

MODERN TRENDS IN VETERINARY MALPRACTICE:
HOW OUR EVOLVING ATTITUDES TOWARD
NON-HUMAN ANIMALS WILL CHANGE
VETERINARY MEDICINE

By
Mary Margaret McEachern Nunalee*
& G. Robert Weedon**

The magic of Lassie is not just a movie script made in magicland USA, but for many a young boy and girl it may well be the theme song for their feelings about a little dog that just happens to live at home with them, and for most of these persons who have dogs at home, the greatest problem, pooper-scooper notwithstanding, is that these dogs believe quite honestly that they are human beings and members of the family. In a sense this decision might be dedicated to just such a four-legged member of the family. The facts are, at least at the beginning, not uncommon to many a home, where a pet permits his owners to live with him. As often happens, the pet . . . took ill on the weekend and the owner was unable to reach a veterinarian. To those who are not indoctrinated in this field of unusual medicine, a veterinarian . . . may, with no disrespect meant to either medical specialty, be referred to with love and affection as a "pet's family pediatrician."¹

* © Mary Margaret McEachern Nunalee, 2004. Ms. McEachern Nunalee practices law as *Mary Margaret McEachern Nunalee, P.L.L.C.* in Wilmington, North Carolina. She has been an *Animal Legal Defense Fund* attorney since she began her practice in 1996. She guest lectures and teaches courses as an Adjunct Lecturer of Honors at the University of North Carolina at Wilmington. Her courses focus on issues surrounding the human-animal relationship, including social, legal, and ethical implications. Ms. Nunalee is a 1996 graduate of the Norman Adrian Wiggins School of Law, Campbell University, in Buies Creek, North Carolina. She served as a Notes & Comments Editor on the *Campbell Law Review*. She has published several scholarly articles, lectures on a variety of topics, and has served as lead counsel in several reported state and federal cases.

** © G. Robert Weedon, 2004. Dr. Weedon practices veterinary medicine as the senior partner at the College Road Animal Hospital, P.L.L.C. in Wilmington, North Carolina. He teaches courses as an Adjunct Lecturer of Honors at the University of North Carolina at Wilmington. His courses focus on issues surrounding the human-animal relationship, including social, legal, and ethical implications. He received his Doctorate of Veterinary Medicine from Purdue University in 1981, and is currently pursuing a Masters Degree in Public Health at the University of North Carolina at Chapel Hill.

¹ *Animal Hosp. of Elmont, Inc. v. Gianfrancisco*, 100 Misc. 2d 406, 406-07 (Dist. Ct., 2d Dist., Nassau County 1979).

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I. INTRODUCTION

As our relationships with the animals who grace our lives morph over time into something greater than that of simple property ownership, so do our attitudes toward their veterinary care. The purpose of this article is to trace the historical trends in the attitudes of humans toward non-human animals generally and apply that analysis to recent and predicted future trends in veterinary malpractice jurisprudence. This article is also designed to assist attorneys representing owners and veterinarians in spotting the myriad legal issues that have arisen from these trends in order to more effectively represent parties to malpractice actions.

First, the article will briefly compare schools of thought in animal welfare and animal rights. Within that analysis, the article will trace the evolution of logical syllogisms ranging from "animals as property" to "animals as constitutive property" to "animals as persons." The author (McEachern Nunalee) will propose a new category: "animals as companion constitutive chattels."

Second, as one of the major concerns surrounding veterinary malpractice jurisprudence involves the potential award of substantial non-economic damages, the article will delve into how these damages are directly affected by our general attitudes toward animals. It will explore historical trends and give the reader a snapshot of nationwide legislative and judicial attitudes toward such damages.

Third, the article will highlight the metamorphosis of the veterinary medical profession over time.

Fourth, the article will translate these analyses into specific legal concerns for today's veterinarian and for any attorney who desires to practice in the area of veterinary malpractice from either side of the issue. It will explore how veterinary medicine differs from conventional medicine, focusing on some of the reasons the practice of veterinary medicine may pose more challenges than conventional medicine.

The veterinarian is often faced with several potential levels of liability: malpractice liability, premises liability, liability under the doctrine of *respondeat superior*², and bailment liability. The article will explain, using hypothetical examples, how these types of liability differ from one another in legal theory, as well as in practical application. It will touch on how the practical aspects of veterinary medicine affect veterinarians' potential legal liability.

² Defined literally as, "let the master answer," this legal doctrine stands for the proposition that the master or employer is liable in certain cases for the wrongful acts of his servant or employee. *Black's Law Dictionary* 1311-12 (7th ed. West 1990). A veterinarian who represents that an individual is his servant or other agent, thereby causing a third person to justifiably rely upon the care or skill of such apparent agent, is subject to liability to the third person for harm caused by the lack of such care or skill on the part of the servant or agent. Sam A. Mackie, *Veterinary Malpractice*, 32 Am. Jur. 3d Proof of Facts § 351 (1988 & Supp. 2003).

For the attorney, simple negligence theories can become complex in the context of veterinary malpractice actions. In order to state a claim for negligence, a plaintiff must establish the following four elements: 1) duty; 2) breach; 3) causation; and 4) damages. For instance, one must determine to whom a duty is owed. Is it the animal, the animal's owner, both, a third party, the public? In other words, does the veterinarian serve an animal "patient," a human "client," both, a third party, the public? What constitutes breach of duty? How can a plaintiff conquer the formidable "actual and proximate cause" hurdle? For reasons expounded upon below, the damages issue poses likely the most difficult obstacle to plaintiffs in veterinary malpractice cases. Because of the historical treatment by our laws of animals as property, proving non-economic damages is almost impossible and generally will require the establishment of new common law.

In any professional malpractice action it is important to establish a proper standard of care. In the case of veterinary malpractice, the issue is in flux. For instance, courts tend to favor a "professional paradigm" analysis over the "ordinary prudent person" standard, which fails to take into account a professional's specialized skills, or the "locality rule," which was much more in favor during those times when our society was more agrarian in nature.

Fifth, the article will survey statutory and common law trends in veterinary malpractice jurisprudence throughout the United States.

Finally, the article will analyze the potential ramifications of these trends, acknowledging the proverbial double-edged sword: while we want the highest quality care for our companion animals, will the rising cost of veterinary malpractice insurance borne out of the increase in litigation and larger damages awards render veterinary care cost-prohibitive for the average pet owner? The article will explore both the upsides and downsides of recent trends, will project future trends, and will alert the reader to up-and-coming services, such as pet health insurance, that may tend to ultimately negate the downsides of recent and future trends.

II. TRENDS IN HUMAN ATTITUDES TOWARD NON-HUMAN ANIMALS³

A. *Modern Syllogistic Trends*

Modern syllogistic trends mandate treating animals—especially companion animals—as something greater than property; although

³ Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* 2 (Temple U. Press 2000) [hereinafter Francione, *Introduction to Animal Rights*] (citing René Descartes, *Discourse on the Method*, in *The Philosophical Writings of Descartes* vol. 1 (John Cottingham, Robert Stoothoff, & Dugald Murdoch trans., Cambridge U. Press 1985)); Gary L. Francione, *Animals, Property, and the Law* 8 (Temple U. Press 1995); Gary L. Francione, *Introduction to Animal Rights* 3 (citing Immanuel Kant, *Lectures of Ethics* (Louis Infield trans., Harper Torchbooks 1963)); Tom Regan & Peter Singer, *Animal Rights and Human Obligations* 23–44 (Prentice-Hall 1989); Gary L.

animals have not yet attained the status of legal "personhood," they are certainly not of the same ilk as the living room sofa.⁴ Some authors advocate considering animals as "constitutive property."⁵ As "constitutive property," companion animals are metaphorical extensions of their owners.⁶ This type of property is "bound up with personhood . . . [and is] part of the way we constitute ourselves as continuing personal entities in the world."⁷ The loss of this type of property "causes pain that cannot be relieved by [its] replacement."⁸ The killing of a person's pet may threaten the very way the person constitutes oneself; in losing one's companion animal, one loses a vital part of oneself.⁹

While at first glance the "constitutive property" syllogism seems to accurately depict public attitudes toward companion animals, it does not reveal the entire picture. "Constitutive property," by definition, occupies a special place in its owner's heart; however, such property cannot—due to its inanimate nature—respond to its owner expressively in the same manner as does a pet. In other words, while a person

Francione, *Introduction to Animal Rights* 5 (citing Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Laurence J. Lafleur ed., Hafner Press 1948)); see generally Peter Singer, *Animal Liberation* (2d ed., Pub. Group West 1990); see also Peter Singer, *Ethics and Animals*, 13 *Behavioral & Brain Sci.* 45, 46 (1990) (postcommentary to Marian S. Dawkins, *From an Animal's Point of View: Motivation, Fitness, and Animal Welfare*, 13 *Behavioral & Brain Sci.* 1, 1–9 (1990)); see generally Tom Regan, *The Case for Animal Rights* (U. of Cal. Press 1985).

