Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cowick v. YMCA - YWCA of Vancouver Island*, 2022 BCCRT 66

B E T W E E N :

DEBBIE COWICK

APPLICANT

A N D :

YMCA - YWCA OF VANCOUVER ISLAND

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This small claims dispute is about personal injury damages from a 'trip and fall' incident that occurred on January 4, 2021.

2. The applicant, Debbie Cowick, says she tripped over an orange cone (cone) that was placed under a table in the entrance of a community centre run by the respondent,

YMCA - YWCA of Vancouver Island. The applicant says the cone's presence was dangerous, so the respondent is responsible for her fall. She says she broke her shoulder and suffered other injuries as a result of the fall, and she seeks $5,000 in damages for pain and suffering and out-of-pocket expenses.

3. The respondent says the cone was placed beside the table in a line with other cones, to guide foot traffic in the facility as part of its COVID-19 safety plan. The respondent says the cone was in plain view, but the applicant failed to look where she was going. The respondent says the applicant's fall was due to her own error and it is not responsible for her damages.

4. The applicant is self-represented. The respondent is represented by an employee.

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.

9. The respondent submitted an item of late evidence, which consisted of a written description of the events recorded on security camera footage already in evidence. I find the late evidence is marginally relevant, as it identifies individuals in the video. The applicant was given the opportunity to respond to it and so is not prejudiced. Bearing in mind the CRT's mandate for flexibility, I admit the respondent's late evidence, though note that nothing turns on it in my analysis below.

ISSUE

10. The issue in this dispute is whether the respondent is responsible for the applicant's trip and fall and, if so, what remedy is appropriate.

EVIDENCE AND ANALYSIS

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

12. The circumstances of the applicant's fall are generally undisputed. As noted, there was security camera footage of the incident, which was submitted in evidence. The video shows a view of the facility entrance. The applicant also submitted photographs of the entrance from a different point of view, taken on January 5, 2021, the day after her fall.

13. The video shows a long desk to the right as people enter the main doors. Red arrows are taped to the floor from the doors towards turnstile-type gates just beyond the end of the desk. While there are 2 gates, the arrows direct people to enter the right gate.

There is a red cross taped to the floor in the middle of the left gate to indicate it should not be used.

14. The video also shows 4 bright orange cones in a line from about the middle of the left gate back to a tall table in front of a large concrete post that is approximately halfway between the gates and the front door. I find the photographs taken of the entrance the next day show the cones and table were placed in about the same position as the day of the incident, as shown in the video footage.

15. The respondent describes the 4 cones as “full-sized traffic pylons” standing over 12 inches tall and placed approximately 2 feet apart. The applicant does not disagree with this description, and I find the video and photographic evidence before me supports it. The video and photographs show the tall table has a sign stating it is a “sanitation station”, and a large bottle of hand sanitizer.

16. The video shows the applicant entered the brightly-lit facility and walked towards the table, which was on her left. She then turned to walk around the cone closest to the table (so, between the first and second cones), so she could stand at the back of the table, beside the concrete post. The applicant then rested her right elbow on the table, with the first cone located directly in front of her at her feet.

17. The video shows the applicant continued resting her right arm on the table, and was operating her phone in her right hand, for approximately 1 minute and 12 seconds. The evidence suggests that the applicant was trying to book her next reservation at the facility for 2 days later, as the bookings opened up exactly 48 hours in advance. In any event, the video shows the applicant was still looking at her phone and had just started to lower her right arm off the table when she started moving forward. I find the applicant almost immediately caught her right foot on the cone in front of her and tripped over it, falling to the ground. It is undisputed that the applicant broke her shoulder as a result of her fall.

18. The respondent says this was an unfortunate incident, but that it is not responsible. The respondent argues the cone was in plain view, the applicant knew it was there, and she simply did not look where she was going, causing her own fall.

