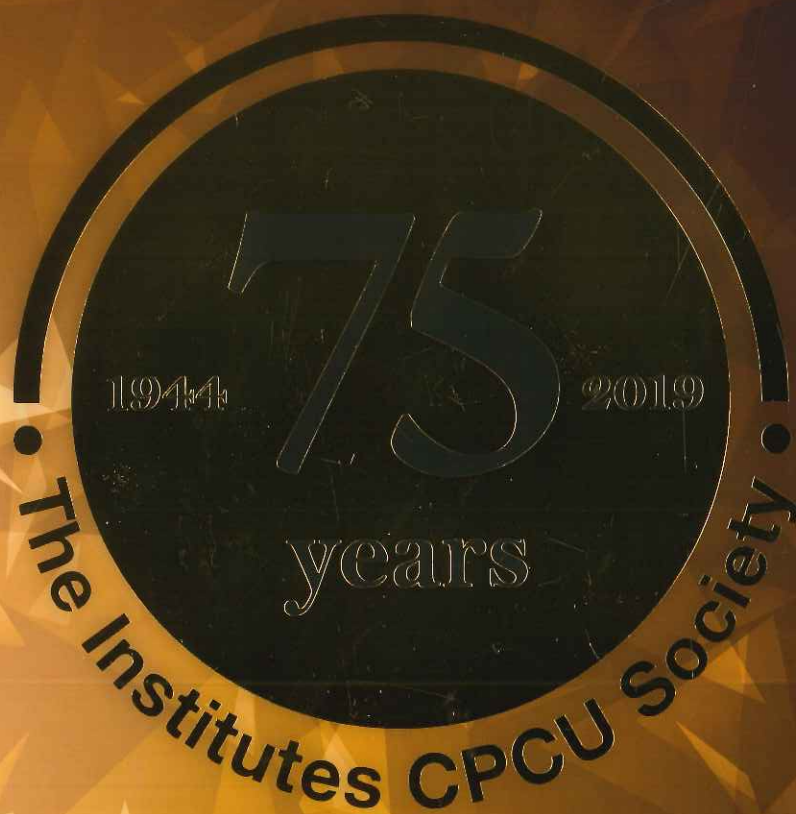
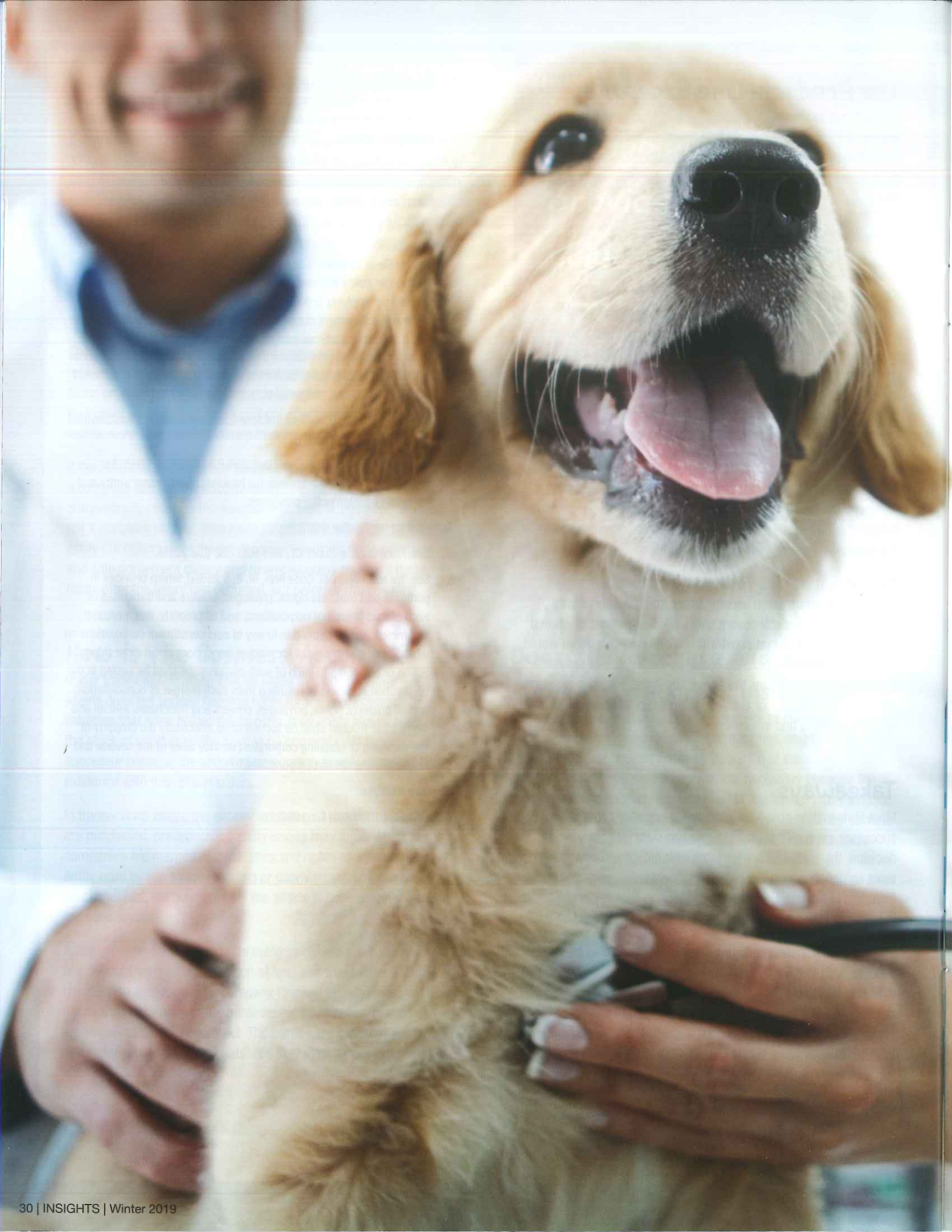