⁴ See 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, 41–42, 47 (1998) (stating that "legal reasoning that is excessively formal, or formalistic, may result in legal rules that logically relate both horizontally (across disciplines) and vertically (across time), but that stagnate and become increasingly platonic and more detached from the problems of the real world, or become excessively arbitrary. The judicial 'animals as property' syllogism (that one may never recover damages for emotional distress and loss of society for the negligent destruction of property, that companion animals are property, and therefore one may never recover damages for emotional distress for the negligent destruction of companion animals) both unthinkingly perpetuates anachronistic and unprincipled rules and ignores substantial factors that the common law should consider." Wise also asks rhetorically: "what owner of a worn and broken chair or sofa would not seize the opportunity to replace it with a brand new one for free? But human companions do not usually throw their companion animals out. They do not usually abandon them. They do not euthanize them merely to obtain newer, younger, or healthier ones. This is because the value of their companion animals to them is not economic. Companion animals are not fungible. They are of a different order").

⁵ Margaret Jane Radin *Reinterpreting Property*, 81 (U. of Chi. Press 1996) [hereinafter Radin, *Reinterpreting Property*]; See also Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849, 1880 n. 117 (1987) [hereinafter Radin, *Market-Inalienability*] (stating "The distinction between fungible and . . . [constitutive] property is intended to distinguish between, on the one hand, things that are really 'objects' in the sense of being 'outside' the person, indifferent to personal constitution and continuity, and on the other hand, things that have become at least partly 'inside' the person, involved with one's continuing personhood").

⁶ Radin, *Reinterpreting Property*, *supra* n. 5, at 36–37, 44–53.

⁷ *Id.* at 36.

⁸ *Id.* at 37.

⁹ See Wise, *supra* n. 4, at 68.

would feel great remorse at the loss of a wedding ring or precious family heirloom, these items are not alive and do not respond affectionately to their owners. Perhaps the courts should adopt a sub-category of “constitutive property” known as “companion constitutive chattel.”¹⁰

Some authors argue that the “companion animals as property” syllogism utilized by a majority of today’s courts is “unacceptably arbitrary, perverse and unfair because it ignores the commonly understood reality that the relationship between human and companion animal is no more based upon economic value than is the modern parent-child relationship.”¹¹ The relationships pets share with their human companions are characterized by “economic dependence, strong emotional bonds and an enduring sense of loyalty” to the extent that these animals “should be regarded as family members.”¹² Companion animals are generally regarded by their human companions as young children.¹³

¹⁰ The “companion constitutive chattel” designation would allow courts to save face by skirting the risky issue of legal personhood for animals, while at the same time acknowledging the true worth of a companion animal to its owner. In the not-too-distant past, women were accorded strikingly similar treatment by the judiciary; *see also* the following excerpt from Carolyn B. Matlack, author of *Journey to Justice*, a treatise scheduled to be published in 2004:

Actions are litigated within the increasingly outdated definition of animals as plain property . . . Why not try this argument in front of a particularly recalcitrant judge: We know our animals have feelings, right? We know they are not “feelingless” like a couch or a chair. Why not at least place Rover or Boots into a new property classification. Call them “sentient” (feeling) property—“sentient property.”

Carolyn B. Matlack, *Sentient Property: Unleashing Legal Respect for Companion Animals*, 7 A.L.D.F. Update (newsletter of the A.L.D.F.) (Spring/Summer 2003). In cases involving minors and incompetents, courts use substituted judgment to determine the best outcome. The same doctrine could be used in cases of sentient property, which would allow proper treatment of companion animals while at the same time preserving our ability to eat meat, wear leather or enjoy the zoo. *Id.* at 7–8.

¹¹ Wise, *supra* n. 4, at 70.

¹² Charlotte A. LaCroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 Animal L. 1, 7 (1998). A 1995 national survey of 1,019 pet owners, conducted by the American Animal Hospital Association, elicited the following responses further exemplifying the degree to which pet owners anthropomorphize their pets: 1) Eighty percent of pet owners have their pets for companionship; 2) Seventy-nine percent of owners celebrate their pets’ holidays or birthdays with gifts; 3) Thirty-three percent of pet owners who are away from home, talk to their pets on the phone or through the answering machine; and 4) Sixty-two percent of owners sign letters or cards from themselves and their pets. *Id.*

¹³ *See* Alan Beck & Aaron Katcher, *Between Pets and People—the Importance of Animal Companionship*, 41–43 (2d ed. 1996); Kimberley Stevens, *Teacher’s Furry Pets*, *New York Times* 9-3 (June 28, 1998); Wise, *supra* n. 4, at 42–48 (summarizing biblical to modern press and academic accounts of humans viewing animals as family members and more specifically as children); Governments at various levels are acknowledging society’s changing attitudes toward companion animals. For instance, Boulder, Colorado and two cities in California have replaced all references of “pet owners” to “pet guardians.” The Commonwealth of Rhode Island has taken a similar action. *See generally* J. of the Am. Veterinary Med. Assn., R. Scott Nolen, *Owners or Guardians? Cities*

B. Animal Welfare Theory Versus Animal Rights Theory

1. Animal Welfare Theory

Animal welfare theory forms the basis of most presently existing anti-cruelty and similar legislation in the United States.¹⁴ This theory encompasses the view that it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken that the animal is treated as humanely as possible.¹⁵ In addition, the theory allows that all animal interests must give way, to any human interest, so long as that human interest is held to be sufficiently important.¹⁶ The law regards animals as property and is therefore slow to protect animals.¹⁷ The seemingly protective laws that have developed are aimed at protecting humans' property interests in animals instead of the well-being of the animals themselves.¹⁸ Animal welfare theory requires that we balance the interests of humans and animals in order to decide what constitutes such vague standards as "humane treatment" and "unnecessary suffering."¹⁹

Change Identity of Pet Owners, Hoping to Promote Welfare, <http://avma.org/onlnews/javma/apr01/s041501b.asp> (Apr. 15, 2001) (describing how city councils for Berkeley and West Hollywood, California, as well as Boulder, Colorado, have replaced the terms "pet owner" with the terms "pet guardian" in their respective municipal codes to reflect an understanding of companion animals as sentient beings rather than mere property).

¹⁴ Through Their Eyes, The National Abuse Registry, *Animal Cruelty Laws By State*, <http://www.inhumane.org/data/crueltylaws.html> (accessed Mar. 1, 2004) (Presently, all fifty states have criminal anti-cruelty statutes. In the following states, animal cruelty constitutes only a misdemeanor: Alaska, Arkansas, Hawaii, Idaho, Kansas, Mississippi, Nevada, Ohio, South Dakota, Utah, and West Virginia. In the majority of all 50 states (Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming), however, animal cruelty has risen to the level of a felony.

¹⁵ Francione, *Animals, Property, and the Law*, *supra* n. 3, at 4-6.

¹⁶ *Id.* at 6. Again, whether something is "sufficiently beneficial" leaves a lot of room for debate.

¹⁷ Francione, *Animals, Property, and the Law*, *supra* n. 3, at 3-49 (Stating that no state has been willing—either by statute or through its common law—to classify animals as other than property. The property classification has been defended as having several justifications, ranging from the theological, to the argument that animals are qualitatively defective compared to humans, to the proclamation that animals may be possessed, used, managed, controlled, and given away and thus animals exhibit traits that make them capable of being owned).

¹⁸ In other words, the laws accord only that level of protection that is consistent with the exploitation of animals solely as means to human ends. Because of the property classification, animals are treated no differently by the law than the average living room couch or pair of blue jeans. As in the old slave cases, the law is sometimes quick to define what is or is not cruelty, but the larger issue—whether the property classification itself is proper—is avoided.

¹⁹ Francione, *Animals, Property, and the Law*, *supra* n. 3, at 17-32.

2. *Animal Rights Theory*

Having a right means that the holder of that right has some value that requires our respect, regardless of whether our exploitation of the holder or the holder's right would be beneficial to us or others.²⁰ In other words, a right cannot be taken away simply because it would benefit someone if the holder of the right lost the right.²¹ Rights can be overcome only with valid moral reasons. Rights theory requires that we see animals not merely as means to ends but as beings with intrinsic value and with interests that should be respected.²² Problems with this theory surface—according to those who reject rights theory—in determining which animals should have which rights and in dealing with cases of conflicting rights.²³ Some suggest that the line be drawn at the point of “sentience” or at the point of “ability to suffer.”²⁴

Animal rights theory has virtually no practical application in today's courts because in order to accord true “rights” to animals, our law will have to cease regarding animals as property and grant them the status of “legal personhood.”²⁵ While this may theoretically come to pass at some point in the future, the law is slow to evolve and the practical hurdles are potentially impossible to overcome. Therefore, animals will likely not rise above some level of favored property status for quite some time, if ever.

3. *Ramifications of Property Status for the Veterinarian: The Possibility of Non-Economic Damages*

Although the law relating to veterinary malpractice varies significantly from state to state, plaintiffs have traditionally found themselves able to recover only “market value” damages for the loss of their companion animals.²⁶ Moreover, these damages are typically nominal unless the animal involved is a high-dollar purebred show or stud

²⁰ *Id.* at 8. Rights stem from two major sources: 1) divine rights conferred by God and giving rise to divine laws; and 2) natural rights borne out of man's nature and depending upon his personality as distinguished from positive laws enacted by a duly constituted government to create an orderly and civilized society, giving rise to natural laws. *Black's Law Dictionary*, *supra* n. 2, at 1027.

²¹ Francione, *Animals, Property, and the Law*, *supra* n. 3, at 8.

²² *Id.* at 9.

