



**UNIVERSITY OF  
BIRMINGHAM**

**PRIORITISING THE BEST INTERESTS OF THE ANIMAL AND RE-FRAMING  
VETERINARY NEGLIGENCE**

**By**

**SAMANTHA ANNE SCHNOBEL**

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## **Abstract**

Veterinary negligence within the United Kingdom is under-litigated and under-theorised. Further, the owner-property dyadic means those who have suffered emotional harm cannot claim whilst veterinarians lack external guidance on evolving expectations. To address this tension, this thesis aims to provide guidance to veterinarians on their legal obligations stemming from the triangular relationship between veterinarian, owner, and animal, and to advance the position of the animal within this relationship by advocating a best interests approach. At the damage stage, a sentient constitutive property model, in which the reciprocal relationship between owner and animal is central, will be advocated. The veterinarian's duty will similarly shift from one which protects the claimant's financial interest, to one protecting the integrity of the reciprocal relationship. Where the animal's best interests are at risk, veterinarians may be protected from liability where they have acted to protect this interest. Looking to breach, the importance of expert testimony necessitates profession-wide support of these ideas. To achieve this, new professional guidance developed by a representative council who embrace the aims of this thesis is advocated. Grounding these ideas is the position that courts should be alive to doctrinal aspects of vulnerability and reason decisions based on compassion and fairness.

*To my family and dearest friends. Thank you for your constant and unwavering support; it has meant more to me than you will ever know. In times of darkness, it was your love and encouragement that brought me back to the light. And to Darcy, Max, Zeus, Nikki & Squiggy. It is because of you that I undertook this thesis. Throughout my life, you have each uniquely contributed to the person I am today. For all of the experiences you have given me, I consider myself truly blessed. I keep the lessons you have taught me close to my heart and love you each immeasurably.*

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General and Specialist Practice (Education, Training and Qualifications) Order 2010, SI  
2010/234

The Civil Procedure Rules

The Medical Act 1983 (Amendment) Order 2002 (SI 2002/3135)

**United States (Primary Legislation)**

Animal Welfare Act 1966

## Introduction

*“Not long ago, there lived in London a young married couple of Dalmatian dogs named Pongo and Missis Pongo...They were lucky enough to own a young married couple of humans named Mr. and Mrs. Dearly, who were gentle, obedient, and unusually intelligent—almost canine at times...Like many other much-loved humans, they believed that they owned their dogs, instead of realising that their dogs owned them.”<sup>1</sup>*

### Introduction

#### a) *Contextualising the Positions of the Animal, the Owner, and the Veterinarian*

In my first year tort module I was taught, by one of the supervisors of this thesis, the ingredients of a negligence action. Alongside the duty of care, breach, and causation requirements, the claimant had to establish that she suffered from some form of actionable damage. Traditional categories of actionable damage remain property and physical injury,<sup>2</sup> however, courts have come to recognise exceptional categories in the form of pure economic loss and psychiatric harm; this all seemed quite straightforward. I then turned my attention to the case of *Rees v. Darlington Memorial Hospital NHS Trust*.<sup>3</sup> I recall reading the facts and

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<sup>1</sup> Dodie Smith, *101 Dalmatians* (Egmont 2006) 1.

<sup>2</sup> See for example: *Le Lievre v. Gould* [1893] 1 QB 491, 504, where it was stated by Lord Esher that, ‘if one man is near to another, or near to the property of another, a duty lies on him not to do that which may cause a personal injury to that other, or may injure his property.’ This quote illustrates the types of damage initially accepted by the courts, but also the importance of proximity in the duty of care analysis, which is discussed in greater depth below.

<sup>3</sup> [2004] 1 AC 309. In this case the claimant was severely visually impaired. Believing that she would be unable to care for a child if she ever became pregnant, the claimant underwent a sterilisation procedure. The procedure itself was negligently performed and the claimant became pregnant, later giving birth to a healthy child. The claimant sought to recover damages for the costs of raising the child. At trial, the claimant was denied the additional costs, however, on appeal the court allowed those costs which could be attributed to the mother’s additional needs to assist in raising the child. At the House of Lords, it was held that quantifying the benefits and burdens of being a parent were impossible and that viewing the child as nothing more than a financial burden went against viewing the human life as sacred. The claimant was, however, awarded non-compensatory

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trying to determine for myself the nature of the damage claimed and whether it could be classed as physical injury, psychiatric, or more complex still, loss of autonomy. Attempting to relate the damage to the remaining negligence requirements was more difficult still and the judgments provided little clarity. However, it was Lord Scott's judgment which had a lasting impact and in many ways acted as a catalyst for the research I undertake in this thesis.

Particularly controversial was the issue of assessing the claimant's damages. Here, Lord Scott made what he believed to be an uncontroversial comparison using an analogous profession to illustrate the complexity of valuing a human life.<sup>4</sup> According to Lord Scott, whilst it would be impossible to assess the value or the burden of a particular human life, his example was designed to demonstrate how damages would be assessed in an analogous professional negligence scenario 'that did not involve these difficulties.'<sup>5</sup> In his example, a veterinarian negligently gelded a colt with the result that one of the mares became pregnant, later giving birth to a healthy foal. Whilst negligence on the part of the veterinarian would not be contested and damages could be awarded in line with the cost of the veterinarian's negligently-provided services, additional compensation for the rearing of the foal was thought to be "absurd."<sup>6</sup> According to Lord Scott:

[The owner] could have the foal destroyed as soon as it was born.

But this would be an unlikely choice for the foal would be likely

to have some *value*...Or the owner could decide to keep the foal

until *it* could be weaned and then to *sell it*. Or he could decide to

keep *it* until, as a yearling or a two year old, it had reached a little

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damages in the amount of £15, 000.00 in recognition of the legal wrong that was suffered and the claimant's loss of opportunity to live her life in the way she had planned.

<sup>4</sup> *ibid* 352.

<sup>5</sup> *ibid*.

<sup>6</sup> *ibid*.

more maturity and then *sell it*. Or he could try and add *value to it* by breaking it in...and selling it. Or he could keep it for *his own use*.<sup>7</sup>

According to Lord Scott, then, the young foal presented no problem in terms of valuation because, to the owner, the foal was only ever an “it” with an ascertainable property value; the only question for the fictional owner in *Rees* was which option provided the best return on his investment. The problem with this conclusion is that whilst it accords with the letter of the law insofar as animals are regarded as the property of their owner, it makes far-reaching assumptions about the owner-animal relationship and how it should be characterised. In short, Lord Scott’s decision raised far more questions for me than it answered.

In the forefront are issues surrounding the position of animals under the law and how the law constructs the owner-animal relationship. On the periphery, however, is the role of the veterinarian. Lord Scott’s passing acknowledgment to the care provided by the veterinarian belies an area of the law rich with legal and ethical complexity. Important legal and ethical issues are raised, for example, when the veterinary relationship is placed in opposition to the human medical relationship, or where the owner, acting on his property interests over an animal, wishes, for example, to have a healthy animal destroyed. This raises questions as to the doctrinal nature of veterinary liability and whether there does, or should, exist a clear division between human medical negligence cases and those involving veterinarians and nonhuman animals. Taking this further, larger questions relating to the veterinary

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<sup>7</sup> *ibid* [emphasis added]. There is a resemblance here to Honoré’s theory on full liberal ownership. On this point, see: Tony Honoré, ‘Ownership’ in AG Guest (ed.) *Oxford Essays in Jurisprudence* (OUP 1961).

## Introduction

relationship as to whose interests and what relationships matter and deserve protection under the law also arise. For example, whilst animals are classed as property and therefore “things” under the law,<sup>8</sup> an increase in both spending on veterinary care<sup>9</sup> and veterinary stress levels in the face of treatment and welfare dilemmas<sup>10</sup> indicates that animals are not mere inanimate “things”. To what extent negligence can be adapted and stretched to protect the interests of animals and consequently impact the veterinary relationship, emerge as inter-related questions of central importance.

Looking at the veterinary relationship through the lens of a negligence claim allows important questions to be asked of what is legally owed to owners, and potentially also to animals, and why. Regardless of whether negligence is seen as an institution whose aim is to correct injustices between parties,<sup>11</sup> or a tool to achieve certain social policy ends,<sup>12</sup> or to vindicate rights,<sup>13</sup> or compensate for wrongs and deter similar conduct,<sup>14</sup> negligence is first a form of fault-based liability. In determining duties of care, the court decides what equates to right conduct ‘in the sense that breaches of them generally stand to earn the breaching party criticism for acting without sufficient regard for the interests of others.’<sup>15</sup> Further, because duties of care are relational, an argument which will be expanded upon in Chapters One and

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<sup>8</sup> See: Joan E. Schaffner, *An Introduction to Animals and the Law* (Palgrave 2011) 19.

<sup>9</sup> See: Christopher Green, ‘The Future of Veterinary Malpractice Liability in the Care of Companion Animals,’ (2004) 10 *Animal Law* 163, 170-171.

<sup>10</sup> See: C. E. M. Batchelor, D. E. F. McKeegan, ‘Survey of the Frequency and Perceived Stressfulness of Ethical Dilemmas Encountered in UK Veterinary Practice,’ (2012) 170 *Veterinary Record* 19, 21 and Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (London, November 2015) 27-28 <<http://vetfutures.org.uk/launch-of-the-vet-futures-report/>> accessed 8 July 2016.

<sup>11</sup> See: Ernest J. Weinrib, ‘Corrective Justice in a Nutshell,’ (2002) 52 *Univ. of Toronto LJ* 349 and Ernest J. Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice,’ (2001) 2(1) *Theoretical Inquiries in Law* 1.

<sup>12</sup> See: Andrew Robertson, ‘Policy-based Reasoning in the Duty of Care Cases,’ (2013) 33(1) *Legal Studies* 119 and Andrew Robertson, ‘Constraints on Policy-Based Reasoning in Private Law’ in Andrew Robertson and Tang Hang Wu (eds.), *The Goals of Private Law* (Hart 2009) 261.

<sup>13</sup> See: Robert Stevens, *Torts and Rights* (OUP 2007)

<sup>14</sup> See: Glanville Williams, ‘The Aims of Tort Law,’ (1951) 4 *Current Legal Problems* 137.

<sup>15</sup> John C.P. Goldberg, ‘Ten Half-Truths about Tort Law,’ (2008) 42 *Valparaiso Uni.L.R.* 1221, 1243.

Four, only those who stand in the correct relationship— those argued to be beneficiaries of the duty breached— have standing to complain.<sup>16</sup> Again, because these duties are imposed by the courts, we see what relationships are considered “correct” or, in essence, what relationships matter in the sense that the law looks to both precedent and changing social attitudes to answer these questions. Lastly, because duties found in negligence ‘are duties of non-injuriousness, persons who have not suffered the right sort of adverse effect because of a breach have no grounds to sue for the breach.’<sup>17</sup> Questions can therefore be raised about what right sorts of actionable damage qualify in terms of what harms matter and why they should matter.

I argue that the negligence assessment ought to be a holistic assessment and that when it is, we stand to learn a considerable amount about evolving social behaviour and expectations between people. With regards to veterinary negligence, however, as it currently stands, courts in the United Kingdom (“UK”) have either approached the issue from the perspective that such considerations are “absurd,”<sup>18</sup> as evidenced in *Rees*, or as will be discussed in Chapter One, these important questions are simply ignored. Academic scholarship in the area of veterinary negligence is similarly undeveloped. The result is that assumptions regarding the types of relationships owners can form with their animals and questions relating to professional obligations and expectations go unchallenged.

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<sup>16</sup> *ibid.*

<sup>17</sup> *ibid* 1244.

<sup>18</sup> *Rees v. Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, 352.

### b) *Aims of this Thesis: Adopting a Professional Negligence Framework to Better Understand the Veterinary Relationship*

To this end, the purpose of this thesis is to take seriously the complexities and legal problems raised as a result of the triangular, veterinary relationship between veterinarians, owners and animals discussed above and resolve them so far as possible, utilising the requirements of a negligence claim as the overarching structure.<sup>19</sup> I undertake this task with the aim of achieving two primary goals: first, to provide veterinarians with guidance as to their legal obligations stemming from the veterinary relationship and second to improve the position of the animal patient within this relationship by advocating that, so far as possible, the animal's best interests should be of primary concern. As Cane has argued, two of the intrinsic characteristics of tort are 'to provide guidance to individuals about how they may and ought to behave in their interactions with others [and] to provide protection for certain interests of individuals...'<sup>20</sup>

As it currently stands, however, the few reported veterinary cases adopt a strong commercial perspective and though ultimately the claims are framed in negligence, a contractual undertone is also present. I submit that whilst it is open for the owner in possession of a contract with the defendant veterinarian to bring a claim in either contract or tort,<sup>21</sup> it does not follow from the point that one can bring a claim in contract that one should; negligence, I argue, should be the preferred route. Problematically, a contractual approach to the

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<sup>19</sup> My thesis does not, however, consider issues of causation. First, the scenarios that I contemplate would not typically give rise to issues concerning the link between fault and the damage suffered and second issues relating to causation are heavily reliant on the specific facts of each case, making it difficult to analyse specific scenarios within the confines of this thesis.

<sup>20</sup> Peter Cane, *Anatomy of Tort Law* (Hart 1997) 206.

<sup>21</sup> *Henderson v. Merrett Syndicates Ltd.* (1995) 2 AC 145, 194. That concurrent liability can exist outside pure economic loss cases, see: *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWHC 6 (TCC) para 169.



veterinary relationship engenders the idea that ‘fees pay for veterinary services, not for animal health.’<sup>22</sup> In these instances, questions asked by the court centre on the scope of the retainer and the parties’ commercial expectations.<sup>23</sup> Where, however, the relationship between owner and animal is constitutive in nature, such that both the owner’s and the animal’s sense of self is constituted in part by their mutual companionship, characterising the relationship as commercial in nature, as in *Rees*, represents a gross mischaracterisation. Commentating on one of the earliest recorded negligence cases in which a horse died after the defendant veterinarian undertook its care,<sup>24</sup> Holmes stated that ‘...the duty was independent of contract...and stood on the general rules applied to human conduct...’<sup>25</sup> I agree and submit that to provide veterinarians with guidance as to their legal obligations and to forward the best interests of the animal patient, questions asked by the court should follow those asked in negligence. Focus in this regard should be placed on the proximity and the nature of the relationship between veterinarian, owner and the animal, and the nature of the wrong to determine the obligations that are owed when care is undertaken.

It should be stated from the outset that this thesis principally concerns the potential negligence liability of veterinarians and improving the best interests of the animal within the triangular veterinary relationship by exploring the limits of negligence jurisprudence. In Chapter Three, I argue that owned animals should continue to be legally regarded as property. However, in order to improve their position within the veterinary relationship, animals should be viewed as a special form of constitutive property and that veterinarians

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<sup>22</sup> James Yeates, *Animal Welfare in Veterinary Practice* (Wiley-Blackwell 2013) 52.

<sup>23</sup> This is evidenced by available case law, in particular, *Glyn (t/a Priors Farm Equine Veterinary Surgery) v. McGarel-Groves* [2006] EWCA Civ 998. See also discussion in Chapter 1.3(b)(i).

<sup>24</sup> *Waldon v. Marshall* (1367) Y.B. 43 Ed. III, f.33, pl. 38. The distinction would have been between an action on the case and assumpsit (an early form of contractual breach).

<sup>25</sup> See discussion in: Oliver Wendell Holmes, *The Common Law* (Macmillan & Co. 1882) 276.

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should act so far as possible to protect the animal's best interests when they undertake to care for the animal. It will not be in all cases that a constitutive relationship is present and understanding the owner-animal bond is not straightforward; indeed, this relationship has been described by Fudge as being both messy and complex.<sup>26</sup> '[Animals] are things of value; they are living symbols; and they are...members of the household with whom humans share bodies...and blessings. And all these states happen at the same time.'<sup>27</sup> This is in stark contrast to the picture painted by Lord Scott in *Rees* and so a particular aim of this thesis is to advocate a form of actionable damage and a corresponding duty which can protect and forward the animal's best interests.

As regards the owner, to claim, as I argue, that the harm suffered is both proprietary and emotional places the damage on relatively unprecedented footing. In essence, the harm suffered 'sit[s] somewhere in between two recognised forms of damage in negligence law,'<sup>28</sup> here, property and emotional harm. As such, the harm suffered by the claimant owner is, again, not straightforward and instead best conceived of as being hybrid in nature. In this regard, Priaulx, referencing Horsey and Rackley, states that these hybrid forms of harm are claims for "messed up lives;"<sup>29</sup> they are not wholly divined by looking for deleterious changes in the body, such as a broken arm (or in this case, a deleterious change in the animal property), nor will they be easily diagnosable in terms of the emotional harm suffered.

Damage sustained to the constitutive relationship between owner and animal is similar to the hybrid damage construction discussed by Priaulx. As the divide between subject and object

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<sup>26</sup> Erica Fudge, 'The Animal Face in Early Modern England,' (2013) 30 *Theory, Culture & Society* 177, 196.

<sup>27</sup> *ibid* 190.

<sup>28</sup> Nicky Priaulx, 'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law,' (2012) 33 *Adelaide Law Review* 177, 184.

<sup>29</sup> *ibid*, referencing Kirsty Horsey and Erika Rackley, *Tort Law* (3rd ed., OUP 2013) 160.

becomes blurred<sup>30</sup> and owner and animal cease to see each other as a means to an end and instead contribute a significant benefit to a central aspect of each other's lives,<sup>31</sup> the damage sustained can no longer be classified as straightforward property damage. Thus, in many ways the constitutive relationship is about revealing 'the features human beings share with animals—being born, ageing, mortality, and vulnerability.'<sup>32</sup> Whilst in the past it used to be the case that discourse on these subjects resulted in the "othering"<sup>33</sup> of animals, or maintaining the object-subject divide, one of the primary aims of this thesis is to argue that it is, in fact, the reciprocal experiences of these "human features" that characterise the constitutive relationship. For the veterinarian, then, an integral part of their professional role and legal duty is linked to a greater understanding of this relationship and the damage that is suffered when the constitutive relationship is severed. Thus, in aiming to provide guidance to veterinarians and protecting the interests of both animals and owners so far as possible, a large portion of this thesis will be devoted to understanding the constitutive relationship and, in essence, making sense of the mess.

### *c) Developing Negligence: Veterinary Negligence and Evolutionary Change*

One of the greatest strengths of the common law, of which negligence is but one area, is its ability to evolve alongside shifting social norms. In this way, the life of the law has not been logic or the predictable developments of mathematical formulae, but rather experience.<sup>34</sup> We describe the common law as a corpus in one way to illustrate the law as a collection or body of laws, but also, arguably, to personify the idea that the common law is living, evolving,

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<sup>30</sup> Margaret Jane Radin, 'The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood,' (1995) 74 Oregon Law Review 423, 426.

<sup>31</sup> Jerrold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (2nd ed., Mosby 1995) 184-185

<sup>32</sup> Anca Gheaus, 'The Role of Love in Animal Ethics,' (2012) 27(3) Hypatia 583, 595.

<sup>33</sup> *ibid.*

<sup>34</sup> Holmes, *The Common Law* (n5) 1.

and experiential. Ibbetson, for example, has described the process of legal change as occurring:

...through filling gaps between rules in the way that seems most convenient or most just at the time; through twisting existing rules, or rediscovering old ones...; through reformulating claims into a different conceptual category...; through inventing new rules that get tacked onto the existing ones...; [and] through injecting shifting ideas of fairness or justice...<sup>35</sup>

It is through a similar process that I argue the limits of veterinary negligence are to be discovered. For example, in the actionable damage requirement, discussed in Chapter Three, the hybrid form of damage that is presented depends on a reformulation of current rules on property damage by including the crucial element of consequential emotional harm, founded on the idea of constitutive property. For as much as negligence can be seen as an evolving body of law, it can also be accurately described as anthropocentric and individualistic. Being the 'product of human actors, it entrenches the interests of humans over virtually all others and centres the reasonable human person as a main legal subject,'<sup>36</sup> therefore, advocating in favour of a constitutive property framework for animals requires not only a twisting of existing rules, but also the placing of veterinary negligence claims into a new conceptual category within property damage.

In Chapters Two and Four, which consider aspects of the duty of care, I argue for a return to a more robust, relational duty assessment focusing on proximity and a normative assessment

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<sup>35</sup> David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999) 294.

<sup>36</sup> Maneesha Deckha, 'Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm,' (2013) 50 *Alberta Law Review* 783, 784.

of what it means to assume responsibility for the care of another. In this way, I argue that courts should adopt a flexible approach to the duty assessment, taking into consideration normatively-relevant principles that reflect underlying values within the law,<sup>37</sup> but also developing and crystallising social norms that point to a changing understanding of that particular normative relationship.<sup>38</sup> This method of determination exists in stark contrast to current veterinary negligence case law, which simply attributes to the defendant, as a matter of course, an assumption of responsibility in order to find a single duty to act reasonably.<sup>39</sup>

In terms of breach, the dominance of the commercial model in the veterinary profession and the importance courts place on expert witness testimony arguably makes it more difficult to depart from the *Bolam*<sup>40</sup> test despite a greater willingness to scrutinise accepted practice in other professions, and more recently, the medical profession.<sup>41</sup> Assisting courts in their standard setting capacity, I submit, can be achieved by the development of detailed professional guidance, which embraces the triadic veterinary relationship, whilst also emphasising the best interests of the animal, which ought to remain primary. This change, which is considered in Chapter Five, will itself necessitate reforms to the Royal College of Veterinary Surgeons (“RCVS”) as the official regulator of the veterinary profession. In

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<sup>37</sup> Ken Oliphant, ‘Against Certainty in Tort Law’ in Stephen GA Pitel et al (eds.), *Tort Law: Challenging Orthodoxy* (Hart 2013) 7.

<sup>38</sup> John C.P. Goldberg and Benjamin C. Zipursky, ‘The Moral of *MacPherson*,’ (1998) 146(6) *University of Pennsylvania Law Review* 1733, 1816.

<sup>39</sup> David Howarth, ‘Many Duties of Care— Or A Duty of Care? Notes from the Underground,’ (2006) 26(3) *Oxford Journal of Legal Studies* 449. In this regard, I argue that the duty follows a *Hedley-Byrne* approach based on the defendant’s assumption of responsibility for the claimant’s financial wellbeing. See: Chapter 1.3(b)(i) and *Hedley Byrne & Co Ltd. v. Heller & Partners Ltd.* [1964] AC 465.

<sup>40</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. The *Bolam* test currently sets the standard for determining whether a professional person has breached her duty of care. In *Bolam* itself, which concerned the potential negligence liability of a doctor, McNair J stated that a doctor ‘is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art’ (at 587).

<sup>41</sup> See, for example: Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (Manchester Univ. Press 2016) xx and Rachael Mulheron, ‘Trumping *Bolam*: A Critical Legal Analysis of *Bolitho*’s “Gloss,”’ (2010) 69(3) *Cambridge Law Journal* 609.

particular, I argue that reforming the RCVS Council to include greater diversity of lay and professional opinion and instituting widely-disseminated professional codes of conduct carries the potential to change professional mindset in line with the veterinary relationship I advocate. New codes will also provide courts with objective information to consider alongside professional witness testimony when determining the expected standard of care. Underscoring these points is that at the heart of the veterinary relationship is the animal and that shifting, and sometimes conflicting, social perceptions about the animal-owner relationship<sup>42</sup> should encourage courts to reason decisions which reflect notions of justice and fairness in these circumstances.

Lastly, although I do seek to critically challenge existing notions of what various elements in the negligence inquiry require, the ultimate position that I take regarding these arguments is that they are evolutionary changes, not revolutionary. As such, I accept that negligence is limited in terms of what it can achieve and that certain arguments— for example, the argument that animals should be granted full legal standing— would likely be unsuccessful before the courts. The stronger argument, then, is to develop the law. To do this, I draw on existing doctrine and analyse it for its potential to develop veterinary negligence and negligence law more broadly. Doctrinal analysis, which looks to the language adopted by the law itself to determine its foundations and internal structures, reveals lines of reasoning adopted by judges and the courts as a whole and can point toward changing social sentiments or legal perspectives. It is submitted that in certain important areas germane to the

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<sup>42</sup> See: Mary Margaret McEachern Nunalee, and Robert G. Weedon, 'Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine,' 10 Animal Law 125; Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (London, November 2015) 19-20 <<http://vetfutures.org.uk/launch-of-the-vet-futures-report/>> accessed 8 July 2016 and Jerrold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (2nd ed., Mosby 1995) 9.

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development of veterinary negligence, this change is occurring. This is perhaps most obvious in Chapter Two, which argues a vulnerability-based approach to the law relating to negligence, but also, importantly, in the actionable damage and duty of care chapters that follow. In these chapters, I utilise doctrine to illustrate the process as evolutionary change and nascent development, but also to make clear that courts should approach legal questions creatively and with a willingness to respond to novel situations and relationships. Lord MacMillan famously stated that the ‘categories of negligence are never closed’;<sup>43</sup> my thesis sets out to confirm this sentiment and give effect to the notion that negligence is a changing, responsive body of law which can accomplish the specific aims I have set for this thesis.

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<sup>43</sup> *Donoghue v. Stevenson* [1932] AC 562, 619.

## 1. Reframing Veterinary Negligence Liability

### 1. Reframing Veterinary Negligence Liability: Setting the Scene

#### 1.1 Introduction

In a recent lecture, Lord Justice Jackson stated that the ‘legal principles regulating the liability of professional persons have mutated over time and they have done so in a way that reflects the changing perception of the professions in society.’<sup>1</sup> The result, according to Jackson LJ, is that the privileged position once held by professionals is rapidly waning and that in some cases courts have shown a willingness to extend professional liability beyond its traditional bounds *because* of the defendant’s position as a professional and their role in society.<sup>2</sup> In one area of professional liability, however, Jackson LJ may be guilty of putting the cart before the horse. Although cases of veterinary negligence can be traced back to 1367,<sup>3</sup> predating England’s first recorded human medical negligence case in 1375,<sup>4</sup> the liability of veterinarians stemming from professional negligence remains greatly under-theorised. It is submitted that the reason for this is twofold: first, the position of the animal

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<sup>1</sup> Lord Justice Jackson, ‘The Professions: Power, Privilege and Legal Liability’ (Peter Taylor Memorial Lecture to The Professional Negligence Bar Association, London, 21 April 2015) 5.7.

<sup>2</sup> *ibid.* Here, Jackson LJ goes on to cite the case of *White v. Jones* [1995] 2 AC 207, which concerned the ability of an intended beneficiary under a will to sue the solicitor who had negligently failed to update the will in line with the testator’s wishes, thus disintitling the intended beneficiary. Finding the solicitor liable, Lord Goff ‘expressly relied upon “the role played by solicitors in society” as one of the justifications for his decision’ (at 5.1-5.2).

