

# Veterinarians at Fault: Rare Breed of Malpractitioners

## I. INTRODUCTION

California leads the nation in the amount of money spent on health care for pets.<sup>1</sup> California pet owners pay over \$43 million annually to 670 veterinary establishments as a measure of their concern for pets.<sup>2</sup> Despite this concern, and the resulting willingness to pay a substantial sum, pet owners' attempts to obtain competent veterinary care are sometimes frustrated by malpractice. When this occurs, aggrieved pet owners have two avenues of redress, the courts and the Board of Examiners in Veterinary Medicine. Neither provides a viable remedy or protects the public from further malpractice. The inadequacy of existing legal and administrative remedies in California for veterinary malpractice is the subject of this article.

The article begins with an analysis of the veterinary profession's attempts at self-regulation. The Board's handling of complaints, from investigation to application of administrative sanctions, is analyzed from the standpoint of the Board's effectiveness in responding to individual and public needs. Finding the Board's response to be inadequate, the article then examines the availability of a remedy in the courts.

Litigation, as an alternative to administrative redress, is shown to be similarly inadequate because damages for pets have historically been limited to the market value of the pet.<sup>3</sup> California courts have not been responsive to the proposition that the owner's emotional distress at the loss of or injury to a pet should be compensable.<sup>4</sup> The article presents arguments based on the established exceptions to the rule disallowing recovery of emotional distress damages for injury to

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<sup>1</sup>Baker, *What the Census Bureau Learned About Veterinarians*, 13 VET. ECON. 26 (1972).

<sup>2</sup>*Id.* This expenditure amounts to approximately \$5 annually per pet owner. If the size of this expenditure seems small, one might compare it with the \$48 annual per capita expenditure for physicians' services for human medical care. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT Table 92 (1972).

<sup>3</sup>*Roos v. Loeser*, 41 Cal. App. 782, 183 P. 204 (1919).

<sup>4</sup>*See infra* note 35 and accompanying text.

property, which may be utilized in arguing for a change in judicial attitudes. Such exceptions are found in cases in California on heirlooms and in cases decided under the doctrine of intentional infliction of emotional distress.

The article concludes that if the pet owner is to have a realistic remedy for veterinary malpractice, and if the veterinary profession is to be effectively regulated, the archaic views found in the case law must be discarded, and new and imaginative approaches to the subject explored. The examples given are from the emerging tort law of negligent infliction of emotional distress and the trend toward liberal construction of wrongful death statutes.

## II. ADMINISTRATIVE REMEDIES

Because litigation is impractical in most cases, pet owners often seek administrative relief from veterinary malpractice. In California the Board of Examiners in Veterinary Medicine is the administrative agency that licenses and regulates the veterinary profession.<sup>5</sup> The Board receives complaints either from consumers directly or from a local veterinary medical association, to which a pet owner with a complaint frequently turns first. These local associations do not attempt to handle complaints because the disciplinary function is centered in the Board.<sup>6</sup>

Complainants receive letters from the Board encouraging them to rely on the Board to investigate the incident and to take the necessary disciplinary action against the subject veterinarian.<sup>7</sup> The Board sends these letters regardless of its intention to investigate the matter complained of.<sup>8</sup> Such a practice seems designed to lull complainants into inaction. For if they were told at the outset that the Board was dismissing their complaint as frivolous, some pet owners might pursue another course of action.

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<sup>5</sup>The Board, appointed by the Governor of California for a once-renewable term of four years, consists of six members: five practicing veterinarians and one lay person. It operates as an agency within the Department of Consumer Affairs, located at 1020 N St., Sacramento, CA 95814.

<sup>6</sup>Letter from Wendell C. Morse, D.V.M., Executive Director, American Animal Hospital Association, March 11, 1974. Complaint methodology may vary according to the owner's purpose or sophistication. Not only local veterinary medical associations, but also public agencies, like the Consumer Complaint and Protection Coordinators, listed in some California city telephone directories, steer individuals in the direction of the Board of Examiners in Veterinary Medicine. Only one organization consulted by the writer, an animal protection society in Oakland, California, called Pets and Pals, suggested that a lawyer be contacted. Some grievances may be aired in small claims courts, possibly as a defense to a bill for services.

