

Discretion Bites: The Current State of Animal Emergency Planning

PAIGE CHRETIEN*

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I. INTRODUCTION

Natural disasters have historically wreaked havoc on the lives of animals. Hurricane Katrina, which hit the gulf coast of Louisiana in 2005, exposed the tragic vulnerabilities of pets and pet owners in disasters and brought awareness to the significance of the human-animal bond.¹ As climate change will likely breed storms that are more deadly than their predecessors, planning and preparedness are essential to mitigating the impacts of these storms. The current status of animal emergency planning and preparedness in the state of California does not ensure that such vulnerable population will be adequately protected.

Part I begins by discussing the relationship between climate change and the increased threat of natural disasters. The pervasiveness of the human-animal bond and the implications of that bond in the context of natural disasters are also considered. Part II discusses the legislative response to Hurricane Katrina both federally and in the state of California. Specifically addressed are the federal Pets Evacuation and Transportation Standards (“PETS”) Act and the California Animal Response Emergency System (“CARES”). Part III addresses the flaws in both the federal and state responses and how such flaws leave the implementation of animal planning and emergency at the discretion of lower level agencies. Whether the immunity that comes with discretion precludes any tort law cause of action that may otherwise have a deterrent effect is further analyzed. Part IV concludes and proposes changes to the current CARES program aimed at minimizing discretion in implementing animal emergency planning and preparedness efforts.

A. *Climate Change and Natural Disasters*

Reconstructions of global temperature since the mid-19th century show that the global climate is warming at an unprecedented rate.² Atmospheric and oceanic temperatures have been rising since the 1950s, with a more rapid increase beginning in the 1980s.³ Twenty of the warmest years on

1. *Hurricane Katrina*, LOUISIANA SPCA, <http://www.la-sPCA.org/katrina> [https://perma.cc/F2SG-Q737] (last visited Apr. 18, 2016).

2. See *Climate change: How do we know?*, NASA, <http://climate.nasa.gov/evidence/> [https://perma.cc/M9TU-GWBK] (last updated Dec. 3, 2015); see also Lisa V. Alexander et al., *Summary for Policymakers*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 1, 3-4 (Thomas F. Stocker et al. eds., 2013); *Climatic Research Unit: Home*, UNIVERSITY OF EAST ANGLIA, <http://www.cru.uea.ac.uk/> [https://perma.cc/ZJ2Y-ZUF6] (last visited Dec. 1, 2015).

3. *Climatic Research Unit: Home*, UNIVERSITY OF EAST ANGLIA, <http://www.cru.uea.ac.uk> [https://perma.cc/ZJ2Y-ZUF6] (last visited Dec. 1, 2015).

record have occurred since 1981, nine of which occurred in the 2000s.⁴ The current warming trend, caused by anthropogenic greenhouse gas emissions, is projected to continue into the late 21st century.⁵

Climate change is very likely to have an impact on future disasters.⁶ A warming climate could both increase the number of intense storms and result in increasingly intense drought and flood cycles.⁷ While some scientists speculate that global warming will “spawn more hurricanes,” others predict that it will impact the severity of hurricanes.⁸

Even if tropical storms don’t change significantly, other environmental changes brought on by global warming could make the storms more deadly. Melting glaciers and ice caps will likely cause sea levels to rise, which would make coastal flooding more severe when a storm comes ashore. In their 2001 report, the Intergovernmental Panel on Climate Change stated that global warming should cause sea levels to rise 0.11 to 0.77 meters (0.36 to 2.5 feet) by 2100.⁹

With global warming predicted to continue, and its likely effect on natural disasters, it is imperative that effective mitigation strategies are put in place. Emergency planning and preparedness are key to mitigating the impacts of disasters on society and, due to the strength and pervasiveness of the human-animal bond, including accommodations for pets and pet owners in such efforts is essential to their effectiveness.¹⁰

B. Implications of the Human-Animal Bond

In modern society, a household pet is often viewed as more than just a companion animal and instead considered to be a member of the family,

4. *Climate change: How do we know?*, *supra* note 2; see also *Global Temperature*, NASA, <http://climate.nasa.gov/vital-signs/global-temperature/> [<https://perma.cc/BY79-9FXQ>] (last updated Dec 3, 2015).

5. See Alexander et al., *supra* note 2, at 15.

6. *The Impact of Climate Change on Natural Disasters*, NASA, http://earthobservatory.nasa.gov/Features/RisingCost/rising_cost5.php [] (last visited Jan. 30, 2017); *The Rising Cost of Natural Hazards*, NASA (Mar. 28, 2005), http://earthobservatory.nasa.gov/Features/RisingCost/rising_cost.php [<https://perma.cc/VXW7-MXUR>].

7. *The Impact of Climate Change on Natural Disasters*, *supra* note 6.

8. *Id.*

9. *Id.*

10. See Dr. Shari O’Neill & Dr. Grant Miller, *Local and State Efforts to Help California Animals in Disasters*, in ANIMAL CARE CONFERENCE 1, 1–2 (Mar. 2015).

much like a child.¹¹ According to the 2015-2016 APPA National Pet Owners Survey, an estimated 65% of U.S. households include one or more pets.¹² This estimate reflects the 77.8 million dogs and 85.8 million cats owned in the United States.¹³ When evacuation efforts fail to include accommodations for pets, pet owners must choose between two dismal options: either leave their pets behind to face the disaster alone or stay with their pets and fail to evacuate altogether.¹⁴ Both options pose considerable public health and safety risks.¹⁵ For example:

Uncontained bodily waste may spread disease among live animals that are left to wander. In limited cases, when the disaster involves water, communicable diseases may also transfer to humans via animal carcasses. Contact with wildlife and vermin may expose unvaccinated companion animals to the rabies virus. These potentially harmful illnesses could affect not only animals and evacuees in the immediate area, but also rescue workers who are essential to recovery efforts. Roaming animals, even those whose history includes no prior aggression toward humans, may become fearful and lash out.¹⁶

