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Bailment and Veterinary Malpractice: Doctrinal Exclusivity, or Not?

KATIE J.L. SCOTT*

INTRODUCTION

This Note highlights an inconsistency in how the law is applied to animals. Animals are considered the personal property of their owners, and as such, when they are delivered by their owner to a veterinarian, the facts of the situation perfectly satisfy the elements of a bailment relationship. Nonetheless, when courts determine negligence by a veterinarian, animals' classification as property is disregarded and bailment principles are not applied. Instead, courts use veterinary malpractice standards. In doing so, courts treat veterinary malpractice and bailment as mutually exclusive doctrines.

Animals' classification as property is usually detrimental to their interests, resulting in low damage awards and difficulty obtaining judicial relief. However, in determining liability for negligence by a veterinarian, it would be beneficial to animals to be treated as property because the application of bailment principles would make it easier for their owners to recover damages.

Even when courts choose to apply veterinary malpractice rather than bailment, the property classification is still used for determination of damages. Thus, even though the classification is disregarded for the

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1. While the Author recognizes the present movement by some communities to change the title of "owners" to "guardians," the present state of the law makes clear that animals are in fact owned by their owners. See infra note 13 and accompanying text.

2. "Veterinary malpractice" is a term used to describe negligence by a veterinarian when professional negligence standards are applied. "Veterinary negligence" is synonymous with "negligence by a veterinarian," and could be used to refer to when either ordinary or professional negligence standards are applied. The differences between professional negligence and ordinary negligence are discussed in Part I.C, infra.
determination of liability when it would be beneficial to animals and their owners, it is applied for determination of damages when it is detrimental to their interests. This Note will explore the reasons for this inconsistency.

This Note argues that treating bailment and veterinary malpractice as mutually exclusive is neither necessary nor desirable. The reason most often given for applying malpractice standards rather than bailment—that veterinarians are "professionals" and deserve a "professional standard of care"—should not pose a barrier to applying the doctrine of bailment to this type of case. A professional standard of care is, in fact, entirely consistent with principles of the bailment doctrine.

The troubling aspect of this situation is that currently, even if bailment principles were applied, thereby making it somewhat easier for plaintiffs to recover, the potential damages awarded would rarely cover the litigation costs. However, states are beginning to expand the range of damages for which a pet owner can recover, and as they do, the theory of liability under which a pet owner can recover will become increasingly important.

This Note will first give an overview of animals' status as property, the doctrine of bailment, and veterinary malpractice. Second, the seminal case discrediting bailment in favor of veterinary malpractice, Price v. Brown, will be discussed. Finally, this Note will explore the reasons why bailment and veterinary malpractice should not be treated as mutually exclusive, and why pet owners should be able to recover for negligence by a veterinarian under the doctrine of bailment.

I. DOCTRINAL OVERVIEW

A. THE STATUS OF ANIMALS

Throughout the United States, animals are primarily treated as personal property in the eyes of the law. The classification of animals as personal property may date as far back as 2100 B.C. Under English common law, this classification was thought to originate in Genesis. This
classification became a part of American common law, as English common law was thought to be imported into American law unless the specific law was “altered or rejected” by American law-makers.10

"Hominum causa omne jus constitutum. The law is made for men and allows no fellowship or bonds of obligation between them and the lower animals."11 The long history of classifying animals as property of their human “owners” is important because this classification underlies many of the problems faced by animal rights advocates, pet owners, and other humans who seek to protect the interests of nonhumans.12 These problems fall into two broad categories: (1) limitations on access to the judicial forum by or on behalf of animals and (2) a limited availability of damages for injuries to animals or animals’ owners.

I. Access to a Judicial Forum

The lack of access to a judicial forum stems from the rule that animals do not have legal status to sue for their own grievances. In state court, animals are not granted standing because they are the property of their owners.13 In federal court, standing is either granted to “persons” only,14 thereby excluding animals,15 or capacity to sue is based on state law,16 where as just noted, animals are not granted standing because they

foundation of man’s dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers on the subject.

Id. (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *2-*3 (quoting Genesis 1:28)).

10. Id. at 530 n.383 (“Kent ‘[t]ook it for granted, that the common law of England, applicable to our situation and governments, is the law of this country, in all cases in which it has not been altered or rejected by statute, or varied by local usages, under the sanction of judicial decisions.’") (quoting JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW *28 (1896)).

11. Id. at 473 n.12 (quoting F.J. FITZGERALD, SALMOND ON JURISPRUDENCE 300 (12th ed. 1966)).

12. See infra notes 13-23 and accompanying text.

13. See, e.g., Oberschlake v. Veterinary Assocs. Animal Hosp., 785 N.E.2d 811, 814 (Ohio Ct. App. 2003) (holding that “a dog cannot recover for emotional distress—or indeed for any other direct claims of which we are aware”); Bueckner v. Hamel, 886 S.W.2d 368, 370 (Tex. App. 1994) (noting that dogs are property); see also Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49-50 (D. Mass. 1993) (“While neither Massachusetts nor Hawaii law addresses the precise question of animal standing, cases in each state indicate that animals are treated as the property of their owners, rather than entities with their own legal rights.”).


