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Valuation in Veterinary Malpractice

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By Rebecca J. Huss*

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  veterinarians that I have been privileged to meet and is in the memory of Cornelius von Owen,
  the most hopeful dog I have ever known. © 2003 by Rebecca J. Huss.
I. INTRODUCTION

The treatment of animals, whether such animals are used for food production, entertainment, or companionship has generated a significant amount of attention over the last few decades.¹ For many people, their

focus is on the animals that they interact with on a daily basis—their animal companions. There is a growing body of literature on the positive impact on human health attributed to interaction with companion animals. Companion animals are used as part of the treatment for some types of mental illness. Studies have been conducted to learn the impact on children of having companion animals in their homes.

Many people consider animal companions as part of the family. The role of these animals as family members has become progressively more important over time. The relationship between people and companion animals has changed from one of utility to one of affection and companionship. In some households, these animals are viewed in ways similar to that of human children.

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2. **COMPANION ANIMALS IN HUMAN HEALTH** (Cindy C. Wilson & Dennis C. Turner eds., 1998) (discussing a variety of studies done on the impact of companion animals in human health). Research shows that physical contact with companion animals has a calming effect on people and can decrease blood pressure. Aaron H. Katcher, *How Companion Animals Make Us Feel* (discussing how visual and physical contact with animals induces calm and reporting human physiological changes during interactions with pets), in *PERCEPTIONS OF ANIMALS IN AMERICAN CULTURE* 113, 120, 123 (R.J. Hoage ed., 1980). One study even found that people with companion animals had lower cholesterol and triglycerides. Alan M. Beck & Aaron Honor Katcher, *Between Pets and People: The Importance of Animal Companionship* 7 (1996).

3. Elizabeth Blandon, *Reasonable Accommodation or Nuisance? Service Animals for the Disabled*, Fl.B.J., Mar. 2001, at 12. Although the use of service dogs to assist persons with physical disabilities is well known, recently the use of animals to help persons with mental disabilities such as depression, panic disorder, and bipolar disorder has generated attention. Id. at 14; see also Gail F. Melson, *Why the Wild Things Are: Animals in the Lives of Children* 99-131 (2001) (discussing the use of animals in therapy with children).

4. See generally Melson, supra note 3 (discussing the relationship between animals and children and the impact of contact with animals on children). Recent studies indicate that the presence of animals in a home actually decreases the risk of children having allergies later in life. Delthia Ricks, *Early Exposure to Pets May Put Leash on Allergies Immunology*, L.A. Times, Sept. 2, 2002, at S3 (discussing a recent study that found that exposure to at least two dogs or cats during the first year of life might drastically reduce the risk of allergies), available at 2002 WL 2500873.

5. AM. PET PRODS. MFRS. ASS’N, 2003-2004 APPMA NATIONAL PET OWNERS SURVEY, at xxxiii (2003) (reporting that in a recent poll, 70% of people with dogs and 62% of people with cats agreed with the statement that the companion animals in their households were like children or family members); see also Katcher, supra note 2, at 121 (discussing studies that find that pets are viewed as “members of the family”).

6. See Katcher, supra note 2, at 123 (citing to the studies that show that fewer people are having children and that there are fewer children in families).

7. For a discussion on the domestication of animals and the changing role of animals in the United States, see Melson, supra note 3, at 19, and Rebecca J. Huss, *Separation, Custody and Estate Planning Issues Relating to Companion Animals*, 74 U. Colo. L. Rev. 181, 188-95 (2003) [hereinafter Huss, *Companion Animal Issues*]. There are many factors that contributed to
A significant amount of money is spent on companion animals in the United States. There are estimates that approximately thirty billion dollars are spent each year on the care of these animals. Daily expenses include the cost of day care or pet sitting services. People spend time with their canines in special dog parks that include off-leash areas to enable dogs to socialize freely with one another. Vacations

the development of this new paradigm in the relationship between people and companion animals. Melson cites the effects of urbanization, industrialization, and isolation of modern society as reasons for the new relationship. Melson, supra note 3, at 25–31; see also Leslie Mann, Celebrating a Pet's Love, Chi. Trib., Feb. 6, 2000, at 5 (reporting on the changing perspective of dogs as utility animals to dogs as members of families), available at 2000 WL 3633646.

8. Beck & Katcher, supra note 2, at 41 (citing the analogous treatment of children and companion animals). Although sometimes companion animals are viewed as child substitutes, pets are often present in households with children. Melson, supra note 3, at 17 (stating that pets live in "at least 75% of all American households with children"). Pet ownership increases as children enter elementary school. Id. at 32; see also Sandra Block, Pet Insurance Can Save Owners from Wrenching Decisions, USA Today, Feb. 19, 2002, at B3 (citing to survey that found that 78% of people "think of their pets as their children"), available at 2002 WL 4719848.


10. Dog sitting services can be used when a family is out of town or on a daily basis; a dog (or cat) sitter comes to the home and walks, feeds, and otherwise interacts with an animal. Generally for day care the animal is dropped off (or in some cases picked up and taken to a central location) to interact with other dogs and caretakers. Dave Ford, Bark and Ride: Pet Taxi Fills Void in Driver's Life, Clients' Schedules, S.F. Chron., Feb. 2, 2001, at 1, available at 2001 WL 3393992. The cost of these services varies considerably based on the geographic location and level of care. Beth Dolan, Yappy Days, Tampa Trib., Mar. 23, 2001, at 1, available at 2001 WL 5497110. There are organizations that provide information about sitters in various geographic areas. See, e.g., Petsitters.com, Find a Sitter, at http://www.petsitters.com (last visited Feb. 20, 2004); see also Betsy Cook Donahue, Dog Days: If It Is a Dog's Life, It's a Pretty Good One These Days, Charleston Gazette, Feb. 16, 2000, at P1D (stating that 27% of customers in a recent Petsmart survey said that they take their pets to day care), available at 2000 WL 2593104.

can now include the entire family, human and non-human, with resources available to find pet friendly hotels and resorts or even camps where humans and their dogs can go to train and bond.\textsuperscript{12} If animals must be left behind, the animals are not left in stark kennels but are now boarded at "retreats" that provide individualized care and color television for discriminating viewers.\textsuperscript{13}

Just as with other family members, when an animal is ill, its owners take it to a medical professional—a veterinarian. One survey indicated that 91\% of pet owners take their dogs or cats to a veterinarian regularly.\textsuperscript{14} Although the level of care can range significantly, one poll found that the average number of visits to a veterinarian per year was

\begin{itemize}
  \item Traveling to a vacation spot has become safer for dogs and cats with a new airline that has been established to transport companion animals in cabins rather than in cargo compartments. See COMPANIONAIR AIR CORP., \textit{WHAT WE DO}, at http://www.companionair.com/whatwedo.php (last visited Feb. 2, 2004) (stating that it is the first airline created for pets and their owners, with discounts on fare prices for human clients).
  \item Christine Winter, \textit{Pet Health Insurance Plans Grow by Leaps and Bounds}, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 26, 2000, at 1A, available at 2000 WL 5648771. One reason for the regular visits to veterinarians is the requirement that dogs (and sometimes cats) be vaccinated against rabies pursuant to state law. See JAMES F. WILSON, LAW AND ETHICS OF THE VETERINARY PROFESSION 79–80 (1988). Unlike childhood vaccinations that are concentrated within the first few years of life, depending on the jurisdiction, rabies boosters are required every two or three years. \textit{Id}. Individual jurisdictions set the frequency that rabies vaccinations must be administered. \textit{Id}. Lawsuits alleging that particular statutes relating to the control of animals are beyond the police power of the jurisdiction have generally been unsuccessful. ORLAND SOAVE, ANIMALS, THE LAW AND VETERINARY MEDICINE, A GUIDE TO VETERINARY LAW 164 (4th ed. 2000); see also Nicchia v. New York, 254 U.S. 228, 231 (1920) (holding that a state statute requiring the licensing of a dog is not an infringement of the Fourteenth Amendment of the Constitution).
\end{itemize}
2.7 for dogs and 2.3 for cats. Veterinarians may be referred to as the “other family doctor” or a “pet’s family pediatrician.” The amount of money that people are willing to spend on medical care for their animals varies widely; however, the total amount of money spent by pet owners in the United States on veterinary care is estimated at twelve billion dollars per year.

More veterinarians now specialize in areas of medicine such as dermatology, cardiology, dentistry, neurology, oncology, and ophthalmology. If one is willing and able to pay, veterinary medicine offers a wide range of preventive care as well as treatment for major


17. Jerry Gleeson, Dog-gone Expensive, J. NEWS (Westchester Co., N.Y.), Dec. 26, 2001, at 1D (discussing the total amount of money spent on veterinary care and the reasons for the increase in costs). Gleeson also reported on a survey by the American Animal Hospital Association that found that more that one third of the respondents said they “would spend any amount of money to save the lives of their pets . . . eighteen percent . . . said they had spent more than $1,000 on veterinary care for their pets in the previous 12 months.” Id. The amount of money spent on veterinary care has increased significantly in the last decade. Richard Willing, Under Law, Pets Are Becoming Almost Human, USA TODAY, Sept. 13, 2000, at 1A (citing to the American Veterinary Medical Association statistics that “Americans spent $11.1 billion on pet health care in 1998, up 61% from 1991”), available at 2000 WL 5789496. The “demand for veterinary services has grown significantly faster than growth in the overall economy” for the period from 1980 through 1997, and growth through the year 2015 is expected to be considerably higher than the anticipated growth in total consumer expenditures. John P. Brown & Jon D. Silverman, The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States: Executive Summary, May 1999, 215 J. AM. VETERINARY MED. ASS’N 161, 164 (1999). The Executive Summary is derived from a comprehensive study of the veterinary profession that was commissioned by the American Veterinary Medical Association, the American Animal Hospital Association and the Association of American Veterinary Medical Colleges. Id. at 161.

diseases. The type of medical care provided to animals is as sophisticated as the care available to humans and includes laser surgery, CAT scans, and MRIs.\textsuperscript{19} Companion animals receive kidney transplants, surgery to correct ruptured disks, and chemotherapy to treat cancer.\textsuperscript{20} An increasing number of animals receive daily pharmaceuticals and supplements to improve their quality of life, such as pain medication for arthritis.\textsuperscript{21} Increasingly, psychopharmaceuticals are prescribed to assist in the treatment of behavior problems.\textsuperscript{22} Holistic treatments are available as an alternative to traditional veterinary medicine.\textsuperscript{23}

Obviously the cost of these treatments can be significant. There are HMOs, discount networks, and other insurance plans to assist in paying for the costs of such care.\textsuperscript{24} Some companies now offer pet health

\footnotesize
\begin{itemize}
\item 20. Brody, supra note 19, at F4 (discussing treatments available to companion animals); see also Burkhard Bilger, \textit{The Last Meow}, \textit{THE NEW YORKER}, Sept. 8, 2003, at 46 (discussing kidney transplants and other issues relating to specialized veterinary treatment), available at 2003 WL 10742365.
\item 21. Linda Bren, \textit{Prescriptions for Healthier Animals: Pets and People Frequently Fight Disease with Similar Drugs}, FDA CONSUMER, Nov. 1, 2000, at 24 (discussing the drugs used to treat both humans and animals for arthritis and other diseases), available at 2000 WL 91603600; Ranii, supra note 9 (discussing pain medication use for veterinary treatment generally and new medications that are now available).
\item 24. Winter, supra note 14. Traditional health insurance policies have been available for twenty years; HMOs and discount networks recently have been established for veterinary treatment. \textit{Id.}; see also Michelle Leder, \textit{How Much Is That $100 Deductible in the Window?}, N.Y. TIMES, July 22, 2001, § 3, at 10 (discussing pet insurance policies), available at LEXIS, News Library, New York Times File. A company called Veterinary Pet Insurance, which has more than 80% of the business, dominates the market for pet health insurance. \textit{Marketplace: Pet
insurance as an employee benefit. Although the number of animals covered by insurance in the United States is quite low, the pet health insurance business is growing. The cost of insurance varies depending on the type, age, and health of the animal. Because the vast majority of companion animals are not covered by insurance, the cost of their veterinary care must be covered by their human caretakers.


26. Estimates of the number of pet owners who have health insurance for their animals range from one to three percent. Marketplace: Pet Health Insurance, supra note 24. Note that, in Europe, approximately thirty percent of pets are covered by insurance. Id.; Leder, supra note 24; Patricia Poist-Reilly, Pet Insurance, LANCASTER NEW ERA (Lancaster, Pa.), Sept. 17, 2001, at 1 (stating that the number of insured pets increased from one percent in 1997 to three percent in 2000).

27. Block, supra note 8. According to the CEO of Veterinary Pet Insurance, the “average dog owner pays $250 a year in premiums... cat owners pay an average of $200 per year.” Id.

28. As further evidence of the importance of these animals, as well as the costs that some will incur on their behalf, consider how some people handle the death of their companion animals. The backyard burial is no longer the only option; pet cemeteries provide a final resting place for many pets. La Monica Everett-Haynes, Rest in Peace: Sending Spot to His Reward; Casket Company Tries To Ease Pain of Parting with Pets, SALT LAKE TRIB., Aug. 4, 2000, at B1, available at LEXIS, News & Business Library, All News File; Andrea Jones, Pet Cemetery an Idyll to Unconditional Love, ATLANTA J. & CONST., Dec. 25, 2001, at 16D, available at 2001 WL 3705701; John Murawski, A Quiet Resting Place for Lost Loved Ones, PALM BEACH POST, Feb. 26, 2001, at 1A, available at 2001 WL 14130406; Pat Shellenbarger, Burial Services Help Survivors Mourn Loss of Pets, SOUTH BEND TRIB., May 21, 2001, at C5 (quoting Brenda Drown, the executive secretary of the International Association of Pet Cemeteries, that there are 750 to 800 pet cemeteries in the United States), available at LEXIS, News & Business Library, All News File; Dawn Wotapka, Owners Increasingly Opt To Cremate Deceased Pets, NEWS & OBSERVER (Raleigh, N.C.), Sept. 14, 2001, at N1, available at 2001 WL 3482461 (discussing an increase in animal cremation and a ban on backyard burials). It is still possible to dispose of an animal’s body by sending it to a local landfill in some municipalities. Wotapka, supra. There are a few cemeteries that allow for the burial of both humans and animals. Linda Wilson-Fuoco, Cemetery Offers Resting Place for Pets and Their People, PITTSBURGH POST-GAZETTE, Feb. 20, 2000, at W4 (discussing a pet cemetery located within the bounds of an existing cemetery in Pennsylvania), available at 2001 WL 10882850; see also Grave Animal Reunion, MX (Melbourne, Austl.), Sept. 18, 2001, at 9 (discussing joint human-animal cemetery in Great Britain), available at LEXIS, News & Business Library, All News File. If a person cannot bear to be separated from his or her pet, it is possible to mummify small dogs and cats. SUMMUM, MODERN MUMMIFICATION, at http://www.summum.org/mummification/pets/animalcosts.shtml (last visited Feb. 20, 2004) (providing for mummification of small dogs and cats at prices ranging from $6000 to $14,000). There are also organizations that bank the genes of animals in anticipation of the development of technology that will allow them to clone these family members. Roy Bragg, Businessman Sees Dollars in Replication, SAN ANTONIO EXPRESS-NEWS, Sept. 4, 2002, at 1A (discussing the market for pet-related ventures including pet cloning and
Given the changing nature of the relationship of humans to companion animals and the practice of veterinary medicine, it is time to consider the way that the legal system assesses damages in veterinary malpractice cases. This Article begins with a description of veterinarians and the status of veterinary malpractice. I will compare veterinarians and human physicians and the malpractice situation for both. Next, this Article considers the elements and the key issues involved in veterinary malpractice. This Article then analyzes the current law relating to the damages available in veterinary malpractice suits. Finally, this Article considers whether the way that these damages are calculated is appropriate and suggests an alternative to the current system. The focus of this Article will be on the treatment of companion animals, as the calculation of damages for malpractice


29. See infra Part II.A-B (providing an overview of the veterinary profession and the scope of veterinary malpractice claims). The following terms are used in this Article: “animal” or “animals” refer to non-human animal(s); “client” refers to the person who has engaged a veterinarian to care for his or her animal; and “patient” refers to the animal under a veterinarian’s care.

30. See infra Part II.A. (comparing veterinarians and physicians); infra Part II.B.4 (comparing issues in veterinary malpractice and medical malpractice).

31. See infra Part III (discussing elements of veterinary malpractice).

32. See infra Part IV (discussing available economic and non-economic damages in veterinary malpractice claims).

33. See infra Part V (analyzing the arguments for and against non-economic damages and proposing the adoption of veterinary malpractice acts).
involving animals for food production has been relatively uncontroversial to date.\textsuperscript{34}

II. VETERINARIANS AND THE STATUS OF VETERINARY MALPRACTICE CLAIMS

A. Veterinarians

The practice of veterinary medicine is similar in many ways to the practice of human medicine, with some obvious significant differences. As with other professionals, the practice of veterinary medicine is governed primarily by state law.\textsuperscript{35} Veterinarians are required to have a minimum of six years of training, with two years of study in a pre-veterinary program and four years in a college of veterinary medicine.\textsuperscript{36} Individuals in most states may apply for licensure after obtaining a Doctor of Veterinary Medicine (D.V.M.) degree and passing a national board examination.\textsuperscript{37}

As discussed above, the medical care provided to some companion animals is comparable to the best that human medicine has to offer.\textsuperscript{38} Similar to human medicine, veterinary medicine has developed specialized practice areas.\textsuperscript{39} Because of their status as licensed professionals, veterinarians, like physicians, receive protection under Good Samaritan laws in some states if they provide emergency medical care.\textsuperscript{40}

\textsuperscript{34} Equines fall within the category of companion animals, in so much as they are generally treated on an individual basis rather than as part of a group, at least in connection with damage awards. Unlike dogs, cats, certain birds, and other animals kept in or near a house, equines historically have possessed independent economic value. Many early animal welfare statutes limited their scope to animals that were deemed commercially valuable, such as horses, cattle, sheep, and swine. DAVID FAVRE & PETER L. BORCHELT, ANIMAL LAW AND DOG BEHAVIOR 254-55 (1999). Note, however, that according to one source, the United States slaughters approximately 100,000 horses per year, and worldwide approximately 75% of all racehorses end their lives at slaughterhouses. GARY L. FRANCIONE, INTRODUCTION TO ANIMALS RIGHTS: YOUR CHILD OR THE DOG? 26 (2000). Presumably, at that point in time, the horse is valued similarly to food producing animals.

\textsuperscript{35} WILSON, supra note 14, at 50-51.

\textsuperscript{36} David M. Smith, Pay and Productivity Differences Between Male and Female Veterinarians, 55 INDUS. & LAB. REL. REV. 493, 495 (2002).

\textsuperscript{37} Id.; see also SOAVE, supra note 14, at 56-67 (discussing veterinary practice acts and the general practice of veterinary medicine).

\textsuperscript{38} See supra notes 19-20 and accompanying text (discussing the medical procedures available to animals).

\textsuperscript{39} See supra note 18 and accompanying text (discussing specialization in veterinary medicine).

\textsuperscript{40} See, e.g., ALASKA STAT. § 09.65.097 (2002) (stating that a veterinarian providing emergency care to an injured or sick animal will not be liable for civil damages as a result of the
Another similarity to physicians is that veterinarians in some states must keep information about their patients confidential.41 This privilege has not arisen out of the common law but instead has been adopted by statute.42 Without statutory authorization, courts have been unwilling to create the privilege between veterinarians and clients, perhaps because there is no widespread recognition of privacy concerns in connection with the care of animals.43 Statements of privilege generally provide that a veterinarian will not disclose any information concerning the care of an animal without written authorization or other waiver by the client.44 The statutes also set out exceptions to the privilege, including the required reporting of communicable diseases.

care, but not precluding liability for civil damages as a result of gross negligence or reckless or intentional misconduct); MICH. COMP. LAWS ANN. § 333.18826 (West 2001) (providing protection from liability for civil damages in situations where animals have been brought to a veterinarian by someone other than their owners but stating that the section would not apply if acts amount to gross negligence or willful and wanton misconduct); OR. REV. STAT. § 686.440 (2001) (providing immunity from civil liability for emergency treatment of animals under certain circumstances and stating that the section does not apply to acts that constitute gross negligence); see also Mark Turner, Dial 911: Emergency Medical Care Providers, Gross Negligence, and the Loophole in the Connecticut Good Samaritan Statute, 19 QUINNIPIAC L. REV. 419 (2000) (discussing Good Samaritan statutes covering physicians generally and the Connecticut statute in particular); Jennifer L. Groninger, Comment, No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What Is Left of the American Rule, and Will It Survive Unabated?, 26 PEPP. L. REV. 353, 364–66 (1999) (discussing the adoption in all fifty states of Good Samaritan laws to deal with the provision of emergency medical services to humans).

41. Note that statutes relating to confidentiality “contain an exception to their application when a communicable and reportable livestock disease is involved.” Harold W. Hannah, When Can Failure To Inform Support a Malpractice Claim, 218 J. AM. VETERINARY MED. ASS’N 1419, 1420 (2001).

42. COLO. REV. STAT. § 12-64-120(3) (2003) (providing that records concerning an animal’s care are available to the public unless a veterinary-patient-client privilege exists); FLA. STAT. ANN. § 474.2165 (West 2001) (providing for the ownership and control of veterinary medical patient records and requiring confidentiality of records with exceptions allowing disclosure); TEX. OCC. CODE ANN. § 801.353 (Vernon 2003) (setting forth veterinary-client privilege and providing exceptions allowing veterinarians to release information concerning a veterinarian’s care of an animal); see also Harold W. Hannah, Communications, Privilege, and the Veterinarian, 219 J. AM. VETERINARY MED. ASS’N 32, 32 (2001) (discussing confidentiality and privilege in veterinary medicine).

43. Tucker v. Steele & Assocs., No. 93-C1268, 1994 U.S. Dist. LEXIS 4600, at *9 (N.D. Ill. Apr. 8, 1994) (rejecting the application of a common law veterinarian-client privilege and stating that “the reasons for seeking veterinary care and the medical condition of an animal are of an entirely different nature from the personal privacy of one’s own health”). But see GA. CODE ANN. § 50-18-72(a)(2) (Harrison 1998) (providing that public disclosure is not required for medical or veterinary records “the disclosure of which would be an invasion of personal privacy”). Note that Illinois now has a statutory provision governing the disclosure of information contained in veterinary records. 225 ILL. COMP. STAT. 115/25.10 (2002).

44. CAL. BUS. & PROF. CODE § 4857 (West 2003); FLA. STAT. ANN. § 474.2165(5); GA. CODE ANN. § 24-4-29 (Harrison 1998); 225 ILL. COMP. STAT. 115/25.17 (2002); KAN. STAT. ANN. 47-839 (2000); MO. ANN. STAT. § 340.286 (West 2001); TEX. OCC. CODE ANN. § 801.353; see also Hannah, supra note 42, at 32.
Other exceptions to the rule provide for disclosure if the information is subpoenaed, an issue in litigation, or the subject of an administrative disciplinary action.\textsuperscript{45} From a practical perspective, problems arising out of the disclosure of confidential information in veterinary medicine, while perhaps not good practice for purposes of client retention, are limited.\textsuperscript{46}

Despite the similarities, there are several aspects of a veterinarian's practice that are distinctly different from the practice of medical doctors. For example, veterinarians customarily dispense drugs through their practice.\textsuperscript{47} Medication and supply sales are part of the gross profits that a veterinary practice generates.\textsuperscript{48} One veterinarian estimated that fifteen to twenty percent of his practice's gross profits were due to the sale of drugs and treatments.\textsuperscript{49} There is no prohibition on pharmaceutical companies selling drugs for animals to pharmacies, but some of the larger manufacturers have policies that restrict their sales to licensed veterinarians.\textsuperscript{50} The American Veterinary Medical Association ("AVMA") has expressed concern that some pharmacy practices will undermine the veterinary client-patient relationship.\textsuperscript{51} The AVMA has a position statement that "encourages veterinarians to honor client requests to prescribe rather than dispense a drug";\textsuperscript{52} yet one veterinarian has stated that he will give prescriptions upon a client's request but "over the long run he will advise them to think about seeking pet treatment elsewhere."\textsuperscript{53} Veterinarians indicate that if they no longer are able to profit from sales of medications, it may be

\textsuperscript{45} Hannah, supra note 42, at 32.

