

Damages for the Injuring or Killing of an Animal in Swiss Law

By

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I. Introduction

On 1 April 2003, after perennial preparatory work and heated public debates, new provisions in the Swiss Code of Obligations² and the Swiss Civil Code³ became effective which brought about a change in the legal status of animals as well as reflecting the special significance of some animals to their keepers⁴. The main aim of the statutory changes, some of which will be discussed in this paper, was according to the legislative body the improvement of the legal position of the animals. Furthermore, the lawmaker wanted to accommodate in the law the changed perception of animals by the general public. To that effect, the focus of the legislator was on animals with which persons interact on a daily basis out of sentimental interest and which will hereinafter be called “companion animals”.

II. The Legal Status of Animals

Due to the prevailing Roman legal tradition Swiss law did not differentiate between things and animals before the legislative change in the year 2003. In fact, animals were not separately mentioned in the law of property at all, which simply referred to “things”. As in other countries, animals were not legally recognized “persons” either and, if they were not living in the wild, were normally in the property of a person.

On 1 April 2003, Article 641a of the Swiss Civil Code came into effect. Article 641a holds the following:

“¹ Tiere sind keine Sachen. ² Soweit für Tiere keine besonderen Regelungen bestehen, gelten für sie die auf Sachen anwendbaren Vorschriften.”

¹ Eveline Schneider Kayasseh, J.D. magna cum laude University of Zurich, Switzerland 2009. All the topics mentioned in the present paper are discussed in detail in the author’s doctoral dissertation “Haftung bei Verletzung oder Tötung eines Tieres – unter besonderer Berücksichtigung des Schweizerischen und U.S.-Amerikanischen Rechts” (Damages for the Injuring or Killing of an Animal – under a Comparative Perspective of the Swiss and U.S.-American Law), edited by Schulthess Publishing House, Zurich 2009.

² Systematic Compilation of the Federal Legislation, SR number 220.

³ Systematic Compilation of the Federal Legislation, SR number 210.

⁴ Amendments were also made to the Swiss Penal Code and the Swiss Prosecution and Insolvency Law. However, this paper focuses on the legal position of animals as well as damages for the injuring or killing of an animal.

(¹ Animals are not things. ² Insofar as there are no special provisions relating to animals, they are governed by the provisions that apply to things⁵.)

Probably as a result of opposition in the Swiss parliament and the prevailing fear of certain interest groups that animals could be deemed juristic persons, no separate category for animals was introduced into law. The new law simply states that animals are no longer “things”, but it does not clarify their actual position within the framework of the law. Moreover, the “special provisions relating to animals” mentioned in paragraph 2 are predominantly improving the position of the animal’s owner or keeper, and not of the animal itself.

It crystallizes from the legislative material that Article 641a of the Civil Code is primarily of a declarative nature and animals do still not have an acknowledged legal personality and thus remain personal property; neither have they gained legal standing. It can be said though that the result is a compromise but more clarity would have been desirable. Nevertheless, Article 641a of the Civil Code is a step in the right direction: animals are no longer things in Swiss Law, which is in itself a remarkable achievement.

III. Valuation Concepts in Swiss Law

A. Tort Law

1. Preface: The Valuation of Property

There is no definition in Swiss law as to what constitutes damage (*Schaden*). According to the Federal Supreme Court of Switzerland⁶, damage is measured based on the difference in the plaintiff’s wealth immediately before and after the defendant’s tort. In other words, damages (*Schadenersatz*) are measured based on the idea that the plaintiff’s balance sheet shows a pecuniary loss (loss of net worth) as a result of the defendant’s actions. One whose property is damaged, converted or destroyed is not entitled to recover for sentimental attachment to the property, except if the defendant’s actions amount to a qualified injury of a person’s individual inherent rights (violation of the plaintiff’s personality)⁷.

Generally speaking, if personal property is completely destroyed, the cost of replacement with an equivalent is to be reimbursed. The same applies to mere harm to property, if the costs of repair together with other costs are disproportionate compared with the replacement value⁸. If the harm to the property is minor, reasonable costs of repair as well as any remaining diminution in value constitute the measure of damages.

⁵ Unofficial translation by the author.

⁶ See e.g. Federal Supreme Court of Switzerland, decision no. 133 III 462, page 471.

⁷ Articles 47 and 49 of the Swiss Code of Obligations (Systematic Compilation of the Federal Legislation, SR number 220).

