



Civil Resolution Tribunal

Date Issued: August 17, 2020

File: SC-2020-003242

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Dhillon v. Erin Poirier dba Ocean Blue Day Spa*, 2020 BCCRT 918

BETWEEN:

RABINDER DHILLON

APPLICANT

AND:

ERIN POIRIER (Doing Business As OCEAN BLUE DAY SPA)

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This dispute is about symptoms following facial skin treatments. The applicant, Rabinder Dhillon, obtained facial skin treatments from the respondent, Erin Poirier, doing business as Ocean Blue Day Spa. Ms. Dhillon says that the treatments injured her, causing “permanent scarring.” Ms. Dhillon claims \$4,889.17: \$4,500 in damages for alleged injuries and scarring, a refund of \$289.17 for the cost of the

treatments, and \$100 in care aide expenses that went unused because of the symptoms.

2. Ms. Poirier says she performed the treatments properly, but Ms. Dhillon's failure to follow the required after-care instructions, and failure to disclose her use of contra-indicated medication, are likely the cause of her facial skin symptoms. Ms. Poirier denies injuring Ms. Dhillon, and says that in any event, Ms. Dhillon signed a liability waiver that eliminates Ms. Poirier's liability for any injury. So, Ms. Poirier says she owes nothing.
3. Each party is self-represented in this dispute.

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). 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 parties to a dispute that will likely continue after the dispute resolution process has ended.
5. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. This dispute involves a "she said, she said" scenario in some respects, with each side calling into question the credibility of the other. Credibility of witnesses cannot be determined solely by the test of whose personal demeanour appears to be the most truthful in a courtroom or CRT proceeding. In the decision *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. Keeping in mind that the CRT's mandate includes proportionality and a speedy resolution of disputes, I find I can properly assess and weigh the written evidence and submissions before me, and that an oral hearing is not necessary. Therefore, I decided to hear this dispute through written submissions.

6. 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.
7. 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.

ISSUE

8. The issue in this dispute is whether Ms. Poirier is responsible for Ms. Dhillon's facial skin symptoms, and if so, does Ms. Poirier owe Ms. Dhillon \$4,889.17 or another amount?

EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, Ms. Dhillon, as the applicant, must prove her claims on a balance of probabilities. I have read and weighed all the submitted evidence, but I refer only to the evidence I find relevant to provide context for my decision.
10. The undisputed evidence is that the parties discussed facial skin treatments in early December 2019. The parties agree that these discussions addressed Ms. Dhillon's pre-existing facial acne. Ms. Poirier says, and Ms. Dhillon does not directly deny, that the acne was related to pre-existing "scarring" on the right side of Ms. Dhillon's face and her entire chin.
11. On December 10, 2019, Ms. Poirier performed a microdermabrasion treatment and a glycolic peel treatment on Ms. Dhillon's facial skin. From context and the evidence before me, I find that microdermabrasion involves the mechanical exfoliation and abrasion of a thin layer of surface skin, and a glycolic peel involves similar exfoliation and abrasion by chemical means. Ms. Dhillon signed a questionnaire

before the treatments, which included a liability waiver as well as questions about medication she was taking and pre-existing conditions. The evidence shows Ms. Dhillon expressed no dissatisfaction to Ms. Poirier at the time of treatment. The parties agree there were no obvious skin symptoms immediately after the treatments, apart from two pink lines on Ms. Dhillon's left jaw.

12. The parties agree that Ms. Dhillon experienced increased facial skin symptoms the following day. Photos taken on December 11, 2019 show a series of red scratch-like lines on Ms. Dhillon's face, primarily on her right cheek and chin. Ms. Dhillon says Ms. Poirier's treatments caused her facial skin symptoms, including permanent scarring. Ms. Dhillon says she felt unable to attend a Christmas party soon after the treatments due to her face's appearance. Ms. Dhillon says she paid a caregiver \$100 to take care of her mother so she could attend the party, and her arguments imply that she was unable to obtain a refund from the caregiver.
13. The details of Ms. Dhillon's facial care following the treatments are relevant. Ms. Dhillon does not directly deny that on December 10, 2019, Ms. Poirier explained the expected after-effects of the treatments, including that her entire face would dry and flake. However, Ms. Dhillon says during their discussion several days before the treatments, Ms. Poirier advised that her face would be in good condition for an event two days after the treatments, and there would be "no downtime." In contrast, Ms. Poirier says Ms. Dhillon said she had a Christmas party 1.5 weeks after the treatments. Regardless of this misunderstanding, Ms. Dhillon experienced additional symptoms by the day after the treatments, as discussed below.
14. I find the evidence confirms Ms. Poirier provided Ms. Dhillon with specific instructions for facial care immediately following the treatments, and Ms. Dhillon did not follow those instructions. Ms. Poirier says, and Ms. Dhillon does not deny, that she told Ms. Dhillon not to put anything, including water, on her face until the morning after the treatments. That following morning, Ms. Dhillon was to apply ½ a packet of moisturizer given to her by Ms. Poirier, and the remaining ½ packet the following evening, and nothing else that day.

