

Case Name:

**Musson v. Ontario Society for the Prevention of
Cruelty to Animals**

**Between
Melville Musson, and
Ontario Society for the Prevention of Cruelty
to Animals**

[2007] O.J. No. 5778

File No. 07-119 SCC

Ontario Superior Court of Justice
Small Claims Court - Owen Sound, Ontario

A. Drury Deputy J.

Heard: July 4 and 10, 2007.

Judgment: October 3, 2007.

(61 paras.)

Counsel:

Counsel for the Plaintiff was Mr. Bryan Buttigieg.

Counsel for the Defendant was Ms. Jennifer Friedman.

Judgment

A. DRURY DEPUTY J.:--

Claim and Defence

1 The plaintiffs claim is for:

- \$10,000 for the economic loss of a flock of sheep and for damages suffered by the Plaintiff due to the manner in which he lost his sheep,
- costs, pre-judgment interest and post-judgment interest.

2 The Defendant's defence is that:

- the animals were in need of protection and the manner in which the Society obtained the animals was appropriate.

3 The Defendant's claim, is for;

- its costs incurred in the matter over and above what it sold the sheep for.

4 The Plaintiffs defence is:

- that the Defendant is not entitled to compensation for expenses.

5 Exhibits entered were as follows;

1. Society notice prepared by Ms. C. Roberts of the Society on January 20 2006 and posted on Mr. Musson's farm advising he should contact the Society immediately, that there were "abandoned animals" and "sheep may be removed if contact is not made".
2. back page of Exhibit 1 above, noting s. 446 CCC and that the Society permits its investigator to issue a written order, that non-compliance may result in the animal being removed.
3. Surrender of Animal (Society form) dated January 21 2006, slating "this is to confirm that the following animals are freely surrendered to the Society, to be cared for, to be made available for adoption or to be euthanized at the sole discretion of the Society", with reference to all sheep and lambs and signed by Mr. Melville Musson.
4. letter of January 25 2006 by Dr. Lloyd Wieringa, veterinarian, and his examination of the sheep at Mr. Jilesen's farm, 46 sheep and 6 lambs, "very thin" and a body score of 1.
5. photos of the Musson farm and sheep taken January 20 2006 by Society employee Ms. Cheryl Roberts.
6. bills by Dr. Wieringa dated January 21 2006 for \$208.65, noting "water supply minimal" and "owner unable to cope", "convinced to surrender the sheep to OSPCA, and for January 25, 2006 \$160.50.
7. same as 4, clear copy.
8. composite bill by Dr. Wieringa for items in 6 above.
9. bill by Pat Jilesen dated February 1, 2006 for \$670 for trucking, feeding and housing the sheep. "I, Pat Jilesen, hereby agree to receive the flock of sheep in exchange for payment of the total \$670 from the SPCA" and signed by Mr. Jilesen and Ms. J. Bluhm.
10. cost statement dated by the Society dated April 4 2006 for expenses less sale of sheep.
11. letter from Mr. Darren Grandel, Senior Inspector of the Society, dated June 7 2006, to Mr. Musson.
12. letter from Ms. J. Friedman, counsel for the Society, dated August 18 2006 to Mr. W. Murdoch, MPP.
13. letter from Ms. J. Friedman dated August 21 2006 to Mr. Bryan Buttigieg.
14. letter from Mr. W. Murdoch, dated May 26, 2006 to Ms. J. Friedman.
15. letter from Mr. Buttigieg dated April 12 2006 to Ms. J. Friedman.

Facts Accepted

6 The Plaintiff was an elderly gentleman, being 88 years of age as of the date of trial. He lived alone on his farm outside of Owen Sound and had been there 22 years, raising sheep and lambs for occasional market. Mr. Musson's background was that of a war veteran and as an engineer. Mr. Musson testified that his health had been poor in the last year, he had cancer. He indicated when the sheep were removed on January 21 2006 he had trouble standing on his feet.

