

NEW MEXICO Lawyer

August 2012 Volume 7, No. 3

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The Emerging Field of Animal Law



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Animal Law:

What Is It and Why Do We Care?

By Helga C. Schimkat

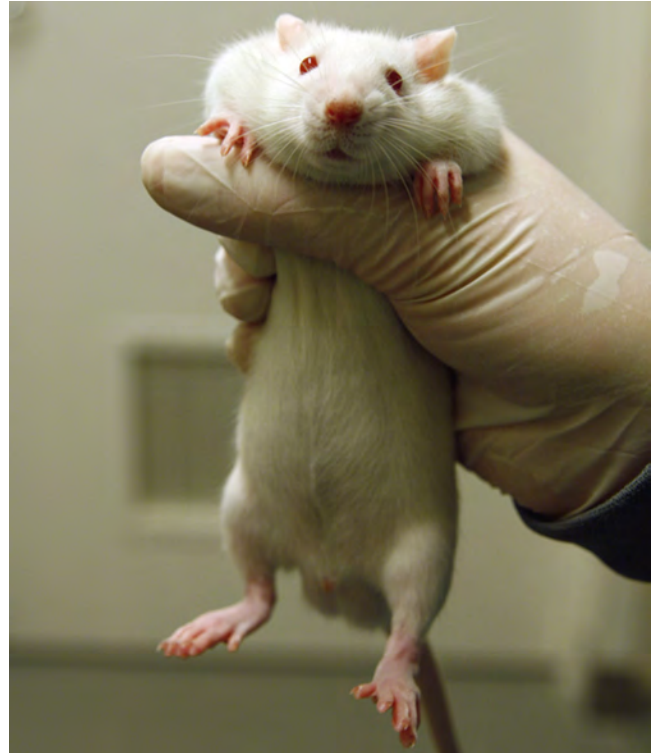
Animal law is a growing area of law that many lawyers have brushed up against without even thinking of the matter as “animal law.” Essentially, animal law is the substantive body and practice of law that affects non-human animals (referred to for the sake of simplicity as “animals” for the balance of this article) and the interests of humans with respect to animals. Animal law is similar to fields of law such as children’s law, wherein many types of law affect or relate to a particular grouping of individuals.

The practice of animal law may involve such diverse areas of law as torts, contracts, criminal, administrative, regulatory, municipal, trusts and estates, property and constitutional. Specific examples include prosecuting cruelty cases, defending dog bite cases, drafting a pet trust provision in someone’s estate plan, pursuing a tenant’s rights against a landlord with respect to a pet, and resolving a contract dispute between an adopter and the rescue group from which a pet was adopted.

Animal lawyers are also involved in public policy and may pursue federal and state legislation and local ordinances that affect animals, such as wildlife conservation and endangered species laws, dangerous dog statutes, and creating life-long sanctuaries for the country’s captive chimpanzee population. Other animal law lawyers get involved with litigation that affects the well-being and rights of animals.

Law regarding animals affects many animals and thus also the people who have an interest in the how animals are treated in our society. For example:

- New Mexico’s farmers owned over 1.7 million farm animals in 2007, according to the results of the United States Department of Agriculture’s *2007 Census of Agriculture, New Mexico State and County Data*, February 2009 (<http://www.agcensus.usda.gov/Publications/2007>), including 1.7 million head of cattle and 126,000 sheep. Animals in agriculture are the subject of numerous state laws.
- In 2011, the state’s animal shelters took in 118,000 cats and dogs and euthanized 55,000 of them due to “shelter overpopulation,” according to a *Feasibility Study: Creating a Fund to Aid Low-Income Households in Sterilizing, Vaccinating and Spaying or Neutering their Companion Animals*, January 24, 2012, by this author for the New Mexico Animal Sheltering Board and Regulation and Licensing Department (http://www.rld.state.nm.us/boards/Animal_Sheltering_Services.aspx). Due to the state’s Animal Sheltering Act, passed in 2007, § 77-1B-1 et seq. NMSA 1978, those animals were euthanized under the supervision of a licensed veterinarian or by a licensed euthanasia technician, which was not necessarily the case in each shelter before that law was enacted.
- The Lovelace Respiratory Research Institute in Albuquerque reported in its *Annual Report of Research Facility for the USDA’s Animal and Plant Health Inspection Service*, November 14, 2008 (http://www.humanesociety.org/assets/pdfs/animals_laboratories/usda_reports/new-mexico/2008_usda_annual_lovelace_research_institute.pdf), that it had 432 non-human primates, 307 ferrets, 180 rabbits, 172 dogs and 98 guinea pigs in use or under its control



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for biomedical research. The report does not list the laboratory-bred mice and birds that the Institute may have because the federal Animal Welfare Act, which governs most aspects of biomedical research, does not require them to be listed.