INSIGHTS

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PET SHOP BOYS (VET LIABILITY)

by Chantal M. Roberts

According to a survey by the American Pet Products Association, pet owners spent nearly \$72.5 billion on pet products in 2018. More than \$18 billion was spent on vet care alone, with another \$16.01 billion spent on pet supplies and over-the-counter medicine. The American Animal Hospital Association stated that 58 percent of owners take their pets to the veterinarian more often than they see their own doctor. With such high stakes invested in our furry companions, is it any wonder that veterinarian malpractice claims are on the rise? This article discusses veterinarian malpractice and liability risks and how to adjust the claims.

When someone loses a pet, the owner may identify with the Pet Shop Boys' song "What Have I Done to Deserve This?": "How am I gonna get through? Since you went away, I've been hanging around/I've been wondering why I'm feeling down."

Pets are an integral part of most people's lives, even treated by some as family members or a substitution for children. This article focuses on veterinary malpractice liability claims involving domesticated companion animals (rather than farm or working animals or injuries sustained by humans while in a veterinary clinic).

I WANT A DOG

"To walk in the park/When it gets dark, my dog will bark..."

In "I Want a Dog," the Pet Shop Boys sing about how a dog can help alleviate its owner's loneliness. But companion animals such as dogs and cats are legally considered property in most states—no different from a television or a car.

The traditional value of a pet is market value—the amount of money an average person would pay for the same animal of the same age, breed, and condition. This idea is hard for many pet owners to swallow, and courts struggle to reconcile the concept that a nonhuman household member has no monetary value with the need to provide adequate indemnification for those whose pets have been harmed as a result of malpractice. This dichotomy is also present in settlement valuation and is burdensome to adjusters attempting to settle pet-injury claims.

The history of animals' status as property dates back to humans' initial use of them as a means to an end—often as beasts of burden, livestock, service animals, and tools for the military and law enforcement.¹ Gary L. Francione, a prominent animal rights advocate and legal scholar, notes that neither animals nor inanimate objects have rights, such as legal standing to sue,² which leads to a failure to recognize that nonhuman animals have interests of their own and a presumption that humans are superior to animals, an idea that is firmly entrenched in common law.³

A DIFFERENT POINT OF VIEW

When it comes to the valuation of companion animals, attorney Steven M. Wise, who has practiced animal protection law in the United States for 30 years, might quote the Pet Shop Boys' song "A Different Point of View" regarding Francione's valuation opinion: "We can't agree about anything."

