LITIGATING THE HORSE TRANSPORTATION CLAIM

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Liability issues surrounding the transport of horses have obvious significance for the Kentucky practitioner. Horses are now Kentucky's top agricultural revenue producer.[1] In 2006, over 15,000 Thoroughbred horses entered auctions at Keeneland and Fasig-Tipton in Lexington. Of that number, 9,970 horses were sold to new owners. Over twenty percent of the horses auctioned at Keeneland were purchased by buyers identified as "foreign."[2] All of these horses had to be transported: from their point of origin to the auctions, and then to the buyers (or, if unsold, back "home"). Horses made thousands of other trips within Kentucky, whether to Standardbred auctions, training or breeding facilities, or racetracks.

If a horse is injured or dies while in transit, a claim may exist against the party who arranged the transportation, the farm where the horse was made ready for shipment, the veterinarians who provided pre-transportation treatment, and/or the carrier. This article addresses the elements of, and potential defenses to, such claims, the expert testimony needed in litigating those claims, the damages that may be recoverable if a loss occurs, and ways in which potential targets might minimize their liability.

I. ESTABLISHING THE STANDARD OF CARE

When a horse is injured during the transportation process, identification of the parties who might be held responsible depends on when the horse's injury occurred. For example, if a horse is to be shipped overseas by plane, or if it will have a long van ride, then mineral oil may be administered directly into its stomach through a nasal gastric tube. That tube could cause death by asphyxiation, either by being improperly placed so that oil is inserted into the horse's lungs, or due

to swelling in the horse's windpipe.[3] In such a scenario, the veterinarian who administered the mineral oil, the owner of the farm where the horse was prepared for transport, and/or the agent responsible for handling the transport might all be held liable. The owner must establish the standard of care to which each of those defendants should be held. To prove that standard, a qualified witness with sufficient expertise is needed.

A. Admissibility of Expert Testimony

Admission of expert opinion testimony is governed by Kentucky Rules of Evidence ("KRE") 702 (setting out the general rule on expert testimony), 703 (identifying the bases of expert testimony), and 705 (governing the disclosure of the facts or data underlying expert opinions). An expert must (1) qualify by experience, training, or specialized knowledge to testify as an expert, and (2) provide a sound basis for the testimony.[4]

Professor Lawson explains that Kentucky law does not require satisfaction of an "onerous burden" before an expert may testify.[5] Experience in a highly particularized field is not a prerequisite to admissibility of expert witness testimony in an ordinary negligence case. All that is required is experience or education sufficient to enable the expert to "assist the trier of fact."[6] Requiring a high degree of specialized experience on the part of an expert would impose an "onerous burden" on parties, especially when the relevant industry is small and tightly-knit.[7] Accordingly, issues regarding an expert's lack of particularized, practical experience go to the weight of the testimony, not its admissibility.[8]

As explained below, however, Kentucky courts have held that experts who propose to testify as to the relevant standard of care in professional malpractice cases must base their testimony on the special technical knowledge which is relevant to the case.

B. Veterinarians' Liability

To prevail in any negligence action, a plaintiff must establish a duty, breach, causation, and damages.[9] When applied to a professional malpractice claim against a veterinarian, these elements require the plaintiff to prove (a) that the veterinarian owed a duty to the plaintiff, (b) the veterinarian failed to conform to the standard of care owed to the plaintiff, and (c) the veterinarian's breach of the standard of care was the direct cause of the plaintiff's injury.[10] Kentucky law requires that both the defendant's deviation from the standard of care and the causal link between that deviation and the plaintiff's damages be established by expert testimony.[11]

In addition, Kentucky law requires expert testimony on the proper standard of care in a professional negligence action to be based on the technical knowledge relevant to the case.[12] For example, in a dental malpractice action, only another dentist may testify as to the accepted standard of care to which a dentist should be held.[13]

In order to survive a motion for summary judgment in a professional negligence claim, a plaintiff horse owner must have an equine veterinarian who is willing to testify that the horse suffered its injury or death as a result of the treating veterinarian's failure to comply with the standard of care. However, in light of the above-discussed application of KRE 702, it is likely that any equine veterinarian will qualify as an expert, even if he or she does not possess specialized expertise with regard the particular injury or disease purportedly caused or inappropriately treated by the treating veterinarian.