16. Citizens to End Animal Suffering, 836 F. Supp. at 49 (noting that under Federal Rule of Civil Procedure 17(b), the capacity to sue “shall be determined by the law of the individual’s domicile” and that the “provision generally addresses the capacity of corporations, partnerships, and other business entities to litigate, there is no indication that it does not apply to other non-human entities or forms of life”).
are the property of their owners. Therefore, an animal cannot sue his veterinarian for negligent medical treatment,\footnote{17. See Oberschlake, 785 N.E.2d at 814 (holding that "a dog cannot recover for emotional distress—or indeed for any other direct claims of which we are aware").} cannot sue developers for harming his habitat,\footnote{18. Cf. Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 126 F.3d 461, 466 n.2 (3d Cir. 1997) (refusing to address whether turtles and snakes have standing under the ESA because human co-plaintiffs clearly did have standing but noting that "the standing to sue of the animals protected under the ESA is far from clear").} and cannot sue for pain and suffering resulting from cruel treatment.\footnote{19. \textit{See} Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151, 157, 159 (S.D.N.Y. 1994).} Occasionally, an animal will be listed as a plaintiff when the designation is not challenged by the defendant.\footnote{20. \textit{See} Mt. Graham Red Squirrel v. Yeutter, 930 F.2d 703 (9th Cir. 1991); \textit{Palla v. Hawaii Dept. of Land and Natural Res.}, 852 F.2d 1106 (9th Cir. 1988); \textit{Northern Spotted Owl v. Lujan}, 758 F. Supp. 621 (W.D. Wash. 1991); \textit{Northern Spotted Owl v. Hodel}, 716 F. Supp. 479 (W.D. Wash. 1988).} It is also possible that a statute could confer standing to an animal, and give it access to the judicial forum.\footnote{21. \textit{Citizens to End Animal Suffering}, 836 F. Supp. at 49. The case states: [A]s with regard to the ESA in 'Alala, the MMPA expressly authorizes suits brought by persons, not animals. This court will not impute to Congress or the President the intention to provide standing to a marine mammal without a clear statement in the statute. If Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly. \textit{Id.}} However, on the federal level, none currently do so.\footnote{22. Sunstein, \textit{supra} note 15, at 1335.}

It should also be noted that individuals and organizations seeking to increase protections for animals also have trouble gaining standing in court.\footnote{23. For a complete discussion of the difficulties that humans and human organizations face when seeking to protect the interests of animals in federal court, see \textit{id.} at 1342–52.} Thus, animals do not have personal access to a judicial forum, and it is also difficult for humans to use the judicial forum to protect animals' interests. This problem does not normally arise in veterinary malpractice or bailment cases because the animal has a human owner. Any injury to the animal is considered property damage suffered by the owner, and is sufficient for the owner to meet standing requirements.

2. Damages for Injuries to Animals

Damages for injuries related to animals are severely limited. This results in two problems: (1) there is little to no financial incentive to sue for injuries to most companion animals; and (2) the types of damages available are often not adequate to address the injury to the animal or its owner.

a. Financial Incentives to Sue for Injuries to Animals

There is little financial incentive to sue for injuries to companion animals because many courts limit damages to "the amount which will
compensate the owner for the loss and thus return the owner, monetarily, to the status he or she was in before the loss.\textsuperscript{24} This will usually amount to the fair market value of the animal.\textsuperscript{25}

However, the owner of a pet "wrongfully killed is not circumscribed in his proof to its market value, for, if it has no market value, he may prove its special value to him by showing its qualities, characteristics and pedigree, and may offer the opinions of witnesses who are familiar with such qualities."\textsuperscript{26} Interestingly, this rule leaves open the possibility for two different ways to measure damages: market value and special value. Nevertheless, as the rule is applied, neither method of measuring damages is likely to give a significant financial incentive to pet owners to sue for injuries to their pets.

For example, in \textit{Green v. Leckington}, the Oregon Supreme Court reviewed a trial court judgment that awarded the plaintiff $700 for the death of his pedigreed puppy that he bought two months before its death for $200.\textsuperscript{27} One of the plaintiff's witnesses testified that the reasonable market value of the dog at the time of its death was $250, but the plaintiff testified that the dog had no market value, and thus, he should be able to prove the dog's special value to him, which he said was $1000.\textsuperscript{28} The Supreme Court of Oregon held that since the dog had a market value, the plaintiff was not entitled to prove the dog's special value and was limited to the reasonable market value.\textsuperscript{29}

The plaintiff's approach in \textit{Green} is interesting because it clearly demonstrates the pet-owner's view, that the pet's special value is greater than its market value even when it does have a significant market value. However, the pet owner's valuation of the "special value" is almost certainly tied closely to what courts call "sentimental value," for which courts usually refuse to award damages for personal property.\textsuperscript{30} The types of characteristics that courts have used to determine "special value" include: specialized training given to the animal;\textsuperscript{31} rarity of breed;\textsuperscript{32} and

\textsuperscript{24} 4 AM. JUR. 2D \textit{Animals} § 162 (2002).
\textsuperscript{26} See McCallister v. Sappingfield, 144 P. 432, 433-34 (Or. 1914).
\textsuperscript{27} Green v. Leckington, 236 P.2d 335, 337 (Or. 1951).
\textsuperscript{28} Id.
\textsuperscript{29} Id. (emphasizing that only "if it has no market value" shall proof of special value be allowed).
\textsuperscript{30} See, e.g., McCallister, 144 P. at 433-34.
\textsuperscript{31} See, e.g., McDonald v. Ohio State Veterinary Hosp., 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994).
\textsuperscript{32} Wilcox v. Butt's Drug Stores, 35 P.2d 978, 979 (N.M. 1934).
breeding potential among others. This approach leads to the result that many mixed-breed domestic pets—which often have a negligible market value—also have no "special value" unless they have some special characteristic that sets them apart from similar animals.

