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Docket: CI 19-01-19823
(Winnipeg Centre)
Indexed as: Wagner v. The Young Men's & Young Women's Christian Association of Winnipeg Inc. et al.
Cited as: 2023 MBKB 179

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

BRENDA WAGNER,	)	
	)	On their own behalf
plaintiff,	)	for the plaintiff
	)	
- and -	)	
	)	
THE YOUNG MEN'S & YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF WINNIPEG INC. AND THE CITY OF WINNIPEG,	)	Brett A. Steidl
	)	for the defendant,
	)	The Young Men's & Young
	)	Women's Christian Association
defendants.	)	of Winnipeg Inc.
	)	
	)	
	)	Judgment Delivered:
	)	December 8, 2023

BOCK J.

INTRODUCTION

[1] On Saturday afternoon, March 18, 2017, Brenda Wagner slipped and fell in the family change room of the YMCA's Kimberly Avenue branch in Winnipeg. (The defendant, The Young Men's & Young Women's Christian Association of Winnipeg Inc., is commonly known as the YMCA, and I will refer to it as such in these reasons. Ms. Wagner's claim

against the other defendant, The City of Winnipeg, was discontinued at the commencement of the trial.)

[2] Ms. Wagner broke her left wrist as a result of her fall. She alleges her right foot slipped on water that the YMCA had carelessly allowed to accumulate on the floor. She argues the YMCA is therefore liable for her fall.

[3] The YMCA admits Ms. Wagner fell and injured her wrist. In its defence, it denies there was water on the floor as alleged by Ms. Wagner. In the alternative, the YMCA argues it discharged its duty of care to Ms. Wagner because at the time it had, and was following, a reasonable system for the inspection and upkeep of the floor in the family change room.

[4] For the reasons that follow, Ms. Wagner's claim is dismissed.

THE CIRCUMSTANCES GIVING RISE TO MS. WAGNER'S CLAIM

[5] Ms. Wagner was 54 at the time of her accident. By March 2017, she had been attending the YMCA's Kimberly Avenue branch three to five times per week for over five years. She was generally familiar with the location of the change rooms and the layout of the pool area.

[6] On Saturday, March 18, 2017, Ms. Wagner went to the YMCA to attend an aquafit class scheduled to begin at 1:30 p.m. In the ladies change room, she changed into a bathing suit and a pair of plastic sandals commonly known as "Crocs". She entered the pool area from the change room. As she walked across the pool deck toward the aquafit class, she realized she had a piece of chewing gum in her mouth. She entered the nearby family change room area, looking for a garbage can in which to dispose of her gum.

She saw one several feet away from the entrance, affixed to the wall. As she walked across the white ceramic tile floor toward the garbage can, she felt her right foot slip from under her as water "gushed" into her right shoe. She fell to the floor, with her left wrist bearing the brunt of the impact.

[7] A member of the YMCA notified someone at the membership desk that a woman had fallen in the family change room. That message was relayed to Wendy Yates, the branch's lifeguard coordinator, who responded. She found Ms. Wagner seated on the floor where she had fallen, holding her left wrist. At Ms. Wagner's request, Ms. Yates helped her to lie down in that spot. Once Ms. Wagner had collected herself, she was helped to her feet by Ms. Yates. Ms. Yates escorted Ms. Wagner to the ladies change room to retrieve her belongings, and then to the office to arrange for a ride home.

[8] Ms. Wagner did not immediately realize the severity of the injury to her wrist. On Monday, March 20, 2017, she attended on her chiropractor, Dr. DeJong, for a previously scheduled appointment for a condition unrelated to her fall. Dr. DeJong examined her swollen left wrist and advised her to get an x-ray if swelling persisted.

[9] Ms. Wagner's wrist did not improve in the days that followed. She sought further medical care, and was ultimately diagnosed with a left distal radius fracture. On April 5, 2017 she underwent open reduction and internal fixation, a surgical procedure to realign and set the broken bone in her broken wrist. That procedure included the permanent placement of a metal plate on the bone with screws to hold it in place. She was released from hospital later that same day with her arm in a cast. Her cast was removed on April 26, 2017, and was replaced with a removable brace to permit her to do range of

motion exercises at home (see Exhibit 7). She received physiotherapy until November 2017, as reflected in her physiotherapist's chart notes (Exhibit 10).

[10] Ms. Wagner's surgeon, Dr. Tudor Tufescu, last examined her on January 9, 2023. In his report (Exhibit 2), Dr. Tufescu noted Ms. Wagner was left with a scar from the incision on her forearm measuring approximately 1 centimeter. He observed a normal and comparable range of motion for extension, flexion and prosupination in her left and right hands, as well as equivalent grip strength. He identified no surgical complications or concerns and imposed no restrictions on Ms. Wagner's use of her left wrist or hand.