<sup>7</sup>Interviews with Gary Hill, Executive Secretary, California Board of Examiners in Veterinary Medicine, Sacramento, California, November, 1973, through March, 1974.

<sup>8</sup>*Id.*

Only if the original complaint appears to have substance does the Board investigate the incident. First it requires the subject veterinarian to submit his or her version. It compares the two versions; and if it then suspects the existence of a violation of the Practice Act (the statutory framework governing veterinary medical practice), it conducts a more thorough investigation out in the field, including interviews of witnesses.<sup>9</sup> The investigators used by the Board are not trained in medicine.<sup>10</sup> Thus, where the veterinarian's suspected violation is, for example, a faulty technical procedure, it is difficult to imagine that it could be detected by them. Yet it is the information supplied by these investigators that is used as a basis for the Board's decision to proceed against the subject veterinarian or to drop the matter.<sup>11</sup>

In 1971, 61 out of the total 140 complaints received by the Board were investigated. In 1972, 105 of the total 733 received were investigated.<sup>12</sup> This recent deluge of complaints has not, therefore, spurred a corresponding increase in activity by the Board. Fiscal limitations cannot be blamed for the small proportion of consumer complaints investigated. Since the Board invokes "privilege" to prevent public inspection of the complaints it chooses not to investigate,<sup>13</sup> it is impossible to discover whether they were dismissed for lack of merit or whether the Board chose instead to allocate most of its resources to its other interests. But in 1972, the Board elected to make 735 investigations for violations of the Practice Act other than incompetence.<sup>14</sup> These investigations were into such things as cleanliness of business premises, license display, advertising, and unauthorized practice of medicine.<sup>15</sup> Given that investigations for these latter kinds of suspected violations greatly outnumber investigations made into consumer complaints, and given that complaints are the sole sure source of information concerning specific acts of veterinary incompetence, it would seem to follow that the Board's interests lie elsewhere than in detecting incompetence. Because of this pattern, a consumer complaint will rarely result in disciplinary action being taken against a veterinarian. In fact, in 1972 out of the total 840 investigations made by the Board for whatever reasons,

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<sup>9</sup>*Id.* And see CAL. BUS. & PROF. CODE § 4882 *et seq.* (West 1962).

<sup>10</sup> Interview with Hill, *supra* note 7.

<sup>11</sup>*Id.*

<sup>12</sup> Statistics for both years are in California Board of Examiners in Veterinary Medicine, 1 NEWSLETTER 4 (1973) [hereinafter cited as NEWSLETTER].

<sup>13</sup> The writer's request to examine these complaints was denied by the Board. The Board's refusal could possibly have been attacked under the California Public Records Act, CAL. GOV'T. CODE § 6250 *et seq.* (West Supp. 1974). See also *Public Access to Information*, 68 NW. U.L. REV. 175 (1973).

<sup>14</sup> NEWSLETTER, *supra* note 12.

<sup>15</sup> CAL. BUS. & PROF. CODE § 4882 *et seq.* (West 1962).

only 8 resulted in the filing of a formal accusation.<sup>16</sup>

The Board may proceed against a veterinarian either formally or informally. If the evidence is insufficient to support the filing of a formal accusation, it may still constitute grounds for requiring the veterinarian to appear personally for a reprimand at one of the Board's regular meetings. If the Board decides to file a formal accusation, there must be an administrative hearing. The Board is free to accept or reject the hearing officer's findings. If the Board accepts the findings, and they are against the veterinarian, the possibility for judicial review is still open to the veterinarian. The entire disciplinary process may extend for a period of two or three years or more, so the pet owner who chooses to wait for the outcome before deciding whether or not to sue the veterinarian may discover that the statute of limitations has expired.

One justification for the licensing of professionals and for reposing regulatory powers within the licensing agency is the belief that a class of professionals is best qualified to police its members, and has the greatest interest in doing so. Opponents of this view contend that licensing agencies exhibit primary allegiance toward the members of the profession they are presumably set up to police.<sup>17</sup> Thus it is the admitted view of the California Board of Examiners in Veterinary Medicine that the penalties it is empowered to use against a veterinarian who violates the Practice Act's incompetency provision, namely, license suspension or revocation, are too harsh a price to pay for what is frequently characterized as "an error in judgment."<sup>18</sup>

To solve its dilemma the Board is presently sponsoring legislation that would permit it to impose a fine as an alternative to license suspension or revocation.<sup>19</sup> The ability to impose a fine in lieu of the more stringent penalties could have the beneficial effect of stimulating investigations of consumer complaints, since the Board might now be resisting investigation of those complaints that will not ultimately justify the harsher penalties. With the addition of the proposed new sanction, lesser infractions could be investigated and deterred. On the other hand, there is no assurance that the Board would be willing to invoke this penalty any more readily than it has the others.