19. While neither party specifically referred to it, I find the *Occupiers Liability Act* (OLA) applies to this dispute. Section 3 of the OLA requires the respondent to take reasonable care to ensure its property was reasonably safe in the circumstances. The standard of care under the OLA is the same standard of care at common law for negligence, which is to protect others from an objectively unreasonable risk of harm (see *Agar v. Weber*, 2014 BCCA 297).

20. To succeed in her claim, the applicant must show that: (1) there was a hazard on the floor, (2) that hazard caused her to trip, and (3) that the respondent did not take reasonable steps to ensure that such a hazard would not exist (see *Fulber v. Browns Social House Ltd.*, 2013 BCSC 1760).

21. Turning to the first requirement, the applicant argues that the cone she tripped over was placed so close to the table that it was not visible to her. She also says the cone was so large and heavy that when she tripped over it, it did not move and it "sent her flying". I infer it is the applicant's position that the cone represented a hazard.

22. For the following reasons, I disagree with the applicant, and I find the cone she tripped over did not represent a hazard under the OLA. First, I find that all the cones, given their colour and size, were highly visible. The applicant provided statements from 2 friends who witnessed the accident, and both stated the cone the applicant tripped over was placed under the table. However, I find those statements are inconsistent with the video evidence, and I find the cone was placed beside the table, not under it. So, I find there was nothing inherently dangerous about where the cone was placed.

23. I also find the applicant was aware of the cone's location, given she had deliberately walked around it before stopping at the table to use her phone. I find there was

nothing impeding the applicant's ability to see the cone, and she should have known it was directly in front of her.

24. The applicant also argues that all the cones in the facility entrance were "overkill" and "an accident waiting to happen". However, I accept the respondent's evidence that the cones were placed in the entrance in July 2020 as part of its COVID-19 safety plan, to assist with directing the flow of foot traffic in the facility. The respondent included in its submissions a transcription of a July 10, 2020 email from an Island Health Environment Health Officer, noting that the respondent's "flow of patron plan" was well thought out and would promote good physical distancing. I find the cone placement was part of the flow of patron plan, as the respondent says they were present during the officer's inspection, which I accept. I also accept the respondent's submission that dividing incoming and outgoing traffic was required because the facility did not have a second entrance or exit to otherwise separate the flow of foot traffic.

25. Under the circumstances, I find the applicant's opinion that the cones were unnecessary to be unhelpful. I find the evidence supports the respondent's position that the cones were an approved part of its pandemic safety plan. The respondent also says there had been no prior incidents involving the cones or complaints that the cones may be unsafe, which I accept.

26. I find the mere fact that the applicant tripped over the cone and was injured does not mean the cone was a hazard under the OLA. I note that such cones, due to their visibility, are often placed as a warning to alert people about potential hazards. Here, I find the applicant disregarded the cone's purpose to separate foot traffic and deliberately stepped around it, but then forgot it was there in front of her. Overall, I find the cone did not represent a hazard due to where it was placed.

27. I also find the applicant's submission that the cone's size and weight were a hazard to be unproven. I find the video evidence shows the second cone tipped over relatively easily when the applicant's hand hit as she fell, and that the first cone remained standing simply because the applicant's feet and legs blocked its fall.

28. On balance, I find the applicant has not established that the cone or its location presented a hazard or that the respondent failed to ensure its property was reasonably safe in the circumstances. Rather, I agree with the respondent that the applicant did not take reasonable care for her own safety by failing to pay sufficient attention to her surroundings and by starting to move while still looking at her phone instead of where she was stepping.

29. Given my conclusions, I find the applicant has not proven the respondent breached its duty under the OLA or caused her claimed damages. I find I must dismiss the applicant's claims.

30. 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. The applicant was unsuccessful and so I dismiss her claim for CRT fees. The successful respondent did not pay any CRT fees or claim dispute-related expenses, so I make no order.

ORDER

31. I dismiss the applicant's claims and this dispute.

Kristin Gardner, Tribunal Member