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The Animal Welfare Trial: An Overview

Judge Gordon Shumaker (Ret.)

Preface

As sensitivity to issues of animal welfare increases in contemporary society, so also do complaints about the mistreatment of animals. Some of those complaints result in criminal prosecutions or civil lawsuits and related proceedings.

In the American justice system, there is an implicit preference for resolving disputes without the necessity of trials. This preference is manifested by **plea agreements** in criminal cases and **settlements** in civil actions. When attempts at such resolutions are not successful, formal **trials** are often necessary.

The following is a broad overview of the trial process in criminal and civil cases. It is intended to inform and to provide perspective to those who become participants in trials, or who are just interested in how the process works. Although I have relied primarily on Minnesota law, I have tried to identify as much as possible the universal rules and practices that likely characterize trials in all jurisdictions.

The Adversary System

All criminal and civil trials are **adversarial proceedings** in which opposing sides of a case are presented for resolution to a **neutral factfinder**, either a jury or a judge without a jury. In most cases, the defendant is entitled to a jury trial.

Cases arise out of allegations of violations of the **substantive law**. This is the law that sets forth rights and obligations in statutes and local ordinances and in the historic common law that is part of the American justice system. The term **procedural law** refers to the procedures for enforcing the substantive law.

The **parties** to any case are the **plaintiff** (or more than one), who is the person or entity making the claim, and the **defendant** (or more than one), who is the person or entity against whom the claim is made. Criminal cases at the state level are prosecuted in the name of the state, as plaintiff. There is often a misunderstanding that a crime victim is the one who brings a criminal

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prosecution. The crime victim is not a party to the case but likely will testify as a witness, and is sometimes referred to as the **complainant.**

In both criminal and civil cases, the plaintiff has the **burden of proof.** In other words, the party who makes a claim must prove that claim. The **standard of proof** is the degree to which the plaintiff must convince the jury (or judge if there is no jury) of the validity of the claim. With a criminal charge, the standard is **proof beyond a reasonable doubt.** This is not proof to an absolute certainty, however. The usual civil standard is **proof by the greater weight of the evidence.** Here the jury, or judge, must be persuaded that the claim is more likely true than not true. Occasionally, a law will require still another standard, namely, **proof by clear and convincing evidence.** This is less than the criminal standard and greater than the usual civil standard, and it does not appear frequently in the law.

Trials are regulated primarily by the **rules of evidence**. These rules determine what information may be presented in a trial, and they have the goal of ensuring the allowance of only helpful and reliable information. They are also structured so as to ensure that trials will be reasonably economical and efficient and will produce a fair result. To assist with carrying out the goals of these rules, lawyers have a duty to make **objections** or **motions** (which are special applications to the judge to take some action) when they believe that the rules are being violated. The judge **rules** on the objections by **overruling** or **sustaining** them, and on motions by **granting** or **denying** them. The judge is charged with the general duty of managing the trial and applying the rules of evidence. In performing this duty, the judge enjoys wide **judicial discretion**, which means that, when there is more than one proper course of action to be taken, he or she has the authority to choose any of them.

Evidence

The term **evidence** refers to the information that the parties present at trial in support of or opposition to the claim. Evidence is either **admissible**, which means that the jury, or judge, is allowed to consider it, or **inadmissible**, which means that it is not allowed into the trial. When an item of evidence is offered and the opposing lawyer believes that it is inadmissible, he or she will object to it and will state the reason for the objection. The judge then decides. If the evidence is admissible, the judge will overrule the objection. If it is inadmissible, the judge will sustain the objection.

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Presenting Evidence

There are three primary ways in which evidence is presented in a trial:

1. By **oral testimony** of witnesses. These can be lay witnesses and expert witnesses.
2. As **tangible things**, such as documents (including digital "documents") or other items. These are referred as **exhibits**, and each is assigned a number for identification. To illustrate, suppose that the case is about a claim that a dog trainer committed animal abuse by using a sharp-spiked collar that punctured the dog's skin. The collar itself likely would be offered as an exhibit at the trial for inspection by the jury, or judge.
3. By **stipulation**. This is an agreement by the parties that certain things may be accepted as true or correct without the need to present proof. For example, a defendant might stipulate that she operates a dog breeding business in Stearns County. There is no need then to offer evidence to prove that point.