Under a new provision of the Business and Professions Code, the Board may also be in a position to provide a direct remedy to the victim of veterinary malpractice.<sup>20</sup> The section would permit the

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<sup>16</sup> Interview with Hill, *supra* note 7.

<sup>17</sup> Speegle, *Bugaboo of The Rising Cost of Malpractice Suits*, *The Recorder*, December 3, 1973, at 1, col. 1. Rosenbloom, *Who Regulates the Regulators?* *The Boston Globe*, December 26, 1973, at 19, col. 1.

<sup>18</sup> Interview with Hill, *supra* note 7.

<sup>19</sup> A.B. 2714, Calif. Leg. Reg. Sess. (1973-74).

Board, upon finding the veterinarian to be in violation of the Practice Act, to petition the superior court to order restitution to the injured party. But the statute is general in its terms, applying to every agency in the Department of Consumer Affairs, and thus gives little guidance concerning what the term "restitution" would mean to the consumer of veterinary services.

The provision went into effect January 1, 1974, and one legislative consultant who worked on the bill has remarked that it will take an "activist" agency to put the legislation to the test.<sup>21</sup> The California Board of Examiners in Veterinary Medicine has as yet given no indication that it is such an agency, or that it intends to use this part of the statute. From the Board's point of view the law's best feature is its allowance for reimbursement for the cost of an investigation.<sup>22</sup>

Concerned lawyers, who have some interest in improving the plight of the pet owner, as well as in performing an important role in the exposure of veterinary incompetence, must urge the Board to utilize the restitution provision, since it allows for a compromise that is less dire for each side than an adverse court decision would be.

### III. THE REMEDY AT LAW

Few pet owners turn to lawyers when their pets are injured or die from veterinary treatment.<sup>23</sup> And there are, perhaps, few lawyers

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<sup>20</sup>CAL. BUS. & PROF. CODE § 125.5 (West Supp. 1974) provides in pertinent part:

(b) The superior court for . . . any act which constitutes a violation of a chapter of this code . . . [within the Department of Consumer Affairs] may, upon a petition by the board with the approval of the director, order such person to make restitution to persons injured as a result of such violations.

(c) The court may order a person subject . . . to subdivision (b) to reimburse the petitioning board for expenses incurred by the board in its investigation related to its petition.

<sup>21</sup>Interview with Barbara Moore, Majority Consultants Staff, Sacramento, California, December, 1973.

<sup>22</sup>Interview with Hill, *supra* note 7.

<sup>23</sup>While there are no data to substantiate what is largely an observation based on the dearth of appellate decisions, the comprehensive study on medical malpractice done by the Secretary's Commission on Medical Malpractice finds that only 8% of individuals interviewed who attested to negative medical care experiences considered seeking the advice of a lawyer. Of these, fewer than half actually did talk to a lawyer. Peterson, *Consumer Knowledge of and Attitudes Toward Medical Malpractice*, in DEPT. OF HEALTH, EDUCATION AND WELFARE, APPENDIX TO REPORT OF SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 659 (1973).

For most pet owners there is initially the problem of realizing that animals don't die from unexplained causes merely because the veterinarian says they do, *e.g.*, a Californian recently wrote to the New York-based Fund for Animals asking for advice on whether to accept the explanation of his veterinarian that his dog's death on a routine visit for teeth-cleaning was due to the dog's idiosyncrasy. Interview with spokeswoman for Fund for Animals, New York, December 28, 1973. This problem is rapidly disappearing as the public is being educated to

who are willing to represent a pet owner in such a suit. Those lawyers who are willing to prosecute a malpractice suit against a veterinarian may find themselves facing difficult legal problems.<sup>24</sup>

