



# Civil Resolution Tribunal

Date Issued: June 25, 2021

File: SC-2020-009786

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Lash v. Johnson*, 2021 BCCRT 708

BETWEEN:

SARAH LASH

**APPLICANT**

AN

PAMELA JOHNSON

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Richard McAndrew

## INTRODUCTION

1. This dispute is about a collapsed wall bed. The applicant, Sarah Lash, purchased a property from the respondent, Pamela Johnson. The sale included a built-in wall bed. Ms. Lash says the wall bed was negligently installed causing it to collapse. Ms. Lash claims \$4,359 for repairs and replacement of the bed.

2. Ms. Johnson denies Ms. Lash's claim. Ms. Johnson say the wall bed was installed properly and she was not aware of any defects when she sold the property.
3. Both parties are self-represented.

## **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. 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.
6. 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.
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. Johnson negligently installed the wall bed, and if so, what is the appropriate remedy.

## EVIDENCE AND ANALYSIS

9. In a civil proceeding like this one, the applicant Ms. Lash must prove her claim on a balance of probabilities. I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.
10. Ms. Johnson sold her property to Ms. Lash on June 29, 2020. The property included a built-in wall bed which could be placed in a horizontal position for use as a bed and could be raised to a vertical position for storage. Ms. Johnson says the wall bed was installed by a carpenter in 2016 and she used the bed daily until she sold the property. The purchase contract specifically included the wall bed.
11. Ms. Lash says she rented the property to tenants and the wall bed detached from the wall and collapsed on her tenants on September 20, 2020. The tenants are not parties to this dispute.
12. To prove negligence, Ms. Lash must show that Ms. Johnson owed her a duty of care, Ms. Johnson breached the standard of care, Ms. Lash sustained damage, and the damage was caused by Ms. Johnson's breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27).
13. Did Ms. Johnson owe Ms. Lash a duty of care? In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, 1995 CanLII 146, the Supreme Court of Canada held that the doctrine of *caveat emptor*, buyer beware, applies to real estate sales which generally negates a seller's duty of care to a buyer. However, the Supreme Court of Canada also said that the duty of care is not negated for dangerous defects.

14. The BC Supreme Court considered a negligence claim involving similar facts as in this dispute in *Coglon v. Ergas*, 2009 BCSC 1170. In *Coglon*, the defendant seller performed renovations to their home resulting in defects. The purchaser sued when the defects were discovered after they purchased the property. The court found that the construction defect posed a real and substantial danger if not repaired. Further, the court held that, in performing substantial home renovations, the seller was in sufficient proximity to owe the buyer a duty of care because it was foreseeable that building defects could pose a real and substantial danger to a subsequent home buyers.
15. In this dispute, I find that there was a foreseeable risk of real and substantial danger to future occupants if the wall bed was not properly installed. The photographs show that the wall bed was large and it appeared to be heavy. I am satisfied that the bed could pose a substantial danger to a person if it fell. In applying *Winnipeg Condominium* and *Coglon* to this dispute, I find that Ms. Johnson was in sufficient proximity to a subsequent buyer, such as Ms. Lash, to owe her a duty of care.
16. So, did Ms. Johnson breach the standard of care? Ms. Johnson says the wall bed was installed by a carpenter who is not a party to this dispute. Although Ms. Lash does not dispute this, she claims that Ms. Johnson is still responsible for the allegedly negligent installation.
17. Generally, an employer can be vicariously responsible for its employee's conduct, whereas with certain exceptions, a party is not held responsible for the negligence of an independent contractor they reasonably hired to do work. The relevant factors to consider in deciding whether a person is an independent contractor or employee are discussed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 and further in *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044. These factors include the level of control the employer has over the worker's activities, whether the worker has their own equipment, whether the worker hires their own helpers, the degree of financial risk of the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for

profit in the performance of their tasks. These factors are not exhaustive, and the relative weight of each factor depends on the facts and circumstances of each case. The central question is whether the worker is performing services as a person in business on their own account. If so, the person is more likely an independent contractor.

18. In this dispute, Ms. Johnson says she was present for the entire installation and she observed the manufacturer's directions being followed exactly. Ms. Johnson also sent Ms. Lash an undated letter saying that she was "holding up an end from time to time and therefore watched/supervised the installation." Although Ms. Johnson was present when the bed was installed, I find that Ms. Lash has not proved that Ms. Johnson was acting as the carpenter's employer. There is no evidence before me that Ms. Johnson provided the carpenter's tools and equipment, other than the wall bed itself. Further, I find that Ms. Lash has not proved that Ms. Johnson provided instructions to the carpenter or that the carpenter followed her direction. Based on the limited information provided about Ms. Johnson's contractual relationship with the carpenter, I am unable to determine whether the carpenter was Ms. Johnson's employee or an independent contractor. However, since Ms. Lash has the burden of proof, I find that Ms. Lash has not proved that Ms. Johnson was vicariously responsible for the carpenter's work. Further, I find that Ms. Lash has not proved that Ms. Lash unreasonably hired the carpenter or unreasonably relied on their work. So, I find that Ms. Johnson is not liable for carpenter's work. As such, I find it unnecessary to determine whether the bed installation was below the standard of care.
  
19. In her submissions, Ms. Lash also argued Ms. Johnson failed to disclose defects to the wall bed when she sold the property. However, I find that this claim is not before me since it was not raised in Ms. Lash's application for dispute resolution and there has been no amendment to the Dispute Notice. I find it would be procedurally unfair and prejudicial to Ms. Johnson to permit Ms. Lash to raise new claims during her submissions. Further, even if this claim was considered, I would dismiss it anyway because Ms. Lash has not provided sufficient evidence to show Ms. Johnson was aware of any defects when she sold the property.

20. For the above reasons, I dismiss Ms. Lash's claims.

21. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. Ms. Lash was unsuccessful and so I dismiss her claim for reimbursement of CRT fees and dispute-related expenses.

## **ORDER**

22. I dismiss Ms. Lash's claims and this dispute.

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Richard McAndrew, Tribunal Member