



# Civil Resolution Tribunal

Date Issued: January 8, 2019

File: SC-2018-001648

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *de Jong v. DeLaCruz et al*, 2019 BCCRT 32

**B E T W E E N :**

Carl de Jong

**APPLICANT**

**A N D :**

Mynor DeLaCruz, Bishara Tours Inc. dba Marlin Travel, and Goway  
Travel Ltd.

**RESPONDENTS**

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## **REASONS FOR DECISION**

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Tribunal Member:

Shelley Lopez, Vice Chair

## **INTRODUCTION**

1. This dispute is about alleged damage to the applicant's CPAP machine, for which he claims \$1,675.
2. The applicant, Carl de Jong, went on a tour through Africa. He says an Avis Limousine driver, hired by the respondent Goway Travel Ltd. (Goway), opened his vehicle's trunk at the South Africa Port Elizabeth airport on September 12, 2017 and his CPAP machine fell on the ground and did not work that night.
3. The applicant arranged for his tour through the respondent travel agent Mynor DeLaCruz, who worked for the respondent Bishara Tours Inc. dba Marlin Travel (Marlin). The tour was provided through Goway. The applicant chose not to buy travel insurance from Marlin, and instead bought it from Goway.
4. The applicant had originally also named Northbridge General Insurance Corporation Societe D'assurance Generale Northbridge (Northbridge) as a respondent, but as the applicant never served Northbridge with the Dispute Notice, the dispute against Northbridge did not proceed.
5. The applicant and Mynor DeLaCruz are each self-represented. Marlin is represented by its principal, Wagih Bishara. Goway is represented by David Zolis, an employee or principal.
6. For the reasons that follow, I find the applicant's claims must be dismissed.

## **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* (Act). 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 the circumstances here, I find that I am properly able to assess and weigh the documentary 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 that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.
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. Under tribunal rule 126, 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.

## **ISSUE**

11. The issue in this dispute is to what extent, if any, each of the respondents are responsible for damage to the applicant's CPAP machine, and if so, what is the appropriate remedy.

## **EVIDENCE AND ANALYSIS**

12. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. I have only addressed the evidence and submissions below as necessary to explain my decision.

13. Together with his travelling companion, the applicant went on a tour in Africa in the fall of 2017. It is undisputed that while on the trip, his CPAP machine was damaged when it fell out of a limousine trunk after the driver opened the trunk lid at the South African airport.
14. The applicant's evidence consists of a series of emails to Mr. DeLaCruz and Goway, and his written submission. In one submission, the applicant says "full responsibility should be with" Goway, and, Avis Limousine (Avis). The applicant does not address why Mr. DeLaCruz or Marlin should be held responsible, other than alleging they received a commission from selling the insurance and therefore allegedly have a fiduciary responsibility to honour the insurance.
15. Marlin denies it is liable. I agree. The applicant has not proved Marlin is responsible for any damage to the CPAP machine, given it is undisputed that Marlin did not arrange the tour or the limousine service. Further, Marlin did not provide the applicant with the insurance for the trip, and by the applicant's own submission, it is Goway that should be held responsible. Mr. DeLaCruz worked for Marlin, and there is no evidence whatsoever that Mr. DeLaCruz should be held personally liable for anything. I dismiss the applicant's claims against Mr. DeLaCruz and Marlin.
16. I turn then to the respondent Goway, the tour operator. Goway says it could not determine fault for the broken CPAP machine. I find the applicant has not proved negligence by the limousine driver or anyone. My reasons follow, and I will address separately the issue of insurance coverage below.
17. The applicant says that after driving the group from a game reserve to the Port Elizabeth airport in South Africa, the limousine driver, hired by Goway, opened the trunk and the applicant's CPAP machine fell onto the road. The applicant says the driver packed the CPAP machine into the trunk. The applicant says he had told the driver it was a CPAP machine and to handle it with care. The applicant says that night his CPAP machine did not work, but it had worked the night before.

18. Mr. DeLaCruz and Goway acknowledge that during the trip to the airport the luggage shifted in the trunk due to the bumpy gravel road. They acknowledge that when Edward opened the trunk the bag rolled out onto the ground.
19. The difficulty for the applicant is that apart from the issue of insurance, discussed below, there is no strict liability. The applicant has not proved Goway is responsible for the limousine driver's actions. However, even if Goway was responsible for the driver, the applicant has not proved the driver was negligent.
20. In order to succeed in a claim of negligence, 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;
  - d. The respondent's breach of the standard of care caused the applicant's damages, in fact and law.

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

21. Certainly, there was a duty of care to the applicant customer. I find the standard was to take reasonable precautions in packing a customer's luggage and in removing it. The issue in this dispute is the applicant has not proved Goway or even the driver breached that standard of care. The only evidence is that the luggage shuffled in the trunk during a bumpy ride, and unexpectedly fell out when the trunk lid was opened. The applicant has not indicated what the driver could have done differently to avoid the damage or what the driver could have done to better store his CPAP machine in the trunk. For these reasons, I find the applicant has not proved Goway was negligent.
22. I turn then to the question of insurance.

23. Upon return home on September 17, 2017, the applicant hoped the CPAP could be fixed, but later he learned it could not and bought a replacement machine for \$1,600. The applicant submits that he took his machine to 2 CPAP suppliers and both said it could not be repaired. However, the applicant provided no evidence from those suppliers nor any invoice for the cost of the CPAP. That said, I note one of the applicant's emails notes he paid only \$1,300 for the replacement CPAP machine, yet the applicant does not explain why in this dispute he claims \$1,675. Quite apart from the fact the applicant has not proved Goway was negligent, the applicant has not proved the claimed damage.
24. The applicant says the travel insurance was through "Trip Mate", paid to Marlin. Goway provided the applicant with a "Trip Mate" travel insurance policy. Based on the parties' submissions, I accept that the applicant submitted a claim to Trip Mate, who found that the applicant's CPAP machine was about 10 years old, and therefore worth a fraction of its original value. The applicant was given a nominal refund, about \$160 CAD. Later, Goway says as a gesture of good faith, it increased the compensation to the applicant by offering \$640, bringing the applicant's total compensation to \$800.
25. In reply, the applicant submits that he appreciated the \$640 from Goway, but feels that Avis, via Goway, should pay at least \$500 additional since Avis' employee was "totally responsible" on the basis of "if you break it, consider it sold". Again, the applicant does not explain why he still claims \$1,675 in this dispute.
26. The applicant says Goway, and Avis Limousines (Avis), should be "100% liable" for damaging his CPAP. The applicant says Avis was "supplied with the tour package", and Avis was Goway's subcontractor. Avis is not named as a respondent. The applicant says both Goway and Avis should have liability insurance for accidents caused by their employees and their suppliers.
27. The applicant chose travel insurance through Goway, not Marlin. Based on the evidence before me, the Goway policy provides for a maximum payment of \$300 for damage "per article". The Goway policy also excludes coverage for breakage of

“fragile” items, which the applicant says applies to the CPAP machine. For all of these reasons, the applicant has not proved he is entitled to more than the \$800 he has received. I find the applicant’s claim under the Goway insurance policy must be dismissed.

28. Given my conclusions above, I find the applicant’s claims must be dismissed. The applicant was unsuccessful in this dispute. In accordance with the Act and the tribunal rules, I find he is therefore not entitled to reimbursement of tribunal fees or dispute-related expenses.

## **ORDER**

29. I order the applicant’s claims, and this dispute, are dismissed.

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Shelley Lopez, Vice Chair