²³ *Id.* at 10. For instance, should a horse have a right to vote? A right to live? What about a monkey? Should a roach have a right to live? Should a roach have any rights? Should pet animals have greater rights than farm animals? What about wild animals? What would be the practical implications on society if the law enforced a cow's right to life? A fish's right to life? What about single-celled organisms like bacteria? Should animals be allowed to file lawsuits?

²⁴ *Id.* at 9. Sentience, while difficult to prove, is often characterized by the presence of one or more of the following: perception, memory, desire, belief, self-consciousness, intention, sense of the future, and emotion.

²⁵ *Id.* See *supra* n. 23 (listing some of the difficulties that would be occasioned on society were the courts to take this drastic step).

²⁶ See generally *infra* nn. 126–86 and accompanying text (describing the gradual but real trend of courts to allow non-economic damages in veterinary malpractice cases).

animal, a race horse, or other animal of similar ilk.²⁷ The traditional damages treatment is a direct result of animals' "legal thinghood" status.²⁸

Veterinarians should not, however, lull themselves into believing that—as long as animals are accorded personal property status—they are safe from liability for emotional distress damages as a result of professional malpractice. Historically, it has been possible to secure damages out of established legal principles concerning emotional distress over the loss of property with uniquely personal characteristics.²⁹

A plaintiff may, for instance, claim recovery of the "actual value" of the animal, which may include the animal's sentimental value to the plaintiff.³⁰ A plaintiff may also claim negligent infliction of emotional distress, although in most jurisdictions, this tort would prove too narrow to cover a situation involving an animal.³¹ A plaintiff could claim intentional infliction of emotional distress, but must usually prove intent, wantonness, recklessness, or other outrageous and extreme conduct.³² Finally, a plaintiff may seek to recover emotional distress damages as part of a punitive damages award, regardless of the nature of the underlying tort.³³

Non-economic damages are coming under increasing consideration in litigation involving companion animals.³⁴ For instance, the Animal Legal Defense Fund's network of attorneys has proposed language to be enacted by state legislatures regarding animal cruelty and civil rights of action.³⁵ While the proposed language is limited in that

²⁷ *Id.*

²⁸ See generally Steven M. Wise, *Rattling the Cage—Toward Legal Rights for Animals* (Perseus Books 2000) (described by famed naturalist Dr. Jane Goodall as "The Animals' Magna Carta").

²⁹ See *supra* nn. 5–10 and accompanying text regarding "constitutive property," "companion constitutive chattel," and "sentient property."

³⁰ *Id.*

³¹ See *e.g.* *Roman v. Carroll*, 621 P.2d 307, 308 (Ariz. App. 1980) (denying claim for negligent infliction of emotional distress because the animal involved was property); *Gill v. Brown*, 695 P.2d 1276, 1277 (Idaho App. 1985) (denying claim for negligent infliction of emotional distress because plaintiffs were not physically injured when defendant killed their donkey); *contra City of Garland v. White*, 368 S.W.2d 12, 15–16 (Tex. Civ. App. 1963).

³² *Gill*, 695 P.2d at 1277–78; Restatement (Second) of Torts § 46 (1965).

³³ See *infra* n. 35 (The Animal Legal Defense Fund's model law on civil rights of action proposes language providing for emotional distress damages *as* punitive damages.).

³⁴ See *infra* nn. 126–80 and accompanying text (discussing the gradual but real trend of courts to allow non-economic damages in veterinary malpractice cases).

³⁵ The model language states as follows:

Any guardian of an animal subjected to a violation of the [animal protection statutes] may bring a civil action to recover the damages sustained by the animal and guardian. Damages may include but are not limited to, the pecuniary value of the animal, veterinary expenses incurred on behalf of the animal, any other expenses incurred by the guardian in attempting to mollify the effects of the violation, pain and suffering of the animal, emotional distress and any loss of companionship

it is linked to state animal protection statutes—which are often narrow in application—defining damages as “punitive” serves the dual purpose of deterring would-be offenders and removing pressure from courts who might otherwise be loathe to award “non-economic” damages for pet loss. Allowing attorney fees as damages encourages potential plaintiffs who might otherwise be foreclosed from prosecuting an action for financial reasons.

Throughout the country, courts are increasingly acknowledging that companion animals have an intrinsic worth greater than that of mere personal property. For instance, in 1980, a Florida District Court of Appeals acknowledged that “anyone who has enjoyed the companionship and affection of a pet will often spend far in excess of any possible market value to maintain or prolong its life.”³⁶ Similarly, in 1987, the Supreme Court of Alaska mentioned in dicta that a person may recover intentional infliction of emotional distress damages for the loss of an animal companion.³⁷ A concurring opinion in a 1994 Texas Court of Appeals case urged courts not to “hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the only family members they have.”³⁸ The concurring opinion further concluded that “the law should reflect society’s recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.”³⁹

The celebrated 1994 case of *Gluckman v. American Airlines, Inc.*, however, marks a sharp contrast to the seemingly growing tendency of courts to allow non-economic damages in cases involving the loss of a companion animal.⁴⁰ In the *Gluckman* case, the plaintiff’s golden retriever was allowed to remain in the baggage compartment of an airliner, in 140 degree heat, for over one hour.⁴¹ The dog died as a result, and the plaintiff sued the airline for negligent infliction of emotional distress, intentional infliction of emotional distress, loss of companion-

suffered by the guardian. In addition to actual damages as may be proven, the guardian shall also be awarded for punitive damages a sum of not less than \$1,000.00 for each violation to which the animal was subjected. In addition, the court shall award reasonable attorney’s fees and costs incurred by the guardian in the prosecution of the action. The remedies provided in this section are in addition to, and do not replace or supplant, any other remedies allowed by law. The court may enter injunctive orders as are reasonably necessary to abate further violations of the [animal protection statutes] by the defendant.

Animal Legal Defense Fund, *Model State Animal Protection Laws*, http://www.aldf.org/uploads/ALDF_Model_Laws_v04.pdf (accessed Mar. 1, 2004).

³⁶ *Paul v. Osceola County*, 388 So. 2d 40, 40 (Fla. 5th Dist. App. 1980).

³⁷ *Croft v. Wicker*, 737 P.2d 789, 792-93 (Alaska 1987).

³⁸ *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. App. 1st Dist. 1994) (Andell, J., concurring).

³⁹ *Id.*

⁴⁰ 844 F. Supp. 151 (S.D.N.Y. 1994).

⁴¹ *Id.* at 154.

ship, and for the dog's pain and suffering.⁴² The court dismissed the plaintiff's claim for negligent infliction of emotional distress, stating that such a claim does not lie for the loss of an airline passenger's property.⁴³ The court dismissed the plaintiff's claim for intentional infliction of emotional distress, stating the airline's conduct did not rise to the level of "outrageous . . . extreme . . . beyond all possible bounds of decency . . . atrocious, and utterly intolerable in a civilized community."⁴⁴ The court dismissed the plaintiff's claim for loss of companionship, relying on its holding that companion animals are personal property, and stating that cases holding otherwise are "aberrations flying in the face of overwhelming authority to the contrary."⁴⁵ Finally, the court dismissed the plaintiff's claim for the dog's pain and suffering, reasoning that "there is not yet a cause of action recognized for the pain and suffering of an animal."⁴⁶

Gluckman, however, appears to exhibit the exception rather than the rule. For instance, the Minnesota Court of Appeals in 1995 observed that "[w]hen a pet is lost, its owner frequently cares least about the amount of money it will cost to replace the pet."⁴⁷ In 1997, the Vermont Supreme Court stated that "[l]ike most pets, [a mixed breed dog's] worth is not primarily financial, but emotional; its value derives from the animal's *relationship* with its human companions."⁴⁸ In a 2002 Ohio case, the trial court found that the plaintiffs had established irreparable injury where their cat was captured and euthanized by the city, without the plaintiffs having ever been notified of the cat's capture.⁴⁹ The plaintiffs' counsel in that case noted that the finding of irreparable injury is a step toward the recognition by Ohio of damages above pure market value for the loss of a pet.⁵⁰

The argument in favor of allowing non-economic damages in companion animal wrongful death actions is becoming ever more compelling.⁵¹ In *Lunas v. Stockton*, a recent veterinary malpractice case

⁴² *Id.* at 156.

⁴³ *Id.* at 157.

⁴⁴ *Id.*

⁴⁵ *Gluckman*, 844 F. Supp at 158.

⁴⁶ *Id.* at 159.

⁴⁷ *Soucek v. Banham*, 524 N.W.2d 478, 481 (Minn. App. 1995) (nonetheless deferring to precedent and denying non-economic damages, stating that under Minnesota law, dogs are personal property).

⁴⁸ *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997) (emphasis in original).

⁴⁹ Animal Legal Defense Fund, *Cat Ordinance Decision Offers Legal Silver Lining*, 7 A.L.D.F. Update 1, 3 (Spring/Summer 2003) (discussing *City of Akron ex rel. v. Plusquellic No. PF 231.30* (Summit County, Ohio Dec. 9, 2002) (unpublished opinion)).