C. Transportation Agents' or Carriers' Liability

The law of bailment for hire may modify the ordinary elements of negligence in a claim against a transportation agent and/or commercial carrier. In a bailment for hire case, a plaintiff need only prove (1) that he or she delivered personal property in good condition (a healthy horse) (2) to the defendant (a transportation agent or carrier), and (3) that it was returned in a damaged

condition.[14] Once that showing is made, the plaintiff has established a prima facie case, creating a presumption of negligence on the part of the bailee.[15] "If the bailee hopes to prevail, he must come forward with evidence to counteract this rebuttable presumption."[16] In *Welch v. L.R. Cooke Chevrolet Co.*, for example, the plaintiff/bailor delivered a car to the defendant/bailee for repair.[17] While in the bailee's possession, the car was destroyed by fire. The bailee bore the burden of proving that the fire resulted from a cause other than his negligence.[18]

Because an agent responsible for transporting a horse and a commercial carrier are deemed bailees-for-hire, a presumption arises that a horse's injury or death was the result of their negligence unless they are able to prove otherwise. These defendants can establish the normal duty of care under the circumstances, and show that they satisfied that duty, through the testimony of a witness or party who has been involved in transporting horses and who is aware of the normal course of conduct for a transportation agent and/or carrier.

Even in a bailment case, however, an agent or carrier may avoid liability if the owner consented to the act which led to the horse's injury or death. Returning to the example of the administration of mineral oil, American owners are arguably aware that this procedure is commonly performed and may therefore be assumed to have implicitly consented to the procedure as well as the known risks presented by it. Because the practice of "oiling" is less standard in Europe, however, a foreign owner may not be aware that a horse entrusted to a carrier or agent will undergo this procedure. Counsel should therefore emphasize to carriers and transportation agents the importance of clearly explaining (prior to transportation) to the horse owner any procedures the horse may undergo, and of obtaining the owner's express, written consent to those procedures.

D. Farm Owners' Liability

Whether a horse is placed on a farm for a brief time prior to being transported domestically,

for quarantine prior to being transported overseas, or for a longer-term basis, the obligations of the farm owner are the same: he or she must provide the care normally received by a horse at a qualified and competent facility within Central Kentucky.

Although a bailee-for-hire at common law, the Kentucky farm owner has been statutorily relieved from the burden of establishing that he or she was not negligent, or that a horse's injury or death did not result from his or her negligence.[19] The statute applies to one who "for compensation" has another's horses on his land for custody, care, breeding or selling, and it provides that the farm owner's possession of the horse at the time it died or was injured "shall not be sufficient to create a presumption of negligence on the part of the boarder, or a prima facie case in favor of the owner" of the horse.[20]

In a negligence action against a farm owner, a witness with experience as a boarding farm manager is needed to establish the standard of care. So long as the witness has experience in caring for horses and familiarity with the appropriate management of a boarding farm, a witness's expertise may be based upon experience earned at farms outside of Kentucky, or even overseas.

II. ESTABLISHING CAUSATION

Even if the evidence overwhelmingly shows that one of the parties having control of the horse failed to meet the standard of care, the owner must still establish a direct connection between the defendant's negligent act and the plaintiff's loss. This becomes difficult if there are multiple causes for a horse's injury or expiration. Fortunately, Central Kentucky offers an excellent resource for determining the cause of a horse's death: the University of Kentucky Livestock Disease Diagnostic Center is staffed by extremely capable pathologists who have performed thousands of equine necropsies and who are typically accessible to attorneys.