The first problem may be the statute of limitations. California's medical malpractice statute of limitations bars absolutely any suit brought more than four years after the date of the injury, regardless of the failure to discover the injury within that time.<sup>25</sup> This statute was passed at a time when malpractice suits against physicians were noticeably on the rise, and was intended to discourage the bringing of such suits.<sup>26</sup> Veterinarians receive unneeded protection by being expressly included within its terms.<sup>27</sup>

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ask more searching questions and to expect more frank answers from veterinarians. When the cover story of a nationally distributed magazine puts to its readers the question "How Good Is Your Veterinarian?", provides them with some criteria for evaluating veterinary practice, and alerts them to potential conflicts of interest in the operation of both pet cemeteries and crematoriums by veterinarians, there is reason to expect that pet owners will become increasingly sensitized to the possibility that the reason their pets died was that the veterinarian did something wrong. Weisinger, *How Good Is Your Veterinarian?*, PARADE, December 2, 1973, at 6.

<sup>24</sup>The current wave of medical malpractice litigation has left few shores of the medical profession untouched. A search of the current legal literature on veterinarians' malpractice, however, reveals only two articles written within the last eight years on the subject: Hannah, *Is Res Ipsa for the Dogs?*, 3 VAL. L. REV. 183 (1969) [hereinafter cited as Hannah]; Note, *Malpractice by Veterinarians*, 15 CLEV-MAR. L. REV. 276 (1966). Cf. also Note, *Liability for the Injury and Destruction of Canines*, 26 FLA. L. REV. 78 (1973). There are no hornbooks, no treatises, no loose-leaf services on veterinarians' malpractice available to lawyers. But see Annot., 38 A.L.R.2d 503 (1954). Cf. also 1 A.L.R.3d 997 (1965); 1 A.L.R.3d 1022 (1965). These annotations answer some questions concerning the measure of damages for dogs, and amounts of recoveries.

One index of the feasibility of litigation is the number and amount of claims paid by liability insurers. Where there is no viable threat of litigation, insurance companies are not particularly motivated to answer claims or negotiate settlements. California requires professional liability insurers to report to the appropriate licensing agency for the professionals it insures, all judgments and settlements against insureds in excess of \$3,000 each. CAL. BUS. & PROF. CODE § 800 *et seq.* (West Supp. 1973). For the year 1972-73 insurers of medical doctors reported the total of such payments to be \$11,387,782. By comparison the report of the Board of Examiners in Veterinary Medicine stated: "No reports of judgments or settlements."

<sup>25</sup>CAL. CODE OF CIV. PROC. § 340.5 (West Supp. 1974).

<sup>26</sup>See Dietz, S., *et al.*, *The Medical Malpractice Legal System* in DEPT. OF HEALTH, EDUCATION AND WELFARE, APPENDIX TO REPORT OF SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 122 (1973), documenting this motivation.

<sup>27</sup>Cf. Southall v. Gabel, 277 N.E.2d 230 (Ohio 1971). The Ohio Court of Appeals held that the defendant veterinarian could not be sued for malpractice, noting that OHIO R.C. § 2305.11, the state's one-year statute of limitations on malpractice actions, had been interpreted by a *nisi prius* court of that state to include veterinarians within the professional group covered by the statute, but went on to say: "Until the Supreme Court speaks, veterinarians are not included in the definition of malpractice." *Id.* at 232. The holding enabled the plaintiff, whose horse had to be destroyed after becoming disturbed because of actions by the clinic, to avoid the bar of the statute of limitations. Cf. CAL. CODE OF CIV. PROC. § 340.5 (West Supp. 1974), specifically mentioning veterinarians.

Another procedural obstacle is a statutory bond requirement. Upon motion of the defendant in a medical malpractice case, the court may require the plaintiff to post a bond in an amount up to \$500.<sup>28</sup> Inclusion of veterinarians in this statute has the ironic, if unintended, result that this group, which has never been the target of excessive numbers of malpractice suits, is now the best protected. This is so because a \$500 bond is not a significant obstacle to a meritorious human malpractice case, but looms as a major barrier to a pet case, where damages will rarely exceed that amount.<sup>29</sup>

