



# Civil Resolution Tribunal

Date Issued: September 21, 2020

File: SC-2020-004138

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Shusterman v. Kendel*, 2020 BCCRT 1064

BETWEEN:

KESSIAH SHUSTERMAN

**APPLICANT**

AND:

MOLLY KENDEL

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Julie K. Gibson

## INTRODUCTION

1. This dispute is about the allegedly negligent care of a dog.

2. The applicant Kessiah Shusterman says the respondent Molly Kendel was negligent in caring for her 4-year-old English bulldog (Larry), causing him to suffer heat stroke.
3. Ms. Shusterman says Ms. Kendel took Larry for a 3-hour walk on a hot day, despite knowing Larry's physical limitations. Ms. Shusterman claims reimbursement of \$2,131.70 for veterinary care to treat Larry's heat stroke.
4. Ms. Kendel denies being negligent in caring for Larry. She asks me to dismiss the dispute.
5. The parties are each self-represented.

## **JURISDICTION AND PROCEDURE**

6. 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.
7. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute amounts to a "she said, she said" scenario with both sides calling into question the credibility of the other. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.
8. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. In *Yas v.*

*Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the court recognized that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.

9. 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.
10. 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.

## **ISSUES**

11. The issues in this dispute are:
  - a. Whether Ms. Kendel was negligent in her care of Larry, and,
  - b. If so, what remedy is appropriate.

## **EVIDENCE AND ANALYSIS**

12. In this civil claim, Ms. Shusterman, as the applicant, bears the burden of proof on a balance of probabilities. I have reviewed the evidence and submissions but refer to them only as I find necessary to explain my decision.
13. In May 2020, Ms. Kendel and Ms. Shusterman were roommates.
14. I will begin by considering Ms. Kendel's version of events. She says that, on May 13, 2020, she took her own dog, Larry, and Ms. Shusterman's second dog for a walk at Sooke Potholes. It is undisputed that Ms. Kendel had permission to walk Larry.
15. Ms. Kendel says the walk started at around 10 am.

16. Ms. Kendel says she chose the walk because they had done it recently without problems, and it was flat so that Larry's feet would not hurt.
17. Ms. Kendel took water bottles for each dog and stopped many times during the walk, adopting a leisurely pace. Ms. Kendel says the path had ample shade. Ms. Kendel did not notice Larry's breathing being any more labored than usual for a bulldog.
18. Ms. Kendel lifted Larry into her car and took him home. They arrived home around 12 noon. Ms. Kendel says Larry lay down to have a nap, which is typical for him. However, after this, Ms. Kendel noticed that Larry was not feeling well. Ms. Kendel notified Ms. Shusterman and accompanied Ms. Shusterman and Larry to the local veterinarian.
19. Ms. Shusterman says that when Larry arrived home, he was immediately unwell, but I find nothing turns on this distinction. I find that Larry became unwell shortly after arriving home from the walk.
20. Ms. Shusterman says the walk was 3 hours long, on a "very warm" day. No one provided evidence of the temperature on May 13, 2020.
21. Another roommate, KE, provided a statement that differs from Ms. Kendel's account. KE says the walk started at 12 noon and finished 3 hours later when Ms. Kendel arrived home. KE writes that when Larry returned, he was struggling to breathe and could barely stand up. It is not clear from KE's statement whether he was at home and directly observed Larry's state or the timing of these events. KE's evidence that the walk was 3 hours long is inconsistent with veterinary records showing that Ms. Shusterman called with concerns about Larry shortly after 2 pm. For these reasons, I give little weight to KE's evidence.
22. I accept Ms. Kendel's evidence that the walk and return travel took about 2 hours and that the walk was mostly flat. I find the walk did not take 3 hours because the call to the veterinarian is recorded as happening inside the 3-hour window. I also

accept Ms. Kendel's description of the walk itself, as she provided the only direct evidence of it.

23. The veterinary records show that at about 2:05 pm on May 13, 2020, Ms. Shusterman called the veterinarian's office reporting that someone took Larry on a long walk and that he could not stand and had raspy breathing. Larry's temperature was 42.6 degrees Celsius and a presumptive diagnosis of heat stroke was made.
24. Larry had a variety of veterinary care to address heat stroke including an overnight emergency admission at West Coast Animal Veterinary Emergency Specialty (WAVES) Hospital. Triage notes from the WAVES records record that Larry was transferred there to address "hyperthermia, shock, seizures, vomiting" and possible "aspiration pneumonia". The WAVES records also show that a veterinarian warned Ms. Shusterman that steps should be taken to control Larry's weight.
25. About a month later, Ms. Kendel moved out.
26. To prove her claim in negligence, Ms. Shusterman must show that Ms. Kendel owed her a duty of care, failed to meet a reasonable standard of care, that it was reasonably foreseeable her failure would cause the claimed damages, and the failure caused those damages, namely Larry's heat stroke. It is undisputed that Ms. Kendel owed a duty of care to Ms. Shusterman in looking after Larry.
27. Ms. Shusterman's central submission is that she informed Ms. Kendel that Larry could not go for "long hikes". Ms. Shusterman did not explain what constituted a long hike or a walk in the hot sun. Ms. Shusterman did not provide evidence that she communicated specific time or temperature guidance for walking Larry. I have found that that Ms. Kendel took breaks and offered Larry water during the walk. Ms. Shusterman did not prove that she provided specific walking instructions to Ms. Kendel, nor that Ms. Kendel failed to follow a general instruction to keep walks manageable for Larry.
28. Where a dispute's subject matter is technical or beyond common understanding, it is necessary to produce expert evidence to help the decision-maker determine the appropriate standard of care: see *Bergen v. Guliker*, 2015 BCCA 283, paragraphs 124 to 131. I find that the determination of a reasonable standard of care for

someone looking after an English bulldog, including the recommended duration of a walk, whether Ms. Kendel met that standard, and whether a failure to do so probably caused Larry's ailment, is something that requires expert evidence.

29. I make this determination in part because there is no evidence that the two other dogs suffered any ill effects after the same walk, with the same person, on the same day. While I find that Larry developed heat stroke after the walk, and became very ill, the question of what a reasonable standard required due to Larry's breed or some other factor, and the parameters of that standard, have not been addressed by an expert.
30. The CRT's rules explain that written expert evidence must include a statement of the expert's qualifications, which must show that the person is qualified by education, training or experience to give the opinion.
31. A friend of Ms. Shusterman, BV, offered her opinion that she felt that Ms. Kendel was negligent in her care of Larry. BV's opinion was based on observing other lifestyle choices by Ms. Kendel that BV did not endorse. I find that BV did not have direct evidence about Ms. Kendel's care of Larry. I find BV's evidence is not expert opinion evidence because BV is not qualified, and her opinion was speculative.
32. I am left without expert opinion to prove negligence. Therefore, given that Ms. Shusterman bears the burden of proof, I dismiss her claim because she has not proven the standard of care or a breach of the standard.
33. 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. Ms. Kendel, the successful party, did not claim tribunal fees or dispute-related expenses.

## **ORDER**

34. I dismiss Ms. Shusterman's claims and this dispute.

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Julie K. Gibson, Tribunal Member