III. ESTABLISHING DAMAGES

The damages recoverable for any lost, converted or damaged personal property, including a horse, equal the fair market value of that property at the time of the injury or loss.[21] "Fair market value" means "the price that a willing seller will take and a willing buyer will pay for property, neither being under any compulsion to sell or buy and both being in possession of all relevant information regarding the property."[22]

In establishing the fair market value of an injured or deceased horse, a party may rely on expert testimony, even if that expert's opinion is based on information gathered from third parties.[23] In fact, if the information on which the expert relies is "of a type reasonable relied upon by experts in the particular field in forming opinions or inferences upon the subject," the second-hand information on which the expert relies need not even be independently admissible into evidence.[24] All horse valuations of a deceased horse constitute an opinion, because when a horse is injured or dies, an appraisal is necessarily based on information other than a sale between a willing buyer and willing seller. Opinion testimony is an appropriate basis for determining the damages suffered by a horse owner.[25]

Typically, an equine expert will provide a range of values for a deceased horse, not a single dollar figure. This does not impact the admissibility or persuasiveness of the expert's valuation.[26] Moreover, because the equine industry does not have any specialized education courses, licensing, or certification procedures for persons involved in the buying and selling of horses, there are no specific requirements to be satisfied in order for an expert to be qualified to testify about the value of a horse. Typically, an ideal expert for that role is someone who has been involved in multiple horse purchases and sales.

Valuation of a deceased horse, like any appraisal, may be based on a number of criteria. The horse's pedigree (family history) is particularly important for a horse which has not yet raced. The

horse's conformation (physical appearance) may also be important, although an expert may not have this information first-hand if the horse is deceased or if the expert has not had an opportunity to view it. If this is the case, the appraiser may examine photographs, if available, or may discuss the horse's appearance with someone who has seen the horse. Historical auction prices and race records of the horse's relatives are also important. If the horse has raced, then its success at the track will be a very influential factor. Even if unraced, however, the horse's performance in training will be significant. Finally, for horses purchased at auctions and then exported to Great Britain, the "value added tax" ("VAT") imposed on the horse by Great Britain may provide probative, though not dispositive, information about the horse's value. The VAT is based on the owner's value of the horse.

IV. POTENTIAL DEFENSES

A. Contractual Limitations of Liability by Commercial Transporters and Boarding Farms

Commercial carriers, shipping intermediaries, and brokers frequently include within their contracts a boilerplate provision attempting to limit their liability for any loss or damage to the horse resulting from negligence or any other fault to either $50.00 or the fees charged for the shipment, whichever is less. These provisions are generally upheld.[27] In some circumstances, a "course of dealing" argument may permit a defendant to invoke a limitation on liability even if that limitation appears only in an unsigned invoice rather than a mutually negotiated contract.[28]

In the authors' experience in representing Thoroughbred breeding, sales, and boarding entities in Central Kentucky, only a few of those entities contractually attempt to limit their liability for injuries to or deaths of horses which they board. Typically, a contractual limitation on a boarding farm's liability is enforceable. Although contracts exempting parties from negligence are not favored, they will be enforced where the language is unmistakably clear and understandable.[29]

B. An Agent's Authority to Agree to a Contractual Limitation of Liability

When a horse is injured or killed during transport, a question may arise as to the authority of the owner's agent to agree to a limitation on the liability of a carrier or boarding farm. Although buyers are often represented at auctions by agents who bid on horses, an "agent" who was authorized to purchase a horse may not have been authorized to contract with a transportation company.

It is important to distinguish whether the person contracting with a carrier or a boarding farm on behalf of the new owner is acting as the owner's authorized agent or as an independent contractor.[30] This is because knowledge of (and notice to) an independent contractor cannot be imputed to the person for whom the contractor is performing work.[31] Knowledge and notice can, however, be imputed to an agent.[32]

CONCLUSION

With thousands of horses - many of which are very valuable - being transported annually to, from and through Kentucky, the possibility of an injury or death during transportation (or during preparation for transportation) cannot be discounted. This risk makes it important for attorneys who represent participants in the equine industry to understand how best to protect their clients and, if and when an accident does occur, how to proceed. Because of the protections which may be afforded by statute or contract, a horse owner may suffer a loss for which he or she has no viable remedy against responsible parties. If the horse owner receives appropriate advice prior to a loss, however, he or she may seek protection through proper insurance.