\textsuperscript{46} Wilson, supra note 14, at 345. But see Tucker, 1994 U.S. Dist. LEXIS 4600, at *8-*10 (discussing the physician-patient privilege in the context of a veterinary malpractice case). "[T]he purpose behind the physician-patient privilege simply does not apply in the context of the veterinarian-client relationship because the reasons for seeking veterinary care and the medical condition of an animal are of an entirely different nature from the personal privacy of one’s own health." Id.


\textsuperscript{48} Snel, supra note 47; see also Veterinary Care Without the Bite, CONSUMER REP., July 2003, at 12, 14 ("Drug sales are a leading profit center for veterinarians, constituting 18 percent of revenue. Markups on medicines range from 100 to 250 percent.").

\textsuperscript{49} Snel, supra note 47.

\textsuperscript{50} Id.


\textsuperscript{52} Id.

\textsuperscript{53} Snel, supra note 47.
necessary to increase the rates for their other services. Veterinarians are held to the same standards as other dispensers of controlled substances. There are only approximately a dozen pharmacies that specialize in medications for pets in the United States, but a growing number of online animal pharmacies are entering the market.

Certainly the compensation for the average veterinarian is far less than for a medical doctor. Nationwide, the average salary for veterinarians is $60,910 compared with dentist and doctor mean incomes (in 1999) of $125,358 and $163,000, respectively.

Another distinction is that, pursuant to some state laws, veterinarians may have a lien on the animals under their care. In this way veterinarians are treated like any other caretakers of animals, or in fact, like automobile mechanics. In some states, a veterinarian who is not paid for an animal’s care may sell the animal to satisfy the debt.

Just as there are some similarities between the practice of veterinary medicine and human medicine, parallels can be drawn between the status of malpractice claims in these two professions.

54. Id.
57. Snel, supra note 47.
60. See, e.g., CAL. CIV. CODE § 3051 (West 1993) (providing for liens on animals under the care of veterinary proprietors and surgeons (as well as liens benefiting drycleaners and plastic fabricators)); see also SOAVE, supra note 14, at 49. The lien depends on possession of the animal. Id.
61. SOAVE, supra note 14, at 49-51. The Iowa provision cited to by Soave specifically cites to “[l]ivery and feed stable keepers, herders, feeders, [or] keepers of stock.” IOWA CODE ANN. § 579.1 (West 1992 & Supp. 2003). The same Iowa code section is used to recover the expenses of storing motor vehicles and boats. Id. Soave states that “the right to sell or otherwise dispose of an animal in the holder’s possession is not legal in many states.” SOAVE, supra note 14, at 50.
62. CAL. CIV. CODE § 3052 (West 1993) (allowing for the public sale by veterinarians of animals under their care following notice that such sale will occur if amounts due are not paid); IOWA CODE ANN. § 579.2 (West 1992) (providing for lienholders to sell the specified stock and property at public auction); see also Jakubaitis v. Fischer, 40 Cal. Rptr. 2d 39 (Ct. App. 1995) (analyzing the applicability of sections 3051 and 3052 of the California Civil Code to veterinarians).
B. The Status of Veterinary Malpractice Claims

1. Trends in Veterinary Malpractice Claims

It is difficult to obtain statistics on the number of cases brought against veterinarians for malpractice. One source states that there are more than two thousand cases of malpractice and negligence filed in U.S. courts each year. This, of course, does not reflect the actual number of claims filed with veterinary malpractice insurance carriers. There are statistics indicating that the frequency and dollar amount of claims for veterinary malpractice increased significantly in the ten-year period prior to 1993. The frequency of claims increased from one claim for every twenty-five insured veterinarians to one claim for every sixteen insured veterinarians during that period of time, but then remained consistent for a period of years. It is clear that the number of claims, at least in some jurisdictions, is increasing.

There are concerns that the average dollar amount of veterinary malpractice claims is increasing as well. In the mid-1990s, lawsuits often settled for between $5000 and $10,000. A 1995 case in California over the death of a cat when a veterinarian treated the cat’s fleas with a toxic product settled for $15,000. A Kentucky jury awarded a client $15,000 after a veterinarian negligently spayed a German shepherd causing the animal’s death. Botched dental repairs

63. SOAVE, supra note 14, at 21. The damages claimed for many of these cases are likely relatively low dollar amounts. For example, the State of California requires every professional liability insurer to report any settlement of more than $3000 to the California Veterinary Medical Board (“CVMB”). CAL. BUS. & PROF. CODE § 801 (West 2003). The CVMB records indicate that over the last four years the board has received eight reports of settlements over $3000. E-mail from Gina Bayless, Enforcement Program Manager, California Veterinary Medical Board, to author (Nov. 1, 2002) (copy on file with author).


65. Id.

66. Telephone Interview with Jay P. O’Brien, CIC, Executive Vice-president, ABD Insurance and Financial Services (Oct. 28, 2002) (stating that his company has seen an increasing number of malpractice claims against veterinarians in California in recent years); see also Willing, supra note 17 (stating that “lawsuits against veterinarians are increasing”).

67. FAVRE & BORCHELT, supra note 34, at 233.

68. Id. (citing to the Rappaport v. McElroy settlement with insurance company). Note that the plaintiff in Rappaport alleged a variety of claims against the veterinarian including trespass to chattel, conversion, and spoliation of evidence. Complaint of Plaintiff, Rappaport v. McElroy, No. 95E09139 (L.A. Mun. Ct. (Van Nuys Branch) filed Sept. 25, 1995) (copy on file with author). One of the allegations in the Rappaport case was that the veterinarian lost the deceased cat’s body when the plaintiff specifically requested that the body be preserved. Id.

on a Rottweiler led to a $27,000 award against another California veterinarian in 2000.\textsuperscript{70} One study found that in the late 1990s, jury awards for the tortious loss of animals generally ranged from $5000 to $35,000 in a six-state survey.\textsuperscript{71} What clearly has changed is the growing attention to the issue in the general press with cases with large damage awards receiving significant coverage.\textsuperscript{72}

2. Reasons for Increases in Veterinary Malpractice Claims

There are several factors often cited for the increase in frequency and dollar amount of claims.\textsuperscript{73} In discussions regarding the increase in veterinary malpractice, as well as other professional malpractice claims, one category of factors often referenced is the changes in the litigation system that support these types of claims.\textsuperscript{74} Jack Dinsmore believes that there is an increased willingness to litigate claims.\textsuperscript{75} The legal and mainstream press report cases with large damage awards, leading to the perception that these types of awards are commonplace.\textsuperscript{76} This

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\textsuperscript{70} Evers v. Palmer, No. 773909 (Cal. Super. Ct. Jan. 4, 2000) (copy on file with author). In addition to the veterinary malpractice claims, Evers' complaint included claims of conversion and breach of a California statutory provision. According to the attorney for Evers, owing to limitations on non-economic damages in veterinary malpractice cases, attorneys in California have developed alternative theories for recovery. Telephone Interview with Michael Rosten, Attorney (Jan. 16, 2003); see also Willing, supra note 17 (stating that jury verdicts for harm done to pets outside the veterinary malpractice area also appear to be increasing, with awards running as high as $35,000).

\textsuperscript{71} Willing, supra note 17 (citing to a Jury Verdict Research study finding jury awards of $5000 to $35,000 in the previous four years in Alabama, California, Connecticut, Kentucky, Michigan, and Utah).

\textsuperscript{72} Richard L. Cupp, Jr. & Amber E. Dean, Veterinarians in the Doghouse: Are Pet Suits Economically Viable?, 31 THE BRIEF 43, 43 (2002) (discussing media reports of damage awards). Notwithstanding the coverage of cases where there have been significant monetary awards, it appears that the average award in cases dealing with companion animals remains relatively low. See E-mail from Gina Bayless, supra note 63 (noting only eight settlements of more than $3000 were reported to the California Veterinary Medical Board).

\textsuperscript{73} See Dinsmore, supra note 64, at 1020–23 (discussing trends in lawsuits against veterinarians).

\textsuperscript{74} Id. at 1020–21.

\textsuperscript{75} Id. at 1020; cf. Marc Galanter, An Oil Strike in Hell: Contemporary Legends About the Civil Justice System, 40 ARIZ. L. REV. 717, 746-47 (1998) (stating that one impact of the American public’s perception that there is a litigation explosion has been “to increase the calls that lawyers receive” and that “[t]he effect of this rhetoric is to make people think that if anything goes wrong they can get significant compensation”). But see Roselyn Bonanti, Tort “Reform” in the States, TRIAL, Aug. 2000, at 28 (stating that one study found that “tort filings have decreased 16 percent since 1996”).

\textsuperscript{76} Galanter, supra note 75, at 744–47 (discussing the “jaundiced view” of the civil liability system in the United States and media distortion of tort issues, including the fact that one study reported “virtually all” television coverage of trials was triggered if a verdict had an “unusually large” punitive damage award).
regularity in image damages results in an increased awareness of the possibility of claims against veterinarians by plaintiff's attorneys. Presumably, these plaintiff's attorneys will then be more likely to represent clients with similar lawsuits, increasing the total number of claims.

A second category of factors relates to the changing nature of the veterinary client. Clients now have higher expectations of veterinary treatments and procedures than they did in previous decades. Certainly there are clients who are willing to spend a significant amount of money on sophisticated procedures in order to save a companion animal's life. There is growing recognition of a significant bond between some people and their companion animals. When these companion animals die, their owners can experience grief in a manner similar to when a human family member dies. This is important since many claims brought against veterinarians relate to the death of an animal. Particularly in connection with equines with a significant economic value, there can be corporate or syndicate investors that are accustomed to utilizing the legal system to "replace a financial loss."

Regardless of the type of animal at issue, unhappy clients are more

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77. Dinsmore, *supra* note 64, at 1020. Jay O'Brien also cites to increased publicity as a factor supporting the increase in the number of claims. O'Brien, *supra* note 66.

78. Dinsmore, *supra* note 64, at 1020. Dinsmore also cites to the contingent fee arrangement, which allows clients the possibility of collecting money for claims without paying the costs of an attorney's time. *Id.*

79. *Id.*

80. *Id.*; cf. 1 ROLAND E. MALLEN & JEFFERY M. SMITH, LEGAL MALPRACTICE 21 (5th ed. 2000) (discussing reasons for the increase in legal malpractice claims, including "higher client expectations"); David J. Sokol, The Current Status of Medical Malpractice Countersuits, 10 AM. J.L. & MED. 439, 442 (1985) (citing the unrealistic expectations of patients arising from the improvements in medical technology as a major factor in the medical malpractice crisis); O'Brien, *supra* note 66 (discussing the focus of veterinarians on preventive care).

81. See O'Brien, *supra* note 66 (discussing the changing nature of veterinary medicine and the increased investment by clients using sophisticated technology); see also Brody, *supra* note 19 (discussing medical treatments available to companion animals including CAT scans and M.R.I.s); Draper, *supra* note 13 (discussing laser surgery).

82. Huss, Companion Animal Issues, *supra* note 7 at 182 & n.6 (discussing the theory that the way humans speak to companion animals indicates a significant bond).


84. WILSON, *supra* note 14, at 119–20 (discussing the number of claims associated with the death of an animal and ways that veterinarians can avoid complaints relating to such deaths).

85. Dinsmore, *supra* note 64, at 1021.
likely than satisfied customers to try to avoid paying a veterinarian’s bill. Just as with other types of professional malpractice, a lawsuit by a veterinarian to collect on an unpaid bill often results in a counterclaim against the veterinarian for malpractice.\textsuperscript{86}

The final category of factors leading to an increase in the number of claims and in the amount of damages relates to the economic value of the animals themselves.\textsuperscript{87} Just as with other forms of personal property, market pressures and inflation have caused the economic value of at least certain animals to increase.\textsuperscript{88} Food producing animals, such as cattle, sheep, and chickens, and working equines have always had measurable economic value.\textsuperscript{89} In contrast, dogs (and presumably, by analogy, cats) were considered to have no intrinsic value.\textsuperscript{90} As discussed below, there have been inroads into the traditional ways that animals, particularly companion animals, have been valued.\textsuperscript{91} With the awarding of higher damages, veterinary malpractice suits become more feasible from an economic perspective for both clients and attorneys.\textsuperscript{92}

\textsuperscript{86} Id.; 1 MALLEN \& SMITH, supra note 80, at 7 (discussing claims filed in response to lawsuits by lawyers for unpaid fees as a major area of legal malpractice actions); see, e.g., Hamilton v. Thompson, 23 P.3d 114, 114–15 (Colo. 2001) (setting aside a damage award based on professional negligence (as it found that the client did not present expert evidence establishing that the veterinarian failed to meet the standard of care for veterinarians) in a case where a veterinarian sued for $2861 in unpaid fees and the defendant’s response included a counterclaim for $5000 for negligent performance of services); Bedford v. Jorden, 698 P.2d 854, 854–56 (Mont. 1985) (affirming summary judgment in favor of veterinarian-defendant for a malpractice case alleging $50,000 in punitive damages after a parrot died following the filing of a claim with a credit bureau against the client for an unpaid bill); Lakeshore Animal Hosp. v. Sutton, No. 13-083, 1989 WL 78582 (Ohio Ct. App. 1989) (upholding a trial court’s judgment that allowed a client to counterclaim for professional malpractice after a veterinarian sued her for unpaid services). Mallen and Smith state that “insurers have reported that malpractice claims filed in response to fee actions comprise approximately 20 percent of all claims against attorneys.” 1 MALLEN \& SMITH, supra note 80, at 7. Mallen and Smith continue by discussing the fact that these counterclaims act to deter lawyers from suing for unpaid fees. Id. at 8.

\textsuperscript{87} Dinsmore, supra note 64, at 1020.

\textsuperscript{88} Id.

\textsuperscript{89} FAVRE \& BORCHELT, supra note 34, at 255 (discussing early welfare statutes that limited their coverage to animals that were deemed to be commercially valuable).

\textsuperscript{90} Sentell v. New Orleans \& Carrollton R.R., 166 U.S. 698, 700–01 (1897) (finding that a dog that allegedly was negligently killed by a railroad company had no intrinsic value, unlike other animals that can be used as beasts of burden or for food).

\textsuperscript{91} See infra Part IV (discussing animal valuation issues).

3. Veterinary Malpractice Insurance

The largest provider of professional liability insurance for veterinarians in the United States is the AVMA’s Professional Liability Insurance Trust (the “PLIT”).93 The PLIT insures more than 70% of the eligible members of the AVMA.94 The PLIT considers the number of claims, costs of defense, costs of settlement, and other statistics about its relationship with its insured veterinarians to be proprietary information.95 Some information is available that may be used to reflect the impact of malpractice claims on veterinarians. The PLIT divides veterinarians into four categories: Small Animal, Mixed Practice (Predominately Small), Large Animal, and Equine.96 The lowest rates are available for veterinarians in small animal practices and the highest for equine practices.97 Primary insurance coverage (per claim/aggregate) ranges from $100,000/$300,000 to $1,000,000/$3,000,000.98 Excess professional liability insurance is available up to $5,000,000 (per claim and aggregate).99 It is also possible to purchase a professional extension endorsement that covers claims due to the injury or death of animals under a veterinarian’s custody and control unrelated to treatment.100 The rates are the same

93. Telephone Interview with Dr. Richard E. Shirbroun, Trust Representative, American Veterinary Medical Association Professional Liability Insurance Trust (Sept. 4, 2002) [hereinafter Shirbroun Interview].
94. Id. The AVMA created the PLIT in 1962 to provide a source of professional liability coverage for veterinarians. Id.
95. Id. A few articles relating to professional liability issues were published by the Journal of the American Veterinary Medical Association through the 1980s. Joseph H. King, Jr., The Standard of Care for Veterinarians in Medical Malpractice Claims, 58 TENN. L. REV. 1, 2 n.3 (1990); Gregg A. Scoggins, Legislation Without Representation: How Veterinary Medicine Has Slipped Through the Cracks of Tort Reform, 1990 U. ILL. L. REV. 953, 955 n.17.
97. AVMAPLIT, supra note 96 (listing annual premiums effective January 1, 2001). From even a layperson’s standpoint, the higher rates for equine practice make sense given the large damage awards that historically have been awarded in successful malpractice cases relating to equines in comparison to the low damage awards in cases involving loss of companion animals.
98. Id.
99. Id.
100. Id.
regardless of the geographic location of a veterinarian’s practice. The PLIT has not changed its rates since 1994.

4. Comparison to Medical Malpractice

The relatively stable situation for veterinarians is in sharp contrast to the professional liability insurance and malpractice situation for physicians. Medical malpractice claims increased substantially in the

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101. Shirbroun Interview, supra note 93. This is in contrast to medical and legal malpractice insurance rates, which are dependent in part on the location of the professional. Hansen, supra note 96, at 26 (discussing increasing malpractice rates and citing experts that state that such rates are up by 100% or more “depending on such criteria as location, claims history, policy limits and area of practice”).

102. Shirbroun Interview, supra note 93. The rates actually decreased from 1992 to 1994 and have remained unchanged since that time. Id. The rates are set pursuant to actuarial tables that take into account, in part, the number of claims and extent of damages. Id.

103. Medical malpractice claims include suits against healthcare professionals other than physicians, but just as with physicians, the trend appears to be an increase in cases and awards in other areas of medical practice. E.g., Sokol, supra note 80, at 442 n.15 (discussing the dental malpractice crisis). The malpractice situation for other professionals also has been considered in crisis. For example, there was approximately a 155% increase in legal malpractice decisions in the 1990s. 1 MALLEN & SMITH, supra note 80, at 21 (citing to studies on the number of published appellate decisions concerning legal malpractice). There is a significant increase in the number of lawyers in the population (with new admissions at 30,000 to 32,000 per year); the relative rate of increase of decisions is greater than this increase in lawyer population. Id. (analyzing statistics on malpractice decisions and growth in the lawyer population). Mallen and Smith report that “the rate of increase is declining, though the absolute number of claims is not.” Id. As with veterinary malpractice insurers, legal malpractice insurers generally do not disclose data on the number and cost of claims. Id. at 21–22 (discussing available statistics on legal malpractice claims). Notwithstanding the limited information available, statistics “confirm the trend of reported decisions that claims frequency is not increasing significantly but severity (size of loss) is increasing.” Id. at 22. As with medical malpractice rates, legal “malpractice insurance rates have been on the increase in recent years.” WARREN FREEDMAN, A GUIDE TO MALPRACTICE LIABILITY FOR LEGAL AND LAW-RELATED PROFESSIONS 12–13 (1995) (citing to a rate increase of 20% by the Attorneys Liability Assurance Society). Some of the recent increases have been attributed to the changing legal climate after the terrorist attacks of September 11, 2001; however, market forces are considered to be the driving force in the increasing rates. Hansen, supra note 96. “Legal malpractice insurance rates are up across the board for the first time in years . . . .” Id. For example, one carrier that covers lawyers practicing in large firms “raised its rates by 35 percent to 40 percent at the start of the year.” Id. Another company that insures solo practitioners and small firm lawyers “is raising rates 5 percent to 30 percent.” Id. The market for insurance for attorneys is reportedly tightening with experts predicting that rates will likely increase before any leveling or decrease. Id. Insurers also are reallocating risk in other ways, such as adding exclusions and lowering policy limits. Id. Although there are concerns about rising legal malpractice rates, the situation is better than in previous decades, particularly “the mid-1980s, when many lawyers couldn’t find insurance or couldn’t afford the coverage that was available.” Id. (citing to experts in insurance). In order to assist attorneys in obtaining coverage, some state bars have created their own insurance companies. Mark Hansen, Under Covered: Proponents Say Fewer Lawyers Will Go Bare If Forced To Disclose Their Insurance Status, A.B.A. J., Nov. 2001, at 46 (stating that there were sixteen bar-related insurance companies that offer malpractice insurance in thirty states).
mid-1970s and mid-1980s.\textsuperscript{104} In response to the increasing number of malpractice suits and damage awards, insurance companies increased their rates significantly.\textsuperscript{105} In the 1990s, the severity of claims steadily increased; however, the increase did not result in a malpractice “crisis,” as in the previous two decades.\textsuperscript{106} Initially, in response to the increasing costs of insurance, physicians cancelled high risk procedures, formed their own insurance carriers, and lobbied extensively for reforms in the liability laws to prevent excessive damage awards.\textsuperscript{107} Within the last few years there have been concerns that another malpractice crisis could lead to a reduction in patients’ access to care.\textsuperscript{108} Insurance rates and the number of claims per physician vary substantially from state to state.\textsuperscript{109}

The American Medical Association has identified the primary cause of the “emerging crisis” as the “escalation in jury awards in medical

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\item Patricia J. Chupkovich, \textit{Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Health Care?}, 9 J. CONTEMP. HEALTH L. & POL’Y 337, 337 (1993). In the 1960s, the frequency of tort claims per one hundred physicians was one claim per one hundred doctors. \textsc{Paul C. Weiler, Medical Malpractice on Trial} 2 (1991). In the mid-1980s, the number of claims was seventeen claims per one hundred doctors. \textit{Id.} By the end of the 1980s the number of claims was approximately thirteen claims per one hundred doctors. \textit{Id.}; see also Jason Leo, \textit{Note, Torts—Medical Malpractice: The Legislature’s Attempt To Prevent Cases Without Merit Denies Valid Claims}, 27 WM. MITCHELL L. REV. 1399, 1402–06 (2000) (examining the history of medical malpractice claims and statutes).
\item Chupkovich, \textit{supra} note 104, at 337.
\item \textit{See} David M. Studdert, \textit{Toward a Workable Model of “No-fault” Compensation for Medical Injury in the United States}, 27 AM. J.L. & MED. 225, 225 (2001) (discussing the cyclical nature of medical malpractice and issues with insurance coverage); \textit{see also} Bonanti, \textit{supra} note 75 (stating that one study found that “tort filings have decreased 16 percent since 1996” and another study found “only 2 percent of persons injured by negligent medical care filed suit”).
\item Chupkovich, \textit{supra} note 104, at 337–38. \textit{But see} Bonanti, \textit{supra} note 75 (citing studies that show that “excessive verdicts in civil cases are rare” and “only 7.2 percent of civil litigants received damages of $1 million or more, and million-dollar verdicts continue to be awarded only in cases involving the most severe injuries”).
\item John A. MacDonald, \textit{Bush: Cap Awards in Malpractice Cases; President Says Doctors Are Leaving}, HARTFORD COURANT, July 26, 2002, at A3, available at 2002 WL 24224973; Rob Stein, \textit{Increase in Physicians’ Insurance Hurts Care; Services Are Being Pared, and Clinics Are Closing}, WASH. POST, Jan. 5, 2003, at A01, available at 2003 WL 2366088. This same argument has been used against proposals to allow increased damage awards for veterinary malpractice claims. \textit{See infra} notes 303–08 and accompanying text (discussing arguments that allowing non-economic damages in veterinary malpractice cases will result in less access to veterinary care).
\item Robyn Suriano & Greg Groeller, \textit{Malpractice Rates Soar—Doctors Rethink Risks; Patients Are Caught in the Middle as Doctors Flee Florida To Avoid Rising Insurance Costs}, ORLANDO SENTINEL, Sept. 22, 2002, at A1, available at 2002 WL 100141438. For example, according to one insurance provider in Florida, one out of every forty-four doctors settles a malpractice claim nationwide compared with one out every eighteen doctors in Florida. \textit{Id}. 
\end{enumerate}
malpractice cases.”110 In contrast, lawyers representing patients point to poor management and investment losses by insurance carriers along with market forces that kept premiums artificially low in the early 1990s.111 Early efforts at tort reform occurred at the state level, with a majority of the states enacting legislation.112 The tort reform provisions often consisted of statutory caps on damages in response to concerns over high and inconsistent non-economic losses, though there were other provisions adopted in an attempt to make the litigation process more efficient and to screen out non-meritorious cases.113 In addition to

110. MacDonald, supra note 108. Studies cited by the AMA state that “median jury awards increased 43 percent [in 2001]” and that “half of all jury awards in malpractice cases top $1 million.” Id. Another problem is the increasing number of insurance companies that are leaving the malpractice market and causing physicians to scramble for coverage. See Kris Hundley, Prognosis for Trouble, ST. PETERSBURG TIMES, Mar. 11, 2002, at 8E (reporting the withdrawal of St. Paul Company, the second largest malpractice insurer in the United States, from the market and noting other insurance carriers that were leaving the Florida market), available at 2002 WL 15926502. Other factors have been cited as causes of the malpractice crisis, including unrealistic expectations of patients, fear of overly sympathetic responses from juries leading to settlements for cases that may be non-meritorious, and the contingent fee system. Sokol, supra note 80, at 442–45.