He told the vet Dr. Lloyd Wieringa on the day the sheep were surrendered that he could only work a short time then he would have to lie down. In light of his health he testified he had planned to sell all of his sheep that spring.

7 The Plaintiffs home and barn were not connected to Ontario Hydro service; he used solar power, generators and wood for heat.

8 His flock of sheep numbered about 52 animals at the start of 2006. The animals were on pasture in the summer and in the winter had access to and from the barn, being fed hay, grains, salt and minerals as supplied by Mr. Musson. Their water came from a small creek or stream that ran through the barnyard, although Mr. Musson testified this would dry up in the summer. The sheep relied on this creek (which was not obvious from the photos provided as Exhibits) and on snow. Mr. Musson said that in January of 2006 the apparatus that delivered grain to the sheep had been not working and that they were living on hay. As of January in 2006 the sheep had not been sheared for one or more years (during cross examination he indicated they were sheared every two years).

9 Mr. Musson indicated that he liked to be independent. He had not called on veterinary assistance for three or four years, he stated they had priced themselves out of the market. He had neighbours but as one testified (Mr. Tom Gray) that while he was willing to help, and had delivered hay two days prior to January 21 2006, that Mr. Musson seldom if ever asked for assistance. Mr. Gray did testify that after the sheep were removed Mr. Musson was depressed.

Chronology

10 Mr. Musson came home on Friday January 20 2006 and found a notice attached to his door and posted on several other spots on his property. This notice (Exhibits 1 and 2) stated that he should contact the Society immediately, that his animals may be removed and that s. 466 of the CCC may apply.

11 Mr. Musson called the Society as directed by the Notice that same day, at about 4:30 pm. He spoke to a person (later identified as Ms. Jennifer Bluhm, Inspector and Manager) and was told the Society would come to see him the next day. She told Mr. Musson of her concerns for his animals as based on the report by Ms. Roberts to her. She indicated the call took place about 5:15 pm. He told her one ewe had died, they had water from a creek. He told her he planned to sell the sheep that fall. He indicated he had hay but had run out of grain, his health was poor and he had no relatives or other help on the farm. Ms. Bluhm instructed Ms. Roberts to return to the farm the next day.

12 On January 21 2006 the Society investigator Ms. Cheryl Roberts, a co-worker being Ms. L. Ward and several OPP officers attended. The police were present in case of a problem. Ms. Roberts was attired in her uniform. Also present at Society request was Dr. Lloyd Wieringa, a local veterinarian. She arrived after 11:00 am.

13 Previously she had received a complaint as to the care of the sheep at the Musson farm. She had gone to the farm January 20, 2006, Mr. Musson not being present. Ms. Roberts testified that she had been dispatched to the farm after the Society received a telephone call from a person not identified, indicating the animals were in need of assistance. She could hear the sheep from the road side. She observed the dead sheep in the barnyard and she took a number of photos (Exhibit 5). She took photos of the yard and noted manure runoff going into the water source (creek). Ms. Roberts called her superior Ms. Jennifer Bluhm. Ms. Roberts felt the sheep were in distress.

14 When the Society attended on January 21, 2006, the Investigator Ms. C. Roberts noted 3 dead sheep in the barnyard area. One had apparently died in childbirth. Mr. Musson confirmed that he would bury dead sheep himself using his farm equipment, but that at that time the necessary equipment was not working. There were also bones noted by the Investigator in the yard, which, were believed to be sheep bones. Ms. Roberts said the sheep "squished" when they walked, due to the dirt, urine and fecal matter trapped in the wool. A neighbour was present; Mr. Laycock and he did not offer help.

15 Mr. Musson was told that his care for the sheep was lacking, he should order grain, fix the grain delivery apparatus, build birthing pens and to provide the sheep with a water source. Mr. Musson understood that he was asked if

he could do the work necessary in three days, and he told them that he could not. He was told three times he could be fined \$5,000. Dr. Wieringa told him the sheep were on the "thin side". Mr. Musson admitted in cross exam that the body conditions of the sheep were not good, not "first class".