[11] Ms. Wagner testified, and I accept, that she had no use of her left wrist and hand for the first five months following her accident. From March to June 2017, she relied heavily on her daughter, Carolina, who was then 16, to cook, clean and perform other housekeeping duties. During this period, she also paid her brother, Robert, $400 per week for four weeks to provide live-in assistance.

[12] Ms. Wagner's evaluation of her injured wrist was less positive than Dr. Tufescu's. She testified it took two years for her wrist to recover to its current level of function, which she described as "80 to 90 per cent" compared to its pre-injury function. She experiences occasional pain with certain activities, like shoveling snow or opening a jar. Her fingers on her left hand get cold "fast" and she experiences intermittent "tingling" in the second, third and fourth fingers of her left hand. At trial, she explained that while she cannot do everything with her left wrist in the way she used to before her accident, there is nothing her injury prevents her from doing.

THE PARTIES' POSITIONS

[13] Ms. Wagner contends the YMCA carelessly allowed a puddle of water to accumulate at the spot where she fell. She also argues the YMCA's failure to maintain the floor in a reasonably safe condition was made worse by the absence of a non-slip mat or grab bar. She claims general damages of $70,000 plus special damages of $5,239.15. (Because Ms. Wagner was retired at the time of her accident, she made no claim for loss of income.)

[14] The YMCA denies Ms. Wagner's fall was caused by a puddle of water, and submits there was no puddle there at all. It says her accident was the result of her Crocs, an inappropriate choice in the circumstances. The YMCA also argues that at the time of Ms. Wagner's fall, it had a reasonable system for the inspection and upkeep of the floor, which its staff was carrying out properly. In the circumstances, neither a non-slip mat nor a grab bar was reasonably necessary. As regards damages, the YMCA submits general damages of $30,000 plus special damages in the amount claimed by Ms. Wagner, $5,239.15, are reasonable in the circumstances.

ANALYSIS AND DISPOSITION

[15] As I will discuss, I do not accept Ms. Wagner's evidence with respect to the presence of a puddle of water where she fell. I accept the evidence led by the YMCA that it met its duty of care by taking reasonable steps to inspect and maintain the floor of the family change room. Finally, there is no evidence that a non-slip mat or grab bar in the area where Ms. Wagner fell was reasonably necessary in the circumstances.

[16] If I am incorrect in my conclusions with respect to liability, I would award Ms. Wagner general damages in the sum of $34,500 plus special damages of $5,239.15.

a) The law

[17] The YMCA's duty to Ms. Wagner is found in s. 3(1) of ***The Occupier's Liability Act***, C.C.S.M. c. O8. In short, its duty was to take such care as, in all the circumstances of the case, was reasonable to see that she would be reasonably safe while on the premises. The standard of care against which the YMCA's efforts are to be measured is one of reasonableness, not perfection (***Kulynych v. Manitoba Lotteries***, 2009 MBQB 187 (CanLII), at para. 19). The YMCA is to be judged by its efforts to discharge its duty, and not by the outcome of those efforts (***Kulynych***, at para. 18, citing ***Sandberg v. Steer Holdings Ltd.***, (1987), 1987 CanLII 6883 (MB KB), 45 Man. R. (2d) 264, para. 22).

b) The condition of the floor at the time of Ms. Wagner's fall was not hazardous

[18] Ms. Wagner testified that her fall was caused by a puddle of water because as she fell she felt water "gushed" into her right shoe. She speculated that the water came from the four showers located to the left of the entrance to the family change room area. She also testified that she told Ms. Yates "to clean up the water before someone breaks their neck". However, by her own admission, Ms. Wagner did not make any observations of the state of the floor where she fell, either before or after her fall. She also called no witnesses to corroborate her version of events.

[19] By contrast, Ms. Yates testified that when she came upon Ms. Wagner there was no water on the floor. I prefer Ms. Yates's evidence on this point for several reasons.

[20] Ms. Yates testified that when she first came upon Ms. Wagner, she checked the condition of the floor in order to make sure that the automatic electronic defibrillator, which another staff member carried to the scene, could be safely used if necessary. Ms. Yates testified she saw no water.

[21] Ms. Yates crouched down next to Ms. Wagner, who was sitting on the floor. She quickly determined the defibrillator was not necessary. She found Ms. Wagner dizzy, lightheaded and complaining of pain in her left wrist. She took note of Ms. Wagner's vital signs, including pulse, respiration, pupils, state of consciousness and skin condition. She confirmed that sensation, mobility and circulation were all present in Ms. Wagner's left hand. During all of this, Ms. Yates testified, she did not detect any water on the floor beneath her.

[22] Ms. Yates then helped Ms. Wagner lie down on the floor, and laid down beside her. They remained in this position for several minutes, until Ms. Wagner felt well enough to stand up. Ms. Yates testified that she did not feel any water beneath her as she lay on the floor, and when she got up her clothes were still dry.