An additional concern is the threat to pet owners' health and safety.¹⁷ When pet owners choose to leave their animals behind, they oftentimes return to the dangerous conditions in an attempt to locate and rescue their pets.¹⁸ Those pet owners who refuse to evacuate altogether risk their lives to stay with their pets during a disaster.¹⁹

Hurricane Katrina tragically affected the lives of as many as 50,000 household pets and highlighted the strength and pervasiveness of the human-animal bond.²⁰ Many pet owners reluctantly left their pets behind as animals were neither allowed on the evacuation busses, nor allowed inside the evacuation shelters.²¹ Thousands of the cats and dogs left to fend for themselves died during the initial surge of the storm, and of those

11. See 2015-2016 APPA National Pet Owners Survey Statistics: *Pet Ownership & Annual Expenses*, AMERICAN PET PRODUCTS ASSOCIATION, http://www.americanpetproducts.org/press_industrytrends.asp [<https://perma.cc/W5C2-ZMER>] (last visited Nov. 8, 2016).

12. *Id.*

13. *Id.*

14. See O'Neill, *supra* note 10, at 2.

15. *Id.*

16. Jessica J. Austin, *Shelter from the Storm: Companion Animal Emergency Planning in Nine States*, 40 J. SOC. & SOC. WELFARE 185, 187 (2013).

17. *See id.*

18. *See id.*

19. *See id.*

20. Amy Cattafi, *Breed Specific Legislation: The Gap in Emergency Preparedness Provisions for Household Pets*, 32 SETON HALL LEGIS. J. 351, 359 (2008).

21. Stanley Coren, *The Dogs of Hurricane Katrina*, MODERN DOG, <http://modern.dogmagazine.com/articles/dogs-hurricane-katrina/151> [<https://perma.cc/5EGD-W2GF>] (last visited Apr. 16, 2016).

pets that were still alive, roughly half were unable to be rescued.²² In the words of an emergency responder, “Pets who were lucky enough to be rescued ‘were in . . . bad shape . . . they had chemical burns from being in the flood waters. They were emaciated. A lot of them had heart worms.’”²³

Hurricane Katrina was not the first time that domestic animals suffered in the face of disaster. Approximately 1,000 dogs and cats were euthanized when Hurricane Andrew hit South Florida in 1992.²⁴ In 1999, Hurricane Floyd killed over three million animals.²⁵ Hurricane Charley left many pets without a home when it hit Southwest Florida in 2004.²⁶ The devastation of Hurricane Katrina did, however, bring the necessary attention to this reoccurring problem. Forty-four percent of the people who refused to evacuate in Hurricane Katrina did so because of the pre-hurricane evacuation policy prohibiting evacuees from bringing their pets.²⁷ Rescuers later found many of these pet owners dead in their homes with their pets sitting beside them.²⁸

Thousands of volunteer rescuers were exposed to unhealthy and dangerous conditions while attempting to rescue the surviving pets.²⁹ In what was described to be a scene comparable to that of a combat zone, animals were waiting for help on the rooftops of flooded homes, swimming in filthy water, and standing in packs on the streets.³⁰ The volunteer rescuers worked through one-hundred-degree heat and humidity attempting to save the lives of those animals—the ones that were left behind.³¹

22. Caitlin Johnson, *Katrina’s Lost Pets Come Home*, CBS NEWS (Aug. 31, 2006), <http://www.cbsnews.com/news/katrinas-lost-pets-come-home/> [https://perma.cc/7V7L-5CGJ].

23. Cattafi, *supra* note 20, at 359 (quoting Dan Harris & Mark Reeves, *Katrina Rescuers Saved Thousands of Pets*, ABC NEWS (Aug. 27, 2006), <http://abcnews.go.com/WNT/HurricaneKatrina/story?id=2362416&page=1> [https://perma.cc/U4WZ-A6LB]).

24. Cattafi, *supra* note 20, at 361 (quoting Leslie Irvine, *Providing for Pets During Disasters: An Exploratory Study*, in QUICK RESPONSE RESEARCH REPORT 171, 1 (Natural Hazards Research and Applications Information Center, University of Colorado 2004)).

25. Irvine, *supra* note 24, at 1 (this number includes both pets and livestock).

26. *See id.*

27. Johnson, *supra* note 22.

28. *See id.*

29. *See* Cattafi, *supra* note 20, at 368.

30. *Id.*; Johnson, *supra* note 22.

31. Cattafi, *supra* note 20, at 368.

II. RESPONDING TO HURRICANE KATRINA

A. *The Federal PETS Act*

Hurricane Katrina was a wake-up call. Notwithstanding the dangers to pet owners who failed to evacuate, in a survey conducted after Katrina, 61% of all household owners still reported that they would refuse to evacuate their homes unless they could bring their pets.³² The media and public outrage surrounding the disaster inspired legislators to consider the necessity of including pets in emergency preparedness efforts.³³ The need for such change was expressed:

The nation was transfixed by images of abandoned cats and dogs left to fend for themselves in the flooded houses and streets of New Orleans, and of evacuees having to leave their pets behind. Tom Lantos, a member of the U.S. House of Representatives at the time of Katrina, was moved by such a photo, one showing a boy being separated from his pet dog. ‘The scene from New Orleans of a 9-year-old little boy crying because he was not allowed to take his little white dog Snowball was too much to bear,’ Lantos said. ‘As I watched the images of the heartbreaking choices the Gulf residents had to make, I was moved to find a way to prevent this from ever happening again.’³⁴

Lantos and fellow congressman, Christopher Shays, introduced H.R. 3858, the Pets Evacuation and Transportation Standards (“PETS”) Act, on September 22, 2005.³⁵ The bill’s purpose was to require state and local preparedness groups to include pet owners and pets in their disaster plans.³⁶ On October 6, 2006, the PETS Act amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act to include emergency preparedness standards consistent with the purpose of H.R. 3858.³⁷ The PETS Act requires the Director of the Federal Emergency Management Agency (“FEMA”) to ensure that pet owners needs before, during, and after a major disaster or emergency, are addressed in state and local emergency preparedness

32. *See id.* at 365.