111. Suriano & Groeller, supra note 109 (discussing insurance coverage and the malpractice crisis in Florida); Frank Todaro, What’s the Key to the Medical-malpractice Dilemma?, COLUMBUS DISPATCH, Sept. 18, 2002, at 19A (citing to failed insurance profits from poor investments as one reason for the crisis), available at 2002 WL 100598241; Refuting the Myth That Iowa Is a Litigious State, IOWA L. REV., Nov. 2002, at 9–10 (discussing a task force that was set up in Iowa to determine the medical malpractice situation in the state and raising the possibility that malpractice rates are increasing “because of insurance industry pricing errors, lost investment income, and the premium price war in the 1990s with the off-the-map stock market covering the spread”). As one commentator states:

[T]he most central argument against the caps for health care providers is that if there is a crisis… the problem is theirs and not that of an individual victim of their negligence; and that while government might provide assistance to the providers, the individual victim should not be forced to do so.


112. Chupkovich, supra note 104, at 338 (stating that twenty-seven states enacted legislation).

113. Id. at 353 & n.119 (discussing tort reform and non-economic damages); see also Neasbitt v. Warren, 22 S.W.3d 107, 111–12 (Tex. App. 2000) (discussing the Texas Medical Liability and Insurance Improvement Act and stating that the original act, “passed in 1977, sought to address a ‘medical malpractice insurance crisis in the State of Texas’” (citation omitted)); Sokol, supra note 80, at 445–48 (discussing responses to the malpractice crisis, including arbitration, screening panels, and proposing the greater use of countersuit litigation to alleviate the crisis). See generally infra Part V.C (discussing various provisions that could be adopted to encourage settlement of meritorious cases and to block frivolous claims in veterinary malpractice cases). Constitutional challenges to these state tort reform acts followed, with courts split on their validity. Robert S. Peck et al., Tort Reform 1999: A Building Without a Foundation, 27 FLA. ST. U. L. REV. 397, 416–19 (2000) (discussing constitutional rights that are arguably impacted by a tort reform act passed in Florida in 1999); Studdert, supra note 106, at 241–45 (discussing constitutional challenges to tort reform acts). Some courts have found that key provisions of the statutes were invalid based on state constitutional principles of due process, equal protection, jury trials, or open courts. DOBBS, supra note 111, at 526–27; Studdert, supra note 106, at 243 (citing
tort reform at the state level, efforts have been made to pass federal legislation to address the crisis.\textsuperscript{114} In comparison to medical as well as other professional malpractice claims, the veterinary profession appears to be in a relatively good position. As discussed above, insurance rates for veterinary malpractice have been steady over the last decade, unlike medical and legal malpractice rates.\textsuperscript{115} The veterinary malpractice insurance industry has not made distinctions by geographic location and is not as practice specific as other professions are. Given this information, why should there be any concern over the current standards that are applied in veterinary malpractice actions? First, from the perspective of veterinarians, there has been an increase in malpractice claims, and there are reports of settlements with damages in higher amounts than was customarily found in the past.\textsuperscript{116} Veterinarians have concerns about the litigation system similar to those of physicians. Second, from the perspective of clients, the remedies available under the current system do not reflect the importance of the relationship between humans and their animal companions.\textsuperscript{117} Finally, for both sides to Garty T. Schwartz, Beginning and the Possible End of the Rise of Modern American Tort Law, 26 GA. L. REV. 601, 683 n.435 (1992)).

\textsuperscript{114} The most recent federal legislation is the Help Efficient, Accessible, Low Cost, Timely Healthcare ("HEALTH") Act of 2002. H.R. 4600, 107th Cong. (2002). Section 2 of the HEALTH Act lists the effects on interstate commerce and federal spending to support the Act. Supporters of the HEALTH Act say that federal legislation providing damage caps in health care lawsuits is necessary because the rising insurance premiums cause physicians in high-risk specialties to leave their specialty or move to states that have caps. A report by the Department of Health and Human Services states that the federal cap could cut patients' medical costs by as much as 30%. MacDonald, supra note 108. The HEALTH Act provides for a standard three-year statute of limitations (or one year after discovery) to encourage speedy resolution of claims. H.R. 4600, § 3. The HEALTH Act provides that full economic losses may be recovered but caps non-economic damages at $250,000 for each occurrence. Id. § 4. The cap on non-economic damages applies "regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same occurrence." Id.

\textsuperscript{115} Punitive damages are also capped at the greater of double the economic damages awarded or $250,000. Id. § 7(b). Finally there are provisions governing attorneys' fees and the disclosure of collateral source benefits. Id. §§ 5–6.

\textsuperscript{116} See supra notes 102–06 and accompanying text (discussing veterinary malpractice insurance rates in comparison to medical malpractice rates); supra note 103 (noting the increase in legal malpractice rates).

\textsuperscript{116} Cupp & Dean, supra note 72, at 43 (discussing an increase in veterinary claims and media reports of damage awards that are higher than market value). Malpractice carriers are similarly in a potentially precarious position. Although they can spread risk among many veterinarians, these companies are also at risk of at least short-term losses if numerous significant damage awards are assessed against their insured before the companies are able to take such losses into account in their pricing.

\textsuperscript{117} See supra notes 2–8 and accompanying text (discussing the relationship between humans and companion animals).
involved in these types of claims, there is a growing uncertainty about the remedies that are available. Providing more consistency in the damages available in these cases allows both parties to understand fully the ramifications of their actions if malpractice occurs and, if necessary, to adjust their behavior accordingly.

III. VETERINARY MALPRACTICE

The goals of tort actions are to "compensate victims, affirm social values, and deter wrongdoers." Two primary public policies supporting the application of malpractice principles to veterinarians are to protect the public and to discourage unqualified individuals from representing themselves as qualified veterinarians. It is important to distinguish between claims of malpractice and negligence. If a veterinarian is acting in a manner outside of his or her professional capacity, a normal negligence standard will be used. An example of these types of actions relating to animals include veterinarians providing


119. SOAVE, supra note 14, at 16.

120. One reason it is important to distinguish between negligence and malpractice actions is that if the lawsuit is based in negligence (rather than malpractice) expert medical testimony will not be required. Moses v. Richardson, No. DO335312, 2001 Cal. App. Unpub. LEXIS 1154, at *8 (Cal. Ct. App. Nov. 29, 2001) (affirming judgment against veterinarians when a horse was seriously injured during a treadmill procedure); Savo v. Kazlauska, No. CV-950127443S, 1999 Conn. Super. LEXIS 314, at *4 (Conn. Super. Ct. Feb. 5, 1999) (denying summary judgment for a veterinarian in a negligence action where a horse kicked the plaintiff when the veterinarian argued as an affirmative defense that the cause of action sounded in veterinary malpractice and thus required an expert to set the applicable standard of care); Smith v. Hugo, 714 So. 2d 467, 468 (Fla. Dist. Ct. App. 1998) (affirming verdict in favor of a client who was bitten by cat during vaccination and finding that the jury instruction for ordinary negligence was appropriate).


boarding facilities or transportation services. Veterinarians also may be subject to claims of negligence if a client is injured (often bitten) while the veterinarian treats the client’s animal. In addition, veterinarians can be subject to negligence claims not relating to animals, such as slip and fall actions on their property.

Malpractice claims are appropriate if the issues relate to specialized skills not ordinarily possessed by lay people—specifically, the medical skills of the veterinarian. Essentially, malpractice is a specialized professional negligence or “bad practice due to a lack of skill or the failure to apply it.” Initially, claims based on malpractice applied only to specific professionals such as doctors and lawyers. Many courts have applied the malpractice standards established for doctors by analogy to veterinarians, even without specific statutory authority.


123. See Countryman v. Lester, 183 N.E.2d 727, 728 (Mass. 1962) (holding that a veterinarian was not liable in a negligence action for bite injuries inflicted on the plaintiff-client by her cat during the cat’s treatment); Branks v. Kern, 359 S.E.2d 780, 783 (N.C. 1987) (finding that a veterinarian was not liable under a negligence theory when the client’s cat bit her during the cat’s treatment). Professors Favre and Borchelt report that, according to one insurance company, “during the 1990s injuries to humans represented 18% of the claims against veterinarians.” Favre & Borchelt, supra note 34, at 247 n. 12. Dr. Soave reports that about 20% of the 2000 malpractice and negligence cases brought to court against veterinarians each year involve injuries to human beings that are caused by animals under the care of such veterinarians. Soave, supra note 14, at 21. Damage awards can be significant, especially in cases where injuries have occurred in connection with the treatment of horses. Dinsmore, supra note 64, at 1021 (stating that 13.7% of injuries to humans were caused by horses but the costs associated with such claims equal 41.4% of the total incurred losses). The breakdown for injuries from other animals is as follows: 39.6% of the injuries and 19.7% of the costs are caused by dogs and 28.8% of the injuries and 15.6% of the costs are caused by cats. Id. These types of cases could be considered malpractice rather than simple negligence if the harm occurs because of the type or manner in which the veterinarian applies medical treatment; however, the focus of this Article is on the damages that arise due to the injury or death of the patients rather than clients or others who may be involved in the treatment process.

124. See, e.g., Hallberg v. Flat Creek Animal Clinic, 483 S.E.2d 671 (Ga. Ct. App. 1997) (illustrating this type of action in an unsuccessful negligence claim against a veterinary clinic for injuries suffered when a client fell on a ramp leading out of the clinic).

125. Favre & Borchelt, supra note 34, at 237.

126. Soave, supra note 14, at 14. Malpractice may be willful as well as negligent. Id.

127. Favre & Borchelt, supra note 34, at 236.

128. Ladnier v. Norwood, 781 F.2d 490, 492 (5th Cir. 1986) (citing to Louisiana cases that adopted the medical malpractice standard for veterinarian malpractice prior to the adoption of statutory provisions clarifying the standard); Williamson v. Prida, 89 Cal. Rptr. 2d 868, 872 (Ct. App. 1999) (applying a medical malpractice standard of care to veterinary malpractice and citing to other courts that held the same); Price v. Brown, 680 A.2d 1149, 1152 (Pa. 1996) (extending professional negligence concepts to veterinary medicine); see also Harold W. Hannah, What Is the Standard of Care for a Veterinarian and Does Departure from It Always Spell Liability?, 218 J. Am. Veterinary Med. Ass’n 1090 (2001). Several early cases stated that a claim for
There are still a few states where courts have been reluctant to apply “malpractice” standards to veterinarians without statutory authority. One basis used to reject the application of malpractice standards to veterinarians is that the patient-physician relationship (or presumably the attorney-client relationship) that exists at the core of a malpractice claim is not found in veterinary medicine. Instead there is a relationship between the veterinarian and the client who in turn owns the patient. Presumably, since animals are considered personal property, these courts would find the relationship between a customer and automobile mechanic more analogous. Just as a car does not have the ability to sue a mechanic, an animal does not have the ability to sue his or her veterinarian. The client, who holds a legal interest in the animal, maintains the right to sue over the injury or destruction of his or her property as animals currently do not have standing to bring suits on their own behalf in any situation.

Notwithstanding these cases, unless otherwise indicated, the discussion in this Article centers on the special type of negligence based veterinary malpractice was made without clarifying the standards to be set. See, e.g., Conner v. Winton, 8 Ind. 289, 289 (1856) (describing the case as one in which Connor sued Winton for unskilfully treating a horse). The Conner case is described by one author as the “first malpractice case in the United States against a veterinarian.” SOAVE, supra note 14, at 13. Other early cases applied a professional standard of care without further comment. Barney v. Pinkham, 45 N.W. 694, 694 (Neb. 1890) (stating that a veterinary surgeon is bound to use “such reasonable skill, diligence, and attention as may be ordinarily expected of persons in that profession”).


130. Southall v. Gabel, 277 N.E.2d 230, 232 (Ohio Ct. App. 1971) (discussing the physician-patient relationship between the veterinarian and animal and stating that “[u]ntil the [Ohio] Supreme Court speaks, veterinarians are not included in the definition of malpractice”). Notwithstanding the fact that malpractice would not be applicable, Ohio courts have used analogies between injuries to persons and injuries to animals in negligence actions. Southall v. Gabel, 293 N.E.2d 891, 894 (Franklin County, Ohio Mun. Ct. 1972) (finding that where alleged damage to a horse is an injury that results in physical or mental disability, it is necessary to prove the causal connection between the injury and disability in the same way as when the injury is to a person and such causal connection must be established by the opinion of competent medical witnesses); see also Downing v. Gully, 915 S.W.2d 181, 183 (Tex. App. 1996) (stating that the court would adopt the standard applied to physicians and surgeons in medical malpractice cases for veterinary negligence cases). But see Pruitt v. Box, 984 S.W.2d 709, 711 (Tex. App. 1998) (rejecting the Downing analysis and applying a general negligence standard utilizing a standard of care “applicable to a professional of ordinary skill and care in similar communities”).

131. See Huss, Companion Animal Status, supra note 1, at 68–79 (discussing the legal status of animals and the possibility of treating animals as “persons” for limited purposes).

132. Id. at 79–83 (analyzing the issue of standing as it relates to animals).
on the professional medical skills of the veterinarian that result in injury or harm to a patient, whether the standard is set by analogy to medical malpractice or as "professional negligence."\textsuperscript{133}

Just as with other tort actions, the plaintiff will have the burden of proving the essential elements of the claim. In a malpractice action, the elements are as follows: (a) the veterinarian owed a duty of care toward the animal, (b) the veterinarian did not conform to the standard of conduct required by those in the profession, (c) such non-conforming conduct is the proximate cause of the injury or harm, and (d) the injury or harm resulted in damages to the plaintiff.\textsuperscript{134} The damages that arise are due to either the injury or harm to the property of the client (the animal) or to the client as an individual.

\textbf{A. Standard of Care}

Of these elements, an issue that some courts are continuing to struggle with is the applicable standard of care in veterinary malpractice cases. As stated above, the standards used for medical malpractice cases are often applied by analogy to veterinary malpractice cases; however, significant differences in the professions may impact the standard.\textsuperscript{135}

Clearly, the treatment a veterinarian will provide varies depending on the animal involved.\textsuperscript{136} The type and value of the animal will control the treatment provided to the animal.\textsuperscript{137} An animal that is used for food production will receive different treatment from a beloved animal companion.

The nature of the patients also impacts the level of treatment. Many veterinarians treat several different species of animals with a wide spectrum of problems.\textsuperscript{138} Communication is limited with the patients so

\textsuperscript{133} See Pruitt, 984 S.W.2d at 711 (applying a general negligence standard utilizing a standard of care "applicable to a professional of ordinary skill and care in similar communities").

\textsuperscript{134} FAVRE & BORCHELT, supra note 34, at 237.

\textsuperscript{135} See King, supra note 95, at 6.

\textsuperscript{136} SOAVE, supra note 14, at 15.

\textsuperscript{137} Id.

\textsuperscript{138} Id.; see also AM. VETERINARY MED. ASS’N, VETERINARY MARKET STATISTICS, at http://www.avma.org/membshop/marketstats/usvets.asp (Sept. 2002) (showing the breakdown of practice areas for veterinarians, with the majority of private clinical veterinarians designating their practices as "small animal exclusive" or "small animal predominant"). The implication of the treatment of multiple species appears to be that the veterinarian’s knowledge of each species may be lessened. The treatment of multiple species, as well as the extreme variations in size and weight, make it more difficult to determine proper medication dosages, increasing the likelihood that claims will be brought because the drugs were improperly prescribed or administered. Harold W. Hannah, Veterinary Medical Malpractice and Medical Malpractice: Some Parallels and Differences, 202 J. AM. VETERINARY MED. ASS’N 1819, 1820 (1993). One implication for
it can be more difficult to define problems. Another obvious difference is the legal and acceptable use of euthanasia on animals, as well as the economic limitations applied to the treatment of many animals.

One articulation of the standard of care that is commonly applied to veterinary malpractice claims is whether

the injury complained of was caused by the doing of a particular thing
that a veterinarian of ordinary skill, care and diligence would not have
done under like or similar circumstances, or by the failure or omission
to do some particular thing that such a veterinarian would have done
under like or similar circumstances.

Essentially, the standard of care is one set by the actions of other professionals in the same position, rather than a standard set by laypersons. It is important to recognize that the standard is not set by the actions of the most skilled veterinarians—merely ones that are considered average or normal.

Expert testimony is generally necessary in order to determine whether a veterinarian has complied with this professional standard of care. As in other negligence actions, research literature and other

the lower expectation for the care provided by a “general practitioner” is that specialists have been held to a higher standard of care. See infra note 159 and accompanying text. The percentage of general practitioners in the veterinary profession is higher than the percentage of general practitioners in the medical profession. Hannah, supra, at 1820.

139. SOAVE, supra note 14, at 15.
140. Id.; WILSON, supra note 14, at 137.
141. Turner v. Sinha, 582 N.E.2d 1018, 1021 (Ohio Ct. App. 1989) (setting forth a standard in a case that actually was not defined as malpractice); see also King, supra note 95, at 10.
142. King, supra note 95, at 12–18.
143. FAVRE & BORCHELT, supra note 34, at 238; see also Barney v. Pinkham, 45 N.W. 694, 694 (Neb. 1890) (stating that a veterinary surgeon “does not contract to use the highest degree of skill, nor an extraordinary amount of diligence, but to exercise a reasonable degree of knowledge, diligence and attention”).
144. WILSON, supra note 14, at 137; see also Jahn v. Equine Servs., PSC, 233 F.3d 382, 388–93 (6th Cir. 2000) (discussing expert testimony in a veterinary malpractice action); Bekkemo v. Erickson, 242 N.W. 617, 618–19 (Minn. 1932) (discussing expert witnesses and expert witness fees in a case alleging negligence by a veterinarian); Zimmerman v. Robertson, 854 P.2d 338, 340 (Mont. 1993) (finding that expert testimony is necessary to establish the standard of care in a veterinary malpractice action); Fackler v. Genetzky, 638 N.W.2d 521, 528 (Neb. 2002) (stating that “[m]edical expert testimony regarding causation...must be stated as being at least ‘probable,’ in other words, more likely than not” in a veterinary malpractice case); Durocher v. Rochester Equine Clinic, 629 A.2d 827, 829 (N.H. 1993) (finding that expert testimony from a veterinarian is necessary to prove the elements of causation and harm in veterinary malpractice cases); McGee v. Smith, 107 S.W.3d 725 (Tex. App. 2003) (discussing the standard of care and the need for expert testimony in a veterinary malpractice action). Note that if a locality rule is applied, it may be difficult to obtain this expert testimony. FAVRE & BORCHELT, supra note 34, at 239. Plaintiffs may also be required to fulfill statutory requirements, such as the filing of an expert affidavit, to proceed with veterinary malpractice actions. Collins v. Newman, 517 S.E.2d
sources, such as warning labels, can assist in establishing the standard of care. Additionally, state veterinary medical associations or veterinary medical practice acts can establish the standard of care. Although the AVMA has not adopted specific practice standards, it does have fourteen general guidelines for practice, and the AVMA’s PLIT has a survey that lists twenty-nine desirable practices in a veterinary clinic. An inference can also be made that a veterinarian has not met the applicable standard of care if the actions alleged are the types listed in statutes that support the revocation of a veterinarian’s license.

Notwithstanding the application of a professional standard of care, it is possible to establish a prima facie case if the “very nature of the acts complained of bespeaks improper treatment and malpractice.” The doctrine of res ipsa loquitur may be applied in veterinary malpractice cases, but only if the injury complained of is of a kind that does not ordinarily occur in the absence of negligence, and other responsible causes are sufficiently eliminated by the evidence. An example of the application of this doctrine is an injury resulting from a veterinarian leaving a surgical instrument or sponge in an animal that has undergone surgery.

100, 101–02 (Ga. Ct. App. 1999) (finding that section 9-11-9.1 of the Georgia Annotated Code required the filing of an expert affidavit in a veterinary malpractice case in which the plaintiff alleged that instruments were left inside a dog during a spaying procedure).

145. Ladnier v. Norwood, 781 F.2d 490, 493 (5th Cir. 1986) (discussing research literature and product manufacturer recommendations to support a finding that a veterinarian was not negligent in the administration of a medication); Ruden v. Hansen, 206 N.W.2d 713, 716 (Iowa 1973) (using contraindications enclosed with a vaccine to set the standard of care in a lawsuit over the deaths of pregnant gilts after vaccination); Carter v. La. State Univ., 520 So. 2d 383, 388 (La. 1988) (finding that medical records kept by veterinary students supported the testimony of the plaintiff).


147. Harold W. Hannah, Establishing the Standard of Care, 208 J. AM. VETERINARY MED. ASS’N 1034 (1996) [hereinafter Hannah, Standard of Care]. Note that the ability of a licensing board to set the standard of care has been challenged with mixed results from the courts. Id. at 1035.

148. Id. at 1034.

149. Mathew v. Klinger, 686 N.Y.S.2d 549, 550 (App. Term. 1998) (citing to Restrepo v. State, 550 N.Y.S.2d 536 (Ct. Cl. 1989), and finding that no expert is necessary to explain that a veterinarian should x-ray a dog if she suspects that the dog has swallowed something).


