Developments in Ohio Veterinary Medicine
If You Cried When Old Yeller Died, Can You Sue the Veterinarian?

John A. Fiocca, Esq.
Smith, Rolfes & Skavdahl Company LPA

I did not intend this article to be a "law review" type of survey, comparing the similarities and distinctions addressing the idiosyncrasies of veterinary malpractice in the fifty States. There are dozens of such articles already available. Rather, this essay is simply intended to provoke discussion on our changing attitudes toward animals, and how those attitudes are shaping our attitudes toward the practice of veterinary medicine, as well as the legal principles applicable in veterinary malpractice cases today.

Muffy was not a piano.

Over the years, I have had the privilege of representing and defending judges, lawyers, dentists, architects, engineers, nurses, hospitals, and – yes – veterinarians. Occasionally I am asked, "Who in the world would sue a veterinarian? I mean, aren't animals personal property? Recoverable damages are limited, right?" I tell them that anyone who owns anything with fur or a hide or feathers that dies while under the care of a veterinarian, is a potential plaintiff in a veterinary malpractice case. These owners will sue the veterinarian for *economic* damages, and not just for the animal's "fair market value." They will also seek reimbursement of *every* expense incurred over the animal's lifetime, including all veterinary costs, every can of dog food, every grooming and kenneling expense, and every pet toy. And that's just the beginning. The owners will also seek *non-economic* damages for "pain and suffering," "emotional distress," the "intrinsic value" of the animal to the family, and for "sentimental damages."

And these owners are, as a rule, very angry when they do sue, particularly if the animal is a pet. If there is even a *hint* of malfeasance (and even where there is none whatsoever), the owner is determined to make the veterinarian pay for the owner's grief. They invariably argue, "My pet was not property – she was family. Muffy was not a piano."

Twenty years ago, even the most ardent pet lover would have eschewed the analogy. Not anymore. Increasingly, courts around the country are expanding the nature, scope, and recoverability of not only economic, but non-economic damages in veterinary malpractice cases.

It this all about "greed?" Maybe. But I think this trend is spawned by a more basic reality: The changing relationship between humankind and animals. And that relationship is currently at the center of a fiery debate about what it means to be "human," and what it means to be an "animal." (And, no, I am not talking about my former college fraternity brothers).

I've noticed that most animal owners (but certainly not all), and the veterinarians I have represented, truly do have one thing in common: Both genuinely love animals. But when an animal dies, from natural causes or otherwise, the grief experienced by the owner can be overwhelming. When a pet dies, ordinary folks who love their families and friends, suddenly become emotional heat-seeking missiles in search of a target. And more often than not, that target is the veterinarian.

Veterinarians will be sued by virtually anyone who owns an animal — medical doctors, lawyers, grandmothers, teachers, insurance agents, moms, dads – anyone. When it comes to coping with emotional loss associated with the death of an animal, usually a family pet, the pool of potential plaintiffs is limitless. Over the past several years, veterinary medicine has been a "target rich environment" for grieving animal owners, and for the lawyers who represent them, who seek "justice" for Muffy's death. Battalions of animal rights groups work around the clock to expand the scope of recoverable damages in lawsuits filed against veterinarians. These groups endeavor to expand the nature and scope of recoverable *economic* damages, and the scope of

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non-economic damages as well, including emotional distress damages, "intrinsic" damages, and "sentimental" damages. All, of course, in contravention of existing common law, and in abject defiance of an ancient legal truism, "Animals are personal property."

The debate itself is hardly new. What *is* new, however, is the escalated ferocity of the fight. The anger on the part of many plaintiff animal owners borders on rage in many cases, and that rage is directed at the defendant veterinarian. The reason for this change is pure conjecture on my part, but I can only conclude the antipathy directed by so many animal owners against their family veterinarian (and one-time family friend) is due, at least in part, to the new role animals play in our daily lives.

Based upon my interaction with grieving pet owners who have sued their veterinarians, I sense the owner's vitriol is based upon the following rationale: "I loved my pet. She died while under the care of the veterinarian, the last person to see her alive. She was my family. I am suing the veterinarian because he could not save her. She was priceless to me. I owe this to Muffy." The lesson here is: "Grief needs a target."