## A. TRADITIONAL DAMAGES

### 1. MARKET VALUE

Once the procedural barriers are overcome, the greatest obstacle to bringing a suit still remains — the substantive law on damages for pets. The measure of damages for pets is the market value or “actual” value, determined exclusively by the pet’s commercially cognizable qualities of breed, pedigree, or profitable uses in which the pet may be employed.<sup>30</sup> The same measure of damages is found in all cases where damages are sought for the loss of or injury to a pet: those in which pets are hit by automobiles, shot while trespassing, or injured in any number of negligent or intentional ways.<sup>31</sup>

There are only a few cases in California that deal with damages for pets<sup>32</sup> and none where a veterinarian is a defendant. The general rule has been established that proof of either market value, “actual” value, or both will be allowed.<sup>33</sup> And unlike some jurisdictions, California does not consider the price paid to be conclusive of market value.<sup>34</sup>

### 2. SENTIMENTAL VALUE

In California, as in most other states, there is also the rule that no

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<sup>28</sup> CAL. CODE OF CIV. PROC. § 1029.6 (West Supp. 1974).

<sup>29</sup> See Annot., 1 A.L.R.3d 1022 (1965).

<sup>30</sup> See Annot., 1 A.L.R.3d 997 (1965). *Roos v. Loeser*, 41 Cal. App. 782, 183 P. 204 (1919). There is language in the case which suggests that the actual value of the animal to its owner may be proved. The court does not set out in exact terms the offer of proof that may be made, other than to refer to the animal’s usefulness or other qualities, as one would if following 1 AM. JUR. PROOF OF FACTS, *Animals* 10. These elements of proof do not admit of testifying to the degree of the owner’s attachment to the pet.

<sup>31</sup> See Annot. 1 A.L.R.3d 997 (1965).

<sup>32</sup> *Johnson v. McConnell*, 80 Cal. 545, 22 P. 219 (1889); *Sabin v. Smith*, 26 Cal. App. 676, 147 P. 1180 (1915); *Roos v. Loeser*, 41 Cal. App. 782, 183 P. 204 (1919); *Wilkinson v. Singh*, 93 Cal. App. 337, 269 P. 705 (1928); *Dreyer v. Cyriacks*, 112 Cal. App. 279, 297 P. 35 (1931); *Wells v. Brown*, 97 Cal. App. 2d 361, 217 P.2d 995 (1950); *Kane v. San Diego County*, 2 Cal. App. 3d 550, 83 Cal. Rptr. 19 (1969).

<sup>33</sup> *Roos v. Loeser*, 41 Cal. App. 782, 183 P. 204 (1919).

<sup>34</sup> *Wells v. Brown*, 97 Cal. App. 2d 361, 217 P.2d 995 (1950).

evidence of what is termed "sentimental" value may be admitted.<sup>35</sup> Although the reason for the rule is not specifically articulated, it follows generally from the notion that such is not a proper element of recovery for property.<sup>36</sup> This rule that damages for pets must exclude any of the elements of what is more properly termed "emotional distress" felt by their owners completely ignores the fundamental principle of tort recovery, namely, that the injured party is to be compensated for the full loss sustained.<sup>37</sup> This over-emphasis on the status of pets as property clouds the real issue that the injury is one that is personal to the owner.

The evolution of the status accorded pets reveals that even if the courts were once justified in relying on the property classification of pets to deny emotional distress damages, this reliance is no longer appropriate. The law has adjusted before to changes in the status of pets. It is time for another step forward.

At common law pets were not even accorded the status of property. The United States Supreme Court, in one of the two cases it has ever decided on pets, held that no damages whatsoever could be recovered for the negligent destruction of a dog because of the common law view that:

[D]ogs are . . . of an imperfect . . . nature, as it were, between wild animals in which . . . there is no property, and domestic animals, in which the rights of property is [*sic*] perfect and complete. They are not considered upon the plane with horses . . . cattle . . . or other domesticated animals, but rather in the category of . . . animals kept for pleasure, curiosity, or caprice . . .<sup>38</sup>

California, however, enacted a statute in derogation of this common law rule, providing that dogs were personal property, and their value

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<sup>35</sup>Dreyer v. Cyriacks, 112 Cal. App. 279, 297 P. 35 (1931). In Wilkinson v. Singh, 93 Cal. App. 337, 269 P. 705 (1928), the court found error in the admission of such evidence, which had produced a jury verdict in the amount of fifteen hundred dollars. The court remitted the award to seventy dollars, the established market value of the two dogs, and three hundred dollars in punitive damages.