33. Ali Berman, *Hurricane Katrina prompted a shift in pet rights*, MOTHER NATURE NETWORK (Aug. 19, 2015, 12:24 PM), <http://www.mnn.com/family/pets/stories/why-hurricane-katrina-was-shift-pets-rights> [<https://perma.cc/7K96-B4D3>].

34. Scott Nolen, *The PETS Act: A legal life preserver*, AVMA: JAVMA NEWS (July 29, 2015), <https://www.avma.org/News/JAVMANews/Pages/150815b.aspx> [<https://perma.cc/7K96-B4D3>].

35. Christopher Shays, *Animal Welfare: Its Place in Legislation*, 12 ANIMAL L. 1, 1 (2005).

36. *Id.* (including service animals as well).

37. Cattafi, *supra* note 20, at 364–65.

operational plans when approving such plans submitted to FEMA for review.³⁸ The PETS Act authorizes the Director to:

(1) study and develop plans that take into account the needs of individuals with pets [] prior to, during, and following a major disaster or emergency; and (2) make financial contributions, on the basis of programs or projects approved by the Director, to the states and local authorities for animal emergency preparedness purposes, including the procurement, construction, leasing, or renovating of emergency shelter facilities and materials that will accommodate people with pets and service animals.³⁹

Additionally, following the declaration of an emergency or disaster by the President, the PETS Act authorizes federal agencies to provide rescue, care, shelter, and essential needs to both pet owners and pets when responding, on the direction of the President, to threats to life and property resulting from the declared disaster.⁴⁰

B. CARES and the California Emergency Services Act

Legislation similar to the federal PETS Act was also adopted at the state level.⁴¹ In September 2006, the Governor of California signed Assembly Bill 450 into law requiring incorporation of the California Animal Response Emergency System (“CARES”) program into the state’s standardized emergency management system developed in accordance with section 8607(a) of the California Emergency Services Act (“CA ESA”).⁴² The law provides that the California Department of Food and Agriculture oversee the development of the CARES program and tasks the Governor’s Office of Emergency Services with approval, adoption and incorporation of that

38. Summary for the Pets Evacuation and Transportation Standards Act of 2006, GOVTRACK, <https://www.govtrack.us/congress/bills/109/hr3858/summary> [<https://perma.cc/47B3-8TQR>] (last visited Dec. 1, 2015).

39. *Id.*

40. *Id.*

41. *See, e.g.*, CAL. GOV. CODE § 8608 (West 2013); *see also* Cattafi, *supra* note 20, at 367.

42. Press Release, Governor Arnold Schwarzenegger, Governor Schwarzenegger Signs Legislation to Improve Emergency Response for Animals, (Sept. 29, 2006) [http://www.caloes.ca.gov/PlanningPreparednessSite/Documents/cares%20PRESS%20RELEASE%20\(1\).pdf](http://www.caloes.ca.gov/PlanningPreparednessSite/Documents/cares%20PRESS%20RELEASE%20(1).pdf) [<https://perma.cc/BV8M-PZXR>]; *see also* *California Animal Response Emergency System*, CALOES, <http://www.caloes.ca.gov/cal-oes-divisions/planning-preparedness/california-animal-response-emergency-system> [(last visited Oct. 26, 2015) (noting that CARES was initially created in response to the California floods of 1997).

program.⁴³ In its current state, CARES functions as operational guidance assisting animal emergency providers with all aspects of animal care and control during a disaster or emergency, and is designed for use by such providers as a reference.⁴⁴ The CARES Field Operations Guide contains standard procedural guidelines, references to local disaster plans, and information about setting up and running an animal shelter, including the forms and supplies that will be needed, as well as who to call for help.⁴⁵ The CARES program further provides animal emergency providers with the opportunity to request needed resources.⁴⁶ Resource requests move upwards through the various standardized emergency management system levels,⁴⁷ “from the field to local government to County Operational Area to the Regional Operational Area, to the State Operations Center, to FEMA.”^{48,49} As opposed to directly requesting a specific resource, the levels are instructed to request a need—one which those along the chain of communication will use to determine the most appropriate, available, and closest resource capable of fulfilling.⁵⁰ The request ultimately stops at the level with the ability to fulfill the request.⁵¹

1. Immunity Under the California Emergency Services Act

The CA ESA sets forth the immunities granted to particular persons in sections 8655 through 8660.⁵² The state of California and its political subdivisions enjoy significantly broad immunity “for any claim based

43. CAL. GOV. CODE § 8608.

44. *California Animal Response Emergency System*, *supra* note 42.

45. *Id.*

46. *Resource Lists*, CAL. ANIMAL RESPONSE EMERGENCY SYS. (CARES), <http://cal-cares.com/resource-lists/> [<https://perma.cc/9UD4-F7VE>] (last visited Dec. 1, 2015).

47. *SEMS: Standardized Emergency Management System*, CALOES, http://www.caloes.ca.gov/PlanningPreparednessSite/Documents/01%20SEMS%20Maint%20Brochure%20May_2014.pdf [] (last visited Dec. 1, 2015) (explaining that California’s standardized emergency management system is comprised of five organizational levels: Field, local, operational area, regional, and state. At the field level are on-scene responders. Counties, cities, and special districts are considered the local level. The operational area, or third level, manages and coordinates all of the local governments within a county’s geographic boundaries. The regional level manages and coordinates both information and resources among operational areas. At the state level, statewide resource coordination is integrated with federal agencies.).

