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Veterinary legal issues: 2006 in review

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The American Veterinary Medical Law Association (AVMLA) is a national association of attorneys, veterinarians, other individuals, and organizations with an interest in veterinary medical law. Incorporated in 1994, the AVMLA strives to provide information to its members regarding pertinent issues in the field of veterinary medical law and increase public awareness and understanding of the impact of law on all aspects of veterinary medicine.

The impact of the legal profession on veterinary medicine has substantially increased over the past several years as more and more attorneys have become interested in areas of the law concerning animals and their welfare. More than 88 law schools in the United States offer classes in animal law, and many publish journals devoted to the topic of animal law. During 2006, the American Bar Association established, at the request of its Tort Trial and Insurance Practice Section, an award for excellence in the advancement of animal law. The American Bar Association's Animal Law Committee addresses issues relating to a vast array of human-animal interactions ranging from the legality of estate planning for companion animals, to changes in liability standards and insurance coverage in dog bite cases, to compensation beyond fair-market value for animals that are killed, to public and private conflicts about where animals can be kept, and to the competing interests of wild animals and urban, farming, and recreational land use.¹ Several organizations are pushing for changes in state and federal laws relating to animals, with the result that the AVMA currently has 2 attorneys on its staff who spend much of their time monitoring pending legislation across the country concerning veterinarians.

As a part of its mission, the AVMLA publishes a quarterly newsletter for its membership that, in part, details ongoing legal activities relating to animals and veterinary medicine. Over the past several years, the newsletter's authors have seen a marked increase in the number of pages of legislation they review each quarter, and there is no doubt that the field of veterinary law is expanding and will continue to expand. The past year

in particular has been a busy time in the field of animal law, and the present report attempts to highlight some of the most important trends and developments.

The Legal Status of Animals

The twin questions regarding the status of animals as property and the awarding of emotional damages were argued in several veterinary malpractice cases and cases involving intentional injury to animals during 2006. A case² in Washington state involving a cat that was stolen and maliciously burned, resulting in the cat's death, created a new cause of action and remedy, with the trial court's opinion upheld on appeal. The owner of the cat filed suit in her personal capacity as a "personal representative and special guardian over the sentient being and equitable estate of Max Womack, deceased feline and property sui generis." Sixteen liability claims were filed with the trial court including, among others, negligent infliction of emotional distress. The court narrowed the claims, but kept the emotional distress claim and awarded a default judgment. Subsequently, the Washington appeals court found that the \$5,000 awarded by the trial court for "unliquidated damages" constituted an implicit finding of malicious injury and stated that this finding could support a claim for emotional distress damages, akin to a general award for pain and suffering.

A Connecticut case³ decided during 2006 involved a veterinarian who was sued for negligence in regard to the postsurgical care and treatment of a 3-year-old English Bulldog that died. The plaintiffs sought compensatory damages for the cost of the dog as well as emotional distress and punitive damages for allegedly reckless or malicious conduct. The court allowed the claim for punitive damages to go forward, even though in Connecticut, punitive damages cannot be assessed against a properly licensed veterinarian who follows accepted standards of practice for the profession. Because the complaint specifically alleged that the veterinarian failed to follow accepted standards of veterinary practice, the court ruled that it could not strike the claim for punitive damages as a matter of law. In contrast, the court reached the opposite conclusion with respect to the claim for emotional distress damages. As in most states, dogs are considered personal property in Connecticut, and common law has never recognized the awarding of emotional distress damages for loss of

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property. Therefore, the defense motion to strike the claim for emotional distress damages was granted.

The past year was also quite busy on the legislative front. Several cities changed the language used in their city codes and regulations regarding pet ownership. Boulder, Colo, for instance, amended its municipal code to refer to "pet guardian," rather than "pet owner."⁴ Other cities that followed suit included Imperial Beach, Calif, and Menomonee Falls, Wis.^{5,6} Although most such changes took place at the city level, the state of Rhode Island enacted a statute that states that "guardian" may be used interchangeably with "owner."⁷ Proponents of these changes hope that changing the way people talk about pets will change the way people think about pets. However, such changes to that language alone, without accompanying changes in the laws that define animals as property, may not have any immediate impact on the legal status of animals.