Many lawyers and related legal personnel work on animal law issues through various employers. Quite a number of state and local agencies are involved on a regular basis in animal law matters. They include, among others, the Board of Veterinary Medicine, the Animal Sheltering Board, the Game Commission, the Livestock Board, the Department of Agriculture, the Attorney General’s Office, and law enforcement at all levels—courts, animal control officers, prosecutors, public defenders and city and county attorney offices. Besides the government lawyers and related personnel, lawyers in private practice engage in animal law, as described earlier, as do lawyers with non-profit organizations that handle animal issues such as animal shelters, advocates for animal causes, and business associations for commercial interests.

Animal law also makes the papers a lot and provides for heated debate. For example, every year at least a few cases involving severe dog maulings or killings make the news. In some states or communities, those situations led to the passage of “dangerous dog” acts or even breed-specific legislation. New Mexico passed the Dangerous Dog Act in 2005, §§ 77-1A-1 et seq. NMSA 1978, and more than one attempt has been made to designate some breeds as automatically

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Protecting Animals Can Make Us a Safer Society:

Examining the Link Between Animal Abuse and Human Violence

By Laura E. Sanchez

In May, Luka Rocco Magnotta was arrested in a gruesome case in Berlin on charges of killing and dismembering, then eating, his alleged lover. The incident was taped and posted on the Internet, including footage of Magnotta eating and possibly having sex with parts of his victim.¹ Many animal activists had long suspected that Magnotta was dangerous after he had posted similar videos in the past two years showing him killing kittens.² As grisly and shocking as this act of violence was, the connection between animal cruelty and subsequent human violence is hardly new. Serial killer Jeffery Dahmer loved to dissect animals and had a history of impaling dogs' heads, frogs and cats on sticks.³ Between 1978 and 1991, Dahmer killed 17 males, molesting many of them, dismembering them, and keeping their body parts in the refrigerator. From police reports, we know that Ted Bundy was forced to witness animal cruelty by his grandfather. He later killed 33 women. David Berkowitz, the "Son of Sam," poisoned his mother's parakeet out of jealousy. He later shot 13 young men and women, leaving six people dead and at least two with permanent disabilities.



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While these repugnant tales are the most infamous and may seem too rare to suggest a problem for our community, the New Mexico State Police files are full of many local examples of the connection between animal abuse and human violence. The problem is particularly prevalent in households that suffer from domestic violence. According to the American Humane Association (AHA),⁴ 71 percent of pet-owning women entering women's shelters reported that their batterer had threatened, injured or killed family pets for revenge or to psychologically control victims, and 32 percent reported their children had hurt or killed animals. Sixty-eight percent of battered women reported violence towards their animals, with 87 percent of these incidents occurring in the presence of the women and 75 percent in the presence of the children to psychologically control and coerce them.

This article examines the resources available in New Mexico to raise awareness about this issue, including an upcoming *Annual Conference on the Link Between Animal Cruelty and Human Violence*. This conference will educate and train representatives from various government departments and antiviolence organizations on the cycle of violence in our society impacting both people and animals. This article also reviews state laws that could be changed to permit cross-reporting among law enforcement, animal control officers, shelters and mental health and social work professionals.

The Link

Research supports the notion that healthy relationships between humans and animals enhance physical and psychological health and teach us how to understand another being and how to express compassion, empathy, and nurturing. But for the past several decades, there has also been documentation of a link between domestic violence, child abuse, elder abuse and animal abuse. When domestic violence exists, companion animals are often caught in the cycle of family violence. Perpetrators who commit violent acts against their partners will often commit animal abuse, including killing, harming, or threatening family pets. Women caught in the cycle of violence will hesitate to leave an abusive partner because the animals have been threatened with harm. In some cases, children will defend or attempt to protect their companion animals by intervening in domestic disputes, thus placing children in greater danger. Animal abuse in the home has also been an indicator of potential child abuse, and studies suggest that abusers of the elderly population may correlate with those who also abuse animals.