<sup>36</sup>See Annot., 12 A.L.R.2d 902 (1950), and Annot., 28 A.L.R.2d 1070 (1953).

<sup>37</sup>CAL. CIV. CODE §3333 (West 1970); Valdez v. Taylor Auto Co., 129 Cal. App. 2d 810, 278 P.2d 81 (1954); Sullivan v. Old Colony Street Railway Co., 197 Mass. 512, 83 N.E. 1091 (1908).

Emotional ties to pets are real. Those who regard these ties as frivolous should be made aware that the role pets play in mental health has received scholarly attention. One psychiatrist has demonstrated in clinical studies how pets may be used to ward off aggressive drives. Heiman, 25 PSYCH. Q. 568 (1965). For a compendium of factual situations illustrating the importance of pets in American society and abroad, see K. SZASZ, PETISHISM (1968). The Institute for Human-Animal Relationships in New York has placed pets in the homes of the aged, only children, and the physically and mentally handicapped with documented emotional and physical improvement. *Id.*

<sup>38</sup>Sentell v. New Orleans, 166 U.S. 698, 701 (1896).



was to be ascertained in the same manner as that of other property.<sup>39</sup>

California's elevation of pets to equivalency with other farm animals was a step forward. And it may have been true in a rural setting, where pets shared quarters with the other farm animals, ate table scraps, lived, multiplied and died as nature dictated, that the market value of such a pet was sufficient to make the owner whole. But it can scarcely be contended that this notion of the fungibility of pets has any vitality in a highly urbanized society, where pets are frequently an integral part of the family, where they are fed special foods widely advertised to their owners, and where their care has given rise to a lucrative medical care industry.

What the California courts must now recognize is that the loss of a pet can be much more than the loss of a piece of property; that it is often the loss of a child-surrogate, a child's playmate, a companion in old age. It is the value of this relationship that must be measured, not the replacement value of the pet in the market place, for the simple reason that, in many instances, there is no replacement for this unique being.

#### B. EMOTIONAL DISTRESS DAMAGES

Arguments that the loss of or injury to a pet can produce genuine and verifiable symptoms of emotional distress can be made by analogy to four areas of the law where recovery for this element of damages is allowed: 1) heirlooms; 2) intentional infliction of emotional distress; 3) negligent infliction of emotional distress; and 4) wrongful death.

In California an exception to the general rule that no emotional distress damages may be recovered for property is made in the case of heirlooms. Thus, what was denominated "sentimental loss" was recovered in a case in which an irreplaceable book was destroyed in a negligently caused fire.<sup>40</sup> While permitting such recovery, the court did not lay down any reason for the exception, although the reason has been stated in a Texas case as follows:

[I]tems which have their primary value in sentiment . . . generally have no market value which would adequately compensate their owner for their loss or destruction. Such property is not susceptible of supply and reproduction in kind, and their greater value is in the sentiment and not in the market place. In such cases the most fundamental rule of damages that every wrongful injury or loss to persons or property should be adequately and reasonably compensated requires the allowance of damages in compensation for the reasonable

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<sup>39</sup>CAL. PEN. CODE § 491 (West 1970).

<sup>40</sup>Willard v. Valley Gas Fuel Co., 171 Cal. 9, 151 P. 286 (1915).

special value of such articles to their owner taking into consideration the feelings of the owner for such property.<sup>41</sup>

If these reasons are persuasive in the case of heirlooms, they should be no less persuasive where the irreplaceable property is a pet.

A second area in the law where emotional distress damages have been recovered for loss of property is under the rubric of the tort of intentional infliction of emotional distress. The idea that a person may suffer and be compensated for emotional distress because of intentional injury to property is not a novel one in California.<sup>42</sup> Generally, California has adopted the Restatement view on recovery for these intentional torts:

If the actor has by . . . tortious conduct become liable for an invasion of any legally protected interest of another, the emotional distress caused by the invasion . . . is taken into account in assessing the damages recoverable by the other.<sup>43</sup>

The courts cannot rationally distinguish pets from other legally protected interests of pet owners.