The Practice of Veterinary Medicine

The definition of what constitutes the practice of veterinary medicine was the subject of several legal cases during 2006 and was addressed by several states during revision of their state veterinary practice acts. Dental procedures, particularly dental floating in horses; chiropractic manipulation; and various other procedures were included in revised versions of some state veterinary practice acts. California was considering adding physical therapy guidelines to its state veterinary practice act, whereas Ohio considered broadening the definition of veterinary practice to include treatment of dental and mental conditions; the use of complementary, alternative, and integrative therapies; and the provision of professional advice or recommendations by any means, including by telephone and electronically.⁸ The Ohio bill also sought to further define limited licensure and veterinary consultants.

In Canada, the British Columbia Veterinary Medical Association brought suit against a nonveterinarian, claiming that he engaged in cutting or otherwise removing hooks from horses' teeth and floating horses' teeth with power and manual tools, provided advice and diagnoses in return for a fee, and held himself out as being qualified and willing to provide treatment with respect to these activities.⁹ The court held that the intention of the legislature in passing the Veterinary Profession Act was the protection of the public and animals and further held that monopolistic statutes serve the purpose of protecting the public. In addition, the court concluded that dentistry, at its core, relates to the health of the teeth and gums; is distinct from cosmetic and other types of care of animals; and, therefore, falls under the definition of the practice of veterinary medicine. The nonveterinarian was enjoined from providing services without a veterinarian supervising the procedures.

Animals and Disasters

The aftermath of Hurricane Katrina, which hit the Gulf Coast of the United States during 2005, spurred changes to the way animals are treated during natural disasters. In 2006, Hawaii, Louisiana, and New Hampshire all enacted laws¹⁰⁻¹³ that address issues regarding the care of animals during disasters, such as provid-

ing shelters for pets and allowing service animals to be kept with the people they serve. In addition, Congress passed, and the President signed, the Pet Evacuation and Transportation Standards Act¹⁴ during 2006, which requires state and local emergency preparedness authorities to include in their evacuation plans information on how they will accommodate household pets and service animals in case of a disaster. California passed a law that will require its Office of Emergency Services, Department of Agriculture, and other agencies involved with disaster response preparation to develop a plan for the needs of service animals, livestock, equids, and household pets in the event of a disaster or major emergency.¹⁵

Pet Trusts

Several states passed laws during 2006 regarding wills and trusts that provide for pets after their owners have died, with the result that 46 states now have laws that provide for the establishment of pet trusts. Delaware passed a law that allows for a trust to be created for animals that are alive at the time of the creator's death and allows a person who has an interest in the welfare of the animal or animals or in the declared purpose of the trust, other than a general public interest, to petition the Court of Chancery for an order that appoints a person to enforce the terms of the trust or to remove that person.¹⁶ Florida and Virginia have recently passed similar laws.^{17,18}

Intellectual Property

The animal health industry became caught up in a number of patent and trademark lawsuits during the past year. In 1994, Barclay Slocum obtained patents for the tibial plateau leveling osteotomy procedure, which is used in the treatment of dogs with cranial cruciate ligament rupture, and for the devices used in the procedure.¹⁹ During 2006, Slocum Enterprises filed a patent infringement suit²⁰ against New Generation Devices, arguing that the Unity Cruciate Plate manufactured by New Generation infringed on the patent for the Slocum TPLO plate. However, the court never reached a decision on the issue of patent infringement, ruling that it did not have jurisdiction on the basis of the small number of plates sold in the state in which the case was filed and the information provided on a Web site maintained by Slocum Enterprises. Other patent battles waged during 2006 concerned the use of laser technology for onychectomy in cats,²¹ pet identification chips,²² pig vaccines,²³ and pet "deshedding" tools.²⁴