As regards the role professionals assume within society, Jackson LJ notes that although at one time professionals were seen as possessing a combination of specialised skill and a sense of heightened morality which transcended the mere provision of a service to an understanding that the provision of their professional skill was intrinsically valuable (at 2.6), now, professional status is seen to bring with it enhanced responsibility (at 5.7). ‘Courts have reflected this general shift in public perception by (a) slowly stripping away the protections which they previously accorded to the professions and (b) devising new ways of imposing liability upon professionals.’ (at 5.7)

<sup>3</sup> *Waldon v. Marshall* (1367) Y.B. 43 Ed. III, f.33, pl. 38. See also: *The Farrier’s Case* (1372) Y.B. 46 Ed. III, f.19, pl. 19.

<sup>4</sup> *The Surgeon’s Case* (1375) Y.B. 48 Ed. III, f.6, pl.11.



## 1. Reframing Veterinary Negligence Liability

under the law being that of fungible property and second the nature of the legal relationship between the owner of the animal and the veterinarian being characterised under the law as purely commercial in nature. The reality of the situation, I argue, is far more complex than available case law indicates; the animal is not merely a thing, the owner is not simply the client, and the veterinarian is not simply the service provider.

The purpose of this chapter is first to provide an overview of the internal and external forces that have and continue to influence the veterinary profession. The second portion of this chapter will then look to how the law interprets this picture and later constructs its vision of veterinary liability. Whilst much of this chapter and the thesis as a whole looks to resolve the current lacuna of clearly-articulated guidance on veterinarians' legal obligations, understanding the detailed role played by courts deciding on veterinary negligence cases cannot take place without first understanding how the veterinary profession has changed over time and the challenges that continue to affect how they provide care. In this regard, it is submitted that whilst the past saw the veterinary profession evolve alongside the predominantly commercial-based needs of its client base, a new, more complex clientele and a lack of effective external regulation has stalled professional evolution. Thus, the emphasis courts place on the commercial aspects of the veterinary relationship serve only to misdirect veterinarians as to where the full extent of their professional and, importantly, legal obligations lie. The result, I argue, is that veterinarians, confronted with internal changes at the professional level and external changes from society, are increasingly ill-prepared to meet the needs of owners and animals.

## 1. Reframing Veterinary Negligence Liability

### 1.2 The Veterinary Profession: Why Re-Frame?

#### a) *The Veterinary Profession: Shifting Expectations and a Profession in Transition*

According to Tannenbaum, ‘the more vibrant, interesting, and important a profession, the more difficult it is to briefly characterise the ethical [and legal] problems it faces.’<sup>5</sup>

Following from this, in the section that follows, my aim is to provide an introductory account of the professional issues and challenges which have played an important role in shaping veterinary medicine. The aim here is not to resolve all of these tensions, merely to situate the veterinary profession amongst other professions, in particular the medical profession. Key within this analysis is that though under-theorised, the complexity of the legal and ethical issues raised demonstrates that veterinary medicine warrants greater academic attention.

Not unlike human medicine, at the turn of the century, the greatest problem facing the veterinary profession was how to define themselves as professionals, separate from lay individuals claiming professional knowledge.<sup>6</sup> Legislation set out that only those on the Royal College of Veterinary Services’ (“RCVS”) register could call themselves veterinary surgeons,<sup>7</sup> however, the challenge for the profession was how to convince the public that receiving their services provided an additional advantage. Put another way, why should the animal owning public choose the services of a veterinary surgeon over a lay husbandry

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<sup>5</sup> Jerrold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (2nd ed., Mosby 1995) 12.

<sup>6</sup> Abigail Woods, ‘The History of Veterinary Ethics in Britain’ in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 6. See also: Lord Justice Jackson, ‘The Professions: Power, Privilege and Legal Liability’ (n1) 3.20-3.21 for an account which illustrates the same process was happening for the professions generally during this time.

<sup>7</sup> See: Michael Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford 2001) 74 and 307 and Veterinary Surgeons Act 1966 s19(1).

## 1. Reframing Veterinary Negligence Liability

expert? According to Woods, the answer lay in equating veterinary treatment with the ethical and proper treatment of animals.<sup>8</sup> '[Taking your animal to a veterinarian] would not only serve the interests of the animal but also those of the owner, state and society;'<sup>9</sup> indeed, it was in the best interests of the animal to be placed under the care of a veterinarian.<sup>10</sup> It was veterinarians, not lay experts, who were best placed to make determination as to what constituted cruelty toward an animal, or when an animal was suffering.<sup>11</sup> According the Rollin, this power to persuade derives from the veterinarian's Aesculapian authority, or 'the powerful authority possessed by all medical professionals that comes with the title "Dr."...' <sup>12</sup>

Problematically, however, issues such as the intensification of farming practices involving animals (or "factory farms")<sup>13</sup> and a sharp increase in companion animal ownership<sup>14</sup> arguably altered concepts of ownership and the ways in which owners related to their animals, resulting in an increasingly disparate and nuanced clientele base. As Tannenbaum highlights, 'the elevation of the status of companion animals raises serious ethical issues for a profession many of whose patients are eaten, worn, or ridden... — in short, viewed not as companions but economic resources.'<sup>15</sup> Within this dyadic paradigm of companion animals and agricultural animals, however, are animals that straddle the divide, such as horses. In the section that follows, claimants suing for the loss of their horse currently represent the only

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<sup>8</sup> Woods, 'The History of Veterinary Ethics in Britain' (n6) 8-9.

<sup>9</sup> *ibid* 8.

<sup>10</sup> *ibid* 7.

<sup>11</sup> *ibid* pp 6 and 8.

<sup>12</sup> Bernard Rollin, *Putting the Horse Before Descartes: My Life's Work on Behalf of Animals* (Temple University Press 2011) 62.

<sup>13</sup> Peter Sandøe and Karsten Klint Jensen, 'The Idea of Animal Welfare – Developments and Tensions' in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 20.

<sup>14</sup> Mary Margaret McEachern Nunalee and Robert G. Weedon, 'Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine,' (2004) 10 *Animal Law* 125.

<sup>15</sup> Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n5) 9.

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reported case law on veterinary negligence in the UK. In all of the cases, the animal's high market value made it economically viable to bring a claim, yet, horses are now increasingly companion animals whose value is not determinable solely by their market worth. Thus, as the idea of animal ownership has become more complex, so too have the demands on the veterinarian's role within that relationship.

Further, in terms of client expectations:

Animal owners were demanding higher levels of veterinary competence, ethical conduct and value for money...and were fast moving away from the attitude that the word of the professional man...had to be accepted without question.<sup>16</sup>

The tensions these changes created eventually led to a societal perception that the veterinary profession, along with other professions, in particular the medical profession with its adage that "doctor knows best," could not be trusted.<sup>17</sup> Further, the need to serve the interests of an increasingly diverse client base has arguably contributed to an actual and perceived conflict in professional approach. As Marshall noted almost eighty years ago, 'commercialism is the opponent of professionalism in the private sector...'<sup>18</sup>

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<sup>16</sup> Woods (n6) 10-11.

<sup>17</sup> *ibid* 10. See also: Lord Justice Jackson, 'The Professions: Power, Privilege and Legal Liability' (n1) 8. For the human medical context see: Law Commission, *Regulation of Health Care Professionals, Regulation of Social Care Professionals in England*, (Law Com No 202, 2012) para 1.14 <<http://www.scotlawcom.gov.uk/files/5813/3051/2520/dp153.pdf>> accessed 17 June 2016.

<sup>18</sup> TH Marshall, 'The Recent History of Professionalism in Relation to Social Structure and Social Policy,' (1939) 5 *The Canadian Journal of Economics and Political Science* 325 quoted in David Mangan, 'The Curiosity of Professional Status,' (2014) 30(2) *Professional Negligence* 74, 77. See also: D.C.J. Main, 'Offering the Best to Patients: Ethical Issues Associated with the Provision of Veterinary Services,' (2006) 158 *Veterinary Record* 62, 63 and Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n5) 10.

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A further issue which has had an effect on the veterinary profession is the dramatic shift from an agriculturally-focused profession to a companion-focused profession. Indeed, this shift from the pastures to the cities and suburbs has, according to Tannenbaum, had a “transformative”<sup>19</sup> effect on the veterinary profession. Whilst the focus of a veterinarian’s practice once rested on animals that were valued for their market price tag and concern was placed on the health and vitality of the herd, as opposed to an individual animal, veterinarians now increasingly practice in small animal hospitals, where the focus is placed on companion animal care.<sup>20</sup> Here, the relationship between animal and owner ‘tend[s] to be lengthy, intense, and decidedly nonexploitive (on both sides).’<sup>21</sup> Fundamental to this shift is the way in which veterinarians approach their practice, or the values they bring to bear on the veterinary relationship.<sup>22</sup> As McEachern Nunalee and Weedon note, the shift from an agrarian focus to companion has meant that ‘the profession is now more aligned with the field of human medicine than with the field of agriculture.’<sup>23</sup> Although there is an element of generalisation in this discussion, it is, nonetheless, useful to reflect on how some values, such as the concept of animal health, varies between practices. For the agricultural owner,

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<sup>19</sup> Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n5) 9.

<sup>20</sup> *ibid.* See also: Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (London, November 2015) 35 <<http://vetfutures.org.uk/launch-of-the-vet-futures-report/>> accessed 24 November 2015 and Bernard Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* (Iowa State University Press 1996) 59.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.* See also: Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* (n20) 59. A separate issue which would also arguably bear on the values and methods by which veterinarians approach their practice is the gender of the veterinarian. Unfortunately, there is very little empirical evidence on this topic, however, statistics show that of veterinarians currently practising in the UK, 57% are women and in 2014, 78% of graduates were women (see: Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (London, November 2015) 36-38 <<http://vetfutures.org.uk/launch-of-the-vet-futures-report/>> accessed 24 November 2015). There are arguably large employment and ethical complexities involved with this shift, but as of yet, the issue has not been fully explored within the UK context. Unpublished research has indicated that female veterinarians do approach their professional obligations in a more care-centred way, akin to that of a paediatrician, than her male counterparts; however, the implications of this have not yet been explored in great detail (For details, see the reference to this in: Stephen A. May, ‘Veterinary Ethics, Professionalism and Society’ in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 50).

<sup>23</sup> McEachern Nunalee and Weedon, ‘Modern Trends in Veterinary Malpractice’ (n14) 138.

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she is likely to be concerned with the animal's health only insofar as it would later affect the amount of money she would obtain from the animal's intended use, whether for slaughter, for breeding etc. The owner's interests in this regard are likely to be purely economic. As regards companion animals, however, optimal animal health is likely to be defined by longevity and quality of life factors, thus bringing care more in line with human medicine. The focus of animal health under the agricultural perspective is, therefore, arguably outward-facing to the market, whilst the companion is inward-looking, focusing on the individual animal and its relationship with its owner. For the veterinarian, this is likely to mean a very different set of values will apply in each context.

The purpose of this section was to highlight some of the more pressing issues currently affecting the veterinary profession. What is perhaps most clear from the above discussion is that the veterinary profession is currently in a period of transition and uncertainty. Whilst what distinguishes veterinarians from other healing professions is that they are *animal* doctors<sup>24</sup> and veterinarians swear an Oath to 'ABOVE ALL'<sup>25</sup> make it their constant endeavour 'to ensure the welfare of animals committed to [their] care,'<sup>26</sup> to what extent the client, the animal, the purpose of the animal, and the veterinarian's need to ultimately turn a commercial profit affects this endeavour varies. In the end, the confluence of these issues and the tensions they continue to create can be reduced to one fundamental question; it is this question which forms the basis of the next section.

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<sup>24</sup> Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n5) 12.

<sup>25</sup> Royal College of Veterinary Surgeons, 'Code of Professional Conduct for Veterinary Surgeons and Supporting Guidance,' (RCVS 2012) 12 <<http://www.rcvs.org.uk/advice-and-guidance/>> accessed 11 November 2015 [emphasis in original].

<sup>26</sup> *ibid.*

## 1. Reframing Veterinary Negligence Liability

### b) *The Fundamental Question of Veterinary Ethics...and Law*

According to Rollin, the fundamental question of veterinary ethics is, ‘to whom does the veterinarian owe primary obligation: owner or animal?’<sup>27</sup> Rollin continues by presenting two opposing metaphors. On the first account, the veterinarian is seen as a garage mechanic and the animal a car. Here, the veterinarian owes a primary obligation to the owner, and repairs the car in line with the owner’s wishes; the relationship is purely commercial and the animal a mere object.<sup>28</sup> This model resembles the early Cartesian model, which saw animals relegated ‘to the status of an automaton, a being capable of acting in the world but only by virtue of its instincts and bodily mechanism.’<sup>29</sup>

On the paediatric model, however, the veterinarian ‘owes primary obligation to the animal, just as a paediatrician does to a child...’<sup>30</sup> The child here is unable to consent to treatment, weigh or balance the risks involved with particular treatments, and cannot verbally express her thoughts and feelings. The veterinarian must then act as the animal’s advocate in much the same way as the paediatrician must act in the best interests of the child; here, the relationship is decidedly care-based. This is not to disavow the important position of the owner in care decisions, only to emphasise that the veterinarian’s primary duty rests with the animal patient.

Support for Rollin’s paediatric model has been evidenced in the UK context, however, their interpretation ultimately misses Rollin’s central thesis. Williams and Jewell, for example, argue that following Rollin’s paediatric model and adopting a family-centred approach to the

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<sup>27</sup> Bernard Rollin, *Putting the Horse Before Descartes: My Life’s Work on Behalf of Animals* (n12) 35.

<sup>28</sup> *ibid* 36.

<sup>29</sup> Erica Fudge, ‘The Animal Face of Early Modern England,’ (2013) 30 *Theory, Culture & Society* 177, 182.

<sup>30</sup> Rollin, *Putting the Horse Before Descartes* (n12) 36.

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veterinary relationship in which the owner and animal are seen as a family unit is to be preferred over the garage mechanic model.<sup>31</sup> Whilst in one way it is good to see veterinary practitioners engage with Rollin's model, to consider alternative perspectives to the veterinary relationship and to the relationship between owner and animal, the authors here misinterpret an important part of Rollin's argument. It is submitted that rather than viewing the role of the veterinarian as limited to maintaining the bond between owner and animal, Rollin puts forward the image of the paediatrician because of their *additional* role as advocates for the patient;<sup>32</sup> to have both the concerns of the animal and the owner as primary is, arguably, to invite further confusion when the interests of these two parties conflict. Thus, a family-centred approach can only take veterinarians so far.

Indeed, both Rollin's paediatric model and Williams and Jewell's family-centred model ultimately fall short of being able to effectively change current practice. From the perspective of the veterinarian the pull between, on the one hand, reasoning in favour of the paediatric or family-centred model, but then having to adopt the mechanic model in order to accord with legal concepts of ownership in property, could prove emotionally harmful and detrimental for the veterinarian.<sup>33</sup> In these instances, it is ultimately unhelpful to simply problematise the issue or come to the conclusion that the only workable solution to adopt is that veterinarians will simply always be the 'servant of two masters';<sup>34</sup> this does nothing to help veterinarians make difficult care decisions or improve the position of the animal patient

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<sup>31</sup> David Williams and Jonathan Jewell, 'Family-centred Veterinary Medicine: Learning from Human Paediatric Care,' (2012) 170 Veterinary Record 79.

<sup>32</sup> Bernard Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* (Iowa State University Press 1996) 58.

<sup>33</sup> There does already exist some evidence to the effect that veterinarians are increasingly finding it difficult to reason through ethically complex scenarios involving conflicts of interest and that emotionally-detrimental side effects are suffered as a result. See: C. E. M. Batchelor, D. E. F. McKeegan, 'Survey of the Frequency and Perceived Stressfulness of Ethical Dilemmas Encountered in UK Veterinary Practice,' (2012) 170 Veterinary Record 19.

<sup>34</sup> Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n5) 5.



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who receives care. In instances of conflict, veterinarians will likely opt to stay on the right side of the law, which means that the wishes of the owner remain determinative under a commercial approach. In these circumstances, then, it is submitted that if veterinarians are to receive greater decision-making guidance and the animal's best interests given greater place of prominence within the veterinary relationship, change needs to occur at a legal level. Going forward, it is submitted that when veterinarians find themselves confronted by a conflict between the interests of the owner on one side and the animal on the other, they should act to uphold the animal's best interests. To assist veterinarians in making these decisions and to protect them if their conduct is called into question before the courts, additional legal mechanisms and tools are needed. Guidance is therefore needed on the limits of being able to act for the benefit of the animal patient; indeed, it is endeavouring to clarify and reconcile these inter-related issues that form the principal aims of this thesis.

Whilst these arguments would significantly alter the nature of the veterinary relationship, a best interests approach also presents the greatest opportunity to positively influence the position of the animal under the law and provide veterinarians with greater clarity as to how to fulfil their legal obligations to owners and animal patients. Importantly, society has developed an increasing concern for the quality of treatment that animals receive<sup>35</sup> and though the developments I argue for here would have the corollary of increasing the negligence liability of veterinarians, I agree with Radford that the best way forward when considering the law as it relates to animals is to recognise that:

...it is far more important to secure a level of legal regulation which  
recognises the needs and capacities of animals, imposes a clear and

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<sup>35</sup> Rollin, *Putting the Horse Before Descartes: My Life's Work on Behalf of Animals* (n12) 40.

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explicit duty on those who assume responsibility for them to ensure that prescribed standards are met, and—crucially—to ensure that this strategy is supported by adequate means of enforcement.<sup>36</sup>

The next section will take Radford's argument forward and introduce the veterinary negligence framework I adopt.

### 1.3 Veterinary Negligence: Limitations of Current Case Law

In comparison to other professions, the case law relating to veterinary negligence is sparse; an extensive search revealed only three reported cases containing enough information to undertake greater analysis.<sup>37</sup> It would be wrong, however, to assume that the reason for there

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<sup>36</sup> Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (OUP 2005) 129.

<sup>37</sup> In completing my case law search, I started with online databases, specifically Westlaw UK and Lexis Library. I began by entering various specific search terms such as 'veterinary negligence' and 'veterinary liability', however, these searches yielded no references when placed in the 'search terms' section of Lexis. When placed in the 'Subject/Keyword' category of Westlaw, however, one positive source was located, namely, *Calver v. Westwood Veterinary Group* [2001] P.I.Q.R. P11. From here, I expanded my search to include the use of various root expanders. In this regard, I searched for combinations that included terms such as, 'veterinar!' to catch both veterinary and veterinarian, and 'negligen!' to catch both negligence and negligent. These root expander searches revealed a considerable number of results, many of which included professional misconduct matters brought by veterinarians against the Royal College of Veterinary Surgeons and other professional regulatory bodies such as the General Medical Council. These cases were reviewed, however, given that my thesis concerns private law actions between individuals and that standards can differ when attempting to establish negligence and professional misconduct, these cases were rejected. The remaining cases discussed in this thesis, namely, *Blass v. Randall* [2008] EWHC 1007 and *Glyn (t/a Priors Farm Equine Veterinary Surgery) v Jane McGarel-Groves, Erik Grandiere, Clinique Veterinaire Equine De Chantilly* [2005] EWHC 1629 and *Glyn (t/a Priors Farm Equine Veterinary Surgery) v. McGarel-Groves* [2006] EWCA Civ 998 were found by entering the search terms 'veterinary AND negligence' in the 'Subject/Keyword' category of Westlaw. In addition to these cases, the case of *Chute Farms v Curtis* also appeared. Dated the 1<sup>st</sup> of January 1961, but reported on the 10<sup>th</sup> of October 1961, the Case Analysis states that the defendant veterinary surgeon was held vicariously liable for the actions of his assistant in treating a yearling colt for lameness due to a leg injury. In treating the wound, the assistant applied a poultice, but no anti-tetanus serum. Several days later, the colt developed tetanus and died. It was held that 'since the risk of that deadly disease was always present,' a competent veterinarian would have administered the serum. A full case transcript could not be found, however, a very brief report (less than 450 words) was found in *The Times*. *Chute Farms* is also briefly discussed in *Charlesworth & Percy on Negligence* (See: His Honour Judge Walton et al., *Charlesworth & Percy on Negligence* (11<sup>th</sup> edn, Sweet & Maxwell 2006) para 8-337). These searches were last run in the Spring of 2016, however, when they were run again in January 2017 a new case had become available. The facts itself do not

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being so little case law is the fact that owners of animals are wholly satisfied with the services they receive from veterinarians.<sup>38</sup> More likely the reasoning lies in how the law conceptualises animals and the value of the relationships they are capable of forming with their owners. A close reading of the reported case law reveals that the law relating to veterinary negligence reflects only a very narrow and simplistic construction of the human-animal relationship and is based largely on the commercial underpinnings present between owner and animal, leaving unanswered the duties and obligations owed in more diverse, complex relationships.

The purpose of this section is to assess the case law on veterinary negligence in light of current professional negligence principles relating to damage, duty and breach, and identify, within this framework, limitations and gaps which arise. The subsequent chapters of this thesis will address these gaps and, so far as possible, resolve them by applying orthodox tort principles utilised in slightly novel ways. By way of introduction, this section will provide alternative arguments for assessing the various stages of a veterinary negligence claim, taking into account not only the owner's loss, but also the welfare of the animal patient,

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allege negligence on the part of the attending veterinarian, but rather two stud farmers responsible for the care of the owner's two mares and newly-born colts; the veterinarian's conduct was not in question. For reference, the case citation is: *Knowles T/A Beechwood Grange Stud v Watson* [2016] EWCA Civ 1122. Beyond Lexis and Westlaw, I conducted online searches, looking specifically at Higher Education institutions that have specialised Animal Law centres, such as Michigan State University. See for example: Michigan State University Animal Legal & Historical Center <<https://www.animallaw.info/cases/topic/veterinarian-issues>> accessed December 2012 and again 10 July 2016. Unfortunately, these websites did not yield any additional cases within the UK context.

<sup>38</sup> Royal College of Veterinary Surgeons, 'The Annual Report of the Royal College of Veterinary Surgeons: Part 2' (RCVS, 2013) <<http://www.rcvs.org.uk/publications/rcvs-facts-2013/?destination=%2Fpublications%2F>> accessed 6 May 2014; Royal College of Veterinary Surgeons, 'The Annual Report of the Royal College of Veterinary Surgeons: Part 2' (RCVS, 2012) <<http://www.rcvs.org.uk/publications/rcvs-facts-2012/?destination=%2Fpublications%2F%3F%26p%3D2>> accessed 20 November 2012; Royal College of Veterinary Surgeons, 'The Annual Report of the Royal College of Veterinary Surgeons: Part 2' (RCVS, 2011) <<http://www.rcvs.org.uk/publications/rcvs-facts-2011/?destination=%2Fpublications%2F%3F%26p%3D3>> accessed 20 November 2012. The facts reported in these annual reports illustrate a steady increase in the number of complaints made by owners against a veterinarian for alleged inadequate care. From the years 2011 to 2013, the number of complaints totalled 275, 335, and 340 respectively.

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which, it is argued, is best represented by acting in the best interests of the animal. From the outset, there is the admitted concern of relying too heavily on what the cases reveal in terms of what the law *is* given their very narrow application; however, it is submitted that the value to be derived from the cases lies in what they do not discuss. Thus, the case law will be utilised as a platform to advance the argument that more needs to be done in the area of veterinary negligence if the law is going to act as a guide for veterinarians and a mechanism to effect positive changes in animal welfare, as opposed to merely a mechanism for imposing liability.<sup>39</sup> Given the importance of the damage element in setting out the existence and extent of a duty of care, it is with actionable damage that this discussion will begin.

### a) *Actionable Damage*

#### i. *Establishing a Framework: A Sentient Constitutive Property Model*

It is important from the beginning to emphasise that this chapter, indeed the whole of this thesis, will work from the primary premise that to forward the animal's best interests within the veterinary relationship and provide adequate guidance for veterinarians on their rights and liabilities in tort, sentient animals that are owned should hold a legal status above mere fungible property for the purposes of the actionable damage aspect of a veterinary negligence claim. Arguably, one of the primary reasons why so little case law on the issue of veterinary negligence has been reported is the fact that damages for an animal which has

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<sup>39</sup> John C.P. Goldberg and Benjamin C. Zipursky, 'The Moral of *MacPherson*,' (1998) 146 University of Pennsylvania Law Review 1733, 1841-1842. In this article Goldberg and Zipursky make the argument that a relational duty (ie. one that contemplates many different duties owed to others) is to be preferred for its action-guiding potential over a singular, instrumentalist duty, which, views the factual assessment of breach as the liability-imposing mechanism.

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been negligently killed or injured can be set no higher than the animal's market value.<sup>40</sup> The traditional property damage paradigm may work, for example, in exceptional categories of damage where the loss is easily calculable and is sufficiently high to warrant bringing a claim in the first place, however, the vast majority of animals possess very little, if any, economic value. Thus, the question remains as to how the courts would evaluate loss in these circumstances.

The position adopted here, and expanded upon in the Chapter Three, is that a more accurate representation of an animal's value, both from an animal welfarist perspective and to more accurately reflect the owner's loss, is to recognise sentient animals as a form of sentient constitutive property embodying a value which extends beyond its market price. Recognising this elevated property status would allow a more nuanced and accurate representation of the damage sustained by the owner and the animal. In addition, it will be argued that this model can better advance the argument that veterinarians should act, so far as possible, to further the animal's best interests. Several academic commentators<sup>41</sup> have suggested the adoption of a sentient property paradigm, however, this thesis will advocate a novel version of this idea

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<sup>40</sup> This has traditionally been the accepted method of evaluation in American jurisprudence. For academic commentary on this point see: Christopher Green, 'The Future of Veterinary Malpractice Liability in the Care of Companion Animals,' (2004) 10 *Animal Law* 163, 192 and 196-198; Mary Margaret McEachern Nunalee & G. Robert Weedon, 'Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine,' (2004) 10 *Animal Law* 125, 132; Steven Barghusen, 'Noneconomic Damage Awards in Veterinary Malpractice: Using the Human Medical Experience as a Model to Predict the Effect of Noneconomic Damage Awards on the Practice of Companion Animal Veterinary Medicine,' (2010) 17(1) *Animal Law* 13, 16-17 and Joan E. Schaffner, *An Introduction to Animals and the Law* (Palgrave Macmillan 2011) 163-165. Some literature has also described the market value approach as viewing animals as a commodity with no value beyond what the property owner chooses to give. For this point see: Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press 2000) xxiv and Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (OUP 2005) 101. One point to highlight here is the issue that of the many works which discuss the market value approach to determining an owner's loss – of which only a few are extracted here – only a handful cover a British perspective. It has been shown in the cases discussed in this chapter that British courts adopt a similar approach to North America; however, the lack of British commentators on the more contentious (ie. economically less viable claims) highlights the need for greater jurisdiction-specific research. Indeed, this thesis aims to address this point.