48. *Id.*

49. CAL. GOV. CODE § 8559(c) (West 2011) (“[A]n “operational area” is an intermediate level of the state emergency services organization, consisting of a county and all political subdivisions within the county area.”).

50. *Resource Lists*, *supra* note 36.

51. *Id.*

52. ANN TAYLOR SCHWING, 2 CALIFORNIA AFFIRMATIVE DEFENSES § 38:53 (2d ed. 2016).

upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of [the CA ESA].”⁵³ Section 8655 expressly precludes liability for both performance and failure to perform a discretionary act due to the time constraints inherent in a declared emergency state and the quick decisions that must be made to protect the public.⁵⁴

Officers, agents, or employees of the state are not bound to their normal territorial limits for immunity purposes and are entitled by law to enjoy all of the privileges and immunities from tort liability that they enjoy in their own political subdivision⁵⁵ while acting under the CA ESA to provide emergency services within the territorial limits of another subdivision.⁵⁶ Effectually, this serves as an expansion of the general immunity provided to public employees for discretionary acts to include those discretionary acts beyond the employee’s scope of employment.⁵⁷ Such immunity applies whether or not the employee engaged in an abuse of discretion.⁵⁸

Additionally, the CA ESA grants immunity to volunteers pursuant to section 8657(a),

Volunteers duly enrolled or registered with the Office of Emergency Services or any disaster council of any political subdivision, or unregistered persons duly impressed into service during a state of war emergency, a state of emergency, or a local emergency, in carrying out, complying with, or attempting to comply with, any order or regulation issued or promulgated pursuant to the provisions of

53. CAL. GOV. CODE § 8655 (West 2011); see 2 CALIFORNIA AFFIRMATIVE DEFENSES, *supra* note 52, at § 38:53.

54. CAL. GOV. CODE § 8655; see also *LaBadie v. State*, 256 Cal. Rptr. 604, 606 (Ct. App. 1989) (holding the purpose of the Act is self-explanatory. In situations in which the state must take steps necessary to quell an emergency, it must be able to act with speed and confidence, unhampered by fear of tort liability. A state of emergency imposes severe time constraints, forcing decisions to be made quickly and often without sufficient time to carefully analyze all potential repercussions. Therefore, the immunity granted by the Act is broad and specifically extended to encompass not only discretionary actions, but also the performance of or failure to perform those discretionary actions.).

55. CAL. GOV. CODE § 820.2 (West 2011) (“[A] public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.”).

56. CAL. GOV. CODE § 8656 (West 2011).

57. Editor’s Note, CAL. GOV. CODE, § 820.2 (West 2011) (explaining that Section 820.2 codified the “pre-existing discretionary immunity rule” to ensure that, unless otherwise provided by statute, “public employees” will continue to remain immune from liability for their discretionary acts within the scope of their employment.).

58. CAL. GOV. CODE § 820.2.

this chapter or any local ordinance, or performing any of their authorized functions or duties or training for the performance of their authorized functions or duties, shall have the same degree of responsibility for their actions and enjoy the same immunities as officers and employees of the state and its political subdivisions performing similar work for their respective entities.⁵⁹

Volunteers thus enjoy the same discretionary immunity as similarly situated officers, agents, or employees of the state and its political subdivisions.⁶⁰

Four years after CARES was incorporated into the CA ESA, section 8659(b) was enacted for the purpose of providing immunity to veterinarians and veterinarian technicians rendering emergency services.⁶¹ Section 8659(b) is not as broad as the general discretionary immunity otherwise provided by the CA ESA and does not preclude liability in the event of a willful act or omission.⁶² Absent a willful act or omission, however, a veterinarian or veterinarian technician is not liable for any injury to an animal resulting from services rendered upon the request of a state or local official or agency during an established emergency regardless of the circumstances in which an injury is sustained.⁶³

2. Discretionary Acts

Immunity under the CA ESA is significantly broad.⁶⁴ In *Soto v. State of California*, the court declined limiting such immunity to apply only during a declared emergency and held that the state was immune from liability for injuries resulting from the design and execution of an emergency training course.⁶⁵ The court further noted that any evidence as to the alleged negligent design and execution of the course could not “raise a triable issue of fact in light of the broad immunity granted by section 8655.”⁶⁶ Similarly, a California Reclamation District did not lose immunity under the California Emergency Services Act for unintentionally causing further inundation of a campground by cutting a levee during a declared emergency due to flooding, notwithstanding that the district had failed to adopt a specific flood fight plan prior to that emergency.⁶⁷

59. CAL. GOV. CODE § 8657(a) (West 2011).

60. *See id.*

61. *See* 2 CALIFORNIA AFFIRMATIVE DEFENSES, *supra* note 52, at § 38:53; *see also* CAL. GOV. CODE § 8659(b) (West 2011).

62. *See* CAL. GOV. CODE § 8659(b).

63. *Id.*

64. *See Labadie*, 256 Cal. Rptr. at 606; *see also Soto v. State*, 65 Cal. Rptr. 2d 11 (Ct. App. 1997).

65. *Soto*, 65 Cal. Rptr. 2d at 11.

66. *Id.* at 14.

67. *Thousand Trails, Inc. v. Cal. Reclamation Dist. No. 17*, 21 Cal. Rptr. 3d 196, 203-04 (Ct. App. 2004).

