SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Butler v. Pet Focus Veterinary Group Inc*., 2022 NSSM 59

Date: 20221121
Docket: SCCH 515356
Registry: Halifax

Between:

Arron Butler and Heidi Lee Butler

Claimants

- and -

Pet Focus Veterinary Group Inc., d.b.a. Tantallon Veterinary Hospital and Dr. Susan Andrus

Defendants

RULING ON NON-SUIT MOTION

Adjudicator: Eric K. Slone

Heard: November 3, 2022, in Halifax, Nova Scotia

Appearances: For the Claimants, self-represented

For the Defendants, Sarah Flanagan

BY THE COURT:

[1] The Claimants are the owners of a 7-year-old greyhound named Eddie. They are suing the Defendants for professional negligence arising from canine dental surgery in July 2021 when Eddie had some 19 or 20 teeth extracted.

[2] I believe it is fair to say that Eddie had a very bad experience and came very close to dying. Fortunately, after being discharged from the Defendants' facility, he received life-saving care from the Metro Animal Emergency Clinic (MAEC) in Dartmouth and came through his ordeal, though not until after the Claimants spent thousands of dollars on such after-care, which is the bulk of what they seek to recover in this Claim. They also seek a refund of the fees charged by the Defendants for the surgery itself. The total monetary claim is $8,546.65.

[3] The matter came on for trial via zoom on November 3, 2022, and the court heard testimony from both Claimants. Although much documentary material was submitted by the Claimants, including extensive chart notes and some relevant literature, no expert testimony was offered. At the conclusion of the Claimants' evidence, counsel for the Defendants brought a motion for non-suit, which she had clearly anticipated making as the Claimants had disclosed their witness list in advance, and it did not include a veterinary expert. The argument, in a nutshell, is that the Claimants have failed to adduce any evidence that would establish the standard of care that should apply to the practice of veterinary medicine in the context of a small animal hospital in Nova Scotia.

[4] There is nothing in the *Small Claims Court Act* or Regulations that governs non-suit motions, so it is appropriate to be guided by the Civil Procedure Rules:

> **51.06 Non suit**
>
> (1) At the close of the plaintiff's case and before the defendant elects whether to open the defendant's case and present evidence, the defendant may make a motion for dismissal of the proceeding, or a claim in the proceeding, on the ground that there is no evidence on which a properly instructed jury could find for the plaintiff.
>
> (2) A defendant who unsuccessfully makes a motion for a non suit must elect whether to open the defendant's case and call evidence when the motion is dismissed.

[5] The task of the court on a non-suit motion was further elaborated upon by the Nova Scotia Supreme Court in *Salman v. Al-Sheikh Ali*, 2010 NSSC 450:

> 13 The test is therefore whether there is any evidence upon which a properly instructed jury could find that the defendants or any of them slandered the plaintiffs. It has been re-stated as whether there is a *prima facie* case against the defendants or whether there is a reasonable prospect of success.
>
> 14 Edwards, J. in *Morrison* in paragraph 4 quoted from *MacDonell v. M & M Developments Ltd.* (1998), 165 N.S.R. (2d) 115 (N.S. C.A.) for the test. He went on to say in paragraph 6:
>
> > Although the threshold for a plaintiff in establishing a *prima facie* case is low, evidence upon which an alleged *prima facie* case is based must be sufficient to generate a reasonable prospect of success. In other words, it is not enough for a plaintiff to show that some evidence has been elicited on a necessary element of their case without also satisfying the Court that said evidence is probatively sufficient in the context of the legal framework of each cause of action alleged.
>
> 15 In paragraph, he also 8 quoted from *Petten v. E.Y.E. Marine Consultants*, [1995] N.J. No. 197 (Nfld. T.D.) at paragraph 10:
>
> > What is contemplated by the probative sufficiency test is nothing more than a threshold common-sense screening of the evidence to ensure that it has some meaning and is not fanciful or ridiculous....

[6] So the first question I must answer is not about the sufficiency of the evidence, but rather whether there is ANY evidence pertaining to all of the constituent elements of the cause of action. If such evidence is entirely lacking, the Defendants are entitled to a dismissal without being obliged to mount their defence. If I find that there is SOME evidence, I must still consider whether it is more than merely "fanciful or ridiculous."