151. Hannah, Standard of Care, supra note 147, at 1035.
One rule courts have utilized to set the standard of care is referred to as the "locality rule." The locality rule evaluates the conduct of a professional by considering the professional standards in the geographic area where the professional practices. The geographic area may be as narrow as the immediate locality or as large as a national standard. Courts have also considered the care practiced in a particular or like community as one of the elements to be used in setting the standard. The locality rule can impact liability by limiting the pool of available experts to opine on the applicable standard, and such standard may be narrower than in a jurisdiction that applies a national standard. Just as with the medical profession, with the increasing access to information and continuing professional education requirements, it appears the veterinary profession should adopt a more uniform standard. A more general uniform standard promotes higher levels of competence within the profession.

Notwithstanding any applicable geographic limitation, veterinarians who hold themselves out as specialists in a particular aspect of veterinary practice should be held to the standards of other specialists in that field. One difficulty in determining the standard of care for this area of malpractice is that some practitioners specialize in a species or type of veterinary practice while others are actually board certified specialists. Regardless of board certification, veterinarians who are considered specialists will likely be held to a higher standard of care than generalists.

152. King, supra note 95, at 18–21.
153. Id. at 19.
154. Id. An interim standard can be referred to as the "same or similar" locality. Id.
155. Ruden v. Hansen, 206 N.W.2d 713, 716 (Iowa 1973) (rejecting the locality rule and stating that the standard of care practiced in a particular community can be one of the elements considered though it is not conclusive).
156. King, supra note 95, at 19. See generally Favre & Borchelt, supra note 34, at 239 (discussing policy considerations supporting a general standard of national or statewide scope rather than a more narrow locality rule).
157. Favre & Borchelt, supra note 34, at 239. Professors Favre and Borchelt would caution that an exception to such a standard could be related to access to advanced equipment. Id. The trend is to move away from the application of a narrow locality rule. Wilson, supra note 14, at 136; see also Carter v. La. State Univ., 520 So. 2d 383, 387 (La. 1988) (rejecting the use of a locality standard for a malpractice case involving a veterinary specialist).
158. Favre & Borchelt, supra note 34, at 239.
159. Id.; King, supra note 95, at 17; see also Restrepo v. State, 550 N.Y.S.2d 536, 540–41 (Ct. Cl. 1989) (discussing the application of the locality rule and applying a standard of care set by other racetrack veterinarians).
160. Wilson, supra note 14, at 139.
161. Id. at 140. Note that generalists can also be found negligent if they fail to refer a patient to a specialist in some situations. Harold W. Hannah, Knowing the Limits of One's Skill—
There is also a temporal frame of reference used to evaluate professional services.\textsuperscript{162} The standard of care is one that existed at the time of the alleged malpractice.\textsuperscript{163} Veterinarians, like other professionals, are not held to standards developed or adopted by practitioners subsequent to the treatment at issue.

It is important to note that the standard of care is reasonable professional competence, not merely errors in judgment.\textsuperscript{164} There is no guarantee of a particular result of treatment (unless a guarantee or warranty is independently provided).\textsuperscript{165} There is no presumption of malpractice even if injury or death occurs after treatment.\textsuperscript{166} Malpractice can be found with omissions in treatment as well as the commission of acts relating to treatment.\textsuperscript{167} Although omissions in treatment occur more frequently than the commission of incorrect treatment, it is generally easier to prove malpractice if there has been improper treatment.\textsuperscript{168} Given the role of clients in determining the extent of medical treatment, it can be difficult to measure the appropriate level of treatment.\textsuperscript{169}

\textit{B. Types of Malpractice Claims}

Malpractice claims have been based on allegations of improper treatment in a variety of areas. Unskillful surgeries and improper postsurgical care are common claims.\textsuperscript{170} Problems with vaccinations also

\textit{Referrals}, 210 J. AM. VETERINARY MED. ASS’N 31, 31 (1997). If a veterinarian calls in a consultant and is guided by such consultant’s advice, the veterinarian will be liable for the consultant’s negligence as well as his or her own negligence. \textit{Id.} at 32.

\textsuperscript{162} King, \textit{supra} note 95, at 21.

\textsuperscript{163} \textit{Id.}; see, e.g., Mires v. Evans, No. 82-4436, 1986 U.S. Dist. LEXIS 22524, at *30 (E.D. Pa. July 21, 1986) (stating that in judging the degree of skill, regard is to be had to the advanced state of the profession at the time); Williams v. Reynolds, 263 S.E.2d 853, 855–56 (N.C. Ct. App. 1980) (discussing the excluded testimony of a veterinarian who did not live in the county during the month that an alleged malpractice occurred).

\textsuperscript{164} King, \textit{supra} note 95, at 22.

\textsuperscript{165} See FAVRE & BORCHELT, \textit{supra} note 34, at 238 (“The standard does not make the veterinarian an insurer of the recovery of an animal.”).

\textsuperscript{166} \textit{Id.} at 238; see also Mires, 1986 U.S. Dist. LEXIS 22524, at *29 (stating that “no presumption or inference of negligence arises merely because the medical treatment of a racehorse yields a bad result”).

\textsuperscript{167} WILSON, \textit{supra} note 14, at 136–37.

\textsuperscript{168} \textit{Id.} at 137.

\textsuperscript{169} \textit{Id.}

have frequently formed the basis for malpractice claims.\textsuperscript{171} Similarly, it is not uncommon for courts to consider malpractice claims alleging the misuse or improper administration of medications or drugs.\textsuperscript{172}

Not only have claims been based on allegations of improper treatment but the failure to inform a client of the availability of alternate treatments and disclose the risks involved in treatments can be used to support malpractice claims.\textsuperscript{173} For example, the failure to inform an owner about the necessary care for an animal after its release from a veterinarian's care can support a malpractice action.\textsuperscript{174} Malpractice claims also have arisen from alleged errors in the confinement or restraint of animals during treatment, as restraint can be considered an integral part of the practice of veterinary medicine.\textsuperscript{175}

Occasionally, a veterinarian can be held liable if he or she does not follow up on treatment when the veterinarian has a duty to do so, either by circumstances or because he or she has agreed to continue (alleging negligent surgical and post-surgical care of a colt after castration); Decurtis-Slifkin v. Kolbert, 668 N.Y.S.2d 949, 949 (App. Div. 1998) (alleging negligence in the discharge of an animal while it was partially sedated); Williams v. Reynolds, 263 S.E.2d 853, 853 (N.C. Ct. App. 1980) (alleging negligent post-surgical care of a castrated horse); Downing v. Gull, 915 S.W.2d 181, 183 (Tex. App. 1996) (alleging negligence in the administration of anesthesia in a neutering operation).

\textsuperscript{171} E.g., Greives v. Greenwood, 550 N.E.2d 334, 336 (Ind. Ct. App. 1990) (alleging the negligent injection of cattle with a brucellosis vaccine); Ruden v. Hansen, 206 N.W.2d 713, 715 (Iowa 1973) (alleging that a veterinarian used an improper vaccination on pregnant gilts); Phillips v. Leuth, 204 N.W. 301, 302 (Iowa 1925) (alleging blood poisoning caused by improper vaccination); see also Duane Flemming, The Potential for Liability in the Use and Misuse of Veterinary Vaccines, 31 VETERINARY CLINICS N. AM.: SMALL ANIMAL PRAC. 515 (2001) (discussing liability issues relating to the use of vaccinations).

\textsuperscript{172} E.g., Ladnier v. Norwood, 781 F.2d 490, 493 (5th Cir. 1986) (alleging improper administration of medication containing vitamin E); Kerbow v. Bell, 259 P.2d 317, 318 (Okla. 1953) (alleging that a dip used to treat mange was too strong, causing the death of dogs); Erickson v. Webber, 237 N.W. 558, 559 (S.D. 1931) (alleging improper administration of a worming treatment, causing the death of sheep).

\textsuperscript{173} Emes Stable v. Univ. of Penn., No. 85-5402, 1988 U.S. Dist. LEXIS 2972, at *1 (E.D. Pa. Apr. 4, 1988) (alleging malpractice when a veterinarian operated on a horse before informing its owner of all alternative available treatments); Flemming, supra note 171, at 518-20 (discussing informed consent issues and stating that the current informed consent standard is the "reasonable patient standard").

\textsuperscript{174} Hannah, supra note 41, at 1419. Malpractice claims may also arise from dispensation of prescription drugs, security for prescription drugs, and the failure to warn a client if the client assists in an examination, as there is a risk that the client could be injured. Id. In addition, there may be circumstances in which a veterinarian must warn someone or report that an animal has a communicable disease. Id. at 1420.

\textsuperscript{175} Beck v. Henkle-Craig Livestock Co., 88 S.E. 865, 866 (N.C. 1916) (alleging malpractice in the way in which a mule was put into a stall in preparation for surgery); Harold W. Hannah, Malpractice Implications of Animal Restraint, 214 J. AM. VETERINARY MED. ASS'N 41, 41 (1999) (discussing cases in which restraint was part of a malpractice claim). Improper restraint may also contribute to human injury. Id.
It is important to note that veterinarians are under no legal obligation to accept a case, even in an emergency. This does not mean that a veterinarian's refusal to accept a case will not violate the ethical standards set by the veterinary community, just that a legal cause of action does not arise from such a refusal. It is only when a relationship has been established for the care of an animal that a veterinarian can be held liable for the abandonment of such animal's care. Given the increased availability of specialists, a veterinarian can also be liable if he or she fails to refer a client to a specialist in appropriate circumstances.

C. Defenses to Malpractice Claims

Just like defendants in other actions brought under tort law, veterinarians have a variety of common defenses to malpractice claims. The negation of any of the elements of this cause of action defeats the malpractice claim. Thus, the veterinarian could show that he or she was not under a duty of care to the patient because no relationship had been entered into at the time of the alleged malpractice. Obviously, the lack

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176. Restrepo v. State, 550 N.Y.S.2d 536, 538 (Ct. Cl. 1989) (alleging negligence when a racetrack veterinarian left a needle in a horse’s jugular vein); Boom v. Reed, 23 N.Y.S. 421, 422 (Gen. Term 1893) (alleging that a veterinarian was negligent when he did not return as promised to treat a sick horse).

177. SOAVE, supra note 14, at 21. Some states have adopted Good Samaritan laws to protect veterinarians who take on the care of an animal in emergency situations. E.g., MICH. COMP. LAWS ANN. § 333.18826 (West 2001) (limiting liability for civil damages to acts amounting to gross negligence or willful and wanton misconduct when providing treatment to an animal where the ownership of such animal is unknown at the time of the treatment); N.Y. EDUC. LAW § 6705-a (McKinney 2001 & Supp. 2004) (providing that veterinarians who provide emergency treatment outside of an animal hospital or clinic will not be liable for damages relating to the animal’s injury or death).

178. FAVRE & BORCHELT, supra note 34, at 238; see, e.g., In re Kerlin, 376 A.2d 939, 942-43 (N.J. Super. Ct. App. Div. 1977) (appealing the decision of the Board of Veterinary Medical Examiners’ (the “Board”) that a veterinarian was guilty of “gross malpractice or gross neglect” in a case in which his office assistant allegedly refused to treat an ill kitten). In the Kerlin case, the Board held “that a veterinarian is expected to exhibit professional interest, compassion and empathy.” Id. at 942. The Board determined that a veterinarian who does not make a preliminary inquiry to determine the need for emergency care or humane treatment would substantially deviate from the standards of the profession. Id. at 942-43. The court found, however, that the lack of qualities such as compassion and empathy would not “standing alone” constitute gross malpractice or gross neglect. Id. at 944. The court found that even if it adopted the Board’s definition of grossly neglectful treatment, there was no proof that the veterinarian “refused to treat or examine, or . . . [that] he did not allow his employees to examine or treat the kitten.” Id.

179. SOAVE, supra note 14, at 21; cf. RICHARD M. PATTERSON, HARNEY’S MEDICAL MALPRACTICE § 5.8 (4th ed. 1999) (“It is a basic rule in the medical profession that having once undertaken the care of a patient, a physician may not neglect him.”).

180. Geyer, supra note 120, at 1034 (discussing theories underlying veterinary malpractice claims).
of this element is more likely to be raised in situations involving the omission by a veterinarian; however, as stated above, veterinarians are not legally required to treat any animal before they have accepted a case.\textsuperscript{181} The second element, the veterinarian's failure to conform to the standard of conduct, can be rebutted by proving that the veterinarian did not act negligently. The defendant veterinarian can use the same types of evidence as the plaintiff can.\textsuperscript{182}

A defendant can neutralize the third element by showing either that the harm would have occurred regardless of the veterinarian's actions or that there was another reason for the injury. For example, a veterinarian may be able to show that the client did not medicate or care for the animal as the veterinarian had prescribed.\textsuperscript{183} The final element, that injury or harm has occurred, is at the heart of this Article. As discussed below, there are currently limitations on the value placed on animals; thus, the financial harm to the client is usually quite limited.\textsuperscript{184} Regardless, to reduce any damages, a veterinarian can show that the injury or harm is not as significant as the client alleges.

In addition to fighting the lawsuit based on the elements of the claim, veterinarians also have other possible defenses.\textsuperscript{185} Plaintiffs must file their claims for veterinary malpractice within the appropriate statute of limitations.\textsuperscript{186} State statutes generally set limitation

\begin{itemize}
\item \textsuperscript{181} See supra notes 177–79 and accompanying text (noting that veterinarians are not legally obligated to accept an animal for care).
\item \textsuperscript{182} Hannah, *Defenses*, supra note 146, at 1703 (discussing evidentiary uses to make or defend a case); supra note 145 and accompanying text (discussing evidence that can be used in veterinary malpractice cases to establish the requisite standard of care).
\item \textsuperscript{183} Hannah, *Defenses*, supra note 146, at 1703 (discussing the use of contributory and comparative negligence as defenses).
\item \textsuperscript{184} See generally infra Part IV (discussing the types of damages that are awarded in veterinary malpractice actions).
\item \textsuperscript{185} Under certain circumstances, it may be possible to use evidence of a habit as a defense in veterinary malpractice actions. Harold W. Hannah, *Habit as a Defense in a Veterinary Malpractice Suit*, 211 J. AM. VETERINARY MED. ASS'N 1129, 1129 (1997). Habit can be defined as "how an individual responds to a recurring situation." Id. A habit can be something that is either never done or always done, but the party asserting the habit must show that the conduct is semi-automatic or performed as a matter of course. Id.
\item \textsuperscript{186} See, e.g., Storozuk v. W.A. Butler Co., 203 N.E.2d 511, 513 (Ohio Ct. C.P. 1964) (finding that the practice of veterinary medicine would be included within the definition of malpractice for purposes of a one-year statute of limitations and sustaining a demurrer that barred action brought more than one year after services were performed); Satterwhite v. Weedn, 415 S.W.2d 445, 446–47 (Tex. Civ. App. 1967) (upholding an instructed verdict on grounds that the suit was barred by the applicable two-year statute of limitations). Veterinarian defendants may be required to plead the statute of limitations as an affirmative defense. See, e.g., Lobrillo v. Brokken, 837 So. 2d 1059, 1061 (Fla. Ct. App. 2002) (finding that the statute of limitations must be raised in the answer as an affirmative defense in a veterinary malpractice action).
\end{itemize}
Statutory language is not always easy to interpret and can become a focus in the case. For example, in a veterinary malpractice case discussing the applicable statute of limitations, a Minnesota Court of Appeals found that the statute of limitations began to run on the date when treatment for a particular condition ceased, rather than at the time of the negligent action or omission causing the injury. The court explained that the "termination of treatment" rule is used in medical malpractice cases because the trust relationship between patient and physician inhibits the patient's ability to discover malpractice during treatment. The same concerns were deemed to be equally present in veterinary malpractice cases, as both physicians and veterinarians "deal with the investigation, prevention, cure and alleviation of disease." The court found that animal owners rely on veterinarians during the course of treatment to support the application of the termination of treatment rule to veterinary malpractice cases.

Other defenses can be tailored to specific claims. For example, if a veterinarian has evidence that a client granted informed consent, a claim based on the type of treatment selected could be defeated. It may be possible to argue that a client signed an exculpatory clause; however, courts have been reluctant to enforce these types of clauses. Some states also have statutory provisions that provide for specialized standards for professional negligence actions, and the failure to meet the standards can be used to defeat these types of claims.

In claims that relate to injuries to humans, the common law defense of assumption of risk could be utilized. The assumption of risk defense requires the veterinarian to show that the plaintiff knew of

187. MINN. STAT. ANN. § 541.07(1) (West 2000 & Supp. 2003) (providing that all actions against veterinarians must commence within two years).
189. Id. at 923.
190. Id.
191. Id.
192. Hannah, Defenses, supra note 146, at 1703 (discussing informed consent).
193. Id. at 1703–04; see, e.g., Nikolic v. Seidenberg, 610 N.E.2d 177, 179–81 (Ill. Ct. App. 1993) (constraining an exculpatory clause narrowly to allow a veterinary malpractice claim to proceed).
194. See, e.g., Hamilton v. Thompson, 23 P.3d 114, 115 n.2 (Colo. 2001) (noting that the client did not file a certificate of review as required by Colorado law in a counterclaim for professional negligence); see also infra note 361 and accompanying text (noting statutory provisions requiring special procedures for claims of professional malpractice).
195. See supra note 123 and accompanying text (discussing injuries to clients that occurred during veterinarians' treatment of clients' animals). This issue is raised only because of the significant number of such claims, although these claims are not the focus of this Article.
196. Hannah, Defenses, supra note 146, at 1704.
the risk involved in what he or she did (commonly the plaintiff was restraining or near the animal during treatment) and voluntarily assumed the risk.\textsuperscript{197} Assuming that a client is able to prove successfully that veterinary malpractice occurred, the next step in the process is to assess damages in the case.\textsuperscript{198}

IV. DAMAGES

Just as with other animal law issues, determining the value of animals under the legal system has been the subject of increased legal commentary in recent years.\textsuperscript{199} What the commentary in this area generally does not do is distinguish between intentional and negligent torts. Nor does the commentary consider whether a veterinarian should be held to a different standard of care given the veterinarian's status as a professional and the fact that the client has entrusted an animal to the veterinarian's care. By necessity, due to the limited case law in the area, this Article will address damages available for the injury or death of animals regardless of the circumstances surrounding the claim. Where case law allows, the focus of the discussion of damages will be on those cases involving veterinary malpractice.

\textsuperscript{197} Id.

\textsuperscript{198} Just as with other lawsuits, a veterinarian may be able to countoursue under a variety of theories, including malicious prosecution, abuse of process, or breach of contract for unpaid fees. See generally Sokol, supra note 80 (discussing the use of countersuits in medical malpractice cases, most notably as a response to frivolous medical malpractice suits).

\textsuperscript{199} See, e.g., Peter Barton & Frances Hill, How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat?, 34 N.Y.L. SCH. L. REV. 411 (1989) (evaluating the market value approach and variations thereon to account for intrinsic measures of companion animal value); Lynn A. Epstein, Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classification, 26 S. ILL. U. L.J. 31 (2001) (addressing issues of property value approaches to include other non-market value qualities of pets to assess damages for loss of pets); Huss, Companion Animal Status, supra note 1; Squires-Lee, supra note 118 (proposing that the valuation of companion animals should not be wholly dependent upon a property classification); Waisman & Newell, supra note 83; Steven M. Wise, Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal, 4 ANIMAL L. 33 (1998) (proposing that compensation for loss of companion animals should parallel valuation and compensation methods used in cases where parents have lost a small child); S. Joseph Piazza, Note, Liability for the Injury and Destruction of Canines, 26 U. FLA. L. REV. 78, 85–89 (1973) (proposing legal reform to protect companion animals and to allow recovery by owners for more damages than just the market value of the pet); Janice M. Pintar, Comment, Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and Their Owners, 2002 WIS. L. REV. 735 (proposing changes in tort law and the market value approach for companion animals); William C. Root, Note, "Man's Best Friend": Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury, 47 VILL. L. REV. 423 (2002) (arguing that companion pets should be valued as family members). This issue is not a new one for legal commentators.
A. Economic Damages

Traditionally, the only damages available in malpractice claims were the economic damages that arose due to the injury or death of an animal. Clients who are deprived of the use of an animal can be compensated for such loss, just as if any other piece of personal property were damaged or destroyed. Courts historically have used "fair market value" to establish the economic cost of an animal. This is based on the general rule that the value of personal property is the market value immediately before and after the injury. A definition of market value as stated in one veterinary malpractice case is

the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling. In considering market value, you may consider the highest and best use to which the animal may have been used.