16 Ms. Roberts advised Mr. Musson that he could surrender the sheep or she would prepare an order for their seizure. Mr. Musson signed the surrender while at the barn at about 12:50 pm. Mr. Musson did not ask for time to consider the matter nor ask for help. She allowed the vet and Mr. Musson to discuss the matter privately.

17 Dr. Wieringa testified that he suggested the surrender of the sheep would be best for the animals. Dr. Wieringa stated in testimony that there were close to 50 sheep when he attended at the Musson farm on January 21, 2007 at the request of the Society. He arrived at 11:35 am and left at 1:15 pm.

18 Dr. Wieringa indicated the water source was a creek in the barn yard and he was not certain that it was open for the sheep. The concern indicated was for quantity of water available. The barn was in poor condition, things falling apart and it was not suitable for lambs. When he examined the sheep more closely on January 25 2006 he found them thin, a body score of 1 and below. On the body score scale 5 would be over conditioned. They had not been shorn in at least a year. His estimate of weight would be 125 to 150 pounds for the ewes. Dr. Wieringa had experience with sheep, having raised Dorset's mostly for ten years. His value for the Musson animals would be \$50 per sheep, and he said not all would have been accepted by a market. Exhibit 7 contains recommendations made for the sheep subsequent, addressed to Mr. Jilesen, to whom the Society had transferred the sheep for care.

19 Dr. Wieringa told Mr. Musson on the day of surrender that this was not the way to keep sheep. Mr. Musson told him he had no assistance.

20 The property needed a clean up and proper bedding for lambs was lacking. He noticed several dead sheep and one had died lambing. He felt this was neglect, not to provide proper care. The sheep alive on the farm did not need immediate care that day. Dr. Wieringa did hear later that Mr. Musson did have neighbours who would assist, but that is not what Mr. Musson told him on January 21, 2006.

21 Mr. Musson was presented with a document (Exhibit 3, dated January 21, 2006) being a surrender of the sheep to the Society. Mr. Musson testified he was "just about falling over" that day, he could not perform the remedial work requested in three days (he said one day was a Sunday).

22 He signed it while the Society was there. The Investigator called for transportation and that day the sheep were removed from the farm. Mr. Musson found this disturbing, and he said three ewes collapsed while being chased and loaded.

23 When the Society had arrived, Mr. Musson called an acquaintance, Mr. Laycock, who attended at the property and was present for the loading of the sheep. I heard that Mr. Laycock while there did not offer to help Mr. Musson with the suggested corrective measures.

24 Mr. Musson testified that the Society did not offer to help him with his sheep. During cross exam he stated he would not accept help from the Society if offered. Mr. Gray told the OPP officer by the farm entrance that he was available to help Mr. Musson, but that message was apparently never conveyed to the plaintiff or Society.

25 As to the value of the sheep, Mr. Musson testified that he had 44 ewes and 2 rams, and I believe 6 lambs. Some of the ewes were pregnant and he was expecting 25 lambs that spring. There were Suffolk and Dorset crosses. He indicated the average weight would be 150 pounds after better nourishment, that when surrendered they averaged 125 to 130 pounds. He believed based upon what he had read in the newspaper as to local stock prices (Keady Market) that adults were about \$1 per pound and lambs \$1 to \$2 per pound. He determined weight not by scale but by body feel and by looking at the animals. More specifically Mr. Musson indicated he believed the values to total \$6,500 or more for the animals. I would note counsel for Mr. Musson led him through a number of detailed prices and values, but no

independent valuation was provided by testimony of a witness, written appraisal or newspaper account of stock prices.

26 I would note that after Mr. Musson completed his testimony, cross examination by the defendant's counsel and redirection by the plaintiffs lawyer, and after the lunch break, Mr. Buttigieg requested an opportunity to have Mr. Musson return to testify on the issue of prices and to introduce newspaper evidence on prices. He indicated they had not planned to do so but now would like to. This was objected to by Ms. Friedman on the grounds that the newspaper(s) had not been previously disclosed and served. I agreed with Ms. Friedman, such evidence should be discussed at settlement conference or sooner and accordingly disclosed as per the Small Claims Court Rule 18.02.