Furthermore, many owners keep their animals solely for companionship and enjoyment, making it even more difficult for pet owners to prove any specific facts that would give their animals "special value." In *Ramey v. Collins*, after plaintiffs were not satisfied with the treatment of their dog by the defendant veterinarian, they took the dog to another veterinarian. The second veterinarian successfully treated the dog, and at the time of the lawsuit, the dog was still alive. The court held that the pet's owners could not recover damages for the negligence because the dog's value as a pet had not changed as a result of the negligent treatment. The plaintiffs were allowed to state a claim to recover only the costs paid to the first veterinarian for the negligent treatment.

In *Ramey*, the court applied a rule similar to that in *Green*, allowing factors other than market value to be considered when calculating damages to personal property that does not have an ascertainable market value. But, the *Ramey* court implicitly made the distinction between having no ascertainable market value and having a negligible market value. Only when the market value is not ascertainable, rather than merely negligible, should the finding of special value be allowed. The court noted that "[f]or most people, dog ownership is a liability rather than an asset to be valued."

34. The Executive Board of the American Veterinary Medical Association (AVMA) adopted the following statement, titled “Establishing Compensatory Values for Animals Beyond Their Property Value”:

The American Veterinary Medical Association recognizes and supports the legal concept of animals as property. However, the AVMA also recognizes that some animals have value to their owners than may exceed the animal’s market value. In determining the real monetary value of the animal, the AVMA believes the purchase price, age and health of the animal, breeding status, pedigree, special training, and any particular utility the animal has to the owner should be considered.

Several Factors at Play When Determining Compensatory Value of Animals, AVMA Says, JAVMA ONLINE NEWS, July 1, 2003, at http://www.avma.org/onlnews/javma/ju03/030701.asp. One should note that the above position remains a market-based approach, looking at the particular utility of the animal, not at the sentimental value to the owner.

36. Id. at *3.
37. Id.
38. Id.
39. Id.
These examples demonstrate the difficulty in recovering damages for injury to a domestic pet. Even if the pet owner can recover the costs of the negligent treatment, the monetary cost of hiring an attorney and going to court, as well as the emotional costs of dwelling on the mistreatment of the pet during the course of litigation, may render it an unwise choice to file suit against a negligent veterinarian.

b. Adequacy of Damages of Injuries to Pets

Pets' classification as property also leads to the problem that the types of damages available do not adequately address the injuries suffered by pets and their owners. In most jurisdictions, pet owners cannot recover for their emotional distress from the injury or death of their pet. Regardless of sentimental attachment, damages for emotional distress are not allowed for the destruction or injury to personal property. Furthermore, a pet owner cannot recover for the mental and emotional distress that the pet may have suffered as a result of the negligent action. This rule leads to an especially unfortunate outcome when the injury is a permanent one that causes continual emotional distress to the pet's owner and the pet itself.

For example, in Nichols v. Sukaro Kennels, plaintiffs boarded their dog at the defendant's kennel. While the dog was at the kennel, the kennel owner's dog ripped off one of the front legs and shoulder blade of the plaintiffs' dog. The trial court limited damages to the medical expenses involved in treating the dog and refused to award damages for the emotional distress of the owners or for the aesthetic injury to the dog. One witness testified that the market value of that type of dog was between "$100 or $200 regardless of whether it has three or four legs." The court indicated that there "is no indication [the dog's] value as a
family pet has even been diminished” and that the dog did not have any “special value.” Thus, the plaintiffs were left with a three-legged dog and only payment of the veterinary bills as redress.

Many pet owners consider their pets as members of their family, or even as their own children. It is to be expected that pet owners will be very upset when their pets are injured or killed. It has even been shown that “grief responses following the death of a pet were comparable to the grief reactions following the loss of a spouse, parent or child.” Yet, when a pet is injured by another person’s negligence, pet owners cannot recover any damages for their emotional distress in most jurisdictions.

Very few cases have awarded damages for emotional distress caused by the injury or death of an animal. It is more likely that a court will award emotional distress damages for intentional, rather than negligent acts. Courts tend to struggle with the reality that when a pet is injured or killed, there is an emotional injury rather than an economic, or property-type, loss. Yet, courts feel bound by precedent which explicitly classifies animals as personal property that cannot be the subject of damages for emotional distress. Courts are hesitant to “open the floodgates”