If an animal is injured but not killed, the measure of damages is "the difference between the fair market value of the animal before the injury and its fair market value immediately after the injury." Fair market value can be established in a number of ways. Certainly, the purchase price of an animal can be used as evidence of the value of the animal. Any specialized training or skill that an animal has can be used for market value determination. Damages for "future

200. Squires-Lee, supra note 118, at 1061.
203. State v. Morison, 365 P.2d 266, 272 (Colo. 1961) (remanding for a new trial on damages and finding that the plaintiffs were "entitled to a sum equal to the difference between the fair market value of the herd before it contracted paratuberculosis and its fair market value after it became infected with the disease").
204. See Kenny v. Lesser, 722 N.Y.S.2d 302, 305-06 (App. Div. 2001) (reviewing evidence that was utilized to show a race horse's value, including an offer to purchase the horse, and declining to interfere with the fact finding function of the jury, which awarded $100,000 for the death of the horse in a veterinary malpractice action); Collins, 1989 Tex. App. LEXIS 2739, at *5.
205. McDonald v. Ohio State Univ. Veterinary Hosp., 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994) (discussing the damages for the paralysis of a dog that subsequently was euthanized).
conditions where they are reasonably certain to occur or exist in the future," such as potential earnings, can be awarded.\textsuperscript{206} In the context of animals, a common type of future earnings would be the breeding services to be provided by such animals.\textsuperscript{207} It is relatively straightforward to determine the damages for the loss of a food producing animal, as there is a market for such animals.\textsuperscript{208} For food producing animals, damages have been claimed for lost income from the production of products from the animals.\textsuperscript{209}

Notwithstanding the clear precedent that values animals under a fair market value standard, several courts have utilized more flexible standards in determining value though continuing to reference market value as the usual standard. As one court stated, "[m]arket value is... a standard not a shackle."\textsuperscript{210} Other examples of the use of different valuations include cases in which market value cannot be obtained easily or feasibly.\textsuperscript{211} An example of this more flexible standard is the case of McDonald \textit{v.} Ohio State University Veterinary Hospital, in which a highly trained and pedigreed German shepherd suffered paralysis after surgery.\textsuperscript{212} The court considered several factors in determining the value of the dog, including specialized training, awards, and titles, as well as the stud services of the dog.\textsuperscript{213} Expert testimony in

\begin{itemize}
\item \textsuperscript{206} \textit{Id.} (discussing potential earnings for a pedigreed German shepherd).
\item \textsuperscript{207} \textit{Id.} (discussing stud fees for a pedigreed German shepherd).
\item \textsuperscript{208} Bekkemo \textit{v.} Erickson, 242 N.W. 617, 617–18 (Minn. 1932) (setting a market value for spring pigs, sows, and fall pigs and reiterating the standard used by the trial court that "the measure of damages...is the reasonable market value of those hogs which you are reasonably certain would have been saved if the defendant had exercised that required degree of care, skill, and diligence"). The Bekkemo court also noted that "such damages as here involved can never be determined with absolute accuracy or mathematical certainty." \textit{Id.} at 618.
\item \textsuperscript{209} See State \textit{v.} Morison, 365 P.2d 266, 268 (Colo. 1961) (setting forth the damages requested for the loss of a dairy herd from disease allegedly caused by veterinary negligence, including lost income and the use of dairy products and beef). The court in this case cautioned that the plaintiffs were not entitled to damages for losses that occurred after the cattle were sold, or in this case compensation for the loss of the progeny of the sold cattle, as should be reflected in the fair market value of the animal itself. \textit{Id.} at 272–73. The plaintiffs were eligible to receive damages based on the diminution in market value, and allowance of the additional items was considered a form of double recovery. \textit{Id.}; see also Collins, 1989 Tex. App. LEXIS 2739, at *5 (discussing the market value of a steer that died after a dehorning procedure and stating that the potential meat value ranged from $300 to $500).
\item \textsuperscript{210} McDonald, 644 N.E.2d at 752 (discussing damages for the paralysis of a dog that subsequently was euthanized).
\item \textsuperscript{211} \textit{Id.} (providing an example of a case that adopted a flexible quality standard instead of using a market value approach to determine the damages for the loss of an animal).
\item \textsuperscript{212} \textit{Id.} at 751–52 (discussing damages in a case where the defendant filed a stipulation of liability admitting that the surgery on the dog was negligent).
\item \textsuperscript{213} \textit{Id.} at 752 (awarding damages of $5000 for the loss of the dog itself and potential earnings from stud fees).
\end{itemize}
McDonald placed the dog’s value between $0 and $10,000.\textsuperscript{214} Although the court began its analysis with market value, it referenced the time used to train the dog, as well as the efforts of McDonald to rehabilitate the paralyzed animal, and awarded $5000 in damages for the loss of the dog.\textsuperscript{215}

Courts will also use alternative valuations if market value is “not available or not accurate.”\textsuperscript{216} For example, in Hohenstein v. Dodds, the Minnesota Supreme Court recognized that diseased pigs have no market value.\textsuperscript{217} The Hohenstein court set as the proper measure of damages the following: “the difference between the value of the pigs as they were on the date of the defendant’s call, if they were to receive proper treatment, and the value of those which survived defendant’s treatment.”\textsuperscript{218}

Occasionally plaintiffs demand damages consisting of the veterinary expenses incurred because of the tortious conduct.\textsuperscript{219} Statutory provisions in some states provide for veterinary expenses to be used to support damage awards. As an example, a Maryland statute provides that the measure of damages in the tortious injury or death of an animal (specifically a pet) is “the market value of the pet before the injury or death or the reasonable cost of veterinary care, but not more than $5000 if such charge is greater.”\textsuperscript{220} Often the application of these statutes is limited to service animals and the stated purpose is intended only to provide restitution to the disabled persons being assisted by such

\begin{footnotes}
\item[214] Id.
\item[215] Id. This court, although applying a “more elastic standard,” reiterated that “[s]entimentality is not a proper element in the determination of damages caused to animals.” Id.
\item[216] Hohenstein v. Dodds, 10 N.W.2d 236, 238 (Minn. 1943). The court also stated that market value “is not the only measure of value.” Id.
\item[217] Id. (finding that Minnesota law prohibits the selling of animals with infectious or contagious diseases, and that as a result, the pigs had no market value in their diseased condition).
\item[218] Id.
\item[219] Mathew v. Klinger, 686 N.Y.S.2d 549, 550 (App. Term. 1998) (affirming a modified judgment consisting of the amount paid to a veterinarian for treatment where a court later found that the veterinarian committed malpractice in such treatment); Bowles v. Singh, No. CA99-10-094, 2000 Ohio App. LEXIS 3410, at *3, *9 (Ohio Ct. App. July 31, 2000) (affirming a damage award that included veterinary expenses in a veterinary malpractice case). Note that there were several procedural problems with the veterinarian-defendant’s assignments of error in Bowles; thus, the trial court’s presumption of an evidentiary basis for the damages award was affirmed. Bowles, 2000 Ohio App. LEXIS 3410, at *8–*9. The court in Klinger declined to allow recovery for a necropsy to determine the cause of death and found that market value could have been used; however, plaintiff did not introduce any evidence of the dog’s value. Klinger, 686 N.Y.S.2d at 550. But see Stettner v. Graubard, 368 N.Y.S.2d 683, 684–85 (Harrison, N.Y. Town Ct. 1975) (limiting the damages in a veterinary malpractice case to the animal’s market value, despite the fact that the veterinary costs were higher than such market value).
\item[220] MD. CODE ANN., CTS. & JUD. PROC. § 11-110(b) (2002).
\end{footnotes}
animals. The availability of this type of damage to a plaintiff in a malpractice action will depend on the language of the statute, as it is not uncommon that such acts exclude from coverage claims against veterinarians.

B. Non-economic Damages

1. Emotional Distress (Intentional/Negligent)

In addition to damages based on the loss of an animal as personal property, another claim often raised in connection with veterinary malpractice is the intentional or negligent infliction of emotional distress on the client. As there is growing literature discussing the bond between people and their animal companions, as well as greater acknowledgement that the deaths of these animals have a significant impact on people, it is not surprising that people are raising claims for emotional distress relating to the injury or death of animals on a regular basis.

The ability to recover damages for emotional distress depends on widely varying state laws. Some states have allowed claims based on damage to property, while others have held that the destruction of property will not support claims of emotional distress. States also

221. See, e.g., CAL. PENAL CODE. §§ 600.2, 600.5 (West 1999) (providing restitution in the amount of the veterinary bills and replacement cost of the assistance dog if the dog is disabled or killed either by a person or another dog); 740 ILL. COMP. STAT. 13/10 (2002) (allowing economic and non-economic recovery where economic damages include but are not limited to veterinary, retraining, and replacement costs); N.Y. GEN OBLIG. LAW § 11-107 (McKinney 2001) (providing for damages consisting of veterinary costs, retraining or replacement costs, and lost wages or damages due to the loss of mobility incurred while retraining or replacement takes place); OR. REV. STAT. § 346.687 (2001) (allowing economic damages including temporary replacement services, veterinary expenses, and any other cost and expense incurred as a result of the theft of or injury to the animal); UTAH CODE ANN. § 78-20-102 (2002) (providing for damages that included veterinary expenses, replacement services, and costs incurred in recovering the assistance animal).

222. See infra notes 283–87 and accompanying text (discussing statutes that allow non-economic damages for the death or fatal injury of a domesticated dog or cat but may exclude veterinarians (in actions for professional negligence) from their coverage).

223. A person who proximately causes harm is required to pay for damages regardless of the nature of such damages under tort law. Squires-Lee, supra note 118, at 1062. This includes damages for emotional distress even though these types of damages are more difficult to quantify. Id.

224. See Huss, Companion Animal Issues, supra note 7, at 211–12 (discussing the greater attention and awareness given by courts to the grief process that people with companion animals may experience when their companion animals die).

create distinctions based on whether the conduct alleged is intentional or negligent. Conduct usually must be extreme and outrageous in order to support claims of intentional infliction of emotional distress. In order to recover under the theory of negligent infliction of emotional distress, plaintiffs in some states must be close relatives of the victim or have been in fear of physical harm because of the conduct. Recovery for the negligent or intentional infliction of emotional distress may also be limited to those cases where the person alleging the distress is a witness to the tortious conduct or is on the scene immediately after the injury occurs.

Courts have generally been reluctant to allow claims of emotional distress based on the injury or death of animals. It is not uncommon

resulting from the negligent destruction of property and, more specifically, holding that “damages for mental suffering or emotional distress may not be recovered for the negligently inflicted death of an animal”), and Strawser v. Wright, 610 N.E.2d 610, 612 (Ohio Ct. App. 1992) (stating that Ohio law does not permit recovery for emotional distress caused by the negligent injury or destruction of property). One argument that has been raised to attempt to circumvent the restrictions on recovering damages for the loss of personal property is the theory of “constitutive property.” See Lockett v. Hill, 51 P.3d 5, 7 (Or. Ct. App. 2002). Constitutive property is based on the theory that “ownership or possession of certain personal property, like a pet, can become a central aspect of the owner’s sense of identity.” Id.

226. See Carroll v. Rock, 469 S.E.2d 391, 394 (Ga. Ct. App. 1996) (discussing the level of conduct necessary to support a claim of intentional infliction of emotional distress against a veterinarian when a client’s cat escaped while under the veterinarian’s care); see also Katsaris v. Cook, 225 Cal. Rptr. 531, 536–38 (Ct. App. 1986) (discussing the test of extreme and outrageous conduct in a case in which two dogs were shot and remanding to determine if post-shooting conduct supported the claim); Harasymiv v. Veterinary Surgical Assocs., 2003 Cal. App. Unpub. LEXIS 9056, at *10–*11 (Cal. Ct. App. Sept. 23, 2003) (concluding that conduct by a veterinarian sued for malpractice was not extreme, shocking or despicable and that “no reasonable juror could find that defendants’ conduct as alleged ‘exceeded all bounds usually tolerated by a decent society’” (citation omitted)). The Katsaris case had a strong dissenting opinion interpreting the statute that provided immunity from the killing of animals harassing livestock. Katsaris, 225 Cal. Rptr. at 534 n.2; id. at 538 (Sabraw, J., dissenting). “Not only is [the dog] more than property today, he is the subject of sonnets, the object of song, the symbol of loyalty. Indeed, he is man’s best friend.” Id. at 538 (Sabraw, J., dissenting).

227. See Langford v. Emergency Pet Clinic, 644 N.E.2d 1035, 1037 (Ohio Ct. App. 1994) (providing that a plaintiff must be a bystander to an accident or be in fear of physical harm to present a claim for negligent infliction of emotional distress in a case relating to a dog’s improper burial); Rowbotham v. Maher, 658 A.2d 912, 913 (R.I. 1995) (finding that a third party may only recover if he or she is a close relative of the victim and, because the victim was a dog, finding that the dog was not considered a relative).

228. See Krasnecky v. Meffen, 777 N.E.2d 1286, 1289 (Mass. App. Ct. 2002) (applying the general rules relating to emotional distress recovery and precluding any recovery for emotional distress suffered by the owners of sheep that were allegedly killed by neighbors’ dogs). The Krasnecky court specifically found that it was not required to consider whether the class of persons included within emotional distress coverage included companion animals. Id. at 1288–89.

229. Huss, Companion Animal Status, supra note 1, at 93–97 (discussing emotional distress claims relating to the loss of companion animals generally, regardless of the circumstance); see
There have been a few cases where courts have allowed for the possibility of emotional distress.

Roman v. Carroll, 621 P.2d 307, 308 (Ariz. Ct. App. 1980) (finding that where a dog was dismembered by another dog, "damages are not recoverable for negligent infliction of emotional distress from witnessing injury to property"); Coston v. Reardon, No. 63892, 2001 Conn. Super. LEXIS 3188, at *9-*11 (Conn. Super. Ct. Oct. 17, 2001) (finding the requirement that one be closely related to the injury victim in order to establish emotional distress would not be fulfilled by the relationship to the animal and noting that Connecticut does not allow recovery for negligent infliction of emotional distress resulting from injury to property); Krasnecky, 777 N.E.2d at 1288-89 (utilizing existing temporal and spatial proximity requirements in Massachusetts law to not allow claims of emotional distress for the death of seven sheep that the plaintiffs considered companion animals and declining to consider the expansion of the class of persons allowed to recover for emotional distress to companion animals); Rabideau v. Racine, 627 N.W.2d 795, 802, 806 (Wis. 2001) (holding that negligent damage to property cannot be used to maintain a claim for emotional distress, though recognizing that the argument was made in good faith for an extension of existing law and was not frivolous). In addition, there have been several cases raising this issue in New York. New York courts have consistently found that New York laws do not permit recovery for mental suffering and emotional distress in connection with the loss of an animal. See Gluckman v. Am. Airlines, 844 F. Supp. 151, 163 (S.D.N.Y. 1994) (providing an example in a case in which a dog died, allegedly due to the negligence of an airline); Johnson v. Douglas, 734 N.Y.S.2d 847, 848 (App. Div. 2001) (affirming a dismissal of a claim for emotional distress resulting from the loss of a pet by only stating "[i]t is well established that a pet owner in New York cannot recover damages for emotional distress caused by the negligent killing of a dog"); Jason v. Parks, 638 N.Y.S.2d 170, 171 (App. Div. 1995) ("It is well established that a pet owner in New York cannot recover damages for emotional distress caused by the negligent destruction of a dog."); Young v. Delta Air Lines, Inc., 432 N.Y.S.2d 390, 391 (App. Div. 1980) (holding that the plaintiff could not recover for emotional distress for loss of property).

Some confusion has arisen from a finding in an often cited and criticized New York case in which an owner of a poodle who had made elaborate arrangements for the burial of her dog instead found remains of a dead cat in the casket and succeeded on her claim. Corso v. Crawford Dog & Cat Hosp., 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979) (finding plaintiff was entitled to damages beyond the market value of the dog to compensate for "shock, mental anguish, and despondency"). But see Gluckman, 844 F. Supp. at 158 (criticizing the Corso case). The Corso court found that losing the right to memorialize a pet dog (versus a pet rock or losing a family photo album) would be actionable. Corso, 415 N.Y.S.2d at 183. The court distinguished between inanimate objects and pets that return love and affection, respond to human stimulation, and have brains capable of displaying emotion, causing a human response. Id. The court held that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property." Id. The court found that the plaintiff was entitled to damages beyond the market value of the dog from due to the "shock, mental anguish, and despondency" caused by the wrongful destruction and loss of the dog's body. Id. Although sometimes this case is cited to support claims of emotional distress, the New York court treated the mental anguish suffered by the plaintiff as merely a component of the damages from the wrongful destruction and loss of the dog's body, not as a separate claim of emotional distress. Id.; see also Brown v. Muhlenberg Township, 269 F.3d 205, 218-19 (3d Cir. 2001) (discussing a distinction in Pennsylvania law between claims of emotional distress based on behavior toward animals and claims based on behavior that is focused on humans).

230. E.g., State v. Morison, 365 P.2d 266, 268 (Colo. 1961) (reporting that the trial court struck a claim for damages in the amount of $25,000 based on the plaintiff's suffering "great distress and anguish of mind, and loss of time and effort"); Harabes v. Barkery, Inc., 791 A.2d 1142, 1143-46 (N.J. Super. Ct. Law Div. 2001) (setting forth arguments for and against allowing emotional distress damages for the loss of pets in a negligence action against a groomer and
damages in the event of injury or death to animals but have found that the conduct at issue did not meet the standard.\textsuperscript{231} The courts in these cases generally have been able to find that existing state law supports the recovery of emotional distress damages for the loss of property.\textsuperscript{232}

finding that allowing such damages would "proceed upon a course that had no just stopping point").

231. A Kentucky court of appeals found that punitive damages for claims based on intentional infliction of emotional distress would not be precluded simply because the underlying facts involved an animal. Burgess v. Taylor, 44 S.W.3d 806, 812–13 (Ky. Ct. App. 2001) (holding that a case involving the sale of horses for slaughter supported a claim for intentional infliction of emotional distress). The facts supporting this claim included repeated lying on the part of the defendants as to the status of the horses. \textit{Id.} at 810. In another case, the Vermont Supreme Court indicated that a future case seeking recovery for emotional distress resulting from the negligent handling of an impounded animal could be successful. Lamare v. N. Country Animal League, 743 A.2d 598, 605 (Vt. 1999) ("[T]his is not to say that a future case seeking recovery for the emotional distress or other damages resulting from the negligent handling of an impounded animal—a claim not alleged here—would be unsuccessful."). The \textit{Lamare} case can be distinguished from many of the other cases discussed in this section because no injury was inflicted on the animal. \textit{Id.} at 599–600. In \textit{Lamare}, a dog was allowed to be adopted even though an owner had been identified and had taken measures to reclaim the dog. \textit{Id.} at 599–600.

North Dakota's Supreme Court has analyzed the conduct of police officers who shot and killed five dogs in a claim of intentional infliction of emotional distress. Kautzman v. McDonald, 621 N.W.2d 871, 876–77 (N.D. 2001). The \textit{Kautzman} court found that the actions of the officers were not within the parameters of the tort of intentional infliction of emotional distress but reinstated the negligence claim based on the status of the animals. \textit{Id.} at 877–80. Similarly, the Alaska Supreme Court stated that it was "willing to recognize a cause of action for intentional infliction of emotional distress for the intentional or reckless killing of a pet animal in an appropriate case." Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985). The Alaska Supreme Court reaffirmed its willingness to support a claim of emotional distress for the loss of a pet in 2001. Mitchell v. Heinrichs, 27 P.3d 309, 311–12 (Alaska 2001) (recognizing a cause of action for the intentional infliction of emotional distress for the killing of a pet animal but finding that the facts of the case did not support this claim). For an Idaho court decision addressing claims of emotional distress stemming from animal loss, see Gill v. Brown, 695 P.2d 1276, 1277–78 (Idaho Ct. App. 1985) (finding that a lower court erred in striking the Gill's claim for damages caused by mental anguish for the alleged killing of a pet donkey).

232. For examples of non-malpractice cases discussing emotional distress claims for the injury or death of the animal, see \textit{Campbell v. Animal Quarantine Station}, 632 P.2d 1066, 1067 (Haw. 1981) (discussing the negligence of the Animal Quarantine Station where dogs were left in a hot van for at least an hour causing one dog to die of heat prostration), and see also \textit{McAdams v. Faulk}, No. CA01-1350, 2002 Ark. App. LEXIS 258, at *13–*14 (Ark. Ct. App. Apr. 24, 2002) (reversing a trial court's dismissal of a complaint against a veterinarian for negligence and malpractice and stating that "damages on a negligence claim are not limited economic loss damages, and include compensation for mental anguish")., and \textit{Johnson v. Wander}, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (providing that a dog owner's claim for mental pain and suffering presented a question for the jury in a case where a veterinarian allegedly left a dog on a heating pad for a long period of time resulting in serious burns to the animal). \textit{But see Koester v. VCA Animal Hosp.}, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (expressing sympathy for the plaintiff's position regarding emotional distress but deferring to the legislature to create such a remedy); Soto v. United States, No. 1:01-CV-117, 2001 U.S. Dist. LEXIS 10743, *6–*8 (W.D. Mich. July 23, 2001) (citing to the \textit{Koester} case to find that Michigan does not allow for recovery of emotional distress damages resulting from the loss of a pet). In \textit{Campbell}, the damages for the loss of the dog totaled $1000. \textit{Campbell}, 632 P.2d at 1067. Hawaii had previously allowed
As the claim of veterinary malpractice usually is based on a theory of negligence, it is not surprising that it is difficult to find cases that have facts supporting the intentional infliction of emotional distress. The case of *Miller v. Peraino* illustrates one court's view of the use of the claim of intentional infliction of emotional distress in a case involving the relationship between a client and a veterinarian. The clients brought their dog Nera to the veterinarian for oral surgery. The veterinarian told the clients that Nera had died of a heart attack but employees of the veterinarian reported that Nera died after the veterinarian had kicked and beaten the dog with a pole. After the former employees and the clients began picketing the veterinary hospital, the veterinarian sued all of them for defamation, intentional interference with a business and contractual relationship, intentional infliction of emotional distress, and negligence. The clients counterclaimed with allegations, among others, of the intentional infliction of emotional distress resulting from the conduct that led to Nera's death. The *Miller* court distinguished between the veterinarian's actions towards the dog and other conduct that would support the claim of the intentional infliction of emotional distress. Essentially, conduct that is directed toward the dog does not support a cause of action. The court found that recovery for conduct directed toward third parties is limited to members of a person's immediate family present at the time, or other persons if the distress results in bodily harm. The *Miller* court cited to Pennsylvania statutory language stating that dogs are considered to be personal property and cannot be considered persons or family members.

claims of emotional distress for the negligent or intentional infliction of damage to personal property and did not require that the plaintiffs have actually witnessed the tortious event in order to recover damages. *Id.* at 1069, 1071. Hawaii was the first jurisdiction to allow recovery for mental distress without a showing of physically manifested harm. *Id.* at 639-40.

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234. *Id.* at 638.
235. *Id.*
236. *Id.*
237. *Id.* at 639-40.
238. *Id.* at 640.
239. *Id.* The *Miller* court cited to an earlier Pennsylvania case alleging the intentional infliction of emotional distress arising from the death of a dog, *Daughen v. Fox*, 539 A.2d 858, 864 (Pa. Super. Ct. 1993). The *Miller* case is discussed in greater length in this Article because the *Daughen* court focused more on the viability of the tort of intentional infliction of emotional distress itself, rather than the possible facts that could support such a tort.
241. *Id.*
Conversely, it might be possible to sustain a claim of intentional infliction of emotional distress based on the veterinarian’s conduct toward clients.\textsuperscript{242} As the \textit{Miller} court stated, the defendant's conduct must be extreme and outrageous: \textsuperscript{243}

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.\textsuperscript{244}

In the \textit{Miller} case, the veterinarian allegedly made statements such as “Nice truck, soon I’ll own it” while writing down the truck’s license plate number, and that Nera was “fat and ugly like Mrs. Peraino.”\textsuperscript{245} The veterinarian also “asked whether the Perainos had made a rug out of Nera” and had “placed the Perainos' phone number on public phones with the notation that a good time could be had by calling ‘Flo.’”\textsuperscript{246} The \textit{Miller} court found that the lower court did not abuse its discretion by finding that these statements did not meet the standard for a successful claim of intentional infliction of emotional distress.\textsuperscript{247}

An illustration of the way courts consider claims based on the negligent actions of a veterinarian is \textit{Bobin v. Sammarco}, in which a Pennsylvania district court discussed and dismissed a claim of negligent infliction of emotional distress in the case of a dog that died allegedly due to negligent post-operative treatment.\textsuperscript{248} In order to state a claim for negligent infliction of emotional distress in Pennsylvania, it is necessary to show that the plaintiff is a “foreseeable plaintiff who suffered physical injury as a result of the defendant's negligence.”\textsuperscript{249} The element of foreseeability is satisfied if “(1) the plaintiff is a bystander who contemporaneously witnesses an accident in which a close family member is injured, or (2) the defendant owes the plaintiff a

\begin{itemize}
\item \textsuperscript{242} \textit{Id.}
\item \textsuperscript{243} \textit{Id.} at 641.
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{249} \textit{Id.} at *5.
\end{itemize}
pre-existing contractual or fiduciary duty of care.”

In order to meet this standard, the Bobins argued that the court:

should (1) regard domesticated dogs as “‘persons’ for the limited purposes of recognizing the intimate and familial relationship between [a dog] and its owner”; (2) expand the definition of “family” to include pets; and (3) recognize domesticated animals as a special category of personal property entitled to special legal status.

The Bobin court declined to follow any of these theories. The Bobin court (like the Miller court) cited Pennsylvania statutory and case law supporting the proposition that dogs are personal property and not persons. The court next found that there was no controlling authority that would even suggest that Pennsylvania “would recognize the relationship between [pets and their owners] as the functional equivalent of an intimate familial relationship for this purpose.” Finally, the court found that Pennsylvania does not regard pets as a unique form of personal property. Using this analysis, the district court predicted that the Pennsylvania Supreme Court would not recognize the cause of action for negligent infliction of emotional distress resulting from the death of a dog and dismissed that count of the pleading.

Courts in Connecticut have also considered the applicability of emotional distress claims in a veterinary malpractice lawsuit. The court in George v. Leopold found that “bystander emotional distress should not be recognized as a basis for recovery in veterinarian malpractice.”