ENDNOTES

1. United States Department of Agriculture website, http://www.ams.usda.gov/statesummaries/KY/KentuckyInBrief.htm, last visited on February 9, 2007.

2. Sales Statistics obtained by the author from Harvie Wilkinson, Vice President of Keeneland (January 30, 2007).

3. This is not a theoretical problem. Our office recently represented the owner of a valuable horse that died after receiving mineral oil.

4. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000) (adopting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)); *Mitchell v. Com.*, 908 S.W.2d 100 (Ky. 1995) (adopting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

5. ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 6.15 (4th ed.) ("[t]he preliminary inquiry on qualifications cannot be used as a subterfuge for judging the worth of the expert's opinion, for that judgment is ultimately for the [trier of fact] . . .) (citations and internal paragraph break omitted).

6. For example, in *Murphy v. Montgomery Elevator Co.*,957 S.W.2d 297 (Ky. App. 1997), the Court of Appeals reversed summary judgment for an escalator manufacturer because the trial court had excluded expert testimony on the grounds that the expert (who held a master's degree in mechanical engineering) lacked experience in the manufacture or design of escalators.

7. *Id.* at 299 (*quoting Trowbridge v. Abrasive Co. of Philadelphia*, 190 F.2d 825, 839 n. 9 (3rd Cir. 1951).

8. *Id.*

9. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245 (Ky. 1992).

10. *Donoho v. Rawleigh*, 18 S. W. 2d 311 (Ky. 1929); *Stacey v. Williams*, 69 S.W.2d 697 (Ky. 1934); *Meador v. Arnold*, 94 S.W.2d 626 (Ky. 1936); and *Steinmetz v. Humphrey*, 160 S.W.2d 6 (Ky. 1942).

11. *Hambry v. University of Kentucky Medical Center*, 844 S.W.2d 431 (Ky. 1992). *Donoho v. Rawleigh*, 18. S.W.2d 311 (Ky. 1929); *Stacy v. Williams*, 69 S.W.2d 697 (Ky. 1934); *Meador v. Arnold*, 94 S.W.2d 626 (Ky. 1936); and *Steinmetz v. Humphrey*, 160 S.W.2d 6 (Ky. 1942).

12. *Butt v. Watts*, 290 S.W.2d 777, 779 (Ky. 1956).

13. *Donoho v. Rawleigh, supra.* See also *Morgan v. Hill*, 663 S.W.2d 232 (Ky. App. 1984) (excluding a physician's expert testimony as to a chiropractor's standard of care because the physician lacked "the appropriate training and experience to determine what constitutes malpractice" by a chiropractor).

14. *Threlkeld v. Breaux Ballard, Inc.*, 177 S.W.2d 157, 159 (Ky. 1944).

15. *General Truck & Sales Service Co. v. Schlensker*, 424 S.W.2d 387, 389 (Ky. 1968).

16. *Id. See also Threlkeld*, 177 S.W.2d at 159 ("if it shown that the goods were delivered to the bailee in good condition, it then devolves on the bailee to show affirmatively that such loss or injury was not due to his failure to exercise due care").

17. 236 S.W.2d 690 (Ky. 1951).

18. *Id.*

19. KRS 422.280.

20. *Id.*

21. See 22 Am. Jur. 2d *Damages* § 430 (value of personal property taken or destroyed is determined at the time of taking or destruction); *Batson v. Clark*, 980 S.W.2d 566 (Ky.App. 1998); *Amlung v. Bankers Bond Co.*, 411 S.W.2d 689 (Ky. 1967); *McCarty v. Hall*, 697 S.W.2d 955, 956 (Ky.App. 1985) ("It is the law in this Commonwealth that the proper measure of damages for injury to personal property is the difference in the fair market value of the property before and after the accident") (citing *Howard v. Adams*, 246 S.W.2d 1002 (Ky. 1952); *Ecklar-Moore Express v. Hood*, 256 S.W.2d 33 (Ky. 1953); *Hayes Freight Lines v. Hamilton*, 257 S.W.2d 60 (Ky. 1953)); *Louisville & N.R. Co. v. Lankford*, 200 S.W.2d 297, 299 (Ky. 1947).