15. Ms. Dhillon says she did not wait until the morning after, but applied the packet of moisturizer on December 10, 2019, the same day as the treatments. Because her face began to feel felt tight and painful that evening, she also applied rose hip oil to it. I find correspondence between the parties confirms that Ms. Dhillon also applied makeup the following day. Ms. Dhillon does not explain why she felt she could ignore Ms. Poirier's instructions, but suggests she expected no negative effects from her actions.
16. Ms. Poirier says rose hip oil can contain Trentinoin, which is contra-indicated for Ms. Dhillon's treatments. Ms. Poirier also says rose hip oil is used to treat acne, and that Ms. Dhillon's symptoms appeared only where she had pre-existing acne. Ms. Poirier felt this was evidence that Ms. Dhillon had previously used rose hip oil or a similar medication on her acne. Ms. Dhillon denies previously using rose hip oil on her face. I note that Ms. Dhillon indicated in the questionnaire that she does not take Trentinoin, and the evidence does not indicate that she asked Ms. Poirier what Trentinoin was or what products might contain it. Ms. Dhillon also indicated that she did not take any "natural, recreational and/or pharmaceutical medication", which I find in this case includes rose hip oil. Ms. Poirier says that applying any kind of oil to the face following the treatments, including rose hip oil or makeup, can cause burns, which she says is likely what happened to Ms. Dhillon.
17. Ms. Dhillon provided no medical evidence, and does not say whether she ever sought medical attention for her symptoms. As a result, the evidence contains no diagnosis of Ms. Dhillon's symptoms, or whether they are medically related to Ms. Poirier's treatments, Ms. Dhillon's chosen post-treatment oil and makeup applications, or another cause. There is also no medical confirmation of whether Ms. Dhillon suffered permanent scarring from any cause.
18. Turning to Ms. Dhillon's claims, I find she alleges, essentially, that Ms. Poirier was negligent in providing her treatments. According to *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paragraph 3, to prove negligence, Ms. Dhillon must demonstrate that:

- a. Ms. Poirier owed her a duty of care,
- b. Ms. Poirier's behaviour breached the standard of care,
- c. Ms. Dhillon sustained damage, and
- d. That damage was caused, in fact and in law, by Ms. Poirier's breach.

19. The parties do not dispute that Ms. Poirier owed Ms. Dhillon a duty of care. The question here is whether Ms. Poirier breached the applicable standard of care, and if so, whether the breach caused Ms. Dhillon's claimed damages. I noted above that Ms. Dhillon bears the burden of proof, and for the below reasons I find she has not proved any such breach or damage.

20. In claims of professional negligence, the applicant generally needs to show a breach of the standard of care through expert opinion evidence. I consider Ms. Poirier's facial treatments to be 'professional' services in these circumstances. While there is not an absolute rule, I find expert opinion evidence is needed here, because the subject matter is technical and outside the knowledge and experience of the ordinary person (see *Bergen v. Guliker*, 2015 BCCA 283).

21. Ms. Dhillon provided a June 19, 2020 report from another aesthetician, LM, which she says is expert evidence showing that Ms. Poirier breached the standard of care. LM said that she had never seen post-microdermabrasion skin like that in the photos of Ms. Dhillon's face, but she said the photos showed path lines of microdermabrasion. Based on this, LM thought Ms. Poirier administered the microdermabrasion too aggressively and without care and attention. LM also thought rose hip oil would not have had detrimental effects on Ms. Dhillon's skin, without specifying how she came to this conclusion.