<sup>41</sup> See for example: McEachern Nunalee & Weedon, 'Modern Trends in Veterinary Malpractice,' (2004) 10 *Animal Law* 125, 130 and Diane Sullivan and Holly Vietzke, 'An Animal is Not an iPod,' (2008) 4 *Journal of Animal Law* 41, 44.

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and thus alter how animals should be viewed under this definition and how courts should adjudicate on veterinary negligence cases. Briefly, the current literature appears to consider only those animals which would be considered companion animals (ie. dogs, cats) or those animals— almost exclusively dogs and cats— that occupy a position in the home akin to a child or other beloved family member.<sup>42</sup> The position advocated here is that, in keeping with current literature, the sentience element is utilised to elevate the status of the animal in question beyond fungible property. However, this model will utilise sentience to go further and highlight the constitutive nature of the relationship between animal and owner as the driving force behind claims in veterinary negligence, and importantly, to highlight that animals, companion or otherwise, should have their best interests prioritised by veterinarians engaged in providing care.

A related issue that comes to the fore is to what extent the *type* of animal concerned, for example, “companion animal,” “agricultural” or “high market” bears on the question of damage. There is perhaps an inclination to think that only expensive animals or those animals which have traditionally held a more companion place in the hearts of their owners should be considered; indeed, the reported cases in Britain have only considered a very narrow category of animal— thoroughbred horses that possess a sizeable market value.

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<sup>42</sup> For examples of the more traditional conceptions see, for example: Sandra Corr, ‘Companion Animals’ in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 188 who discusses in one line the importance of the relationship as being the important determinant in companion relationships, but then confines her analysis only to dogs and cats; Rebecca Huss, ‘Valuation in Veterinary Malpractice,’ (2004) 35 Loyola Univ. Chic L.J. 479. See also: Orland Soave, *Animals, the Law and Veterinary Medicine* (4th ed., Austin & Winfield Publishers 2000) 15, who argues that different levels of skill would be required depending on the “use” of the animal and its “value.” The exception to these references can be found in the one sentence reference by Kristensen that, it is the nature of the relationship, not the species, which identifies an animal as a companion animal. See: A.T. Kristensen, ‘Companion Animals’ in P. Sandøe and others (eds.), *Ethics of Animal Use* (Blackwell Publishing 2008) 122. In many ways this is a grey area because whilst the majority of works concern dogs and cats, the authors themselves were uncertain in what respects their models could be expanded, for example, to consider animals such as rabbits that lived in the home.

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However, the argument I adopt is that the type of animal or its primary purpose should be irrelevant in considering the damage sustained by the owner. This would mean that as long as the animal in question is capable of participating in a constitutive relationship, the type of animal involved, whether a dog, a pig or a cow, is irrelevant. In this way, this thesis seeks to depart quite substantially from much of the academic literature in this area. In many instances, academic commentators focus on the position of those animals traditionally conceived of as companion animals, here, the focus will be on the relationship the owner shares with the animal as the driving force behind why certain legal duties are owed by the veterinarian.<sup>43</sup>

Crucial for understanding the nature of the damage claimed is, therefore, the constitutive element. This framework will be developed in Chapter Three, but for present purposes, the model looks to the relationships humans construct with their property. Adapting the model advanced by Margaret Radin's<sup>44</sup> theory on constitutive property, I argue that animals can positively contribute to and constitute the owner's sense of person. Where, for example, our animals feature in our life plans and, importantly, are capable of actively participating in the relationship, this will necessarily impact how our life plans and visions of our future self are constructed and experienced.<sup>45</sup> In essence, then, the animal is constitutive of the owner's personhood. It is this constitutive relationship, I argue, that should be afforded greater protection under the law. To some extent, the range of possible animal-owner relationships

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<sup>43</sup> A corollary to this point is that veterinarians would arguably have to take a more purposive view of their own duties of care. It will not always be the case that an owner of a companion animal shares a particularly close bond with their animal. However, other relationships will be sufficiently strong to the extent that the owner suffers emotional harm over the animal's loss or injury. This will be explained in greater detail in Chapter Three, more specifically, sections 3.3(a) and 3.5(c)(i).

<sup>44</sup> See for example: Margaret Jane Radin, 'Property and Personhood,' (1982) 43(5) *Stanford Law Review* 957, 968. See also: Margaret Jane Radin, 'The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood,' (1995) 74 *Oregon Law Review* 423.

<sup>45</sup> Radin, 'Property and Personhood,' (n44) 968.

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can be seen in the available veterinary negligence case law. In *Blass v. Randall*,<sup>46</sup> for example, the claimant purchased a horse vetted by the defendant veterinarian. Not long after, the horse became lame, yet the owner continued to work the animal intensively despite medical advice given by the defendant to the contrary. The horse later had to be destroyed.<sup>47</sup> However, in *Glyn v. McGarel-Groves*,<sup>48</sup> which involved the negligent administration of steroidal medication to a dressage horse, the claimant described her relationship with Anna (the horse) in the following way:

Words cannot explain how special she was to me. As a horse lover, I am fond of all the horses that I own and have owned...I get a huge amount of pleasure from looking after the horses and training them to a competition standard...In Anna's case she was not only the most talented horse that I have ever owned (or am likely to ever own) she was a kind a gentle mare...She was the horse of a lifetime.<sup>49</sup>

Thus, the *type* of animal remains the same, here, an expensive thoroughbred horse, however, totally divergent relationships are evident. The owner in *Glyn*, for example, almost certainly saw her relationship with Anna extending over a long period of time. It was also a relationship in which both owner and animal appeared to actively participate through the conveyance of affection for one another. In this regard, I argue that a constitutive relationship exists in the latter case, but not the former. A more detailed analysis of this

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<sup>46</sup> *Blass v. Randall* [2008] EWHC 1007 at 45.

<sup>47</sup> *ibid.*

<sup>48</sup> *Glyn (t/a Priors Farm Equine Veterinary Surgery) v Jane McGarel-Groves, Erik Grandiere, Clinique Veterinaire Equine De Chantilly* [2005] EWHC 1629 and *Glyn (t/a Priors Farm Equine Veterinary Surgery) v McGarel-Groves* [2006] EWCA Civ 998.

<sup>49</sup> *Glyn (t/a Priors Farm Equine Veterinary Surgery) v Jane McGarel-Groves* [2005] EWHC 1629 at 23.



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argument and its parameters will be addressed in Chapter Three.<sup>50</sup> Importantly, then, the property element simply categorises the nature of the relationship between owner and animal for the purpose of defining the damage sustained. However, alongside the property element, is the emotional harm element represented by the constitutive relationship, which would allow those claims where the animal possess no, or very little, monetary value to proceed. How courts currently view animals for the purposes of a veterinary negligence claim is, however, quite different, as the next section will show.

### ii. *Current Constructs: The Limitations of Viewing Animals as Fungible Property*

As previously mentioned, for the purposes of a veterinary negligence claim, the relationship between owner and animal is currently that of property-holder and property. Thus, any harm sustained by the animal is seen as property damage to the owner, plus any consequential economic damages that may have been sustained (ie. veterinary bills). Damages are therefore assessed by calculating what the animal could have been sold for to a willing purchaser.<sup>51</sup> Evidence of this approach can be seen in the case of *Glyn*,<sup>52</sup> where the Court of Appeal awarded the owner damages for the death of her horse when the owner's primary veterinarian failed to prevent the second defendant from administering multiple high doses of two different steroidal medications, contrary to established practice. The treatment resulted in an overdose causing the horse to develop a serious disease, at which point she had to be destroyed. For the actionable damage portion of the claim, the court referred to the damage sustained as the 'death of a top-class international dressage mare...owned by the

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<sup>50</sup> See Chapter Three, sections 3.5(b) and 3.5(c)(i).

<sup>51</sup> Barghusen, 'Noneconomic Damage Awards in Veterinary Malpractice,' (n40) 17.

<sup>52</sup> *Glyn (t/a Priors Farm Equine Veterinary Surgery) v Jane McGarel-Groves, Erik Grandiere, Clinique Veterinaire Equine De Chantilly* [2005] EWHC 1629 and *Glyn (t/a Priors Farm Equine Veterinary Surgery) v McGarel-Groves* [2006] EWCA Civ 998.

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defendant.<sup>53</sup> Further, in determining the market value of the horse, the court noted that, ‘Anna was a very successful and valuable dressage competition horse...’ and that her value was agreed to by the parties in the sum of £350,000.<sup>54</sup> Though in this case the only damage claimed was the property damage sustained, the more important point to be considered is whether this method of assessment is capable of representing the measure of loss occasioned by a veterinarian’s negligence in all cases.

In particular, three important issues arise as a result of the basic property conception represented in the current law. First, by framing the damage in terms of property with consequential economic loss, the court has limited its conception of damages to those sums which represent the ascertainable commercial/financial loss sustained, and closing its eyes to the potential for any consequential emotional harm sustained by the owner. As Chapter Three will discuss, in response to quickly-changing social ideas and perceptions of harm, courts have shown themselves to be accepting of novel forms of actionable damage and have found creative ways in which to accommodate such claims under more well-established heads of damage, including property damage.<sup>55</sup> It is submitted that the current approach of viewing the loss sustained by the owner in purely financial terms for the damage or loss of property sustained, as evidenced in *Glyn*, ignores the more complex companion relationship that can exist between owner and animal.

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<sup>53</sup> *Glyn v McGarel-Groves* [2006] EWCA Civ 998 at 1.

<sup>54</sup> *Glyn v Jane McGarel-Groves, Erik Grandiere, Clinique Veterinaire Equine De Chantilly* [2005] EWHC 1629 at 3.

<sup>55</sup> See for example: *Attia v. British Gas* [1988] QB 304 and *Yearworth and others v North Bristol NHS Trust* [2010] QB 1. See also: Christian Witting, ‘Physical Damage in Negligence,’ (2002) 61 Cambridge Law Journal 189 and Christian Witting, ‘Distinguishing between Property Damage and Pure Economic Loss in Negligence: A Personality Thesis,’ (2001) 21 Legal Studies 481.

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Secondly, this economic approach to damage fails to recognise that a harm has primarily been suffered by the animal. Under the current fungible property model, the animal is viewed as a tradable, purchasable commodity with a determinable market value extending solely to its contemplated purchase price or replacement value. This conception, however, fails to take into account the animal as an entity capable of suffering harm as a result of a veterinarian's negligence. A primary aim of this thesis is to advocate in favour of the best interests of animals within the veterinary relationship, yet, the present view of animals as fungible property precludes any consideration of even their most basic interests. A sentient property model would not only formally recognise the status of animals as feeling, intelligent beings within negligence law, but also ensure that veterinarians are protected from liability where they have accepted the animal as a patient and undertaken a positive duty to protect the animal's best interests. This, I argue, provides a more solid and realistic foundation from which to evaluate the profession that provides animal care.

Third is that the animals in all current reported veterinary negligence claims are thoroughbred horses of an exceptionally high value.<sup>56</sup> Interestingly, and indeed this argument could be made for any of the animals considered in this thesis, horses have the potential to bridge the gap between a primarily utilitarian purpose or a companion purpose and that, as a result, their market value can vary widely. Crucially, the arguments advanced in the actionable damage chapter will illustrate that for the purposes of a claim in veterinary negligence, it should not be the case that only those animals which possess a sufficiently high market value are worth being litigated. Indeed, as Schaffner highlights, unless the animal is an economically valuable race horse or show dog, for example, the fair market

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<sup>56</sup> In *Glyn*, for example, Anna was valued at £350,000. In *Blass v. Randall* [2008] EWHC 1007, the horse was valued at £45,625.00 and, lastly, in *Calver v. Westwood Veterinary Group* [2001] P.I.Q.R. P11, the value of the mare was placed at £13,592.

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value of the animal is negligible compared to the costs of suit, and therefore, few lawsuits are filed.<sup>57</sup> Negligence, it is argued, exists independent of an animal's market value or the animal's classification as a thoroughbred or pedigree; yet, the point that veterinary negligence is currently bound to this fungible property model means that only exceptional cases are litigated. What this point highlights, then, is the inadequacy of the market value assessment in producing results that capture the sentient quality of the animal and the full measure of loss sustained by the owner.

Importantly, though in some cases the market value approach may satisfy the loss occasioned by the owner in certain limited circumstances, this model will not always leave the claimant fully compensated. Indeed, in the vast majority of cases where veterinary negligence has occurred, the animal will possess a market value which would *not* make it economically viable to pursue a claim. A mechanism should, therefore, exist where those who have suffered the loss of an animal possessing an insignificant or non-existent market value, but where other, arguably, compensatable loss has occurred, to pursue a claim. Thus, it is submitted that conceiving harm in purely proprietary terms will not achieve this aim, but that such a mechanism presents itself utilising the sentient constitutive property approach. If we take as a matter of principle, as Eisenberg argues, that courts are authorised to lead by establishing principles or rules based on existing social standards and overturn those that have lost support, then, arguably, the courts stand in a strong place to see this mechanism established.<sup>58</sup> It must not be forgotten, however, that the nature of the damage suffered is

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<sup>57</sup> Schaffner, *An Introduction to Animals and the Law* (n40) 164. See also: Christopher Green, 'The Future of Veterinary Malpractice Liability in the Care of Companion Animals,' (2004) 10 *Animal Law* 163, 192. Green also makes the argument that because people are precluded from claiming for economic reasons, proper judicial oversight of the veterinary profession is not able to occur.

<sup>58</sup> Melvin Eisenberg, *The Nature of the Common Law* (Harvard University Press 1988) 19.

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also relevant to the existence and extent of any duty to avoid or prevent it<sup>59</sup> and so how the duty of care is conceptualised must be able to accommodate the provisions of the sentient constitutive property model. As the discussion in the next section will highlight, extensive, but certainly not insurmountable change must occur at the duty stage for this to take place.

### b) *Duty of Care*

It has been argued by many tort commentators that the duty of care assessment in a negligence claim possesses little if any value to the ultimate determination of liability; instead, the emphasis should be placed on the breach assessment and that a singular duty to act reasonably be adopted across the board for all interactions between people.<sup>60</sup> Though such a rejection is not made explicit in the current case law dealing with veterinary negligence, the duty of care assessment itself is either completely ignored or rooted in the contractual arrangement between the parties and restricted to a simple articulation that the veterinarian should act reasonably.<sup>61</sup> In this regard, the formulation mirrors that found in the *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.<sup>62</sup> assumption of responsibility line of jurisprudence— a point which will be discussed in greater detail below.

The position adopted in this thesis and expanded upon in greater detail in Chapter Four is that rather than a duty which is restricted to a simple statement that one should act

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<sup>59</sup> *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1 at 48.

<sup>60</sup> See: Stephen Hedley, *Tort* (7th ed., Oxford 2011) 26: ‘a “duty of care” has no legal consequences until it is broken, and it seems a fiction to say that a duty hangs over D’s relations with others...’; Michael Jones, *Textbook on Torts* (8th ed., Oxford 2002) 41: ‘the concept of duty of care adds nothing to the tort of negligence...’. See also: Donal Nolan, ‘Deconstructing the Duty of Care,’ (2013) 129 *Law Quarterly Review* 559 and John Oberdiek, ‘Philosophical Issues in Tort Law,’ (2008) 3(4) *Philosophy Compass* 734.

<sup>61</sup> Soave, for example, explains that a veterinarian’s duty of care is simply a duty to exercise reasonable care and skill. In the regard Soave states that ‘every person owes a duty to another person to conduct themselves in such a manner that no one will be injured by their actions.’ See: Soave, *Animals the Law and Veterinary Medicine: A Guide to Veterinary Law* (n42) 11 and 15.

<sup>62</sup> [1964] AC 465.

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reasonably, a veterinarian, in fact, owes many specific duties of care. Further, those duties will necessarily vary depending on the nature of the relationship shared between the owner and the animal, and the owner and the veterinarian, but also the nature of the wrongful conduct alleged. If, as it is argued in this thesis, the court's role in veterinary negligence actions is to guide conduct and not simply to impose liability, a singular duty to act reasonably simply does not go far enough. Veterinarians find themselves in the special position of having to consider multiple interests and resolve difficult treatment-related conflicts which inevitably occur as a result of the triangular relationship between animal, owner and veterinarian. A singular duty conception, however, precludes a deeper analysis of these issues as determinations under the single duty theory tend to focus attention on what *did* happen between the claimant and the defendant, as opposed to what *ought* to have happened.

### *i. A Duty Akin to Contract*

Before discussing how the courts applied assumption of responsibility reasoning to the reported veterinary negligence cases, it is first important to note that much of *Hedley Byrne's* genesis lies in contract theory. Indeed, as Lord Devlin stated in *Hedley Byrne* itself, the special relationship required to found an assumption of responsibility in tort is the *equivalent* to that in contract— what prevents these claims from proceeding in contract is a lack of consideration.<sup>63</sup> In response, 'the law of negligence... adopts an interstitial, gap-filling role to make good deficiencies in the law of contract, by rectifying damage caused by promises which the law of contract cannot enforce.'<sup>64</sup> With regards to veterinarians, it may be the case

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<sup>63</sup> *Hedley Byrne & Co. v Heller & Partners Ltd.* [1964] AC 465, 529 [emphasis added].

<sup>64</sup> Kit Barker, 'Unreliable Assumptions in the Modern Law of Negligence,' 109 *Law Quarterly Review* 461, 462.

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that a formal contract is in place between the two concerned parties, however, if a harm occurs and no contract exists, negligence can fill this gap where it can be shown that an assumption of responsibility on the part of the defendant for the financial interests of the claimant has occurred and the claimant has reasonably relied on the advice or services of the defendant. When the two ingredients are found, it can be said that a special relationship exists between the parties to which the law can then attach a duty of care.<sup>65</sup>

The dicta found in veterinary negligence claims adopt this *Hedley Byrne*-type reasoning. An example of such language can be seen in *Glyn*, for example, where the lower court judge (later upheld by the Court of Appeal) emphasised that:

...[the claimant] wanted [the defendant] to be present at High Meadows when Anna was examined and treated by [the second defendant], because he was Anna's vet and [the claimant] *relied* on him to *protect her own interests* and to ensure that Anna was not endangered in any way...<sup>66</sup>

Importantly, it was found by the lower court and approved by the Court of Appeal, that the duty undertaken by the defendant was restricted to that which could be found in the instructions or retainer, express or implied, which covered the visit giving rise to the incident leading to Anna's death and not the fact that the defendant was Anna's vet.<sup>67</sup> This statement,

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<sup>65</sup> *Hedley Byrne & Co. v Heller* [1964] AC 465, 503. Since the decision in *Hedley Byrne*, which applied in instances dealing with negligence misstatement, the law has developed to include the provision of professional services more generally. See: *Henderson v Merrett Syndicates Ltd.* [1995] 2 AC 145; *White v. Jones* [1995] 2 AC 207, 275.

<sup>66</sup> *Glyn (t/a Priors Farm Equine Veterinary Surgery) v Jane McGarel-Groves* [2005] EWHC 1629 at 41 [emphasis added].

<sup>67</sup> *Glyn (t/a Priors Farm Equine Veterinary Surgery) v McGarel-Groves* [2006] EWCA Civ 998 at 70.

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again, emphasises the duty arising from the contractual understanding between the parties, but nothing further.

In *Blass v. Randall*,<sup>68</sup> the claimant brought an action against the defendant veterinarian for damages sustained as a result of purchasing a lame horse. As part of the purchase procedure, the defendant veterinarian conducted a pre-purchase examination of the horse.<sup>69</sup> From there, it was the claimant's position that, 'acting in *reasonable reliance* on the certificate and information and *advice* set out...above [namely that the horse had never been lame], the claimant purchased Panther [the horse] for £45,625.00.'<sup>70</sup> Importantly, the court did not address the particulars of whether, ultimately, a duty should be imposed, but appeared to use the terminology to illustrate that a *breach* had not occurred. Hence, the court determined that, contrary to the claimant's allegations, factual evidence supported the finding that the defendant had advised not to purchase right away and rather to see if the claimant could lease the horse,<sup>71</sup> and that the claimant had not relied on the information contained in the certificate when she did decide to purchase the horse.<sup>72</sup>

These two cases highlight several problems with utilising a *Hedley Byrne*-based assumption of responsibility in the context of veterinary negligence claims. First, the duty of care is said to emerge as a result of the special contractual arrangement between the parties. This represents a very specific and narrow construction which may not correspond with how owners (and possibly even veterinarians) view the veterinary relationship and the obligations

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<sup>68</sup> [2008] EWHC 1007.

<sup>69</sup> A pre-purchase examination is conducted by a veterinarian before the purchase of a horse. The examination is essentially to determine the health and wellbeing of the horse at the time. During the examination medical abnormalities are recorded as well as known medical history.

<sup>70</sup> *Blass v. Randall* [2008] EWHC 1007 at 14 [emphasis added].

<sup>71</sup> *ibid* 66.

<sup>72</sup> *ibid* 62.



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that stem from it.<sup>73</sup> Further, viewing the duty of care in this manner also precludes consideration of the animal's best interests, as the duty arises as a result of what the owner and veterinarian contemplated, which may not always include consideration of the animal's interests. Lastly, using reasoning similar to that found in the *Hedley Byrne* jurisprudence fails to give veterinarians much in the way of guidance or concrete scenarios from which to order their behaviour. Unlike other methods of determining whether a duty of care exists, the assumption of responsibility test although 'a very attractive way of summarising a result,.. has very limited utility as a mechanism to assist in reaching that result.'<sup>74</sup> A similar outlook was shared by Longmore LJ when his Lordship stated that an assumption of responsibility is a 'conclusory phrase to describe the result of the imposition of a duty of care rather than an essential step in the reasoning to be used in progressing the argument on the question of whether a duty of care should arise.'<sup>75</sup> Combining these statements with the treatment by the courts in the cases considered above, the duty inquiry in veterinary negligence claims assumes an instrumentalist purpose, allowing the courts to determine liability based on either a positive or negative finding of breach.<sup>76</sup>

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<sup>73</sup> Owners may, for example, view the veterinary relationship and the duties as revolving around the provision of care, not a service. Thus, if a duty is breached, it is not simply a breach of contract, a "thing" constructed between the owner and veterinarian, or even a breach of promise, but rather a duty owed to care for and treat a sentient being. On the point that a contract can be viewed as a "thing," see: P.S. Atiyah, *Essays on Contract* (Clarendon 1990) 14. See also: James Yeates, *Animal Welfare in Veterinary Practice* (Wiley-Blackwell, 2013) 39.

<sup>74</sup> Keith Stanton, 'Professional Negligence: Duty of Care in the Twenty First Century,' (2006) 22(3) Professional Negligence 134, 138.

<sup>75</sup> *Customs and Excise Commissioners v. Barclay's Bank plc* [2005] 1 WLR 2082 at 41.

<sup>76</sup> Interestingly, Prosser, who adopted the view that the concept of duty was meaningless and doctrinally redundant, also said of duty that it is simply 'a shorthand statement of a conclusion, rather than an aid to analysis in itself.... "[D]uty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' This would seem to mirror the arguments made in respect of the *Hedley Byrne* line of reasoning. This could be then be seen as bolstering the argument that the courts in the veterinary negligence cases imposed a general duty of care as a result of the relationship between the parties being akin to contract to then focus on breach. See William L. Prosser, *Handbook on the Law of Torts* (1st ed., West Publishing Co. 1941) quoted in John C.P. Goldberg and B.C. Zipursky, 'The Moral of *MacPherson*' (n39).

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To conclude this section, two potential arguments are put forward to explain why the courts reasoned the cases in this manner; however, it is submitted that neither are satisfactory and that the relational method of determining the duty of care question discussed below should be adopted. First, there is the argument advanced by Stanton<sup>77</sup> that no single test for establishing a duty of care exists and that courts have, instead, adopted whichever method they feel is ‘best’ to achieve the *policy* aims it feels important.<sup>78</sup> If the courts in the above cases believed simply that they were applying the best method possible to achieve the policy aims desired, for example adequate compensation, arguably adopting *Hedley Byrne*- type reasoning would, for the reasons discussed above, not always capture the true nature of the loss. Further, it remains questionable whether answering questions regarding the duty of care based solely on policy analyses *is* actually to be preferred. As Chapter Four will argue, a return to active judging and to fundamental negligence principles and values provides a sounder approach to the duty analysis. The final argument suggested that because emphasis was placed at the breach stage of the negligence inquiry, it can be said that the courts were content to find that a single general duty of care as a result of the contractual arrangements between the parties existed. This argument would also seem to accord with my argument above that a finding of assumption of responsibility is a conclusory phrase, used to say that *a* duty existed (ie. the courts made a determination as to breach and simply needed a method of then saying a duty also existed). As the next section will seek to show, however, the duty of care assessment needs to be far more extensive and multiple duties must be recognised if the

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<sup>77</sup> Keith M. Stanton, ‘Professional Negligence: Duty of Care Methodology in the Twenty First Century,’ (n74).

<sup>78</sup> *ibid* 149 [emphasis added]. A caveat to this is argument is that Stanton only appears to be applying this “best approach” argument to the House of Lords and assumes that decisions should be made by appealing only to policy considerations. Further, for decisions made in the lower courts, much is determined by the way in which counsel argues the case and are thus “opting for the combined approach,” which includes an assessment of what is thought to be “best” combined with how counsel argued the case.

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law is to provide adequate guidance to veterinarians and prioritise the best interests of the animal patient.

### ii. *Multiple Duties: A Relational Concept*

If a general duty to act reasonably is adopted, in Prosser's words, 'the duty is always the same— to conform to the legal standard of reasonable conduct in light of the apparent risk.'<sup>79</sup> Hence, the question is not whether a duty arises, but whether the standard has been met, which is necessarily a factual inquiry occurring at the breach stage.<sup>80</sup> In this way, then, the heavy reliance on the specific facts of each case, which is evident upon reading the three judgments, is consistent with the general duty analysis. The problem with this analysis, and why it should be rejected, is that it prevents the development of a set of normative principles which can guide veterinarians in their everyday practice. Because the courts in the three cases place such heavy reliance on the breach stage, each decision is essentially a one-off based solely on the particular facts as they arose in the given case. It is, therefore, only when the courts look at the duty question in terms of the relationships between the parties as generating specific duties that conduct can be shaped and specific interests forwarded.

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<sup>79</sup> William Lloyd Prosser et al., *Prosser and Keeton on Torts* (5th ed., West Publishing 1984) quoted in John C.P. Goldberg and B.C. Zipursky, 'The Restatement (*Third*) and the Place of Duty in Negligence Law,' (2001) 54(3) *Vanderbilt LR* 657, 705.