22. *Com. v. R.J. Corman Railroad Co./Memphis Line*, 116 S.W.3d 488 (Ky. 2003) (citing *Wilhite v. Rockwell Int'l Corp.*, 83 S.W.3d 516, 519 n. 6 (Ky. 2002)).

23. KRE 703.

24. *Id. See also Peterson v. National Railroad Passenger Corp.*, 618 S.E.2d 903 (S.C. 2005) (reversing trial court's finding that expert testimony was inadmissible, and holding that "experts' lack of first-hand knowledge" "goes to the weight of the testimony, not its admissibility"); *Wayne v. P.L.P.*, 556 N.W.2d 657, 660 (N.D. 1996) ("[a] medical expert must often rely on second-hand information unless it is demonstrably unreliable.").

25. *See, e.g., Wilhite v. Rockwell Intern. Corp.*, 83 S.W.3d 516, 518 (Ky. 2002) (trial court correctly ruled that appraiser could give expert opinion on value of property). *See also Adkins v. Burris Mill & Feed, Inc.*, 644 So.2d 839 (La. App. 1995) (expert testified to value of horses based on their pedigrees and ability to bear foals).

26. *See In re Lindell*, 334 B.R. 249, 225 (Bkrtcy. D. Minn. 2005) (expert valued personal property in a range between $120,000 and $130,000, and finder of fact set value at $130,000); *IFG Leasing Co. v. Gordon*, 776 P.2d 607, 610 (Utah 1989) (expert appraiser testified that sale of equipment would bring between 15% to 25% of its original value, supporting finding of fact of an 18% sale price).

27. *See, e.g., Government of the United Kingdom of Great Britain and Northern Ireland v. Northstar Services, Ltd.*, 1 F.Supp.2d 251 (D.Md. 1998) (applying $50/entry limitation to claim for damage to cargo valued at nearly $1,000,000); *General Electric Co. v. Harper Robinson & Co.*, 818 F.Supp. 31, 34-35 (E.D.N.Y. 1993) (applying $50/entry limitation to claim against

customs broker for alleged negligent retention of trucking company); *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 253 F.Supp.2d 757 (S.D.N.Y. 2003) (applying $50/entry limitation to claim against freight forwarder/customs broker for negligent selection of trucker that purportedly caused over $600,000 in cargo damage).

28. *See, e.g., Insurance Co. of North America v. NNR Aircargo Service (USA), Inc.*, 201 F.3d 1111 (9th Cir. 2000).

29. *United Services Automobile Association (USAA) v. ADT Security Services, Inc.*, 2006 WL 2578019, *4 (Ky. App. Sept. 8, 2006). Kentucky's Supreme Court has set out four "alternative" factors for determining whether a pre-injury release from negligence liability may be enforced. Those factors are: (1) the release explicitly expresses an intention to exonerate by using the term "negligence"; or (2) "it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct"; or (3) "protection against negligence is the only reasonable construction of the contract language"; or (4) the hazard experienced was clearly within the contemplation of the provision." *Hargis v. Baize*, 168 S.W.3d 36, 47 (Ky. 2005).

30. An independent contractor is "a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details." *Schenk's Committee v. Riedling*, 171 S.W.2d 251, 252 (Ky. 1943). An agent, in contrast, has a fiduciary relationship with a principal or employee, resulting from "the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *City of Winchester v. King*, 266 S.W.2d 343, 345 (Ky. 1954).

31. *Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 56 F.3d 726 (6th Cir. 1995) (consultant's knowledge is not imputed to the party engaging the consultant where the consultant acts as an independent contractor rather than an agent).

32. *Schenk's Committee v. Riedling*, 171 S.W.2d 251 (Ky. 1943).