The link is evident. Animal cruelty is not just about the animals involved. Evidence suggests this may be a signal of a deeper and more violent problem, whether as an act of abuse and control over victims through their cherished pets, or as a red flag when a young person tortures animals and must get help to prevent an escalation to human violence.

What Can We Do About This Problem?

The AHA explains what advocates can do for battered women with pets.⁵ Changes as simple as adding questions about pets and their welfare to shelter intake questionnaires and risk assessments can help bring awareness. Advocates can also work with animal shelters, veterinarians, and rescue groups to establish "safe haven" foster care programs for the animal victims of domestic violence. Some women's shelters around the country are already building kennels at their facilities. Other efforts include making provisions for pets in safety planning strategies, helping clients prove ownership of their animals, and helping victims retrieve animals left behind. Additionally, the AHA says including animals in abuse prevention orders can make a significant difference. Finally, the AHA recommends establishing community coalitions against family violence that include humane societies, SPCAs (Society for the Prevention of Cruelty to Animals), animal control agencies, and veterinarians, and using these coalitions to train volunteers on how animal abuse cases are investigated and prosecuted and to train the community about domestic violence issues.

In New Mexico, advocates for this issue have been doing just that on an annual basis since 2004. The *Annual Conference on the Link Between Animal Abuse and Human Violence* (www.e-solved.com/TheLink) will be held again this year on Sept. 17 at the Sheraton Albuquerque Airport Hotel. This conference will bring together concerned professionals, including animal control officers, animal shelter staff, attorneys, domestic violence workers, juvenile justice workers, law enforcement officials, social workers, and anyone interested in stopping violence in our society. Resources are available in New Mexico to continue educating ourselves and the community about The Link, but we need more committed citizens to participate.

Cross-Reporting Changes in the Law

Certain parts of the law can provide obstacles to fully alerting law enforcement about the dangers posed by violent perpetrators. Currently, privacy laws in counseling or social work services prevent reporting of suspected animal abuse. Health care professionals are obligated to report suspected child abuse, and counselors and therapists are permitted to override confidentiality rules if the patient's family is in imminent danger. However, these same professionals are not able to report admitted animal abuse, even when it is a sign of other violent tendencies. Certain changes could be made within the law to permit cross-reporting among law enforcement, animal control officers, animal shelters, and mental health and social work professionals.

A few states have already moved forward to try to change the law to help prevent this type of continued animal abuse and, when it is suspected, enable professionals to prevent associated violence against humans. In 2007, Maine amended its laws to include animal control officers among those who may report when they have a reasonable cause to suspect that an incapacitated or dependent adult has been or is at substantial risk of abuse, neglect or exploitation. (Maine Revised Statutes Title 22 §3477) That law was also amended to permit other health care, social work, or law enforcement officials to report reasonable suspicion of animal cruelty, abuse or neglect to the local animal control officer or to the state's animal welfare program. Similarly, a law was enacted in Connecticut last year that requires animal control officers and social workers with the State Department of Children and Families to share information on cases of suspected animal abuse. However, the Connecticut law won't make animal control officers mandated reporters of child abuse, like teachers and doctors. West Virginia and Illinois are also among the states that have changed state law to require cross-reporting.

In New Mexico, efforts have been made to work with the Psychologists Examiners Board and the Board of Social Work

Examiners to support these changes in our state law. Already, the social workers' ethics require that they hold client interests as primary but also uphold a responsibility to the larger society that may supersede the loyalty owed to clients. *See* Rule 16.63.16.8 NMAC. "Social workers should promote the general welfare of society... should advocate for living conditions conducive to the fulfillment of basic human needs and should promote social, economic, political, and cultural values and institutions that are compatible with the realization of social justice." *See* Rule 16.63.16.13 NMAC.