<sup>80</sup> An example of this type of reasoning can arguably be seen in the Queen's Bench decision in *Glyn*. It was provided in evidence that the risk of developing laminitis as a result of cortico-steroid injections, though small, is dose-related meaning that the more steroids are injected the higher the risk. Further, if the owner had known of the risk, however small, it was found that she would *not* have consented to the treatment. When coming to a decision as to whether the veterinarian had conformed to the standard of conduct expected, Mr Justice Forbes stated:

Mr. Glyn effectively rendered himself unable to judge whether the proposed treatment was inappropriate by his failure to make any inquiry as to the types of cortico-steroids...or as to the dosages that were to be administered. As it seems to me, that was an extraordinary failure, given that Mr. Glyn knew perfectly well...that a high dose of cortico-steroids would involve sufficient risk of laminitis to make it necessary to warn (in effect) [the owner] (at 67).

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In this regard, Goldberg and Zipursky, view duties being relational in two ways: first, any relationship, even those between strangers, can give rise to duties of care. Second, those relationships which pre-date the tortious incident or where certain power or knowledge inequalities exist, are termed “relationship-sensitive” and can give rise to more onerous duties of care because a special relationship is said to exist between the parties.<sup>81</sup> For example, whether the defendant would owe an affirmative duty to act or to protect would be largely dependent on a finding that some type of pre-existing relationship was in place at the time the tortious incident occurred. A more in-depth analysis of these issues will be offered in Chapter Four. For present purposes, however, what is important, and what is *not* captured by the current case law on veterinary negligence, is how this concept affects veterinarians.

Veterinarians operate under unique conditions in comparison to other professions. To start, though only legal duties can be owed to the owner,<sup>82</sup> actual care and treatment is administered to the animal. This creates a triangular relationship between veterinarian, owner and animal, giving rise to various complex legal and ethical obligations.<sup>83</sup>

Unfortunately, the reported cases on veterinary negligence fail to consider this complex relationship, or any relationship between owner and veterinarian outside one which may arise out of a contractual arrangement. Looking briefly at just some of the duties owed to the owner, it can be seen how inadequate the general duty to act reasonably is in capturing the reality of veterinary practice.

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<sup>81</sup> John C.P. Goldberg and B.C. Zipursky, ‘The Restatement (*Third*) and the Place of Duty in Negligence Law,’ (2001) 54(3) *Vanderbilt LR* 657, 707-708. See also: John C.P. Goldberg and B.C. Zipursky, ‘The Moral of *MacPherson*,’ (1998) 146(6) *University of Pennsylvania Law Review* 1733.

<sup>82</sup> Soave (n42) 16.

<sup>83</sup> Martin C. Whiting, ‘Justice of Animal Use in the Veterinary Profession’ in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 63 and 69 and Bernard E. Rollin, *Veterinary Medical Ethics: Theory and Cases* (2nd ed., Blackwell 2006) 32.

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Building from the relational model introduced above, veterinarians may owe duties of care stemming from two primary scenarios: those which arise from an act of misfeasance and those arising from nonfeasance. Within these two broad areas, further duties may arise relating to the treatment and diagnosis of the animal's condition, and those related to disclosure of risk relating to any proposed treatment of the owner's animal. With treatment and diagnosis, duties may arise from a positive act of misfeasance where, for example, the veterinarian negligently performs an operation on an owner's dog or, as in *Glyn*— though duty was not explicitly discussed by the courts— the veterinarian negligently administers a particular drug or combination of drugs. Potential duties stemming from an omission could be found in a situation where the veterinarian fails to attend the owner's seriously ill horse after accepting a call from the owner, or where the veterinarian has through his or her omission created a source of danger, for example, in the way animal patients are boarded. There may also be separate duties to disclose the risks associated with a certain treatment<sup>84</sup> which, given the medical advancements currently being made in veterinary medicine, would certainly be conceivable.

With regards to the animal patient, one of the primary aims of this thesis is to forward the best interests of the animal. In this regard, it is argued that veterinarians should view their obligations through the perspective of a best interests lens. Although it cannot be currently said that veterinarians owe direct legal duties of care to the animal itself— for this would

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<sup>84</sup> This issue recently presented itself in the human medical context in the case of *Montgomery v. Lanarkshire Health Board* [2015] AC 1430 and will be discussed throughout this thesis. This may have also been an issue in the *Glyn* case. It was stated by the lower court that, broadly speaking, it was generally recognised by veterinarians that administering cortico-steroids carries the small risk of developing laminitis (the disease later suffered by the horse) and that the risk is dose-related. It will be recalled that the horse was given an overdose of cortico-steroids and did suffer laminitis as a result. It was also noted that had the owner been warned of the slight risk, she would not have agreed to the treatment. As the case did not turn on these matters, the issue was not considered further, however, it is arguable that the veterinarian did also owe a duty to disclose in this case. See: *Glyn (t/a Priors Farm Equine Veterinary Surgery) v Jane McGarel-Groves* [2005] EWHC 1629 at 31 and 32.

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imply a corresponding right to bring an independent claim against the veterinarian, which because of animals' status as property currently does not exist— considering the animal's best interests may also have a bearing on the duty owed to the owner. For example, a conflict between the interests of the animal and the owner may arise when dealing with the issue of 'overtreatment' or life-prolonging treatment. Overtreatment, Corr states, is treatment sought by the owner which either, 'results in a poorer quality of life than no treatment or euthanasia...or [can be described as] a treatment or test that makes no difference in the animal's condition or quality of life.'<sup>85</sup> Here, then, a situation could easily be envisioned where a veterinarian, believing he was acting in the best interests of the animal, refused to give life-prolonging treatment to a seriously ill and suffering animal, which then died. In these circumstances questions need to be asked as to whether the owner's wishes in having that treatment administered remain operative if a negligence claim was brought and whether acting in the best interests of an animal could potentially offer the veterinarian some form of protection from liability. Thus, an important aspect of determining the nature of the many duties potentially owed to owners is determining how conflicts could affect those duties and how they are likely to be dealt with by the courts.

### iii. *Concluding Thoughts on Duty of Care*

In none of the cases considered do the courts detail their findings as to the duty of care. Though language resembling that consistent with a finding of an assumption of responsibility in line with *Hedley Byrne* can be identified, this is never made explicit. It would appear from the dicta that the courts were satisfied to find that a general duty arose as

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<sup>85</sup> Sandra Corr, 'Companion Animals' in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 188, 195.

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a result of the claimant hiring the veterinarian, having decided the issue largely at the breach stage. Quite simply, conceptualising the duty of care inquiry in this framework skirts far deeper issues. Writing soon after the decision in *Hedley Byrne*, Stevens stated that the decision in *Hedley Byrne* ‘represents the most interesting exercise in the judicial development of the common law since *Donoghue v. Stevenson*.’<sup>86</sup> Though it is true that *Hedley Byrne* has done much to impact the duty of care inquiry in negligence claims, when applied in the veterinary negligence context, it only serves to obscure deeper questions which require attention. The focus courts place on the commercial and economic interests of the claim gives the impression that they are the only interests which require attention by the veterinarian. What remains to be answered, therefore, is a more complete understanding of the various duties of care to which veterinarians may be exposed to as a part of their daily practice, the types of relationships which give rise to those duties, and how considerations such as the animal’s best interests bear on how the duty is conceptualised. If, as it is argued in this thesis, negligence is not simply about imposing liability, but rather guiding conduct, a deeper consideration of these issues must occur.

### *c) Breach of Duty*

A necessary consequence of finding that a single general duty to take reasonable care exists is that breach becomes a focal point of the negligence assessment. Essentially, those elements which would represent duty considerations if the relational duties approach were adopted become subsumed by the breach assessment. One of the problems with this approach and why it should be ultimately rejected is that leaving matters to the breach assessment results in answers which are largely case or fact-specific. Difficulties, therefore,

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<sup>86</sup> Richard Stevens, ‘*Hedley Byrne v. Heller*: Judicial Creativity and Doctrinal Possibility,’ (1964) 27(4) *Modern Law Review* 121, 122-123.

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arise in establishing a body of law which sets out normative principles capable of informing how one ought to act within a particular legal relationship. Arguably, this places too great an emphasis on the breach stage. Rather, the preferred course, as previously argued, is to undertake a far deeper analysis at the duty stage and leave breach to determine the important question of whether the veterinarian's conduct met the standard expected within the profession.<sup>87</sup>

A further point which is raised in the case law concerning veterinary negligence is to what extent the use of *Bolam*<sup>88</sup>/*Bolitho*<sup>89</sup> principles bear on the determination of breach. Given that veterinarians are professionals dealing with matters of clinical skill and judgment, reliance on this area of jurisprudence is to be expected. A reading of the case law would appear to support this view, although how the courts deciding veterinary negligence claims have interpreted this case law and the extent to which they have applied it, varies. This leaves several unanswered questions relating to the use of expert evidence and judicial scrutiny of such evidence. These issues will be introduced below and later expanded upon in Chapter Five of this thesis.

A related point is the extent to which professional guidelines are utilised to assist in determining the expected standard of care. There is currently great debate in the professional negligence arena over the use of professional guidelines in shaping the breach of duty.<sup>90</sup> This

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<sup>87</sup> As Goldberg and Zipursky note, the duty question in a negligence case is whether the defendant owed a duty to the plaintiff to use a particular level of care to avoid the sort of injury the plaintiff suffered. The breach question is the question of whether, assuming there was a duty to the plaintiff to use that level of care, the defendant did use the appropriate level of care. See: Goldberg and Zipursky, 'The Moral of *MacPherson*' (n39) 1828.

<sup>88</sup> *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.

<sup>89</sup> *Bolitho v. City and Hackney Health Authority* [1997] 4 All ER 771.

<sup>90</sup> See for example: Ash Samanta et al., 'The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the *Bolam* Standard?' (2006) 14(3) *Modern Law Review* 321 and Ash Samanta et al., 'Legal



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has perhaps been most strongly felt in the human medical context with a multitude of regulatory and professional bodies developing clinical and professional guidelines, some of which have then subsequently been utilised by the court to help determine questions relating to professional standards of care.<sup>91</sup> Though professional guidelines are not determinative when assessing breach, guidance can track very close to expected tort standards<sup>92</sup> and provide courts with an example of professionally-held standards relating to patient care and professional practice.<sup>93</sup> With regards to veterinarians, the RCVS has recently updated its Professional Code of Conduct outlining good professional practice.<sup>94</sup> Though it will be argued that the use and understanding of professional guidance is to be encouraged, both in litigation and practice, to what extent it can be said that existing guidance is fit for purpose in terms of the interests it considers merits analysis.

### *i. Expert Evidence in Veterinary Negligence: The Use and Misuse of Bolam and Bolitho Jurisprudence*

Before discussing the application of *Bolam* and *Bolitho* in the context of the veterinary negligence cases considered here, it is necessary to briefly set out how these two cases bear on the breach assessment. Next to Lord Atkin's speech in *Donoghue v. Stevenson*,<sup>95</sup> the direction given by McNair J in *Bolam* is perhaps one of the most influential in negligence

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Considerations of Clinical Guidelines: Will NICE make a Difference?' (2003) 96 Journal of the Royal Society of Medicine 133.

<sup>91</sup> See for example: Ash Samanta et al., 'The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the *Bolam* Standard?' (n90).

<sup>92</sup> Maria Lee, 'Safety, Regulation and Tort: Fault in Context,' (2011) 74(4) Modern Law Review 555, 572.

<sup>93</sup> Ash Samanta et al., 'Legal Considerations of Clinical Guidelines: Will NICE make a Difference?' (n90).

<sup>94</sup> Royal College of Veterinary Surgeons, 'Code of Professional Conduct,' (RCVS 2012) <<https://www.rcvs.org.uk/advice-and-guidance/code-of-professional-conduct-for-veterinary-surgeons/?voted=5#poll5>> accessed 22 December 2012.

<sup>95</sup> [1932] AC 562.

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law. In this case, the jury was directed that the defendant will not be found to have breached his duty if he:

...has acted in accordance with a practice accepted as proper by a responsible body of opinion skilled in that particular art... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.<sup>96</sup>

For the next forty years, it was widely held that if a doctor<sup>97</sup> could proffer expert opinion to the effect that he or she would have undertaken a similar course as the defendant, breach had not occurred.<sup>98</sup> Importantly, the decision in *Bolitho* altered the position of the courts giving them authority to scrutinise the expert evidence delivered to ensure that the evidence meets not only logical scrutiny, but could also be considered reasonable and responsible.<sup>99</sup>

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<sup>96</sup> *Bolam* (n88) 587.

<sup>97</sup> 'Doctor' here is specified for two reasons. First, while the *Bolam* standard arguably applies to all professionals, it has been in the medical field where this case has been subject to greatest debate. Examples can be seen in the allegations that the judiciary are excessively deferential to the medical profession and the recent move to impose more stringent regulation of the medical profession. See for example: The Right Honourable Lord Woolf, 'Are the Court Excessively Deferential to the Medical Profession?' (2001) 9 Medical Law Review 1; and Margaret Brazier and José Miola, 'Bye-Bye *Bolam*: A Medical Litigation Revolution?' (2000) 8(1) Med Law Rev 85. Secondly, there are arguably many similarities between the medical profession and veterinary medicine and can give rise to similar legal, ethical and practical problems. On this point see: Joseph H. King Jr., 'The Standard of Care for Veterinarians in Medical Malpractice Claims,' (1991) 58 Tenn. L. Rev. 1, 4 and Stephen A. May, 'Veterinary Ethics, Professionalism and Society' in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 44, 49.

<sup>98</sup> See: José Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Hart 2007) 12 and see: *Maynard v. West Midlands Regional Health Authority* [1984] 1 WLR 635.

<sup>99</sup> In this way, 'reasonable' and 'responsible' have taken on a normative meaning requiring the court to consider also what ought to have happened in the circumstances. Arguably, this was always the intention of *McNair J* in directing the jury. See on these points: José Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (n97) 10-12 and Rob Heywood, 'The Logic of *Bolitho*,' (2006) 4 Professional Negligence 225.

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Writing soon after the decision in *Bolitho*, Teff<sup>100</sup> noted that increasingly medical negligence claims ‘contain elaborate treatment of the medical issues, coupled with signs of more independent and critical judicial appraisal of expert evidence on the requisite standard of care.’<sup>101</sup> What remained unanswered at the time Teff wrote this piece, however, was whether courts were scrutinising substantive evidence given by experts or simply their professional credibility in relation to one another. At the time, this discussion highlighted the possibility that an over reliance on the expert evidence and a hesitancy to engage with the normative aspects relating to proffered standards existed within the judiciary. Whilst it now seems settled that courts are considerably more willing in human medical claims to challenge evidence which objectively falls short of expected standards,<sup>102</sup> in the veterinary context, this tension may still prove problematic for some of the reasons initially cited in human medical negligence claims. In this regard, the court may place particular weight on a knowledge deficit which they themselves possess and an acknowledgement that medicine is not an exact science, but an “art”<sup>103</sup> based on clinical observation, past experience, knowledge of the patient, and intuition.

An example of this reasoning could be said to exist in the case of *Calver*.<sup>104</sup> Here, the defendant was called by the claimant to attend his thoroughbred mare, which had aborted her foal the previous evening. The veterinarian attended, but after examining the afterbirth and the state of the mare, decided not to administer antibiotics and a uterine flush, which

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<sup>100</sup> Harvey Teff, ‘The Standard of Care in Medical Negligence— Moving Away from *Bolam*?’ (1998) 18 Oxford Journal of Legal Studies 473.

<sup>101</sup> *ibid* 483.

<sup>102</sup> Lord Justice Jackson, ‘The Professions: Power, Privilege and Legal Liability’ (Peter Taylor Memorial Lecture to The Professional Negligence Bar Association, London, 21 April 2015).

<sup>103</sup> *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, 587.

<sup>104</sup> *Calver v. Westwood Veterinary Group* [2001] P.I.Q.R. P11 at 32.

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represented professional practice if the afterbirth was not all there or the mare appeared ill.<sup>105</sup> The mare soon after developed laminitis resulting from retained biomaterial and had to be destroyed.<sup>106</sup> Two experts gave evidence at the trial, both with converging views on the treatment which ought to have been administered. At first instance, the veterinarian was found to have been negligent in determining the horse to be fit and well, however, the decision was overturned on appeal. Near the conclusion of the judgment, Simon Brown LJ raised, what he considered the “critical question arising out of the appeal.”<sup>107</sup>

Was the judge entitled to regard this as one of those “rare case[s]” in which one body of veterinary opinion (represented by Mr. Vogel) demonstrated that the other (represented by Mr Hughes and Mr Greenwood) was not capable of withstanding logical analysis, or was it not one of “the vast majority of cases” where the reasonableness of Mr Hughes’ opinion was demonstrated by the fact that it was shared by Mr. Greenwood, a distinguished expert in the field?”<sup>108</sup>

Looking at how the question was posed, it appears to frame the breach assessment in light of the consistency of the expert evidence, as opposed to the cogency and reasonableness of that evidence in practice. On the facts as presented, the administration of antibiotics would have been an inexpensive and easy precaution and one which would have completely eliminated risk to the horse.<sup>109</sup> In her article looking at the human medical context, Mulheron cites judicial support for the point that if ‘the risk of an adverse outcome for the patient could

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<sup>105</sup> *ibid* 11.

<sup>106</sup> *ibid* 5-7 and 9.

<sup>107</sup> *ibid* 31.

<sup>108</sup> *Calver v. Westwood Veterinary Group* [2001] PIQR P11, 177.

<sup>109</sup> *ibid* 13 and 14.

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have been easily and inexpensively avoided by an alternative course of medical treatment or diagnosis, then the doctor's conduct will be held to be negligent, even if a body of medical opinion did endorse that conduct.'<sup>110</sup> What *Calver* highlights, then, is the important point that when courts are deciding on veterinary negligence claims, it should not be the case that they abdicate their responsibility of determining the expected standard of care to an expert witness simply because that witness could be classed as 'distinguished in the field.' Writing during the same time period *Calver* was decided, Maclean stated that within the judiciary there existed an unwillingness to undertake an assessment of the 'proffered standard which would be necessary if the [breach] test is to have an appropriate normative standard,'<sup>111</sup> deferring instead to the opinion of the medical profession. Going forward, whilst the involvement of expert witnesses remains fundamental to the determination of professional negligence cases, I argue, in Chapter Five, that courts hearing veterinary negligence claims actually sit in a strong position to start challenging outmoded professional norms and should take a firmer stance on setting normative standards of care which would apply across the profession. In this regard, courts should focus on achieving a balance between the internal consistency of the evidence and the cogency and reasonableness<sup>112</sup> of that evidence, which is what *Bolam*, as reinterpreted by *Bolitho*, originally intended.<sup>113</sup>

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<sup>110</sup> Rachel Mulheron, 'Trumping *Bolam*: A Critical Legal Analysis of *Bolitho*'s "Gloss,"' (2010) 69 Cambridge Law Journal 609, 620. Mulheron cites various cases for this proposition, a selection of which include: *Hucks v. Cole* [1993] 4 Med. L.R 393 and *French v. Thames Valley Strategic Health Authority* [2005] EWHC 459. Certainly at the time *Calver* was decided, the court could have applied *Hucks*.

<sup>111</sup> Alasdair Maclean, 'Beyond *Bolam* and *Bolitho*,' (2002) 5 Medical Law International 205, 224.

<sup>112</sup> "Reasonableness" is taken to assume, following Norrie, a normative meaning. In this way then, when courts are asked whether the veterinarian has acted in a reasonable manner, this would allow the court to also state what ought to have been done in the circumstances. See: Kenneth Norrie, 'Common Practice and the Standard of Care in Medical Negligence,' (1985) Judicial Review 145 at 148 cited in Miola, *Medical Ethics and Medical Law* (n98) 11.

<sup>113</sup> *ibid* 11-12.

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Underlying these arguments is the crucial point that before the courts can be expected to develop a normative standard of care for the veterinary profession, the reliance placed on expert evidence means that a profession-wide change in mindset must logically come first. Methods as to how this change can be achieved is featured in Chapter Five, however, what is salient here and what is not represented in the case law, is that the change must be directed to advancing the best interests of the animal and the constitutive relationship between owner and animal. The point that courts look to expert opinion in professional negligence claims raises the parallel point that along with active judicial scrutiny of witness evidence must come an acceptance of the constitutive property model and best interests approach. It cannot be the case, if the dual aims of this thesis are to be met, that the commercial approach is the only, or even the dominant, method of approaching the veterinary relationship. I argue in the next section and in Chapter Five that effecting this change is best achieved through the introduction of new professional guidelines commissioned by the RCVS.

### *ii. Impact of Professional Guidelines on the Breach Assessment: Current Application and Future Possibilities*

There has been much debate amongst academics about the use of professional guidelines or so-called “soft law” to more clearly articulate the standard of care expected from a professional.<sup>114</sup> In a rapidly changing area of practice, professional guidelines can assist the practitioner by outlining standards considered good practice and the client by outlining the

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<sup>114</sup> Shaun D. Pattinson, *Medical Law and Ethics* (3rd ed., Sweet & Maxwell 2011) 84-85; Angela Campbell and Kathleen Cranley Glass, ‘The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research,’ (2001) 46 McGill L.J. 473; Samanta et al., ‘The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the *Bolam* Standard?’ (n90); Samanta et al., ‘Legal Considerations of Clinical Guidelines: Will NICE make a Difference?’ (n90); Joseph H. King Jr., ‘The Standard of Care for Veterinarians in Medical Malpractice Claims,’ (1991) 58 Tennessee Law Review 1, 12-13.

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conduct professionals must follow.<sup>115</sup> Importantly, guidelines may also be utilised by the courts when determining complex issues relating to the normative standard of care and, where they possess institutional legitimacy, provide support where the court deviates from professional opinion.<sup>116</sup> Though I submit that guidelines should play an important supporting role in the breach assessment, questions must be asked, however, regarding the validity of the guidelines themselves and what interests they seek to promote and, conversely, leave out.

In the veterinary negligence context, the courts in all three cases made reference, either directly or indirectly, to professional guidance. Both *Glyn* and *Blass* made explicit use of guidelines produced by professional bodies, specifically guidance created by the RCVS and an independently-developed manual written by the British Equine Veterinary Association (“BEVA”). Though the question of *how* the guidance was utilised is of importance, greater consideration will be given here and in more detail in Chapter Five, as to whether it can be said the guidance, particularly the RCVS guidance, can be utilised to greater effect within veterinary negligence claims and whether it can be said that such guidance is fit for purpose.

In the case of *Glyn*, for example, Rix LJ, in finding that the defendant’s contemporaneous notes of the treatment administered represented the best evidence as to his understanding of the scope of his responsibilities on that day, then highlighted that the RCVS guidance recommended veterinarians maintain clear and accurate case records.<sup>117</sup> Thus, it would

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<sup>115</sup> Campbell and Cranley Glass, ‘The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research’ (n114) 477.

<sup>116</sup> *ibid* 476. See also: Samanta et al., ‘The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the *Bolam* Standard?’ (n90) 9.

<sup>117</sup> *Glyn v. Jane McGarel-Groves* [2005] EWHC 1629 at 74. However, in *Blass v. Randall* [2008] EWHC 1007, counsel for the claimant utilised a manual published by the BEVA and expert evidence to argue that as part of the pre-purchase examination undertaken by the veterinarian, some form of written record indicating the horse’s operation should have been included in the final assessment (at 72 and 73). It was, however, considered by the court that a veterinarian need not make contemporaneous notes on the matter, as long as the information

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appear that the guidance was utilised to justify the heavy reliance the courts placed on the notes in determining the scope of the defendant's responsibility. Combine this with corroborating expert evidence as to professional practice on the actual actions undertaken by the defendant and breach can be established. Looking beyond how the actual guidance was applied, however, further consideration ought to be given to the relationship or interplay between expert evidence and professional guidelines. In this instance, the expert opinion and the guidance worked in tandem to support the breach analysis undertaken by the court. Uncertainty may occur, however, where, for example, expert opinion diverges from RCVS guidance. Further, if it is shown that the guidance itself is contradictory or merely sets standards in line with professional etiquette, serious questions arise as to the weight each piece of evidence should carry. This would be especially important where questions are raised regarding the veterinarian's expert evidence, perhaps because the practice adopted by the defendant and supported by the expert appears outdated.

Taking this forward, it will be argued in Chapter Five that the human medical context can provide assistance on the use and development of professional guidance. Although the RCVS did, in 2012, produce new guidance for its veterinarians, it will be argued that in its current form the document fails to provide veterinarians with necessary guidance. As

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is communicated clearly and is understood by the client (at 77). In coming to this conclusion the court agreed with the defendant's witness that a 'responsible body of veterinary surgeons share[d] his view that it was not necessary to include any reference to the horse having undergone [the surgery]...' and rejected the claimant's expert evidence and guidance to the contrary (at 79). Two separate issues arise from this case. First, the manual itself presented inconsistent opinions as to the extent of the duty owed by a veterinarian in completing the examination and in some cases placed too high an obligation on veterinarians; ultimately, this was why the guidance was rejected. In one way, this shows judicial scrutiny of the guidance, which in itself is to be commended. However, the second point this decision raises was the court's finding that as a matter of law, advice which is communicated clearly and comprehensively need not be written down (at 77). Unfortunately, this point was not elaborated upon and no reference was made to RCVS guidance on the point of clinical notes. It will also be recalled, however, that Rix LJ in *Glyn* quite clearly supported the RCVS guidance relating to accurate keeping of clinical records and the veterinarian's duty to keep such records. As a result, there is now confusion as to the standards expected of a veterinarian in this area.



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evidenced in *Glyn*, courts are prepared in the veterinary negligence context to engage with professional guidance, however, to be effective, I argue the guidance must reflect the arguments introduced in the previous sections concerning sentient constitutive property and a relational approach to the duty of care. In this regard, regulatory lessons learned by the General Medical Council (“GMC”) can provide assistance. In particular, as this thesis advocates a paediatric approach in guiding veterinarians as to their professional and legal obligations, Chapter Five will look at the development and content of the *0-18 Years: Guidance for all Doctors*<sup>118</sup> and determine to what extent elements of the guidance, namely the best interests assessment in section 12, could be adapted to fit the veterinary context.

Importantly, however, to effect the greatest positive change, it is submitted that reform to the guidance must be accompanied by a change in professional mindset that would see the sentient constitutive property model broadly supported.<sup>119</sup> To achieve this, a change in Council representation within the RCVS to include greater diversity of opinion will be advocated. As official drafter of the Code, diversity between lay professional within the Council itself is necessary to ensure that professional concerns do not dominate.<sup>120</sup> Thus, to give effect to the primary aims of this thesis, these changes at the professional level must occur. As evidenced by all of the veterinary negligence cases, courts will look to expert evidence and, as shown in *Glyn*, are willing to consider professional guidance in assembling their findings as to breach; however, the current RCVS guidance does not go far enough in articulating the full range of veterinary obligations. Because, as Lee stated, professional

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<sup>118</sup> General Medical Council, *0-18 Years: Guidance for all Doctors* (GMC 2007).

<sup>119</sup> Some evidence of this support already exists. See: Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (London, November 2015) <<http://vetfutures.org.uk/launch-of-the-vet-futures-report/>> accessed 24 November 2015.