Melissa Bjorkenstam Bonfiglio, a graduate from UCLA Law School and prior volunteer at the UCLA Research Safety and Animal Welfare Administration, states that there are three ways for animals to obtain legal rights: legislation, common law precedent, and ballot initiatives or referendums. She notes that back in 2000, San Francisco and Marin County, both in California, and Boulder, Colorado, changed their municipal codes to refer to people as "guardians" of their pets instead of "owners." This does not change animals' legal status, but it may change cultural views, since guardians can bring suits against someone who has harmed their ward.⁴

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Adjusters should be aware of shifting societal and legal paradigms because this will also change how veterinarian malpractice claims are adjusted.

Pets, because they have a special bond with their owners, are considered more than property by a large portion of the population. A niche market has sprung up around them, accordingly: The Animal Legal Defense Fund found that 167 law schools in the U.S. and Canada now have animal law studies.

Adjusters may face the argument that even while heirlooms or family photographs have a special place in a person's heart, those objects are not capable of responding to its family member's emotions. A puppy tucks his tail when a voice

is raised; a cat studiously ignores her humans' displeasure. As stated in the verdict for the 1979 case *Corso vs. Crawford Dog & Cat Hospital, Inc.*, the fact that humans anthropomorphize their pets is a sign that animals occupy "a special place somewhere in between a person and a piece of personal property."⁵