In this respect it should be noted that two recent Florida cases have applied the Restatement view to pets. In *La Porte v. Associated Independents, Inc.* the Supreme Court of Florida upheld the trial court's award of \$2000 compensatory damages, which took into account the emotional distress suffered by the plaintiff when the defendant's agent threw a garbage can at her miniature dachshund, thus killing it as she looked on.<sup>44</sup> The defendant had argued that such damages were not proper for the loss of property when that property was a pet. But the court held that the established law of the state permitted both these compensatory as well as punitive damages for the intentional infliction of emotional distress for injury to property of any kind.<sup>45</sup>

The second Florida case is even closer to our present concern, in that it allowed the owner to seek damages for emotional distress where the alleged tortious conduct was that of a veterinarian, in an aggravated cases of professional misconduct. In *Levine v. Knowles* the veterinarian told the owner that his dog had died from natural causes while undergoing a routine treatment for a skin condition.<sup>46</sup> The owner had thereupon instructed the veterinarian to retain the dog's body so that he could have an autopsy performed. But the veterinarian cremated the body before the owner could pick it up,

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<sup>41</sup> *Brown v. Frontier Theatres*, 369 S.W.2d 299, 304, 305 (Tex. 1963).

<sup>42</sup> *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

<sup>43</sup> RESTATEMENT OF TORTS § 47b (1934).

<sup>44</sup> *La Porte v. Associated Independents, Inc.*, 163 So. 2d 267, 269 (Fla. 1964).

<sup>45</sup> *Id.* at 269.

<sup>46</sup> *Levine v. Knowles*, 197 So. 2d 329 (Fla. 1967).

presumably to avoid a malpractice claim. The lower court awarded summary judgment to the defendant, but the appellate court followed *La Porte, supra*, in allowing the plaintiff to put on proof of both compensatory and punitive damages.<sup>47</sup>

Admittedly, only the exceptional malpractice case would be based on an intentional tort. This theory of recovery would not take care of the average malpractice action, which is based on negligence.<sup>48</sup> In this last regard the language of the Florida Supreme Court should carry weight independent of the fact that it was uttered in an intentional tort case.<sup>49</sup> It is, to date, the most realistic assessment of the relationship between owner and pet to be found in American case law:

The restriction of the loss of a pet to its intrinsic value in circumstances such as the ones before us is a principle we cannot accept. Without indulging in a discussion of the affinity between "sentimental value" and "mental suffering" we feel that the affection of a master for his dog is a very real thing and that the malicious destruction of a pet provides an element of damage for which the owner should recover, irrespective of the value of the animal because of its special training as a Seeing Eye dog or a sheep dog.<sup>50</sup>

There is no logical reason why this affection between owner and pet should be seen as any less real where the tortious activity is merely negligent.

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<sup>47</sup>*Id.* at 332. In California it should not be necessary to allege "malice" to recover punitive damages in the context of a veterinary malpractice action. See CAL. CIV. CODE § 3340 (West 1970) (exemplary damages for animals). Cf. CAL. CIV. CODE § 3294 (West 1970) and *Ebaugh v. Rabkin*, 22 Cal. App. 3d 891, 99 Cal. Rptr. 706 (1972), holding that "malice" is a necessary component under this exemplary damages statute.

<sup>48</sup>Generally, malpractice is based on the principles of negligence since a physician employed in a professional capacity is charged with certain duties and obligations. 38 CAL. JUR. 2d, *Physicians* 65 (1957); Annot., 13 A.L.R.2d 11, 21 (1950). As defined in California, malpractice is the neglect of that degree of skill and learning possessed by physicians of good standing in the same locality in the treatment of the sick and wounded. A physician is not liable for every unfortunate result which occurs in medical practice, but only for those which ordinary care and diligence within the foregoing standard would have avoided. See generally *Valentin v. La Société Française*, 76 Cal. App. 2d 1, 172 P.2d 359 (1946); *Engelking v. Carlson*, 13 Cal. 2d 216, 88 P.2d 695 (1939); *Burns v. American Gas Co.*, 127 Cal. App. 2d 198, 273 P.2d 605 (1954); *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); *Carmichael v. Reitz*, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971). Although malpractice may be categorized under negligence, technical battery, breach of contract or lack of informed consent, all are part of the law of negligence, or aspects of it, in that there is an absence of a wilful intent to injure the patient. See *Cobbs v. Grant*, 8 Cal. 3d 229, 104 Cal. Rptr. 505 (1972). In most malpractice cases, expert testimony is required to show that the damage or injury was caused by an unskillful or negligent act. See *Hannah, supra* note 24, at 186.