<sup>120</sup> See: Secretary of State for Health, *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century* (Cm 7013, 2007) 5 <<http://www.official-documents.gov.uk/document/cm70/7013/7013.pdf>> accessed 7 December 2012.

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guidance can track very close to the expected tort standard,<sup>121</sup> there is scope to create the basis for legitimate change in favour of the animal's best interests and the constitutive relationship.

### *iii. Concluding Thoughts on Breach of Duty*

The current law concerning veterinary negligence places breach at the centre of the negligence inquiry. Though it was argued that much more of the court's consideration should be directed at the duty of care stage, the current situation does not reflect this. Instead, liability appears to be determined largely on the unique factual situation before the court. It is submitted that the courts and the various professions work together— not always harmoniously, but together nonetheless— to develop the common law and the various duties and standards of care to be expected. It is from case law that professionals are guided as to their legal duties and requisite standards of care, and conversely, the courts look to the professions to help them understand and interpret evolving standards of care through expert evidence. To maintain this relationship, deeper consideration needs to be given to boundaries between duty of care and breach, and the tests and considerations found in each one. This is currently missing in veterinary negligence jurisprudence.

The primary aim of Chapter Five, then, will be to reassess the breach inquiry in light of the argument that a shift of emphasis to the duty of care stage should occur and attempt to more clearly define the breach assessment taking into consideration not only *Bolam* and *Bolitho* jurisprudence, but more importantly the role of professional guidelines within that framework and the feasibility of including a best interests provision.

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<sup>121</sup> Lee, 'Safety, Regulation and Tort: Fault in Context' (n92).

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### 1.4 Conclusion

The purpose of this chapter was to highlight the current challenges and uncertainties facing the veterinary profession and to demonstrate that within veterinary negligence claims, the wrong questions are being asked by the courts. As it currently stands, the veterinary profession is undergoing considerable change from numerous sources, however, an increasingly disparate and complex clientele with evolving expectations regarding the treatment of their animals means that, going forward, a clear vision of veterinary liability is necessary. In its current state, both the profession and the courts have adopted a commercial perspective to the veterinary relationship, however, this provides an increasingly myopic view of what is both ethically and, I argue, legally, a triangular relationship. From a legal perspective, the lens needs to be refocused and emphasis placed on understanding the nature of the harm sustained by the claimant and in response to this analysis, what the defendant veterinarian ought to have been mindful of.

The next chapter of this thesis will provide a lens through which to view veterinary negligence. As this thesis will make arguments which challenge orthodox perceptions to, or argue a re-working of, the various requirements of a negligence claim, understanding the underlying rationale from which these arguments are made is crucial. When presented with arguments that seek to advance the law in new ways, courts will often look to ground their reasoning in theories or principles which already possess doctrinal support. However, it must be asked whether any of these approaches, for example, corrective justice or rights-based theories are capable of elucidating the basis of veterinary liability; I argue in the next chapter that they are not. Instead, it will be argued that an instrumentalist approach in which focus is placed on protecting the interests of the vulnerable party should be adopted. From here, the

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remainder of this thesis will then address the damage, duty, and breach requirements within a negligence claim taking on board the changes introduced in this introductory chapter.

## 2. The Nature and Purpose of Negligence Law

### **2. The Nature and Purpose of Negligence Law: Situating Veterinary Liability Within a Vulnerability Framework**

#### **2.1 Introduction**

The previous chapter highlighted that although veterinary negligence operates as a recognised form of professional negligence liability, its reach in practice is restricted to animals with a high market value. Further, the reasoning behind the court's decisions revealed a strict application of orthodox negligence principles relating to property damage, prioritising the claimant's financial interest and maintaining an arm's-length, commercial structure between owner and veterinarian. Going forward, I argue that the aims of my thesis, namely to advocate in favour of a best interests approach to animal care and provide more detailed guidance to veterinarians as the extent of their legal obligations, will be prevented from developing in a positive way if current practices remain unchanged. Before discussing the substantive issues relating to actionable damage, duty of care, and breach, it is important first to discuss the lens through which I argue veterinary negligence operates; this is the purpose of the present chapter.

It is submitted that although persuasive in some respects, looking at veterinary negligence through a purely philosophical lens fails to capture the nuance of the veterinary relationship and fails to provide a solid foundation from which to argue that animals' best interests should be prioritised within that relationship. Instead, an instrumental perspective, in which protection of the vulnerable is central, will be advanced. Unlike the various philosophical

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approaches to negligence, discussed in this chapter, an instrumental perspective can better represent the strongly relational veterinary liability model I adopt in this thesis and offers a more pragmatic approach to analysing special legal relationships more broadly. In this way, developing an instrumental approach in which the court's primary aim is to protect the vulnerable can be viewed as a legitimate aim within negligence jurisprudence and represents a logical and pragmatic extension of existing case law when considering negligence more broadly. Furthermore, although a vulnerability-based approach does not represent a truly novel or radical departure from current judicial reasoning— courts have, in a number of cases, incorporated reasoning which looks to the idea of being vulnerable to arrive at decisions it considers fair and just. This chapter will develop and attempt to reconcile these ad hoc applications and provide a grounded rationale for this approach which can be taken forward.

To demonstrate this, the first section of this chapter will analyse the more influential philosophical theories relating to negligence including corrective justice, distributive justice, and rights-based approaches to negligence. It will be argued that these theories cannot be sufficiently adapted to allow the animal's interest to be considered and must therefore be rejected as explanatory mechanisms for veterinary negligence liability. Of primary importance is the rigid adherence of all three models to a binary, correlative structure which, although rooted in strong jurisprudential history, relies too heavily on the individualistic, autonomous models of personhood this thesis ultimately rejects. Section two of this chapter will introduce the instrumental perspective which I adopt and argue why it is to be preferred, particularly in the veterinary context. This section will also introduce the way in which I utilise vulnerability. Although vulnerability discourse in the tort context has been addressed by academic commentators and the courts in the past, this has been done without detailed

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explanation or analysis. An important component of this section will therefore be to put forward a more unified view of how vulnerability can be utilised in the doctrinal context whilst also accounting for the various legal relationships negligence considers.

The final two sections will analyse in greater detail the vulnerability framework adopted in this chapter, looking first at how vulnerability discourse has been creatively applied by the courts in the past to achieve practical justice aims. A final analysis is devoted to the relationship between the best interests assessment and vulnerability. Both models play a fundamental role in how veterinarians and the courts ought to view veterinary negligence and the triangular relationship; therefore, it is important to highlight how the two are able to support one another within a negligence inquiry. It is submitted that this type of analysis is best undertaken at the duty of care stage and that such an analysis should be based on the flexible application of normatively-relevant considerations, which underpin the law as it relates to negligence.

### 2.2 Tort Theories Scrutinised

Naffine argues that:

While the law of the person is most conspicuously dealt with when a case explicitly considers the legal personality of a given entity...the nature of law's person is also to be discovered within the *underlying assumptions* about legal being embedded within the general principles of law.<sup>1</sup>

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<sup>1</sup> Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects,' (2003) 66(3) Modern Law Review 346, 349.

## 2. The Nature and Purpose of Negligence Law

The purpose of this section, then, is to bring to the fore some of these underlying assumptions and argue that, as currently conceived, the structural and in some cases substantive elements of the dominant theoretical approaches to negligence cannot be stretched to accommodate the interests of the animal or properly account for the constitutive relationship shared between owner and animal. When I introduce the animal as a single entity into consideration, this is done to situate their position within the specific theory under discussion. As none of the tort commentators discussed below contemplate the potential positions of non-legal actors and rather assume the full legal status of any concerned parties, this analysis is necessary to demonstrate the deficiencies created when these theories are measured against the integral parts of the veterinary negligence construct I adopt.

One final point relating to the structure of this section concerns the division between distributive and corrective justice models.<sup>2</sup> Whilst it is the case that important lessons can be learned from their separation,<sup>3</sup> for example, why it is important to restore a harmed individual and correct the wrong occasioned by another. Indeed, influential tort theorists like Honoré<sup>4</sup> and Weinrib<sup>5</sup> see corrective and distributive justice operating in distinct spheres, in practice, the two are more likely to be considered alongside one another. As Campbell makes

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<sup>2</sup> The division itself comes from Aristotle's treatment of justice discussed in the *Nicomachean Ethics*, Book V. This division continues to ground many contemporary theories of private law. On this point see: Ernest J. Weinrib, 'Corrective Justice in a Nutshell,' (2002) 52 Univ. of Toronto LJ 349, 349.

<sup>3</sup> Tom Campbell, *Justice* (Macmillan Education 1988) 19.

<sup>4</sup> A.M. Honoré, 'Social Justice,' in R.S. Summers (ed.), *Essays in Legal Philosophy* (Basil Blackwell 1970) quoted by Tom Campbell, *Justice* (Macmillan Education 1988) 23. For Honoré, the division is to be found in the attribution of liability and payment of compensation on one hand, and the distribution of benefits and burdens on the other.

<sup>5</sup> Weinrib, 'Corrective Justice in a Nutshell,' (n2) 349 and 351. For Weinrib, the difference between corrective and distributive justice lies in notions of equality and structural justification. Briefly, distributive justice 'divides a benefit and burden in accordance with some criterion that compares the relative merits of the participants' (at 349), whilst corrective justice concerns the re-establishment of equality by 'depriving one party of [a specific] gain and restoring it to the other party' (at 349). In terms of structure, 'corrective justice links the doer and suffer of an injustice in terms of their correlative positions' (at 351) with each other, whilst distributive links all parties through the benefits and burdens they share.



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clear, ultimately, in both corrective and distributive models, issues of distribution<sup>6</sup> and the treatment of persons as responsible agents are at stake.<sup>7</sup> An example of this can be seen in the duty of care assessment within the *Caparo*<sup>8</sup> test used in novel duty of care situations. On one level are the considerations particular to the claimant and defendant, such as foreseeability of risk and proximity between the parties, yet the final consideration (that it would be fair, just and reasonable to impose a duty of care on the defendant), is a question answered by looking to broader social policy questions. This is not to imply, however, that answers in response to those questions which consider corrective issues and those that consider distributive issues exist in harmony.<sup>9</sup> The answer in a duty of care assessment must embrace either a positive or negative finding, yet, the tensions created by blending questions of corrective and distributive justice is well-evidenced and inherent in negligence case law.<sup>10</sup> Negligence is an evolving body of law, which must respond, simultaneously, to allegations of a private wrong as between claimant and defendant and changing societal norms, which may bear on the corrective question at hand. With this in mind, I treat corrective and distributive justice issues separately to highlight the different ways in which these theories approach negligence liability and also to consider how each branch would address the role of the animal within the veterinary relationship.

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<sup>6</sup> Campbell, *Justice* (n3) 19.

<sup>7</sup> *ibid* 31.

<sup>8</sup> *Caparo Industries plc v. Dickman* [1990] 2 AC 605. This can also be seen in the failed *Anns* test. See: *Anns v. Merton LBC* [1978] AC 728 per Lord Wilberforce.

<sup>9</sup> An example of this can be seen in the decisions of the House in *Home Office v. Dorset Yacht Co. Ltd.* 1970 AC 1004. Some of the Law Lords quite openly engaged with questions relating firmly to policy. Lord Reid, for example, stated that regarding policy, the question in this case was quite simple: 'who shall bear the loss caused by that carelessness—the innocent respondents or the Home Office...?' (at 1032). Lord Morris of Borth-y-Gest, however, stated that, 'I doubt whether it is necessary to say, in cases where the court is asked whether in a particular situation a duty existed, that the court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way' (at 1039).

<sup>10</sup> See: Christian Witting, 'Duty of Care: An Analytical Approach,' (2005) 25(1) *Oxford Journal of Legal Studies* 33. See also: Benjamin N. Cardozo, 'The Function of the Ends of Law,' in *The Growth of the Law* (Yale Univ. Press 1924) 83-89.

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### a) *Corrective Justice Theory*

Corrective justice theory is simple in its structure and substance, yet is capable of explaining the nuance and interconnectedness of the relationship between claimant and the defendant. According to Weinrib, the position of the claimant and the position of the defendant is only intelligible in light of the other's.<sup>11</sup> Thus, in finding that the defendant is liable to the claimant, 'the court is making not two separate judgments (one that awards something to the plaintiff and the other that coincidentally takes the same from the defendant), but a single judgment that embraces both parties in their interrelationship.'<sup>12</sup> Hence, it is frequently said of the claimant and defendant that they are 'doer and sufferer of the same injustice.'<sup>13</sup> This idea manifests in the principle of correlativity, which holds that, insofar as tort (more specifically negligence) is concerned, obligations arise when the claimant's right forms the basis of the defendant's duty, or when the scope of the duty owed includes the particular type of right-infringement that the claimant suffered.<sup>14</sup> Corrective justice, then, looks only to the relationship that exists between the claimant and defendant and excludes those considerations which are external to the parties before the court. This, therefore, removes from the equation questions of policy, which focus on public interest or community welfare arguments.<sup>15</sup>

In many ways, excluding external policy questions can be viewed as a good thing. For example, taking a strong corrective justice stance would prevent judges from hiding under

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<sup>11</sup> Ernest J. Weinrib, 'Corrective Justice in a Nutshell,' (n2) 351.

<sup>12</sup> *ibid.*

<sup>13</sup> Ernest Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice,' (2001) 2(1) *Theoretical Inquiries in Law* 107, 107.

<sup>14</sup> *ibid* 118.

<sup>15</sup> Andrew Robertson, 'Policy-based Reasoning in the Duty of Care Cases,' (2013) 33(1) *Legal Studies* 119, 120

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the guise of the fair, just, and reasonable criterion when deciding whether the defendant owed the claimant a duty of care. Instead courts would need to engage openly with relational factors and principles directly impacting the parties. This could arguably do much to remove incoherence arguments which currently plague the duty of care assessment.<sup>16</sup> However, this is not the position this chapter takes. Negligence cannot exist in vacuum and in certain circumstances taking into account societal viewpoint or welfare goals can be an asset and not a hindrance when it widens access to justice and allows the law to evolve and modernise.

Returning to principles of corrective justice, in addition to the structural component between claimant and defendant, each party must also possess legal personality. Personality for Weinrib follows a Kantian account rooted in rationality and agency, which animals lack.<sup>17</sup> Thus, personality means that:

From the standpoint of the doer of injustice...the ascription of responsibility for one's actions...[and] from the standpoint of the sufferer, personality is the basis of the rights that mark out the sphere that others must treat as inviolate.<sup>18</sup>

On this account, from the standpoint of the claimant, or the sufferer of the injustice, personality relates to the inward capacity for purposive agency, but also 'achieves external existence in social interactions through its exercise by or embodiment in an agent.'<sup>19</sup>

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<sup>16</sup> Andrew Robertson, 'Constraints on Policy-Based Reasoning in Private Law' in Andrew Robertson and Tang Hang Wu (eds.), *The Goals of Private Law* (Hart 2009) 261.

<sup>17</sup> Christine M. Korsgaard, 'Interacting with Animals: A Kantian Account' in Tom L. Beauchamp and R.G. Frey (eds.), *The Oxford Handbook of Animal Ethics* (Oxford 2011). Korsgaard argues that Kant's arguments could, in some places, be seen to support animals, however, this is the minority view.

<sup>18</sup> Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice,' (n13) 123.

<sup>19</sup> *ibid* 122.

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Moving to the veterinary context obvious problems arise when the corrective justice model is applied in its pure form. First, although simple in its structure, the binary nature of corrective justice would not allow for the interests of the animal to play a role. It has already been mentioned that veterinary negligence is best conceptualised as triangular in nature with the legal interests of the owner running in many cases alongside the animal's best interests, but in others diverging. Therefore, a structure is needed which is capable of recognising the triangular nature of the veterinary relationship, but is responsive when the interests of the two harmed parties diverge.<sup>20</sup> Corrective justice does not allow for this type of construction.

Fundamental to this discussion is the further point that animals are not currently capable of being rights-holders under the law. Animals are viewed as lacking the capacity and agency necessary to exercise rational thought and autonomous decision-making and, more controversially, it needs to be asked whether granting animals this standing truly represents the best way to improve their welfare position. With these points in mind, the theory which underpins corrective justice, though highly persuasive in many contexts, cannot be used in its pure form to explain the structure or content of the veterinary relationship. Its strict adherence to formalism, both structurally and substantively, ultimately makes corrective justice theory an unsuitable candidate to explain the underlying characteristics of a veterinary negligence claim.

### b) *Distributive Justice*

Unlike corrective justice, which looks strictly to the interests of the parties before the court, distributive justice is 'premised on a scarcity of resources or funds...[which] aim to provide

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<sup>20</sup> This could happen, for example, where the best treatment option for the animal does not meet with the desires of the owner. See further discussion in Chapter 4.4, in particular, Scenarios 1&2.

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justifications for apportioning and sharing the common pie,’<sup>21</sup> or some proportionately-based criteria to assess merit or need.<sup>22</sup> Simply put, distributive justice aims to ensure that as between the parties ‘that neither equal persons have unequal things, nor unequal persons things equal.’<sup>23</sup> In one sense then an equality is reached, however, this is done to achieve the more pressing objective of furthering a common good within society as a whole, yet there is also ‘no reason to suppose that treating everyone identically when distributing...resources’ contributes to this.<sup>24</sup> Various “yardsticks” are needed to achieve this idea of a common good, whether it be need-based, risk-based, etc., however, all are premised on some form of ranking. This becomes a problem, however, when animal interests are weighed against those of humans.

With primary goals centred on achieving community and societal welfare and a downplaying of individual considerations, distributive justice has much to recommend itself and, in premise, could provide a workable framework from which to develop veterinary negligence. However, its utilitarian underpinnings present problems when the interest of the animal is introduced as a relative factor in the decision-making process. Importantly, ‘a distributive justice claim...is based solely on a person’s status as a member of the political community,’<sup>25</sup> a status which animals currently lack. Epstein, for example, argues that while animals are not treated as inanimate objects, this fact does not establish that they are in some way entitled to

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<sup>21</sup> Yock Lin Tan, ‘Deterrence in Private Law’ in Andrew Robertson and Tang Hang Wu (eds.), *The Goals of Private Law* (Hart 2009) 311, 313.

<sup>22</sup> Richard W. Wright, ‘Right, Justice, and Tort Law’ in David G. Owen (ed.), *Philosophical Foundations of Tort Law* (Clarendon 1995) 159, 167.

<sup>23</sup> Tan, ‘Deterrence in Private Law’ (n21) 313. See also: William Lucy, ‘Torts, Egalitarianism and Distributive Justice by Taschi Keren-Paz,’ (2009) 72(6) *Modern Law Review* 1048, 1048. Lucy defines distributive justice as ‘the task of constructing principles by which social burdens and benefits are divided among a group bound by cooperative and other ties.’

<sup>24</sup> John Finnis, *Natural Law and Natural Rights* (2nd ed. Oxford 2011) 174.

<sup>25</sup> Wright, ‘Right, Justice, and Tort Law’ (n22) 167.

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treatment as human beings.<sup>26</sup> This ranking of relative interests is something which, according to Epstein, is inherent in how we live our lives and necessarily includes elements of speciesism.<sup>27</sup> According to Epstein, then, animals will always come second to human interests. This point is re-enforced by Deckha who states that, ‘as legal subjects who occupy the centre around which the law revolves, it is the rights of the human and corporate owners that are protected and privileged when interests [between animals and humans] conflict.’<sup>28</sup> Of course, whether this state of affairs should continue is certainly debatable, however, the point that human interests are given greater weight than those of an animal weighs heavily against any steps taken to improve animal interests when this theory is applied in the negligence context. The point that the majority of existing animal welfare laws, even though aimed at improving animal welfare, are carefully worded to ensure human interest outweighs animal serves as further support for Epstein’s position.<sup>29</sup> Given that this thesis goes one step further to argue that veterinarians should act in ways which forward the animal’s best interests (sometimes in direct opposition to the desire of the owner), the ranking of human over animal interests makes putting forward a distributive-centred account of veterinary negligence more difficult.

Taking a more moderate approach, Cane argues for a combination of distributive and corrective justice principles stating that *what* ‘wrongs’ or ‘harms’ are tortious is a

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<sup>26</sup> Richard A. Epstein, ‘Animals as Objects, or Subjects, of Rights’ in Cass R. Sunstein and Martha C. Nussbaum (eds.), *Animal Rights: Current Debates and New Directions* (OUP 2004) 156.

<sup>27</sup> *ibid.* In the ethical context, see the debate on moral standing, which also seeks to rank or grade moral importance based on certain characteristics such as sentience, cognitive properties, and agency. See: Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (7th ed., OUP 2013) pp 62-79.

<sup>28</sup> Maneesha Deckha, ‘Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm,’ (2013) 50 *Alberta Law Review* 783, 787.

<sup>29</sup> This can be seen in many of the laws concerning animal use. Although humans are not permitted to do whatever they may like with animals (ie. torture or inflict acts of cruelty), few uses are banned completely. The language used in these laws such as, *unnecessary* suffering permit those in a position to use animals in ways which to forward human ends to continue. See for example: Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (OUP 2005) 104 and 241-257.

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distributive question and that *how* that wrong ought to be corrected is a corrective justice question.<sup>30</sup> There is certainly an appeal to this perspective as I would agree that part of how we define the harm is socially constructed and changes with time.<sup>31</sup> However, the particularised way in which harm can be suffered means that certain harms may not always reflect an overall majority shift in community view, but perhaps the faint beginnings of that change. Put another way, the process of deciding what harms are tortious may not always be straightforward in terms of the distributive objectives which can be met. Unfortunately, Cane does not discuss the process of determining what harms can be regarded as tortious, but if the assessment would work on some form of ranking or interest-based system, arguably we would be no further ahead when trying to prioritise the best interest of the animal within the relationship. This is particularly important, I argue in the veterinary negligence context given the complex nature of the animal's position. On a more fundamental level, the same problems regarding the ranking of animal interests against human exist, as do the structural issues discussed in the previous section on corrective justice once the question shifts from one of defining the harm to its correction or repair.

### c) *Rights-based Theory*

Of the three forms of justice considered, rights-based theory is perhaps the most familiar to those wanting to improve the status of animals under the law. Many commentators have written on the position that animals should hold moral rights,<sup>32</sup> whilst others such as

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<sup>30</sup> Peter Cane, 'Distributive Justice and Tort Law,' (2001) 4 New Zealand Law Review 401, 415. See also: Simon Deakin, 'The Evolution of Tort,' (1999) 19 Oxford Journal of Legal Studies 537.

<sup>31</sup> See for example the concept of 'damage hybrids' in Chapter Three, in which damage is conceived of as including both an orthodox form of damage (for example, personal injury) and a psycho-social aspect of harm.

<sup>32</sup> See for example: Tom Regan, *The Case for Animal Rights* (Univ. of California Press 2004). Briefly, Regan argues that to achieve justice for animals, they must possess broad moral rights. For Regan, because sentient animals possess and can experience a variety of sensory, cognitive, conative, and volitional capacities, such as fear, love, loneliness, pain, etc., they ought to be considered "subjects of a life". See on this point: Tom Regan,

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Cochrane<sup>33</sup> have argued that sentient animals possess moral rights, some of which ought to translate to legal rights held against organs of the state.<sup>34</sup> Currently, however, the legal position regarding animals is that although humans owe certain duties to animals (for example, not to inflict unnecessary suffering upon an animal), this does not result in a right being held by the animal in the correlative sense discussed previously. Feinberg describes this situation as having duties *regarding* animals, but that is not the same thing as saying we have duties *to* animals.<sup>35</sup> Animals, therefore, ‘are incapable of claiming a right on their own.’<sup>36</sup> Whether animals *should* be given rights is an issue which is far beyond the remit of this chapter. What needs to be addressed is to what extent rights discourse in tort law can assist in understanding and explaining veterinary negligence liability.

Like distributive justice and corrective justice theories, rights-based theory also follows a strict bilateral structure— here, based initially on the infringement of a primary right.<sup>37</sup> As previously discussed, this poses problems given the triadic nature of the veterinary relationship. Ultimately, there must be scope within the given theory to permit courts to consider the interests of the animal, independent of the owner. Strict bilateral structures, which rely on agency, prevent this type of analysis. More pressing for the rights-based

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*Defending Animal Rights* (Univ. of Illinois Press 2001) 42-44. As “subjects of a life”, Regan argues that all animal usage should be abolished.

<sup>33</sup> Alasdair Cochrane, *Animal Rights Without Liberation* (Columbia Univ. Press 2012). See also: Will Kymlicka and Sue Donaldson, ‘Animals and the Frontiers of Citizenship,’ (2014) 34(2) *Oxford Journal of Legal Studies* 201.

<sup>34</sup> Cochrane, *Animal Rights Without Liberation* (n33) 13-14.

<sup>35</sup> Joel Feinberg, ‘The Rights of Animals and Future Generations’ (1974) <<http://www.animal-rights-library.com/texts-m/feinberg01.pdf>> accessed 9 June 2016. See also: James Rachels, ‘Drawing Lines’ in Cass R. Sunstein and Martha C. Nussbaum (eds.), *Animal Rights: Current Debates and New Directions* (OUP 2004) 162.

<sup>36</sup> *ibid.* Feinberg continues by stating that animals cannot initiate proceedings, nor are they capable of distinguishing harm from wrongful injury, nor determining whether their rights have been violated.

<sup>37</sup> This is then followed by a ‘secondary’ right which corresponds with receiving some form of compensation or recognition for the infringement of the primary right. A ‘primary’ right is when the law grants a person, C, either a guarantee of some kind and similarly imposes a duty on D to refrain from harming C in a particular way corresponding with the guarantee.



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model, however, is the imprecise way in which the term ‘right’ is used to describe the infringement suffered. In *Torts and Rights*,<sup>38</sup> for example, Stevens appears at first to discuss rights in a claim right, Hohfeldian way,<sup>39</sup> but then discusses broad moral rights,<sup>40</sup> legal rights, and human rights without discussing clearly how they all interrelate or are different; thus, the initial tenor of Stevens’s argument that rights are clear and specific, turns out to be far more complicated. Indeed, according to Stevens, ‘the varieties of legal rights we could have are as many and varied as the wit of human imagination allows.’<sup>41</sup> Further, in critiquing Beever’s discussion on rights theory, which, as an aside, appears to adopt a conceptually different<sup>42</sup> approach to rights than Stevens, Witting asks whether anything is gained in terms of the precision of the law by the use of rights-based language.<sup>43</sup> His answer is, simply put, ‘no.’ Ambiguity is increased not only because the origin of the right itself differs depending on context, but also the extent to which rights can be enforced against another party also differs.<sup>44</sup>

Recalling that the goals of this thesis are to advocate that the best interests of the animal within the veterinary relationship be protected and provide additional guidance and clarity to veterinarians, the use of rights-based language in negligence does not deliver. At the heart of this problem— beyond the point that rights-based theory lacks the necessary definitional clarity and application to animals to properly develop and inform veterinary negligence— is

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<sup>38</sup> Robert Stevens, *Torts and Rights* (OUP 2007).