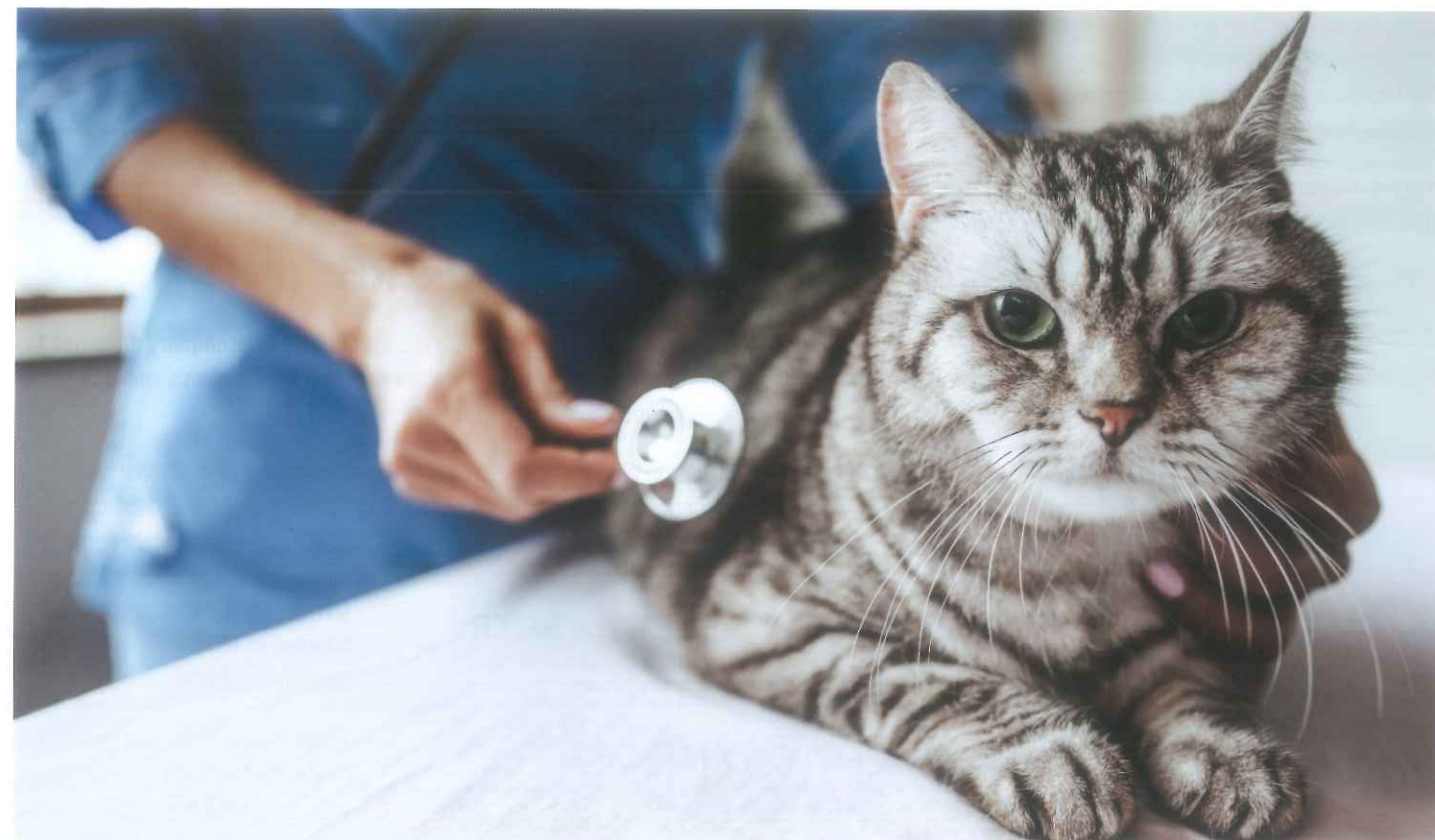
LOVE COMES QUICKLY

"Love comes quickly, whatever you do/You can't stop falling."

These Pet Shop Boys lyrics from the song "Love Comes Quickly" capture an experience familiar to many people who have a companion animal. Adjusters empathize with the human claimant—after all, adjusters have pets too. Unfortunately, informing the pet's owner that common law sees Fluffy and Fido as property and values them just as it would a TV or car is often not well-received.

For most claims, market value is determined by factors such as the item's age and condition. This leads to another difficult settlement conversation: telling the pet owner that sentimental value will not be taken into consideration.

It is easy to believe that a cat's owners value it at \$200,000, but Fluffy might not be as valuable to others. Every spring, countless domesticated animals are given away for free; therefore, unless the animal is used for



studding purposes or is pedigreed, it has little to no value, even though the animal is priceless to its owner. This makes it difficult to determine the market value of a pet obtained from a pet store or humane society.

The typical veterinarian malpractice policy does not speak to human emotional distress caused by harm to the animal, and it is further governed by the rules and regulations that interpret the contract. Therefore, an adjuster's hands may be tied by common law.

Tennessee law provides that a person may obtain up to \$5,000 for pain and suffering caused by the negligent death of a pet.⁶ Unfortunately, this statute only applies if the death occurs on the owner's property or while the animal is in the control and supervision of the owner, which is generally not the case for veterinarians.

California courts, however, recognize the emotional bond humans have with animals and allow owners to recover the cost of veterinarian invoices in cases of a pet's negligent injury or death as long as the costs are "reasonable and necessary." Some courts may require the liable party to reimburse the owner for out-of-pocket expenses, which may exceed the pet's market value.⁷ Of course, these amounts do little to assuage the pain and anger owners feel over the loss of an integral member of their lives.

The 1936 edition of the legal digest *Corpus Juris Secundum* devoted nearly 300 pages to legal issues concerning animals, but the terms "veterinarian" and "malpractice"

do not appear. Judicial rules and new legislation have been the main catalysts for enlarging the concepts of veterinarian malpractice.⁸

To adjust the claim, the standard of care and treatment must be established. Statute and common law language may provide unambiguous affirmative duties.

There has been no direction regarding California's "reasonable and necessary" veterinarian costs, but Maryland, Virginia, and the District of Columbia contain explicit provisions requiring a minimum level of veterinary care.⁹

Unfortunately, the language can be left open for interpretation. Take Michigan's penal code, which defines "adequate care" and "sanitary conditions" and states that the owner "shall not...fail to provide an animal with adequate care." However, there is little guidance beyond the animal version of the Hippocratic Oath to do no harm.¹⁰

...THERE IS LITTLE GUIDANCE BEYOND THE ANIMAL VERSION OF THE HIPPOCRATIC OATH TO DO NO HARM

The scope of a veterinarian's professional responsibility is important because this is where the professional standard of care applies. Malpractice, according to the Merriam-Webster Online Dictionary, is the "dereliction of professional duty or a failure to exercise an ordinary degree of professional skill or learning by one...rendering professional services which results in injury, loss, or damage."

If a pet suffers harm as a result of a negligent act, that act can be classified as malpractice. States that provide provisions, such as those listed above, outline what acts are considered professional and should be performed by a licensed veterinarian.

