

Can the law help us to tackle genetic diseases that affect the welfare of dogs?

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Abstract

Some pedigree and other dogs suffer from serious genetic health problems. It is sad to acknowledge that this is not new. Dogs have been exposed to an increasing number of hereditary diseases for decades. Some of the diseases are the result of naturally occurring processes that result in mutations and the close linkage of undesirable traits with desirable ones, others, however, are the result of choices made by breeders and owners about what is desirable for the dog breed. An owner with a sick dog, has recourse to consumer's legislation should they wish to get some of the money back that they paid for the 'defective' animal. Consumer's law is based on EU standards, and does give the owner some opportunities to litigate. This paper explains EU legislation, and provides an overview of the opinion of (Dutch) judges regarding cases involving animals with genetic defects. Legal and veterinary perspectives do not always work together in a satisfactory manner. The need for further legislation to prevent the continued breeding of dogs with serious genetic defects is discussed.

Keywords: animal welfare, consumer's law, dog-breeding, hereditary diseases, lawsuit, pedigree dogs

Introduction

Dogs with inherited defects can be extremely upsetting for their owners. The frustrations about the dog's illness, combined with veterinary costs, may act as an incentive to take the case to court, to sue the breeder for the production of the 'defective' animal. But does that help? Does the option of a lawsuit help the dog that is experiencing pain and distress? How are sick pedigree dogs judged in lawsuits? Is the breeder fully liable for every disease or abnormality a dog develops? And what information do we get from these lawsuits about the welfare of pedigree dogs? Do such lawsuits work as an incentive for an increase in the welfare of dogs, or should we think of other options? This study details the law and legislation applicable to dogs, and discusses the implications for animal welfare.

Dogs with defects

The issue of dogs suffering from inherited diseases has been recognised for decades (eg Ministry of Agriculture 1988). An important point in this paper is the distinction between 'chosen' and 'not-chosen' diseases. Let us assume that the normal lifespan of a dog varies from ten to fifteen years, in reasonable health. This normal dog is born without veterinary intervention, can breathe, see, hear, smell, eat, drink, walk, bark, in short, show all the biologically essential functions to survive as a mammal, and also shows the functions which are essential for a dog (and in line with the

principles described for farmed animals by the Brambell committee [Brambell 1965; PDSA 2011]).

In some dog breeds, many individuals suffer from serious impairments of those functions. One of the best known examples, is breathing difficulties in brachycephalic breeds; those with a disproportional wider skull, short muzzles and protruding eyes (Bannasch *et al* 2010). These problems are now common and referred to as 'brachycephalic respiratory syndrome' (eg UFAW 2011). Other health problems seen in such breeds involve the eyes, joints, skin and the birthing process. The recent BBC documentary, *Pedigree Dogs Exposed* (BBC 2008) showed many of these types of health impairments. These problems did not occur by accident, but because 'we' human beings deliberately chose to breed dogs with short noses, bulbous protruding eyes, skulls too small to hold the brain (Rusbridge 2007), extreme wrinkles and other malformations that are a threat to a dog's health and welfare (Bateson 2010).

At the same time, we have bred other breeds in colours and types that match show standards or owner's wishes, like the popular chocolate-coloured Labrador retriever. In themselves, those physical appearances do not threaten health. However, breeding focused on appearance often involves inbreeding (CAWC 2006, 2008, 2009; Klein Swormink 2011). Inbreeding greatly increases the risk of genetic diseases (Gubbels & Scholten 2005; APGAW 2009; Peelman 2009).

Applicable law

Is the law a possible instrument with which to fight those diseases? This paper explores the possibilities for the owner to litigate, 'to sue', the breeder for the health problems of their dog. In this situation, the type of law that applies is civil law: the law concerned with the rights, duties and obligations of individual members of the community between themselves. The relationship between a breeder and an owner (to be), is a commercial one in which the dog is treated as an object, like a bicycle or a washing machine. A thing that can be sold for money and which is, unlike human beings, submitted to ownership. Breeder and owner are considered equal civilians who can choose, in freedom, whether they agree to sell or buy the dog. This is different from public law that lays out the rules we all have to follow. We do not have a choice about stopping at a red traffic light but we do have a choice about buying a dog from a breeder.

When one of those parties, the buyer, decides to litigate because the sold product is not satisfactory, it is the duty of the buyer to prove his or her case. This raises a difficulty, however. Imagine an MP-3 player malfunctioning, and a consumer having to prove that this is the store's fault. This would be nearly impossible.