Employment Law

Employment law, particularly noncompete clauses, was also an issue for veterinary medicine during 2006. In 1 such case,²⁵ a specialty practice attempted to use a noncompete clause contained in a contract signed 4 years earlier to support claims of breach of contract, breach of an employee's duty of loyalty, fraud, negligent misrepresentation, promissory estoppel, misappropriation of trade secrets, tortious interference with business relations, unfair competition, and unjust enrichment against a former employee. The court, however, found that the veterinarian who was subject to the noncompete clause

was not liable for any of the claims because of a lack of evidence supporting them. In a second case,²⁶ an embryo transfer service sued a former employee veterinarian who opened his own business offering similar services after many years of employment with the embryo transfer service. The veterinarian had signed a contract containing a noncompete clause that stated the veterinarian would not practice within 250 miles of any facilities owned and operated by the original employer for 1 year after leaving the employer's service. However, the original employer had gone through a number of changes as an organization since the original contract had been signed, and the court concluded that the original noncompete clause had not survived the multiple transformations of the company.

Wrongful termination claims were also an issue during 2006. In 1 particular case,²⁷ a veterinarian who had been employed as a Veterinary Medical Officer by the USDA Animal and Plant Health Inspection Service filed suit against the department. While still employed by the USDA, the veterinarian had filed an administrative grievance complaining of a reduction in his job responsibilities and a questionable job performance evaluation. When the USDA demoted the veterinarian a month later, he filed a second grievance alleging retaliation and contending that his workplace had become dysfunctional and left him in need of psychological counseling. At the time he was involuntarily terminated by the USDA, the veterinarian had sought sick leave to address his alleged psychologic condition and had requested disability accommodations. Nine months later, the USDA entered into a settlement agreement with the veterinarian to resolve all of his pending complaints and grievances. In addition to paying a nominal monetary sum, the USDA agreed to provide neutral references (ie, dates of employment, job titles, and salaries) to potential employers and indicate that the veterinarian had resigned from the USDA, rather than having been terminated. Included in the settlement was a provision that the veterinarian would never apply for re-employment. Nevertheless, shortly after the settlement agreement was signed, the veterinarian attempted to find another position in the USDA. When his efforts were not successful, he filed suit in the Court of Federal Claims, claiming breach of contract (specifically, the neutral references clause) and seeking reinstatement to his former position, back pay, reinstatement of benefits, attorneys' fees, and costs. The court transferred the case to another court that the original court thought had more appropriate jurisdiction, and the case is still pending.

Finally, issues regarding the Family Medical Leave Act had an impact on veterinary medicine during 2006. In 1 such case,²⁸ claims of retaliatory discharge under the Family and Medical Leave Act, constructive discharge under the Americans with Disabilities Act, and breach of contract were alleged. In this case, the complainant was a veterinary hospital manager who had suffered a spinal fracture 20 years prior to her employment at the hospital. Around the time the woman began working for the hospital, she began experiencing lower back problems in connection with this previous injury. Four months after beginning employment with the hospital, the woman went on paid medical leave for 2 months to undergo spinal fusion. Within the next year, an adjacent disk ruptured, precipitating a 2-week period of

unpaid medical leave. The woman continued to have spinal problems, and the following year, after receiving a good employee performance evaluation, she decided to undergo extensive spinal reconstruction surgery, necessitating a several-month-long leave of absence. During her absence, the woman maintained contact with employees at the practice and received information that led her to believe that she would be terminated within months of her returning to work. After a confrontation with the president of the veterinary hospital, the woman resigned and subsequently sued the practice. The court concluded that there were genuine issues of material fact that required a trial relating to the retaliation and breach of contract claims. On the other hand, the court rejected the claim of constructive discharge under the Americans with Disabilities Act, finding that the woman had not proven herself to be disabled as defined in that act.

Conclusion

The incidents described in the present report represent just a few examples of how the veterinary profession is affected by state and federal legislatures and courts. As pet owners continue to embrace the human-animal bond and society struggles with the impact of that bond on the legal status of animals, the area of animal law will continue to grow.

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