22. CRT rule 8.3 says that expert opinion evidence will only be accepted from a person the CRT decides is qualified by education, training, or experience to give that opinion. I am not satisfied that LM is qualified to give an expert opinion in this case. In her report, LM says she is the owner and operator of a spa, and has practiced as

an aesthetician since 1987. LM also says she has an “Aesthetics Licence” from the Academy of Excellence in Victoria, BC, although the evidence does not show that aesthetics is a licenced profession in BC, and LM provided no detail on the length or content of her training. Further, LM suggested that she performs microdermabrasion and glycol peel procedures, but does not say how long she has been performing such procedures or what her training in those specific procedures is, if any.

23. In addition, I note that Ms. Dhillon gave a template “expert opinion” document to LM, which LM filled in to create the report. While LM added her own opinions to the report, she kept almost the entire template paragraph labelled “Your Instructions to Me”, as well as the first line of the opinion section, which reads, “In my opinion, Ms. Erin Poirier did not meet the expected professional standard in performing this procedure.” I find Ms. Dhillon wrote those passages. I find this casts doubt on whether the report is entirely a neutral expert opinion, or was created to support Ms. Dhillon’s pre-determined conclusions. LM also did not explain the complete factual basis used to form her opinions, and did not identify or provide the results of the rose hip oil “research” she claims to have performed. She also based her opinion on photos of Ms. Dhillon’s facial skin taken after Ms. Dhillon’s failure to follow the required after-care instructions. I find this casts doubt on the reliability of the report in any event.
24. Even if I had accepted LM’s report as expert evidence, I find it does not adequately address the applicable standard of care and whether Ms. Poirier breached it. LM simply outlined what her usual treatment practice is, rather than what the applicable standard should be. Further, I find LM was aware of, but failed to sufficiently explain, Ms. Poirier’s allegations about Trentinol in rose hip oil, the effects of applying that oil, makeup, or other materials after the procedures, and Ms. Dhillon’s pre-existing acne and related treatments. As a result, I place little weight on LM’s conclusion that Ms. Poirier administered the microdermabrasion too aggressively and without care and attention.

25. In her own words, Ms. Dhillon submitted information about treatment procedures and resulting symptoms, which she says she collected from other spas. But, Ms. Dhillon did not identify those spas or provide evidence confirming their alleged opinions, so I place no weight on that evidence. I find Ms. Dhillon has failed to provide expert evidence showing that Ms. Poirier breached the applicable standard of care, which is required in this case.
26. Further, even if Ms. Poirier had breached the standard of care, I find that Ms. Dhillon has failed to show that such a breach caused Ms. Dhillon's symptoms, for the following reasons. I found above that there is no medical evidence showing that substandard treatments by Ms. Poirier were a significant cause of Ms. Dhillon's symptoms, or that her symptoms were unexpected in the circumstances, including Ms. Dhillon's post-treatment oil and makeup applications. I also reviewed the photos of Ms. Dhillon's face in evidence, and I find they fail to demonstrate the cause of any symptoms, and do not show any permanent scarring.
27. Specifically, I find that Ms. Dhillon is wearing full makeup in the photos taken before the treatments, and that those photos do not show the state of her skin. There are no photos of Ms. Dhillon's skin immediately after the treatments, when they parties agree her only symptoms were two pink lines on her left chin. As noted, the photos taken the day after the treatments show scratch-like marks primarily on her right cheek and chin, but I am unable to determine the degree to which any of these marks might have pre-dated the treatments. Finally, I find the February 2020 photos Ms. Dhillon says show permanent scarring do not reveal any noticeable scarring, and if they did, there are no adequate comparison photos showing the extent of any pre-treatment scarring. Parties are told during the facilitation stage to provide all relevant evidence, and I find it likely Ms. Dhillon submitted her best available photos, despite her suggestion that she possessed additional photos that she failed to submit.

28. Overall, I find Ms. Poirier was not negligent. Further, even if I am wrong in my conclusion that Ms. Dhillon failed to prove negligence, I find that the waiver of liability is a full defence to her claims.

29. Ms. Dhillon signed the questionnaire immediately below the waiver, which read (capitalization in original):

“NO LIABILITY: WE HAVE NO LIABILITY TO YOU OR ANY PERSON FOR:

Any health complaints or injury incurred by the undersigned, as a result of a massage or any Spa Treatment received by either Erin Poirier or Ocean Blue Day Spa Practitioner while on these premises. I have disclosed all medical information that may cause any contraindications involved with services to be performed and wish to proceed.”