47. Id. at 692.
48. Id.
49. Id.
51. Id. at 439-40.
52. Id. at 440 (quoting John Archer, Why Do People Love Their Pets?, 18 EVOLUTION HUM. BEHAV. 237, 240 (1997)).
54. See La Porte v. Associated Indep., Inc., 163 So. 2d 267, 268-69 (Fla. 1964) (allowing emotional distress to be considered in awarding compensatory and punitive damages for malicious killing of pet dog); Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1071 (Haw. 1981) (allowing recovery of emotional distress resulting from negligently caused death of plaintiff’s dog even though dogs are personal property); Corso v. Crawford Dog & Cat Hosp. Inc., 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979) (allowing recovery for emotional distress caused by wrongfully disposing of plaintiff’s dog when the plaintiff had planned a ceremony memorializing the dog).
55. See La Porte, 163 So. 2d at 268 (allowing emotional distress to be considered in awarding compensatory and punitive damages for malicious killing of pet dog).
56. Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691 (Iowa 1996). (“[A]lthough we are mindful of the suffering an owner endures upon the death or injury of a beloved pet, we resolve to follow the majority of jurisdictions that do not allow recovery of damages for such mental distress.”).
57. Id. However, juries may not feel as bound to precedent as judges do. On February 20, 2004 an Orange County, California, jury awarded a pet owner $30,000 for the “special value” of his three-year-old dog even though the estimated market value of the mixed-breed dog was $10. Nolen, supra note 40 While this award was for special value, not emotional distress, the award was surely premised on “sentimental value” and not a market-based valuation.
of litigation,\footnote{58 See, e.g., Oberschlake v. Veterinary Assocs. Animal Hosp., 785 N.E.2d 811, 815 (Ohio Ct. App. 2003).} and possibly extend emotional distress damages to other types of personal property that people may have a sentimental attachment to, such as heirlooms.\footnote{59 Corso, 415 N.Y.S.2d at 183.}

\section*{B. Bailment}

A bailment is a legal relationship "created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust."\footnote{60 8A AM. JUR. 2D Bailments § 1 (1997).} The person delivering the property is the bailor.\footnote{61 Armistead M. Dobie, Handbook on the Law of Bailments and Carriers § 1, at 2 (1914).} The person receiving the property is the bailee.\footnote{62 Id.} A bailment can only exist for personal property; it cannot exist for real property.\footnote{63 Id. § 9, at 20.} Early cases make it clear that a bailment can be for any tangible, movable personal property.\footnote{64 8A AM. JUR. 2D Bailments § 7 (1997).} Modern courts have even extended bailment principles to include intangible personal property.\footnote{65 Id.}

For many years, bailments have been divided into categories, based on the purpose of the bailment.\footnote{66 Edwin C. Goddard, Outlines of the Law of Bailments and Carriers § 12, at 5 (1904) (bailments were first divided into categories in Roman Law and those divisions heavily influenced English legal writers).} American law has traditionally divided bailments into three categories: bailments for the benefit of the bailor, bailments for the benefit of the bailee, and bailments that are mutually beneficial to the bailor and the bailee.\footnote{67 8A AM. JUR. 2D Bailments § 7 (1997).} Bailments that are for the sole benefit of the bailor or the bailee are called gratuitous bailments because one party receives a benefit from the bailment relationship as a gratuity of the other party.\footnote{68 Id.} Alternatively, bailments where the relationship is mutually beneficial to the bailor and bailee are sometimes called lucrative bailments or bailments for hire.\footnote{69 Id. § 7.} Mutually beneficial bailments include the performance of a service upon the delivered property\footnote{70 This sub-category of mutually beneficial bailments is also called "hired services about a thing" or "locatio operis faciendo." See Dobie, supra note 61, § 58, at 129.} in
exchange for consideration, and the payment of consideration in exchange for use of the delivered property. The situation in which a veterinarian would be part of a bailment relationship falls into the category of mutually beneficial bailments: the animal owner, the bailor, delivers the animal to the veterinarian, the bailee, for veterinary service to be performed upon the animal, in exchange for payment for the service rendered.

When a bailment is for hire, and the bailee is hired to provide services upon a piece of property, the bailee has a legal duty to provide those services. If the bailee must only care for the bailed property, such as boarding an animal in a kennel, the bailee is under a duty to use ordinary diligence in providing that care and would be liable for ordinary neglect. The standard of ordinary diligence, also called "reasonable care," is best described as the same level of care that a person would provide to their own property under similar circumstances. Thus, in the example of boarding a dog at the kennel, reasonable care would include feeding and watering the animal, providing it with exercise, and medical attention if needed. The bailee would be liable if he neglected to provide these facets of ordinary care.

However, if the bailee purports to have specialized skill or knowledge in the service he is hired to provide, he is bound to exercise that skill or knowledge, and will be held liable if he fails to do so. Furthermore, when a bailee is hired for his specialized skill, the bailor is compensating the bailee for "both his labor and his judgment. [The bailee] ought not to undertake the work, if he cannot succeed; and he should know whether he can or not." An example of this is described in Commentaries on the Law of Bailments, by Joseph Story: "[I]f a farrier undertakes the cure of a diseased or lame horse, he is bound to apply a reasonable exercise of skill to the cure; and if through his ignorance or

71. Id.
73. GODDARD, supra note 66, § 16, at 9.
74. Story, supra note 72, § 431, at 392.
75. Id. at 393.
76. The present meaning of the word "farrier" is a person who shoes horses. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). However, from the mid-1800s to the late 1800s the definition of a "farrier" changed from someone who undertook much of the medical care of horses to someone who solely shod horses. Tom Ryan, The Farrier and Hoofcare Resource Center, A Short History of the Term "Farrier," at http://www.horseshoes.com/advice/ryan/thsoftr.htm (last visited Feb. 26, 2004). See also Conner v. Winton, 8 Ind. 315, 317–20. (Ind. 1856). Thus, in Story's example he was likely referring to a farrier as a someone who undertook at least some of the medical care of horses, not merely tending to their shoes. See Ryan, supra.
bad management the horse dies, he will be liable for the loss." In modern language: when a person takes their animal to a veterinarian to determine the cause of an illness and the veterinarian decides that the best treatment is surgery, the person should expect the veterinarian to use his specialized skill and judgment in making the decision that surgery is the best treatment. In addition, the person should be able to expect that the veterinarian would not undertake that course of treatment if he did not expect it to be successful. However, it is important to note that these are often implied contractual terms that can be modified by an express understanding between the parties. Thus, if the veterinarian is unsure of his possible success, the terms of the contract on which the bailment is founded can be modified to exclude the implied promise of successful treatment.