To strengthen the consumer's position in commercial transactions, measures have been taken by the EU in the so-called 'Consumer's Directive' (EU 1999). This directive states that if the product is bought from a professional and/or commercial party by an 'ignorant' individual, the product should be satisfactory, fit for purpose and 'as described'. The product should meet 'reasonable expectations'. If the product does not meet these requirements, we call it a 'faulty' product. If the product appears to be faulty within six months after purchase, the trader has to offer repair, replacement or a refund, or prove that the fault is not theirs.

Like all directives, the Consumer's Directive has to be incorporated into national legislation by the EU member states. The exact nature of these laws may differ, but the six-month period is a minimum that cannot be changed. However, countries still have freedom about how to implement the directive, and judges still have freedom in interpretation, unless the European Court of Justice makes a ruling which changes this situation.

Real life

In daily life, the consequence of this legislation is that a dog breeder breeding more than an incidental and/or accidental litter of puppies, could be considered to be a commercial trader, although opinions may differ on this. In 2007, a Dutch court of appeal decided that a breeder who breeds only a few litters a year and sells each puppy for €1,250 is not a commercial breeder (Dutch Court of Appeal 2007). Two months earlier, a regional judge had decided that a cat breeder who sold a kitten with feline infectious peritonitis and other infectious diseases, must pay back to the owner all purchase and veterinary costs, except those associated with the cremation of the cat (Regional Court 2007).

If a breeder can be considered 'commercial' and if a dog appears to be faulty within six months after purchase, and

the breeder refuses a 'repair, refund or replace', the new owner can take the case to court. Then, the breeder has to prove that the defective product (the dog) was not their fault. With inherited diseases, this may prove to be difficult for the breeder, but that does not necessarily mean that a lawsuit is the easiest way for the owner of a sick 'defective' dog to get compensation for their costs, if the breeder is unwilling to reimburse these.

First of all, the judge has to decide whether the breeder has to be considered as a trader. Since there is a lack of clear guidelines, or numerical measures from which to decide whether a breeder is a commercial trader or not, judges could reach very different decisions in each case. If the breeder is not considered 'commercial', the owner is confronted with the much harder task of proving that the dog's defect was already present at the time of purchase.

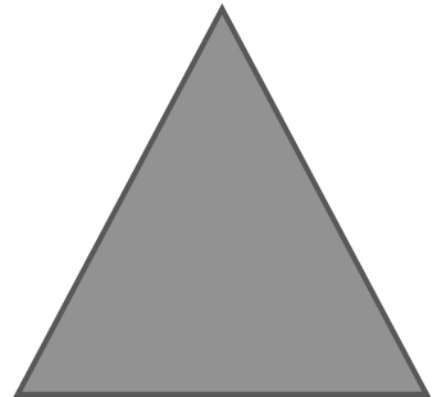
The focus of the lawsuit will then shift to the question as to whether the dog meets 'reasonable expectations', but again, clear guidelines about this are lacking. What lifespan, which level of health, behaviour and welfare do we consider a reasonable expectation for a dog? How many dogs have a mild form of hip dysplasia and yet still live satisfactorily for many years as a family pet? And, on the other hand, is it reasonable for an owner, who purchased one of the brachycephalic breeds, to claim they had no idea about respiratory problems in the breed? An owner who goes to court to sue a breeder because their English Bulldog snores too loudly, can expect a defence from the breeder that this is not a 'hidden defect', or even a faulty dog, since this is typical for the breed (Rooney & Sargan 2009; Packer 2012). There may be judges who will stress the duty of the breeder to tell the owner about the specific characteristics of the breed (Regional Court Leeuwarden 2001), but it will be hard for an owner to persist with the contention that they had no idea that they existed.

In other cases, such as hip dysplasia, it may be that the breeder has tested all ancestors, but the puppy still develops this disease. In such circumstances, the breeder has to offer a repair, refund or replacement. Neither replacement nor a refund (if the dog has to be returned to the breeder) are likely to be attractive options for an owner, but repair is often much more expensive than a new dog. If the breeder took all the proper precautions, it is very unlikely that a judge will grant the owner more compensation than the amount that was paid for the dog (Supreme Court of The Netherlands 1998). The EU Directive, as well as the European Court of Justice, state that the costs of compensation should not be disproportionate to the value of the product, but on the other hand, the seller cannot avoid the obligation to replace the product, even if that requires the seller to take care of removing the faulty product, and paying for the costs involved (EU Court of Justice 2011). The breeder cannot try to make the owner pay for the 'use of the dog' (EU Court of Justice 2008). Even if the case is taken to court, it is up to the judge to decide whether the breeder should be regarded as a trader, if the dog is faulty at all, and what compensation should be granted to the owner.

Figure 1

Scheme of selection in court jurisdiction for dogs with defects.