Recently, a story in the *Albuquerque Journal* described two kittens that were pulled from a dumpster; one was dead and the other had its eyes matted shut with paint. (*ABQJournal, Kittens in Dumpster; 1 Dead, Other's Eyes Painted Shut*, June 12, 2012) A veterinarian washed white paint from the surviving kitten's eyes, revealing swelling and abrasions on the kitten's eyelids; the condition of his eyesight remained uncertain at the time of the article. Animal Protection of New Mexico offered a \$2,500 reward for information leading to the arrest or prosecution of those responsible, and the Attorney General's Office urged the public to call its animal cruelty hotline (877-548-6263). Continued efforts like these aimed at the community to report incidents of animal abuse could very well prevent humans from suffering a similar fate.

For more information, visit Animal Protection of New Mexico (www.apnm.org) or Animal Protection Voters (www.apvnm.org).

Endnotes

¹The Vancouver Sun, June 6, 2012: <http://www.vancouversun.com/news/Luka+Rocco+Magnotta+make+first+court+appearance+Berlin/6731586/story.html>.

²The Montreal Gazette, May 31, 2012: <http://www.montrealgazette.com/technology/Dead+kittens+porn+scary+digital+trail/6704229/story.html>.

³http://www.pet-abuse.com/pages/abuse_connection.php and <http://minnesota.publicradio.org/display/web/2006/07/06/animalkillers/>.

⁴<http://www.americanhumane.org/interaction/support-the-bond/fact-sheets/animal-abuse-domestic-violence.html>.

⁵<http://www.americanhumane.org/interaction/support-the-bond/fact-sheets/animal-abuse-domestic-violence.html>.

About the Author

Laura E. Sanchez, J.D., M.P.A., is an attorney licensed in New Mexico and Arizona. She lives in Albuquerque and practices in the areas of energy, environment and natural resources.

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"dangerous," which is commonly referred to as breed-specific legislation (see sidebar, page 7). Other animal law issues that periodically make the news in New Mexico include a variety of horse issues (e.g., a permit request for a slaughterhouse, egregious horse racing industry conditions, and starvation and neglect), dog and cockfighting cases, individual animal cruelty cases, trapping on public lands, and the reintroduction of the endangered gray wolf in southern New Mexico.

According to the Animal Legal Defense Fund (www.aldf.org), New Mexico is not alone in having an animal law section or committee within its state bar association. In fact, New Mexico is the 24th state with such a section (as well as fourteen regional or local sections or committees). Even the American Bar Association has an Animal Law Committee.

Furthermore, at least 141 law schools in Canada and the U.S., including the University of New Mexico School of Law, offer (or have offered) courses in animal law (www.aldf.org). Law students can even participate in the National Animal Law Competitions, organized each year by the Center for Animal Law Studies at Lewis & Clark Law School. The event consists of the Legislative Drafting and Lobbying Competition, the Closing Argument Competition, and the Appellate Moot Court Competition. Finally, Lewis & Clark Law School will welcome its first class for an LL.M. in animal law this fall.

About the Author

Helga C. Schimkat is an activist, writer and lawyer who focuses on animal and environmental issues in New Mexico. She is a founder and chair of the Animal Law Section of the State Bar of New Mexico, writes a monthly column, "Animals Matter," for *The Santa Fe New Mexican* and has an Animal Law 101 column on dogtime.com/cattime.com.

Alamogordo Chimps in Limbo



By Julia Jarvis

In June 2010, the National Institutes of Health (NIH) transferred 14 chimpanzees housed at the Alamogordo Primate Facility (APF) to the Southwest National Primate Research Center in San Antonio, Texas, for use in Hepatitis C research.¹ The NIH then announced its plan to close APF and transfer the remaining 200-plus chimpanzees to the same facility for research. The announcement rallied public objection. Many felt New Mexico's Air Force chimps, which were first used as research subjects in the space program and later in infectious disease research, had "done their service" and urged NIH to retire officially the APF chimps under the Chimpanzee Health Improvement Maintenance and Protection Act, 42 U.S.C. § 201 *et seq.* (2000).