<sup>49</sup>163 So. 2d 267 (Fla. 1964).

<sup>50</sup>*Id.* at 269.

#### IV. CONCLUSION: NEW AND IMAGINATIVE APPROACHES

The doctrine of negligent infliction of emotional distress in California has some fairly well-defined limitations, but its application to a medical malpractice case is imminent.<sup>51</sup> The California approach has been along the lines of foreseeability and close relationship.<sup>52</sup> It should be possible to argue that a veterinarian, whose livelihood is based upon the love and affection an owner feels for his or her pet, should reasonably foresee the owner's emotional distress where there is negligent injury to the pet. The fact that the pet is property, in contemplation of law, should not cut off the use of this doctrine. In at least two jurisdictions, other than California, there has been a recovery for emotional distress resulting from negligent destruction of property.<sup>53</sup>

A similar expansion in construction of wrongful death statutes may hold some possibilities for a pet case. It is well-settled in California that in an action for wrongful death of a child, damages based on the loss of society, comfort and protection of the child may be recovered.<sup>54</sup> While this remedy is statutory, an emerging line of cases, heralded by a decision of the Arizona Supreme Court, suggests that the express words of a wrongful death statute may not impose the absolute limits of recovery.<sup>55</sup> The court interpreted the words "fair and just," with reference to the measure of damages provided in the statute, to include damages for anguish, sorrow, and mental suffering.<sup>56</sup> Since, psychologically, a pet represents an emotional

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<sup>51</sup>The court refused to apply the doctrine to a case where a child suffered and died as a result of a faulty diagnosis, stating: "[T]o extend the broadening process to the whole field of medical malpractice in diagnosis appears to us an unwarranted and impractical expansion." *Jansen v. Children's Hospital Medical Center*, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973). The court distinguished the case of *Capelouto v. Kaiser*, 7 Cal. 3d 889, 500 P.2d 880 (1972), which allowed an infant in a medical malpractice case to recover for its own pain and suffering, but denied recovery for the pain and suffering of its parents, for lack of direct physical injury to them. The court said that the difference between the two cases was that in *Capelouto* the hospital's negligence had *caused* (court's emphasis) the condition from which the child suffered (a salmonella infection). If this is an appropriate line for distinction, refusing to extend the doctrine to medical malpractice in faulty diagnosis cases does not foreclose a whole range of other malpractice cases: *viz.* those based on improper treatment, battery, lack of informed consent, etc.

<sup>52</sup>*Archibald v. Braverman*, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969). *See D'Ambra v. U.S.*, 354 F. Supp. 810 (D.R.I. 1973), *rev'd.*, 481 F.2d 14 (1st Cir. 1973).

<sup>53</sup>*Rodrigues v. State*, 52 Hawaii 156, 472 P.2d 509 (1970); *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674, *aff'd.*, 135 Neb. 232, 280 N.W. 890 (1938).

<sup>54</sup>*Bond v. United Railroads*, 159 Cal. 270, 113 P. 366 (1911). *See* 17 HAST. L.J. 263, 286 (1965), and cases cited therein.

<sup>55</sup>*City of Tucson v. Wondergem*, 466 P.2d 383 (Ariz. 1970), 34 ATL. L.J. 1, 27 (1972); *see also D'Ambra v. U.S.*, 481 F.2d 14 (1st Cir. 1973).

<sup>56</sup>466 P.2d at 387 (Ariz. 1970).

investment by the owner similar to that by a parent in a child, courts could conceivably bring a pet within the ambit of the words "child" or "ward," usually found in these statutes. The resort to wrongful death statutes is not entirely baseless: pets are, after all, one of the few species of "property" that die.

The duty of a lawyer to his or her client demands no less than the exploration of new and imaginative approaches to the issue of damages, if the pet owner is to have a real remedy in the courts. The lawyer who cannot take his or her client's predicament seriously, or who fails to be inventive when the case is one that merits damages for emotional distress, not only does a disservice to the client, but also perpetuates an atmosphere in which veterinarians can commit malpractice with impunity.

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