<sup>39</sup> *ibid* 4.

<sup>40</sup> *ibid* 330.

<sup>41</sup> *ibid* 338.

<sup>42</sup> Allan Beever, *Rediscovering the Law of Negligence* (Hart 2009). Beever appears to view rights as “legally recognised interests” over another (at 243) and conceptually prior to wrongs (at 63).

<sup>43</sup> Christian Witting, ‘The House that Beever Built: Corrective Justice, Principle and the Law of Negligence,’ (2008) 71(4) *Modern Law Review* 621, 627.

<sup>44</sup> *ibid*.

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that these rights are entitlements held *against* others.<sup>45</sup> Thus, holding a right ‘is to have a claim *to* something and *against* someone.’<sup>46</sup> Therefore, at its core, rights discussion runs counter to the deeply relational nature of veterinary medicine argued later in this thesis. The next chapter in this thesis, for example, characterises the relationship between owner and animal as constitutive in nature: both receiving benefits and burdens of companionship, which constitute the owner’s and animal’s sense of self.<sup>47</sup> Splitting this relationship into one of competing rights would arguably damage the integrity of this relationship. Further, Chapter Four, which discusses the role of the duty of care, argues that the relationship between owner and veterinarian should be based on mutual trust and that the veterinarian’s duty should stem from a deep concern for the well-being of the animal and preservation of the constitutive relationship.<sup>48</sup> The antagonistic undertone of holding rights against or over others would arguably impede the development of these important relationships within the law.

One final point to make about the rights-based approach to tort, specifically negligence, is that it does not appear to deal well with complex damage situations. The next chapter of this thesis characterises the damage suffered by the claimant-owner as damage to sentient constitutive property embracing both an orthodox form of damage (here, property) and an emotional harm element (here, damage to the constitutive relationship between owner and animal), however, the requirement that the right be capable of specific definition prior to the

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<sup>45</sup> Tom L. Beauchamp, ‘Rights Theory and Animal Rights’ in Tom L. Beauchamp and R.G. Frey (eds.), *The Oxford Handbook of Animal Ethics* (OUP 2011) 198, 201.

<sup>46</sup> Feinberg, ‘The Rights of Animals and Future Generations’ (n35).

<sup>47</sup> See Chapter 3.5(c)(i).

<sup>48</sup> See Chapter 4.3(a) and 4.6(c).

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interaction between the parties<sup>49</sup> limits the court's ability to respond to new forms of damage. Stevens's<sup>50</sup> confusing treatment of *Rees v. Darlington AHA*<sup>51</sup> illustrates this.

Briefly, in his analysis of this case, Stevens notes that the award given to the claimant as a result of a failed sterilisation was done to vindicate the mother's right, not to compensate for a consequential loss.<sup>52</sup> However, he does not state what the mother's right actually was. He mentions in a few places "the birth"<sup>53</sup> of the child or "the conception"<sup>54</sup> of the child, but does not specifically articulate how this fits with his primary rights analysis. If it is a right to bodily integrity, this is an interest generally protected by the trespassory torts, not negligence. If it is personal injury stemming from negligence, pregnancy is conceptually difficult to make work under the actionable damage requirement.<sup>55</sup> A much deeper analysis from Stevens was therefore needed. From Stevens's analysis, it would appear that a rights-based approach simply cannot explain these more complex damage cases. A similar problem for the rights-based approach would arguably appear in damage to sentient constitutive property. How is the primary right in this instance to be expressed? To understand these more complex forms of damage, the interest infringed must be seen as part of the bigger negligence picture and open to reformulation. The inability, seemingly, of a rights-based analysis to account properly for these mixed forms of damage illustrates a further concern when determining whether a rights-based approach can properly explain veterinary negligence.

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<sup>49</sup> Stevens (n38) 349 and Beever (n42) 383.

<sup>50</sup> Robert Stevens, 'Rights and Other Things,' (2010) available at SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648954](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648954) accessed 14 May 2015.

<sup>51</sup> [2004] 1 AC 309.

<sup>52</sup> Stevens, 'Rights and Other Things,' (n38) 22.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid* 23.

<sup>55</sup> See for example: Donal Nolan, 'New Forms of Damage in Negligence,' (2007) 70(1) *Modern Law Review* 59. See also discussion in Chapter 3.3(a).

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As the above discussions have shown, although persuasive in some aspects none of these prevalent theories relating to tort are able to fully account for the various structural and substantive characteristics in play within the veterinary relationship. Further, because all of the theories hold strongly to various formal requirements, none possess the flexibility to deal with the previously unaccounted for variables and interests found in a veterinary negligence claim. The purpose of the next section is to introduce the theory behind an instrumental approach and later to demonstrate that in the context of veterinary negligence, this model, in which negligence is seen as a mechanism to protect the vulnerable, provides the best framework going forward.

### **2.3 Adopting an Instrumental Approach: Negligence and Protection of the Vulnerable**

#### *a) The Instrumental Approach Explained*

Conaghan and Mansell state that to ask the purpose of negligence is, in itself, to adopt a specific ideological position because it assumes, implicitly, that law can and should be viewed as an instrument of social engineering; that is, as a means to a chosen end.<sup>56</sup> In essence, to ask negligence's function is to approach the problem affecting the claimant and defendant from a perspective which forwards a particular end or sees a particular goal as guiding the court's reasoning. Adopting an instrumental perspective is not to deny the continued relevance of some of negligence's other theoretical understandings, only to argue that negligence, and veterinary negligence in particular, should not be viewed in a vacuum

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<sup>56</sup> Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (2nd ed., Pluto Press 1999) 191-192.

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and that much can be gained from looking beyond rigid formalism. Once it is established what ends can be furthered by negligence jurisprudence, courts and academics are arguably in a better position to determine how and under what circumstances the law can be extended and revised; thus, approaching the law in an instrumental way can reflect the practical and normative approaches taken to adjudication and to law making.<sup>57</sup> Indeed, instrumentalism is itself ‘a practice-focused, practice-minded, anti-theoretic theory...’,<sup>58</sup> which lends itself to evolution and adaptation. In this way, adopting an instrumentalist approach presents the strongest framework from which to advance veterinary negligence.

An explanatory account of veterinary negligence must embrace a perspective which takes on board the fact that within a veterinary negligence claim the legal interest of the owner should be taken into account *alongside* the best interest of the animal. Further, to develop the position of the animal as a sentient being that is entitled to have her best interests upheld, it will also necessarily be the case that when these interests come under threat, the animal’s interests are given priority over those of the owner; a primarily instrumental approach allows for this needed flexibility. To be clear, then, an instrumental perspective views tort as being an instrument to achieve a particular social end or goal. For the purposes of this chapter, and the thesis as a whole, it is submitted that the aim negligence ought to strive to achieve, in its decision-making, is to protect the vulnerable party.

This flexibility is particularly important in the veterinary negligence context. Seeing how we want the law to be developed and being able to shape decisions which reflect both fairness in the decision reached and forwarding new, specific ideals, for example, the constitutive

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<sup>57</sup> See also a similar point raised by Zipursky in the context of civil recourse theory: Benjamin C. Zipursky, ‘Civil Recourse, Not Corrective Justice,’ (2003) *Georgetown Law Journal* 695, 731.

<sup>58</sup> Robin West, *Caring for Justice* (NYU Press 1997) 95.

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relationship and the animal's best interests, is a great advantage. In this way, I adopt an instrumental approach which sees negligence as an instrument to protect the vulnerable to make specific arguments about how the law should relate to veterinarians and how the law can be re-framed to achieve greater understanding of the veterinary relationship.

Keating, however, argues that using tort as an instrument of social engineering fails because 'instrumentalism does and must look forward. Tort adjudication, however, is principled and it does and must look backward. As a result, instrumentalism cannot adequately explain and justify tort.'<sup>59</sup> On one account, for example, an economic approach to negligence, this criticism may be true. Under the economic account, decisions are made with the dual aim of allocating loss to those best placed to handle it and encouraging risk-reducing behaviour in the future. In a similar vein, West states that when focus is placed on consequences such as compensation and deterrence, definitional issues relating to what types of harm matter are left out.<sup>60</sup> Instead, 'a robust instrumentalism should illuminate— and surely should also interrogate— all the ways in which law impacts upon harm...'<sup>61</sup> My account of instrumentalism, in which negligence looks to protect the interests of vulnerable parties, is necessarily wrong-based and therefore does look backward to the relationship between the parties and the wrong that was suffered. In this way, I do borrow some aspects from corrective justice in that there does exist a need to do justice between the claimant and defendant in the sense that the defendant's obligation corresponds to the claimant's interest, but that such a tie cannot be as formalistic as corrective theorists such as Weinrib would require. Instead, it looks to the role of the animal in the relationship, the nature of the relationship between claimant and defendant, and the need for a creative and compassionate

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<sup>59</sup> Gregory C. Keating, 'The Priority of Respect Over Repair,' (2012) 18(3) *Legal Theory* 293, 302.

<sup>60</sup> West, *Caring for Justice* (n58) 94-97.

<sup>61</sup> *ibid* 97.

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approach by the courts when seeking to correct the wrong committed.<sup>62</sup> My account of instrumentalism does, however, also look forward to how the law can be positively shaped to give place of prominence to various interests not currently accounted for and to help shape behaviour by providing guidance as to how these relationships ought to be formed and developed. As previously stated, because there currently exists almost no information for veterinarians on their obligations stemming from their professional position, this forward-looking aspect is particularly important and cannot be disregarded.

This view of instrumentalism which looks both backward to the relationship and the wrong, and forward to future consequences, corresponds to van Rijswijk's analysis of Lord Atkin's decision in *Donoghue v. Stevenson*.<sup>63</sup> According to van Rijswijk, Lord Atkin's duty analysis in which it was held the defendant manufacturer owed a legal duty of care to a subsequent consumer was not only an assertion of moral value as between claimant and defendant, it was also an instrumental morality that recognised power relationships more broadly.<sup>64</sup> Thus, 'the neighbourly mind is a pre-emptive, relational mind.'<sup>65</sup> Importantly, this analysis could

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<sup>62</sup> On this latter point see: West, *Caring for Justice* (n58) and Chapter Three generally.

<sup>63</sup> [1932] AC 562.

<sup>64</sup> Honni van Rijswijk, 'Neighbourly Injuries: Proximity in Tort Law and Virginia Woolf's Theory of Suffering,' (2012) 20 *Feminist Legal Studies* 39, 46. Lord Atkin's decision in *Donoghue* is widely regarded as being a decision based strongly on moral and religious precepts. Thus, in coming to his decision that Mr. Stevenson owed Mrs. Donoghue of duty of care, Lord Atkin applied the now famous 'neighbour principle' which was drawn from the parable of the Good Samaritan. According to Lord Atkin:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be— persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question (at 580).

Lord Atkin therefore combined the geographic sense of proximity or closeness (ie. being geographically close to the claimant at the time of the injury or damage), but also a relational closeness based on the nature of the relationship between the parties (ie. consumer-manufacturer; patient-doctor).

<sup>65</sup> *ibid* 45.

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also be directed to addressing relational power imbalances between consumer and manufacturer, which was an important social issue at the time of the decision in *Donoghue*.<sup>66</sup> Going forward, the connection drawn here is important for two reasons. First, it demonstrates that a normative evaluation can also achieve pragmatic ends; the two inquiries need not be mutually exclusive and can, instead, work together. Secondly, this analysis confirms the central role that duty plays when extending the law to consider novel interactions between parties.

### b) *Vulnerability and the Instrumental Approach*

In the past, only a very small number of academic commentators have discussed the role that vulnerability plays within tort.<sup>67</sup> As a result, this area remains significantly under-analysed within negligence. From the outset, it is important to make clear that when the word vulnerability is used, this is to describe being in a state of vulnerability, not to adopt its theoretical meaning.<sup>68</sup> I, therefore, adopt the language of vulnerability following its use by the courts and its plain usage. The argument which I develop further in the next section of this chapter is that a primary aim of negligence is to protect vulnerable parties and this motivation animates recent judicial reasoning across several important areas within its

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<sup>66</sup> Indeed, *Donoghue* can also be regarded as a case which tacitly dealt with the issue of vulnerability. Mrs. Donoghue was certainly in a position of vulnerability. As she could not provide security for costs, Mrs. Donoghue had to claim the status of a pauper. She was also a single mother, divorced from her husband and working as a shop-assistant during the 1930's. See: van Rijswijk, 'Neighbourly Injuries: Proximity in Tort Law and Virginia Woolf's Theory of Suffering,' (n64) 47-48.

<sup>67</sup> See for example: Jane Stapleton, 'The Golden Thread at the Heart of Tort Law,' (2003) 24 Australian Bar Review 135 and Paula Giliker, 'Making the Right Connection: Vicarious Liability and Institutional Responsibility,' (2009) 17 Torts Law Journal 35. Carl Stychin has also authored a piece on vulnerability in negligence, however, he adopts the theoretical use of vulnerability developed by Martha Fineman. I do not follow a similar model in my thesis and so do not consider this work. See: Carl F. Stychin, 'The Vulnerable Subject of Negligence Law,' (2012) 8 International Journal of Law in Context 337.

<sup>68</sup> For its theoretical use see, for example: Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' in Martha Albertson Fineman (ed.) *Transcending Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge 2011) and Martha Albertson Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Anna Grear and Martha Albertson Fineman (eds.) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013).



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boundaries. The way in which vulnerability has been utilised in negligence in the past, as the below discussion will make clear, is to highlight the inequities between two parties in a legal relationship, typically a professional-lay relationship. In these circumstances, the relationship is described as being one in which the defendant exercised some level of control over the claimant, or there existed a particularly high level of trust between the two parties; thus, a level of disempowerment is detectable on the part of the claimant. Also common is a knowledge imbalance between the professional and the lay individual.<sup>69</sup>

Similarly, where tort commentators have discussed vulnerability, it follows the legal usage in the sense of the concerned party being vulnerable; thus, where Stapleton has utilised vulnerability, this was done to highlight relational imbalances, namely between doctor-patient,<sup>70</sup> builder-purchaser,<sup>71</sup> and solicitor-third party.<sup>72</sup> In this way, Stapleton is able to unify diverse types of claimant under a common umbrella, or, more appropriately, weave together in a common thread. Stapleton also describes the most extreme form of vulnerability as where one 'person is *exclusively* dependent on another to take care, even if that person is a stranger.'<sup>73</sup> Unfortunately, Stapleton does not go into great detail on her vulnerability argument and so her analysis is rather brief. I adopt a similar perspective regarding how vulnerability is here being used; however, I will approach the issue from a UK perspective and expand the doctrinal analysis to include why protecting the vulnerable should be viewed as a legitimate aim within the law as it relates to negligence.

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<sup>69</sup> David Mangan, 'The Curiosity of Professional Status,' (2014) 30(2) Professional Negligence 74, 78.

<sup>70</sup> *Rogers v Whitaker* (1992) 175 CLR 479.

<sup>71</sup> *Bryan v Maloney* (1995) 182 CLR 609. Arguably this finds similarities to *Anns v Merton London Borough Council* [1978] AC 728.

<sup>72</sup> *Hill v Van Erp* (1997) 188 CLR 159. See also similarities in *White v. Jones* [1995] 2 AC 207.

<sup>73</sup> Stapleton, 'The Golden Thread at the Heart of Tort Law' (n67) 142 [emphasis in original].

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Arguably, the most obvious way in which someone could be considered exclusively dependent is where the individual concerned is a child.<sup>74</sup> This will be discussed in greater depth below, but it is worth highlighting at the outset, the parallels shared between child and animal in this respect. Children and animals will, for example, both lack the ability to protect themselves from harm, comprehend risk and, in many cases, lack the capacity to grasp the harm they have suffered. Thus, it is not necessarily the case that an antecedent relationship exists, but what is common to both points that the claimant is unable to protect herself because of a relationship imbalance which exists between the two parties. According to Neal, it is the dependence on the co-operation of others to achieve certain ends which, in so doing, exposes us to harms of various kinds.<sup>75</sup> In this way, vulnerability presents itself as a departure from the ideal self-sufficient, autonomous, free agent that negligence imbues in its various tests and principles. Thus, the use of vulnerability in this context is episodic in nature and the court's goal is to acknowledge the imbalance and restore the claimant (so far as possible) to the position she would have been in had the tort not occurred; in essence, had the claimant's vulnerability had not been realised.

In this regard, I take on board this episodic, legalistic formulation, but also recognise that vulnerability itself is far more complex and manifests itself within the veterinary relationship in ways which extend beyond what courts have thus far acknowledged as regards lay-professional relations. Thus, rather than being only episodic in nature, vulnerability exists within our lives and within the relationships we form, and although the law recognises specific instances of this— for example, where a child lacks capacity to make a medical decision or where the two unequal parties enter a special type of legal relationship— it is

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<sup>74</sup> Giliker, 'Making the Right Connection: Vicarious Liability and Institutional Responsibility' (n67).

<sup>75</sup> Mary Neal, "'Not Gods But Animals': Human Dignity and Vulnerable Subjecthood,' (2012) 33 *Liverpool Law Review* 177, 186-187.

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important to recognise vulnerability extending in other directions and over longer expanses of time. Thus, when looking at the veterinary relationship there is arguably a relationship of power and relative vulnerability that exists between veterinarian and owner, which may be episodic or long-term, however, also vital is the relationship between owner and animal, which when dealing with constitutive relationships, is more likely to be long-term.<sup>76</sup>

I argue in the next chapter of this thesis that from the perspective of the owner, the relationship she has with her animal contributes to her own sense of person in a deep and enduring way.<sup>77</sup> Opening one's self to this type relationship and the understanding of its caring and finite qualities opens the self to wounding and damage; realising this suffering and the capacity for suffering defines this negative aspect of vulnerability<sup>78</sup> and is key to understanding the emotional harm element central to a veterinary negligence claim. Within the constitutive relationship there is, for example, an understanding of the finite quality of the relationship and the possibility that the animal's life may come to a premature end due to illness or injury-causing harm, yet the desire to form loving companion bonds with animals can constitute a deeply meaningful part of our own existence. If the relationship is severed prematurely because of veterinary negligence, there will almost certainly exist a personal

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<sup>76</sup> I say 'arguably' because it may not be the case that the owner and veterinarian find themselves in this type of relationship. The owner of various agricultural animals, for example, may be in a position of greater knowledge than the veterinarian regarding certain practices. This does not weaken the vulnerability argument made in this chapter, it simply means that part of the court's task would be to determine whether it could be said the claimant was vulnerable in the sense discussed here. See also: See for example: Tony Milligan, 'Dependent Companions,' (2009) 26(4) *Journal of Applied Philosophy* 402.

This also raises a related point revolving around the veterinarian's potential vulnerability. There is a sense in which the veterinarian could be considered vulnerable. Because there is currently very little guidance as to how veterinarians ought to view their professional obligations, there is purchase to this argument, however, this would seem to carry greater weight as between veterinarian and the Royal College of Veterinary Surgeons as official regulator, as opposed to the relationship with owner and animal. Chapter Five will address the issue of guidance of greater detail and so discussion will be reserved until then.

<sup>77</sup> See discussions in Chapter 3.2(b) and 3.5(c)(i).

<sup>78</sup> Neal, "'Not Gods But Animals': Human Dignity and Vulnerable Subjecthood' (n75) 187.

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sense of being wronged. This, arguably, also helps explain the motivation behind veterinary negligence claims.

From the perspective of the animal, its vulnerability should be quite clear. In addition to the constitutive connection as between animal and owner, there is also the clear dependency created when the animal becomes dependent on the owner for necessities such as food and medical care. This latter aspect of vulnerability and the reliance placed on receiving care is clearly articulated by Beauchamp when he states that:

Domesticated animals stand in a directly analogous situation  
[between parent and child]. When we deliberately create both  
dependency and vulnerability in these animals, and take caretaking  
and supervisory charge over them, we acquire moral obligations of  
care.<sup>79</sup>

With this in mind, it is submitted that courts should be more responsive to the various relationships of vulnerability in play. Importantly, courts ought to acknowledge these relationships, what they represent, and openly engage with the relational inequalities and harm that is suffered when, as the result of the defendant's negligence, the relationship between owner and animal is severed. The debate, essentially, is one of determining whose interests in law matter.

Although animals are restricted from acting as legal persons, courts can make positive headway utilising vulnerability discourse to acknowledge their best interests. As negligence

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<sup>79</sup> Beauchamp, 'Rights Theory and Animal Rights' (n45) 215. See also: Daniel Engster, 'Care Ethics and Animal Welfare,' (2006) 37(4) *Journal of Social Philosophy* 521, 527.

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exists in a constant state of evolution representing both past and present realities, courts should take an active role in shaping these realities. Thus, courts should be more open and willing to engage in discussion which considers the argument adopted in this chapter, namely that a primary function of negligence is to protect the vulnerable. As the final section will demonstrate, the duty of care stage is arguably the area most amenable to this type of debate as it provides the opportunity to discuss the existence and nature of specific interests held by the claimant, which the law finds the defendant ought to have been mindful of. For now, it is important to consider the doctrinal applications of vulnerability-based discourse within negligence jurisprudence.

### 2.4 Applications of Vulnerability in Negligence

#### a) *Negligence Explored: Doctrinal Examples of Vulnerability*

Over sixty years ago Glanville Williams wrote on the aims of tort law.<sup>80</sup> In his introduction, Williams stated that ‘an intelligent approach to the study of law must take account of its purpose, and must be prepared to test the law critically in light of its purpose.’<sup>81</sup> It is submitted that one of negligence’s primary purposes is to protect the interests of the vulnerable. The remainder of this section will be devoted to exploring to what extent this is already being done in negligence jurisprudence and then to what extent this information can be transferred to veterinary negligence. Before doing this, however, the question still remains: what can be pragmatically achieved by taking an instrumental approach?

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<sup>80</sup> Glanville Williams, ‘The Aims of the Law of Tort,’ (1951) 4(1) Current Legal Problems 137.

<sup>81</sup> *ibid.*

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In his book on *Rediscovering the Law of Negligence*,<sup>82</sup> Beever devotes a limited amount of space to discussion on vulnerability and negligence. In response to Stapleton's argument discussed in the previous section, it is made clear that vulnerability does not explain the law relating negligence, nor should vulnerability be used as a new approach through which negligence could be seen to operate. One of Beever's primary complaints with the use of vulnerability is that it only appears in cases involving pure economic loss. He asks, for example, 'if vulnerable claimants can recover economic loss, then why cannot they recover for personal injuries or property damage?'<sup>83</sup> This section will demonstrate that contrary to Beever's analysis, courts have and continue to adopt vulnerability discourse as a means of extending liability in a range of situations within negligence where the application of orthodox rules and theories would have prevented recovery.

It is the case that vulnerability has played an important role in pure economic loss cases. The House of Lords decision in *Smith v. Eric S. Bush (A Firm)*,<sup>84</sup> for example, adopts vulnerability-based reasoning. It will be recalled that in this case two separate purchasers of modest houses relied on valuers' reports to secure their mortgage. As it turned out, the valuations had been negligently prepared and both claimants suffered economic loss. The tenor of the judgment is one which very much adopts a vulnerability perspective. Lord Templeman in his judgment explicitly characterised the position of the purchasers as one in which both parties were vulnerable.<sup>85</sup> Further, the relationship between the valuer and the purchaser is characterised by the court as one in which the purchaser is seen as dependent. For example, Lord Templeman noted that there is a 'great pressure on a purchaser to rely on

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<sup>82</sup> Beever (n42) 194-95.

<sup>83</sup> *ibid* 194.

<sup>84</sup> [1990] 1 AC 831. See also: *White v Jones* [1995] 2 AC 207, 275 per Lord Browne-Wilkinson.

<sup>85</sup> *ibid* 851.

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the mortgage valuation. Many purchasers cannot afford a second valuation...and the sale may go off.’<sup>86</sup> The valuer is in a position of trust, consistent with his or her professional status and ‘the public are exhorted to purchase their homes...at high rates of interest repayable over a quarter of a century.’<sup>87</sup> Lord Griffiths similarly described the position of the purchasers as ‘people buying at the bottom end of the market, many of whom will be first-time buyers, [and] are likely to be under considerable financial pressure...’<sup>88</sup>

Continuing with the economic loss cases, the decision in *Spring v. Guardian Assurance Plc. and Others*<sup>89</sup> tacitly acknowledges the position of the claimant as one of being vulnerable. The claimant in this action was dismissed by from his employment held with the defendants. After his dismissal, the claimant was interviewed by several prospective employers, however, a negative letter of reference was provided detailing the claimant’s unscrupulous business practices and untrustworthy character. Not surprisingly, the claimant was unable to secure employment and suffered economic loss. It was later determined that the comments made in the letter had not been checked for their own accuracy and it was held by the majority that the defendants had not exercised the requisite level of care in completing the letter. Describing the position of the claimant, Lord Goff stated that ‘nowadays it must often be very difficult for an employee to obtain fresh employment without the benefit of a reference from his present or a previous employer.’<sup>90</sup> Further, by Lord Lowry:

On the one hand looms the probability, often amounting to a certainty, of damage to the individual, which in some cases will be serious and may indeed be irreparable. The entire future

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<sup>86</sup> *ibid* 852.

<sup>87</sup> *ibid* 854.

<sup>88</sup> *ibid* 858.

<sup>89</sup> [1995] 2 AC 296.

<sup>90</sup> *ibid* 319.

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prosperity and happiness of someone who is the subject of a  
damaging reference which is given carelessly but in perfectly good  
faith may be irretrievably blighted.<sup>91</sup>

Implicit within the court's reasoning was that the claimant was unable to protect himself from the effects of his former employer's negligently-prepared letter; quite clearly this was a relationship in which the defendants held considerably more power. In terms of damage, the courts looked to the exception created by the *Hedley Byrne* line of jurisprudence for pure economic loss following an assumption of responsibility for the claimant's financial interest and reasonable reliance on the part of the claimant. Importantly, the majority thought it fair to extend liability in this area to the employee-employer relationship. Also evident throughout the judgments in *Spring* and other cases including *Smith*, in which the exceptional rule in the *Hedley Byrne* line of reasoning was applied, is the overlap with contractual principles. This was discussed in the previous chapter of this thesis,<sup>92</sup> however, as regards the development of vulnerability discourse, it may also be the case that in applying *Hedley Byrne* the courts were also alive to various principles which find place of prominence within contract jurisprudence, such as unconscionability and undue influence, which also look to the inequality of bargaining power between the parties and the degree to which the claimant was a vulnerable party in the course of dealings. If this is the case, then it represents the courts actively and purposively transferring principles from another branch of the common law in order to arrive at a decision in which the claimant's interests are protected. Indeed, it is this same creativity and compassion that is needed in developing veterinary negligence.