Whether an act is effectively immunized turns upon its classification as either discretionary or ministerial.⁶⁸ Aside from the specified statutory exceptions involving health care professionals, the CA ESA extends absolute immunity to all discretionary acts or omissions related to carrying out its provisions; a cause of action arising out of the performance or failure to perform a ministerial act, however, is not insulated from liability.⁶⁹ In a tort suit arising out of insecticide spraying that could not be completed as originally scheduled in accordance with the CA ESA, the court concluded that “[deciding] whether there was time to fully inform the public or other state information services and whether to continue the spraying [were] policy level decisions.”⁷⁰ In a similar case, the court noted that acts regarding the implementation of the insecticide spraying program, including the length of spraying and the size of the drops, constituted discretionary acts.⁷¹ The court distinguished discretionary acts from ministerial acts by stating that, “a ministerial act takes place on the purely operational level rather than the policy making or planning level.”⁷² After a basic policy decision has been made, the subsequent ministerial action may be subject to adjudication on the question of negligence, despite the fact that the initial policy decision was likely discretionary.⁷³ In such situation, before a duty to exercise due care to the victim is established, immunity first needs to be addressed.⁷⁴

3. The Current Status of Animal Emergency Planning and Preparedness in California

A survey conducted by CARES in 2013 identified the existence of implementation gaps concerning animal emergency plans throughout the state of California.⁷⁵ The survey was sent to more than 850 animal emergency

68. See *Labadie*, 256 Cal. Rptr. at 606; see also *Farmers Ins. Exch. v. State*, 221 Cal. Rptr. 225, 231–32 (Ct. App. 1985).

69. See *Farmer’s Ins. Exch.*, 221 Cal. Rptr. at 231–32.

70. *Labadie*, 256 Cal. Rptr. at 606.

71. *Farmers Ins. Exchange*, 221 Cal. Rptr. at 231–32.

72. *Id.*

73. NEIL M. LEVY ET AL., 5 CALIFORNIA TORTS 60-1 (2015).

74. *Id.*

75. *CARES Program Assessment Report: A Project in Support of the California Animal Response Emergency System (CARES)*, CALIFORNIA VETERINARY MEDICAL ASSOCIATION (May 2013), <https://animalsindisasters.files.wordpress.com/2016/02/cares-program-assessment-report-summary-only.pdf> [<https://perma.cc/322Y-UU7Z>].

stakeholders as a means of assessing the current state of animal emergency planning and preparedness, but the information is limited to the 195 survey responses received by CARES.⁷⁶ The assessment covered various areas including the status of disaster plans, resources, and training and exercises.⁷⁷ The findings were analyzed and summarized by CARES as follows:

Concerning the status of disaster plans,

Local, state and federal government agencies have put plans and procedures in place for field response and at their respective governmental levels. Most field response plans are viewed as complete. However, it appears animal emergency management plans are not as complete across the state. While many non-governmental/private sector organizations participate in planning activities, there are few with written plans.⁷⁸

Concerning the status of resources,

Resources for animal emergencies are a huge issue in the state. Only thirty percent of organizations with field responsibilities stated that their resource lists are complete and less than ten percent of local government/operational area entities have a sufficient level of personnel, equipment and supplies.⁷⁹

Concerning the status of training and exercises,

Participation in field level training is strong across the state and, together with plans and procedures, supports an effective field response. Even so, most field organizations felt that training was not sufficient. Far less than half the local government/operational area level respondents have been trained on animal response coordination.⁸⁰ Participation in drills and exercises by field level organizations is fairly strong. However, like training, field level organizations overwhelmingly stated that their exercise program is insufficient. At the local government/operational area level, the majority of emergency operations center exercises do not include animal issues.⁸¹

A look at some of the survey's reported findings better illustrates the problematic status of animal emergency preparedness and planning.⁸² The survey's findings are grouped by region and include an additional group for state and federal responses.⁸³ Such grouping is consistent with California's six mutual aid regions shown below⁸⁴:

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.*

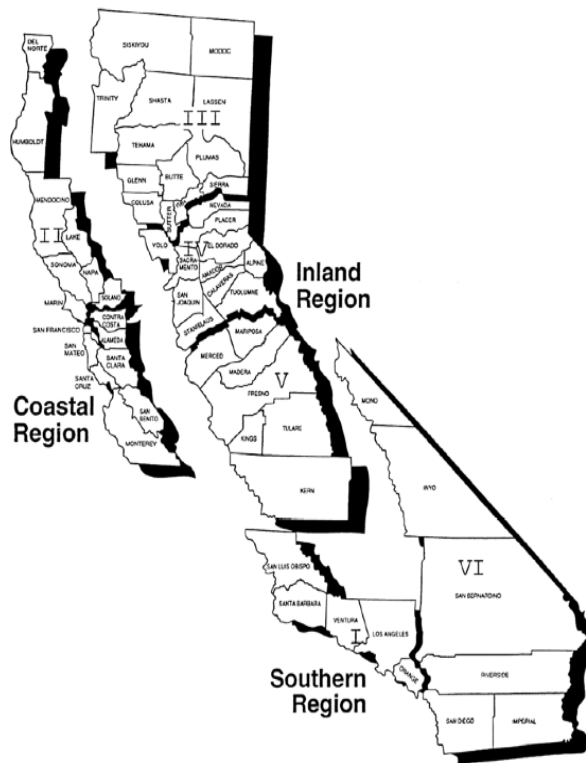
80. *Id.*

81. *Id.*

82. *See id.* at 1–14.

83. *See id.*

84. *Id.* at 1.



The summarized finding that “[l]ocal, state and federal government agencies have put plans and procedures in place for field response and at their respective governmental levels,” overstates the status of animal emergency planning.⁸⁵ Although more than half of the local government/operational area respondents in Regions II, III, and VI stated that they had an animal emergency plan, the opposite is true of the remaining three regions.⁸⁶ Less than half of Region I, IV, and V’s local government/operational area respondents stated that they had an animal emergency plan.⁸⁷

85. *See id.* at 14.

86. *See id.* at 1–13.