The George court considered the existing restrictions on the bystander emotional distress action and found that the cause of action would fail in several respects. Initially the court found that the relationship between the client and patient was not one of close relation. The court also stated “it is unlikely that a cat was contemplated in the court’s contemplation of ‘victim.’” An earlier

250. Id. at *5–*6.
251. Id. at *6 (alteration in the original) (quoting plaintiffs’ complaint).
252. Id. at *7–*8.
253. Id. at *7.
254. Id. The court found that relevant Pennsylvania case law supported the contrary conclusion. Id.
255. Id. at *8.
256. Id.
259. Id. at *7–*8.
260. Id. at *4.
261. Id.
Connecticut case also considered the applicability of bystander emotional distress claims in the context of veterinary malpractice. The court in *Altieri v. Nanavati* considered the likelihood that the claim would be available given that the Connecticut Supreme Court had held previously that there could be no bystander emotional distress claim arising out of a case of medical malpractice on another person. The *Altieri* court stated that there “is no reason to believe that malpractice on the family pet will receive higher protection than malpractice on a child or spouse.”

2. Punitive Damages

Punitive damages are awarded to “punish or deter willful, wanton or malicious misconduct”, they are imposed to punish defendants for

262. *Altieri*, 573 A.2d at 361.

263. *Id.*; cf. *Zeid v. Pearce*, 953 S.W.2d 368, 369 (Tex. App. 1997). In *Zeid*, the court noted “that the Texas Supreme Court has held that one may not recover damages for bystander recovery for mental anguish in medical malpractice cases. We see no reason why the same rule would not apply in cases involving death due to veterinary malpractice.” *Id.* at 370 (citations omitted).

264. *Altieri*, 573 A.2d at 361. Another example is a 1996 Iowa Supreme Court case in which the court refused to allow the owners of a dog that was injured during the dog’s stay at a boarding kennel to recover damages for mental distress based on sentimental attachment to the dog or damages for replacement cost or for the pet’s special value. *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 690–92 (Iowa 1996). The injured dog was a toy poodle that had had her left front leg and shoulder blade torn off by the kennel owner’s dog. *Id.* at 690. Although the Iowa Supreme Court recognized that there had been some cases in which damages for mental distress had been allowed in actions based on the killing of a dog, the court found that Iowa law would not support such a claim. *Id.* at 691. As with some other states, Iowa law required that a plaintiff “must actually witness a tortious event in order to recover damages for emotional distress” and that, furthermore, there must be a close relationship between the plaintiff and the victim. *Id.* The law requires that “the plaintiff and victim [be] husband and wife or [be] related to within the second degree of consanguinity or affinity.” *Id.* As much as a beloved pet may be considered a member of the family, the court found that under the law, the animal would not fall within this definition. *Id.* The court decided to follow the majority of jurisdictions that did not allow the recovery of damages for this type of mental distress. *Id.* The Iowa Supreme Court also held that the intrinsic value of the dog would not be considered in awarding damages for injuries to the dog. *Id.* at 692. Not only did the court state that there was no evidence that the dog had a special purpose, the court also noted that the Nichols still enjoyed the companionship of their pet (with the market value of a three-legged dog and four-legged dog being the same). *Id.* at 690, 692. The Iowa Supreme Court had previously recognized the intrinsic value of trees if the trees were standing for a special purpose, such as sentimental and historic reasons, maintained for shade and windbreaks, or for environmental, wildlife and special landmark purposes. *Id.* at 692. The court cited to an Iowa code provision that allowed for treble damages for the willful injury of trees, the lack of such a statute covering dogs, and the lack of evidence that the dog had a special purpose or intrinsic value, and held that intrinsic value should not be used to measure damages in the case. *Id.* at 692; cf. *Fredeen v. Stride*, 525 P.2d 166, 168 (Or. 1974) (providing that conversion does not ordinarily “cause the property owner sufficient mental anguish” for pain and suffering, but that mental distress may be considered “as an element of the damages”).

wrongdoing that is considered extreme and to "deter others from engaging in similar conduct."266 Punitive damages have long been available for the malicious killing of another person’s animal.267 There have been relatively few cases that illustrate the availability of punitive damages in veterinary malpractice cases.268 An example is the Carroll v. Rock case, in which a client sued for the loss of her cat.269 The Carroll court articulated the test for recovery of vindictive or punitive damages as "when a defendant acts maliciously, willfully, or with a wanton disregard of the rights of others."270 Other cases have established that punitive damages are supported where the conduct is grossly negligent, malicious, willful or wanton, or there has been a

266. Peck, supra note 113, at 409–10 (discussing punitive damages in tort law and stating that punitive damages were “well-established as part of the common law well before the American Revolution”).

267. LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 666 (4th ed. 2000); see also Mitchell v. Henrichs, 27 P.3d 309, 311 (Alaska 2001) (discussing the type of offensive conduct that would support punitive damages); Wilson v. City of Eagan, 297 N.W.2d 146, 150–51 (Minn. 1980) (finding that punitive damages were appropriate in a case against an animal warden who had intentionally killed a cat in violation of an ordinance and statute, although the jury verdict of $2000 in punitive damages was reduced to $500); Molenaar v. United Cattle Co., 553 N.W.2d 424, 426, 428–30 (Minn. Ct. App. 1996) (discussing the availability of punitive damages in a personal property action in which sixty-five heifers were converted and punitive damages in the amount of $400,000 were awarded by the jury); Propes v. Griffith, 25 S.W.3d 544, 547, 550–51 (Mo. Ct. App. 2000) (upholding an award of $2000 in actual damages and $4000 in punitive damages for the euthanization of two dogs by a person who was untruthful about her ownership of the dogs and committed other malicious, willful, and intentional conduct).

268. SCHLUETER & REDDEN, supra note 267, at 666 (citing to Florida cases that have allowed punitive damages in veterinary malpractice cases); e.g., Johnson v. Wander, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (holding that a dog owner may be able to support punitive damages for emotional distress suffered as a result of a veterinarian’s negligence); Knowles Animal Hosp. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (holding that an animal hospital’s neglect of a dog which resulted in injury was sufficient to support a judgment in favor of the plaintiffs); see also McAdams v. Faulk, No. CA01-1350, 2002 Ark. App. LEXIS 258, at *13–*14 (Ark. Ct. App. Apr. 24, 2002) (reversing a trial court’s dismissal of a complaint against a veterinarian for negligence and noting that “punitive damages are recoverable on a malpractice claim”).

269. Carroll v. Rock, 469 S.E.2d 391, 392 (Ga. Ct. App. 1996). This case was not one of malpractice but was based on the theory of conversion or breach of bailment and emotional distress. Id. The client took her two cats to a veterinary clinic for surgery, and one of the cats escaped from the clinic. Id. at 392–93. The cat was never recovered. Id. at 392.

270. Id. at 393. The Carroll court found that the trial court erred in instructing the jury on punitive and vindictive damages but stated that such instruction was “inconsequential because no punitive damages were awarded.” Id. The Carroll court continued and found that award of damages for mental distress that does not accompany physical or pecuniary loss is allowed only if the conduct met the same standard required for outrageous or egregious conduct. Id. at 393–94. The court found that the conduct in the case did “not rise to the level of outrageousness and egregiousness required to support recovery for intentional infliction of emotional distress.” Id. at 394.
reckless disregard of an owner's rights.\textsuperscript{271} As with claims of intentional infliction of emotional distress, if the core of the action is based on the negligent actions of a veterinarian, it appears unlikely that the tortious conduct would rise to the level necessary to support punitive damages.\textsuperscript{272}

3. Loss of Companionship

An additional possible claim relating to the loss of an animal is loss of companionship, which is similar to claims based on a human's loss of consortium.\textsuperscript{273} As loss of consortium claims have developed over the years, so has the argument that a loss of companionship claim based on the death of a companion animal may be viable.\textsuperscript{274}

Courts originally limited loss of consortium claims to the material services that a wife provided in the home.\textsuperscript{275} A more sentimental concept later developed that considered a spouse's loss of affection and companionship.\textsuperscript{276} Finally, parents' claims relating to the loss of a child were allowed, and several states have recognized a child's claim for the loss of parental consortium.\textsuperscript{277}

Surveys show that many companion animals are treated as if they are family members.\textsuperscript{278} Studies examining the nature of the relationship between humans and companion animals demonstrate that there is a

\begin{itemize}
\item 271. SCHLUETER & REDDEN, supra note 267, at 666; see also Knowles Animal Hosp., 360 So. 2d at 38 (affirming a jury award totaling $13,000 for the death of a dog that had been severely burned because a veterinary hospital had left the dog on a heating pad for more than a day and holding the injury "suffered by the dog to have been of a character amounting to great indifference to the property of the plaintiffs").
\item 272. See generally infra notes 355–62 and accompanying text (discussing possible limitations and restrictions on punitive damages).
\item 273. See infra notes 323–43 and accompanying text (discussing analogy to wrongful death claims).
\item 274. Waisman & Newell, supra note 83, at 47.
\item 275. Id.
\item 276. Id. Some courts treat these material and sentimental aspects of consortium indivisibly. Id.
\item 277. Id. at 47, 50. The claim of loss of consortium was originally supported by the injury of a spouse or parent, but there are wrongful death statutes that may allow recovery on the same grounds. Id. at 48. Note that wrongful death claims are often restricted by state statute. One example is the various Indiana code provisions covering wrongful death claims where the decedent is not married and does not have dependent children, or where the decedent is a child. Tammy J. Meyer & Kyle A. Lansberry, Tort Law: Recent Developments in Indiana Tort Law, 34 IND. L. REV. 1075, 1075–80 (2001).
\item 278. See supra notes 5–8 and accompanying text (discussing the familial relationships between humans and their animal companions). Seventy percent of dog owners and sixty-two percent of cat owners consider their companion animals to be like children or family members. AM. PET PRODS. MFRS. ASS’N, supra note 5, at xxxiv (reporting data from 2002).
\end{itemize}
significant impact on humans who share their lives with a companion animal. This is not an argument that companion animals should be treated as if they are human children or siblings, only that some companion animals take on roles similar to those of people. Certainly the issue of proving the relationship is one that would need to be addressed to determine whether damages for loss of companionship are appropriate. Clearly, one can make a distinction between animals that are treated as members of the family, in that they live in the home and receive the best veterinary care that can be provided, and animals that have little contact with human family members.

A few cases have held that loss of companionship can be one factor in calculating the actual value of an animal. On the other hand, several cases have held that separate claims for loss of companionship would not be allowed for the loss of an animal.

279. See generally COMPANION ANIMALS IN HUMAN HEALTH, supra note 2 (discussing a variety of studies done on the impact of companion animals in human health); MELSON, supra note 3 (discussing the relationship between animals and children and the impact animal contact has on children).


281. Jankoski v. Preiser Animal Hosp., 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987) (affirming that the loss of companionship could be used as an element in determining damages in a property damage case, similar to the treatment of other items of sentimental value, such as heirlooms and photographs, but refusing to extend an independent cause of action for loss of companionship).

282. Id. (declining to extend an independent cause of action for loss of companionship for the death of a dog allegedly due to veterinary malpractice); Ammon v. Welty, 113 S.W.3d 185, 187–88 (Ky. Ct. App. 2002) (declining to allow damages for loss of consortium and pointing to the lack of a familial relationship in this case, in which a dog was destroyed by a dog warden prior to the expiration of a statutory seven-day waiting period); Krasnecky v. Meffen, 777 N.E.2d 1286, 1289 (Mass. App. Ct. 2002) (finding that the “absence of statutory authority precludes recovery on the plaintiffs’ loss of consortium claims related to the death of the sheep” where seven sheep that were considered companion animals were allegedly killed by the defendants’ dogs); Oberschlake v. Veterinary Assocs. Animal Hosp., 785 N.E.2d 811 (Ohio Ct. App. 2003) (stating that Ohio does not recognize non-economic damages for injuries to companion animals in a veterinary malpractice case); see also Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (dismissing a loss of companionship claim and distinguishing Brousseau v. Rosenthal, 443 N.Y.S.2d 285 (N.Y. City Civ. Ct. 1980), which had allowed a pet’s companionship to be used as a factor to assess a dog’s actual value to an owner); Koester v. VCA Animal Hosp., 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (declining to create an independent cause of action for loss of companionship); Daughen v. Fox, 539 A.2d 858, 865 (Pa. Super. Ct.
C. Statutory Provisions

Recently there have been proposals for several statutory provisions that would establish a right to sue for damages, including non-economic damages, for the death or injury of animals. Such statutes generally focus on domesticated companion animals. Proposals for these statutes commonly occur after cases involving the intentional killing of companion animals receive significant attention. However, a Tennessee statute, the first of its kind, specifically states that it does not apply to veterinarians in actions for professional negligence. But even if there is not a specific exclusion for veterinary malpractice claims, the language of the statute may preclude its use in such claims, as it is common that for the statutory provision to be applicable, the animal must be within the direct control or supervision of its owner or on the owner's premises.

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283. Huss, Companion Animal Status, supra note 1, at 98–103 (discussing existing and proposed statutes relating to the injury or death of companion animals); see also 510 ILL. COMP. STAT. ANN. 70/16.3 (West Supp. 2003) (providing for damages in civil actions against persons who have acted in bad faith in seizing or impounding animals or have been convicted of certain felony animal welfare provisions); H.R. 1260, 64th Gen. Assem., 7th Sess. (Colo. 2003) (proposing loss of companionship damages not to exceed $100,000 for harm resulting from cruelty to companion dogs and cats or from negligent veterinary practices).

284. TENN. CODE ANN. § 44-17-403 (2000) (covering “domesticated dogs and cats normally maintained in or near the household of the owner”); see also Huss, Companion Animal Status, supra note 1, at 98–103 (discussing the Tennessee act and other proposed statutes).

285. E.g., N.Y. State Assembly, Bill Summary—A04545 (n.d.) (providing a justification based on “two recently-publicized cases” for a proposed law that would allow recovery of non-economic damages in the death or injury of a companion animal), available at http://www.assembly.state.ny.us/leg/?bn=A04545 (last visited Feb. 25, 2004).

286. TENN. CODE ANN. § 44-17-403(e).

V. PROPOSED CHANGES TO DAMAGES AVAILABLE IN VETERINARY MALPRACTICE CASES

A. Should Non-economic Damages Be Available in Claims for the Injury or Loss of Companion Animals?

An initial question is whether there should be a change from the current system that, with very few exceptions, does not provide non-economic damages for the injury or death of an animal. Unquestionably, animals under the legal system are treated as just another form of personal property. Whether this is appropriate depends on one's view of the role of animals in today's society. It appears unlikely that there will be a sweeping change in the legal system in the near future to ensure that animals are no longer treated as personal property.  

The relationship between companion animals and the people who care for them has changed and continues to develop. There is now evidence that companion animals can have a significant positive impact on human health. There is a greater acknowledgment of the role that these animals play in the lives of their human family members. From another perspective, the value of these animals has changed. The financial investment in these animals can be considerable for many people.  

288. Perhaps an exception to this rule can be found in the treatment of great apes. There is an active coalition of organizations attempting to provide additional protection to the great apes—chimpanzees, bonobos, gorillas, and orangutans. One step in this process is providing that these animals have a special and unique status. Ways to accomplish this include considering them as beings and allocating rights to them. New Zealand has already taken this step. New Zealand's 1999 Animal Welfare Act provides that non-human great apes will have individual fundamental rights. Animal Welfare Act, 1999 (N.Z.), available at http://www.legislation.govt.nz (last visited Feb. 25, 2004); see also Germany Enshrines Rights of Animals, TORONTO STAR, May 18, 2002, at A28 (discussing the New Zealand statute and noting that the rights include the right not to suffer cruel or degrading treatment and to participate only in the most benign experiments), available at 2002 WL 21219957.

289. See Huss, Companion Animal Issues, supra note 7, at 188–95 (discussing the domestication of animals and the changing relationship between animals and humans).

290. See generally COMPANION ANIMALS IN HUMAN HEALTH, supra note 2 (discussing studies that have been done on the impact of companion animals on human health).

291. See MELSON, supra note 3, at 37–43 (discussing the impact pets have on children and families).

292. Obviously the amount of money that some are willing and able to invest in these animals differs greatly. One animal may be given treatment for cancer, a kidney transplant, or multiple surgeries to repair damage to its knees while other animals are only given palliative treatment or are surrendered when the cost of their maintenance is considered too high. See Brody, supra note 19 (discussing medical treatments available to companion animals); Draper, supra note 13 (discussing laser surgery for animals).
these animals. The law should reflect the values of society. Clearly, for a considerable portion of the population, these animals have a greater economic value than that reflected by currently available damages.

The relationship between many people and their animals is important and should be protected. The tort law goals of affirming societal values through compensation are not being met under the current system. This matter is important to many people and the law often deals with the issues that impact the quality of life for individuals.

Several organizations have developed curricula with the goals of fostering respect for all living things and improving the treatment of animals at their core. Allowing non-economic damages for the loss of animals supports an argument that the value of all living creatures, including human beings, is increased. Recent studies link the abuse of animals with other violent acts. Providing more serious penalties for tortious acts against animals may allow for the recognition of an individual’s potential for additional violence against humans.

Advocates of non-economic damages state that allowing such damages would force veterinarians to be more conscientious and raise the quality of veterinary care. The economic impact of permitting

293. Eric Sundquist, Nonhuman Rights: Are Animals Ours To Eat, To Wear, To Experiment On?, ATLANTA J. & CONST., Aug. 25, 2002, at Q1 (discussing state protections for animals and stating that four laws making cruelty to animals a felony passed within the last year alone).

294. One insurance brokerage company, ABD Insurance and Financial Services, is working to educate its veterinarian clients about the impact of malpractice claims and the possibility of non-economic damages becoming available. O’Brien, supra note 66. Mr. O’Brien believes that it is just a matter of time before non-economic damages (in some form) will be available to plaintiffs in California. Id.


296. Cupp & Dean, supra note 72, at 43–44 (setting forth the goals of the tort system and the arguments made by proponents for allowing economic damages for emotional harm suffered by pet owners). “Owners’ mental harm when a pet is wrongfully killed or injured is quite real, and failure to compensate allows unchecked and uncompensated wrongs.” Id. at 47.


298. Cupp & Dean, supra note 72, at 47–49.

299. MELSON, supra note 3, at 167–81.

300. Id. at 177–79 (discussing cross training and other activities related to the link between animal and child abuse).

301. Willing, supra note 17 (citing to Robert Newman, an attorney who handles animal law cases, including lawsuits against veterinarians for malpractice).
non-economic damages supports the tort goal of deterring future bad acts. In theory, allowing greater damage awards will force veterinarians who do not meet the standard of care out of practice.

There is also a question of fairness. Veterinarians emphasize the importance of the human-animal bond and should not be able to then argue that the bond is irrelevant when it is time to determine damages in malpractice actions. Clients who are not bonded with their companion animals would certainly not seek the sophisticated and expensive treatments at the core of a growing number of veterinarian specialists' practices. As a result, a natural consequence of veterinary malpractice is emotional harm to the clients.

Opponents of non-economic damages often begin by highlighting the economic impact such lawsuits would have on veterinarians and clients. They argue that allowing these types of damages would cause veterinarians to change their practices and to begin performing more defensive medicine. The cost of veterinary care will increase because veterinarians will order more expensive tests. Veterinarians paying higher malpractice premiums will pass on that cost to their clients. The higher cost of veterinary care could price this treatment beyond some people's ability to pay and may increase the rate of euthanization of animals. The financial impact on veterinarians' practices could be significant, further eroding the relatively low salaries of these medical professionals. This financial pressure could cause veterinarians to leave the practice and could decrease interest in this field.

302. Waisman & Newell, supra note 83, at 70 (citing to a veterinary ethics text discussing the promotion of the human-companion bond).
303. Burge, supra note 295 (citing to Richard Cupp, a law professor at Pepperdine University).
304. Id.
305. Cupp & Dean, supra note 72, at 48; Willing, supra note 17 (citing to Victor Schwartz, counsel for the American Tort Reform Association, who said that allowing these types of damages "encourages unnecessary lawsuits," and to Arthur Tennyson, an officer of the American Veterinary Medical Association, who said that "such suits will drive up the cost of vets' malpractice insurance"; see also O'Brien, supra note 66 (discussing the impact of higher awards on the cost of veterinary care).
306. Burge, supra note 295 (citing to Richard Cupp, a law professor at Pepperdine University); see supra notes 110–14 and accompanying text (discussing some the arguments made by proponents of limitations on medical malpractice damages).
307. See supra notes 58–59 and accompanying text (discussing the average salary for veterinarians compared to other medical professionals).
308. By analogy, consider the physicians who have ceased providing certain services because of the risk of significant judgments against them on malpractice grounds. See generally Stein, supra note 108 (discussing the impact of malpractice rates, including the closing of medical clinics and the elimination of high-risk procedures and practices).
Even if the economic benefits outweigh the costs, opponents of non-economic damages point to philosophical arguments against equating animals to humans in this manner.\textsuperscript{309} One philosophical argument is that allowing non-economic damages for the loss of animals will corrode the traditional view that human life is sacred and more valuable than animal life.\textsuperscript{310} Wrongful death statutes articulate a restricted class of human beneficiaries.\textsuperscript{311} Allowing non-economic damages for the loss of animals, makes it possible to argue that animals are being placed above humans who are not covered by such statutes, such as committed but unmarried partners or unadopted stepchildren.

A practical issue to consider is the recent trend to limit non-economic damages. Non-economic damages are notoriously difficult to measure. What is significant pain and suffering that adversely impacts the quality of life for one person may not have the same effect on another.\textsuperscript{312}

There are strong arguments on both sides of this issue. It is certainly possible that a statutory provision allowing for non-economic damages could cause insurance rates and veterinary costs to increase.\textsuperscript{313} Uncertainty alone, especially in jurisdictions where there have been higher than expected judgments or settlements, could also lead to increased rates. An important public policy is to provide an atmosphere where veterinarians can provide services at reasonable prices to as large a number of animals as possible while supporting the general tort goals.

\textsuperscript{309} Burge, \textit{supra} note 295 (citing to Richard Cupp, a law professor at Pepperdine University, who opposes awarding emotional damages to pet owners, stating that "[h]umans and animals are not the same... and should not be treated the same by the law"). Professor Cupp set out both pragmatic and moral arguments against allowing emotional distress damages in a commentary published in 1998. \textit{See} Richard L. Cupp, Jr., \textit{Barking Up the Wrong Tree Justice: Awarding Emotional Distress Damages to Pet Owners Whose Animals Are Harmed Is a Dog of an Idea}, \textit{L.A. TIMES}, June 22, 1998, at B5, \textit{available at} 1998 WL 24395236.

\textsuperscript{310} Cupp & Dean, \textit{supra} note 72, at 48.

\textsuperscript{311} W. PAGE KEETON ET AL., \textit{PROSSER AND KEETON ON TORTS} 947 (5th ed. 1984).

\textsuperscript{312} Note that this Article is not arguing that non-economic damages should be allocated for the pain and suffering of the animals themselves. Although scientific studies have shown that many species of animals have the capacity to feel pain in what appear to be ways similar to humans, the focus in this Article is the impact of veterinarian malpractice on clients. There is certainly room within the legal system to argue for allocation of damages for pain and suffering of animals (presumably with any damage award to be used for the care of an animal). \textit{See} Huss, \textit{Companion Animal Status}, \textit{supra} note 1, at 101–02 (describing a proposed statute in Massachusetts that would provide for such pain and suffering damages). One animal rights activist argues that these pet cases are "worse than useless" because they reinforce the idea that "non-human animals exist for humans' benefit" and are about "humano-centric interests." \textit{Willing, supra} note 17 (citing to Gary Francione, a Rutgers University law professor and author of several animal rights books that focus on animals' status as property).