⁵⁰ *Id.*

⁵¹ Some authors have observed as follows:

It is difficult to ignore the mounting evidence indicating that the grief people feel at the deaths of their pets is real. Recent studies show that the grief pet owners feel when companion animals die is often overwhelming. Pet owners' responses to pet loss are often as emotional as the grief responses accompanying the loss of a human friend or family member. In one study, seventy-five percent of pet owners

arising out of a misdiagnosis of testicular cancer which ultimately resulted in the death of a dog, the defendants tried to strike the plaintiffs' emotional distress claim as not being available under the law.⁵² The court denied the motion, stating as follows:

If you can negligently kill a living animal and not be liable, but negligently lose a ring and be liable for emotional distress, the system's turned on its head, seems to me. Clearly if it's truly . . . [a] . . . case of first impression, it's going to be decided by this [c]ourt in favor of the plaintiff.⁵³

The *Lunas* case may be a harbinger of the future of veterinary malpractice jurisprudence. As courts become more cognizant of owners' feelings toward their animal companions, they will likely become less loathe to award non-economic damages.

Allowing non-economic damages in veterinary malpractice cases will significantly and—in some views, negatively—impact the very profession that owes much of its modern existence to the bond between companion animals and their human companions.⁵⁴ As will be explored in greater detail herein, veterinarians, veterinary medical schools, courts, and attorneys will need to prepare themselves for the significant effect this trend will have on veterinary malpractice jurisprudence. Since the trend toward allowing non-economic damages in companion animal cases reflects society's attitude toward companion animals in general, the trend is unlikely to reverse itself.

III. THE METAMORPHOSIS OF THE VETERINARY MEDICAL PROFESSION OVER TIME

A. *The Changing Face of Veterinary Medicine*

Today's veterinarians are in the unique position of being the only doctors charged with protecting the health of both animals and people. They must not only meet the health needs of several species of animal but they must also uphold their duties to protect the environment, en-

said they experienced disruptions in their lives after their pets died. One third of these pet owners said they experienced difficulties in their relationships with others and/or needed to take time off from work due to their feelings of grief.

Laurel Lagoni, *Practical Guide to Client Grief: Support Techniques for 15 Common Situations*, 12 (AAHA 1997); Laurel Lagoni et al., *The Human-Animal Bond and Grief* (W.B. Saunders Co. 1994) ("The death of a companion animal may be one of the most significant losses we experience throughout our lives.").

⁵² Animal Legal Defense Fund, *Strong Language in Support of Emotional Distress*, 7 A.L.D.F. Update 1, 2-3 (Spring/Summer 2003) (discussing *Lunas v. Stockton* No. PF 261.90 (Alameda County, California Apr. 2, 2003) (unpublished opinion)).

⁵³ *Id.* at 2-3.

⁵⁴ Jeannie M. Perron, *The Law of Veterinary Liability and the Human-Animal Bond*, 210 J. of the Am. Veterinary Med. Assn. 184 (1997) (stating that the promotion of the human-animal bond may negatively impact the veterinary medical profession, and that veterinarians' policy statements regarding the human-animal bond may be used against them in lawsuits seeking non-economic damages).

sure food safety, and protect the public health.⁵⁵ Society presently perceives veterinarians in a positive light.⁵⁶ The public perception of the veterinarian as being compassionate and honest has likely been a factor in keeping the number of veterinary malpractice lawsuits significantly below the number of traditional medical malpractice lawsuits. As the law expands to allow non-economic damages for pet loss, however, the incidence of veterinary malpractice lawsuits is likely to increase relative to the incidence of traditional medical malpractice lawsuits.

B. *The Growth of the Veterinary Medical Profession*

Pet ownership is ubiquitous in the United States. Americans own more than 500,000,000 pets, ranging from dogs to cats to birds to horses to small mammals to reptiles to exotic animals to fish.⁵⁷ With pet ownership having increased dramatically over the past two decades, approximately 58% of American families house one or more pets.⁵⁸ As a result, demand for veterinary medical services has grown significantly relative to overall economic growth.⁵⁹

As demand has increased, the practice of veterinary medicine has changed radically over the past two decades. The profession has experienced growth in both interest and member numbers during this time.⁶⁰ Other than demand, several additional factors may contribute to this growth. First, the popularity of such books as James Herriot's series about his experiences as a country veterinarian in England has glamorized the profession and sparked tremendous interest in the pro-

⁵⁵ American Veterinary Medical Association [hereinafter AVMA], *Today's Veterinarian* http://www.avma.org/communications/brochures/veterinarian/veterinarian_fa.asp (accessed Mar. 6, 2004).

⁵⁶ John P. Brown & Jon D. Silverman, *The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States* 166 (KPMG Economic Consulting Services May 1999) [hereinafter Brown & Silverman, *Market for Veterinarians*] (This study, by KPMG Economic Consulting Services for the AVMA and the American Association of Veterinary Medical Colleges revealed clients' top three criteria for choosing a particular veterinarian included the following: (1) whether the veterinarian is kind and gentle; (2) whether the veterinarian is respectful and informative; and (3) whether the veterinarian has a reputation for high-quality care.).

⁵⁷ Beck & Katcher, *supra* n. 13, at xiii.

⁵⁸ AVMA, *U.S. Pet Ownership & Demographics Sourcebook 2* (AVMA 2002) (In 1991, there were 52,500,000 pet dogs and 57,000,000 pet cats in the United States. That number has increased to 61,600,000 pet dogs and 68,900,000 pet cats in 2001).

⁵⁹ Brown & Silverman, *Market for Veterinarians*, *supra* n. 56, at 164 (For the period 1980 through 1997, there has been an increase in expenditures on veterinary services of nearly 7.2% annually in real (inflation-adjusted) dollars. This compares with a 2.9% annual real increase for all consumer expenditures during the same period).

⁶⁰ *Id.* at 166 (The number of veterinarians in the United States has increased from 32,500 in 1980, to a projected 70,384 in 2005.); Assn. of Am. Veterinary Colleges, *AAVMC Statistics*, <http://aavmc.org/appdata.htm> (accessed Feb. 20, 2004) (applications to schools of veterinary medicine in the United States have more than tripled in the last decade, going from 7,848 in 1991, to 24,448 in 1999, while the number of first-year positions has increased from 2,172 to 2,301 during that time period).

fession as a career.⁶¹ Second, the profession has gradually gravitated from its agrarian roots with an emphasis on utilitarian goals to the treatment of animals with no real utilitarian value other than companionship. As a result, the profession is now more aligned with the field of human medicine than with the field of agriculture. Third, with the growth in society's appreciation and understanding of the importance of the human-animal bond, veterinarians have had the opportunity to provide broader and more comprehensive services to clients who are increasingly likely to invest in their pets' well-being.

C. *The Importance of Technology to Veterinary Medicine*

The importance of technology and sophistication cannot be over-emphasized when looking at the changes in the veterinary medical profession. It was only a generation ago that radiology became widely available to the practicing veterinarian on a routine basis. Now, while virtually every private veterinary practice has in-house radiology available, even more sophisticated diagnostic modalities are available, including radioimmunoassay, diagnostic ultrasound, computed axial tomography, and magnetic resonance imaging. These sophisticated modalities have not only increased the capacity of veterinarians to provide high-quality care; they have also served to increase clients' expectations regarding that care.⁶²

⁶¹ E.g. *All Things Bright and Beautiful* (St. Martin's Press 1998) (originally published 1974); *All Creatures Great and Small* (St. Martin's Press 1998) (originally published 1972); *Every Living Thing* (St. Martin's Press 1996); *Cat Stories* (St. Martin's Press 1994); *Dog Stories* (St. Martin's Press 1987).

⁶² Dr. Wilson states:

As new technological and scientific breakthroughs occur in veterinary medicine, the standard of care changes. Therefore, the standard of five years ago often will not be the accepted standard for today's "reasonable veterinarian." This is especially true regarding advances in diagnostic testing procedures. An example is found in the changing standard for the diagnosis of Addison's disease (hypoadrenocorticism) in dogs. For years the basis for diagnosing this life-threatening malady depended primarily upon the animal's symptoms, an elevated BUN, a radiographically smaller-than-normal heart shadow, and a high blood potassium. No significant changes in diagnostic methodology appeared in veterinary textbooks between the 1980 edition of *Current Veterinary Therapy VII* and *Current Veterinary Therapy VIII* (1983). During this time period, though, advances were being reported in journals regarding radioimmunoassay techniques for measuring body hormones. By 1986, veterinary textbooks had caught up with these changing times, and the section on Addison's disease in *Current Veterinary Therapy IX* said, "Definitive diagnosis of hypoadrenocorticism requires the demonstration of inadequate cortisol response to exogenous ACTH." Even though the symptoms previously discussed are still important clues, the entire diagnosis portion of that section discusses only the use of ACTH stimulation tests to diagnose this disease. Thus, sometime during the mid 1980s, the diagnostic standard of care for Addison's disease underwent a significant change.

Another factor that may contribute to increased client expectations is the expanded use of specialists in the practice of veterinary medicine. In 2002 the American Veterinary Medical Association reported 7,357 active specialists, reflecting an increase of 464 specialists between 2001 and 2002.⁶³ Now, most metropolitan areas support specialists with practices offering advanced diagnostic and therapeutic modalities.⁶⁴

“Telemedicine”—the utilization of technological devices such as telephones, facsimile machines and the internet as tools to create a professional support network—is another advancement that has contributed to the increased standard of care now being demanded of the veterinary medical profession. Transtelephonic electrocardiography has been available for more than two decades, with IDEXX CardioPet® being the innovator in helping veterinarians manage the many new developments in cardiology.⁶⁵ Recently, competitors such as the Veterinary Heart Institute have offered, in addition to transtelephonic electrocardiography, advanced services such as color doppler echocardiography, radiograph interpretation, and specialist consultation in other areas.⁶⁶

The advantages telemedicine offer to the practicing veterinarian are clear. First, the income from diagnostic studies remains with the attending veterinarian instead of going to a specialist. Second, telemedicine offers the convenient support of a board-certified specialist, thereby enhancing quality of care for both veterinarian and client.