Once in a while the cynical lawyer in me wants to conclude that Muffy's owner simply wants to find a way recover the thousands of dollars spent on caring for the animal over her lifetime. Regardless of motive, however, the willingness to blame the veterinarian for personal emotional pain caused by the death of a pet, rather than blame Mother Nature, is real. It is a phenomenon that was unheard of a few short years ago.

Perhaps, the change in attitude and behavior of pet owners in recent years is a mere reflection of the larger issue relating to our changing attitudes toward animals generally. Increasingly, veterinary malpractice lawsuits and the judicial system have become the "theater of choice" where the war over the issue of whether animals will continue to be deemed "personal property" will be fought. In agricultural States like Ohio, animal rights advocates prefer to seek animal rights reforms through the judicial system rather than through the legislative system. It is simply too difficult to circumvent the entrenched lobbying organizations in agricultural states like Ohio or Texas. From the activist's perspective, it is easier to effect change judicially. And in some States, they are doing just that.

When Old Yeller died, we cried (well, most of us did, anyway). When my first dog, Poppy, died after sipping antifreeze which leaked from a car into a puddle, we cried again. But in those days, we *didn't* sue the one person trying to save her in the Clinic ER, the veterinarian. So how did we get here? The answer is simple: "We are not in Kansas anymore." Times, and attitudes, have changed.

To understand how the animal rights movement impacts veterinary medicine today, we need to understand the nature of the fundamental relationship between humans and animals. In 1850, about 64% of Americans lived on farms. By 1988, the number of farmers, as a percentage of the U.S. population, fell to just over 2%. Most of us live in cities today. Historically, in agrarian societies, humans intuitively understood the nature of their relationship with animals. To survive, humans killed animals for food, shelter, leather, shoes, belts, saddles, and clothing. We needed dogs to protect the herds that fed our families. We needed cats to kill vermin hanging around the old homestead and eating the corn in the barn intended to feed people and cattle alike. We needed tallow to make candles and soap. We needed horses and mules for transportation. Our relationship with animals was fairly simple in 1850: Animals (both dead and alive), were required to sustain human life. The subject was not debatable. And in 2017, it's no small irony humans still destroy animals for our own needs, intentionally, right or wrong. And we still need veterinarians to take care of these animals, whether those animals are intended for our present-day food chain, or clothing chain, or just fetch a stick.

There were few "animal rights" in 1850. At least, not in a way we would recognize today. But this is not to suggest Americans didn't *value* animals. To the contrary, humans have revered animals since the beginning of time. (How important was the bison herd to the Sioux in "Dances with Wolves?") There was a time when the life of one stolen horse was worth *far* more than the life of the cowboy who stole him. In 1850, stealing a steer or a horse would buy the offender a one-way ticket to Boot Hill. The horse, not the horse thief, lived to see the next cattle drive. And that was the law.

But the most dramatic change since that time has been the change within ourselves, and how we relate to our animal friends. The only contact most of us have in 2017 with animals of any kind is usually limited to our pets, and the occasional visit to the local zoo. The fact is, most folks in 2017 really don't know the difference between an otter and an udder. Collectively, we have become more

urbanized, more "house broken." Many of the products formerly derived from animals, can be made synthetically today. Our pets (usually dogs and cats) are "a part of the family." Dogs don't herd sheep in Cleveland much anymore. Instead, we want to anthropomorphize animals, particularly our pets. We increasingly ascribe *human* traits, *human* emotions, and *human* intentions to our pets. Yet we somehow forget the fact that the gourmet pet food we feed to our pets – usually beef and chicken – were also living, breathing animals themselves at one time.

Depending upon who you ask, the cost of raising a pet dog today, from birth to death, ranges anywhere from $10,000 to $20,000, sometimes more. Clearly, the cost of sustaining a pet over its lifetime far exceeds the animal's "fair market value," particularly if the pet has been spayed or neutered. Surprisingly, veterinary expenses constitute a relatively small percentage of those costs. Of course, we are willing to incur these costs precisely because we love our pets. Yet despite our lofty rhetoric about the nobility of our animals, most still eat hot dogs and hamburgers and chicken nuggets and steaks, order leather seats for the Buick, and wear Ferragamo belts or shoes. Our response to this shining display of cognitive dissonance is, well, "Poodles are not Pigs." Maybe it's just me, but the slope is beginning to feel slippery.