\textsuperscript{313} The cost of veterinary care has already increased with the utilization of specialists and lifestyle drugs. \textit{See supra} notes 19–23 and accompanying text (discussing the increasing number of specialists and the types of veterinary treatment now available).
of compensation, deterrence, and affirmance of societal values.\textsuperscript{314} Capping non-economic damages to a "reasonable" level would appear to limit the impact of such damages on insurance rates and the provision of veterinary services while allowing meritorious lawsuits.

If such a change is going to be made, for what losses should non-economic damages be available? Non-economic damages in medical malpractice cases are available to plaintiffs for pain, suffering, inconvenience, mental distress, physical impairment, disfigurement, loss of capacity to enjoy life, loss of consortium, society and companionship, loss of love or affection, and other nonpecuniary damages.\textsuperscript{315} Similar damages could be applied to veterinary malpractice cases that impact clients.

Another issue is whether malpractice relating to all species of animals should be covered. Historically, certain animals have been treated differently.\textsuperscript{316} The value of food producing animals appears to be adequately measured under the current system. These animals have always had economic value and such value usually can be determined through market forces. Unlike companion animals, the treatment of these animals does not cause great concern among the majority of the population.\textsuperscript{317} The availability of non-economic damages is premised

\textsuperscript{314} See generally Cupp & Dean, supra note 72, at 48 (discussing the elastic demand for veterinary medicine). One response to the increasing cost of veterinary treatment is to allow for the provision of basic treatment by animal care and nonprofit humane societies. Often there are limitations on the care that these organizations can provide; however, Washington State recently passed statutory provisions, effective on July 1, 2003, that would allow these types of organizations to provide electronic identification (microchipping), surgical sterilization, and vaccinations to low income households. See WASH. REV. CODE ANN. § 18.92.260 (West Supp. 2004). Sometimes services provided to low income animal owners are primarily intended to accomplish a public health or safety goal, such as the vaccination of animals to prevent rabies and the spaying or neutering of pets to deal with an overpopulation problem. See Claudia Kawczynska, Taking It to the Streets, BARK, Fall 2001, at 30 (describing a mobile veterinary clinic used in Los Angeles to provide spaying or neutering services to low income residents' pets).

\textsuperscript{315} CAL. CIV. CODE § 3333.2 (West 1997) (discussing California's cap of $250,000 on non-economic losses for medical malpractice cases); COLO. REV. STAT. § 13-64-302 (2003) (providing for a cap of $300,000 for non-economic damages in tort cases against health care professionals); MO. ANN. STAT. § 538.205(7) (West 2000) (defining non-economic damages); N.D. CENT. CODE § 26.1-14-11 (2002) (providing for limited liability of insureds under the state's medical malpractice insurance scheme of $500,000 per claim and $1 million per policy period); S.D. CODIFIED LAWS § 21-3-11 (Michie 1987 & Supp. 2003) (providing for a cap on general damages of $500,000 with no limitation on special damages in medical malpractice cases); WIS. STAT. ANN. § 893.55(4)(a) (West 1997) (defining non-economic damages).

\textsuperscript{316} See Huss, Companion Animal Status, supra note 1, at 84--88 (discussing existing distinctions based on an animal's species).

\textsuperscript{317} If so, presumably there would be a significantly greater percentage of vegetarians in the population and more attention would be paid to factory farming. See generally MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO
on the type of relationship that a person has with an animal. Presumably, most people involved in food production would not have this type of relationship with their food producing animals (although certainly they may feel very differently about their companion animals). Making distinctions based on animal species is quite common under current law, and there is no reason that such differences, based on the use and usual relationship people have with their animals, cannot be continued under any new statutory provision.\footnote{\textit{Mercy} (2002) (discussing, among other matters, factory farming); Pollan, \textit{supra} note 1, at 58 (discussing the industrialization of American animal farming and one response to it).}

Should general statutes relating to the death or injury of animals include veterinarians? There are compelling arguments on both sides of this issue. Those in favor of including veterinarians in a general statute argue that, especially in egregious cases, veterinarians should not receive protection from liability simply because of their profession. In fact, an argument can be made that veterinarians should be held to a higher standard of care because of the privilege the state grants them, in the form of a license to provide veterinary medical treatment for a fee. In addition, by bringing their companion animals to a veterinarian for treatment, clients have formed a relationship of trust with their veterinarian. The tort goal of deterrence of future bad acts applies equally to veterinarians and other wrongdoers.

Opponents of including veterinarians in general statutes argue that veterinarians are already regulated under veterinary practice acts and by boards of veterinary medicine. One of the reasons for the general statutes is to provide a civil remedy against wrongdoers for the mistreatment of their animals. But, they argue, the common law has already provided such a remedy—that of veterinary malpractice. In addition, there will likely be more suits against veterinarians than other wrongdoers simply because veterinarians are identifiable, unlike many perpetrators of violence against animals.\footnote{See, e.g., N.Y. State Assembly, Bill Summary—A04545, \textit{supra} note 285 (citing to two cases justifying the need for legislation and stating that neither perpetrator had been found).} Finally, from a rational political perspective, unless there are additional safeguards for veterinarians in a statute with general coverage, including veterinarians will likely create a considerable amount of opposition to such legislation. The best statutory language is irrelevant if the legislature cannot pass it. A separate provision relating to damages for veterinary
malpractice would logically be included in the statutory sections relating to litigation actions.\textsuperscript{320}

For these reasons, I recommend the adoption of a separate act relating to veterinary malpractice. Certainly, there should be other acts that relate to the injury or death of companion animals caused by non-veterinarians, as many of the same justifications for adequate remedies apply in those situations.\textsuperscript{321} The distinction is that veterinarians, because of the importance of their role in providing health care to animals, should be afforded protections that are not warranted if a non-veterinarian causes injury to or death of a companion animal.\textsuperscript{322}

\textbf{B. Analogy to Wrongful Death Statutes and the Impact of Tort Reform}

The focus of this paper has been on the underlying action—veterinary malpractice as the basis for suit. Because animals do not have standing to sue on their own behalf, it is necessary to allow their legal owners to sue.\textsuperscript{323} This Article does not attempt to argue that animals should be able to sue on their own behalves—rather, the goal of this Article is to show that the persons closest to the animal should have the right to sue based on the veterinary malpractice's impact on their lives.\textsuperscript{324} It is this impact on third parties that is analogous to existing wrongful death statutes. There are very few cases in which an animal is injured but recovers from its injuries, and the damages issues are complicated in such situations.\textsuperscript{325} Presumably, many of the damages would be the

\textsuperscript{320} For example, under the current law of South Dakota, there is a specific provision providing for a three-year statute of limitations for actions against veterinarians for "malpractice, error, mistake, or failure to cure." S.D. CODIFIED LAWS § 15-2-14.5 (Michie 2001). The section does not prohibit any counterclaim as a defense to any action for services brought by a veterinarian. \textit{Id.}

\textsuperscript{321} \textit{See Huss, Companion Animal Status, supra note 1, at 98–103} (discussing current and proposed statutes that apply to non-veterinarian wrongdoers).

\textsuperscript{322} Although other providers of services for companion animals, such as groomers and boarders, would also experience the impact of allowing non-economic damages, a general statute could cover these providers.

\textsuperscript{323} Huss, \textit{Companion Animal Status, supra} note 1, at 79–82 (discussing the issue of standing as it relates to animals).

\textsuperscript{324} This does not mean that there are no strong arguments that a suit should not be allowed for the impact of the veterinary malpractice on the animals themselves. There are scientific studies supporting the ability of many animals (specifically mammals) to experience pain. There are commentators who argue that focusing the impact on humans reinforces the property status of animals. \textit{See GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW (ETHICS AND ACTION)} (1995).

\textsuperscript{325} An example of this situation is an Iowa Supreme Court case that found that when a dog was injured but not killed, the market value of a three-legged dog and a four-legged dog was the same. Nichols v. Sukaro Kennels, 555 N.W.2d 689, 690, 692 (Iowa 1996). The injured dog was a toy poodle that had had her left front leg and shoulder blade torn off by a kennel owner's dog. \textit{Id.} at 690.
same if an animal survives, but from a practical perspective, many veterinary malpractice suits arise because an animal has died.\textsuperscript{326} The right of survivors to bring suit for compensation for the death of a loved one is established by state statute in the United States.\textsuperscript{327} Wrongful death statutes vary considerably by state.\textsuperscript{328} The statutes define the persons that may bring suit over the death.\textsuperscript{329} Historically, only spouses, parents, and children had the right to sue under a wrongful death statute.\textsuperscript{330} Other possible claimants include siblings. Obviously the relationships between veterinary clients and their animals do not fit within any of these categories, except by analogy.\textsuperscript{331} Wrongful death statutes may create a new cause of action or merely create a remedy to support an existing cause of action.\textsuperscript{332} One example of this is the interaction between medical malpractice claims and wrongful death statutes. In some states, the interaction between statutory provisions dealing with medical malpractice and wrongful death statutes is clear, but in others, there is still some confusion over the rights of parties because of contradictions in the two statutes.\textsuperscript{333}

\textsuperscript{326} Wilson, supra note 14, at 119 (citing to sources at the California State Veterinary Board stating that "approximately 50-70\% of all grievances are associated with the death of an animal"). The complication, of course, is that unlike medical care for humans, euthanasia is a common and accepted part of veterinary practice. The euthanasia of animals occurs both because of economic reasons and a desire to put animals out of their pain. See generally Sara A. Wiswall, Animal Euthanasia and Duties Owed to Animals, 30 McGeorge L. Rev. 801 (1999) (describing new California legislation regulating euthanasia). Note that California has a policy against the euthanization of adoptable animals. See Cal. Civ. Code § 1834.4 (West Supp. 2004).

\textsuperscript{327} 1 Stuart M. Speiser et al., Recovery for Wrongful Death or Injury § 1:9 (3d ed. 1992). Speiser sets out the historical background of wrongful death statutes. Id. § 1:8.

\textsuperscript{328} Id. § 1.9 ("The provisions of the different American state death statutes vary widely."); see also id. § 1.13 (providing that "each of the 50 states has some statutory system under which damages may be awarded for wrongful death").

\textsuperscript{329} Keeton et al., supra note 311, at 947.

\textsuperscript{330} Id. The ability of a person to sue for the death of an unborn fetus varies by state. Many times recovery is based on whether the fetus is viable at the time of the incident that caused the termination of the pregnancy. Jill D. Washburn Helbring, To Recover or Not To Recover: A State by State Survey of Fetal Wrongful Death Law, 99 W. Va. L. Rev. 363 (1996) (discussing the ability to recover for the death of a fetus and dividing the analysis into various time periods relating to the status of the fetus).

\textsuperscript{331} See supra notes 5–8 and accompanying text (explaining that animals are often viewed as members of the family). There have been plaintiffs who have unsuccessfully argued that their companion animals should be treated as family members. See, e.g., Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691 (Iowa 1996) (finding that as much as a beloved pet may be considered a member of the family, under Iowa law, the animal would not fall within the definition requiring that the plaintiff and victim be related to within the second degree of consanguinity or affinity).

\textsuperscript{332} 1 Speiser et al., supra note 327, §§ 1:13–1:14.

\textsuperscript{333} For example, a wrongful death statute may have a different statute of limitations than that of a medical malpractice statute. Jared R. Faerber, Recent Developments in Utah Law, 1997 Utah L. Rev. 1087, 1164 (stating that there are two competing standards in the United States
In addition to wrongful death statutes of general application, there are many state statutes that provide a remedy in the event of a death or injury in specific circumstances. The treatment of a specific profession or activity in a special manner for tort liability is not uncommon. Several recent tort reforms have had limited applicability, allowing legislatures to pass them.

The damages available under wrongful death statutes have evolved over time. The type of damage that is most analogous to the changes proposed in this Article is the ability to recover for the loss of companionship. Early interpretation of many statutes did not allow for the recovery of loss of companionship. Just as wrongful death statutes evolved to allow this type of damage, statutory provisions can be enacted to encompass the relationship between humans and their animal companions.

One barrier to changing the current system is the simple fact that such a statutory provision will be seen as a type of tort reform. Though there are several goals of tort reform, ideally, tort reform should try to discourage the filing of frivolous claims while supporting valid governing which statute of limitations will control wrongful death actions arising from medical malpractice claims).

334. 1 SPEISER ET AL., supra note 327, § 1:9. There are also federal statutes that cover wrongful death in specific situations. KEETON ET AL., supra note 311, at 945-46.

335. Terry Carter, Piecemeal Tort Reform, A.B.A. J., Dec. 2001, at 50 (discussing incremental tort reform measures passed by the U.S. Congress and the likelihood of additional tort reform targets); Andrew Harris, Federal Vaccine Act Shoots Down Suit, NAT'L L.J., Aug. 12, 2002, at B1 (discussing a recent case interpreting the National Childhood Vaccine Injury Act of 1992, 42 U.S.C. § 300, that allows for automatic recovery for damages but requires plaintiffs to fulfill certain procedural requirements); John G. Salmon, Fifteen Years of Colorado Legislative Tort Reform: Where Are We Now?, COLO. L.W., Feb. 2001, at 5, 7-10 (discussing statutory provisions covering the tort liability of special interests, such as dramshops, social hosts, firearms and ammunition manufacturers, ski areas, equine and llama activity sponsors, and baseball team owners).

336. 1 SPEISER ET AL., supra note 327, § 3:3.

337. Id. § 3:36. Speiser points out that the distinction between loss of companionship damages and mental anguish damages is "a fine one." id.


339. Scoggins, supra note 95, at 985-86.
The goal should not be eliminating the ability to file claims against veterinarians. The judicial system can be a powerful force for change. If a veterinarian consistently practices below the standards set by the profession, the veterinarian should be encouraged, through the imposition of damage awards against him or her, to leave the profession. It is unlikely that every individual involved in such a system, whether a veterinarian or a client, will be happy with the system, but the goal should be that, as a whole, the system works best for the public at large.

The difference in types of tort reform reveals that legislatures create rights at the same time they cap potential damages. Although the right to sue for veterinary malpractice exists, the extension of damages to encompass non-economic damages would create a new remedy in most jurisdictions. Based on the adoption and subsequent judicial treatment of other legislation, it appears that courts are likely to uphold the validity of any new veterinary malpractice scheme because of its limited scope.

**C. Proposed Changes in Damages Available in Veterinary Malpractice Cases**

1. Capped Non-economic Damages

In most jurisdictions, statutory provisions must be passed in order to provide for non-economic damages in veterinary malpractice. Similar to the statutory language in existing wrongful death statutes, the proposed provision should set out the parameters for damages and the beneficiaries of the statute. The core language for such a statutory provision is set out in the Appendix to this Article. Any new statutory provision could encompass both economic and non-economic damages.
damages or could limit itself to establishing the ability to recover non-economic damages alone.\textsuperscript{346} Economic damages could expand from merely the loss of the animal itself\textsuperscript{347} to the recovery of veterinary fees,\textsuperscript{348} burial costs, court costs, and attorneys fees.\textsuperscript{349} Allowable non-economic damages could include the loss of reasonably expected society, companionship, and love and affection of an animal.\textsuperscript{350} It would also be appropriate for legislatures to clarify the circumstances, if any, in which emotional distress claims could be brought relating to the injury or death of an animal.

In line with the general trend in tort reform, any non-economic damages allowed by statute should be subject to a cap.\textsuperscript{351} A cap of $25,000 on non-economic damages for the death of an animal is a reasonable goal.\textsuperscript{352} In some jurisdictions, proponents of legislation may need to alter the level of the cap to ensure the passage of the legislation. It is important to note that a cap serves as the outside limit of non-economic damages. There may be relatively few cases in which non-economic damages in any significant amount will even arise, given a particular community’s attitude regarding the status of animals. It will be important to maintain a cap of a certain level in order to provide an incentive to bring only meritorious claims.\textsuperscript{353}

\begin{itemize}
\item \textsuperscript{346} \textit{Id.} (discussing the inclusion of economic damages in wrongful death statutes and the trend toward allowing loss of consortium damages).
\item \textsuperscript{347} See generally supra notes 199–218 and accompanying text (discussing the valuation of killed or injured animals in malpractice cases).
\item \textsuperscript{348} See supra note 220 and accompanying text (discussing a Maryland statute that allows for the recovery of veterinary costs of up to $5000 for the tortious injury or death of a pet).
\item \textsuperscript{349} Waisman & Newell, \textit{supra} note 83, at 72 (setting forth a proposal for recovery of damages in the case of the death or injury of companion animals caused by a tortious act regardless of the circumstances).
\item \textsuperscript{350} \textsc{Tenn. Code Ann.} § 44-17-403 (2000) (setting forth damages allowed by statute for the tortious killing of pets).
\item \textsuperscript{351} Cf. \textsc{Alaska Stat.} § 09.17.010 (2002) (providing non-economic damages caps for personal injury and wrongful death actions). The Alaska statutory provision uses a multiple of a person’s life expectancy to determine damages. \textit{Id. But see Ariz. Const.} art. II, § 31 (providing that there shall be no limitations on “the amount of damages to be recovered for causing the death or injury of any person”); \textit{id.} art. XVIII, § 6 (providing that the “right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation”).
\item \textsuperscript{352} Cf. \textsc{H.R. 03-1260, 64th Gen. Assem.} (Colo. 2003) (proposing that damages for loss of companionship arising out of the death of animals from negligent veterinary practices be capped at $100,000). Compare this with the $250,000 limitation on non-economic loss or injury damages for the death of a human by negligence. \textsc{Colo. Rev. Stat.} § 13-21-203 (2003).
\item \textsuperscript{353} In addition, to reflect the changing economy, the legislature should increase any cap to reflect annual percentage changes in the consumer price index. Cf. \textsc{Mich. Comp. Laws Ann.} § 600.1483(4) (West 1996) (providing an annual increase in the limitation of non-economic damages for medical malpractice cases); \textsc{Mo. Ann. Stat.} § 538.210 (West 2000 & Supp. 2004)
If there is concern that a veterinarian liable for non-economic losses may suffer an unreasonable financial burden, one way to alleviate the problem is to provide that any damages for non-economic losses be payable over a period of time, at the veterinarian’s option.\textsuperscript{354} The time can be set by statute, or such a statutory provision could provide a range of time depending on the value of the non-economic damages. The legislature would determine the public policy issue of whether such a time period would be necessary if the award is covered by insurance.

2. Limited Punitive Damages

It may be necessary to limit punitive damages or collapse non-economic and punitive damages together in order to enable the passage of statutory provisions for punitive damages. Punitive damages have come under criticism in recent years along with other non-economic damages.\textsuperscript{355} Although statistically punitive damages are assessed on a

\footnotesize{(setting a cap on non-economic damages at $350,000 per occurrence from any one defendant, with adjustments based on personal consumption expenditures); NEB. REV. STAT. § 44-2825 (1998 & Supp. 2003) (setting the total amount recoverable under the Nebraska Hospital-Medical Liability Act (optional for patients) to $1.25 million with health-care providers liable for no more than $200,000); NEV. REV. STAT. ANN. 41A.031 (Michie Supp. 2003) (limiting non-economic damages in medical malpractice cases to $350,000 for each defendant with some exceptions, such as gross malpractice); WIS. STAT. ANN. § 893.55(4)(d) (West 1997) (setting a cap of $350,000 for non-economic damages, as adjusted to reflect changes in the consumer price index).}

\textsuperscript{354} Cf. COLO. REV. STAT. § 13-64-203 (2003) (providing that future damages exceeding $150,000 be paid in periodic payments, with future damages lower than $150,000 awarded using periodic payments at the discretion of the court); KAN. STAT. ANN. § 60-3408 (1994) (providing that in medical malpractice liability actions where there are damages for future economic losses, the verdict must specify a period of time over which payment for such losses will be made).

\textsuperscript{355} Symposium, Reforming Punitive Damages: The Punitive Damage Debate, 38 HARV. J. ON LEGIS. 469, 469 (2001) (discussing a public symposium held by the Harvard Journal on Legislation in March 2001 titled “Reforming Punitive Damages”). The issues at the core of the punitive damages debate include (a) the theoretical purpose of such damages, (b) disagreements over the empirical evidence, and (c) policy disagreements over whether there should be reforms of punitive damage law. \textit{Id.} at 470. See generally Theodore Eisenberg, Measuring the Deterrent Effect of Punitive Damages, 87 GEO. L.J. 347 (1998) (responding to Viscusi’s article on the social costs of punitive damages cited below); Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 CORNELL L. REV. 743 (2002) (comparing data on punitive damages imposed by judges and juries); Marc Galanter, Shadow Play: The Fabled Menace of Punitive Damages, 1998 WIS. L. REV. 1 (introducing articles that were the product of a conference on the future of punitive damages); Keith N. Hylton, Punitive Damages and the Economic Theory of Penalties, 87 GEO. L.J. 421 (1998) (commenting on and providing an alternative to the analysis of punitive damages by Polinsky and Shavell cited below); David Luban, A Flawed Case Against Punitive Damages, 87 GEO. L.J. 359 (1998) (criticizing Viscusi’s article on the social costs of punitive damages cited below); M. Stuart Madden, Renegade Conduct and Punitive Damages in Tort, 53 S.C. L. REV. 1175 (2002) (reviewing the matrix in which punitive damages exist and the availability of punitive damage awards in several states); Paul Moin, Why Judges, Not Juries, Should Set Punitive Damages, 65 U. CHI. L. REV. 179 (1998) (considering whether in federal cases judges rather than juries should determine the level of punitive damages); A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic
relatively infrequent basis in civil litigation, substantial verdicts that receive wide publicity have generated controversy.\textsuperscript{356} In addition to court decisions circumscribing the situations where punitive damages are available, legislatures have employed statutory provisions to limit their scope and use.\textsuperscript{357}

There are several ways statutory provisions limiting the availability of punitive damages in veterinary malpractice cases could be drafted. The trigger for punitive damages could be raised from the standard of willful, wanton, or gross misconduct to a standard requiring that the veterinarian defendant have "actual malice."\textsuperscript{358} The evidentiary burden of proof for punitive damages could be set at a standard of "clear and convincing evidence."\textsuperscript{359}


356. George L. Priest, \textit{The Problem and Efforts To Understand It} (discussing punitive damages generally and the controversy surrounding punitive damages), \textit{in Punitive Damages: How Juries Decide} 1–3 (Cass R. Sunstein et al. eds., 2002); Galanter, \textit{supra} note 75, at 744–48 (citing to one study that found that "virtually all" television coverage was triggered if a verdict had an "unusually large" punitive damage awards). Note that the media has reported several cases that have discussed significant monetary awards for injury or death to animals. Julie Scelfo, \textit{Good Dogs, Bad Medicine? More Pet Owners Sue for Malpractice and Win}, NEWSWEEK, May 21, 2001, at 52 (stating that a 1997 Kentucky jury awarded $15,000 to the owner of a German shepherd that bled to death from a botched surgery, and that a California judge in 2000 awarded $27,699 to a woman for the suffering of her dog resulting from bungled dental repairs).


358. Schwartz et al., \textit{supra} note 357, at 1009, 1013 (discussing the use of different standards for the imposition of punitive damages and proposing the use of an "actual malice" trigger, stating that although such a trigger is more conservative than what is currently the law in most states, it would "help separate conduct that is particularly reprehensible and worthy of punishment from that which is not").

