Animal welfare and the 'emotional link'

by Ian Robertson

A recent amendment to the Animal Welfare Act 1999 raises the maximum sentences and fines for animal ill treatment and neglect, and redefines the way some offences are described.

The Act expands the threshold for the offence of wilful ill treatment - the most serious animal welfare offence - and adds a new offence of reckless ill treatment. The maximum sentence for wilful ill-treatment of an animal increases from three to five years prison and the maximum fine will double to $100,000 for an individual and $500,000 for a body corporate. Penalties also increase for a range of other neglect and ill-treatment offences and the Act expands the law relating to forfeiture of animals and disqualification from having custody of animals.

The amendment is a clear indication of decreasing political and public tolerance for animal welfare offences.

As the name of the Act illustrates, the Animal Welfare Act is about animal "welfare" not animal "rights". Not all animal interest groups are the same, and the terms "animal rights", "activists", and "animal welfare" have quite different meanings generically and in law, but misunderstandings about the distinctions are a frequent cause of confusion, contention, and/or bias.

Opinions regarding the role and treatment of animals obviously vary significantly between the polarised views of purist inherent-value concepts versus those which view animals simply as a commodity to be used. Legislators have used concepts of "welfare" in the task of balancing the multitude of opinions, and prioritising the competing and frequently conflicting interests of the many stakeholders involved in issues of animal welfare. It follows that animals are stakeholders who represent one, but not the only, group whose interests are to be represented. Subjective, emotive and anthropomorphic opinions clearly exist about how each stakeholder's interests should be prioritised, and the democratic system provides an opportunity for each opinion to be expressed.

Property status of animals

In legal terms, animals are classified as property, but describing animals simply as legal property similar to a chair in New Zealand, England, Wales, or any one of a number of jurisdictions which have contemporary animal welfare legislation, illustrates either an archaic or misinformed understanding of leading animal welfare law. Contemporary animal welfare legislation creates a form of "specialist property law" by recognising the animate nature of animals that is distinct from inanimate objects as evidenced by the acknowledgement in legislation that animals, as animate property, experience pain and distress.

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Although academic debates regarding the continued classification of animals as property are controversial and likely to continue, the fact remains that the law has historically demonstrated a clear focus and ability in protecting property. In turn, this means that in terms of *practical* protection of animals, and therefore practical benefit *for* animals, there are as many good legal arguments for retaining the property status as there are those who argue against it.

The expansion of animal law as a legal subject, and developments in animal protections paralleling the progress of animal science, will evolve through a process of incremental change. Legislators have contributed to those incremental shifts through their work on the Animal Welfare Act amendments. So, too, has the New Zealand judiciary in providing compensation for emotional harm in cases involving animals.

Reparation for emotional harm

The courts' traditional starting point for ascribing a value to the special property/animal involved in cases of unlawful damage/injury or death is its "market value". However, at least two recent New Zealand criminal court cases have changed that by unlocking the door to reparation for emotional harm (frequently referred to as emotional damages although this is more appropriately a terminology for the civil jurisdiction) for New Zealand animal owners.

The courts have recently ordered reparation to compensate owners for "emotional harm" in circumstances where reckless and/or wilful ill treatment of animals has occurred. After a man recklessly threw his neighbour's small dog against a tree trunk causing it to die. Judge Dominic Flatley in Queenstown District Court established an objective rather than a subjective test in relation to such incidents of animal injury and death by stating *"you may not have had an intention* to kill it Mr Spittle but you had *no regard* at all for whether or not you *might* do so". Addressing the offer by the defendant to make payment for the dog the judge also made it clear that the owner's emotions were appropriate criteria for the court to consider by stating "to my mind, Mr Spittle, that is an attempt by you to buy your way out of this situation and that is not appropriate here … [the victim] is *distraught* and *reliving grief and loss all over again. I have to take the victim's interests into account in this matter; the legislation requires me to do so*". The defendant was then convicted and fined which included an order to "pay reparation directly *to the victim* in one lump sum of $2,000 for emotional harm".

Similarly, Judge Jackie Moran in the District Court at Christchurch ordered a defendant to pay reparation of $1,000 to the owner of a dog by way of reparation for "emotional harm" after a terrier dog was so severely beaten that it ultimately died from the punches and stomping it received as punishment for making a "mess" inside the house.

The award of compensation for emotional harm obviously has enormous implications, particularly for animal service providers who largely trade off the emotional link between humans and their animals/pets but who, to date, have not been held legally accountable for anything beyond the animal's market value in the event of injury or death to the animal.

The decisions also create a potential head of claim for consideration by lawyers involved in relevant cases.

The wide existence of the "emotional link" cannot be disputed. For example, owners might have bought a cat or dog for $500 but may spend literally thousands of dollars – vastly more than the purchase price and/or maintenance costs of the animal - for expensive veterinary medical and/or surgical bills. If "the property" was a chair, car, or some other inanimate object then there would likely

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be a cost-benefit analysis made which would likely result in the owner trading in, or getting rid of, the faulty/damaged property. Of course, to the emotionally attached animal owner, this is unlikely to be an option for consideration and the owner will subsequently pay a significant amount more treating their pet than the animal would logically be worth according to its "market value".