- Cases taken to higher courts and published
- Published cases
- Judged cases
- Legal fight
- Fight
- Unhappy owner
- Problems
- Sold dogs



Will the consumer's directive (which is relatively new) change the state of affairs detailed above? The consequences of the directive may lead to a greater awareness of the issues among breeders, so that they at least make use of a written contract when selling puppies. It is doubtful that the consumer's directive in itself will work as an incentive for improved welfare in pedigree dogs, especially since only a few owners are willing to take cases to court. Even when they do, the number of cases published are still fewer, so it is hard to establish precedence based on judges' opinions on pedigree dogs. Published cases by higher courts are rare, which means that regional judges may continue to hold different opinions, in the absence of guiding principles by a higher or Supreme Court (see Figure 1). These problems could be partly solved through developing and running a database on lawsuits concerning pets.

Discussion

Taking a case to court costs money, time and energy. An owner, who is already frustrated and sad and who is losing money on a sick dog, might not be inclined to do so. And even a relatively simple lawsuit about a dog, where representation by a lawyer is not required, is not always manageable without a lawyer. If we want civil law to work as an incentive for animal welfare, we should ask ourselves about the following matters.

The status of being an object does not work for a pet. Repair and refunding are actually inappropriate. Nobody who had bought a faulty MP3 player would get the device fixed for a price higher than the device itself. With dogs, we do not think that way, but the law requires us more or less to do so. It will be very hard to change that. Arguing that a dog should not be considered as an object in law is not the way forward as that would make buying a dog at all or of claiming ownership of it impossible.

Maybe it should become easier to sue a breeder of dogs with inherited diseases. If the legal process was easier, it might

work more effectively as an incentive for dog breeders to take greater concern about the health and welfare of dogs they sell, or at least to be more concerned about health and welfare of their dogs than about show results. A specialised arbitration committee that took such cases could work if breeders were willing to submit to this system.

We have been breeding pedigree dogs for over 100 years. The serious health problems caused by congenital disorders have been of increasing concern in recent decades. Civil lawsuits may offer some help in individual cases, but are too rare to work as an incentive to prevent the breeding of 'dogs with defects'. Other suggestions are sometimes outside the field of public law, and there are many more thoughts to consider.

For example, might it be time to declare the breeding of dogs with defects to be animal abuse, and to make it a criminal offence? This might sound a harsh way to deal with some cases, such as when hip dysplasia occurs despite the owner taking many precautions to avoid it. However, it may be worth considering as a way of dealing with cases in which dogs are consciously exposed to pain and discomfort through the mere fact of their existence. On the other hand, we have to take into account that the owner who buys a dog like that has a responsibility as well. There may be difficulties also associated with determining who the breeder was in cases where puppies are bought in pet stores or via the internet. Although a dog might carry an electronic transponder for its identification, this may not include data about its breeder.

Or is it time for greater control of the health status of show dogs? In some shows, dogs are allowed to participate and win champion prizes, regardless of their health status. Prize-winning dogs are more likely to be used for breeding and this perpetuates or worsens the trouble.

However, the problem is not only in dogs used in shows. The call for a ban on faulty breeds is growing stronger. This is understandable, but the idea is problematic from a legal point of view. A pedigree dog is recognised by the pedigree.

If the pedigree is forbidden, but the owner continues to be entitled to manage it as they wish, it is impossible to prevent an owner from using it for breeding. Puppies can easily be sold without a pedigree.

Breeding dogs can be a way of generating income. Of course, the amounts generated varies from breeder-to-breeder, but it is fairly easy to charge €500 (about < £400) for a puppy. If a litter is of ten puppies, that is an attractive option. The prices reflect the free market, in which the financial value of a puppy depends on what the buyer is willing to pay. Imagine for a second that it would be impossible to sell animals for more than the cost of breeding and rearing them (including food, veterinary care, etc). In these circumstances, breeding with the most expensive champions would be far less attractive, and the difference in value between pedigree dogs and mongrels could decrease.

The above suggestions are meant to encourage further thought and debate about these issues. They are not meant to infuriate lovers of particular strains and breeds of dogs but to stimulate thinking about the possibilities of developing legal measures that could act as incentives to improve the welfare of those that have suffered from genetic disease in recent decades.

Animal welfare implications and conclusion

Under the EU Consumer's Directive, it is easier for the owners of a 'faulty' dog to get compensation from the breeder through civil lawsuits. However, there is, as yet, no definition of what reasonable expectations a pet dog should meet. And regardless of the existence of the consumer's directive, the fact is that pursuing a civil lawsuit costs time, money and energy and is not easily accessible for dog owners. The threat of a civil lawsuit will therefore not work as an incentive on a large scale to prevent inherited diseases in dogs. If we seriously want to tackle the welfare problems due to inherited conditions, we will have to think 'out of the box' for new solutions.

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