A bailor can sue the bailee for a breach of the bailment if the property was damaged or not returned. The bailor must first make a prima facie showing that the terms of the bailment were not met. To make this showing, the bailor must establish that the property was delivered to the bailee, he demanded the return of the property, and it was either not returned or was returned in a damaged condition. If the bailee had sole, actual, and physical possession of the bailed property, there is a presumption that the bailee was negligent, meaning that the court will assume that the bailee did not meet the requisite standard of care.

The presumption of negligence is rebuttable, or vanishing. If the bailee produces a reason for the breach of the bailment, other than his failure to use a reasonable standard of care, the presumption that the bailee was negligent will be overcome and the burden of production will shift back to the bailor to prove the elements of negligence. In some jurisdictions the presumption is only rebuttable if the bailee proves the actual cause of the injury or loss of the property. It is important to note that the burden of proof of all facts relevant to the cause of action remains with the bailor at all times; the presumption merely shifts the burden of production to the bailee after the bailor makes a prima facie

77. Story, supra note 72, § 431, at 393.
79. Id. § 244.
81. 8A Am. Jur. 2d Bailments § 233.
83. 8A Am. Jur. 2d Bailments § 234.
showing. If the bailee fails to overcome the presumption, the bailor will be entitled to judgment as a matter of law.

C. VETERINARY MALPRACTICE AND NEGLIGENCE

Malpractice is a term used loosely when applied to veterinarians. "Malpractice" is a term used for "negligence" when the negligent conduct involves professional services. Under common law, "malpractice" principles apply only to physicians and attorneys. In some jurisdictions, veterinarians are considered "professionals" for the purposes of distinguishing whether malpractice or negligence principles apply, and in some they are not. The primary differences between malpractice and negligence are evidentiary requirements for proving the standard of care and varying statutes of limitations.

1. Common Principles

Whether you label negligence by a veterinarian "malpractice" or not, the same general principles apply. To prove liability, a plaintiff must prove the standard of care expected of the veterinarian, a duty by the veterinarian to conform to that standard, a failure by the veterinarian to meet that standard of care, a resulting injury to the plaintiff or his property, and that the veterinarian's failure to meet the standard of care was the proximate cause of the injury. Of these elements, arguably the most contentious legal issue is the standard of care because it is the standard against which the veterinarian's conduct will be measured. The stringency of the standard chosen will likely be outcome determinative. If the standard of care is proven to be very high, then it is more likely that the veterinarian will not have met such a high standard. If the standard is set very low, it is more likely that the veterinarian will have met or surpassed it.

The relevant standard of care should be consistent with a level of reasonable skill, diligence, and attention that may ordinarily be expected of careful, skillful, and trustworthy people in the profession. The stan-
standard of care will usually be determined by the jury. The burden is on the plaintiff to "affirmatively prove the relevant standard of care exercised by other veterinarians, as well as the defendant veterinarian's departure from that standard when treating the animal."92

2. Expert Testimony

In non-professional negligence cases, the standard of care is that of a reasonable person93 and is therefore within the understanding of laymen. However, to prove the standard of care in a veterinary malpractice case using professional negligence principles, the plaintiff will almost always need to present expert testimony so that the jury will be able to decide what standard of care should be expected of the defendant veterinarian.94 In many jurisdictions, expert testimony is considered a requirement of a plaintiff's professional negligence case.95 This standard is implicitly objective; it speaks to the standard that should be exercised by other veterinarians, not the actual level of skill that the accused veterinarian possesses.96 In fact, it can be an error for a jury to consider the accused veterinarian's actual experience or training when determining the standard of care.97

In only very rare cases is expert testimony not necessary in a veterinary malpractice case.98 When the "very nature of the acts complained of bespeaks improper treatment and malpractice" it may not be necessary to present expert testimony.99 This may occur when the action taken or omitted by the veterinarian is something that a layperson without veterinary training would understand as falling below the relevant standard of

91. 57A AM. JUR. 2D Negligence § 190 (1989). This is true unless the legislature or an appellate court have established a standard of care applicable to "substantially identical situations." RESTATEMENT (SECOND) OF TORTS § 285 cmt. g (1965).
92. Bailey, supra note 87, at 823 § 2b.
93. "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances." RESTATEMENT (SECOND) OF TORTS § 283.
94. 32 AM. JUR. Proof of Facts 3D 351 Veterinary Malpractice § 8.
95. See, e.g., Haile v. Sutherland, 598 N.W.2d 424, 428 (Minn. Ct. App. 1999); Casey v. Levine, 621 N.W.2d 482, 490 (Neb. 2001).
96. See 57A AM. JUR. 2D Negligence § 192. See also RESTATEMENT (SECOND) OF TORTS § 299A ("Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."); id. § 299A cmt. e ("In the absence of any such special representation [regarding superior skill or knowledge], the standard of skill and knowledge required of the actor who practices a profession or trade is that which is commonly possessed by members of that profession or trade in good standing.").
97. Id.
care. For example, no expert testimony was needed to prove veterinary malpractice when a veterinarian did not x-ray a dog’s throat, esophagus, and stomach when there was reason to believe the dog swallowed a foreign object.  