The explanation for this, of course, is the emotional attachment that the owner has to their pet, and it is that emotional hook that animal service providers, such as companion animal veterinary practices for example, rely on to provide a large portion of their business. Payment of a veterinarian's bills for amounts significantly more than an animal's "market value", whether in companion animal practice or farm animal practice, is likely to be just one of the areas scrutinised by future lawyers considering whether or not there is evidence to claim reparation on the basis of emotional harm.

The role of the professional

In addition to being widely recognised as animal health experts by the public, veterinarians are also specifically referred to in this context under the Animal Welfare Act 1999. Consequently, veterinarians provide a natural reference point when considering the role of the attending professional/animal service provider in issues of animal welfare.

Most prosecutions of animal welfare offences understandably either involve, or should have involved, a veterinarian. Though most veterinarians are good-hearted individuals who genuinely care about the well-being of their clients and their patients, it stands to reason that veterinarians, like other professionals, vary in their professional abilities and attitudes. It also stands to reason that there are likely to be circumstances where there is a potential conflict of interest for the veterinarian between the animal's welfare, the client's interests, or the veterinarian's business interests. In turn, these conflicts should raise questions about potentially inaccurate assumptions that presume that the decisions and actions of the professional are always appropriate and/or lawful.

Consider for example, the following very real scenarios in veterinary large animal practice. A local veterinarian carries out a routine call to a farm and in the course of attending their duties also notices a pile of testicles, while in a nearby paddock with blood running down their hind legs is a mob of recently converted steers. What is the veterinarian to do? Potentially there is an obvious conflict for the veterinarian. On one hand, the veterinarian is obliged to fulfil their obligation ensuring that the properly authorised person does any surgical manipulation of an animal, and it is completed in a proper way including pain management. On the other hand, there are business interests that the veterinarian is unlikely to risk by potentially offending an established client who has likely done the operation on the steers.

Consider another instance involving develvetting. The veterinarian carries out the annual surgery on the sire stag for their client deer farmer. They have been doing this for the past 10 years. They are aware their client is not approved to remove his own velvet, yet the veterinarian has never inquired who carries out the annual develvetting of the spikers. If it is not the usual attending veterinarian or approved person doing the develvetting, then it is quite probable that the farmer has develvetted

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the spikers themselves. Again, there is a potential conflict caused for the veterinarian.

These examples might fairly be described as wilful blindness and in turn must raise questions about the profession, as well as the accountability and potential liability of the individual animal service providers involved, in criminal offences where an animal's well-being has been unjustifiably and/or unlawfully denigrated in favour of other interests.

The evolving practice of animal law

Commenting on issues of professional conduct in the role of the courts, Justice Elias said in *B v Medical Council[2005]3 NZLR810 at 811:* "the best guide to what is acceptable professional conduct is the standards applied by competent, ethical, and responsible practitioners." Her Honour went on to state "…but the inclusion of lay representatives in the disciplinary process and the right of appeal to this court indicates that *usual professional practice, whilst significant, may not always be determinative:* the reasonableness of the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only practice but also patient interests and community expectations, including the expectation that *professional standards are not to be permitted to lag."*

There are several contemporary societal issues that necessitate attention to the evolving role, responsibility, and liability of the professional to ensure that professional standards do not "lag". Lawyers, accountants, and other professionals have been required to respond to demands for increasing transparency, accountability, and attached liability, and it stands to reason that in the evolving animal law landscape, compensation for emotional harm, and attention to the responsibilities of attending professional service providers who financially benefit from the emotional link between people and animals, are matters that warrant consideration alongside increased penalties for animal welfare offences.

Although prosecution is clearly desirable where there is serious or repeated offending, it is obviously flawed logic that suggests that the effectiveness of animal protection legislation is assessable just by the number of prosecutions heard in court. It follows that long-term animal welfare solutions require and involve more than just higher penalties

If legislation to protect animals is to be effective it must be enforceable, and enforced, in order to protect the animals/victims involved and publicly reinforce that the law must be complied with. Effective long-term animal welfare solutions benefiting both humans and animals therefore requires realistic and sensible change management that includes provision of adequate resources, the development of an integrated and applied national animal welfare strategy, accompanied by education that objectively and authoritatively presents the perspectives and interests of the many stakeholders attached to matters of animal welfare.

Equally desirable is the need for unambiguous, equitable and practicable judgments in developing animal law through a process of incremental change. Holding animal service-providers and professionals accountable and liable for the emotional link off which they derive financial gain is an incremental change that may provide challenges for those involved as the legal precedent is expanded; however, it is also an opportunity for the judiciary and lawyers to further develop animal law and ensure that victims are "fairly compensated".

About the author

Ian Robertson is the unusual combination of a veterinarian and lawyer who has combined his training and expertise to become an internationally recognised animal welfare law specialist. He is an advisor to the World Organisation for Animal Health (OIE) Collaboration Centre, a member of the International Advisory Board of Compassion in World Farming, and the Director of International Animal Law (**www.animal-law.biz**). He is also a consultant and law lecturer on issues of animal welfare and a lawyer with the Ministry of Agriculture and Forestry prosecutions team.