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<sup>91</sup> *ibid* 326.

<sup>92</sup> See Chapter 1.3(b)(i).



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Outside of the pure economic loss cases, vulnerability-based reasoning was applied in the doctor-patient context in *Rogers v. Whitaker*.<sup>93</sup> Again, although the court was not explicit in its use of vulnerability, the tenor of the judgment emphasises the dependence of the claimant on the defendant in line with Stapleton's use of "exclusive dependence"<sup>94</sup> and in line with the traditional doctor-patient relationship. In this instance, the claimant sought the advice of an ophthalmic surgeon some forty years after a childhood injury to her eye left her vision impaired. The surgeon recommended an operation to correct her vision, but failed to disclose the risk of sympathetic ophthalmia.<sup>95</sup> The condition transpired and the claimant was left completely blind in her left eye and only partially sighted in her right. In determining whether the doctor had breached his duty to disclose, the court looked to the magnitude of risk<sup>96</sup> faced by the claimant in this instance and reasoned that it was the doctor's duty to disclose beyond what he or she feels the reasonable patient would want to know, to what the particular patient would want to know in the circumstances.<sup>97</sup> According to Stapleton, this is an example where vulnerability was utilised 'to extend tort protection convincingly but carefully...'.<sup>98</sup>

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<sup>93</sup> [1992] HCA 58.

<sup>94</sup> Stapleton, 'The Golden Thread' (n67) 142.

<sup>95</sup> This is where sight in the "good" eye could be reduced or lost completely in response to an injury suffered by the "damaged" eye.

<sup>96</sup> [1992] HCA 58 at 17.

<sup>97</sup> *ibid* at 16.

<sup>98</sup> Stapleton (n67) 142. In the same year, vulnerability discourse was applied in the Canadian case of *Norberg v. Wynrib* [1992] 2 SCR 226, which awarded damages to the claimant in trespass where the defendant doctor provided prescription drugs to maintain the claimant's addiction in return for sexual favours. McLachlin J., however, went further extending vulnerability reasoning to find that the doctor-patient relationship was fiduciary in nature. In this regard, the doctor must act in the best interests of her patient at all times. See: *Norberg v. Wynrib* [1992] 2 SCR 226, 230-231.

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Taking this further, in the recent Supreme Court decision of *Woodland v. Essex County Council*,<sup>99</sup> Lord Sumption, reasoned that a non-delegable duty was owed by the County Council to a child receiving swimming lessons from an independent contractor, and that the duty was owed because of the child's position of vulnerability within the relationship. In this regard his Lordship considered that a non-delegable duty existed where the claimant is a 'patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against risk of injury.'<sup>100</sup> Non-delegable duties, it will be recalled, operate in a somewhat exceptional way by displacing the general rule that liability in negligence is fault-based and personal to the extent that it is the defendant's act or omission which counts, not the person or organisation to whom the duty was initially delegated. In cases involving non-delegable duties the duty of care remains personal to the defendant, but the defendant has given the job of ensuring X does not happen to third party.<sup>101</sup> According to Lord Sumption, the presence of liability in this area is rooted in the defendant's assumption of responsibility (a positive duty) for the claimant's physical

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<sup>99</sup> [2014] AC 537. See, however, the recent Court of Appeal decision in *NA v Nottinghamshire County Council* [2016] QB 739. Here, the claimant was fostered out to two families over a four year period. Whilst in foster care, the claimant claimed to have been both physically and sexually assaulted by her foster parents. This case is complicated by provisions of statute, the intentional nature of the damage suffered by the claimant, and the complex duty structures surrounding the delegation of duties to foster parents versus the delegation of duties to biological parents. Unfortunately, the decision itself raises more questions than it answers and so drawing out particular points of agreement is extremely difficult. What is particularly salient for this discussion, however, is the reasoning of Black LJ. Space precludes a full discussion of this case, however, her judgment provides some interesting points which, it is hoped, the Supreme Court will take into consideration. First, Black LJ found that the local authority had assumed a positive duty to protect the claimant from harm and that the local authority had delegated that role (an integral part of the positive duty which it had assumed) and the control that went with it, to the foster parents (at paras 53-55). Therefore, in substance, the relationship between the various parties did give rise to a duty of care. Further, Black LJ highlighted that Part II of the 1948 version of the Child Care Act 1980 contained a provision that the local authority was to exercise their powers so as to further the best interests of the child (at 50). Taking this forward, it is submitted that an area where the Supreme Court, which will hear the case in 2017, could focus is to what extent the vulnerability of the child, the assumed positive duties of the local authority, and the point that best interests were at one time an integral part of the Child Care Act, could encourage the development of new statutory provisions which make clear the duties of those who assume responsibility for children in care. Given the recent media attention child welfare and protection services have been receiving, this case could act as a positive catalyst for change.

<sup>100</sup> *ibid* 583.

<sup>101</sup> Nicholas J. McBride and Roderick Bagshaw, *Tort Law* (5th ed., Pearson 2015) 273.

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wellbeing,<sup>102</sup> not financial, as in *Hedley Byrne*-type cases. Thus, the essential ingredients to determining whether a non-delegable duty existed were summarised by his Lordship in this way:

Both principle and authority suggest that the relevant factors are the vulnerability of the claimant, the existence of a relationship between the claimant and the defendant by virtue of which the latter has a degree of protective custody over him, and the delegation of that custody to another person.<sup>103</sup>

Present in this description are the hallmarks of the type of relationship discussed in the previous section. Quite clear is the claimant's vulnerability, however, crucial to this characterisation is the position of the defendant being one of control or power, and the nature of their relationship being one which suggests a degree of control consistent with a special relationship.<sup>104</sup>

Interestingly, although distinct from non-delegable duties, Giliker has argued that similar principles relating to vulnerability govern the extension of vicarious liability. In asking why vicarious liability should have been extended to cover intentional torts committed by employees, Giliker reasoned that consistent throughout the court's reasoning in these cases was that the employees were specifically engaged by the defendant employers to 'protect vulnerable individuals. [Further,] the employee abused their discretionary powers and

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<sup>102</sup> *Woodland v. Essex County Council* [2014] AC 537, 575.

<sup>103</sup> *ibid* at 576. Later in the judgment, Lord Sumption expanded this construction to what has now been identified as the five indicia by Black LJ in *NA v Nottinghamshire County Council* [2016] QB 739, 750. For the existence of a non-delegable duty of care, it must also be the case that the claimant had no control over how the defendant chose to perform their obligations and that the third party had been negligent in the performance of the very function assumed by the by the defendant and delegated to him. For the full five indicia, see: *Woodland v. Essex County Council* [2014] AC 537, 583.

<sup>104</sup> This latter point regarding an antecedent, special relationship is confirmed on page 583.

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harm the very persons they were entrusted to protect.<sup>105</sup> In the cases analysed the employees were either teachers or wardens in care homes and the claimants all children. According to Giliker, extending the law in the area was logical based on the premise that the ‘perpetrator had been entrusted to protect and care for the individuals for whom the defendant institution had assumed responsibility.’<sup>106</sup> Moreover, had liability not been so extended, the claimants, all of whom had suffered abuse and emotional trauma, would have been left without redress.

Similarly, in a claim concerning the potential vicarious liability of an educational psychologist who failed to diagnose the claimant pupil with dyslexia, Lord Nicholls of Birkenhead stated:

The [defendant] authority was to act on [the advice of the education psychologist] in deciding what course to adopt in the best interests of the pupil with a learning disability. Throughout, the child was very dependent upon the expert’s assessment. The child was in a singularly vulnerable position.<sup>107</sup>

The application, then, of a vulnerability-based analysis has been extended to areas where the third party had not intentionally committed a tort against the claimant, but was nonetheless negligent in performing the very task the employee had been hired to complete; here, the proper diagnosis of at risk children with learning disabilities. *Phelps* is also interesting because of the harm aspect argued, which was characterised as the:

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<sup>105</sup> Paula Giliker, ‘Making the Right Connection: Vicarious Liability and Institutional Responsibility’(n67) 49.

<sup>106</sup> *ibid* 50.

<sup>107</sup> *Phelps v London Borough of Hillingdon* [2001] 2 AC 619, 666. Arguably, there is link here between the use of ‘singular vulnerability’ by Lord Birkenhead and Stapleton’s ‘exclusive dependence.’

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Failure to ameliorate the effects of a condition affecting a claimant, whether such condition be physical, psychiatric or (as here) neurological, [which] places the "patient" in a worse condition than he or she would be in if appropriately treated.<sup>108</sup>

Although it could be argued that the damage was the pure economic loss suffered by the claimant in failing to secure employment, I prefer the analysis applied in *Adams v. Bracknell Forest Borough Council*.<sup>109</sup> Here, Lord Hoffmann reasoned that the damage suffered in educational negligence claims was best characterised as personal injury, plus consequential economic loss.<sup>110</sup> Importantly, the reasoning applied in *Phelps* is valuable as it demonstrates the court utilising language consistent with efforts to protect the interests of vulnerable individuals where the damage concerned does not represent a straightforward application of orthodox categories. As the next chapter in thesis will demonstrate, complex or hybrid forms of damage present the courts with a range of difficult issues, but also demonstrate an openness and willingness on the part of the judiciary to be creative in ensuring that claimants receive a fair outcome.

With the above discussion in mind, it is apparent that Beever's criticism of vulnerability is largely unfounded. Further, although the present discussion did include examples of damage concerning pure economic loss, it has also been demonstrated that courts apply vulnerability-based reasoning in instances where the damage claimed is not straightforward. As a consequence, it is submitted that the use of vulnerability as a mechanism to protect the interests of the claimant could be extended to damage rooted in property, in particular the

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<sup>108</sup> *ibid* 628.

<sup>109</sup> [2005] 1 AC 76.

<sup>110</sup> *ibid* 83.

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constitutive property framework adopted in this thesis and discussed in greater detail in the next chapter. What is important is that vulnerability has been utilised by the courts in situations involving more than one type of damage, in particular situations where the damage is more complex, and spans different types of legal relationship. The focus of the next section is to analyse the nature of these relationships and how a protection of the vulnerable model can be extended to include novel forms of property damage.

### b) *Legal Relationships and the Vulnerability Model: Common Characteristics and Future Application in Veterinary Negligence*

From the available case law, the term vulnerability has primarily been applied as a descriptor for the legal relationship shared between claimant and defendant. For example, *Rogers* involved a doctor-patient relationship, *Phelps* concerned child and educational professional, and at the centre of *Smith* was a professional and lay person relationship. Thus, the duty relationship could be characterised as “special” in the sense that the defendant could be described as having assumed responsibility for the claimant in some way, however, importantly, it need not always be the case that the claimant correspondingly relied on the defendant. In many cases reliance appears to be inferred by the court, arguably as a result of the claimant’s clear position of vulnerability— a point which will be discussed in greater depth below and in Chapter Four.<sup>111</sup> In addition to the legal relationship shared between claimant and defendant, the characteristics of the individual claimant match factual characteristics consistent with recognised vulnerable groups.<sup>112</sup> For example, the claimants

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<sup>111</sup> See Chapter 4.3(c).

<sup>112</sup> Commentators have cautioned against the overuse of vulnerability, either to describe groups, or individuals within groups; the concern being that everyone in some way could be described as vulnerable rendering the construct ‘too nebulous to be meaningful’ (See: Carol Levine, et al., ‘The Limitations of “Vulnerability” as a Protection for Human Research Participants,’ (2004) 4(3) American Journal of Bioethics 44, 46 quoted by Neal (n75) 186). Although this is certainly an important argument to consider, it is submitted that used thoughtfully,

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in *Phelps*, *Woodland*, and the vicarious liability cases discussed by Giliker all involved children who had not yet reached capacity. In all instances, the claimants were unable to protect themselves or fully comprehend that nature of the harm suffered. *Smith* as well would seem to meet this definition being described as young, financially-stretched, and first-time buyers.

In this way, then, I would argue that vulnerability has also be utilised by the courts as a mechanism to displace the premise that tort concerns parties operating at arm's length with one another, and who are therefore able to protect their own interests.<sup>113</sup> This ideal of two individuals, possessing both autonomy and rationality, is central in the Western political and philosophical tradition of social contract theory where true legal persons or subjects of the law enter into a legal relationship fully capable of enforcing their rights against the other party.<sup>114</sup> This perspective grounds the philosophical theories of tort discussed at the beginning of this chapter, and further helps explain why these models do not fit the veterinary relationship argued here. Importantly, what the Western ideal does not capture is that it is frequently the case that parties come together on unequal footing and various asymmetries in terms of knowledge, power, and emotional commitment therefore exist. If it is accepted, as I think it should, that social and legal relationships<sup>115</sup> give rise to certain social identities,<sup>116</sup> then it must also be the case that courts respond to this and the argument

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vulnerability is less likely to run into indeterminacy issues when applied in the doctrinal context. This is due largely to the special nature of the relationships considered.

<sup>113</sup> In differentiating tort and contract from fiduciary law, Grubb assumes the point that parties come to tort and contractual relations at arm's length with one another, however, I do not believe this can be maintained. See: Andrew Grubb, 'The Doctor as Fiduciary,' (1994) 47 Current Legal Problems 311, 313.

<sup>114</sup> Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart 2009) 22-23 and 155.

<sup>115</sup> I am here thinking of, for example, doctor-patient, student-teacher, employer-employee etc.

<sup>116</sup> Martha Fineman, 'Vulnerability and Legal Subjectivity: Normalising and Neutralising "deviance," "dependency," and "difference"' (Institute of Advanced Studies Public Lecture, Birmingham, September 2015).

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that the ideal of the true legal subject can prevent those who do not fit that mould from receiving an acknowledgment that they have been wronged by the defendant. What the cases discussed above illustrate is that courts have started to recognise this imbalance and utilised vulnerability discourse as mechanism to bring to the fore those relational asymmetries and resolve them in favour of the claimant. To develop this further, courts should be more explicit in their use of vulnerability reasoning and their role in redressing certain relational imbalances by adopting a more instrumental approach.

Similarly, vulnerability has been utilised as a mechanism to overcome policy-based immunities. The relationships in this category are characterised by their high levels of trust and dependency<sup>117</sup> and, in some instances, tread very close to being fiduciary in nature.<sup>118</sup> Yet, for various policy reasons,<sup>119</sup> courts have been reluctant to find a duty of care. Vulnerability has therefore been utilised as a prioritising mechanism to overcome these immunities. In *Rogers*, for example, the *Bolam*<sup>120</sup> test was rejected as the standard to determine breach in instances involving the duty to disclose within the doctor patient relationship— an area of the law where the courts have historically been highly deferential to doctors.<sup>121</sup> In *Rogers*, the court stated that:

Because the choice to be made calls for a decision by the patient on  
information *known to the medical practitioner but not to the*

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<sup>117</sup> David Mangan, 'The Curiosity of Professional Status,' (2014) 30(2) Professional Negligence 74, 78.

<sup>118</sup> See for example: Giliker, 'Making the Right Connection: Vicarious Liability and Institutional Responsibility' (n67) 50, where it is stated in her criteria for imposing liability 'that the employee is entrusted (expressly or implicitly) with a protective or fiduciary duty...' and see also: Andrew Grubb, 'The Doctor as Fiduciary' (n113).

<sup>119</sup> Perhaps the most popular policy concern in these instances is the defensive practice argument. Here, the concern is that professional focus will shift away from the client, the patient etc., to protecting themselves from potential liability.

<sup>120</sup> *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.

<sup>121</sup> The Right Honourable the Lord Woolf, 'Are the Courts Excessively Deferential to the Medical Profession?' (2001) 9(1) Medical Law Review 1.



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*patient*, it would be illogical to hold that the amount of information to be provided by the medical practitioner can be determined from the perspective of the practitioner alone or, for that matter, of the medical profession.<sup>122</sup>

Similarly, in *Phelps*, vulnerability was used to overcome the policy argument that educational psychologists should not owe a duty of care to the child because this would conflict with the duty owed to the education authority. Thus, vulnerability has been used to widen access to justice and correct existing imbalances within certain types of legal relationship.

This analysis finds parallels in the veterinary context. As between owner and veterinarian, for example, it will frequently be the case that the owner is in a vulnerable position due to the knowledge imbalance that exists between the two parties.<sup>123</sup> This is consistent with all of the cases discussed thus far and is consistent across professional negligence relationships more broadly. Importantly, the owner's position of vulnerability is made more profound as a result of the constitutive relationship the owner shares with the animal. Combined, these two factors place the owner, as regards her relationship with the veterinarian, in a situation where she is dependent on the veterinarian to take care. Where a pre-tort relationship exists and the veterinarian has knowledge of the constitutive relationship, the owner's position of

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<sup>122</sup> *Rogers v. Whitaker* [1992] HCA 58 at 14 [emphasis added].

<sup>123</sup> It need not always be the case that the owner is less knowledgeable than the veterinarian, however, in cases where this is so, the owner would arguably be less likely to litigate or the court could simply find based on the facts presented that the claimant was not in a vulnerable position and determine the issue based on more orthodox principles. If there is no knowledge imbalance present, then, arguably, the claimant should have been able to protect her interests appropriately.

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vulnerability would justify an extension of the veterinarian's liability to cover the emotional harm suffered by the claimant.

With regards to the animal, there is little question that the animal is in a position of exclusive dependence, following Stapleton's use. The animal is unable to communicate, provide consent, or comprehend issues relating to its care and in many ways resembles the position of a child who lacks capacity.<sup>124</sup> The animal's position is made more precarious, however, by the fact that, unlike children, animals are not legal subjects and do not possess legal standing in order to ensure their best interests are protected. As Naffine illustrates, as between humans and animals, 'only humans are legal subjects; animals are only and always objects.'<sup>125</sup> If additional rationale is needed to justify an extended model of veterinary liability, courts should engage with this type of open discussion and acknowledge the vulnerability of animals. Instead of downplaying or ignoring animal interests, engage with vulnerability discourse as a means of ensuring greater protection for their best interests as beings with more than mere object value.

Structurally, it is also important to highlight that but for *Rogers*, all of the cases discussed above included diverse multi-party relationships. It is, therefore, submitted that viewing negligence as a mechanism for the protection of the vulnerable is strongest in these types of case. Thus, in *Woodland*, the issue was one of non-delegable duties, *Phelps* it will be recalled involved multiple duties owed to the education authority and the child patient, and *Smith* included potential duties owed to the mortgagees and to the purchasers. The veterinary

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<sup>124</sup> For a discussion on the moral significance and implications of an animal's inability to communicate or provide consent see: Andrew Linzey, 'Why Animal Suffering Matters Morally,' (2007) 39(2) *Colloquium* 139.

<sup>125</sup> Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (n114) 130. The conflict between subject and object is discussed in greater detail in Chapter 3.5(c)(i).

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relationship is similarly complex as the veterinarian owes a multitude of legal and professional duties to both the owner and the animal. Viewing negligence as a mechanism to protect the vulnerable serves to re-focus the inquiry on the relationship between the parties and can provide a foundation for the argument that in some instances the veterinarian should act in the best interests of the animal. The argument that this thesis adopts is that these important relational issues all occur at the duty of care stage in the negligence inquiry and it is for this reason that duty holds a central position within negligence. The next section of this chapter will expand on this point and examine how the position that negligence should protect the interests of the vulnerable can be best accommodated within the duty assessment.

### 2.5 Vulnerability and the Duty of Care

#### a) *Duty as a Central Component within Negligence*

The duty of care assessment is given greater attention in this chapter for two interconnected reasons. First, this thesis adopts the view that the duty of care is relational and specific in nature,<sup>126</sup> thus, there is greater scope to put into practice the vulnerability arguments made thus far in an effort to create positive change for all parties. Secondly, because as I argue here, in the previous chapter,<sup>127</sup> and Chapter Four<sup>128</sup> that a robust duty construct is central to the negligence inquiry, it must also be the case that the approach to vulnerability that I adopt can be seen in harmony with this type of duty assessment.

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<sup>126</sup> See Chapters 1.3(b)(ii) and Chapter 4.3(a) for a discussion on the differences between a singular and relational duty model.

<sup>127</sup> See Chapter 1.3(b)(ii).

<sup>128</sup> See Chapter 4.3(a) & (c).

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To this end, I adopt the argument made by Oliphant that courts should approach the duty question based on the ‘identification of relevant factors and their flexible assessment on the facts of individual cases.’<sup>129</sup> Adopting this approach would arguably allow courts to engage more deeply with underlying moral and normatively-relevant considerations which underpin the law.<sup>130</sup> Further, a more flexible perspective would arguably allow more room to openly and holistically engage with relational qualities which arguably reveal more about human notions of responsibility and relationships.<sup>131</sup> In this way, the use of vulnerability to achieve greater protection for claimants would serve to refocus judges’ minds to aspects of the legal relationship which bear directly on the questions of *what* was actually owed in the instant case, *why*, and to *whom*.<sup>132</sup> Arguably, this is how the courts in the cases discussed in the previous section addressed the duty question. In these instances the courts identified the broad category of case before them, whether it was, for example, public authority or doctor-patient, but at the same time utilised vulnerability to highlight disparities and inequalities within the law, such as policy-based immunities within the legal relationship, and address broader inadequacies or gaps within the law.

### b) *Duty of Care and Vulnerability: The Special Role of Proximity*

Having established the initial link between vulnerability discourse and the duty of care, it is important to determine where, within the duty assessment, courts can include vulnerability analysis. It is submitted that vulnerability has the largest role to play at the proximity stage if

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<sup>129</sup> Ken Oliphant, ‘Against Certainty in Tort Law’ in Stephen GA Pitel et al (eds.), *Tort Law: Challenging Orthodoxy* (Hart 2013) 1.

<sup>130</sup> *ibid* 7.

<sup>131</sup> Prue Vines, ‘The Needle in the Haystack: Principle in the Duty of Care in Negligence,’ (2000) UNSWLJ 35, 39.

<sup>132</sup> This would arguably attribute less weight to certain external policy considerations, which currently play a large role in determining questions of the duty of care. See: Keith Stanton, ‘The Neighbour Principle in the 21st Century: Yesterday’s Revolution,’ (2012) 20 Tort Law Review 61.

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the *Caparo*<sup>133</sup> test is used, or more appropriately, in determining whether it can be said the veterinarian assumed responsibility for the owner's wellbeing, if assumption of responsibility is used.<sup>134</sup> Both assessments look specifically at the closeness, or proximity, of the parties in terms of their relational attributes to determine whether the link is strong enough to say that the defendant ought to have had the claimant's interests in mind.

In describing the role of proximity within the duty assessment, Manderson notes that 'in each case of proximity, plaintiffs find themselves vulnerable to the defendant in a manner that is outside their control and to a degree that *sets them apart from the world at large*'<sup>135</sup> and, continuing, 'a distinct capacity to control particularises the defendant, while a distinct vulnerability to harm particularises the plaintiff.'<sup>136</sup> The importance of particularisation and setting the claimant apart from the world at large supports the position I take regarding the relational and relationship-specific nature of duties of care. These interweaving threads of reasoning provide courts with the opportunity to engage with vulnerability discourse alongside existing negligence principles and examine the unique elements of the constitutive relationship between owner and animal which may give rise to novel duties owed by

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<sup>133</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605.

<sup>134</sup> In Chapter Four of this thesis, it is argued that duty should be assessed based on the veterinarian's assumption of responsibility and that this provides a better way forward than the traditional *Caparo* test. Utilising the language of assumption of responsibility brings veterinary medicine in line with human medicine, but, in arguing that reliance is not required, removes the economic or contractual justification for imposing a duty. For the link between assumption of responsibility and proximity, see: *Sutherland Shire Council v Heyman* (1985) 60 ALR 1; [1985-95] PNLR 238, 297 per Deane JJ: 'The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff... It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another...'

<sup>135</sup> Desmond Manderson, *Proximity, Levinas, and the Soul of Law* (McGill-Queen's University Press 2006) 124.

<sup>136</sup> *ibid* 133. See also: *Dorset Yacht Company v Home Office* [1970] AC 1004.

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veterinarians. In this way, ‘proximity...binds together the why, who and how of the duty of care: it points to a normative foundation [and] a language of analysis.’<sup>137</sup>

Having said this, the above analysis only focuses on the relationship between owner and veterinarian; the animal continues to play a peripheral role. The primary criticism of the tort theories discussed in the previous section was that, structurally, they were unable to fully accommodate the triangular nature of the veterinary relationship. Thus, a critical question is to what extent vulnerability can be extended to include the interests of the animal. In discussing the role that proximity played in Australian negligence jurisprudence, Vines argued that proximity ‘operated not only inside a category of negligence, but also outside whichever category of negligence was being considered.’<sup>138</sup> This latter assessment was, according to Vines, aimed at drawing out general social understandings of responsibility or fault.<sup>139</sup> I therefore submit that vulnerability can operate on both a macro level across the negligence inquiry, but also on a micro level, inside the specific assessment under the proximity requirement. Vulnerability discourse can, therefore, play a role within a specific duty assessment between two legal persons, but also as a construct capable of transcending the assessment between claimant and defendant, animating the whole negligence inquiry. In both circumstances, it is submitted that the courts are acting purposively to protect the interests of the vulnerable party, however, when applied on a macro level, I would argue the position of the animal can be more fully considered, and in some cases may provide a rationale for placing the best interests of the animal above those of the claimant-owner.

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<sup>137</sup> Desmond Manderson, ‘The Ethics of Proximity: An Essay for William Deane,’ (2005) Griffith Law Review 295, 314.

<sup>138</sup> Prue Vines, ‘Proximity as Principle or Category: Nervous Shock in Australia and England,’ (1993) 16 UNSWLJ 458, 466.

<sup>139</sup> *ibid* 460.

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### c) *Vulnerability and the Best Interests Assessment*

A primary argument made throughout this thesis is that veterinarians should view their duties of care through a best interests lens, similar to that of a paediatrician. For present purposes, it is important to address the link between viewing negligence within an instrumental framework in which its purpose is to protect the vulnerable, and taking the position that veterinarians should act in the best interests of the animal. In theory, the two areas are mutually supportive, with the best interests assessment having at its core the goal of protecting the vulnerable. Thus, it is *because* animals are in a vulnerable position, both as regards their relationship with the owner and also the veterinarian, but also as a result of their status under the law, that their best interests ought to be protected. However, a theme throughout this chapter is that what works in theory does not always work in practice. Although it is submitted that the flexibility of the best interests test can be an advantage, it is only beneficial when courts direct their mind to the substantive issues before them and openly engage with the normatively-relevant questions raised by the claim.

#### i. *The Importance of Particularising the Animal in the Best Interests Assessment*

One of the challenges facing courts that have to grapple with complex issues surrounding vulnerability and best interests is that amidst the decision-making process and the complexities that come with weighing various (sometimes competing interests), the child (or the animal) is seen as *nothing more than* dependent, vulnerable, and in need of protection.<sup>140</sup> As the animal in this scenario is in a position of exclusive dependence, it is certainly conceivable that this view may be extended to the veterinary negligence context. Further,

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<sup>140</sup> Jo Bridgeman, *Parental Responsibility, Young Children and Healthcare Law* (CUP 2007) 9 [emphasis added].

