



# Civil Resolution Tribunal

Date Issued: August 23, 2021

File: SC-2021-000731

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Malcolmson v. Tsolum Mobile Veterinary Health Ltd.*, 2021 BCCRT 926

BETWEEN:

DONALD MALCOLMSON and LORILYNN JENKS

**APPLICANTS**

AND:

TSOLUM MOBILE VETERINARY HEALTH LTD.

**RESPONDENT**

AND:

DONALD MALCOLMSON and LORILYNN JENKS

**RESPONDENTS BY COUNTERCLAIM**

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**REASONS FOR DECISION**

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Tribunal Member:

Sherelle Goodwin

## **INTRODUCTION**

1. This dispute is about allegations of veterinary negligence and unpaid invoices.
2. The applicants, Donald Malcolmson and Lorilynn Jenks, owned a horse named Chevy. They say that a veterinarian working for the respondent, Tsolum Veterinary Health Ltd. (Tsolum), was negligent in castrating Chevy, leading to Chevy's death. The applicants claim \$3,000 in damages for the loss of Chevy.
3. Tsolum denies any negligence. It says Chevy was euthanized because he broke his leg during a secondary procedure following the castration. Tsolum says Mr. Malcolmson incorrectly restrained Chevy with a knotted rope during sedation, which caused Chevy to break his leg during the secondary procedure, leading to his death.
4. Tsolum counterclaims \$2,940.40 which it says the applicants owe for medical services provided to Chevy and the applicants' other horse. The applicants say they should not have to pay the invoices because Chevy died due to the veterinarian's alleged negligence.
5. Mr. Malcolmson represents the applicants in their claim, although each applicant represents themselves in the counterclaim. Tsolum is represented by its owner.

## **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). 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.
7. 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.

8. 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.
9. 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**

10. The issues in this dispute are:
  - a. Was Tsolum's veterinarian negligent in performing Chevy's castration, or the secondary procedure?
  - b. If so, must Tsolum pay the applicants for the loss of Chevy, and how much?
  - c. Must the applicants pay Tsolum for the outstanding bills and, if so, how much?

## **EVIDENCE AND ANALYSIS**

11. In a civil dispute like this one the applicants must prove their claims on a balance of probabilities (more likely than not). Tsolum must also prove its counterclaim to the same standard. I have reviewed all arguments and weighed all evidence provided. However, I only refer to that evidence necessary to explain my decision.
12. On January 9, 2021 Tsolum's veterinarian (Dr. X) and 2 assistants castrated Chevy under anesthesia at the applicants' residence. After the procedure, Chevy's scrotum

continued to bleed. Although there is some dispute about the extent of bleeding, it is undisputed that Ms. Jenks was concerned and so texted and called Dr. X to return and examine Chevy. None of this is disputed.

13. Dr. X returned with one of her assistants (LC) a few hours later. Dr. X anesthetized Chevy a second time and tied his hind leg out of the way while Chevy lay on his side. Dr. X inspected the surgical site and repaired some internal “bleeders”. Chevy awoke while his leg was still tied, flailed while trying to stand, and broke his leg. After consulting with the applicants, Dr. X euthanized Chevy. None of this is disputed.
14. It is also undisputed that Dr. X was employed by Tsolum when she performed Chevy’s surgery and follow up examination. At law, an employer is vicariously liable (strictly responsible) for the actions of its employees perform in the course of their employment (see *Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308). So, I find Tsolum is potentially liable for Dr. X’s actions.

### ***Alleged Negligence***

15. In order to establish a claim for negligence the applicants must show Dr. X owed them a duty of care, her conduct did not meet the expected standard of care, her conduct caused the claimed damages, and the damages were reasonably foreseeable (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27).
16. It is undisputed that Dr. X owed the applicants a duty of care, as she was operating on their horse. The standard of care that applies here is that of a reasonably competent veterinarian in practice (see *Priest v. Williams Lake Veterinary Hospital Ltd.*, 2011 BCPC 0063).
17. It is undisputed that Chevy would not have been euthanized if he had not broken his leg.
18. The applicants say Chevy would not have broken his leg if Dr. X had completed the second procedure and untied Chevy before the anesthesia wore off. The applicants say Dr. X failed to complete the procedure quickly enough and failed to notice Chevy

waking up from the anesthesia in time to untie him and prevent him from breaking his leg. As explained below, I find the evidence does not support this conclusion.

19. The applicants say Dr. X took too much time explaining and showing her work to her assistant and Mr. Malcolmson during the second procedure. They provided no expert or other evidence supporting this argument.
20. Tsolum provided a May 6, 2021 statement from Dr. Paul Johnston, a veterinarian with 21 years' general experience and 15 years' experience with horses. It also provided an undated and unsigned statement from Dr. Yaela Gleusteen, a mobile veterinarian with 20 years' experience in equine medicine and surgeries. Both doctors have extensive experience with equine castration and so I find both doctors are qualified to provide expert opinions in this dispute, under the CRT rules. Further, neither veterinarian works for Tsolum and so I find their expert opinions are unbiased and I give them significant weight.
21. Dr. Johnston says it is difficult to maintain an adequate level of sedation for a horse in a field setting. Dr. Gleusteen says horses can enter "lighter planes" of sedation easily, as appeared to be the case with Chevy. Based on these opinions, I find no suggestion that Dr. X should have known how long Chevy would be under anesthesia for, or how quickly she should have worked. So, I find the applicants have not shown Dr. X failed to work quickly enough.
22. The applicants also say LC told Dr. X that Chevy's blink reflex was normal, meaning he was waking up. Tsolum says the opposite, that a normal blink reflex indicates an adequate level of sedation. In any event, both LC and Dr. X say in their witness statements that, despite a normal blink reflex, Chevy flicked his tail and made noise during the procedure which, I find indicated Chevy was waking up. Dr. X and LC both say Dr. X instructed LC to administer more anesthesia. The further anesthetic is noted in Chevy's medical records. So, I find Dr. X reasonably addressed Chevy's noticeable awakening by administering further anesthesia.