[23] Ms. Yates recorded many of her observations in a three page "First Aid Incident Report" which she completed shortly after Ms. Wagner's fall (Exhibit 19). At the beginning of the report, under the heading "Summary of Incident", she noted that a "member reported a woman had fallen in the family change room <u>after slipping on the wet floor</u>…" (emphasis added). The member reporting the incident was not called to testify by either party, and the description of the incident given by that member is not proof of the condition of the floor. But the member's description of the fall did give Ms. Yates another

reason to take particular note of the condition of the floor, and helps to explain why she did so.

[24] Finally, Ms. Yates testified that as she was taking Ms. Wagner to the office she noticed Abrehet Berhe, an on-duty cleaner, near the front desk. She asked Ms. Berhe to go to the family change room to make sure the floor was safe. Ms. Yates testified that after Ms. Wagner left, Ms. Berhe came back to ask why she had been sent to check the family change room floor, since she had already cleaned it earlier and it was still dry. Ms. Berhe and Ms. Yates then returned to the family change room together, where Ms. Yates again saw that the floor where Ms. Wagner had fallen was dry.

[25] Based on Ms. Yates's evidence, which was not shaken on cross-examination, I am satisfied that the area where Ms. Wagner fell was dry at the time of her fall.

[26] Ms. Wagner's own evidence establishes her old Crocs as the likely cause of her fall. Ms. Wagner acknowledged by March 2017, those shoes were more than five years old and "worn out". Photographs taken at the time (Exhibit 16) show a pair of loose-fitting shoes with soles that had been worn smooth, a poor choice given the circumstances. Before her fall, Ms. Wagner walked in her Crocs through the ladies locker room, across the pool deck and past the showers in the family change room. None of these areas could be expected to be perfectly dry, and it was very likely that the soles of her shoes were somewhat wet by the time she reached the family change room. I therefore find it more likely than not that Ms. Wagner's fall was caused by a combination of her inappropriate footwear, wet soles and bad luck.

[27] I find added support for this conclusion in Ms. Wagner's decision after her accident to replace her Crocs with a pair of "water shoes". Photos of her new water shoes show them to be a much more suitable choice for the purpose, with a sturdy tread and an elasticized ankle to provide a better fit (Exhibit 1, pp. 25 – 26).

[28] To conclude this portion of my reasons, I find there was no hazardous accumulation of water in the area where Ms. Wagner fell. Her old shoes, which were inappropriate in the circumstances, combined with wet soles and bad luck, caused her slip and fall.

c) The YMCA met its duty of care

[29] I now turn to explain why I find the YMCA met its duty of care in this case.

[30] The YMCA called Beverly Hodgson to testify. Ms. Hodgson was employed by the YMCA for 29 years, and held the position of cleaning supervisor at the Kimberly Avenue branch from about 2006 until her retirement in January 2023. She was responsible for training the cleaning staff, and she trained Ms. Berhe when she was first hired in 2010.

[31] Ms. Hodgson testified that during "peak hours" cleaning staff were expected to inspect and clean the locker rooms as necessary, and at least every 30 minutes, to coincide with the length of swimming lessons. Ms. Wagner's accident happened during the branch's peak hours. The family change room was given priority during peak hours, because it was a "high traffic" area. Floors were cleaned with either a mop or an automated floor cleaner, called an "autoscrubber", depicted in Exhibit 17. Ms. Hodgson was personally familiar with the work, because she had worked as a cleaner before her promotion to cleaning supervisor, and she still sometimes filled in as a cleaner.

[32] Ms. Berhe was one of two cleaners on duty at the time of Ms. Wagner's fall, Ms. Hodgson testified. According to Ms. Hodgson, Ms. Berhe was "one of the best", thorough, and the subject of "lots of positive feedback". Ms. Hodgson never received a complaint in respect of Ms. Berhe's work.

[33] Cleaning logs were not kept. Ms. Hodgson explained it was considered too time consuming to do so, and would take staff away from attending to their actual work. She regularly conducted walk-throughs of the building with smaller groups of the cleaning staff (the total number of cleaners at the branch was usually about 22), to ensure they all knew, and were doing, what was expected of them. Ms. Hodgson said that Ms. Berhe had taken part in those walk-throughs.

[34] Ms. Hodgson's evidence satisfies me that the YMCA made reasonable efforts to see that the floor in the family change room was reasonably safe. It developed and implemented a system of maintenance and upkeep that bore a rational relationship to the circumstances. Ms. Hodgson personally trained the staff, including Ms. Berhe, gave them tools to do their work, and monitored their performance.