And it gets more slippery still. Just what, exactly, is a "companion animal," and why should they be treated *differently* than other animals or, for that matter, your neighbor's "companion animal"? Veterinary malpractice cases I've defended involve myriad species of "companion animals," including Lizards, and Toucans, and Mares – Oh my! (Just couldn't resist that). Wait, there are more: Macaws, Pythons, Turtles, Cockatiels, Alpacas, Potbelly Pigs, Horses and, of course, Cats and Dogs. The list of "companion animals" is long, and growing. Invariably, the owners of these animals defend their "companion-like qualities, i.e., intelligence, loyalty, and uniqueness." The owner's reason: "A companion animal is intelligent. My companion animal is intelligent. My companion animal is an AKC registered Collie. A 'Honey Baked Ham' is not intelligent." Well, that doesn't work either. The problem is, several research studies suggest that pigs might be just as intelligent, if not more intelligent, than dogs (before the pigs, not the dogs, became "Honey Baked Hams," at least).

If owners are conflicted about the role animals play in the cosmos, they are just as conflicted these days about their veterinarians. Going back to 1850 again, veterinarians treated more hogs, herds, and horses than harriers. It was a less emotional time (unless you enjoyed watching a bunch of convicted cattle rustlers swing from a rope). Veterinarians were more like "animal technicians." They were "auto mechanics for animals." Today, vets treat more family cats than cows, at least in areas where these malpractice suits are likely to be filed. And pet owners increasingly look upon the small practice veterinarian as they would look upon their family pediatrician or primary care physician. If a medical doctor's error kills a family member in 2017, the family may recover economic damages against the doctor including reimbursement of medical bills, as well as non-economic damages for pain and suffering, emotional distress, loss of society, and loss of support. Today, pet owners consider their pets to be "their children." And when they die because of professional veterinary negligence, they are insisting upon their right to recover similar damages.

In the end, animal rights advocates are simply saying, "A Cocker Spaniel is not a Car." The measure of damages applicable to the destruction of a BMW should not apply with respect to the death of the family Beagle. And maybe the activists are right. But this is not Ohio law. Not yet.

Ohio Veterinary Malpractice in 2017.

1. Standard of Professional Care.

Any civil action seeking money damages against a veterinarian devolving from the exercise of professional veterinary judgement, is an action for professional veterinary negligence (sometimes referred to as "veterinary malpractice.") Technically, only actions filed against medical doctors or lawyers are deemed to be "malpractice." And unlike actions filed against doctors and lawyers, the statute of limitations for bringing an action for professional veterinary negligence (and most other licensed professionals) is two years, not one year.

Except for differences relating to the nature and scope of recoverable damages, veterinary malpractice cases are similar to other types of professional negligence actions. To get the case to the jury, and to prevail at trial, the aggrieved animal owner must introduce expert veterinary testimony, expressed to a degree of reasonable medical and scientific probability, with respect to: 1) The standard of professional care applicable to the procedure performed; 2) A breach of the professional standard of care; and 3) A casual relationship between the breach of the standard of care,

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and injury or death to the patient (i.e., the animal). The professional standard of care to be applied is similar the standard of care applicable generally in human medicine, i.e., the standard applicable to licensed Ohio veterinarians possessing similar training, education and experience, while practicing veterinary medicine under like or similar circumstances.

One of the unique problems facing veterinarians in these cases is the fact most animal owners do not believe they should have to support their malpractice claim with expert testimony. Many pet owners have unapologetically argued they do not need a veterinary expert to support their case, because the owner knows more about "their pet" and, consequently, more about veterinary medicine, than the defendant veterinarian. Everyone has a computer, and an "expert opinion," courtesy, of course, of Dr. Google.