The NIH's announcement was a surprise because many had the false impression that all of New Mexico's former Air Force chimps had been retired. A little history explains the confusion. In 1997, the Air Force transferred ownership of almost 600 chimps to the Coulston Foundation (Coulston), a private research facility located in Alamogordo.² In 2000, the NIH took custody of 288 chimpanzees from Coulston after serious and repeated violations of the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* (1990). The current APF chimps are those taken during the seizure. By 2002, Coulston became insolvent and transferred ownership of its remaining 266 chimps to non-profit Save the Chimps, which began a highly-publicized campaign retiring and relocating the chimps to three-acre sanctuary islands in Florida. By the end of summer 2011, Save the Chimps had relocated all of its chimps to Florida. The public either forgot about the remaining APF chimps or assumed they were also retired. Hence, when the NIH began transferring chimps, many were surprised to learn that federally-owned research chimps still lived in New Mexico.

The NIH's announcement to reinstate the APF chimps into active research helped generate momentum to protect chimps from research, such as by the introduction of the Great Ape Protection and Cost Saving Act in 2011, S. 801, 112th Congress (2011), which would ban all invasive research on chimpanzees. In response to a congressional inquiry, the NIH requested the highly-respected Institute of Medicine and the National Research Council to conduct a collaborative assessment examining the scientific necessity of chimpanzees in biomedical and behavioral research.³

The committee's report, published in December 2011, formulated new restrictive criteria for chimpanzee research and found that the current

trend in biomedical research indicates a decreasing need for chimpanzees. The NIH responded to the study by announcing a moratorium on funding new chimp research while it audits all its currently funded chimpanzee research under the new criteria.⁴ The result of this policy decision places the APF chimps in limbo; for now, they will not be re-introduced into research in San Antonio.

There are three potential outcomes for APF and its chimps. One, the chimps are retired and APF is converted to sanctuary status. Two, the chimps are retired and transferred to an out-of-state sanctuary and APF is closed. Three, the chimps are placed into active research and APF is closed. The NIH has not indicated when it will make a final determination. In the meantime, the chimps remain at APF awaiting their fate.

Endnotes

¹ *Why are there so many chimpanzees in New Mexico?* Retrieved May 5, 2012, from <http://www.apnm.org/campaigns/chimps/time-line.php>.

² *A summary of the history of the chimpanzees in Alamogordo, NM.* Retrieved May 12, 2012, from www.savethechimps.org.

³ IOM (Institute of Medicine). 2011. *Chimpanzees in biomedical and behavioral research: Assessing the necessity*. Washington, DC: The National Academies Press.

⁴ Gorman, James, (Dec. 19, 2011). "Elevation of the Chimp May Reshape Research." Retrieved May 2, 2012, from <http://www.nytimes.com/2011/12/20/science/recognition-of-chimps-as-relatives-may-reshape-research.html?pa>

About the Author

Julia Jarvis is a Santa Fe lawyer, currently pursuing an M.S. in psychology. She is a board member of the Animal Law Section of the State Bar of New Mexico and chair of the section's Captive Animal Committee.

Homeowners Insurance and Dogs

By Simone M. Seiler

Animals, especially dogs, are a liability hazard for insurance companies, and different companies use different approaches for underwriting animal-related risks. According to the Insurance Information Institute, dog bite claims accounted for more than one third of all dollars paid out on homeowners insurance policies in 2011 (http://www.iii.org/issues_updates/dog-bite-liability.html (accessed May 22, 2012)). Insurers paid out an average of \$29,396 per dog bite claim in 2011, totaling nearly \$479 million nationwide. Insurers need a clear understanding of the risk they are insuring while policyholders need to understand that honesty and diligence in communicating with their insurer is key to coverage should the unthinkable happen.

Homeowners insurance applications, which help an insurer evaluate the risks they are insuring, often include questions about the number and breeds of dogs on a property, fencing, exposure to children and history of behavioral problems. Some insurers will not insure a property with more than four dogs, under the assumption that a dangerous “pack mentality” emerges. Many insurers have singled out dog breeds as prone to biting and causing serious injury. These breeds often include Akitas, Alaskan Malamutes, American Staffordshire terriers, boxers, chow chows, Doberman pinschers, German shepherds, Great Danes, mastiffs, pit bull terriers, Rottweilers, Siberian huskies, and wolf dogs, and even mixes of the foregoing breeds.