3. Statute of Limitations

The second primary difference between “malpractice” and other negligence claims is that the statute of limitations for malpractice claims is shorter in many states. Some states specifically include veterinarians in their statutes regarding limitations on malpractice actions. For example, in Arkansas, veterinarians are included in the definition “medical care providers,” and thus all legislation regarding malpractice by human-health care providers also applies to veterinarians. Under Arkansas law, all malpractice actions against “medical care providers” have a statute of limitations of two years, whereas the statute of limitations for taking or injury to personal property is three years. In other states, veterinarians are not included in malpractice acts, but there is specific legislation that reduces the statute of limitations for cases against them.

II. DOCTRINAL EXCLUSIVITY

A. Price v. Brown

The seminal case in the conflict between veterinary malpractice and bailment is Price v. Brown. In Price, the Pennsylvania Supreme Court held that breach of bailment does not apply to a veterinarian who has performed surgery on the plaintiff’s animal. The court analogized veterinary practice to legal and medical practices, which involve “specialized education, knowledge, and skills.” The court noted that veterinary medicine is heavily regulated and requires a license. The court also suggested that there are “significant differences” between veterinary surgical services and grooming or kennel services. For these reasons, the

100. Id.
102. See id. at 978–79 (noting that only Arkansas and California specifically include veterinarians in their malpractice reform legislation).
103. ARK. CODE. ANN. § 16-114-201(2) (Michie 1987).
104. Id. § 16-114-203(a).
105. Id. § 16-56-105(6).
106. See Scoggins, supra note 101, at 979 n.228, and accompanying text.
108. Id. at 1151, 1153.
109. Id. at 1152.
110. Id.
111. Id. at 1153.
court extended professional negligence concepts to veterinary medicine, and refused to apply the breach of bailment cause of action.\textsuperscript{112}

The court noted that under a breach of bailment claim, the bailee "is required to exercise ordinary diligence and is responsible only for ordinary neglect."\textsuperscript{113} Under veterinary malpractice, the veterinarian must exercise the "appropriate standard of care," and the plaintiff "must specifically allege that the veterinarian was negligent in the performance of his professional services."\textsuperscript{114} In applying the professional negligence principles to the claim, the court held that "allegations relating to the professional services rendered by [the veterinarian] cannot be deliberately excised from the complaint as if the veterinarian’s services were no different than those offered by a kennel operator or a dog groomer."\textsuperscript{115} The court refused to allow the plaintiff to make a prima facie showing that the terms of bailment were not met, and then rely on the presumption of negligence that would arise under the bailment doctrine.\textsuperscript{116}

Essentially, the court held that even though the plaintiff satisfied the traditional elements of a bailment claim, that cause of action was not applicable when the loss or injury resulted from a professional’s negligence.\textsuperscript{117} The court did not question that the elements of a bailment were satisfied.\textsuperscript{118} Nevertheless, the court seemed compelled to choose between professional negligence and bailment by treating them as mutually exclusive, and chose to apply professional negligence over bailment.\textsuperscript{119}

B. CRITIQUE OF \textit{Price v. Brown}

The majority in \textit{Price} considered only the training and licensing involved with becoming a provider of "professional" services, but not the professional-patient relationship.\textsuperscript{120} This fact seems remarkable considering that the patient in the veterinary context is an animal and the veterinarian actually has no legal duty to the animal since the animal itself has no legal status.\textsuperscript{121} This is a major difference between the animal-veterinarian relationship and the human patient-doctor relationship, the context in which malpractice is usually applied. The relationship between

\begin{itemize}
  \item \textsuperscript{112} Id. at 1152–53.
  \item \textsuperscript{113} Id. at 1152 n.2.
  \item \textsuperscript{114} Id. at 1152.
  \item \textsuperscript{115} Id. at 1153.
  \item \textsuperscript{116} See supra notes 78–85.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id. See also id. at 1154 (Nix, C.J., dissenting); id. at 1154 (Castille, J., dissenting).
  \item \textsuperscript{119} Id. at 1153.
  \item \textsuperscript{120} See id. at 1150–51.
  \item \textsuperscript{121} See supra notes 13–23 and accompanying text.
\end{itemize}
a medical doctor and a human patient is not grounded in contract. It "has its foundation in public considerations which are inseparable from the nature and exercise of his calling; it is predicated by the law on the relation which exists between physician and patient, which is the result of a consensual transaction, and not necessarily one of contract."  

The doctor-patient relationship is entirely different than the relationship between a veterinarian and an animal or between a veterinarian and an animal's owner. In the veterinarian-animal context, the relationship is not consensual, as it is in the doctor-patient context. The animal does not, and cannot give consent, nor is the relationship recognized by law since the animal itself has no legal status. Since animals are considered property, the legal relationship between the animal and the veterinarian is no different than that of a mechanic and an automobile, or a dry-cleaner and a three-piece suit.