[35] I also find that on the day of Ms. Wagner's fall Ms. Berhe performed her duties with respect to the family change room floor in accordance with the YMCA's expectations. I arrive at this conclusion based on Ms. Yates's evidence with respect to the condition of the floor when she came to Ms. Wagner's assistance, and on the hearsay evidence of Ms. Berhe, tendered through Ms. Yates, that she had attended to the floor before Ms. Wagner's fall.

[36] Ms. Berhe died before the trial. Ms. Berhe's comments to Ms. Yates were admitted under the principled exception to the hearsay rule. Ms. Berhe's hearsay evidence was made necessary by her death, and I accept it on the basis of its relatively high degree of reliability. In particular, her statement to Ms. Yates was made contemporaneously with the events in question. Ms. Yates took steps to confirm the accuracy of Ms. Berhe's statement at the time it was made by going to check the floor with Ms. Berhe. Ms. Yates was available at trial to be cross-examined, and was cross-examined on her conversation with Ms. Berhe.

[37] That said, I attach no weight to a written statement given by Ms. Berhe dated April 30, 2018. This hearsay statement was admitted into evidence as Exhibit 18 on the basis that it met the requirements of necessity and threshold reliability, but I have several concerns which prevent me from attaching any weight to it. The statement was signed by Ms. Berhe more than one year after the events in question. It was not prepared by her, but by the insurance adjuster appointed by the YMCA's liability insurer. The adjuster who prepared the statement did not testify at trial. Ms. Hodgson presented the statement to Ms. Berhe in her office, and read it to her before asking her to sign it. While I ascribe no ill motive to Ms. Hodgson, it is not at all clear to me from the evidence presented at trial that Ms. Berhe, whose first language was not English and whose position at the YMCA was subordinate to Ms. Hodgson, understood that she could make changes to the statement, or would have felt comfortable in suggesting changes. Finally, I am concerned that the primary purpose of the statement, drafted by the adjuster of the YMCA's liability insurer more than one year after the events in question, was not to conduct an

independent investigation into Ms. Wagner's fall, but to assemble and present evidence to defend the interests of the YMCA and its insurer.

[38] I turn briefly to Ms. Wagner's contention that the YMCA failed in its duty to her by not placing a non-slip mat or handrail in the spot where she fell, which I do not accept. Ms. Hodgson testified that while it was not within her authority to install either a mat or a handrail, the absence of those items was "never an issue" and she never thought either was needed. For that reason, she never suggested to anyone at the YMCA that either be installed. There is no evidence to suggest that a mat or handrail in this location would be reasonable in the circumstances, and there may be good reasons why they were not installed. For instance, a mat may have been counter-productive, by impeding the operation of the drains which can be seen in the photographs of the spot where Ms. Wagner fell.

[39] In short, I find the YMCA took such care as, in all the circumstances of this case, was reasonable to see that Ms. Wagner would be reasonably safe walking on the floor of the family change room.

d) Damages

[40] As noted earlier, if I am incorrect in my conclusions with respect to liability, I would award Ms. Wagner general damages in the sum of $34,500 plus special damages in the agreed-upon sum of $5,239.15.

[41] Ms. Wagner did not provide any authorities to support her submission of $70,000 on account of general damages. The YMCA offered just one authority, ***Kulynych***, in which the plaintiff's injury, age, course of recovery and ultimate outcome were strikingly

similar to Ms. Wagner's. There the parties agreed, and the court accepted, that Ms. Kulynych's general damages ought to be assessed at $25,000, which counsel told me equates to $34,500 once adjusted for inflation between 2009, the year in which judgment was granted in ***Kulynych***, and 2023.

[42] I can find no reason to deviate from the general damage award in ***Kulynych***. The first five months of Ms. Wagner's two-year recovery were difficult, as she and her daughter testified at trial. However, according to Dr. Tufescu, Ms. Wagner has made a good recovery from her injury. Ms. Wagner acknowledges she has been left with no functional limitations, but submits her left hand is only 80 to 90 per cent equivalent to her right hand, and is occasionally painful. She does not require any ongoing medical, physiotherapy or prescription drug treatment.

[43] Ms. Wagner's circumstances are very like those of Ms. Kulynych, a 55-year-old woman who suffered a right distal radius fracture requiring surgical repair, wore a cast for six weeks, underwent five months of physiotherapy, required assistance in various activities of daily living and suffered occasional pain in her wrist and associated headaches (***Kulynych***, at paras. 39 – 51).

[44] In addition to a provisional award of general damages of $34,500, I would award Ms. Wagner the loss of opportunity to invest that amount at the rate of 3 per cent simple interest per annum from March 18, 2017 to the date of trial, plus pre-judgment interest on the amount of her special damages at the applicable statutory rate.

CONCLUSION

[45] For these reasons, Ms. Wagner's claim is dismissed with costs to be calculated on a party and party basis as a Class II action. If the parties are unable to come to agreement on the final calculation of costs, they may speak to the issue.

_____ J.