Some insurers will not write a policy or will cancel/non-renew the policy of households with dog numbers or breeds they have identified as dangerous. This hard-line approach is problematic for both



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insurers and insureds as policyholders are unlikely to inform their insurance company when they bring home a new animal, even if their insurer requires such disclosure.

Insurers also avoid insuring “dangerous” dog breeds by writing exclusions into their policies specifically excluding coverage for those breeds. In these scenarios, the extent of insurance coverage and the duties of the insured are substantively raised for the first time when an insured makes a dog-related claim. This scenario may be disastrous for the insured and the injured party when the insurer denies coverage of an incident.

Some insurers avoid covering an individual dog they have determined to be a problem by requiring a waiver of insurance when there is a legal determination that a dog is dangerous or an individual dog has a history of biting. Some insurers issue coverage despite dog-related risk, using application information to calculate a higher premium for households with “dangerous” breeds or large numbers of dogs. While this approach is more expensive for the insured at the outset, a dog-related claim is more likely to be covered. Another option for dog owners is to purchase separate insurance to cover their dog-related liability. The bottom line is that homeowners need to be proactive in discussing all animals in their households and their insurance coverage with their insurance agents and reviewing their policies to identify potential coverage issues.

About the Author

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Breed-Specific Legislation

Breed-specific legislation would strictly regulate or ban ownership of dogs based on breed alone. Horrific dog bite cases in the news periodically result in the introduction of breed-specific legislation. The pitbull-type/bully breeds tend to be the targets of such legislation.

The fallout from breed-specific legislation has been tragic where it has been enacted. Instead of encouraging adoption, some shelters euthanize dogs of specific breeds as well as dogs that resemble those breeds. Owners of targeted breeds must choose between moving out of the jurisdiction, finding new homes for their dogs outside of the jurisdiction, or deceiving the authorities in hopes that their dogs will not be discovered.

New Mexico has opted to continue to treat dogs as individuals rather than assuming collective guilt based on breed or body type. As a result, New Mexico has passed and amended its dangerous dog statute, NMSA 1978, § 77-1A-1, et seq., to manage dogs who are prone to bite.



Industrial Farm Animal Production (IFAP) and Farmed Animals

By Autumn Bergh



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While the AWA could be amended to include farmed animals, this would likely do little to improve the welfare of farmed animals and other effects of IFAP facilities. The USDA, which enforces the AWA, historically has been lax in its enforcement, and this has interfered with states' abilities to enforce their own anti-cruelty laws. This is likely due to lack of resources and lack of interest in enforcing the AWA. However, even amending federal or state laws to include farmed animals would be insufficient considering that there is currently no agreed-upon definition of animal cruelty. This is particularly important for farmed animals since so many state anti-cruelty laws exempt customary husbandry practices that can be very painful for the animals.

The current overarching system of food animal production in the United States can be labeled as “industrial farm animal production” (IFAP). This system is a monoculture animal farming industry developed for the purposes of efficiency and yield that “encompasses all aspects of breeding, feeding, raising, and processing animals or their products for human consumption.”¹ The Environmental Protection Agency categorizes these industrialized animal farms as CAFOs (concentrated animal feeding operations) or AFOs (animal feeding operations) for purposes of regulation.²

There is currently no federal regulation of the day-to-day lives of the animals raised in the IFAP system to ensure that they are raised humanely, and the federal Animal Welfare Act (AWA) categorically excludes farmed animals.³ Some industries or companies have adopted their own standards, which are generally voluntary and monitored and enforced by the industry or company itself. There has also been an increase in third-party certification of humane practices, which entails bringing in an independent party to verify that certain animal welfare practices are being followed. This earns the processor a label that lets customers know that the processor meets the standards that have been set by the third party. Beyond this, states and local governments may introduce their own regulations. It is general practice, however, that state animal anti-cruelty laws either expressly exempt farmed animals from such laws or provide exceptions for routine husbandry practices, such as the use of battery cages for hens or gestation crates for sows, which it can be argued generally amounts to the same thing as an express exemption.⁴ This control of standards by industry and lack of significant federal and state legislation is particularly troubling since 98 percent of all animals that humans interact with in the U.S. are farmed animals.⁵

In the 1960s, the Brambell Committee Report defined animal welfare as including physical and mental well-being. The committee included veterinarians, animal scientists, and biologists in the U.K. In the 1970s, an independent advisory body established by the British government adopted certain animal welfare principles it called the “Five Freedoms”—Freedom from Hunger and Thirst; Freedom from Discomfort; Freedom from Pain, Injury, or Disease; Freedom to Express Normal Behavior; and Freedom from Fear and Distress.⁶ These principles became the basis for guidelines and codes of practice for various organizations around the world.