Trial Structure

Trials proceed in stages, each of which has a particular function or purpose. Assuming a jury trial, these are the usual stages:

1. **Jury Selection.** This is called **voir dire** and is the stage at which the lawyers are entitled to ask questions of a panel of prospective jurors to determine which should become jurors for the trial. The ideal is to obtain fair, neutral and open-minded people who have no biases or prejudices respecting the parties or issues; who are willing to keep open minds until they have heard everything that are entitled to hear in the case; and who will be fair in that they will decide the case only on the facts presented at the trial and on the law as explained by the judge.
2. **Opening Statements.** Once the jury has been selected, the lawyers are entitled to make opening statements in which they describe the evidence that they will present in their respective cases. Although these statements are sometimes referred to as opening arguments, this is an incorrect view. The lawyers are prohibited from arguing their cases at this point. And logically there can be no argument because no evidence has been presented yet.
3. **Plaintiff's Case-in-Chief.** The plaintiff is the first to present evidence to support the claim. At this stage the plaintiff has witnesses testify and introduces exhibits. At the end of this stage, the plaintiff **rests** the case.

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4. **Defendant's Case-in-Chief.** The defendant now follows with the presentation of evidence in opposition to the plaintiff's evidence and in support of the defense. At the end of this stage, the defendant will also rest. It is important to note that, in criminal prosecutions, the defendant is never required to present any evidence at all because the entire burden of proof is always on the plaintiff.
5. **Rebuttal Evidence.** There may or may not be rebuttal evidence.
6. **Final Arguments.** After all of the evidence has been presented, the lawyers will give final arguments. They may argue what has or has not been proved, what inferences should be drawn from the facts, and how the facts and law fit together. They will suggest what verdict the jury should return.
7. **Instructions on the Law.** The judge has the duty to tell the jury what law applies to the case and to give some guidelines for their **deliberations.** Some judges give these instructions before the final arguments.
8. **Jury Deliberations.** When all of the evidence has been presented and the jury has been informed of the law and its duties, it is sent to the jury room to discuss and ultimately decide the case.

Questioning of Witnesses

Questions asked of witnesses are called either a **direct examination** or a **cross-examination.** When a lawyer questions his or her own witnesses, this is the direct examination. When the lawyer questions the opposing witnesses, this is cross-examination. Certain rules pertain to each type of examination but the main rule is that **leading questions** may not be asked on direct examination, but may be asked on cross-examination. A leading question is one by which the examiner gives or suggests the desired answer. For example:
Q. When you arrived at the pen, did you see two horses lying on their sides?
Obviously the desired answer is "yes," and the examiner has already given it. The proper way to conduct a direct examination is to use open-ended questions, such as:
Q. When you arrived at the pen, what did you see?
The witness is now free to tell what he saw without the examiner suggesting what the witness should say. The adversarial nature of the proceeding allows the cross-examiner to use leading questions.

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Lay Witness Testimony

A lay witness, also called a **fact witness**, is someone who has firsthand knowledge of facts pertinent to the case. This is knowledge that the witness acquired through sensory perception—something the witness saw, heard, smelled, tasted or felt (by the sense of touch). This witness may testify to his or her firsthand knowledge, and may also testify in the form of an opinion or inference if it is rationally based on firsthand knowledge and would help the jury, or judge, understand or decide an issue in the case. Sometimes the opinion form is virtually the only clear way certain facts can be described. The following example illustrates permissible lay witness testimony by a dog breeder who has been in that business continuously for 20 years:

Q. When you approached the shed on the Baker premises, did you hear anything?

A. I **heard** sounds coming from inside the shed.

Q. Were you able to tell what those sounds were?

A. Yes.

Q. How were you able to recognize them?

A. As a breeder for many years I have come to know various sounds that dogs make in many different circumstances.

Q. How would you describe the sounds you heard coming from the shed?

A. They were **high-pitched whimpering sounds** suggesting **dogs in pain or distress.**

[Note that hearing sounds is a fact of firsthand sensory perception. Characterizing them as whimpering and suggestive of dogs in pain are opinions or inferences. The nature of the sounds is rationally connected to the hearing and it would be virtually impossible to describe them with clarity unless an opinion or inference is used. Note also that the witness has experience in identifying such sounds.]

Q. After you heard the whimpering sounds, what did you do?

A. I went into the shed.

Q. Inside the shed, what did you see?

A. I **saw** several dogs tied with chains to tie-downs in the concrete floor.

Q. How many dogs were there?

A. I counted 9.

Q. Could you estimate the size of the shed?

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A. Yes. It was a standard 8' by 12' shed.
Q. Did anything else catch your attention?
A. Yes. There was a very strong **odor** of feces and urine, and I saw piles of feces in several places in the shed.
Q. How was the shed ventilated?
A. It was not ventilated, no windows or openings of any sort except the door.
Q. In terms of temperature, how did it feel inside the shed?
A. It **felt** very hot and stuffy.
Q. In your view, was this an act of animal cruelty to have these dogs in these conditions?
[Up until this question, the witness confined the testimony to facts and proper opinions or inferences. But this questions asks the witness to state a legal conclusion. That is objectionable and improper. Furthermore, this is a leading question in that it obviously suggests the desired answer.]

