC was not obligated to find against him for declining to do so. Rather, ICBC's obligation was to come to a fair and reasonable determination based on the available evidence.
35. ICBC's August 20, 2020 file notes show that MB considered an August 13, 2020 report from an independent adjuster, who interviewed Ms. Rogers, took photos and measurements of the accident scene and of Ms. Rogers' vehicle and bicycle. Based on the report, MB accepted that Ms. Rogers' bike wheel likely stuck out at least 5 inches from the side of her vehicle. MB noted that Mr. Trischuk would likely convince a trier of fact that an impact had occurred, given his actions after the alleged accident. MB considered that Ms. Rogers may have been distracted, having taken the wrong exit, and she may not have seen the impact, which would have happened behind her. MB also noted that Ms. Rogers had a duty to be extra vigilant not to travel too close to the curb given the position of her bicycle.

36. ICBC advised Ms. Rogers in a September 21, 2020 letter that it had found her 25% responsible for the accident and Mr. Trischuk 75% responsible. The letter noted that this determination would not impact Ms. Rogers' driver factor or future premiums.
37. Ms. Rogers disagreed with the liability finding, and she advised ICBC she wanted to dispute it. She provided ICBC with additional submissions and photographs of the accident location and her vehicle, which ICBC's file notes show MB considered, but they did not change ICBC's position. Overall, I find ICBC diligently reviewed all the evidence and reasonably determined that both parties failed to fulfil their duty to keep a full and proper lookout to some extent.
38. Finally, Ms. Rogers says that ICBC refused to consider an expert report that she obtained, which she argues definitively proves her bicycle could not have hit Mr. Trischuk. The evidence shows Ms. Rogers sent ICBC a December 8, 2020 email advising that she had hired a forensic engineering firm to conduct an investigation into the accident. ICBC responded that day to advise it would not reimburse any cost associated with an engineer's report and requested that Ms. Rogers not send further communication about the matter as it had already fully explained her appeal options to her.
39. ICBC says that when Ms. Rogers provided the May 24, 2021 engineering report, it was "entirely irrelevant" to ICBC's investigation and liability determination, which had been concluded 9 months earlier. ICBC says it is not obligated to keep its liability determinations open for reconsideration for an indeterminate period. It says it had advised Ms. Rogers of her appeal options if she still wanted to dispute the liability determination.
40. I agree with ICBC. I find that ICBC made a fair and reasonable liability determination after diligently reviewing the evidence available, including a detailed report from an independent adjuster. As noted, ICBC does not have to investigate an accident with the proficiency of a detective. I find this means that ICBC does not have to keep its liability determinations open indefinitely to continually reassess new evidence, even if that new evidence comes from an expert. I find ICBC reasonably concluded its

investigation into liability and advised Ms. Rogers it would not be considering further evidence or submissions.

41. I acknowledge that Ms. Rogers disagrees with ICBC's fault assessment. However, I find she has not shown that ICBC breached its statutory obligations or its contract of insurance in investigating the accident and assessing her 25% responsible. I dismiss Ms. Rogers' claims against ICBC.

42. 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. Ms. Rogers was unsuccessful and so I dismiss her claim for CRT fees and dispute-related expenses. Neither Mr. Trischuk nor ICBC paid CRT fees or claimed any dispute-related expenses.

ORDER

43. I refuse to resolve Ms. Rogers' claims against Mr. Trischuk under section 11(1)(a) of the CRTA.

44. I dismiss Ms. Rogers' claims against ICBC.

Kristin Gardner, Tribunal Member