87. *Id.*

Additionally, the summarized finding that most field level plans are considered complete is contrary to the information reported by respondents with field level responsibilities.⁸⁸ In five of the six regions, less than half of the respondents with field level responsibilities reported that they considered their respective plans and procedures to be complete.⁸⁹ For example, seven-eighths of Region V's respondents with field level responsibilities reported that they considered their plans and procedures to be incomplete.⁹⁰

The summarized findings accurately state the resources issue: resources available for animals in emergencies are significantly lacking.⁹¹ For example, twenty-four of the twenty-six local government/operational area respondents in Region I failed to identify their level of available resources as sufficient.⁹² Similarly, none of the local government/operational area respondents in Regions III and V rated their level of available resources as sufficient.⁹³ Specifically lacking is the availability of personnel, equipment, and supplies.⁹⁴

Likewise, the summarized findings accurately reflect the status of training and exercises.⁹⁵ More than half of the respondents in all six regions with field responsibilities stated that they have received training.⁹⁶ Furthermore, in four of the regions, more than half of such respondents with field responsibilities have participated in exercises.⁹⁷ However, the sufficiency of such training and exercises presents more of an issue.⁹⁸ Only one-fourth of Region II's respondents with field responsibilities reported that their training and exercise program was sufficient while none of Region V's respondents with field responsibilities reported that their respective program was sufficient.⁹⁹ Further, at the local government/operational area level, less than half of the respondents in four of the six regions stated that their training included activities involved animal response coordination.¹⁰⁰

88. *See id.* at 2.

89. *Id.* at 1–13.

90. *Id.*

91. *Id.* at 1.

92. *Id.* at 2.

93. *Id.* at 6, 9.

94. *Id.* at 15.

95. *See id.* at 14–16.

96. *Id.* at 1–13.

97. *Id.*

98. *Id.* at 14.

99. *Id.* at 4–5.

100. *Id.* at 1–13.

III. ANALYSIS

A. *Flaws in the Responses*

1. *FEMA Funding*

In order for a city or state to qualify to receive funding through FEMA, that city or state must submit a plan detailing its disaster preparedness program.¹⁰¹ When the PETS Act was signed into law, it added an additional condition necessary to receive funding.¹⁰² Under the PETS Act, state and local emergency preparedness authorities must include accommodations for pet owners when presenting their plans to FEMA.¹⁰³ This simple requirement does not mean that state and local emergency plans must go into detail about such accommodations, nor does it mean that these plans must include any minimum standards, acts, or procedures.¹⁰⁴ As such, a city or state may qualify for FEMA funding without ensuring that pets and pet owners will be protected.

FEMA funding is essential to mitigate the impacts of a major disaster in which both local and state government resources are overwhelmed. In such a disaster, the PETS Act is operational only after declaration of a federal emergency by the President.¹⁰⁵ The declaration functions as a trigger for providing reimbursement of eligible expenditures. Because of this need for federal declaration, resources may be scarce during the early days of a disaster.¹⁰⁶ Similarly, states typically are reimbursed for only 75 percent of its expenditure during a federally declared emergency.¹⁰⁷

2. *Discretionary Nature of CARES*

Section 8608 of the CA ESA satisfies the additional condition for FEMA funding imposed by the PETS Act by mandating the incorporation of CARES

101. *Pets Evacuation and Transportation Standards Act of 2006*, 42 U.S.C.A. § 5196 (WestlawNext through P.L. 114–254).

102. *Id.*

103. *Pets Evacuation and Transportation Standards Act of 2006*, 42 U.S.C.A. § 5170(b) (WestlawNext through P.L. 114–254).

104. *See id.*

105. *PETS Act (FAQ)*, AVMA, <https://www.avma.org/KB/Resources/Reference/disaster/Pages/PETS-Act-FAQ.aspx?PF=1> [] (last visited on Dec. 1, 2015).

106. *See id.*

107. *Id.*

into the standardized emergency management system.¹⁰⁸ As the sole provision for including pets in emergency preparedness efforts, section 8608 did not, however, establish any requirements as to the substance or function of the CARES program that was to be incorporated.¹⁰⁹ CARES, in its subsequently incorporated and present-day form, similarly fails to require any specific actions by animal emergency response agencies.¹¹⁰

Because section 8608 fails to set forth any specific criteria, the California Department of Food and Agriculture and Governor's Office of Emergency Services are afforded broad discretion for their respective roles in the development, approval, adoption and incorporation of CARES.¹¹¹ The development, approval, adoption and incorporation of CARES thus involve the type of policy level decisions that are absolutely immunized under the CA ESA. Similarly, the discretionary nature of CARES does not require the State's political subdivisions to implement any animal emergency plan or procedures or oversee such efforts at the agency level, yet insulates against any liability resulting from a failure to do so.¹¹² The implementation of animal emergency planning and preparedness efforts is ultimately left to the discretion of the animal emergency response agencies.¹¹³ Leaving the implementation of animal emergency planning and preparedness to the discretion of animal emergency response agencies threatens the effectiveness of such efforts.¹¹⁴ As evidenced by the 2013 CARES Assessment, it opens the door for implementation gaps in plans and procedures, which could undermine the purpose of enacting section 8608 into law.¹¹⁵ Absent any specific requirements to the contrary, acts such as adopting written animal emergency response plans, developing adequate training, participating in drills and exercises, and maintaining a sufficient resource list are necessarily discretionary acts. In effect, animal emergency response agencies do not face any legal pressure to engage in animal emergency planning and preparedness as absolute immunity extends to any harm resulting from a failure to do so.