D. *The Significance of the Human-Animal Bond*

Probably the most compelling reason for increased client expectations from the veterinary medical profession is the increasing recognition of the importance of the human-animal bond by society in general.⁶⁷ As a result of the recognition that animal companions can have profound positive effects on the quality of our lives, many pet owners are willing to pursue sophisticated diagnostic and therapeutic

⁶³ AVMA, *Veterinary Specialty Organizations 2003*, <http://www.avma.org/press/profession/specialties.asp> (accessed April 8, 2004).

⁶⁴ AVMA, *Veterinary Specialists*, <http://avma.org/membership/marketstats/vetspec.asp> (accessed Feb. 22, 2004) (as of December 2002, there were 7,357 board-certified specialists in the United States. This figure represents a significant increase over the past two decades).

⁶⁵ IDEXX, *telemedicine*, <http://www.idexx.com/AnimalHealth/Laboratory/United-States/CardioPet.cfm> (accessed Feb. 20, 2004).

⁶⁶ Veterinary Heart Inst., *Veterinary Heart Institute*, <http://www.vetheart.com> (accessed Feb 14, 2004).

⁶⁷ Beck & Katcher, *supra* n. 13, at 1 (This landmark book details the importance of our relationships with our pets and how these relationships have enhanced the quality of our lives, as was first demonstrated in a two-year study on heart disease by the University of Maryland beginning in 1977.).

modalities, and are demanding a concomitant increase in the quality of care their pets receive from veterinarians.⁶⁸

E. Social Trends' Effects on Veterinary Malpractice Jurisprudence—Hypothetical Cases

“Negligence” is broadly defined as “the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.”⁶⁹ Veterinarians subject themselves to liability for professional negligence in several potentialities in the day-to-day operations of their practices.⁷⁰

1. Duty and Breach

A “duty” is an obligation to satisfy a standard of conduct toward another.⁷¹ One must act reasonably in light of apparent risk.⁷² Veterinarians owe to their clients the duty to practice veterinary medicine in such a manner so as to meet the standards expected of the profession. Veterinarians owe this duty not only to their *human* clients but also to their *animal* patients. When a veterinarian agrees to treat a patient, he is bound by the duty to render a level of care equal to that provided in similar cases by his peers.⁷³

For example, suppose Doctor A neuters Client B’s cat by simply pulling the testicles from the body, thereby allowing the blood vessels to retract into the body. When the cat has a fatal hemorrhage due to

⁶⁸ Veterinarians and other professionals are promoting the importance of the human-animal bond in professional organizations. One such group is the American Association of Human-Animal Bond Veterinarians. This organization’s mission is “to further veterinary awareness, scientific progress, and educational opportunities in the area of human-animal bond, to encourage veterinary participation in human-animal bond activities with related organizations and disciplines, and to explore the potential for establishing a veterinary specialty in the area of human-animal bond.” Am. Assn. of Human-Animal Bond Veterinarians, *Our Mission*, <http://aahabv.org/AboutAAHABV/visionmission.htm> (accessed Feb. 22, 2004).

⁶⁹ *Black’s Law Dictionary*, *supra* n. 2, at 1056.

⁷⁰ Telephone Interview with Janice Morgan, AVMA Professional Liability Insurance Trust Officer (Oct. 29, 2003) (A significant and often overlooked risk for liability involves injury to a human client as a result of treating an animal patient. In fact, the AVMA Professional Liability Insurance Trust, which insures the majority of practicing veterinarians in the United States, recommends that human clients not be allowed to assist the veterinarian in animal restraint. According to proprietary information from the Trust’s records, approximately 6% of its claims in 2001–2002 were paid for injuries involving humans. The other 94% of the Trust’s expenses were for claims related to clients’ animals.)

⁷¹ *Black’s Law Dictionary*, *supra* n. 2, at 521–22.

⁷² *Id.* *Restatement (second) of Torts* §4 (1965) (“The word ‘duty’ [requires a person] to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by the other, of which [the person’s] conduct is a legal cause.”).

⁷³ *Infra* nn. 76–79 and accompanying text. (“Peers” can be defined as anything from other veterinarians in the same locale to other specialists nationwide).

Doctor A's failure to ligate the blood vessels, Doctor A may argue that other practitioners in the geographical community neuter cats in a similar fashion. Whether Doctor A owed a duty to provide a better method of hemostasis depends upon the standard of care that would be applied in the case.⁷⁴

Veterinarians also owe a duty to exercise reasonable care for the safety of other humans around the premises. This duty gives rise to a potential negligence claim if, for instance, a human client is bitten or scratched by an animal patient in the waiting room, or if a human client is injured by his own animal. For example, suppose Client C presents a cat to Doctor D for a routine vaccination. Doctor D allows Client C to hold the cat during the vaccination. During the procedure, the cat becomes agitated and bites Client C. Client C's wounds require medical attention. Client C wishes to hold Doctor D liable for payment of Client C's medical expenses. Some courts would hold Doctor D liable for failure to uphold his duty to prevent the bite by having a trained professional restrain the cat, even though the cat belonged to Client C and even though Client C expressed a desire to restrain the cat during the vaccination procedure.⁷⁵

2. *How Standard of Care Relates to Duty and Breach*

A veterinarian acts negligently if she fails to act in accordance with the applicable standard of care. While courts differ on what constitutes the appropriate standard of care, recent trends exhibit an increasingly strict standard due, *inter alia*, to the availability of sophisticated technology for diagnostic and therapeutic modalities.⁷⁶ Additionally, with the rise in specialty referral practices, veterinarians owe a specific duty to offer referral in difficult or complex cases.⁷⁷

For example, suppose Client E presents to Doctor F a dog with an open fracture. Doctor F repairs the fracture with an intramedullary pin, but the fracture fails to heal properly due to an infection. Courts are increasingly likely to hold that Doctor F acted negligently in failing to refer the case to Doctor G, a board-certified specialist in surgery with the requisite training and equipment to handle an open, contaminated fracture. This is the case despite the fact that most uncomplicated fractures could be effectively treated by intramedullary pinning.

The standard of care that has historically applied to veterinary malpractice cases is known as the "similar locality rule," or "locality rule."⁷⁸ Under the "locality rule," the standard of care may vary ac-

⁷⁴ *Id.*

⁷⁵ *Infra* nn. 120–86 and accompanying text (Whenever an injury results from an activity at the veterinarian's office that is not considered a rendering of professional veterinary medical services, the cause of action sounds not in malpractice, but in ordinary negligence.).

⁷⁶ *See supra* nn. 62–66 and accompanying text (describing the impact of changing technology and emerging specialization).

⁷⁷ *Id.*

⁷⁸ Wilson, *Law and Ethics of the Veterinary Profession*, *supra* n. 62, at 136.

ording to the peer group with which a particular veterinarian is compared. With widespread information becoming more and more readily available due to technological advances such as the internet, however, courts are increasingly less likely to apply this antiquated rule.⁷⁹

3. Actual and Proximate Causation

a. Causation Generally

In order to prevail in a veterinary malpractice action, a plaintiff must establish actual and proximate causation.⁸⁰ In some cases, the veterinarian's actions can be shown to have clearly caused the plaintiff's damage. In other words, there exists an actual, clear and logical nexus between the veterinarian's actions and the animal's injuries. For example, causation is clear if a veterinarian amputates the wrong limb.

Proximate cause is much less obvious in most cases,⁸¹ such as when one or more potentially intervening causes takes place between the veterinarian's actions and the plaintiff's discovery of the injury.⁸²

Expert testimony is generally necessary to prove causation in cases where causation is not immediately apparent.⁸³

b. The Res Ipsa Loquitur Doctrine

Res ipsa loquitur, the legal doctrine standing for the principle that "the thing speaks for itself," is rooted in English judicial history and is used as a substitute for direct evidence when such evidence is not available.⁸⁴ If a court invokes this doctrine, then the burden of proof is shifted from the plaintiff to the defendant.⁸⁵ Additionally, if the doctrine applies, then a *prima facie* case for veterinary malpractice may be established without the need for expert testimony.⁸⁶

It is often appropriate to invoke the *res ipsa loquitur* doctrine in veterinary malpractice cases. For instance, the wrong animal may be

⁷⁹ *Id.*

⁸⁰ David S. Favre, *Veterinarian Malpractice*, § D, <http://www.animallaw.info/articles/arusfavrevetmalpractice.htm> (accessed Mar. 1, 2004) (In order to prove causation, a plaintiff must establish the "but . . . for" test; i.e., "but for the veterinarian's actions, the animal would not have sustained the injury.").

⁸¹ *Id.* at § G.

⁸² "Proximate cause" has been defined as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." *Black's Law Dictionary*, *supra* n. 2, at 213; Cheryl M. Bailey, *Veterinarian's Liability for Malpractice*, 71 A.L.R.4th 811 § 2(a) (2004).