In the veterinarian-owner context, the veterinarian is not performing services upon the owner because the owner is not the patient. The relationship between a veterinarian and the owner is grounded entirely in contract, unlike the doctor-patient relationship. The owner is taking his animal to the veterinarian for services to be rendered upon the animal in exchange for consideration. Thus, the doctor-patient relationship that underlies medical malpractice liability is simply not present in the case of veterinary malpractice liability.

Secondly, the fact that the "patients" are animals, and as such are considered personal property, was not considered important enough to warrant discussion. Similarly, that bailment principles developed over many years to deal with situations where one party leaves personal property with another and that property is not properly returned was not sufficient to warrant applying bailment doctrine in this case. The fact that the veterinarian was highly trained and a member of a regulated profession was treated as a sufficiently important justification to enable the court to ignore the doctrine that was developed to deal with precisely this type of case.

Finally, the court gave no justification for why bailment and veterinary malpractice could not be applied. The court treated them as mutually exclusive doctrines even though bailment principles allow for a varying standard of care depending on the experience and training of the
bailee,\textsuperscript{128} and merely shifts the initial burden of production to the defendant, not the final burden of proof.\textsuperscript{129} The majority also did not consider how great, or inconsequential, the burden on veterinarians would be if bailment was applied. In fact, when veterinary malpractice principles are applied, the defendant will usually present his own definition of what the standard of care should be and whether he met that standard when presenting his defense.\textsuperscript{130} So the only real difference is that, when there is simply no defense for the veterinarian's actions, he will not be able to satisfy the initial burden of production and the presumption will allow the plaintiff to win on summary judgment. If the veterinarian has a legitimate defense, then the difference will be that the veterinarian will have to present his defense after the plaintiff makes a prima facie showing, rather than after the plaintiff has presented her entire case. In fact, having the veterinarian present his defense earlier in the proceeding is a very logical way for a court to go about its fact-finding, considering that the veterinarian is the only person that knows exactly what treatment, or lack thereof, was provided to the animal. It is this logic that inspired the development of bailment principles to begin with—the person caring for the property is in the best position to explain why it was not properly returned to its owner.\textsuperscript{131}

C. Malpractice Statutes of Limitations

When malpractice legislation does not explicitly include or exclude veterinarians, courts are left to decide if they should apply the statute of limitations applicable to negligence or to malpractice. This is simply a policy choice left to the courts, and two courts interpreting the statute can easily decide differently. In \textit{Storozuk v. Butler},\textsuperscript{132} an Ohio Court of Common Pleas ruled that "malpractice" includes negligence by a veterinarian under a statute that reduces the statute of limitations in malpractice actions to one year. However, in \textit{Southall v. Gabel}, the Court of Appeals of Ohio interpreted the very same Ohio statute\textsuperscript{133} and ruled that negligence by a veterinarian was not included in the statute.\textsuperscript{134} In \textit{Storozuk}, the court relied primarily on the similarity between physicians and veterinarians in that a professional standard of care is applied to both of them in negligence actions.\textsuperscript{135} In \textit{Southall}, however, the court strictly lim-
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Hastings Law Journal cited the statute’s definition of “malpractice” to the common law definition which included only members of the medical profession and attorneys. The court also noted in Southall that the “very essence of ‘malpractice’ is the patient-physician relationship” which was between the defendant-veterinarian and a colt, not the defendant-veterinarian and the plaintiff.

Thus, even when professional negligence concepts are applied to negligence by veterinarians, there remain inconsistencies in the application of those concepts. If only the similarities in training and types of services provided by veterinarians and physicians are considered, it would seem that the similar theories of liability should be applied. If similar theories of liability are applied, then it would also seem that the time limit for bringing that type of action should be the same. However, if the patient-physician relationship is considered, then the veterinarians and physicians seem to have vastly different practices, both legally and practically. “A human patient cannot leave his or her liver or heart for treatment and make a subsequent demand for its return; it is the patient who is treated and the patient who has a cause of action against the physician providing medical treatment;” whereas an animal patient cannot bring a cause of action against their veterinarian because they lack standing to do so. Furthermore, even if all medical malpractice principles were applied to veterinarians, the types of damages available remain vastly different. Pain and suffering, emotional distress, and loss of companionship are all frequently available either to the human patient or the patient’s family, unlike the animal patient, for whom damages are usually limited to “fair market value.”

III. BACK TO BAILMENT

This Note has explored the conflicts and inconsistencies with applying malpractice principles rather than bailment principles in lawsuits against veterinarians by pet owners for negligent treatment of their pets. These conflicts and inconsistencies demonstrate that the majority in Price v. Brown made an incorrect decision. The elements of a breach of bailment action, delivery of personal property to the bailee for a specific purpose, a demand for that property by the bailor, and a failure by the bailee to deliver that property or delivery in a damaged condition fit

136. Southall, 277 N.E.2d at 232.
137. Id.
140. Root, supra note 25, at 426–27.
141. Price, 680 A.2d at 1154.
142. See id. at 1152.
very neatly with the typical facts surrounding a case involving negligence by a veterinarian. To hold that veterinary malpractice and bailment are mutually exclusive is simply not necessary.

