How Much is that Doggie in the Window - Valuation for a Lost Pet

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Animal Law

In this issue, TortSource has the opportunity to introduce the new TIPS Animal Law Committee, established at the 2004 Fall Leadership Meeting. As soon as we heard about it, TortSource asked if we could highlight some key areas of animal law for TIPS members. Luckily, the answer was yes!

The chair of the Animal Law Committee, Barbara Gislason, leads off with her discussion of evolving issues in veterinary malpractice and the need for a new analytical model. David Favre addresses the complex valuation issues regarding an injured or deceased pet. Debra Bresch weighs in on the problems with breed-specific laws and ideas for change. Finally, John Stockman advises us on liability for equestrian-related torts. These features are designed to begin to educate TIPS readers about legal issues arising from relationships with and investments in animals—both emotional and economic.

How Much Is That Doggie in the Window? Valuation for a Lost Pet

David Favre

The expanding concern about harm to pets presents a unique challenge to law that governs an appropriate level of damages to an individual harmed by the wrongful conduct of another. Throughout legal history, domestic animals have been considered property, and most existed with humans in the context of agricultural provision of food and fiber. Within this culture, an animal’s value was almost entirely economic. At the same time, a legal system’s focus for reimbursement was limited strictly to economic harm. If you killed or harmed a cow, damages were the market value for the cow. If the cow was injured to the degree that the cost of veterinary care and recovery would exceed the animal’s market value, the animal most often was “put down”: killed. Then as now, it made little economic sense to invest more to repair than replace a piece of property.

Veterinary Malpractice Leading the Evolution of Animal Law

Barbara J. Gislason

Veterinary malpractice is arguably the most rapidly evolving area in animal law and is considered by many to be the fulcrum for what will happen elsewhere. As in most areas of animal law, a dearth of state and federal statutes presently address veterinary malpractice. As societal values change, however, and animals increasingly are treated as family members, the courts must follow old common law, find good faith reasons to modify it, or wait for legislative enactments. Consequently, veterinary malpractice is attracting the attention of practicing attorneys. It is the subject of intense interest from professors and scholars, as reflected in challenging articles by Richard L. Cupp & Amber E. Dean, Vets in the Doghouse: Are Pet Suits Economically Viable? 31 Tul. Bus. L. Rev. Spring 2002, at 42; Christopher Green, The Future of Veterinary Malpractice Liability in the Care of Companion Animals, 10 ANIMAL L. 163 (2004); and Rebecca J. Huss, Valuation in Veterinary Malpractice, 35 Loy. U. Chi. L.J. 479 (2004).

The only two models that permeate discussions about veterinary malpractice are based upon strained definitions of property (e.g., animate, constitutive, sentimental, sentient) or personhood (like a ship or corporation), yet animals—as logic would dictate—are neither property nor persons. Can talented legal minds bring all interests to the table and develop model statutory definitions for the word animals, beginning in the veterinary malpractice context? What would this change in nomenclature mean, in practical terms? Are continued on page 4
Issues of harm and damages to many animals have not changed much from how they were resolved 100 years ago. But the issue of harm to pets has prompted reconsideration of old limitations. Pets have replaced farm animals as the primary source of animal-human interaction. Pet ownership now is widespread, with more than 100 million dogs and cats residing in U.S. homes. Some humans undoubtedly have had special relationships with domestic animals ever since they were brought into human households, but it is just in the past decade that the world of science has confirmed the real, noneconomic value of pets as companions. (General discussions of this issue are available at www.animallawinfo.topics/petsedwardsmansfield.)

For most people the relationship between a human and a pet is not based on economic considerations. Indeed, like children, pets cost money that can never be expected to be recovered. Although some pets win awards and command high-dollar breeding and offspring fees, the vast majority of pets are just members of the family. The bond between humans and pets is not imaginary and can contribute significantly to individual well-being. One objective measure of a pet's value to a person is the amount of money an owner is willing to spend for veterinary care. A cat with little or no market value may require surgery that can cost hundreds or thousands of dollars, and many owners are willing to pay such amounts.

Before damages for a person's pain and suffering for loss of or injury to a pet are allowed, a number of difficult questions must be resolved. Although many humans do seriously believe that a pet is a family member, the law has not gone quite this far. A pet is still property—living, special property, but property nonetheless. But pets give rise to a number of public policy questions: How can the system evaluate whether an individual suffered emotional trauma to pay in the event a claim is made against the person was not present during the incident? How do we measure the degree of loss? How do we handle the risk of turning this emotional issue over to a jury that may see tears on one side and deep insurance pockets on the other?

The Cases

In 1981 the Supreme Court of Hawaii, in Campbell v Animal Quarantine Station, 632 P2d 1066 (Haw. 1981), set a precedent for a new interpretation in "pet law" by upholding an award for mental distress to five members of a family whose dog was killed while being transported to a private hospital by a state agency. The dog had been kept in an unventilated van in the hot sun and died of heat prostration after arriving at the hospital. The court upheld the $1,000 award even though family members had not watched the animal die or seen its body; they learned of its death in a phone call, and no member found it necessary to seek psychiatric or medical assistance. Public policy discussion was not really present in the case. It seems the court was unaware of the sweeping changes its opinion represented.

The Wisconsin Supreme Court in Rabideau v City of Racine, 627 N.W.2d 795 (Wis. 2001), was faced with this fact pattern: a woman watched as a neighbor police officer shot and killed her dog. Although the court recognized the bond between owner and pet, it said that public policy prevented recovery based upon either negligent infliction of emotional distress to a bystander or negligent damage to her property. The court noted that under certain circumstances a person could recover for intentional infliction of emotional distress for harm to a pet, but it also stated: "We are particularly concerned that were such a claim to go forward, the law would proceed upon a course that had no just stopping point. Humans have an enormous capacity to form bonds with dogs, cats, birds and an infinite number of other beings that are non-human. Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion.

In Pickford v Masion, 98 P3d 1232 (Wash. 2004), the plaintiffs' dog was mauled by the defendants' dogs and sustained permanent injuries. The trial court granted summary judgment against the plaintiffs' claims of negligent and malicious infliction of emotional distress. The court of appeals affirmed the grant of partial summary judgment and further held that the destruction of the companion relationship could not be extended to dogs: "Such an extension of duty and liability is more appropriately made by the legislature."

Continuing Need for Change

Even though the courts have shown a reluctance to make new law regarding this issue, it will not go away anytime soon. The emotional harm is real, and actions against animals are often too egregious to be ignored; it seems unfair that the risk to a wrongdoer is limited simply to the market value of a harmed pet. Although recovery for human pain and suffering is all well and good, it does not address the real harm, the harm to the animal. The best response of the legal system to a wrongdoer who harms an animal should be on behalf of the animal harmed, directly, by allowing the animal to recover for that harm and be made whole again. At the very least, a wrongdoer should be liable for all reasonable veterinary costs necessary for the animal to recover from the inflicted injury or harm.

Given that the courts currently represent a dead end for damages resolution, the obvious alternative is the legislature. Indeed, legislative change has begun. Kentucky, Connecticut, and Illinois have adopted laws allowing pet owners limited windows of opportunity to recover for losses arising out of harm to a pet. Maryland does not allow collection for pain and suffering but clarifies that actual damage in excess of market value for the pet may be charged, up to $5,000 for veterinary care. MD. CODE ANN. CTS. & JUD. PROC. § 11-110 (2002).

By the end of this decade, a significant number of states likely will have adopted laws that make some provision for enhancement of damages, beyond mere market value, for intentional and negligent harm to pets.