⁸ Adjustments might be made if the replacement goods are worth more than the original.

In order to recover damages, a plaintiff must not only prove harm, but also unlawfulness of the defendant's action, fault and causation.

2. Traditional Approach with Regards to Animals

In keeping with the animal's legal status of property, the measurement of damages followed the rules developed for personal property. So in principle, if an animal was injured or killed, its owner was entitled to recover the animal's replacement cost or expenses incurred as a result of the curative treatment of the animal (veterinary expenses), as the case may be, as long as the latter were not higher than the replacement value. It has been noted by some scholars though, that the courts would not have ruled out the recovery of higher veterinary expenses in any case⁹.

3. Current Approach with Regards to Animals

a) In General

In 2003, Articles 42 paragraph 3 and 43 paragraph 1^{bis} of the Swiss Code of Obligations came into effect. Article 42 paragraph 3 specifically deals with veterinary expenses, while Article 43 paragraph 1^{bis} foresees the possibility of recovering the sentimental value of an animal to its owner (*Affektionswert*) under certain circumstances. These provisions quite clearly acknowledge that some animals' worth is not primarily financial, but emotional.

Articles 42 paragraph 3 and 43 paragraph 1^{bis} have in common that they are only applicable if an animal is kept in the domestic environment and not for pecuniary or profit-making purposes¹⁰. The exact meaning of this phrasing has not been clarified by a court yet. It may be said though, that the animal in question must be kept privately and in a certain spatial proximity to its owner or keeper, as the case may be. Additionally, the sentimental interest in the animal must at least outweigh pecuniary interests. If pecuniary interests prevail and/or the animal is not kept privately, it is regarded as a "commercial animal" and damages will be determined according to the traditional method.

b) Veterinary expenses

Article 42 paragraph 3 of the Swiss Code of Obligations, which deals with the recovery of veterinary expenses for companion animals, holds the following:

"Bei Tieren, die im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten werden, können die Heilungskosten auch dann angemessen als Schaden geltend gemacht werden, wenn sie den Wert des Tieres übersteigen."

(In the case of animals that are kept in a domestic environment and are not kept for pecuniary or profit-making purposes, medical treatment costs may be asserted reasonably even if they exceed the value of the animal¹¹.)

⁹ It has to be pointed out, though, that no cases were officially reported.

¹⁰ The same precondition applies to several other provisions which have been added to the Swiss Code of Obligations and the Swiss Civil Code as well as other laws in 2003.

¹¹ SWISS AMERICAN CHAMBER OF COMMERCE, Swiss Code of Obligations. Volume I: Contract Law (Articles 1-551). English Translation of the Official Text, Zurich 2008.

In other words, courts can allow recovery of veterinary expenses incurred as a result of an injury to a companion animal, even if these costs are higher than the animal's actual value. Obviously, the importance of the animal's value for determining the proper measure of damages has become less but it has not been eliminated completely due to the reference to the reasonable nature of such costs. So what constitutes reasonable treatment costs?

From the legislative material it can be gathered that the courts will have to consider how a reasonable owner in the position of the plaintiff would have acted if he would have had to pay for the incurred veterinary costs himself. Thereby the judge has to consider the emotional relationship between a human being and a companion animal as an established fact recognized by our society as well as by the law.

c) Damages for Non-Pecuniary Loss

(1) Sentimental Value of the Animal (*Affektionswert*)

Before the legislative change in the year 2003, the term "*Affektionswert*" - generally speaking, the sentimental or emotional value of a thing to a person – was not mentioned in any of Switzerland's laws. Corresponding to the notion that most animals that are kept as companions have an emotional value to their keepers, the legislator recognized that where a living creature rather than a mere thing has been harmed unlawfully, the plaintiff should be in a position to claim damages for the sentimental attachment to the animal. Hence, paragraph 1^{bis} was added to Article 43 of the Swiss Code of Obligations:

"Im Falle der Verletzung oder Tötung eines Tieres, das im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten wird, kann er dem Affektionswert, den dieses für seinen Halter oder dessen Angehörige hatte, angemessen Rechnung tragen."

(In the event of injury or death of an animal that is kept in a domestic environment, and is not kept for pecuniary or profit-making purposes, the judge may take into account to a reasonable degree the emotional value of such animal to the keeper or the persons close to him¹².)