⁸³ Favre, *supra* n. 80, at § G(1).

⁸⁴ *Black's Law Dictionary*, *supra* n. 2, at 1311-12.

⁸⁵ *Id.*

⁸⁶ Favre, *supra* n. 80, at § G(1); *Durocher v. Rochester Equine Clinic*, 629 A.2d 827, 829 (N.H. 1993) (holding that no expert testimony is necessary to determine whether a veterinarian was negligent in operating on the wrong animal, but that such testimony is necessary to assist jurors on standards of veterinary care).

ethanized; a surgical procedure may be performed on the wrong animal or the wrong part of an animal; a veterinarian may leave a sponge or instrument inside an animal patient during surgery; or the wrong limb may be amputated.⁸⁷

Since animals cannot speak for themselves, and since—compared with human medical procedures—few support personnel are present during veterinary medical procedures, eyewitness accounts and other direct evidence is less likely to surface in veterinary malpractice cases than in traditional medical malpractice cases. Therefore, *res ipsa loquitur* may be invoked more often in veterinary malpractice cases than in traditional medical malpractice cases.⁸⁸

For example, suppose a cat is declawed by Doctor H. After several days at home when the cat should have fully recovered, it remains unable to use one of its paws. When Client I returns to the clinic suspecting a problem, Doctor J, Doctor H's associate, discovers that a rubber band used as a tourniquet had been left on the cat, thereby causing gangrene to the distal extremity. Had the cat never been declawed, the tourniquet would have never been applied and there would have been no gangrene. "The thing speaks for itself" and—in the absence of contributory negligence⁸⁹—Client I will recover damages from Doctor H.

4. Damages

In order to prove her veterinary malpractice claim, a plaintiff must prove that she suffered some measure of damage. Since the law considers animals as personal property, courts have historically been reticent to allow plaintiffs to recover damages exceeding an animal's market value in animal injury or death cases.⁹⁰

For plaintiffs, proof of sufficient damages to make the cause worthwhile is a difficult hurdle to surmount. Using the "market value" yardstick, it proves virtually impossible to place an appreciable value on a "free" or "shelter" animal, even though its mere presence might be considered priceless to the owner. Due to the societal trend toward the recognition of the social, emotional, and psychological importance of pets, damages for pain and suffering and emotional distress are slowly

⁸⁷ The doctrine is not, however, appropriate in cases of misdiagnosis and scientific treatment. *Brockett v. Abbe*, 206 A.2d 447, 449 (Conn. Cir. 1964) (holding that the mere proof that the diagnosis later determined to be erroneous is insufficient to support a judgment).

⁸⁸ *Id.*

⁸⁹ Some states adhere to the contributory negligence doctrine which holds that where a plaintiff is even 1% negligent, the plaintiff can recover no damages from the defendant. See e.g. *Exum v. A. Coastline R.R. Co.*, 70 S.E. 845, 847 (N.C. 1911). Other states utilize the more modern and arguably more fair comparative negligence doctrine. Henry Woods, *Comparative Fault* §1.3 (2d ed., Lawyers Co-Operative Pub. Co. 1987 & Supp. 1995).

⁹⁰ See generally *infra* nn. 120–86 and accompanying text (revealing the uphill battle historically fought by plaintiffs seeking non-economic damages in cases involving injury to or death of a companion animal).

becoming more commonplace and this trend will likely continue. The courts will likely follow societal trends and acknowledge that the loss of or injury to a pet does, indeed, emotionally and psychologically impact pet owners.

a. Statutory Trends

In 2000, Tennessee passed perhaps the most progressive pet protection law in the country.⁹¹ Known as the "T-Bo Act," named after sponsoring state Senator Steve Cohen's shih tzu, "T-Bo," the law provides for recovery of non-economic damages in cases where a domestic cat or dog is killed or fatally injured while on the property of its family, guardian, or caretaker.⁹² While progressive, the law applies only in limited circumstances—it benefits only the owners of cats and dogs, and applies only if the cat or dog is at home at the time of loss.⁹³ The geographical restriction thus prevents the statute's application to any veterinary malpractice case that does not involve a house call. Needless to say, this law probably has a chilling effect on the willingness of veterinarians to make house calls.

Also in 2000, Michigan State Senator Gary Peters introduced a bill that would have allowed up to \$250,000 in non-economic damages for the loss of a companion animal when such loss arises from gross

⁹¹ The statute states:

If a person's pet is killed or sustains injuries which result in death caused by the unlawful and intentional, or negligent, act of another or the animal of another, the trier of fact may find the individual causing the death or the owner of the animal causing the death liable for up to \$4,000.00 in non-economic damages; provided, that if such death is caused by the negligent act of another, the death or fatal injury must occur on the property of the deceased pet's owner or caretaker, or while under the control and supervision of the deceased pet's owner or caretaker. (b) As used in this section, "pet" means any domesticated dog or cat normally maintained in or near the household of its owner. (c) Limits for non-economic damages set out [herein] shall not apply to causes of action for intentional infliction of emotional distress or any other civil action other than the direct and sole loss of a pet. (d) Non-economic damages awarded pursuant to this section shall be limited to compensation for the loss of the reasonably expected society, companionship, love and affection of the pet. (e) This section shall not apply to any not-for-profit entity or governmental agency, or its employees, negligently causing the death of a pet while acting on the behalf of public health or animal welfare; to any killing of a dog that has been or was killing or worrying livestock . . . nor shall this section be construed to authorize any award of non-economic damages in an action for professional negligence against a licensed veterinarian. (f) The provisions of this section shall apply only in incorporated areas of any county having a population in excess of 75,000 according to the 1990 federal census or any subsequent census.

Tenn. Code Ann. § 44-17-403 (2000).

⁹² *Id.* National Conference of State Legislators, *Canine Loss Spurs New Law*, <http://www.ncsl.org/programs/pubs/1011DOG.HTM> (accessed Mar. 6, 2004).

⁹³ Tenn. Code Ann. § 44-17-403. In addition, the \$4,000 cap on damages would seem nominal in most cases, and the statute's application in urban areas only cuts out a significant percentage of pet owners, especially given that Tennessee is a largely agrarian state.

negligence, willful, or wanton conduct.⁹⁴ Senator Peters introduced the bill with hopes that Michigan would join Tennessee in recognizing pets as more than mere personal property.⁹⁵ Unlike the Tennessee law, the Michigan bill did not contain a geographical or species-specific limitation. Therefore, this bill would have been more likely to come into play in veterinary malpractice cases. While the bill did not ultimately become law, its existence nonetheless evidences society's increasing awareness of the non-economic value of companion animals. In reflecting general societal attitudes, legislatures across the nation are likely to continue this trend.

b. Common Law Trends

To date, courts across the nation have regarded pets as personal property, thereby traditionally shutting out high damages awards. Courts are, however, becoming increasingly likely to award damages exceeding \$25,000 for veterinary malpractice in small animal cases.⁹⁶ If courts continue this trend and permit animal owners to sue for emotional distress damages, loss of companionship damages, and other non-economic damages related to the injury to or loss of a pet, then the practice of veterinary medicine—as well as the veterinary medical malpractice insurance industry—will be forever altered.⁹⁷

F. The Importance of Communication

As is the case with other professions, communication breakdowns cause many problems in relationships between veterinarians and their human clients. These breakdowns generally occur either before-the-fact or after-the-fact.

Before-the-fact communication problems generally include clients' misconceptions regarding fees, clients' mistaken perceptions or unrealistic expectations regarding outcomes, and veterinarians' failures to inform clients on these issues. For example, suppose Doctor K encounters complications during a routine ovariohysterectomy (spaying) and Client L was under the assumption that "spaying" was a "routine" procedure. Client L did not understand the implications of general anesthesia and that, despite due diligence on the veterinarian's part, a very small percentage of animal patients suffer unexplained anesthetic complications. Client L's pet, unfortunately, falls into that small percentage and dies. In order to protect himself, Doctor K should have explained the risks involved and that the procedure might result in an unexpected death, and should have had Client L sign an informed con-

⁹⁴ Sarah A. Moser, *Michigan Debates Monetary Value of Pets*, 43 *Veterinary Economics* 6 (2002).

⁹⁵ *Id.*

⁹⁶ Jennifer Fiala, *Court Rulings Could Up Ante on D.V.M. Malpractice*, *DVM* 1 (May 2001).

⁹⁷ *Id.* See generally *infra* nn. 120–86 and accompanying text (describing the gradual but real trend of courts to allow non-economic damages in veterinary malpractice cases).

sent statement acknowledging the risks and holding Doctor K harmless from their consequences.⁹⁸ While securing written consent does not guarantee that there will not be a lawsuit, such written documentation does indicate that a client was made aware of the risks involved with a particular procedure.⁹⁹

After-the-fact communication problems generally include failure on the part of veterinarian or staff to show adequate compassion, failure to compromise on fees, and failure to give adequate and direct answers to difficult questions. For example, suppose an employee of Doctor M is asked to release the remains of a deceased animal to a client who has come to Doctor M's office to retrieve them. The employee, being untrained in the protocol for releasing remains, and not exercising particularly keen interpersonal skills, presents to the client a frozen carcass—wrapped in a garbage bag—in a waiting room full of other people. Not only has the employee failed to show appropriate compassion, but other clients are left to assume that such lack of compassion is commonplace in Doctor M's practice.