Finally, the lay witness is **not allowed to give technical testimony** that is proper only for a qualified expert witness to give. So, in the illustration, if the examiner asks about the medical consequences of keeping dogs in the described conditions, that would be objectionable because it has not been shown that the breeder has medical veterinary training. Nor may the witness merely guess.

Expert Witness Testimony

If a case involves scientific, technical or other specialized issues, the testimony of an expert witness will be required. There are three basic requirements for expert testimony:

1. The **subject matter** must be of a technical nature. Recalling the illustration above, testimony about hearing and seeing the dogs, smelling the odor in the shed, and feeling the hot temperature are non-technical. No particular expertise is needed to make those observations. But if we want to know the physiological and psychological effects on dogs of such confinement and conditions, we enter the realm of technical and scientific evidence. This requires the testimony of an expert.
2. It must be shown through questioning that the witness is a **qualified expert.** Such qualifications can come through all or any of several things, namely, education, training, skill, knowledge or experience. The witness will be asked

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about his background in dealing with the particular technical issue as to which he will be asked to testify.

3. It must appear that the expert's testimony would be **helpful** to the jury, or judge in understanding and deciding the case. The previous requirement, before the adoption of the rules of evidence in the mid-1970s, was that expert testimony was not admissible unless it was necessary, that is, unless the jury, or judge, would be completely unable to decide the case without such testimony. The current rule has abandoned the necessity requirement and permits the judge in his or her discretion to allow expert testimony that can help give a clearer, deeper, more precise, or more complete and accurate understanding of a technical issue. One court indicated that such testimony is admissible if the jury would get *some* benefit from it. Of course, with medical issues relating to animals, the testimony of a qualified veterinarian is both necessary and helpful.

Although the expert might also be a fact witness, having observed the animal(s) in question, he or she will invariably be asked to give an **expert opinion** about conditions, causes, treatments, and prognoses. The expert need not necessarily be a fact witness for he or she can base the opinion on what he or she has been told or learned about the case from others and from tests performed by others. But any opinion must appear to be **reliable** in the sense that the expert has applied reliable underlying principles in a reliable manner. The following is a partial illustration of questions that might be asked of a doctor of veterinary medicine who has shown his or her qualifications to testify to the condition of a cat:

Q. Doctor, based on your examination of the cat named Billy, the x-rays you reviewed, and the lab test results that you received, were you able to reach a diagnosis of Billy's condition?

A. Yes, I was.

Q. What was your diagnosis?

A. [Doctor states the diagnosis].

Q. And were you able to form an opinion as to the cause of Billy's condition?

A. I was.

Q. Please state your opinion.

A. In my opinion, Billy's [condition] was caused by [doctor describes the cause].

Q. Do you believe, doctor, that Billy's condition resulted from animal abuse?

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[There will likely be an objection here. Like the lay witness, the expert is not permitted to give an opinion on the ultimate legal issue to be decided by the jury, or judge. Such an opinion is not considered to be helpful.]

One additional point should be noted. Many lawyers and judges believe that an expert's opinion must be based on some degree of *certainty.* So, in the illustration above, the examining lawyer might ask:

Q. Doctor, do you have an opinion to a **reasonable degree of veterinary certainty** as to the cause of Billy's condition?

The law does not require any testimony, lay or expert, to be stated with certainty of any sort. There is no problem with asking a question in this way, unless the expert can only state the opinion with *probability*, which is acceptable. Some courts have allowed opinions as to *possibility* as well. But the expert is not permitted merely to speculate or guess.

Credibility

Every case is decided on the basis of which evidence is most believable. Before any witness is allowed to testify, he or she must swear or affirm to tell the truth. Doing that, the witness's credibility becomes an issue in the case and may be tested through the lawyers' examinations. Credibility is not necessarily a matter of lying vs truth-telling (although sometimes witnesses lie), but rather it is more often a question of accuracy vs inaccuracy and the **persuasive force** (called the **weight)** of the evidence. The factors that the jury, or judge, may use in evaluating the credibility of a witness's testimony are:

1. Whether the witness had the **ability** and **opportunity to know the facts** about which he or she testifies. Recalling the testimony about the dogs in the shed, a witness who had good hearing (ability) and was close to the shed (opportunity) is likely more believable than a witness who had a hearing impairment or who purported to hear the sounds while driving by in a car. Furthermore, the persuasive weight of the evidence increases when the witness has had considerable experience with the subject matter. So, the testimony of a dog breeder for 20 years will have more weight than if the witness were someone who once owned a puppy.