359. \textit{Id.} at 1013–14 (stating that this standard is now law in twenty-nine states and the District of Columbia and is the recommendation of principal academic groups that have analyzed the issue over the last ten years).
Providing for caps or proportionality on punitive damages is also an option for legislatures. States could implement special pleading rules for claims that include punitive damages. Although it appears that punitive damages in veterinary malpractice cases will likely be imposed infrequently, providing certainty in the form of a cap may assuage the fears of those concerned about runaway verdicts.

3. Safeguards for Veterinarians

It is possible to include safeguards in any veterinary malpractice act to reduce the likelihood that spurious claims will be brought against veterinarians. These types of safeguards are commonly found in medical liability acts, but unless there is specific statutory language, courts have found that they do not apply to veterinarians. In creating these types of safeguards, legislatures have balanced the needs of physicians and patients. If non-economic damages become available for the loss of animals, veterinarians should receive similar consideration.

360. Id. at 1014–19 (discussing proportionality and state statutes that limit punitive damage awards). Setting the cap of punitive damages as a multiple of the economic or non-economic damages is one option. Id. at 1015–16. Bifurcating a trial involving punitive damages and excluding evidence of a defendant’s net worth are also possible reforms proposed to bring more “equity” in punitive damage awards. Id. at 1018–19.


362. See supra notes 267–72 and accompanying text (discussing the limited number of veterinary malpractice cases involving punitive damages); cf. Michael L. Rustad, Unraveling Punitive Damages: Current Data and Further Inquiry, 1998 Wis. L. REV. 15, 50 (discussing a study of punitive damages in medical malpractice cases that found that these types of damages were “generally awarded appropriately to punish the most egregious medical malpractice abuses . . . [involving] . . . extreme deviation from professional standards of care”). Rustad also found that there were “hot spots” in medical malpractice litigation that formed the bulk of punitive damages awarded in medical malpractice cases. Id. at 34. Rustad cites a 1995 study by the Justice Department that found that the “rate and size of punitive damage awards varies by substantive field of law,” with the rate of punitive damages of three percent in medical malpractice cases. Id. at 27. Note that courts generally refuse to enforce contracts to provide insurance coverage for punitive damages. Tom Baker, Reconsidering Insurance for Punitive Damages, 1998 Wis. L. REV. 101, 101. Although punitive damages then would not impact malpractice insurance rates, individual veterinarians would bear the economic impact of punitive damages. This supports the objective of providing deterrence for egregious behavior but also illustrates the need for caution in allowing punitive damages.

a. Standard of Care

A statutory provision could set forth the requisite standards of practice for veterinarians in those states where case law has not established an applicable standard of care, and where the standard of care needs clarification.\(^{364}\) Obviously, a state providing that the locality rule applies would set a lower standard of care than a state that provides for the application of a universal rule for all veterinarians. As discussed above, the trend of recent cases rejects the locality rule, given the widespread accessibility of information on new and improved treatments for animals.\(^{365}\) As with physicians who are specialists, veterinarians who hold themselves out as specialists for a species or a type of treatment should be held to the standard of such specialists.\(^{366}\) Setting a standard of care of gross negligence or reckless or intentional misconduct prior to civil liability in emergency situations exists by statute in some states and should be adopted if not already established.\(^{367}\)

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\(^{365}\) See supra notes 135–69 and accompanying text (discussing the standard of care in veterinary malpractice cases). Note that another option is to provide that the standard of care be set by veterinarians in the community or in similar communities. This standard may still result in a lower standard of care, but plaintiffs have access to a greater pool of possible experts.

\(^{366}\) Cf. Mich. Comp. Laws Ann. § 600.2912a (setting the standard of practice for physicians in medical malpractice cases and providing that specialists will be held to the standard of care of other specialists in the community or similar communities); see also supra note 18 and accompanying text (discussing the growing number of veterinarians specializing in areas of treatment).

\(^{367}\) Alaska Stat. § 09.65.097 (2002) (stating that a veterinarian providing emergency care to an injured or sick animal will not be liable for civil damages as a result of the care, but not precluding liability for civil damages as a result of gross negligence or reckless or intentional misconduct); Mich. Comp. Laws Ann. § 333.18826 (2000) (providing protection from liability for civil damages in situations where animals have been brought to a veterinarian by someone other than their owners, but stating that the section would not apply if acts amount to gross negligence or willful and wanton misconduct); Or. Rev. Stat. § 686.440 (2001) (providing immunity from civil liability for emergency treatment of animals under certain circumstances and stating that the section does not apply to acts that constitute gross negligence).
Similar to setting the standard of care, a statutory provision could provide for a special burden of proof prior to recovery. In any malpractice case, the plaintiff will have the burden of showing that the injury claimed was proximately caused by the act or omission of the professional. An example of a special burden of proof could consist of a requirement that the plaintiff would not recover unless the plaintiff shows that but for the defendant's negligence, there was a greater than 50% chance of survival or a better result.

Another option is to statutorily circumscribe causes of action to specific situations. An example of this would be limiting actions based on lack of informed consent to non-emergency treatments and articulating defenses that can be used for claims based on a lack of informed consent.

b. Screening Panel

A measure that can be required before or after the filing of a malpractice action is the convening of a screening or review panel. The membership of the panel would be designated by statute and would generally consist of attorneys and, in the case of veterinary malpractice, licensed veterinarians. The screening panel's purpose is to provide recommendations on the issue of whether the professional has met the

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368. See supra note 134 and accompanying text (discussing the elements of a cause of action for a veterinary malpractice action).

369. Mich. Comp. Laws Ann. § 600.2912a(2) (setting forth the burden for plaintiffs in medical malpractice cases). The specific language in the Michigan statute is: "In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." Id.


applicable standard of care. Unlike the activities of a mediator or mediation panel, the written report of a screening panel would be admissible in any subsequent legal proceeding, and the panel members could be called as witnesses at such a proceeding.374

c. Special Pleading Rules

Another safeguard for veterinarians is to implement special pleading rules for malpractice claims. Generally, these standards require the pleading of additional facts or set notice or certificate of merit requirements.375

One option is to require special notice before the filing of a veterinary malpractice claim.376 An analogous example in medical malpractice claims is found in Michigan law, which requires that a plaintiff file a notice setting forth a factual statement of the claim up to 182 days prior to the filing of a suit based on such facts.377 The statute then provides for access to records and a time for the defendants to respond to the allegations.378 These types of notice provisions encourage the settlement of malpractice claims prior to formal litigation.379

Another example of a special pleading rule is the requirement that a "certificate of review" be filed with any claim for negligence against a veterinarian.380 The purposes of such certificates include the reduction

373. Cf. id.
374. Cf. id.
375. Parness et al., supra note 361, at 413.
376. Cf. CAL. CIV. PROC. CODE § 364 (1982) (providing that at least ninety days' notice must be given to a health care provider prior to the commencement of litigation based on such provider's professional negligence); FLA. STAT. ANN. § 766.106 (1997 & West Supp. 2003) (requiring at least ninety days notice prior to filing suit for medical malpractice claims); Mich. Comp. Laws Ann. § 600.2912b (West 2000) (setting forth a notice requirement for plaintiffs in medical malpractice cases).
378. Id.
of frivolous claims and the protection of the defendant from reputational harm. These certificates typically require plaintiffs to show that they have “consulted a person who has expertise in the area of the alleged negligent conduct, and the expert has concluded that the claim is meritorious.” Any certificate or “affidavit of merit” could require the professional serving as the plaintiff’s expert to state that the applicable standard of care was breached, set forth the specific actions that should have been taken or omitted, and provide information on how the actions or inactions caused the injury. A parallel requirement could be established for the defendants of veterinary malpractice actions in which the defendant must provide an affidavit of meritorious defense. In the alternative, a state could require that a bond be filed or cash be placed in an escrow account for each professional named in the action.

(providing that an affidavit must be filed no later than 90 days after the filing of the petition and that the plaintiff shall obtain the written opinion of a legally qualified health care provider); NEV. REV. STAT. ANN. 41A.071 (Michie Supp. 2003) (requiring that an affidavit by a medical expert be included with any filing in any actions for medical malpractice filed in the district court); N.Y. C.P.L.R. 3012-a (McKinney 1991) (providing that a complaint in a medical, dental, or podiatric malpractice actions must be accompanied by a certificate, executed by the attorney, that includes, among other things, certification that the attorney has consulted with one professional in the area where the alleged malpractice has occurred and that there is a reasonable basis for the commencement of such an action, or that such consultation should be excused). See generally Jeffrey A. Parness & Amy Leonetti, Expert Opinion Pleading: Any Merit to Special Certificates of Merit?, BYU L. REV. 537 (1997) (discussing the effectiveness of special certificates of merit). Certificates of merit have also been required in other professional malpractice claims, and in product liability claims and certain sexual abuse claims. Id. at 539; see also Parness et al., supra note 361, at 416–20 (discussing special pleading rules in professional malpractice cases).

381. Parness & Leonetti, supra note 380, at 541–52 (discussing rationales for special certificates of merit and proposing changes to statutes); see also Leo, supra note 104, at 1404–05 (stating that a purpose of the Minnesota statutory provision requiring an affidavit of expert review is “to reduce the cost of medical insurance by preventing frivolous medical malpractice claims”).

382. Hamilton v. Thompson, 23 P.3d 114, 115 n.2 (Colo. 2001) (citing to the failure of a client to file a certificate of review in connection with a counterclaim based on a veterinarian’s professional negligence as support for the dismissal of such counterclaim).

383. Cf. MICH. COMP. LAWS ANN. § 600.2912d (West 2000) (setting forth an affidavit of merit requirement for plaintiffs in medical malpractice cases).

384. Cf. id. § 600.2912e (setting forth an obligation of defendants in medical malpractice actions to provide an affidavit of meritorious defense).

385. Cf. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01 (repealed 2003) (providing for bond or escrow in lieu of filing an expert report pursuant to the Texas Medical Liability and Insurance Improvement Act). This act has been found not to apply to veterinarians. Neasbitt v. Warren, 22 S.W.3d 107, 112 (Tex. 2000).
To ensure prompt action by clients in filing their claims, states could pass a special statute of limitations for veterinary malpractice claims, requiring them to be brought earlier than other negligence claims.\footnote{Cf. Leo, supra note 104, at 1404 (stating that “[n]early every state has a special statute of limitations for medical negligence claims”).}

d. Other Safeguards

It is not always clear whether expressions of sympathy or gestures in the form of apologies are admissible in court.\footnote{CAL. EVID. CODE § 1160 cmt. (West Supp. 2004).} Because of this uncertainty, veterinarians and their staffs may be cautious about expressing their sorrow after the death of an animal under their care. There is evidence that many lawsuits arise out of anger resulting from the “failure of another party to express regret or sympathy.”\footnote{Id.} Clarifying veterinarians’ or their staff members’ ability to express sympathy may reduce the likelihood that a malpractice suit will be filed.\footnote{Cf. COLO. REV. STAT. § 13-64-401 (2003) (setting forth the qualifications required of expert witnesses in medical malpractice actions); IOWA CODE ANN. § 147.139 (West 1997) (setting forth expert witness standards in medical malpractice cases); KAN. STAT. ANN. § 60-3412 (1994) (providing that expert witnesses in medical malpractice actions to have spent at least fifty percent of their professional time in clinic practice within the two years preceding the incident at issue); N.C. GEN. STAT. § 8C-1, R. 702 (2003) (setting forth the criteria for expert witnesses in medical malpractice actions and requiring that such experts have spent a majority of their time teaching or in active practice during the year immediately preceding the action alleged).}

In order to ensure that expert witnesses in veterinary malpractice actions have a realistic view of the practice, a provision could include a requirement that any such expert witness must have devoted a percentage of his or her professional time, within a period preceding the incident, to clinical practice.\footnote{Cf. CAL. CIV. CODE § 3333.1 (1997 & West Supp. 2004) (setting forth the right of a defendant in a medical malpractice action to bring evidence of benefits paid and the right of a plaintiff in such an action to introduce evidence of the costs incurred to secure his or her rights to such benefits).}

Although the percentage of animals covered by health insurance in the United States is still quite low, just as in other types of litigation, a veterinarian who is held liable for malpractice should be allowed to introduce evidence of insurance coverage in order to reduce the amount of veterinary fees the veterinarian may have to reimburse.\footnote{Id.; see also MASS. ANN. LAWS ch. 233, § 23D (Law. Co-op 2000) (providing that under certain circumstances, statements expressing sympathy will be inadmissible as evidence of an admission of liability in civil actions); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon Supp. 2004) (setting forth restrictions on the admission of communications of sympathy in civil actions).}
Finally, it is also possible to require the trier of fact to articulate how the damages were calculated, distinguishing between economic and non-economic damages, which would force judges or juries to justify their damage awards.\textsuperscript{392} Presumably, given the low economic value of most animals, the bulk of any damage award for veterinary malpractice in a jurisdiction that allowed for non-economic damages would be for these damages.

4. Role of Alternative Dispute Resolution

It may also be appropriate to encourage the greater use of alternative forms of dispute resolution in these cases.\textsuperscript{393} There is concern that alternative methods of dispute resolution may be abused when applied to disputes between consumers and providers of goods and services.\textsuperscript{394} Notwithstanding this concern, in situations where alternatives such as binding arbitration have been agreed upon by the parties, such procedures should be supported.\textsuperscript{395}

\textsuperscript{392} Cf. COLO. REV. STAT. § 13-64-204 (2003) (providing that special damages findings are required for certain tort claims); 735 ILL. COMP. STAT. 5/2-1706 (2002) (requiring special findings in medical malpractice case damages); WIS. STAT. ANN. § 893.55 (West 1997) (providing for the articulation of various damages recovered for medical malpractice cases).

\textsuperscript{393} Scoggins, supra note 95, at 986; see also Harold W. Hannah, Reducing Your Malpractice Vulnerability, 209 J. AM. VETERINARY MED. ASS’N 1859, 1859 (1996) (discussing the use of alternative forms of dispute resolution and other ways veterinarians can reduce their vulnerability to malpractice claims). The largest insurer of veterinarians, the AVMA’s PLIT, has not been involved in any formalized ADR program. Shirbroun Interview, supra note 93.

\textsuperscript{394} See Jean R. Sternlight, Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers, 71 FLA. B.J. 8, (1997) (discussing impact of court decisions that allow companies to impose binding arbitration agreements on consumers); Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 TUL. L. REV. 1 (1997) (challenging the assumption that binding arbitration raises no constitutional concerns). Other issues raised by the decreasing percentage of cases that go to trial is the lack of decisions that can be used as precedent, the impact on the right to trial by jury, and isolation of the justice system from the public. Hope Viner Samborn, The Vanishing Trial, A.B.A. J., Oct. 2002, at 24, 26 (2002).

\textsuperscript{395} All types of alternative dispute resolution can produce binding results, however, only agreements to arbitrate can bind parties entering into them before disputes arise. STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 7–8 (2001). But see KIMBERLEE K. KOVACH, MEDIATION PRINCIPLES AND PRACTICE 57 (2d ed. 2000) (stating that “it currently appears that most courts will enforce voluntary mediation clauses”). There is also specific statutory support for binding arbitration in the context of medical malpractice actions. CAL. CIV. PROC. CODE § 1295 (West 1982) (providing for specific language on any contract for medical services containing a binding arbitration clause); COLO. REV. STAT. § 13-64-403 (2003) (setting forth circumstances under which binding arbitration procedures for medical malpractice claims will not be deemed contrary to the public policy of the state); FLA. STAT. ANN. § 766.207 (West 1997 & Supp. 2004) (setting forth rules relating to voluntary binding arbitration of medical negligence claims); 215 ILL. COMP. STAT. 5/155.20 (2002) (providing that medical malpractice disputes subject to arbitration will be binding on insurance companies); MICH. COMP. LAWS ANN.
Given the emotional nature of a claim, often arising out of the death of an animal, mediation could play an essential role in reducing the number of claims that are litigated.\textsuperscript{396} Mediation in medical malpractice actions often utilizes specific statutory provisions reflecting the interests of all parties.\textsuperscript{397} For example, in Michigan, rather than having one or two mediators conduct a mediation, a five-member panel consisting of three attorneys and two medical professionals controls mediation.\textsuperscript{398} Given the considerably lower dollar value of veterinary malpractice cases, a single mediator or three-member panels may be more appropriate. Given the expertise of current members of boards of veterinary practice, such board members could be called upon to act on such panels.

Although mediation is non-binding by its very nature, it is possible to establish consequences for any future litigation arising out of the mediation.\textsuperscript{399} As an example, a unanimous panel could determine that an action or defense is frivolous and without merit, and any party raising such an action or defense at trial could be required to post a bond; if judgment is entered against the party posting the bond, the bond could be used for payment of costs incurred by the other parties responding to the action or defense deemed frivolous.\textsuperscript{400}

Another consequence of a party rejecting a unanimous mediation panel could be the requirement that the “losing” party, which rejected

\textsuperscript{396} KOVACH, supra note 395, at 48–49 (discussing the role of emotions in the mediation process); WILSON, supra note 14, at 119 (reporting that according to sources at the California State Board, 50 to 70\% of grievances relate to the death of an animal).

\textsuperscript{397} MICH. COMP. LAWS ANN. §§ 600.4903–4923 (West 2000) (setting forth the procedures for a medical malpractice mediation); MINN. STAT. ANN. § 604.11 (West 2000) (requiring parties to discuss and determine whether a form of ADR is appropriate in each medical malpractice case); WIS. STAT. ANN. §§ 655.42–61 (West 1995 & Supp. 2003) (setting forth a mediation system in medical malpractice cases and providing for a three-member panel consisting of a public member, an attorney, and a health care provider).

\textsuperscript{398} MICH. COMP. LAWS ANN. § 600.4905.

\textsuperscript{399} The consequences can be informal, such as the psychological benefits of having your case reviewed by an outsider prior to litigation, or formal, as described below. Court ordered non-binding arbitration is also possible. Cf. FLA. STAT. ANN. § 766.107 (1997 & West Supp. 2004) (providing for non-binding arbitration for medical negligence cases at the motion of either party).

\textsuperscript{400} Cf. MICH. COMP. LAWS ANN. § 600.4915 (providing for evaluation and awards by a panel in medical malpractice mediation).
an evaluation, be required to pay the costs of the other party.\footnote{401} Even if “mandatory mediation” is not included in a statutory provision, there could be a requirement that a settlement conference be held before the matter goes to trial.\footnote{402}

The use of alternative forms of dispute resolution would require the support of the veterinary community at large, but the adoption of such dispute resolution systems has occurred in other professions, with some degree of success.\footnote{403}

\section*{VI. Conclusion}

The current system is not ideal, either for veterinarians or their clients. Veterinarians are now feeling the pressure of an increasing number of claims with the possibility of significant damage awards. Not knowing the outer limit of the damages that could occur if a suit is successful makes it difficult to determine the appropriate pricing and coverage of malpractice insurance. Malpractice insurance costs will increase as companies try to stay ahead of potential claims. Increased insurance costs will then likely cause increased prices for the services that veterinarians provide—possibly pricing some clients out of the market and limiting access to necessary medical services for their animals. From a client's perspective, the damages currently available in many jurisdictions do not reflect the value of these animals—economically or otherwise. Limiting damages to economic value also fails to support the general tort goals of deterrence of wrongful acts, appropriate compensation of victims, and affirmation of societal values.

Given the current legal status of animals as personal property, without considerable judicial activism or the adoption of legislation, it is

\footnote{401. Cf. id. § 600.4921 (adjusting costs if there has been a rejection of a unanimous panel evaluation in medical malpractice mediation).}

\footnote{402. Cf. ARIZ. R. CIV. P. 16(c) (providing for comprehensive pretrial conferences in medical malpractice cases and requiring that a date be set for a mandatory settlement conference); FLA. STAT. ANN. § 766.108 (West 1997 & Supp. 2004) (requiring mandatory settlement conferences in medical malpractice actions); KAN. STAT. ANN. 60-3413 (1994) (requiring settlement conferences in medical malpractice actions); NEV. REV. STAT. ANN. § 41A.081 (Michie Supp. 2003) (requiring settlement conferences in actions for medical malpractice).}

\footnote{403. See KOVACH, supra note 395, at 352 (discussing the use of mediation in the resolution of attorney-client disputes). See generally id. at 339–57 (discussing specialized applications of mediation). Mediation has been proposed as an alternative to veterinary disputes in Canada. Elizabeth Saul, To Litigate or Mediate, That Is the Question!, 40 CAN. VET. J. 243, 243 (1999) (discussing mediation as an alternative to litigation in veterinary disputes). Mediation is already used in other disputes relating to animals. Quentin Hardy, If Things Get Caty in Marin County, Police Call Ms. Greer: A Pet Mediator, She Referees Dogged Animal Disputes; Ruff Justice for Rocky, WALL ST. J., June 6, 1997, at A1 (discussing the use of a pet mediator to deal both with disputes between neighbors and custody disputes), available at 1997 WL-WSJ 2423244.
unlikely that there will be widespread establishment of standards that allow clients to be compensated at something other than a fair market value of their companion animals in the near future. Every legislative session provides an opportunity for organizations concerned about animal welfare and the relationship between humans and their animals to propose new statutory language. Adoption of such legislation is controversial. It is good public policy to have laws that reflect the changing nature of the relationship between people and their animals, but such laws must consider the impact on the health of animals overall. A balanced approach that provides for capped non-economic damages is an important starting point in recognizing the changed status of these animals in our society while also encouraging professionals to continue providing quality veterinary care.
APPENDIX

PROPOSED STATUTORY LANGUAGE

Definitions As used in this Section __, unless the context otherwise requires:

(1) "Animal-companion" means a dog, cat, or any warm-blooded domesticated nonhuman animal that is owned or kept by a person primarily for purposes of companionship.

(2) "Owner" means the legal owner of an animal-companion and the people residing in the Owner’s household who have a demonstrable bond with the animal-companion.

(3) "Veterinarian" means a person who has received a doctoral degree in veterinary medicine or its equivalent from a school of veterinary medicine and is licensed to practice pursuant to [cross citation to veterinary licensing section].

(4) "Veterinary service" means a service or procedure included within the practice of veterinary medicine, as defined in [cross citation to veterinary practice act].

Damages for Harm Resulting from Veterinary Malpractice

(1) If it is proven, in a civil action, that a veterinarian has through negligent veterinary practice, performance, or prescription of veterinary services, caused the injury or death of an animal-companion, the animal-companion’s Owner may recover the damages described in this subsection __.

(2) Economic damages may be recovered for the fair monetary value of the animal-companion, veterinary costs and fees, and reasonable burial expenses of the deceased animal-companion.

(3) Non-economic damages may be recovered for the loss of the reasonably expected society, companionship, comfort, protection, and services of the animal-companion as well as the pain, suffering, and emotional distress sustained by the Owner.

404. This statutory language is derived in part from a variety of sources. See TENN. CODE ANN. § 44-17-403 (2000) (providing for damages of up to $4000 for the emotional distress caused by the loss of a pet because of the negligent act of another); H.R. 03-1260, 64th Gen. Assem. (Colo. 2003) (proposing damages for harm from negligent veterinary practices as well as cruelty to animals); H.R. 932, 183rd Gen. Ct., Reg. Sess. (Mass. 2003) (providing for non-economic and capped punitive damages for the tortious injury or killing of a companion animal); H.R. 7610, 224th Leg., Ann. Sess. (N.Y. 2001) (allowing for damages of up to $5000 in a proposed bill); Waisman & Newell, supra note 83, at 71–73 (proposing legislation providing a general remedy for people whose companion animals have been wrongfully injured).
(4) Any award of non-economic damages under this section may not exceed twenty-five thousands dollars ($25,000).