If a veterinarian knowingly makes a mistake, must he share that information with the client? Ethics and honesty form a crucial aspect of communications between veterinarians and their clients. Often, however, while honesty may be the "best policy" for lawsuit prevention, too much honesty in certain situations can cause a needless compounding of pain and grief to a client. In such cases, veterinarians are often forced to make judgment calls.

For example, suppose Doctor N comes into work one morning to find a cat, who had been hospitalized for a serious and terminal condition, dead in the cage. The cat had caught her collar on the cage door and hung herself. The client was prepared and was expecting an unfavorable outcome. In this instance, Doctor N might best serve the client by not revealing the precise cause of the cat's death.

Another example involves an anesthetic death. Suppose Client O presents a patient to Doctor P for a routine castration. The anesthesia machine has, however, been improperly set by staff, and Doctor P fails to discover the mistake before the procedure. The patient thereby suffers anoxia, resulting in its demise. With compassion and apologies, Doctor P and her staff inform Client O of that the animal has suffered an "unexplained anesthetic death." Client O is not informed that—but

⁹⁸ Telephone Interview, Morgan, *supra* n. 70 (The importance of documentation cannot be over-emphasized. Even exemplary advice and patient care is difficult to prove without documentation. Signed consent forms document that the service was authorized and risks were acknowledged by the client.

But cf. Zimmerman v. Robertson, 854 P.2d 338, 342 (Mont. 1993) (noting that a malpractice claim premised on a theory of lack of informed consent is a separate cause of action rather than an element of a professional negligence claim)).

⁹⁹ Telephone Interview, Morgan, *supra* n. 70 (Whether a consent form was signed has become a crucial issue to courts involved in veterinary malpractice cases. In a court's view, if it is not documented, it did not happen. "Dentists advise, 'floss only the teeth you wish to keep'; attorneys defending malpractice suits advise, 'use consent forms only on those cases you wish to win.'").

for the improperly-set anesthesia machine—the patient would not have died. Client O retrieves the body for burial. Subsequently, a disgruntled employee, who has been discharged by Doctor P, calls the Client O and alerts him to the true cause of the patient's demise. Client O can maintain not only a professional malpractice claim but also a professional misconduct claim against Doctor P.¹⁰⁰ In this case, honesty would have been the “best policy.”

G. *Malpractice—Future Implications for Veterinarians*

With today's information technology, clients are becoming increasingly informed about healthcare issues involving their pets. Clients are gaining more knowledge regarding diagnostic and treatment modalities as well as available options, including specialist referral. The availability to veterinarians of technological advancements and specialist consultation is rapidly increasing. Given these factors, combined with society's increasing recognition of the importance of companion animals, the standard of care is rising and veterinarians must—in order to survive professionally—practice a superior quality of medicine.

The year 2003 marked the tenth year in a row that malpractice insurance premiums did not increase.¹⁰¹ The trends enumerated above, however, when coupled with the slow but inevitable change in courts' perception of the legal value of animals, indicate that malpractice insurance premiums will surely increase in the future.

IV. SPECIAL LEGAL CONCERNS FROM THE PERSPECTIVE OF TODAY'S VETERINARIAN

A. *Do Veterinarians Serve “Patients” or “Clients?”*

In a veterinary malpractice case, the court must determine whether to apply a “medical malpractice” analysis or an “ordinary negligence” analysis.¹⁰² This depends upon whether animals can properly be viewed as “patients,” which in turn depends upon whether we view animals as mere personal property or as something more.¹⁰³

Additionally, as stated above, veterinary malpractice jurisprudence is presently in a state of flux regarding what constitutes the proper standard of care. The so-called “locality rule” or “community standard” historically provided a mechanism whereby veterinarians

¹⁰⁰ Professional malpractice claims are civil actions between two parties (a plaintiff and a defendant) at common law. Professional misconduct claims, on the other hand, may be made by disgruntled clients against veterinarians to administrative governing boards whose purpose is to police the profession.

¹⁰¹ Telephone Interview, Morgan, *supra* n. 70.

¹⁰² Joseph H. King, Jr., *The Standard of Care for Veterinarians in Medical Malpractice Cases*, 58 Tenn. L. Rev. 1, 5-6 (1990). See also *infra* nn. 120-86 and accompanying text (describing the gradual but real trend of courts to allow non-economic damages in veterinary malpractice cases).

¹⁰³ King, *supra* n. 102, at 26-27.

practicing in rural areas were not held to as high a standard of care as veterinarians practicing in urban and suburban areas.¹⁰⁴ The “locality rule” or “community standard” has since fallen out of favor, with the “ordinary prudent person” standard being applied when actual professional malpractice is not at issue, such as in cases involving premises or bailment liability.¹⁰⁵ When professional malpractice is claimed, recent court trends have favored the “professional paradigm,” a standard that is similar to the standard applied in traditional medical malpractice cases.¹⁰⁶ When the “professional paradigm” is used, expert testimony—usually from other practicing veterinarians—is almost universally required.¹⁰⁷ The “professional paradigm” necessarily assumes that the veterinarian’s primary duty extends to his animal “patients,” not his human “clients.”¹⁰⁸

Some judges opine that, because the physician-patient relationship in veterinary medicine exists between the veterinarian and the animal patient, not the veterinarian and the human client, then the “professional paradigm” should not apply.¹⁰⁹ These courts thus cling to the notion that animals are personal property, and that one cannot owe a legal duty to a piece of property.

B. Practical Differences Between Veterinary Medicine and Traditional Medicine, and How Those Differences Affect Veterinary Risk Management

The inherent differences between veterinary medicine and ordinary medicine render veterinary medicine arguably more challenging than traditional medicine. First, medical doctors are trained to treat only one species—the human; veterinarians must acquire a more diverse knowledge base and must accept that what may be “normal” for one species (e.g., a cat) may not be so “normal” for another species (e.g., a snake). Because a veterinarian is generally required to acquire a broad knowledge base about many types of animals, specialized knowledge about a particular type is necessarily sacrificed. Second, choice of

¹⁰⁴ *Id.* at 19–21 (The clients of agrarian veterinarians were more concerned for the utility of their farm animals and—as such—were not as emotionally attached to their animals as are modern urbanites and suburbanites whose sole interest in their animals is companionship.).

¹⁰⁵ *Id.* at 18–20 (The trend favoring abandonment of the “locality rule” in favor of a national standard has, however, been statutorily halted in some states by legislative action reaffirming the “locality rule”). See e.g. *N.C. Gen. Stat.* § 90-21.12 (2001); *Tenn. Code Ann.* § 29-26-115 (1980) (both mandating use of the locality rule in healthcare malpractice cases.).

¹⁰⁶ King, *supra*, n. 102, at 8–15 (The professional paradigm standard has, according to King, tended to erode to a “reasonable person” standard in cases of veterinary malpractice. In his article, King favors a reaffirmation of a “more consistent and universal application of the professional paradigm standard” in veterinary malpractice cases.).

¹⁰⁷ *Id.*

¹⁰⁸ In the same manner as a doctor’s duty is to his patients and not to their guardians, the veterinarian’s duty is to his animal patients and not their human owners.

¹⁰⁹ *Southall v. Gabel*, 277 N.E.2d 230, 232 (Ohio App. 10th Dist. 1971).

treatment may be affected by the prospective use of the animal; for instance, a veterinarian might be more restricted regarding which drugs could be prescribed to food animals.¹¹⁰ Third, animals cannot communicate in human language the nature of their symptoms to their veterinarians, raising obvious challenges. Fourth, veterinarians have to deal with the sometimes unreasonable expectations of their often irrationally emotional human clients while at the same time keeping their animal patients' best interests at heart. The desires of the human client are often incongruous with the best interests of the animal patient.¹¹¹

The practical concerns associated with the practice of veterinary medicine present daunting levels of potential liability. For the veterinarian, not only is malpractice liability a potential reality, but so is premises liability sounding in ordinary negligence, negligence liability arising under the doctrine of *respondeat superior*, and negligence liability sounding in bailment theory.¹¹² The savvy veterinarian must effectively manage the sometimes competing risks of these potential liabilities without allowing these risks to negatively affect the efficacy of her practice. The veterinarian must learn the art of practicing defensive medicine without becoming professionally paralyzed.

Veterinarians must also remain cognizant of potential liability associated with, *inter alia*, illness passed to the animals of non-clients off-premises, injuries to humans on-premises and off-premises, injuries to humans and animals from animal drugs and medications off-premises, injuries to humans caused by animal attacks on-premises, and zoonotic diseases.¹¹³ In other words, veterinarians must practice their trades in a competent manner while at the same time remaining cognizant of the potential for premises liability and any foreseeable potential liability that may occur off-premises.¹¹⁴

¹¹⁰ King, *supra* n. 102, at 22.

¹¹¹ Sometimes, the human client's desires are not in his/her best interests. *E.g. Branks v. Kern*, 348 S.E.2d 815, 818 (N.C. App. 1986), *overruled*, *Branks v. Kern*, 359 S.E.2d 780, 782 (N.C. 1987) (involving a woman who was bitten by her own cat while the cat was receiving treatment from the veterinarian and ultimately holding the veterinarian not liable).

¹¹² *Black's Law Dictionary*, *supra* n. 2, at 136 (One owes a bailment duty to another in any case where one holds another's property on behalf of the other. Consignment shops and pawn shops are common examples).