While the Five Freedoms may provide a helpful basis for the creation of federal legislation protecting farmed animals in the U.S., further guidance can be provided by laws in other countries. The *European Convention for the Protection of Animals Kept for Farming Purposes* animal welfare law has specific provisions in each article that are meant to address the concerns of IFAP-type practices. For example, Article 3 requires that:

Animals shall be housed and provided with food, water and care in a manner which—having regard to their species and to their degree of development, adaptation and domestication—is appropriate to their physiological and ethological needs in accordance with established experience and scientific knowledge.

This requires that animals be provided not just subsistence levels of food and shelter, but with an environment that is scientifically shown to be appropriate for their natural behaviors. The *Swiss Animal Protection Ordinance* has similar provisions, including

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The Quest for Sentimental Value

By Yolanda Eisenstein

Companion animals are an integral part of our lives. Dogs are trained to protect us and warn us of danger; they guide the blind and bring cheer to the sick. To almost 73 million homes throughout the country, animals give unconditional love and companionship.¹ So when a beloved companion is killed unnecessarily through the negligence of a shelter worker or veterinarian, what monetary value should be placed on that dog? That is the question I asked Randy Turner, Fort Worth attorney and longtime animal advocate. His recent landmark case, *Medlen v. Strickland*,² has reverberated throughout the animal community.

So what happened?

While the Medlen Family was away, Avery, their mixed breed dog, escaped from their home. When they returned, Jeremy Medlen went to Fort Worth Animal Services and found that they had picked up Avery. The shelter wanted \$80 for boarding and other services, which Medlen did not have with him. When he returned the next day, they told him that Avery had to be microchipped and that the veterinarian was not there. A shelter employee assured Medlen that a sign would be placed on Avery's crate indicating that he had an owner and was not to be euthanized. Upon returning with their children, the Medlens were informed that Avery had been euthanized the day before.

What laws control in this case?

Animals are legally property. There is no statutory law in Texas on damages specifically related to the wrongful death of companion animals, so the measure of damages is controlled by *Heiligmann v. Rose*,³ a case from 1891. The *Heiligmann* court stated that the value of a dog "may either be market value, if the dog has any, or some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog."⁴ Other states have similar cases. In *Wilcox v. Butt's Drug Stores, Inc.*, the Supreme Court of New Mexico specifically stated that sentimental damages were not available but borrowed language from the Supreme Court of Oregon in finding that "the owner of a dog wrongfully killed is not circumscribed in his proof to its market value, for, if it has no market value, he may prove its special value to him by showing its qualities, characteristics, and pedigree. . . ."⁵ The Texas courts have interpreted *Heiligmann* to mean that the measure of damages is purely market value. However, nothing in *Heiligmann* specifically rules out sentimental damages and there have been a number of property cases since then that support it. For example, you can receive sentimental damages for a photograph, so you could be awarded sentimental damages for a photograph of your dog, but not for your dog.

We are all aware of the immunity issue in suits against government agencies. How did that play into this case?

The procedural issues in this case have gotten very complicated. Basically, I knew that I was prohibited from suing the city under the Texas Tort Claims Act, which says that cities are immune from



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liability where property is destroyed *unless* it involved the use of a motor vehicle.⁶ So I did an open records act request to discover who actually euthanized Avery. The city refused my request and even asked the attorney general for an opinion, which was decided in my favor. In the interim, I filed suit against the manager of the shelter, claiming negligent implementation of policies and procedures. Eventually, after several motions to dismiss and appeals, I filed suit against Carla Strickland, the animal control officer who actually euthanized Avery.

The trial court dismissed your case, so it was the appeals court that issued the opinion you were hoping for?