2. Recoverable Damages in Veterinary Malpractice Actions.

Ohio continues to "hold the line" with respect to the nature and scope of recoverable damages in veterinary malpractice case. As an old-line agricultural State, the Ohio General Assembly has historically understood the problems associated with creating "special" legal rights in favor of some animal species or breeds, and not others. If the owner of a beef cattle herd was permitted to recover damages in a class action suit seeking damages for emotional distress associated with the slaughter of the Angus family, your Quarter Pounder would probably set you back $500. The General Assembly is not likely to enact legislation which would re-categorize any animal as anything other than "personal property" any time soon, at least for civil purposes. Ohio has recently enacted a "companion animal statute" however, imposing increased criminal penalties for abuse (defined as "serious physical harm") of a "companion animal." The General Assembly has now defined a companion animal as any animal kept inside a residential dwelling, and any cat or dog regardless of where it is kept. The General Assembly's definition explicitly excludes livestock (including horses, mules, cattle, sheep, goats, pigs, poultry, alpaca, llama, captive white-tail deer, and any other animal that was raised or maintained domestically for food or fiber) and any wild animal. This legislation may signify a shift in the Ohio legislation's willingness to selectively "classify" animals based on their perceived "companionship value" to humans.

Because Ohio law considers animals to be personal property, the measure of damages applicable in damage to personal property cases generally, is applicable in veterinary malpractice cases. That is, in a veterinary malpractice case, the measure of damages is the difference between the fair market value of the animal as calculated immediately before, and after, the alleged negligent veterinary act. And more than one court has held that the fair market value of a family pet, particularly a spayed or neutered pet, is zero or close to zero. Hence, the war. Emotional distress damages, or sentimental damages, or "intrinsic" damages, are not recoverable in veterinary malpractice cases in Ohio.

However, in practice, Ohio is really a "hybrid" State when it comes to the recoverability of economic damages sought in veterinary malpractice cases. For example, if the owner can show "special" value (e.g., Benji has a movie contract; Flipper gets paid by the U.S. Navy for finding and disarming mines; the owner has spent $20,000 on Shutzhund training for his German Shepherd), the owner *may* be entitled to recover more than the animal's fair market value if the animal is injured or killed because of a veterinarian's professional negligence. If the animal is a capital asset (e.g., a race horse), recoverable damages may be expanded somewhat (e.g., breeding value), although even these cases must be approached with caution. Damages must be proven to a degree of "reasonable certainty" in Ohio. An owner claiming his horse would have won the Triple Crown "but for" the negligence of the veterinarian, cannot recover. Anyone guaranteeing that any given horse will win a given horse race, is flirting with a judicial encounter of another kind, probably one involving a prosecutor.

Nationally, however, it's a different ball game in 2017. The camel's nose is under the proverbial tent with respect to the recoverability of expanded economic and non-economic damages. About a dozen States permit recovery, to a greater or lesser extent, of emotional distress damages, reimbursement of veterinary fees, "sentimental" damages, and "intrinsic damages." Some courts have held family pets can, potentially, be more akin to "rare" or "unique" personal property, rather than "ordinary" personal property. And some courts are permitting recovery of increased damages on this basis. Pet owners argue, and some courts are beginning to agree, that some pet owners should be compensated for the pet's "intrinsic" value to the family, like a family heirloom. "Our Golden Retriever was not like an ordinary candle holder you can buy from Macy's. To us, she was like an 18th Century, hand cut Czechoslovakia crystal candle holder to us." In other words, some courts are beginning to permit

recovery of “sentimental damages,” under the moniker of “intrinsic” damages. But not yet in Ohio.

3. Informed Consent.

Unlike human medicine, Ohio does not recognize the existence of an independent tort for “lack of informed consent” in veterinary medicine. Still, animal owners continue to push the envelope with respect to this issue. In veterinary medicine, the animal is the “patient.” The owner is the “client.” The owner contracts with the veterinarian for care administered to the patient, establishing the professional relationship, a condition precedent to filing an action for professional veterinary negligence.

Still, a veterinarian may be sued for failing to advise an owner of *common* risks associated with a given procedure or medication, such as the risk of death associated with administration of anesthesia. The failure to do so does not breach the “tort of lack of informed consent,” because the tort does not exist in veterinary negligence law. However, the failure to warn of common risks associated with a procedure or medication can potentially well breach the professional standard of veterinary care provided the owner’s veterinary expert so testifies, to a reasonable degree of medical probability. Conversely, the veterinarian is under no duty to warn the owner of *rare* or remote risks associated with a procedure or medication.