27 After the sheep were surrendered they were moved to the farm of Mr. Pat Jilesen, Exhibit 9 is his bill for service. The Society settled the bill by giving the sheep to Mr. Jilesen. No evidence was introduced as to the eventual fate of the sheep (or sale for value). The sheep were gone from the Society February 1, 2006 (with reference to Exhibit 9.)

28 Mr. Gray called Ms. Bluhm February 13 2006 to discuss the matter (to indicate there were people to help Mr. Musson and his animals). Mr. Musson called and spoke with Ms. Bluhm on February 20 2006. He told her the sheep were valuable and he was owed \$3,750. She felt the sheep were worth less than \$1,000 in total. This was based on prior Society experience with sheep and a similar size flock was disposed of for that value. She indicated in testimony the Society does not have the resources to care for animals for any period of time. Mr. Jilesen was charging them \$1 per day per animal. As evidenced by Exhibit 10 April 9 2007 the Society bill was \$1,056.30. The Society did not solicit independent values for the sheep and were content to erase the Jilesen bill by giving him the sheep. The Society was not seeking payment on the balance of the bill until sued by Mr. Musson.

29 Ms. Bluhm testified the surrender is a transfer of ownership. Once the Society has the sheep they can do what is necessary for the animals. The society can waive the costs incurred on surrender if the owner has limited means. There were no set fees for sheep (dogs are \$65 and cats \$45 for example). She advised this was the first surrender of livestock, and there had been one other case in May 2007. The surrender was an alternate to a charge under the Act (she said they felt in light of his age and health the surrender was a better solution). Agents are instructed to caution an owner prior to a charge being laid. Her information was that Mr. Musson understood what was asked of him, that she did not believe he was so cautioned with the presentation of the surrender. Ms. Roberts did not advise him to discuss the matter first with a lawyer or any other person. That was Ms. Bluhm's understanding. When she spoke to him January 20 2006 she felt he understood what would occur the next day, but the possible surrender of the sheep was not mentioned. She did not tell him they would attend with OPP. She felt that Ms. Roberts made the correct choice, there would have been further Society costs to continue to monitor the sheep and that was moot as Mr. Musson confirmed he could not care for them and had no apparent help on January 21, 2006. Ms. Bluhm testified that the value of the sheep claimed should include a reduction for costs to get to market condition.

30 Their practice with surrenders is to not suggest the party seek legal advice first if they appear to understand their actions. She stated that there are training materials for employees, that they are instructed to caution a person if charges are to be laid. Firstly, to advise that the person may be charged with an offence, that they have a right to contact a lawyer and that the person does not need to make a statement, that the Society can use any evidence against them. Secondly, that the person should not let anyone influence them. From Ms. Roberts' testimony this was not done with the surrender and. Mr. Musson.

Law

31 Counsel for the plaintiff provided several cases pertaining to Independent Legal Advice and a partial text in the form of pages from "The Law of Independent Legal Advice" by Mr. T. Tjaden, Carswell, 2000.

32 The essence of the law as presented was that persons subject to undue influence and unconscionability should have an opportunity in contractual matters to seek independent legal advice. Age and health may be factors that increase the susceptibility of the person and his or her need for advice before proceeding. Counsel for the plaintiff proposed that

should a contract be found to be unconscionable, the remedy is to set aside the contract.

33 Counsel for the Society distinguished the cases and law presented by noting they were addressing commercial and contractual matters, the case at hand dealt with the Society and its mandate to protect which has no commercial self interest.

34 With reference to s. 446 of the Canadian Criminal Code, it states that a person who causes or allows suffering to occur and continue in an animal is committing an offence.