2. Whether the witness's **recollection** of the facts seems reasonably complete and accurate. Witnesses are not allowed to use scripts to testify but rather must rely on their memory. The ability to recall the facts then becomes a significant

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component of credibility. The witness who has comprehensive recall will be more credible than the one who has partial, sketchy or jumbled recall. But it is permissible to **refresh the recollection** of a witness who has momentarily drawn a blank. This is usually done by having the witness briefly look at a document to see if it jogs the witness's memory. If it does, the witness puts it aside and testifies from his or her "refreshed" memory.

3. How the witness **narrates** his or her testimony. A halting, hesitant narration, as well as an obviously memorized recounting, will raise suspicions about credibility.

4. The witness's **demeanor**, that is, his or her body language can play a role in determining credibility. This is especially important for the expert witness. If he or she becomes argumentative and defensive, credibility might be impaired.

5. Whether the witness's testimony seems **reasonable** and to make sense in light of all the other evidence in the case.

6. Whether there has been specific **impeachment.** Certain things, noted as follows, tend to make a witness less credible:

- Prior inconsistent statement or opinion. This is a form of self-contradiction. Suppose the witness at trial testifies that the shed felt "brutally hot." But on the day he inspected the shed, he told an investigator that the interior of the shed "seemed about average temperature for the time of year." These statement both cannot be true as they contradict each other. This self-contradiction raises concerns about the witness's credibility.

- Prior inconsistent conduct. This is similar to the prior inconsistent statement except that, on a prior occasion, the witness has engaged in conduct that is contradictory to his or her trial testimony. For example, the witness testifies that "I would never leave my dogs unattended for more than a couple of hours." The evidence shows that, a month before the incident being litigated, the witness took a weeklong vacation and left the dogs alone.

- Bias. This encompasses the whole range of activities and relationships that might cause a witness to testify favorably or unfavorably about an issue or person in a trial. So, in a case involving the alleged maltreatment of horses, an employee of the ranch who had been fired might have a bias against the ranch owner. And the ranch owner's brother might have a bias in favor of the owner.

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Sometimes lawyers try to show the bias of an expert witness by bringing out that the expert is being paid an exorbitant fee for his or her work on the case, or that the expert testifies in many similar cases and always gives opinions favorable to the plaintiff (or defendant).

- Prior conviction of a felony or of a crime involving dishonesty or false statement as a misdemeanor, gross misdemeanor or felony. For example, giving false information to the police likely fits the second category.
- Reputation for untruthfulness. If a witness has acquired a reputation in a community, such as a church group, recreational club, workplace, or town, this may be brought out on the issue of the witness's credibility.
- Opinion as to untruthfulness. If a witness is acquainted with another person who testifies, and has interacted with that person sufficiently to know the person's inclination to be untruthful, the witness may state his opinion as to the person's lack of truthfulness.

Foundation

To be admissible, all evidence must be supported by **foundation** from which the jury, or judge, may conclude that an item of evidence is what it is claimed to be. Recalling the example of the sharp-spiked dog collar, before it can be received in evidence there needs to be testimony showing that it is connected with the case. To illustrate, a deputy sheriff is being examined:

Q. What, if anything, did you notice about the dog when you first saw him?

A. I saw a spiked collar around his neck and blood on the collar and matted on his fur.

Q. Showing you Exhibit 4, do you recognize it?

A. I do.

Q. How do you recognize it?

A. I remember it because it is very distinct, a homemade thing. And I also locked a yellow metal ID tag on it and I see the tag there.

The deputy has testified to preliminary facts showing that the exhibit is connected to the case. This is enough evidence to allow the jury to conclude that Exhibit 4 was in fact the collar used on the injured dog in question.

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Hearsay

The preference in the American legal system is that witnesses come to court and testify in real time, under oath, in full view of the jury, from their memories of the event or matter being litigated. So, the general rule is that witnesses are not permitted to testify to something said or written or communicated non-verbally at some other time and place. We can remember this rule as dealing with statements that are asked to be repeated at trial. This is the **hearsay rule** and it is a bit complicated and has many exceptions and some exemptions. It applies when

- there has been an *assertion*, that is a statement that can be either true or false (which eliminates questions and commands)
- made by a *person,* and not a machine such as a computer, or an animal, such as a drug-detection dog. It does not matter who made the statement, whether the testifying witness or someone else;
- made other than while the maker is testifying (a repeated prior statement);
- and is offered at trial to have the jury, or judge believe it to be true.