Yes, I have been trying to bring a case like this one up on appeal for years. I knew that my legal argument was valid, but more importantly that it was the right thing to do. Contrary to what some people have heard, the court did not overrule *Heiligmann*; the court found that the opinion never stated that the *only* measure of damages was market value. The court also found that *Heiligmann* should be interpreted in light of recent court cases, which have held that certain property, such as trees, may have sentimental value. If trees can have sentimental value, why shouldn't our companion animals?

This case drawn the attention of the American Kennel Club and received coverage from as far away as Australia and South Africa. Why has it generated such attention?

Legally, lawyers are interested because it's not an outlandish award based on a default judgment or faulty legal reasoning. It's a valid, well-reasoned case based on solid legal evidence. Because of that, animal-related organizations and businesses have taken notice.

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The American Veterinary Medical Association and various animal services and product providers have come out strongly against the case. What is their argument?

Primarily their position is based on public policy arguments. Their briefs argue that the possibility of sentimental damages will result in increased costs of veterinary care and other services.⁷

Are they right?

First of all, I believe it's the legislature's responsibility to address public policy, not the courts'. Second, even if their prediction is correct, it is not clear whether that is even a valid argument. In California, Proposition 2, which mandated more humane standards for farm animals, passed by 63 percent of the vote despite the knowledge that the price of eggs would increase. Also, the cost of veterinary care has increased significantly, based in part on the value we, as guardians, place on our animals.⁸ I expect the cost of veterinary care and everything else to go up regardless of the outcome of this case. The law must keep pace with the way society values its companion animals, which is evidenced by the fact that even in difficult economic times owners spent over \$50 billion on food, veterinary care, grooming, boarding, and other products and services in 2011.⁹

So what's next?

The Supreme Court of Texas is taking briefs right now, and I expect that regardless of the court's decision, the Texas Legislature will



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take up the issue of damages in 2013 or later.

Endnotes

¹ American Pet Prod. Ass'n, *Industry Statistics and Trends* (2011-12), http://www.americanpetproducts.org/press_industrytrends.asp.

² *Medlen v. Strickland*, (353 S.W.3d 576 (Tex. App.—Fort Worth 2011, pet. Filed).

³ *Heiligmann v. Rose*, 81 Tex. 222, 16 S.W. 931 (Tex. 1891).

⁴ *Id.* at 226.

⁵ *Wilcox v. Butt's Drug Store, Inc.*, 38 N.M. 502, 35 P.2d 978 (1935) (quoting *McCallister v. Sappingfield*, 72 Or. 422, 144 P. 432, 434 (1914)).

⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (1)(A) (Vernon 1986).

⁷ For the case history and briefs, go to <http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=33220>.

⁸ See Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 *Animal* 163 (2004) (presents an analysis of veterinary malpractice and costs).

⁹ *Industry Trends*, *supra*, note 1.

About the Author

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specific requirements for certain animals. For example, the section for pigs provides that "Pigs shall be allowed ample rooting time with straw, roughage, or other suitable material." These examples provide a helpful framework to study alongside the Five Freedoms when considering new legislation in the U.S.

Farmed animals are the single largest group of animals with whom humans in the U.S. interact, yet they have no federal welfare protections. State anti-cruelty protections vary and exemptions generally preclude those anti-cruelty protections from applying to farmed animals. Creating federal legislation that establishes a single definition of animal cruelty and which is in line with other countries' animal welfare laws is a necessary step to protecting farmed animals.

Endnotes

¹ Pew Comm'n on Indus. Farm Animal Prod., *The Pew Charitable Trusts and John Hopkins Bloomberg Sch., Putting Meat on the Table: Industrial Farm Animal Production in America*.

² *What is a CAFO?*, U.S. Env'tl. Prot. Agency, <http://www.epa.gov/region7/water/cafo/index.htm> (Last updated Nov. 21, 2011).

³ Cecilia Issacs-Blundin, *Why Manure May Be the Farm Animal Advocate's Best Friend: Using Environmental Statutes to Access Factory Farms*, 2 *J. Animal L. & Ethics* 173, 173 (2007).

⁴ De Anna Hill, *Combating Animal Cruelty With Environmental Law Tactics*, 4 *J. Animal L.* 19, 24 (2008); *Id.*, at 174.

⁵ Issacs-Blundin, *supra*, at 173.

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