According to the legislative material and the interpretation of the law, the keeper needs not necessarily to be identical with the owner, and his or her relatives have a separate claim for compensation too, if they can successfully prove a qualified attachment to the diseased, injured or killed animal. Further, compensation for the sentimental value has to be made on top of the replacement costs or the veterinary expenses or even in addition to all of these costs, depending on the circumstances of the case.

The idea of awarding compensation for the sentimental value of an animal to its owner/keeper and/or relatives, which constitutes non-pecuniary loss, and the associated difficulty of determining whether and to what extent someone has suffered such loss, as well as the legal qualification of this award, have been hotly debated¹³. Additionally, the lawmaker and the doctrine voiced their concern

¹² SWISS AMERICAN CHAMBER OF COMMERCE, Swiss Code of Obligations. Volume I: Contract Law (Articles 1-551). English Translation of the Official Text, Zurich 2008.

¹³ In Switzerland, the concept of damage (*Schaden*) traditionally only concerned pecuniary losses which can be assessed in damages.

about the difficulty of differentiating between the “sentimental value of an animal to its keeper” and compensation for emotional distress caused by an injury to individual inherent rights as per the Swiss Code of Obligations Article 49.

The sentimental value of an animal represents to the keeper¹⁴ a real, if non-pecuniary, value and may be defined as the whole of the positively perceived aspects of the human-animal relationship. The compensation of the sentimental value has to be paid on top of the replacement value and the reward must reflect the intensity of the relationship between human and animal.

(2) Reparations for Severe Emotional Distress

Sometimes an injured or killed animal does not only have a sentimental value to its owner or keeper which must be compensated but the plaintiff also claims to have suffered emotional distress due to the circumstances of the case. Swiss law grants a person who has suffered qualified emotional distress due to physical or mental injury or an unlawful injury to his or her individual inherent rights the right to recover non-pecuniary damages in the form of “satisfaction” (*Genugtuung*) under certain conditions (Articles 47 and 49 of the Swiss Code of Obligations). As a general principle it can be said that only significant violations entitle a person to a monetary compensation for emotional distress. This is because damages for non-pecuniary loss are handled with some reserve in Switzerland and therefore no satisfaction is due for insignificant harm.

In connection with the present discussion, Article 49 paragraph 1 of the Swiss Code of Obligations is of particular interest:

“Wer in seiner Persönlichkeit widerrechtlich verletzt wird, hat Anspruch auf Leistung einer Geldsumme als Genugtuung, sofern die Schwere der Verletzung es rechtfertigt und diese nicht anders wiedergutmacht worden ist.“

(If individual inherent rights are injured, the damaged person may, where there is fault, claim compensation for damage sustained and, if the particular seriousness of the injury and of the fault justify it and has not been compensated otherwise, claim payment of a sum of money as reparations.¹⁵)

The gravity of the offence may justify a monetary award for instance in the following circumstances: an animal was tortured to death, it was severely mutilated or in other cases of malicious intent and/or cruelty to animals.

d) Punitive Damages

Punitive damages are not a concept of Switzerland’s legislation, and the Swiss Federal Court stated in a decision of 2004 that punitive damages are contrary to Swiss *ordre public*¹⁶.

¹⁴ And/or his or her relatives.

¹⁵ SWISS AMERICAN CHAMBER OF COMMERCE, Swiss Code of Obligations. Volume I: Contract Law (Articles 1-551). English Translation of the Official Text, Zurich 2008.

¹⁶ Decision of the Federal Swiss Supreme Court no. 5P.91/2004 of 24 September 2004.

B. Contractual liability

In many instances the animal's owner may have been injured by tort and breach of contract simultaneously (e.g. in many cases where the defendant is a veterinarian) and may therefore lodge a claim under both theories. If the animal's owner bases his or her claim on breach of contract, the sentimental value of the animal to the keeper may also be recovered, due to the reference of Article 99 paragraph 3 (contractual liability) to Article 43 paragraph 1^{bis} of the Swiss Code of Obligations.

IV. Conclusion

In Switzerland, animals are no longer things but they are not legally recognized persons either. Recent new provisions in Swiss Private Law allow the owner¹⁷ not only to recover the replacement value of a companion animal, but state that a reasonable compensation may be demanded for the sentimental value and/or incurred veterinary expenses. The expenses incurred as a result of the curative treatment of an animal are no longer capped at its replacement value. However, the newly introduced provisions of the Swiss Code of Obligations are not applicable where a commercial animal is injured or killed and conditions apply.

¹⁷ Owner, keeper and/or his or her relatives, as the case may be.