*B. Current State Tort Law Would Not Have a Deterrent Effect
Even Absent Immunity*

California does not currently recognize a tort law cause of action by which a pet owner could otherwise recover damages for harm caused to

108. See CAL. GOV'T CODE § 8608.

109. See *id.*

110. See *California Animal Response Emergency System*, *supra* note 44, at 10.

111. See CAL. GOV'T CODE § 8608.

112. See discussion, *supra* Part II.B., at 20.

113. See *id.*

114. See *CARES Program Assessment Report*, *supra* note 75, at 14.

115. *Id.*

his pet but for the statutory immunity under the CA ESA. Pet owners have, however, been permitted to recover emotional distress damages for tortious injury to pets in a few other states as early as 1979.¹¹⁶ The Hawaii Supreme Court found an animal caretaker liable for the emotional distress that resulted from an animal's death or injuries from inadequate transportation in *Campbell v. Animal Quarantine Station*.¹¹⁷ The animal was being transported from a quarantine station to a pet hospital for treatment when the dog died of heat prostration after being kept in an unventilated van exposed to the sun for an hour.¹¹⁸ The court found in favor of the dog owners on grounds of serious mental distress.¹¹⁹ Rejecting the defendant's argument that it did not owe a duty of due care to the owners because the owners were neither eyewitnesses to their dog's death nor located within a reasonable distance of the accident, and therefore severe emotional distress was not foreseeable, the court found that there was no requirement that the tortious event be witnessed by the plaintiffs.¹²⁰ In reaching a similar conclusion, where the destruction of a dog's body was found to give rise to an actionable tort, a New York state court explained:

In ruling that a pet such as a dog is not just a thing I believe the plaintiff is entitled to damages beyond the market value of the dog. A pet is not an inanimate thing that just receives affection it also returns it. I find that plaintiff [] did suffer shock, mental anguish and despondency due to the wrongful destruction and loss of the dog's body.¹²¹

Although cases such as these may have been an anomaly at the time, and have had limited reach, there has been increased activity in the area of tort law relating to pets and pet owners in recent years.¹²² Commentators have also recently analyzed the rationale supporting legal recognition of recovery of emotional distress damages for the tortious injury or death of a companion animal.¹²³

At the forefront of this analysis is the argument that, under appropriate factual circumstances, recovery for emotional distress resulting from tortious

116. See *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981); see also *Corso v. Crawford Dog & Cat Hospital, Inc.*, 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979).

117. *Campbell*, 632 P.2d at 1067.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Corso*, 415 N.Y.S.2d at 183.

122. SONIA S. WAISMAN ET AL., *ANIMAL LAW CASES AND MATERIALS* 71 (3rd ed. 2006).

123. *Id.*

harm to a pet should be allowed due to the human-animal bond by which household pets are often considered members of the family.¹²⁴ The depth of the human-animal bond that was highlighted in the wake of Hurricane Katrina is acknowledged in the realm of the social sciences.¹²⁵ Social science evidence establishes the profound grief experienced by humans when their pets pass away. Such grief is believed to intensify in the event of a tortious death.¹²⁶ As other aspects of society already acknowledge the implications of such human-animal bond, the legal system is due to progress accordingly.

Some courts express a willingness to permit a pet owner to recover for emotional distress damages resulting from tortious harm or death of a pet, notwithstanding a conclusion that state law does not permit such recovery under the facts presented.¹²⁷ In 2012, a California appellate court did precisely that.¹²⁸ The court expressly disagreed with a defendant's contention that California state law has rejected the concept that a pet owner may recover damages for emotional distress resulting from injuries sustained by his animal at the hands of another person.¹²⁹ Although the case was decided on a technicality, the court stated that they had no doubt that a pet owner could recover such damages in a proper case noting the strong attachment between humans and pets¹³⁰ and reasoning further that "cases in other states have recognized [that] a pet owner may recover for mental suffering caused by another's wrongful acts resulting in the pet's injury or death."¹³¹

124. *Id.*

125. *See id.* at 149.

126. *Id.* at 149.

127. *Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585 (Ct. App. 2012); WAISMAN ET AL, *supra* note 122.

128. *See Plotnik*, 146 Cal. Rptr. 3d at 599.

129. *Id.* ("The primary issue here is whether plaintiffs can recover under the trespass to personal property cause of action for the emotional distress they suffered resulting from Meihaus's injuring Romeo by striking him with a bat.").

130. *Id.* ("We believe good cause exists to allow the recovery of damages for emotional distress under the circumstances of this case. In the early case of *Johnson v. McConnell*, *supra*, 80 Cal. 545, 22 P. 219, the court noted 'while it has been said that [dogs] have nearly always been held 'to be entitled to less regard and protection than more harmless domestic animals,' it is equally true that there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt.").

131. *Id.* at 600-01 ("Furthermore, cases in other states have recognized a pet owner may recover for mental suffering caused by another's wrongful acts resulting in the pet's injury or death. (*Womack v. Von Rardon* (2006) 133 Wash. App. 254, 263, 135 P.3d 542 [cat set on fire; 'malicious injury to a pet can support a claim for, and be considered a factor in measuring a person's emotional distress damages']; *La Porte v. Associated Independents, Inc.* (Fla.1964) 163 So.2d 267, 269 [garbage collector hurled can at tethered dog, killing it; 'the affection of a master for his dog is a very real thing and . . . the malicious destruction of the pet provides an element of damage for which

*C. Emotional Distress Recovery for Pet Owners Will Likely Be
Recognized in California in the Near Future*

Although it is unclear what the court would accept as proper circumstances, *Plotnik* is a strong indication that such tort law cause of action will soon gain traction in the state of California.¹³² Similarly, the United States Humane Society rated the state of California the number one most humane state in its 2012 comprehensive report, which rated each of the fifty states and the District of Columbia based upon a wide range of animal protection laws.¹³³ As a frontrunner in animal protection laws, the stage is set for California to permit pet owners to recover damages in tort for harm sustained by their pets at the hands of another. If, or likely when, such cause of action is legally recognized, any resulting deterrent effect would be offset by CARES.

Because animals do not enjoy the same rights as humans, recovery under a tort theory wherein a pet is the direct victim is not currently recognized under the law of any state and will unlikely be legally cognizable in the near future. Although the Oregon Supreme Court recently conceptualized animals as victims in terms of criminal liability much in the same way as humans are, the ruling was later vacated, albeit on procedural grounds, but vacated nonetheless.¹³⁴ No other court has classified animals in such a way as to suggest a likelihood that pets may be able to recover in tort law as the direct victim of tortious harm in the near future.