¹¹³ Webster's Third New International Dictionary 2661 (Philip Babcock Gove ed., Merriam Webster 1986) (Zoonotic diseases, such as rabies and mad cow disease, are those diseases that are capable of being transmitted from animals to humans.).

¹¹⁴ For example, one claim involved a veterinarian who sold flea dip with no warning labels in a non-childproof bottle. The client's two-year-old son allegedly ingested enough of the dip to put the child into a coma for two days. The claim was settled against the veterinarian for \$275,000. AVMA, *New Claims Point Up Need for Vigilance*, 7 Professional Liability, 1 (Dec. 1987); Another claim involved a veterinarian who sold flea insecticide with a warning label in a non-childproof bottle. The bottle label did not, however, state that the insecticide was poisonous. The client's two-year-old son opened the bottle and suffered exposure to the insecticide, causing a one-month stay in intensive care and \$40,000 in medical expenses. The claim was settled against the veterina-

Veterinarians are also responsible for the negligence of associate veterinarians and others working under their supervision—either actually or apparently—under the doctrine of *respondeat superior*.

Many veterinarians find themselves playing the unfortunate role of “practical insurer” of the behavior of the various animals—and people—who visit their facilities daily. When animals are boarded, veterinarians must take precautionary measures to ensure the safety of their charges, lest they find themselves defending a lawsuit brought under a bailment or premises liability theory.¹¹⁵ Such lawsuits involve the often easier-to-prove “ordinary negligence standard.”¹¹⁶

Another concern that plagues veterinarians is the issue of veterinary medical records, specifically: who owns them, the nature and extent of the client’s rights in them, the nature and extent of others’ rights in them, whether they are admissible in court, and how long they should be retained.¹¹⁷ Veterinary medical records may constitute important evidence in veterinary malpractice actions and, accordingly, veterinarians should take great care in properly maintaining them.

Veterinarians must always remain mindful of client communication. Effective client communication includes securing informed consent from the client before performing a procedure, communicating with the client about aftercare, medication and drugs, warning the client about the dangers associated with prescription drugs, warning and instructing the client when the client assists with a procedure, and informing prospective adopters of communicable diseases.¹¹⁸

Finally, like other professionals, veterinarians must be careful to avoid falling into one or more of the following seven common malpractice traps: missed deadlines; conflicts of interest; lack of documentation; substantive error; administrative and clerical error; fee disputes; and bad client relations.¹¹⁹

rian for \$80,000. AVMA, *Claims Can Arise From A Variety of Sources*, 8 Professional Liability, 1 (Dec. 1988).

¹¹⁵ *E.g. Safford Animal Hosp. v. Blain*, 580 P.2d 757, 759–60 (Ariz. App. 1978) (involving injuries to a bystander by an improperly restrained cow who escaped from a veterinary hospital).

¹¹⁶ *Black’s Law Dictionary*, *supra* n. 2, at 1057 (Under the “ordinary negligence standard,” a plaintiff must first prove that the veterinarian owed some type of duty to the plaintiff. Depending upon the identity of the plaintiff, that duty could potentially extend to the animal patient, the human client, other animals at the facility, children of the human client, employees of the veterinarian, or any combination thereof. A plaintiff must next prove that the veterinarian breached this duty. Whether a breach has occurred depends upon the standard of care employed by the court. A plaintiff must next prove that the veterinarian actually and proximately caused the plaintiff’s damages. Finally, a plaintiff must prove damages.)

¹¹⁷ Harold W. Hannah, *Veterinary Medical Records—Some Legal Issues*, 209 AVMA Legal Brief 570–71 (Aug. 1996).

¹¹⁸ Harold W. Hannah, *When Can Failure to Inform Support a Malpractice Claim?*, 218 AVMA Legal Brief 1419–20 (May 2001).

¹¹⁹ Harold W. Hannah, *Seven Malpractice Traps—a Page from the Legal Profession*, 208 AVMA Legal Brief 38–39 (Jan. 1996).

V. TRENDS IN VETERINARY MALPRACTICE JURISPRUDENCE

A. State Statutory Trends

Only in limited instances do state statutes reference veterinary malpractice. Since professional malpractice in general is governed primarily by the law of negligence, the researcher must rely on common (court-made) law. In the few instances where the subject is addressed statutorily, the references are typically buried in administrative codes or delineated as exceptions to the application of certain statutes to other professions.

In California, the common law has held that veterinarians, like medical doctors, are "licensed health care providers" under its statutes, and that, accordingly, the medical malpractice standard—that a doctor must exercise the degree of skill or care usual in the profession, and will not be held liable for untoward consequences in the absence of such a want of reasonable care and skill—applies to veterinary malpractice cases.¹²⁰ California has thus imputed its traditional medical malpractice statutes to veterinary malpractice cases.

In Illinois, the courts have deferred completely to an administrative agency the issue of whether "gross veterinary malpractice" may have occurred in a particular case.¹²¹ Many states have boards governing self-policing professions such as veterinary medicine and, as such, a considerable amount of power is deferred to these boards.¹²²

In Texas, a "veterinary malpractice" action means a claim "for damages resulting proximately from negligence in performing diagnostic services, toxicological and other diagnostic analyses, and in making recommendations for treatment."¹²³ Texas specifically points out, however, that neither the Texas Business and Commerce Code nor the Texas Deceptive Trade Practices-Consumer Protection Act applies in cases of alleged veterinary malpractice.¹²⁴

Virginia law excepts from liability the delivery of gratuitous veterinary services, providing as follows:

[A licensed veterinarian] who, in good faith and without charge or compensation, renders health care services within the limits of his license to any animal, shall not be liable for civil damages for any act or omission result-

¹²⁰ Cal. Bus. & Prof. Code §§ 4800 et seq. (West 2002); *Williamson v. Prida*, 75 Cal. App. 4th 1417, 1425 (Cal. App. 1999).

¹²¹ *Massa v. Dept. of Registration & Educ.*, 507 N.E.2d 814, 817-18 (Ill. 1987) (stating that "it is beyond the competency of the circuit, appellate, or Supreme Court to 'find' the presence or absence of gross veterinary malpractice; that function has been delegated by the General Assembly to the Department [of Registration and Education] and its committee of veterinary experts").

¹²² *E.g.* California, Missouri, North Carolina, and Ohio all have Veterinary Medical Boards whose make-up and duties are specifically outlined by statute.

¹²³ Tex. Educ. Code Ann. § 59.21(4) (2001).

¹²⁴ Tex. Occ. Code § 801.507 (2002).

ing from the rendering of such services unless such act or omission was the result of [his] gross negligence or willful misconduct.¹²⁵

In recognition of the public policy interest in encouraging the provision of *pro bono* professional services, this law aims to reduce the chilling effect of malpractice claims on would-be “Good Samaritans.”

In order to truly capture the flavor of how veterinary malpractice jurisprudence has evolved and continues to evolve, however, one must examine the common law, how that common law varies among the states, and how that common law has changed over time.

B. Common Law Trends

1. Federal Cases

Veterinary malpractice cases have, from time to time, been the subject of federal courts. One such case, arising out of Louisiana in 1986, involved a plaintiff who sued a veterinarian for malpractice in administering a drug that killed the plaintiff's horse.¹²⁶ The district court found in favor of the veterinarian, stating that he was negligent in neither administering the drug nor failing to warn regarding possible fatal reactions to the drug.¹²⁷ The Fifth Circuit affirmed the district court, holding that no negligence existed because the defendant veterinarian met the statutorily required standard of care.¹²⁸ The court, citing Louisiana law, specifically noted that the “community” or “local” rule would not apply in the case.¹²⁹ The court specifically applied the traditional medical malpractice standard to veterinary malpractice in this case.¹³⁰

In a federal case arising out of Pennsylvania in 1988, the district court denied the plaintiff's motion for judgment notwithstanding the verdict in a veterinary malpractice case arising out of the defendant's

¹²⁵ Va. Code Ann. § 54.1-3811 (2002).

¹²⁶ *Ladnier v. Norwood*, 781 F.2d 490, 492 (5th Cir. 1986).

¹²⁷ *Id.*

¹²⁸ *Id.* at 493; Under the *Erie Doctrine*, which determines whether federal courts, sitting in diversity, will employ federal law or the law of the state in which they sit, Louisiana law applied in this case. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In general, according to the *Erie Doctrine*, state law is employed when an issue of substantive state law is involved, and federal law applies in other cases. See generally Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561 (2001). Louisiana courts, like many other courts, turn to medical malpractice cases when analyzing veterinary malpractice cases. *Dyess v. Caraway*, 190 S.2d 666 (La. App. 1966); *Meyer v. Saint Paul-Mercury Indemnity Co.*, 73 S.2d 781 (1953) (both applying the “professional paradigm” standard of medical malpractice cases to veterinary malpractice cases). See generally *supra* nn. 71–79 and accompanying text (describing how the standard of care relates to duty and breach).

¹²⁹ *Ladnier*, 781 F.2d at 492 (citing *Ardoin v. Hartford Accident and Indemnity Co.*, 360 S.2d 1331 (La. 1978), which specifically abolished the “locality rule” as a basis for establishing the degree of care ordinarily practiced by specialists).

¹³⁰ *Id.* at 492.