23. Based on Chevy's medical records and Dr. X's statement, I find Chevy awoke approximately 5 minutes after the further sedation, with no warning. It is undisputed that, when he awoke, Chevy pulled against the rope tying his hind leg to his neck, breaking his leg as a result. Dr. Gleusteen reviewed Chevy's medical records and said Chevy's awakening could not have been anticipated and Dr. X could not have further sedated Chevy once he started to struggle. Relying on Dr. Gleusteen's uncontradicted expert opinion, I find Dr. X could not have anticipated or prevented Chevy's awakening from sedation while his hind leg was still secured.
24. It is undisputed that, during the second procedure, Dr. X tied a rope around Chevy's hind leg to move the leg away from the surgical site. In her witness statement, Dr. X says she passed the other end of the rope to Mr. Malcolmson to hold while he was holding the sedated horse's neck. Dr. X says, unbeknownst to her, Mr. Malcolmson tied the rope around Chevy's neck with a "forever" or fixed knot, contrary to her instructions. The applicants' photos show the rope knotted around Chevy's neck during the second procedure. As Mr. Malcolmson does not dispute Dr. X's statement, I find he tied the knot around Chevy's neck.
25. In her witness statement Dr. X says the knot tightened when Chevy awoke and moved his leg, causing the horse to flail against the tense rope and break his own leg. Tsolum says that, if Mr. Malcolmson had folded the rope over Chevy's neck, as instructed by Dr. X, the rope would have come loose and slipped off when Chevy startled awake. The applicants do not dispute this but say Dr. X should have either checked that Mr. Malcolmson was following instructions or noticed that Mr. Malcolmson had tied the rope around Chevy's neck. I disagree. I find it unreasonable to expect Dr. X to double check that Mr. Malcolmson, as the horse's owner, followed Dr. X's instructions about rope folding, which I find is a non-medical task requiring little experience. Further, the applicants do not dispute Tsolum's submission that Mr. Malcolmson held the rope in the correct folded position during the initial operation, indicating that he was aware of, and capable of, following Dr. X's instructions.

26. On balance, I find the applicants have failed to show that Dr. X's conduct fell below the industry standard of a reasonably competent veterinarian. As noted, they provided no expert opinions contradicting the expert opinions provided by Dr. Johnston and Dr. Gleusteen, which I accept and rely on. Further, even if the applicants had shown Dr. X failed to meet the required standard of care, I would have found that Mr. Malcolmson's knot tying, rather than Dr. X's conduct, caused Chevy's broken leg, which resulted in the joint decision to euthanize Chevy. So, I dismiss the applicants' \$3,000 claim for the loss of Chevy.

### ***Outstanding Tsolum Invoices***

27. Tsolum claims \$2,940.40 for payment of 2 unpaid invoices, both dated February 3, 2021. Based on invoice 83805 I find Tsolum charged Ms. Jenks \$231 to sedate and "float" the teeth of a second horse. The applicants acknowledge Dr. X floated the horse's teeth and did not dispute that she also sedated the horse to do so. So, I find the applicants must pay Tsolum \$231 for this service.

28. Based on invoice 83807 I find Tsolum charged Ms. Jenks \$2,709.40 for Chevy's castration, medication, anesthesia, and medical euthanasia. There is no indication that Tsolum, or Dr. X, failed to provide the invoiced services and medications. Rather, the applicants argue they should not have to pay the invoice because Dr. X's negligence led to Chevy's death. As noted, I find the applicants failed to prove Dr. X's negligence. So, I find the applicants must pay Tsolum \$2,709.40 for Chevy's operation and care, despite his unfortunate death.

29. As noted, both Tsolum's invoices are addressed to Ms. Jenks. The evidence shows Ms. Jenks asked Dr. X to return and address Chevy's ongoing bleeding and Ms. Jenks emailed Tsolum about Chevy's death after the event. Although the applicants say they are both Chevy's owners, there is no indication that Mr. Malcolmson hired Tsolum to provide veterinary care to the horses or entered into any agreement with Tsolum. So, I find he is not responsible for the outstanding invoices and dismiss Tsolum's counterclaim against Mr. Malcolmson.

30. I find Ms. Jenks must pay the outstanding balance of \$2,940.40.

### ***Fees, Expenses and Interest***

31. The *Court Order Interest Act* applies to the CRT. Tsolum is entitled to pre-judgment interest on \$2,940.40 from the February 3, 2021 invoice date to the date of this decision. This equals \$7.21.

32. 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 find Tsolum is entitled to reimbursement of \$75 in CRT fees because it was successful in its counterclaim. As the applicants were unsuccessful in their claims, I find they are not entitled to reimbursement of their CRT fees. Neither party claimed any dispute-related expenses.

### **ORDERS**

33. Within 30 days of the date of this order, I order Ms. Jenks to pay Tsolum a total of \$3,022.61, broken down as follows:

- a. \$2,940.40 in debt,
- b. \$7.21 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$75 in CRT fees.

34. Tsolum is entitled to post-judgment interest, as applicable.

35. I dismiss the applicants' claims against Tsolum. I also dismiss Tsolum's counterclaim against Mr. Malcolmson.

36. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for



filing a notice of objection is 28 days after the party receives notice of the CRT's final decision. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is in effect until 90 days after June 30, 2021, which is the date of the end of the state of emergency declared on March 18, 2020, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

37. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

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Sherelle Goodwin, Tribunal Member