35 With reference to the Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36,

- s. 11 Inspectors have the powers of a police officer
- s. 12(2)(3) Inspectors may enter a place when they observe an animal in distress and they may bring a veterinarian to examine the animal,
- s. 13 orders, on reasonable grounds an Inspector may issue orders in writing to take care of an animal, such orders must be served on the owner and actions can be specified for the owner within a timeframe.
- s. 14 taking control and possession of the animal if necessary.
- s. 15(1) the owner of the animal may be liable for the expenses of the Society in removing and caring for the animal. The Society in s. 15(2) has the power to sell the animal if the owner does not pay as per (1).
- s. 17 appeal procedure for an owner with reference to a s. 13 or 14 order, within five days of notice of the order. A hearing would follow and if the owner disagrees with that result there is a further appeal to the Superior Court of Justice.

36 Counsel for the plaintiff provided case and text law, and both counsel discussed the above statute law, text and cases.

37 The text referred to was the Law of Independent Legal Advice by Mr. Ted Tjaden. It contained an excellent discussion regarding the doctrines of "non est factum", undue influence and unconscionability.

38 Mr. Buttigieg referred to the cases of *St. Thomas (City) v. Yearsley*, [1895] O.J. No. 42, Ontario Court of Appeal (the request by the court for a bond for the costs of a minor convicted of larceny in exchange for the family's preference of the institution he would be sent to) and *Freake v. Freake*, [2004] N.J. No. 222 (Newfoundland) (regarding a domestic contract).

39 I will make reference to the other case referred to, being *Lloyds Bank Ltd. v. Bundy* [1974] Q.B. 326 and Lord Denning's comments. This case is noted by Mr. Tjaden and Lord Denning was not in the majority. However, I feel his comments summarize much of the law as presented to me and I will repeat part of them. The case involved an elderly farmer who pledged his farm to his (and his son's) longstanding bank for his son's company's overdraft. There was default and the Bank obtained possession of the farm at trial, on appeal this was overturned.

40 There was no independent legal advice, there was a breach by the Bank of its fiduciary duty of care, and the guarantee and charge of the farmer was set aside for undue influence. The general rule is noted that a customer signing a bank guarantee or charge cannot get out of it. However, exceptions were noted when parties meet on unequal terms (page 336, paragraph H). Categories discussed would be:

- a) duress of goods
- b) unconscionable transactions
- c) undue influence in two parts:

- (i) where the stronger party has been guilty of some fraud or wrongful act to gain some gift or advantage from the weaker.
 - (ii) where the stronger party is not guilty of fraud or wrongful act but due to the relationship has gained some gift or advantage for him.
- d) undue pressure
 - e) salvage agreement

41 The general principles all rest on the notion of "inequality of bargaining power". I would quote the following from paragraph C on page 339:

42 "Gathering it all together, I would suggest that through all of these instances there runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms that are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self interest, unconscious of the distress he is bringing the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases.

Decision

43 I find that the sheep were in need of protection and that Mr. Musson was unable to properly care for the animals. This leaves the matter as to the propriety of how the Society obtained the sheep.

44 Mr. Musson takes the position that he should have had an opportunity to consider the matter of the surrender on January 21, 2007, that he should have been told he could obtain legal advice before deciding his course of action. He was elderly, in poor health and would say he was pressured and or influenced by the presence of uniformed Society workers, OPP officers and a veterinarian. In light of the surrender he seeks compensation for the value of the sheep and for his emotional suffering.

45 The Society takes the position that they saved Mr. Musson financial expense (possible court fine) and embarrassment (court procedure) by using the surrender as opposed to having him charged with an offence. It is the Society's position that the sheep were in need of assistance and that they were empowered to remove them either by legislative act or surrender, that they did not have the time (with regard to the health of the sheep) nor mandate nor the funds to work with him on an ongoing basis.

46 The issue is whether the Society should have used the surrender document in this situation. By doing so the Society removes itself from the constraint and procedure of the legislative choices noted above (see Law).

47 The Ontario Society for the Prevention of Cruelty to Animals Act (noted above and referred to as the Society Act) specifies that the owner has a right of appeal. He or she would have five days to challenge a seizure order. With the surrender no such appeal is possible (save in common law as it relates to contracts and their voidability). Mr. Musson did not request the return of the sheep or compensation until his call to Ms. Bluhm on February 20, 2007. This was past any appeal date in the act if such had been applicable.