Statutory immunity under the CA ESA does not absolutely insulate against veterinary malpractice claims, but instead imposes a heightened evidentiary

the owner should recover, irrespective of the value of the animal’]; *Brown v. Crocker* (La.App.1962) 139 So.2d 779, 781–82 [affirming recovery of damages ‘for shock and mental anguish experienced’ for ‘death of . . . mare’ and ‘loss of [stillborn] colt’ ‘as a result of shooting.’]”).

132. *See id.* at 599–600.

133. *State Rankings 2012*, THE UNITED STATES HUMANE SOCIETY, <http://blog.humanesociety.org/wayne/2013/01/humane-state-ranking-animal-welfare.html> [https://perma.cc/AQQ4-5ADD] (last visited on Jan. 25, 2017).

134. Ryan Haas, *Lawyers: Animal Abuse Law Still Strong In Oregon After Supreme Court Ruling*, OPD NEWS, <http://www.opb.org/news/blog/newsblog/lawyers-animal-abuse-law-still-strong-in-oregon-after-supreme-court-ruling/> [HMZ5] (last visited on Jan. 27, 2017) (“Oregon Deputy District Attorney [], said in many ways the Supreme Court’s opinion will still guide the law here, even if it’s no longer technically valid. ‘If you read the court’s most recent ruling, they don’t question the legal standard or the opinion they put out, . . . [t]hey just say that in the case of *State v. Nix*, they weren’t procedurally engaged properly.”).

requirement for bringing a claim of veterinary malpractice.¹³⁵ Absent immunity under the CA ESA, California courts typically apply the well-established rules of medical malpractice cases to cases involving veterinary malpractice.¹³⁶ A veterinarian is granted immunity under such rules, but the immunity is conditioned upon whether he adhered to the appropriate standard of care.¹³⁷ The standard of care necessary for immunity in a veterinary malpractice case requires the veterinarian to exercise the degree of skill, knowledge, and care ordinarily exercised in the profession.¹³⁸ Where the veterinarian breaches such standard of care, he may be liable for any injuries that the animal sustained from his services.¹³⁹ A breach can be sufficiently established by a showing of negligence on the part of the veterinarian.¹⁴⁰ However, for services performed during a state of emergency or local emergency, veterinarians and their technicians are privileged for injuries caused both negligently and recklessly.¹⁴¹

A veterinarian's immunity is functionally different than other immunities granted under the CA ESA, at least as they pertain to the provision of services pursuant to CARES. Following an emergency or disaster, providing medical services to sick and injured animals is essential to both public health and animal welfare.¹⁴² Imposing the traditional standard of care on veterinarians responding to an emergency, however, could discourage the provision of such services. To the opposite effect, veterinarians are encouraged to provide medical services to animals in an emergency situation when fear of liability is reduced. Alleviating liability concerns may also facilitate a more vigorous approach. A veterinarian may be willing to work longer hours or perform risky, but effective, procedures where liability will not stem from doing so. The immunity granted to veterinarians under the CA ESA thus serves the interest of animals in an emergency or disaster.

IV. CHANGES NECESSARY FOR IMPROVEMENT

A. *Eliminating Discretionary Implementation*

When the CA ESA first required CARES' incorporation into the state emergency management system developed pursuant to section 8607(a), it was a step in the right direction for the safety of both pets and pet owners.¹⁴³

135. CAL. GOV'T CODE § 8659(b).

136. *Williamson v. Prida*, 89 Cal Rptr. 2d 868, 872–73 (Ct. App. 1999).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. See CAL. GOV'T CODE § 8659(b).

143. See discussion, *supra* Part II.B.

However, the CARES program currently serves as nothing more than operational guidance. It grants almost absolute discretion, yet fails to ensure that any planning and preparedness efforts will actually be implemented at the field level where most of the animal emergency response activity takes place.¹⁴⁴ It is difficult to say with complete certainty that the current program would not be effective in the case of a major disaster, but with the potential devastation that such a disaster inherently poses to the lives of pets and pet owners, it is crucial to proactively remedy the likely shortcomings.

The legislative goal following Hurricane Katrina is undermined by the broad discretion given to the actors responsible for animal emergency response. To adequately ensure the safety of pets and pet owners, additional legislation must transform the current CARES program from mere guidance into a standardized plan with operational, ministerial requirements. Because liability is not precluded for an action based on the performance or failure to perform discretionary acts, such ministerial requirements would be better aligned with the recent decisions involving pet owners and animal welfare and would sufficiently safeguard public health.

Adequate legislation would require animal emergency response agencies to implement animal emergency plans that include specific steps and actions for evacuating, transporting, rescuing, recovering, sheltering, and tracking. It is imperative that these plans are written and include mandatory training and relevant exercises to further effectuate the purpose of the initial incorporation.

A proposed supplemental statute should task local government bodies with overseeing the development and implementation of written plans by the animal emergency response agencies in their jurisdiction within six months after the statute is enacted into law. The statute should also require these local government bodies to hold quarterly training and operational exercises that must include animal response coordination.

B. Enforcing Compliance with Animal Emergency Planning and Preparedness Efforts

Minimizing the discretion of emergency planning and preparedness efforts will only be effective so long as the ministerial acts are enforceable. Although it is likely that tort law in the state of California will evolve to allow pet owners to recover emotional distress damages for the tortious injury

144. See discussion, *supra* Part III.A.2.

or death of a companion animal, it is not certain that this will happen, nor is there any indication of when it will occur. As such, enforceability via tort law deterrence cannot be certain to ensure that written plans and mandatory training exercises will be implemented.

Mandating specific, enforceable actions for both local governments and animal emergency response agencies is essential to ensure that pets and pet owners will never again suffer a tragedy like that suffered by pets and pet owners in Hurricane Katrina. As the climate continues to change, and the potential for deadly storms increases, it is more necessary than ever to address the dire needs of pets and pet owners in major disasters.