To illustrate, a deputy sheriff testifies in an animal cruelty trial involving the use of a spiked collar. When the deputy arrived on the scene, the collar was not on the dog. Here's part of the testimony:

Q. When you arrived at the yard, what did you see?
A. I saw the dog lying on its side and a neighbor standing next to the dog.
Q. Did you talk to the neighbor?
A. Yes.
Q. Was the dog wearing a collar?
A. No. The collar was on the grass a few feet from the dog.
Q. Did you ask the neighbor about the collar?
A. Yes.
Q. What did he tell you?

[Keeping in mind the elements of hearsay noted above, the deputy is testifying at the trial and he is being asked to **repeat** a statement that the neighbor made. Assume that the neighbor said that the dog was wearing the collar and that the neighbor removed it. If the owner disputes using the collar, the neighbor's statement—which can be true or false—is offered so that the jury will believe it to

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be true. This is hearsay and is inadmissible unless an exception to the rule can be found.

Questions/Answers/Objections

Some types of questions and answers are not permitted in trials, and objections may be made to them. The following is a sampling of some of the more common objectionable questions and answers.

1. Leading question. This is discussed above. Leading is permitted even on direct examination for purely preliminary or undisputed matters, and to help a witness with language difficulties testify. The most serious problem with the leading question is that it takes away from the jury many of the factors used to evaluate credibility. So, recall the factors discussed previously under the "credibility" section and then think about the following question:

Q. So, when you opened the door to the shed you saw several dogs chained to the floor and appearing to be in pain, right?

A. Yes.

This leading question supplied to the witness the facts, the recollection and the narration. The lawyer took away from the jury the chance to learn how the witness came to know the facts, what facts he knows, what he remembers, and how he tells the facts while under oath. Leading on important matters certainly is not harmless.

2. Repetitious, or asked and answered. Lawyers are entitled to get clear answers to their questions. But once a witness has given such an answer, lawyers are not entitled to have the answer repeated. This rule is flexible but basically repetition is time-wasting.

3. Calls for speculation. The question, "Do you believe that Mrs. Quill intended to harm her horse?" appears to ask the witness to guess as to another's intention. Usually such a question is improper.

4. Argumentative. Questions that draw inferences and ask the witness to agree with them, or that ask the witness to comment on another's witness's testimony, or that invite the witness to interpret the evidence are said to be argumentative and are improper. For example:

Q. So that would mean that the defendant was negligent in caring for the cattle?

Q. Would you say that the deputy was lying when she described the condition of the horse?

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Q. That evidence proves that the dog had the collar on all day, doesn't it?

5. Compound or multiple question. This is an objection made to cross examination when the examiner asks more than one question as if it were a single question. For example:

Q. Now, you did not lock the gate and you drove to town for the evening, correct?

There are two questions here and the examiner is seeking a "yes" answer, but it is not clear which question is being answered. The examiner must ask each question separately.

6. The answer is non-responsive. This is an objection to be made on cross-examination. Assuming a clear, concrete question, the examiner is entitled to receive an answer that truly answers the question. For example:

Q. You did not feed the dogs at any time on that Friday, did you?

A. The dogs were always taken care of.

The answer does not answer the specific question and therefore is said to be non-responsive.

7. The question calls for hearsay. This is discussed above.

8. The offered exhibit lacks foundation. This is discussed above.

9. The answer would be irrelevant. Only relevant evidence is admissible. This is evidence that has some tendency to help prove something in the case. For example, in an animal cruelty case in which the allegation is that a farmer caused several cows to starve to death, here is a question asked of an employee who worked on the farm:

Q. Mr. Boyd, you're a Muslim, aren't you?

Unless some connection between a person's religion and the issues in the case can be shown, this matter is irrelevant.

Conclusion

Some of the rules and procedures discussed above are more complex than indicated, and the application of many depend on the variables that are inevitable in trials. Each case will have its own unique facts and the rules need to be applied and enforced within the context of those facts, and judicial discretion is always a significant factor in trials.

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Judge Gordon Shumaker is a former judge of the Minnesota Court of Appeals. He was appointed to this position in 1998 and was subsequently elected in 2000 and 2006. He retired in October 2011. Judge Shumaker also served on the Minnesota Second Judicial District Court from 1982 until 1997, where he was the Chief Judge of this court from July 1, 1996 to December 31, 1997. A supporter of animal protection issues and the law, Judge Shumaker is working collaboratively with Animal Folks to create training materials for the improved understanding and enforcement of animal law.

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