



Civil Resolution Tribunal

Date Issued: June 18, 2021

File: SC-2020-007371

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Wilson v. Wright-Smith Physiotherapist Corp.*, 2021 BCCRT 674

B E T W E E N :

JANIS WILSON

APPLICANT

A N D :

WRIGHT-SMITH PHYSIOTHERAPIST CORP., MATTHEW WRIGHT-SMITH (Doing Business As HEALTHX PHYSICAL THERAPY), and BRYAN CERVANTES

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about a cracked rib that allegedly resulted from physiotherapy. The applicant, Janis Wilson, says the respondent, Bryan Cervantes, caused the injury during a treatment session. She claims \$5,000 as compensation. Ms. Wilson also

named Wright-Smith Physiotherapist Corp. (WSPC) and Matthew Wright-Smith (doing business as HealthX Physical Therapy) as respondents, though she did not say why. I infer her position is that they are vicariously liable for Mr. Cervantes' actions.

2. The respondents deny liability. They say Ms. Wilson's claims are for medical negligence. They say she has not provided the expert evidence necessary to prove Mr. Cervantes breached the standard of care. WSPC also says it is not vicariously liable because Mr. Cervantes works as an independent contractor. Mr. Wright-Smith says he is one of WSPC's directors. He says that, as such, he is not personally liable for Mr. Cervantes' or WSPC's actions in this dispute.
3. Ms. Wilson, Mr. Cervantes, and Mr. Wight-Smith represent themselves. Mr. Wright-Smith also represents WSPC.
4. For the reasons that follow, I find Ms. Wilson requires expert evidence to prove her claim. As there is no such evidence before me, I must dismiss her claims against all the respondents.

JURISDICTION AND PROCEDURE

5. 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.
6. 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. 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.

7. 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.
8. 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

9. The issue in this dispute is whether Mr. Cervantes negligently treated Ms. Wilson, and if so, what remedies are appropriate.

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one, the applicant Ms. Wilson must prove her claims on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and arguments that I find relevant to provide context for my decision.
11. The background facts are largely undisputed. They are also documented in WSPC's treatment notes and a "contact log" noting discussions and phone calls. On May 29, 2020, Ms. Wilson went to WSPC for an initial physiotherapy assessment. She filled out and signed a general history form. She indicated she was seeking treatment for right shoulder and neck injuries from a November 2019 motor-vehicle accident. She also filled out and signed another form about her readiness for physical activity. She indicated she was taking medication for osteoporosis.
12. Mr. Cervantes filled out a treatment note that day. It shows he examined Ms. Wilson and developed a treatment plan.

13. The documents are vague on whether Ms. Wilson contracted with WSPC or Mr. Cervantes for treatment, but given my conclusions, nothing turns on this.
14. Ms. Wilson returned on June 5, 2020 for her first appointment. Ms. Wilson gives the following account, which is undisputed. She says Mr. Cervantes treated her with chest compressions on her back. She says this made a “crunch crunch” sound and caused her pain at the time. She asked Mr. Cervantes to explain the sound and he said it was a muscle releasing. Ms. Wilson finished the session and did not return to WSPC for any subsequent treatments.
15. On balance and for the following reasons, I find it likely that Ms. Wilson broke a rib during the treatment session. Mr. Cervantes’ notes indicate he administered a soft tissue massage of the back area. He did not write down any reports of pain and Ms. Wilson did not say she complained at the time. However, Ms. Wilson consulted with a physician over the phone 3 days later. The physician’s June 8, 2020 chart notes show Ms. Wilson reported hearing cracking sounds and feeling pain in her right upper rib during and after the physiotherapy appointment. Ms. Wilson’s reports of pain are therefore consistent with an injury during her treatment session.
16. The medical imaging evidence further supports my conclusion. Ms. Wilson had an x-ray on June 8, 2020 that did not show any fracture. However, she had a CT scan done on July 9, 2020. The CT scan report identified a fracture involving the lateral aspect of the right 5th rib.

Did Mr. Cervantes negligently treat Ms. Wilson?

17. Ms. Wilson did not provide a legal basis for her claim. I agree with the respondents that her claim is one of medical negligence. 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, Ms. Wilson must prove 1) Mr. Cervantes owed Ms. Wilson a duty of care, 2) Mr. Cervantes breached the standard of care, 3) Ms. Wilson sustained a loss, and 4) the loss was caused by Mr. Cervantes’ negligence.

18. I find that Mr. Cervantes owed Ms. Wilson a duty of care and that Ms. Wilson sustained a loss in the form of a cracked rib. I find that the applicable standard of care was that of a prudent and diligent physiotherapist in the same circumstances: *Swityk v. Priest et al*, 2006 BCPC 518 at paragraph 32.
19. The respondents submit that the CRT should dismiss Ms. Wilson's claims because she did not provide expert evidence about whether Mr. Cervantes breached the standard of care. In *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, the Supreme Court of Canada noted at paragraph 30 that courts and juries do not have the necessary expertise to assess technical matters relating to the diagnosis or treatment of patients. Similarly, many cases have held that as a general rule, in medical negligence claims expert evidence is required to prove the level of skill reasonably expected in the circumstances. See, for example, *Olivier v. Dr. B. Cervienka Inc.*, 2011 BCPC 371 and *Sabine v. Vancouver Island Health Authority*, 2019 BCPC 106 at paragraph 3. Expert evidence may not be necessary, however, if the common or standard practice of medical professionals is itself "fraught with obvious risk": *ter Neuzen* at paragraph 41.
20. I find that the above principles apply to health professionals including physiotherapists like Mr. Cervantes. I find that for Ms. Wilson to succeed she must provide expert evidence, either from a physiotherapist or another appropriate professional, to show Mr. Cervantes breached the standard of care.
21. Ms. Wilson did not provide any expert opinion evidence as contemplated under CRT rule 8.3. In submissions, she referred to academic articles that cautioned against certain treatments, including manual therapy, on patients with osteoporosis. She did not provide the articles and I do not find her summaries of them to be expert evidence. I am therefore not satisfied that Mr. Cervantes breached the standard of care. I also do not find the summaries sufficient to show that the standard practices used by physiotherapists are fraught with obvious risk or otherwise inherently risky.
22. For those reasons, I dismiss Ms. Wilson's claims against Mr. Cervantes. Given this, I do not find it necessary to determine if WSPC or Mr. Wright-Smith would be

vicariously liable for any wrongdoing by Mr. Cervantes. Ms. Wilson also did not allege any wrongdoing by the other respondents, so I dismiss her claims against them as well.

23. 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 dismiss Ms. Wilson's claim for CRT fees and dispute-related expenses. These include her claims for company search and courier fees totaling \$51.95. The respondents did not pay any CRT fees or claim any dispute-related expenses, so I order none.

ORDER

24. I dismiss Ms. Wilson's claims and this dispute.

David Jiang, Tribunal Member