Veterinarians Deserve Respect.

Over the past two decades, I have defended hundreds of veterinarians. I can say without hesitation that in the vast majority of those lawsuits (over 90%), there was no breach of the applicable standard of veterinary care whatsoever. There was no veterinary malpractice. Yet pet owners still went after the veterinarian with a vengeance. Why? It is heartbreaking when the family’s 15-year-old English Sheepdog is failing from a metastasized osteosarcoma. It is heartbreaking for the family, but it’s also hard on the veterinarian who must advise the family there is no hope for survival, and that euthanasia is the only humane option.

Many pet owners fail to appreciate the fact veterinarians do what they do because they love animals. They feel the owner’s pain. I can’t overstate the number of times when a veterinarian, who has committed no wrong, has shared his or her dejection with me caused by comments made by the owner of a deceased animal to the effect: “You didn’t really try to save Muffy. You’re just in this for the money.”

And owners these days are not just suing for the value of the pet, however it’s calculated. We are defending intentional torts, and personal injury torts, within the context of veterinary malpractice cases. A cat owner sued the veterinarian for $1.275 million after the cat bit the cat owner, simply because he was bitten while standing in the veterinarian’s office. A dog owner sued the veterinarian for intentional infliction of emotional distress, alleging the veterinarian killed the dog on the operating table on *purpose* solely to cause the owners “severe and debilitating emotional distress.” Jockeys injured or killed during horse races because a horse stumbles and falls, causing collisions, invariably sue the horse’s veterinarian or the track veterinarian for personal injuries, alleging the accident should have been “foreseeable” to the veterinary professional because there “must have been something physically or emotionally wrong with the horse” that the vet should have spotted.

I think animal owners, the public generally, and yes, even some judges, forget that in most parts of the United States, it is more difficult to be admitted to a college of veterinary medicine, than to a medical school. This is due, in part, to the fact there are fewer veterinary schools overall, but the test results of the applicants to both schools are similar, and vet schools do reject a higher percentage of applicants. The point is, veterinarians are highly trained and educated. Because they treat “animals” and not “humans,” they frequently do not receive the respect they deserve. They should. Unlike human doctors, veterinarians cannot communicate with their patients. Vets typically earn far less than their human medicine counterparts. Yet they must know the physiology, anatomy, treatment courses for not just one species (Homo sapiens), but for *multiple* species and breeds.

Like any licensed professional, veterinarians can and do make mistakes from time to time. And the law provides remedies to the animal owner. But those remedies should not be so disproportionate or onerous that it discourages aspiring veterinarians from entering the profession, or adversely affect the agricultural economy. After all, in the end, where does one draw the line between “companion” animals and “food” animals? The recent expansion of recoverable damages in veterinary malpractice cases nationally through judicial fiat will have substantive, negative consequences for agricultural producers and consumers alike, not to mention the adverse consequences visited upon the veterinary profession itself.

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The prospect of recovering non-economic damages for "pain and suffering" or "emotional distress" in companion animal cases may enrich the legal profession, but it will do *nothing* to lower veterinary costs, or help animals currently suffering from a *lack* of veterinary care. Rather, the expansion of recoverable damages, both economic and non-economic, will increase the cost of that care. And the more expensive we make veterinary care, the fewer animals will receive that care. As such, any expansion of recoverable damages in veterinary malpractice cases, should be made by legislatures, not the courts. And so far, most Ohio jurists have agreed.

John Fiocca is a Shareholder in the Columbus office of Smith, Rolfes & Skavdahl. He has 42 years of state and federal court trial and appellate experience, primarily in the areas of professional liability, product liability, and construction law. John has represented judges, architects, engineers, dentists, lawyers, and medical facilities in professional liability actions. He is a past keynote speaker at the Ohio Judicial Conference on the subject of judicial liability. John has represented Ohio veterinarians in veterinary malpractice actions for two decades, as well as Ohio Veterinary Licensing Board matters. He has been a featured speaker at The Ohio State University College of Veterinary Medicine, as well as the 2012 Midwest Veterinary Conference relating to veterinary malpractice law.