To prove malpractice, the pet owner must first prove the following facts, which are similar to the components of negligence:

1. The veterinarian had a duty of care toward the animal/patient; the veterinarian had accepted responsibility to treat the animal.
2. The actions or inactions of the vet did not conform to the professional standards of conduct.
3. The failure to conform to the professional standards was the proximate cause of the injury.
4. The injury resulted in damage not only to the animal/patient but also to the owner.¹¹

With veterinary malpractice cases, courts often apply the same kind of analysis they apply with medical malpractice or ordinary negligence. This analysis is important because it determines whether the animals can be viewed as patients.¹²

Once the veterinarian establishes the standard of care and treatment plan for the animal, the adjuster can investigate whether the veterinarians' actions or inactions rise to malpractice. Two ways to determine this element are the locality rule (or community standard) and the professional paradigm.

The locality rule was preferred in more agrarian times. It did not hold veterinarians up to as high a standard as their colleagues in urban areas. The professional paradigm is the standard applied in traditional (human) medical malpractice cases. This paradigm assumes that the veterinarian's primary duty is to their animal "patient" and not the human "client."¹³ Indeed, when the adjuster reads the medical notes for the claim, the patient is the animal, and the human is the client.

The owner can claim pain and suffering and infliction of emotional distress, but these claims are based on negligence—not malpractice. David S. Favre of Michigan State University's Animal Legal & Historical Center found one insurer reporting that 18 percent of claims against veterinarians were for injuries to humans.¹⁴ The rest of the claims were for injury to or death of pets.

With the professional paradigm, the adjuster should obtain an expert opinion from another practicing veterinarian to determine whether a standard of care was breached. As mentioned, it is when veterinarians practice their trade that they can be held to a higher standard of care. Malpractice claims traditionally require the professional's agreement to settle the claim.

Some states, such as California, have this requirement written in their regulations. In cases where the insurer believes it best to settle, the veterinarians may withhold their settlement agreement, especially if the regulation requires settlements over a certain sum to be reported to a veterinary medical board because these reports can adversely affect their licenses.

FRIENDLY FIRE

California law specifically allows for punitive or exemplary damages to be awarded to the owner in the event of a veterinarian's willful or gross negligence, in disregard of humanity.¹⁵

George Wallace, CPCU, a Californian attorney for professional negligence claims against veterinarians, states that "Civil Code section 3340, allowing punitive damages for harm to an animal, remains something of a mystery: it was adopted in 1872 and has not been amended since."¹⁶

There is very little case law related to this code. Kansas' case law recognizes that veterinarians' willful, wanton, or malicious acts avail owners to punitive damages—but owners must scale a high bar to obtain the punitive award. Therefore, many owners insert a plea for punitive or exemplary damages into their

lawsuits. And it is understandable for veterinarians to believe that they are coming under friendly fire.

In addition to proving that the veterinarian neither owed nor breached a duty, or that the breach was not the cause of the harm to the pet, professionals can turn to other defenses. For example, under a Good Samaritan Act, the veterinarian would not be held to the normal standards of practice if providing emergency treatment to an animal.

The malpractice statute of limitations may differ from that of general property damage. For example, a Missouri law states that a claim "shall be brought within two years from the date of occurrence of the act of neglect complained of," with two exceptions, while the property statute of limitations is five years.¹⁷

Despite the traditional holes in and opaqueness of the laws, The Pet Shop Boys' song "Metamorphosis" sums up the current state of veterinary malpractice: "It's all about to change."

More attorneys are studying animal law, and owners are pushing for more damages than just market value and outstanding veterinary invoices. Owners may feel that the insurer and veterinarian have not adequately valued their pet and demand justice via social media. When owners more aggressively assert their rights to the friendship and companionship of domesticated animals, laws will become more sensitive to the issues, and pets may be seen differently.

WHEN OWNERS MORE AGGRESSIVELY ASSERT THEIR RIGHTS TO THE FRIENDSHIP AND COMPANIONSHIP OF DOMESTICATED ANIMALS, LAWS WILL BECOME MORE SENSITIVE TO THE ISSUES, AND PETS MAY BE SEEN DIFFERENTLY



In California, for example, a woman filed suit against a veterinarian and the hospital for the death of her dog, which had modeled in magazines and had more than 175,000 Instagram followers. She staged protests outside the hospital and raised approximately 30 percent of her funding goal for her suit by having her story shared over 700 times on social platforms.¹⁸

Taking a global view of the policy, the state's veterinarian regulations, standards of care, and defenses will allow adjusters to help owners get through the loss of a beloved pet. ■

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