30. It is reasonable that someone receiving mechanical and chemical skin exfoliating and abrasion treatments would expect that health complications or injuries were possible, and that they might be asked to sign a waiver of liability. The entire questionnaire Ms. Dhillon signed is one page long, and the waiver itself is very short. There is no evidence that Ms. Dhillon questioned anyone about the waiver or its effects, or that she was rushed when signing it. Ms. Dhillon does not deny reading, understanding, and agreeing to the waiver, and she says, “The waiver I completed was completely accurate and true.” I find Ms. Dhillon had reasonable notice of, and agreed to, the waiver, and I find below it included a waiver of Ms. Poirier’s own negligence (see *Apps v. Grouse Mountain Resorts Ltd.*, 2020 BCCA 78 and *Schuster v. Blackcomb Skiing Enterprises Ltd. Partnership*, 1994 CanLII 2855 (BCSC)).

31. Ms. Dhillon says the exact meaning of the waiver’s text does not absolve Ms. Poirier of liability, since “we” and “Spa Treatment” are not defined, and the waiver only applies to treatments received **by** Ms. Poirier or another practitioner at the spa. Ms. Dhillon says that the legal principle of *contra proferentem* applies, meaning that the

contract is ambiguous and should be interpreted in her favour, since Ms. Poirier wrote it.

32. I find Ms. Dhillon is relying on alleged technical defects in the waiver as a defence, rather than actually being unaware of its contents or disputing its intended effect, including limiting Ms. Poirier's liability for any injuries and health complaints. Based on the questionnaire and the menu of treatments for Ms. Poirier's Ocean Blue Day Spa, among other evidence, I find that "we" refers to Ms. Poirier and any other Ocean Blue Day Spa practitioner. I find that a "Spa Treatment" is anything on Ocean Blue Day Spa's menu other than a massage, and includes a microdermabrasion and a glycol peel.
33. Finally, I note that in the case cited by Ms. Dhillon, *Goodspeed et al v. Tyax Mountain Lake Resort Ltd. et al*, 2005 BCSC 1577, the court confirmed that *contra proferentem* requires that any **ambiguity** in a waiver should be interpreted against the party drafting the waiver. I find there is no ambiguity here, because there are not 2 or more possible meanings. There is simply a grammar error, similar to other typographical mistakes in the questionnaire and in Ms. Poirier's Ocean Blue Day Spa menu. The text of the waiver unambiguously refers to treatments "received by Erin Poirier". So, I find *contra proferentem* does not apply here.
34. But what does the waiver mean? I find any reasonable person in these circumstances would know, or ought to know, that Ms. Poirier, as the practitioner, would be giving treatments rather than receiving them. Therefore, Ms. Dhillon's argument that she signed a liability waiver applying to her own injuries, that are somehow caused by Ms. Poirier **receiving** treatments from Ms. Poirier or another practitioner, makes no sense. Yet, Ms. Dhillon did not question the meaning of the waiver when she signed it. In light of all the surrounding circumstances, I find a reasonable person in the same situation as Ms. Dhillon would recognize, or should recognize, that the waiver only makes sense if the word "performed" replaces "received," and that this is the only reasonable interpretation of the waiver's intent. So, I find the waiver applies to the treatments **performed** by Ms. Poirier, including

Ms. Dhillon's treatments. This is consistent with *Goodspeed*, where a waiver of liability was found to be effective despite deficiencies, including the waiver not expressly naming the parties it protected, and not expressly listing the activities it intended to cover.

35. I also note that, even if I had found Ms. Poirier liable for negligence, Ms. Dhillon has failed to prove the amount of damages she claims. She did not say how much of the \$4,500 in damages was for pain and suffering, or medical expenses, or lost future income, or other types of damage, and provided no evidence supporting any amount of damages. She provided no receipts or other proof of the cost of Ms. Poirier's spa treatments for which she claims a refund. And Ms. Dhillon failed to prove that the \$100 transferred to "Jane" on December 11, 2019 was for non-refundable care aide expenses.

36. As a result, I dismiss Ms. Dhillon's claims.

CRT FEES AND EXPENSES

37. 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. Poirier was successful here but paid no CRT fees and claimed no CRT dispute-related expenses. Ms. Dhillon claims \$250.00 for the cost of LM's expert report, but was unsuccessful in her claims. So, I order no reimbursement of fees or CRT dispute-related expenses.

ORDER

38. I dismiss Ms. Dhillon's claims, and this dispute.

Chad McCarthy, Tribunal Member