

Have the Floodgates Opened?

Current Trends in Damage Awards for Veterinary Malpractice in Canada

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Introduction

Most veterinary practitioners will agree that animals, particularly companion animals, have enjoyed an enhanced status in contemporary North American society. Pet owners have demonstrated a willingness to spend more on their pets for high quality nutrition, new "pet-sitting" and daycare services, specialized training and preventive veterinary care. Various studies have confirmed that animal owners treat their pets as "family members" or "children." Companion animals and horses have taken on new roles in the promotion of human geriatric care, the treatment of autistic children, and the apparent ability to detect various forms of cancer or the onset of seizures.

From a legal perspective, we have witnessed the promotion of rules which are directed to responsible animal ownership (various breed bans), the recognition that animals are more than mere "chattels" (American municipal bylaws that introduce the notion of "animal guardians") and the amendment to existing laws to create more protections for animals against animal abuse (current criminal law proposals).

The evidence supporting the new status of animals is cogent. Equally compelling though is that this new vision of animals brings with it enhanced exposure for higher damage awards to be granted against veterinarians who may be found by the courts to be negligent in the delivery of veterinary services resulting in the death or further injury of the very same animals that are the focus of their owners' affection. While much of the veterinary jurisprudence in this area arises in an American context, a recent decision in Ontario should be of some concern for the Canadian practitioner.

The American Perspective

Until recently, courts throughout North America have adopted the view that animals are mere property; thus, in the event that such "property" were destroyed or damaged through veterinary negligence, the court-awarded damages would be limited to the value of the animal. This body of well-accepted law dictated that in a companion animal context the compensation granted to the animal owner was minimal – often limited to the replacement value of the dog or cat. That long-standing principle then became challenged in the courts in more recent times as animal owners, relying on the new status of animals, have sought damage awards for various non-economic claims such as "loss of companionship," "mental suffering," "sentimental loss," "emotional distress" and "pain and suffering."

One of the leading cases illustrating the emerging claims is *Laporte v. Associated Independents, Inc.*, a 1964 decision of the Florida Court of Appeal. In finding that the courts were at liberty to recognize the human/animal bond by awarding damages for emotional distress the court indicated "...that the affection that a man has for his dog is a very real thing and that the... destruction of the pet... gives an element of damages for which the owner should recover." Many have argued that this case represented the "opening of the floodgates" as it relates to recognizing the true value of animals to their owners. In a veterinary context, the *Laporte* decision was cited with approval in the case of *Knowles Animal Hospital v. Wills* which involved the in-clinic death of a dog which suffered burns when placed on an electric heating pad post-operatively.

In very recent cases, though, the courts in the United States have demonstrated a desire to return to the previous legal principles. In the 1994 case of *Gluckman v. American Airlines* the federal court in New York commented that "viewing a pet as more than property" would be "aberrations flying in the face of overwhelming authority to the contrary." Notwithstanding this, many plaintiffs' attorneys continue to raise arguments that to award damages limited to the value of the animal is to fail to recognize the "actual value" of the animal. In some jurisdictions the state legislatures have passed or are considering passing laws to "cap" the amount of damage awards for the injury or death of an animal; however, the contemplated "caps" range from \$4,000 to \$250,000.

A Canadian Case

While the experience "south of the border" may be interesting to be mindful of, its legal impact is of little legal significance in Canada. The courts in Canada may consider the decisions made by American courts but are generally considered to be of little precedential value. There is though, a recent case decided on January 19, 2006 in the Ontario courts that should be of concern to Canadian veterinary practitioners as the justice system in this country commences its review of the true value of animals. The Divisional Court decision in *Birchmount Boarding Kennels Limited v. Jones and Barrett* appears to be the first case of jurisprudential value to award damages for the pain and suffering experienced by an animal owner for the negligent conduct of another.

In the *Birchmount* case the dog owners boarded their dog, Harley, with the defendant. The dog escaped from the kennel's enclosed play area and was irretrievably lost. The owners commenced a lawsuit in small claims court for damages for the negligence of the kennel in losing the dog and was successful in obtaining a damage award in the amount of \$2,527.42 of which

the sum of \$1,417.12 was awarded for damages for "pain and suffering." The evidence was that the owner of the dog was emotionally distraught and hysterical with the news of Harley's escape and that, upon her return to her home, she suffered insomnia and nightmares requiring her to take time off of work. The court had found that the kennel operator had been negligent in failing to ensure that the fence was secure so as to prevent the escape. An appeal of the small claims court decision found the Divisional Court reviewing cases involving the award of damages for mental distress in cases of wrongful dismissal, and deciding that the facts of this case were appropriate to confirm the trial court's view that pain and suffering was a proper head of damages.

This case signals potential difficulties for the veterinary profession in cases of alleged professional malpractice. In cases where the animal owner can produce clear evidence of the special value of the animal to its owner, then reliance of the *Birchmount* decision could arguably result in increased damage awards for the very same reasons as that found in cases in the United States. Have the "floodgates" opened in our country in this regard?

The Evolution Begins

In the face of the clear evidence of the enhanced status of animals in Canadian society and the decision in *Birchmount*, it will be important for the veterinary profession to address this issue. While respecting and honouring the human/animal bond it is important that the justice system does not create an atmosphere where the veterinary profession, under the threat of expensive lawsuits, practice defensively to the detriment of their patients. The debate is now squarely before the courts – time will determine how this area of the law will develop in the future.

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