In Price v. Brown, the court primarily relied upon similar educational and licensing requirements, and thus an increased standard of care, in imputing professional negligence principles to veterinary negligence cases.\(^{143}\) However, the standard of care in bailment actions can, and should, vary with the purpose of the bailment.\(^{144}\) When professionals, or others with specialized skill, are hired to perform a service as part of a bailment relationship, they are under a duty to use their education, experience, and judgment.\(^{145}\) The fact that veterinarians are more educated or regulated than other types of service-providers who may be involved in bailment relationships should not necessitate that they be excused from the bailment doctrine. Bailment principles developed in response to the reality that the bailee was in the best situation to explain the loss or damage to the property.\(^{146}\) This reality is unaffected by the education or level of regulation required of the bailee.

The major difference between veterinary malpractice and bailment is who has the initial burden of production. In veterinary malpractice the plaintiff has the burden, whereas in bailment once the plaintiff-bailor has made a prima facie case the burden shifts to the defendant-bailee to rebut the presumption of negligence. However, even in bailment, the ultimate burden of proof always remains with the plaintiff-bailor.\(^{147}\) Applying bailment principles will not cause drastic hardship for veterinarians. In most cases where malpractice is applied, the veterinarian will still have to mount a defense to demonstrate he was not negligent.\(^{148}\) Requiring the veterinarian to present his side of the story first may be a procedural inconvenience for the veterinarian, but it makes sense considering that only the veterinarian really knows what happened. Similarly, the presumption of negligence that results from the plaintiff making out a prima facie showing of the elements of a bailment is not so great a burden. If the veterinarian satisfies the burden of production and offers an excuse for the loss of or injury to the animal, then the presumption vanishes and the plaintiff must go forward with her case.\(^{149}\) It is not unreasonable to require a veterinarian to explain the cause of the injury.

\(^{143}\) See id. at 1152-53.
\(^{144}\) Story, supra note 72, § 431, at 392.
\(^{145}\) Id.
\(^{146}\) Dobie, supra note 61, § 17, at 38.
\(^{147}\) Id. § 17, at 36-38.
\(^{148}\) See Price, 680 A.2d at 1155 (Castille, J., dissenting).
\(^{149}\) See 8A AM. JUR. 2D Bailments § 234 (1997).
to, or loss of, a person’s cherished pet. Even if the presumption stands and the veterinarian is found to be in breach of the bailment, the damages awarded to the plaintiff-pet-owner could be minimal if the pet’s traditional property classification is applied. For this reason, the legal system should not be hesitant to give pet owners a forum for demanding from their veterinarian an explanation of their pet’s loss or injury.

CONCLUSION

Plaintiffs should be allowed to state a claim for breach of bailment when their veterinarian negligently treats their pet. But, so long as plaintiffs are limited to the fair market value of their pets, there will be no incentive to sue and veterinarians will have no financial incentive to avoid negligent treatment.

Currently, some state legislatures have begun to consider methods for expanding the types and amounts of damages for injuries to people’s pets. Some of these proposals include allowing claims for damages for loss of companionship, emotional distress, and pain and suffering of animals and/or their owners, even though these are all manifestly contradictory to our classification of animals as property. These proposals further highlight the legal system’s inconsistent approach to issues regarding animals. Also, many commentators have discussed declassifying animals as property, but the idea of giving animals legal status in American courts is something that many people are not prepared to accept. While there is currently no foreseeable consensus on the types of

151. See, e.g., S.B. 932 § 2(b), 183rd Gen. Ct., Reg. Sess. (Mass. 2003) (proposing to allow human companions to recover damages for “loss of reasonably expected society, companionship, comfort, protection and services of the deceased animal to his or her human companions” when their animal-companion is killed by a “willful, wanton, reckless or negligent act”); H.B. 84, 2003 Leg., Reg. Sess. (Miss. 2003) (died in committee) (proposing to allow pet “owner” to recover “an amount not to exceed Five Thousand Dollars ($5,000.00) for the owner’s loss of companionship and affection of the pet” for the intentional or negligent killing of their “canine, feline, bird, horse or other domesticated pet”). But cf. S.B. 159, 2003–2004 Leg., Jan. Sess. (R.I. 2003). Senate Bill 159 proposed to allow damages for “loss of reasonably expected society, companionship, love and affection,” of up to $10,000, when resulting from the death or injury of a pet that was caused by the intentional or negligent act of another but provided that “this section [shall not] be construed to authorize any award of noneconomic damages in an action for professional negligence against a licensed veterinarian.” Id. § 1(e).
152. S.B. 932 § 2(c), (f), 183rd Gen. Ct., Reg. Sess. (Mass. 2003) S.B. 932 proposes allowing a guardian ad litem or next friend to recover damages for “pain, suffering and loss of faculties sustained by the animal” to be put in “a trust for the care of the animal” with “[a]ny remainder of trust funds existing at the death of the animal . . . distributed to a non-profit organization dedicated to the protection of animals.” Id. The Bill also proposes to allow recovery of damages for “pain, suffering, emotional distress and consequential damages sustained by the animal’s human companion . . . .” Id.
154. Bob Vella, host of Pet Talk America, a nationally syndicated radio show devoted to pets, noted that the movement to change “owner” to “guardian” will give animal rights groups “the ammu-
damages that should be allowable, these potential reforms will certainly make legal recourse more attractive to plaintiff-pet-owners, and as that occurs, the appropriate theory of recovery will necessarily come into question. When these issues arise, courts should not treat bailment and veterinary malpractice as mutually exclusive doctrines, and so long as our legal system classifies animals as the property of their owners, courts should apply the doctrine of bailment in cases regarding their injury or loss.