48 Returning to the core issue of independent legal advice, Mr. Buttigieg submitted extensive law on this topic.

49 Ms. Friedman distinguished the law as submitted by noting the Society is not a commercial entity seeking financial gain.

50 The legislation in the Act sets out a procedure for the Society in animal apprehensions. It was not followed here as Mr. Musson was asked to deed his animals to the Society and he did so. The Society by using the surrender avoids the legal protections afforded to the animal owner as offered by the Act. Ms. Roberts was vague as to her understanding of how to advise an owner when the Act was being used and an animal being taken into protection. Ms. Bluhm in testimony said that their agents are instructed to caution a person if charges are to be laid. They are to firstly, advise the person they may be charged and that they have a right to contact a lawyer, they don't need to make a statement and that the Society can use any evidence against them. Secondly they are to say that the animal owner should not let anyone influence them.

51 I find Mr. Musson was allowed to read the surrender, that it was discussed by himself with Ms. Roberts and Dr. Wieringa. It is not clear what Ms. Roberts said to him that day. I accept that he was not given time to think about the matter nor directed to consult legal counsel.

52 If the Society agent had proceeded with a s. 13 of the Society Act order presumably Mr. Musson would have been advised as Ms. Bluhm indicated the agents were to do, and perhaps Mr. Musson would have requested time for legal advice or been notified that he only had five days to appeal. Not being so cautioned left him in the dark as to his rights.

53 I would find the use of the surrender form a manner in which the Society can avoid following the stricter rules as set out in the Society Act. From testimony it was clear the Society felt once they were deeded the animals in the surrender they had no further obligation to the owner. It was a simpler procedure but not one directed by the legislative body with oversight of the Society. The fact that Mr. Musson was essentially alone, elderly and ill would compound matters.

54 Accordingly I would find that Mr. Musson is entitled to have his surrender of the animals in question declared null and void.

55 As for his economic loss, there was little evidence save for Mr. Musson testifying as to what he thought the value would be. Granted he had been farming sheep for several decades but I would expect third party evidence from an impartial source specific to the gender, size, breed and condition of the animals for their market value as of January 2006. To expect finished market values would not work unless you deducted cost of finishing from the end result. There was no evidence to that. Counsel for the Plaintiff was wishing to be helpful in providing his estimate of value based on testimony, but I will not accept evidence from counsel.

56 The plaintiff's case was that Mr. Musson was too old and infirm to care for his sheep and to understand the implications of a simple surrender document, but his testimony to value without supporting stock yard prices in writing or specific value analysis by a qualified third party was to be accepted. I will limit the weight I give to his estimate of value.

57 The value placed on the animals by the Society (being the amount of the bill from Mr. Jilesen) is clearly arbitrary.

58 Having discounted the values from both parties, I will rely on Dr. Wieringa's comments that he thought the animals were worth about \$50 each, but some would not have been accepted for market. I heard nothing as to the eventual disposition of the animals by Mr. Jilesen. I would award Mr. Musson \$50 for each of the 52 animals, \$2,600.

59 I award nothing for Mr. Musson's claim for damages. The award of \$2,600 above compensates him for the value of animals as of the date of apprehension, his suffering was evidenced by Mr. Gray saying that Mr. Musson was depressed afterwards, but that is insufficient to award additional funds. Mr. Musson testified he planned to sell the animals that same year due to his health. I do not see reason to award punitive damages as the Society was not malicious, oppressive and high-handed to borrow the phrase from Binnie, J., in *Whiten v. Pilot Insurance Co.*, [2002] 1

S.C.R. 595. I would similarly decline for other classes of damages.

60 Pre-judgment and post-judgment interest will be granted as per the rates in the Courts of Justice Act.

61 Counsel may provide succinct and brief written submissions as to costs on or before October 25, 2007. I will respond by written order on costs.

qp/e/qljxh/qlvxw/qlana