[7] A bit more factual detail is necessary. There are apparently idiosyncrasies in the greyhound breed that vets must appreciate and allow for. Before the

Claimants consented to the procedure, the Defendant, Dr. Andrus, represented to them that she had prior experience with greyhounds, which gave the Claimants confidence to go ahead.

[8] The Claimants say that they agreed to an estimate for the dental cleaning and extraction procedure, believing that the dog would have somewhere between 4 to 6 teeth extracted. They admit that this was just an estimate, as the vet would not know how bad the dental decay was until she had the dog anaesthetized and could examine him more closely, and that there might be more teeth that needed to come out. They say that they expected to be called to approve the removal of so many teeth, but no such call was received.

[9] In actual fact, there were 19 or 20 teeth removed.

[10] They also say that they were advised of the risks of not going ahead with the surgery, but not told of the risks associated with having the surgery. They say that had they known of all the risks they might not have gone ahead with the procedure.

[11] On the day of the surgery, apparently all went reasonably well until the dog started to come out of the anaesthesia. As told to the Claimants by staff working for the Defendants, the dog regained consciousness suddenly, panicked, bolted and hit his head on a nearby table, biting his tongue and causing a haematoma on his tongue.

[12] When the Claimants were allowed to take the dog home, he was in poor shape, weak and bleeding profusely from the mouth. Photos taken on that occasion are graphic. They immediately transported him to the MAEC where he received intensive treatment including life-saving blood transfusions, which lasted for several days and cost the Claimants about $6,000.00.

[13] The Claimants' case, as pleaded, includes a number of alternate grounds which are said to constitute negligence (I am paraphrasing):

a. Failure to inform the Claimants of the potential risks associated with canine dental surgery;

b. Failure to obtain informed consent for the procedure;

c. Misrepresenting their specialized knowledge (in several respects);

d. Withholding information as to the severity of his condition post-surgery;

e. Failing to transport Eddie to a suitable care facility after it became apparent that he was having a medical emergency;

f. Returning him in a condition that required immediate medical attention;

g. Allowing Eddie to suffer further blood loss when they knew or ought to have known that they lacked the ability to appropriately treat him;

h. Such further or other negligence as the evidence might disclose.

[14] Counsel for the Defendants argues that the lack of expert testimony is fatal to any of these grounds succeeding.

The need for expert evidence in professional negligence cases

[15] In the Ontario Court of Appeal case of *Krawchuk v. Scherbak*, 2011 ONCA 352, at para. 130, leave to appeal refused, [2011] S.C.C.A. No. 319, the court held:

> [I]n general, it is inappropriate for a trial court to determine the standard of care in a professional negligence case in the absence of expert evidence.

[16] This was qualified by the statement at paras. 133-35, that expert evidence is not necessary where:

> (1) it is possible to reliably determine the standard of care in relation to "non-technical matters or those of which an ordinary person may be expected to have knowledge"; or
>
> (2) the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard.

[17] A good example of the type of claim that could not succeed without expert testimony would be if, for example, the Claimants were alleging that the Defendants administered the wrong anaesthetic, or the wrong quantity of anaesthetic, or used an improper surgical technique, or failed to engage in some

procedure or technique. Ordinary people, such as this adjudicator, cannot be expected to know what amounts to good veterinary practice, and what does not.

[18] But most of the Claimants' complaints are not of that type.

[19] I do not believe that expert testimony is necessary to establish that there is an obligation to disclose risks and obtain informed consent.

[20] Most of the other allegations, as pleaded, similarly steer clear of the technical arguments that require an expert.

[21] It should be remembered that, while we speak of professional negligence, we are actually dealing with a contract for services. One of the terms of that contract are that the service will be provided in a non-negligent fashion, which engages the issue of standard of care, but many of the ancillary terms of the contract for service involve ordinary issues such as consent, disclosure, the obligation not to engage in misrepresentation and other matters of which an ordinary person might have knowledge.

[22] The second exception to the need for expert evidence is actions that are "so egregious" that it is obvious that they do not meet any applicable standard. Having heard the Claimants' evidence and having seen the documentary evidence including photographs of the dog *in extremis*, I cannot say that such an argument might not succeed. I appreciate that I must keep an open mind until all of the evidence has heard, and I have not made any such finding, but I believe such a possibility cannot be ruled out.

[23] In the result, then, the motion for non-suit must be dismissed. The Claimants have a *prima facie* case on at least some of their allegations, and the Defendant must be put to their election as to whether or not they will open their case and call evidence.

Eric K. Slone, Adjudicator