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when the legal position of the animal as property and situational position of the animal within the veterinary relationship is put alongside that of the owner— the owner being a legal subject capable of rational agency— objectifying the animal becomes an increasingly legitimate concern. Similar issues arise in the human medical context when dealing with the best interests of a child;<sup>141</sup> however, the process leading to objectification is arguably easier done with animals. Whilst with children, regardless of their capacity to engage with decisions affecting their treatment, children are sacred subjects<sup>142</sup> under the law. Animals, on the other hand, always run risk of being objectified— indeed, this is their starting position under the law— and so the goal is to move them out of legal “objecthood” and into a category which recognises their individuality and sentience. Importantly, then, it must be the case that although the interests between owner and animal are primarily connected through their constitutive relationship, they must also be separate.<sup>143</sup> The animal should, therefore, be viewed as a sentient being capable of experiencing a wide range of emotions, which should be independently considered.<sup>144</sup> This is crucial to understanding the interlinking of best interests with vulnerability, but also to advancing the second aim of this thesis, namely to advance the best interests of the animal within the veterinary relationship.

In responding to this, then, courts should be alive to the position that although it is the case that owners will have a specialised knowledge as regards their animal and that their wishes and desires are important, they are not final. This is also the case for the veterinarian;

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<sup>141</sup> *ibid.*

<sup>142</sup> In decisions involving children, it is frequently the case that courts refer to the sanctity of human life and that children are subjects under the law. With animals, however, none of these principles apply. Indeed, as Schaffner highlights, ‘though animals may be involved as an object— the property of a human— rarely, if ever, [are they] a subject— a recognised individual in her or his own right. See: Joan E. Schaffner, *An Introduction to Animals and the Law* (Palgrave Macmillan, 2011) 135.

<sup>143</sup> Bridgeman, *Parental Responsibility, Young Children and Healthcare Law* (n140) 142.

<sup>144</sup> For discussion on sentience this thesis adopts, see: Chapter 3.5(b).



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although they have specialised knowledge in the medical complexities affecting the animal, their viewpoint also cannot be solely determinative.<sup>145</sup> Crucial in the court's understanding should be the particular animal's vulnerability within the veterinary relationship which in itself gives rise to the need for a best interests assessment in the first instance. It must also be the case that the animal's unique needs and personal attributes are given place of prominence. Undertaking the best interests assessment in ways which acknowledge an animal's emotions and personality would represent a decisive step forward in advancing animal interests under the law. When the court is able to view the animal not as an object but as an entity with subjective preferences, we move closer to recognising that animals are more than simply things.

### *ii. Relational Imbalances Giving Rise to Difficulties*

There remain two points stemming from the power imbalances within the veterinary relationship which require further discussion. First is a point made by Montgomery in the human medical context, namely that when faced with a novel, difficult case judges have been reluctant to set down or codify relevant principles or rules, preferring instead to use the flexibility of the best interests rationale to relieve health professionals from detailed scrutiny<sup>146</sup> and defer to their judgment. In one limited respect, this could be seen as an advantage as part of my argument is that veterinarians should be able to positively act in ways which protect the best interests of the animal and that courts should be receptive to exploring these possibilities. However, although veterinarians should be given greater scope to act in the animal's best interests, the relational imbalance between owner and veterinarian

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<sup>145</sup> This is also a concern in the human medical context. See, for example: Rob Heywood, 'Parents and Medical Professionals: Conflict, Cooperation, and Best Interests,' (2012) 20(1) Medical Law Review 29.

<sup>146</sup> Montgomery, 'Law and the Demoralisation of Medicine' (2006) 26(2) Legal Studies 185, 202. See also: Heywood, 'Parents and Medical Professionals: Conflict, Cooperation, and Best Interests' (n145).

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should not be expanded to the point of giving veterinarians deferential treatment.

Veterinarians should be prepared to have their best interest assessments scrutinised and importantly courts should likewise reason in such a way that their decisions are able to withstand careful scrutiny.<sup>147</sup> Further, in an area where there exists no prior discussion or guidance as to how best interests ought to be applied in the veterinary context, careful application by the court is needed to ensure the legitimacy of the test itself. Therefore, although much of the attraction of the best interests assessment lies in its flexibility, in an area such as veterinary negligence where there exists almost no case law, this flexibility should be directed to achieving and setting out well-reasoned and clearly-articulated principles, which can then be applied across differing situations.

The second point relates to the holistic nature of the best interests assessment. A best interests assessment is considered holistic in that it not only considers the patient's medical best interests in terms of potential treatment(s), but also because the assessment includes elements of the patient's lifestyle, their personality, and also the positions of those around the patient who care for or are some way involved in the patient's care. It is this tension between the particularised aspects of the best interests assessment and the broader interests of those involved in the patient's care which can give rise to complications. In the veterinary relationship this tension arises when considering the owner's vulnerability stemming from the professional relationship with the veterinarian, and the animal's exclusive dependence as between the owner and veterinarian. When these tensions come into contact with one another, it may be the case that the interests of the animal become conflated, for example,

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<sup>147</sup> See the decision of Holman J in *An NHS Trust v. MB* [2006] EWHC 507 at 16 where he states that where the 'parties have asked the court to make a decision [on best interests], it is the role and duty of the court to do so and to exercise its own independent and objective judgment...' See also: Heywood, 'Parents and Medical Professionals: Conflict, Cooperation, and Best Interests' (n145) 44.

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with those of the owner to detriment of the animal, or worse, that the interests of the owner supersede those of the animal completely.

Fox and McHale<sup>148</sup> warn of this issue arising in the context of medical treatment involving children. In these instances, because the best interests assessment is a holistic assessment involving considerations of both the patient and the parent(s),<sup>149</sup> there is the risk that in determining the best interests of the child, parental interests may supersede both medical opinion and the interests of the child. In their piece Fox and McHale discuss the case of *Re T*<sup>150</sup> in which a young boy was diagnosed with a fatal liver condition. Although arguably a rather exceptional case, it illustrates what can happen when courts misconstrue the purpose of the best interests test. Medical opinion in *Re T* was clear that the boy should receive a transplant operation. The procedure itself provided an eighty to ninety percent success rate, however, the mother did not support the suggested treatment. It was acknowledged that if the boy did not receive treatment, he would die from his condition. Finding for the mother, the Court of Appeal reasoned that although the welfare of the child was the paramount consideration, as the welfare of the child was dependent on his mother, it would have been very difficult to proceed with the surgery without her full support.<sup>151</sup> Thus, conflating the interests of the child with those of the mother:

...permitted the Court of Appeal to minimise the potential conflict between the interests of the woman and child. It effectively allowed the Court to encompass within the best interests test the

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<sup>148</sup> Marie Fox and Jean McHale, 'In Whose Best Interests?' (1997) 60(5) *Modern Law Review* 700.

<sup>149</sup> Lynn Haggart, *The Child as a Vulnerable Patient: Protection and Empowerment* (Ashgate 2009) 58.

<sup>150</sup> *Re T (a minor) (wardship: medical treatment)* [1997] 1 WLR 242.

<sup>151</sup> Fox and McHale, 'In Whose Best Interests?' (n148) 704.

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interests of the mother as carer as well as the interests of the child.<sup>152</sup>

In the veterinary context, although both owner and animal are in their own way vulnerable, the best interests assessment should ultimately be introduced into the court's decision-making to protect the interests of the more vulnerable party: the animal. As Elliston notes in the human medical context, 'the test under the inherent jurisdiction of the courts is that the child's best interests are *the* prime and paramount concern.'<sup>153</sup> So, although the test does include considerations affecting both the parent and the child, there must remain a prioritising element within the assessment which places the child's interests at the centre. From the court's perspective what should be done is to consider as best they can what is in the best interests of the child 'in order to retain proper focus, which rests in protecting the vulnerable.'<sup>154</sup> I submit the same needs to occur in veterinary negligence cases.

Importantly, where there is a conflict of interests there should be no effort by the court to disguise or downplay the conflict by simply applying the language paying lip service to precedent without truly engaging with the issue; this not only compromises the integrity of best interests test, but also stalls any effort to develop the law as it relates to veterinary negligence. Human interests are already privileged when put alongside animal interests. This point is made stronger when it is considered that the relationship of vulnerability most familiar to the courts in a doctrinal sense would be the knowledge and power imbalance between veterinarian and owner. Thus, a best interests assessment, prioritising the animal's

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<sup>152</sup> *ibid* 706.

<sup>153</sup> Sarah Elliston, *The Best Interests of the Child in Healthcare* (Cavendish 2007) 14 [emphasis added].

<sup>154</sup> John Coggon, 'Best Interests, Public Interest, and the Power of the Medical Profession,' (2008) 16 *Health Care Analysis* 219, 230.

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interests, is needed to redress the multiple power imbalances in play. To do this, courts should faithfully apply the best interests assessment and be prepared to utilise negligence as an instrument to achieve protection for the animal and ultimately the veterinarian when they have acted to protect the animal's best interests.<sup>155</sup>

### 2.6 Conclusion

Adopting an instrumental approach in which protection of the vulnerable is central opens the doors for courts to engage with normatively and legally relevant principles whilst also abiding by established convention, which holds that in resolving disputes, courts must give priority to values that have found expression in legal documentary form.<sup>156</sup> Because of their obedience to strict bilateral structures and requirements of agency and personality, purely philosophical accounts of negligence do not allow for this type of analysis and potentially stall attempts to craft and advance the law in new ways. Importantly for veterinary negligence, the instrumental approach advocated for in this chapter allows the relationship between owner and veterinarian to be more thoughtfully scrutinised within existing professional negligence jurisprudence. Additionally, by way of a best interests assessment linked to the animal's exclusive dependence, this approach can more fully account for the animal's central position within the relationship, both as a patient and as a sentient being. Judges deciding recent negligence case law have already shown indications that they are willing to accept and develop their reasoning as it relates to its assessment of vulnerable parties when making decisions as to the nature of the duty of care owed. It is submitted that this should be extended to cover the veterinary negligence context.

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<sup>155</sup> Greater discussion of this point will occur in Chapter 4. To show how best interests can be applied to protect the veterinarian from liability, see the discussion in Chapter 4.5(b).

<sup>156</sup> For this second point see: Peter Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law,' (2005) 25 *Oxford Journal of Legal Studies* 393, 407-08 quoted in: Andrew Robertson, 'Constraints on Policy-Based Reasoning in Private Law' (n16) 270.

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Whilst Baroness Hale in *Woodland* highlighted that caution is needed in developing extended ideas relating to the duty of care, she also highlighted that the common law is a dynamic instrument;<sup>157</sup> ‘it develops and adapts to meet new situations as they arise’<sup>158</sup> and ‘therein lies its strength.’<sup>159</sup> Extending the court’s use of vulnerability to the veterinary relationship does not represent unprincipled growth, but rather the evolutionary re-working of an idea which finds parallels in other corners of the law. The next chapter of this thesis will develop this evolutionary perspective and, in the course of discussion, challenge the current actionable damage construction, which views the animal as merely an object of property.

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<sup>157</sup> [2014] AC 537, 586.

<sup>158</sup> *ibid.*

<sup>159</sup> *ibid.*

### 3. Harm to Sentient Constitutive Property

*'...[I] might have a singing song bird, though it be not pecuniarily profitable, yet it refreshes my spirits and gives me good health, which is a greater treasure than great riches. So if anyone takes it from me he does me much damage for which I shall have action.'*<sup>1</sup>

### **3. Harm to Sentient Constitutive Property: Developing Nascent Innovations in Actionable Damage**

#### **3.1 Introduction**

Though damage is considered the 'last element of a negligence case temporally speaking, it really is the tail that wags the dog.'<sup>2</sup> Remembering that one of the primary aims of this thesis is to establish guiding principles and illuminate for veterinarians what their legal duties and liabilities are in negligence, it is first necessary to establish what type of actionable damage they could be sued for. The first chapter of this thesis made clear that as it currently stands the courts utilise a market value assessment, which assesses the animal's value as an item of property on the open market. It was argued that conceiving the damage in purely proprietary terms fails for two primary reasons. First, with regards to the position of the veterinarian, it results in a legal duty which is far too narrow and basic, and which fails to capture the intricacies of the relationship between owner, animal and veterinarian. Further, viewing the animal merely as fungible property does nothing to assist in advancing the argument that animals should have their best interests protected within the veterinary relationship.

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<sup>1</sup> Sir William Holdsworth, *A History of English Law* (1926) (quoting from Y.B. 12 Hen. 8 at 4 (1521) per Justice Brooks) 489.

<sup>2</sup> John Oberdiek, 'Philosophical Issues in Tort Law,' (2008) 3(4) *Philosophy Compass* 734, 735.

### 3. Harm to Sentient Constitutive Property

Contrary to the above, this chapter will argue that in seeking to achieve the two primary aims of this thesis, the strongest way forward, in terms of framing the actionable damage portion of a negligence claim, is to view the harm as constituting damage to sentient constitutive property (“SCP”). Further, as between veterinarian and owner, the damage sustained should be represented as a special form of property damage with consequential emotional harm. At the outset, the idea of SCP raises an important limitation on how the actionable damage portion of a veterinary negligence claim can be framed. Though this thesis advocates that the best interests of the animal should be central within the veterinary relationship, because of their current legal status, it will not be possible to directly reflect their interests at the actionable damage stage. Thus, under the SCP framework, only the owner would be able to bring a claim against the veterinarian. However, as the details of the SCP model are expanded upon, it will further be argued that under this framework, the interests of the animal patient can be forwarded at the duty of care stage discussed in the forthcoming chapter.<sup>3</sup>

Reflecting on current debates within animal law and the argument made by many that animals must possess rights to be afforded legal protections, Posner argues that judicial innovation must proceed incrementally and that arguments made with the aim of prescribing animals rights would be a step too far.<sup>4</sup> Posner’s position is reflective of the broader concern within negligence jurisprudence that allowing wholly new forms of damage could lead to a flood of claims, which would overwhelm an already over-burdened court system. Though

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<sup>3</sup> In time, though outside the scope of this thesis, it is hoped that as the law begins to acknowledge the relationship owners and animals are capable of forming, the more likely it will be that the inherent qualities and virtues animals possess will be recognised, which could then lead to increased protection of animals’ interests. See further on this point: Joan E. Schaffner, *An Introduction to Animals and the Law* (Palgrave Macmillan, 2011) 167.

<sup>4</sup> Richard A. Posner, ‘Animal Rights: Legal, Philosophical, and Pragmatic Perspectives’ in Cass R. Sunstein and Martha C. Nussbaum (eds.), *Animal Rights: Current Debates and New Directions* (OUP 2004).



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incremental development does some work to abate floodgates concerns, this chapter will argue that, in the context of veterinary negligence, classifying animals as sentient constitutive property does not require radical judicial innovation, but rather the careful development of existing damage constructions. I therefore agree with the argument made by Liebman that ‘we should not expect judges to adopt far-reaching...arguments that fundamentally challenge anthropocentrism;’<sup>5</sup> but that as regards the damage suffered in veterinary negligence claims, progress can be made in the direction of life and welfare-affirming ideals by adopting the SCP model.<sup>6</sup> Indeed, it is submitted that rather than creating new law, the idea of sentient constitutive property is rather about developing nascent innovations in the realm of negligence law, in particular property damage. In a sense, then, the SCP model does represent an incremental development within the law and thus worries regarding a flood of SCP-related claims should not hinder its natural development, yet, incremental development is also by no means *the* definitive route to doctrinal development. Indeed, it will be advocated throughout this thesis that judges should feel empowered to innovate and challenge previously-accepted methods and ideals.

In this chapter, I will argue that it would be within the court’s power to allow damage framed in terms of SCP and that doing so would more accurately reflect the relationship capable of existing between owner and animal. To support this argument, this chapter will incorporate ideas relating to feminist tort theory and the concept of hybrid damage. The first section of this chapter will introduce the essence of the SCP theory followed by an analysis of doctrinal

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<sup>5</sup> Matthew Liebman, ‘Who the Judge Ate for Breakfast: On the Limits of Creativity in Animals Law and the Redeeming Power of Powerlessness,’ (2011) 18 Animal Law 133, 150.

<sup>6</sup> *ibid.* See also Robin West, *Caring for Justice* (NYU Press 1997) 49. Here West argues that:  
The work of doing legal justice...must be in the service of values which are life-affirming, if the result is to be justice, and a just society worthy of the name.  
Justice ought to be an interactive human value, and an ideal of human communities.

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developments within UK negligence jurisprudence, which indicate a judicial environment open to novel forms of actionable damage, particularly in the area of property damage. From here, a discussion detailing other sentient property paradigms which have been argued in the past will be undertaken. It is initially submitted that though helpful in advancing the general argument that animals should be afforded greater protection under the law, the theories proposed have been too narrowly conceived as regards the types of animals considered. Further, the theories themselves do not fit well within the specific requirements of a negligence inquiry. A more in depth assessment of SCP will conclude this chapter and illustrate that, within the confines of negligence, this model offers the strongest way forward. Important in this development is the idea that rather than the property relationship being constructed in terms of property-holder and property, subject and object, the more accurate characterisation is to see the property, and hence the damage, as being bound up with the owner.

#### **3.2 Constructing the Actionable Damage: Introducing the Sentient Constitutive Property Model**

##### *a) The Current Model: Market Value Approach*

In the first chapter, it will be recalled that the current approach to assessing veterinary negligence claims is the market value approach. The damage sustained is to fungible property and, as such, the measure of damages accords with what the animal would fetch on the open market, to a willing purchaser. Consequently, veterinary negligence suffers from two problems which severely hamper its development within the law. First, animals are property and as such the market value approach coincides with how damages have

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traditionally been evaluated in this context. In many cases, then, it is not economically viable to bring a claim in veterinary negligence. Second, and more importantly for the purposes of this chapter, is the extent to which, as West<sup>7</sup> has argued, the law-and-economics movement has affected the analysis of harm more broadly.<sup>8</sup> West's argument, with which I agree, is that the law's movement in this direction has had the corollary effect of extinguishing from analysis and study harms relating to "pains" and "pleasures," for example, those experiences which in varying degrees and measures contribute to our pursuit of a "good" or "meaningful" life.<sup>9</sup> Indeed, this occurrence can be seen in the veterinary negligence case law analysed in the first chapter. Though it will not be argued that the legal status of animals as property should change, harm in the veterinary negligence context is inherently relationship-centred, as between owner and animal. Thus, any damage model put forward regarding veterinary negligence should foreground this aspect. This presents a high, but arguably not insurmountable hurdle, given that, as Conaghan has noted, relational losses have been largely overlooked in tort scholarship.<sup>10</sup>

Departing from the market value approach in the veterinary negligence context also requires from the judiciary that, in seeking to achieve a justice between the parties, it be informed by ideals of compassion and fairness, not seek to root them out. Following West, attempts to hold on too tightly to the rigidity of precedential logic and abandon the inquest into the particular circumstances of the claimant and the context under which the alleged negligent incident occurred, leads not to a greater, more accurate sense of justice, but rather 'to a cramped, time-frozen, and at times absurd jurisprudence, unbendable and unbending to the

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<sup>7</sup> Robin West, *Caring for Justice* (n6).

<sup>8</sup> *ibid* 166-167.

<sup>9</sup> *ibid* 167 and 170.

<sup>10</sup> Joanne Conaghan, 'Tort Law and Feminist Critique,' (2003) 56 *Current Legal Problems* 175, 192.

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changing demands of a changing and complex society.’<sup>11</sup> Oliphant too argues that the pursuit of legal certainty tends to produce rigidity and resistance to change, with the consequence that the law loses touch with prevailing social standards.<sup>12</sup> Instead, Oliphant states:

To be preferred is an approach based on the identification of relevant factors and their flexible assessment on the facts of individual cases. The exercise of judgment by the court— and the uncertainty that is necessarily entails— should be recognised as inherent in the judicial role, and as desirable rather than something to be distrusted and constrained.<sup>13</sup>

This issue will be dealt with in greater depth below, however, it bears mentioning at the outset that though SCP will challenge traditional perceptions of damage, it is challenges to time-frozen notions of damage which prompt the judiciary to re-evaluate perceived realities and begin a reworking of precedential rules to better reflect actual societal realities. It is submitted that adopting the SCP model allows for this type of development to occur and that such development ought to be viewed as positive. This section will therefore provide an introduction to the concept of sentient constitutive property in advance of a more detailed discussion later in this chapter as to its scope and applicability.

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<sup>11</sup> Robin West, *Caring for Justice* (n6) 61.

<sup>12</sup> Ken Oliphant, ‘Against Certainty in Tort Law’ in Stephen GA Pitel, Jason W. Neyers and Erika Chamberlain (eds.), *Tort Law: Challenging Orthodoxy* (Hart 2013) 3-4.

<sup>13</sup> *ibid* 1.

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#### b) *Core Features: The Essence of the Sentient Constitutive Property Paradigm and the Limits of Actionable Damage*

Priaulx argues that ‘attention to what kinds of harms negligence embraces tells us much about the general operation of law, and in particular, to whom negligence speaks and whose interests it protects.’<sup>14</sup> Asking these questions of the SCP model is particularly important as it contemplates constructions of emotional harm and relationality, but also considers interests to which the law already speaks at the damage stage. It is submitted that though the SCP model is ultimately not without its limitations, it represents the best way forward in cases involving veterinary negligence. In particular, it maintains animals’ status as property (as opposed to arguing that they should be endowed with rights akin to humans), but recognises the strong relational element between *all* parties, in particular owner and animal. Building from this, the SCP model maintains that it is the owner, not the animal, who would bring a claim in veterinary negligence, though the animal assumes a special form of elevated property. Further, the sentient animal is an active participant in a reciprocal relationship, not simply an inanimate object or a being capable of suffering and experiencing pain.<sup>15</sup> To this extent, the SCP model allows animal interests to be considered, but not actually feature as a protected interest at the actionable damage stage.<sup>16</sup> Instead, it is submitted that the interests

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<sup>14</sup> Nicky Priaulx, ‘Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law,’ (2012) 33 *Adel. L. Rev.* 177, 178.

<sup>15</sup> The famous statement made by Jeremy Bentham that ‘the question is not, Can they reason? nor, Can they talk? but, Can they suffer?’ (see: Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Dover, 2007) Chap 17) has been widely influential in arguments made to accord animals with moral consideration and advocate for the maximisation of greater welfare standards. See also: R.G. Frey, ‘Utilitarianism and Animals’ in Tom L. Beauchamp and R.G. Frey’s (eds.), *The Oxford Handbook of Animal Ethics* (OUP 2011) 174-176. This thesis will contemplate a more detailed application of the sentience requirement. The full details of what sentience includes will be detailed later in this chapter, however, for present purposes, sentience is meant to encompass the ability to enter and participate actively in a reciprocal relationship and from this relationship derive a sense of pleasure.

<sup>16</sup> See: Andrew Tettenborn, ‘What is a Loss?’ in J. Neyers (ed.), *Emerging Issues in Tort Law* (Hart 2009) 441. Though it is beyond the scope of this thesis to consider in full Tettenborn’s argument on a protected legal interest (as opposed to an observable, objective loss), I would submit that this analysis accords more with my argument regarding how the loss is framed in cases involving veterinary negligence. Briefly, Tettenborn

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of the animal, namely the animal's best interests, can be most fully represented at the duty of care stage, which will be addressed in the next chapter.<sup>17</sup> An important point which the SCP model highlights, then, is the holistic nature of the negligence inquiry and the point that each stage develops and depends on the last for meaning and context.

Bearing in mind the function that the sentient constitutive property paradigm is to serve, consideration must be given to how the owner's legal interest and the animal's interest in being treated as a sentient being interact. It is submitted that the best way to protect interests of both parties lies in arguing that the relationship created is constitutive of the owner's personhood. Crucially, it will be argued below that a primary reason behind attributing an elevated property status to animals is that the relationship they form with their owners is capable of contributing in a robust and meaningful way to the owner's sense of person; in essence, the relationship with the animal constructs part of the owner's personhood. The relationship, then, not only transcends the subject-object divide, as between property- holder and property, but is one which is reciprocal and forms an integral element of the owner's life story— it enhances the owner's (and the animal's) flourishing.<sup>18</sup> As Radin explains:

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describes the infringed protected interest which must be valued by the courts includes 'not only [the claimant's] interest in not suffering the wrong, but also [the claimant's] interest in not being consequentially harmed by it' (at p. 458). "Interest" is never explicitly defined, but it is submitted that such legally protected interests would include examples such as an interest in one's bodily integrity, proprietary interests, but also possibly, interests in certain types of relationship. I would argue that this conception of damage fits more accurately with the "damage hybrid" claims discussed in this chapter, including the sentient constitutive property model advocated.

<sup>17</sup> It will be recalled in *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1 at 48 that the 'question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.'

<sup>18</sup> Radin's later work looks at conditions for human flourishing and develops upon Martha Nussbaum's capabilities approach. Very basically, the theory works from the premise that people have certain capabilities (ie. relatedness, cognitive capacity, etc.) for development which make it possible for them to grow into fully developed human beings. Nussbaum later expands her theory to also cover animal capabilities (ie. emotion, social cognition, etc.) and entitlements. I would argue that those in a constitutive relationship (ie. owner and animal) both develop some of those capabilities, which contributes in a meaningful way to their individual flourishing. See on these points: Margaret Jane Radin, 'The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood,' (1995) 74 Oregon Law Review 423, 432 and Martha Nussbaum, 'The

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If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood [for example, a view of personhood as a continuing character structure encompassing future projects and plans, as well as past events and feelings] depends on the realisation of these expectations.<sup>19</sup>

The constitutive element, therefore, serves to highlight the strong relational element present in the damage construction and provides a normative framework from which to develop the SCP model as a whole.

Following from this, it is submitted that the way in which sentience has traditionally been constructed (ie. the ability or capacity to feel pain and suffer) does not fully capture the animal's place within the constitutive relationship. A full discussion of this issue will be addressed later in this chapter, however, it is important to highlight at the outset that sentience is here being recognised as encompassing the animal's ability to enter into a relationship in which both parties actively participate and, from this, derive a sense a meaning. This view of sentience will, therefore, have a bearing not only on how the relationship itself is constructed, but also in later advancing the argument that the animal's best interests should be protected at the duty and breach stages. Thus, when veterinary negligence occurs it is not only damage to property which occurs— indeed, this would constitute only a threshold requirement allowing the claim to accord with already existing,

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Capabilities Approach and Animal Entitlements' in Tom L. Beauchamp and R.G. Frey (eds.), *The Oxford Handbook of Animal Ethics* (OUP, 2011) 228.

<sup>19</sup> Margaret Jane Radin, 'Property and Personhood,' (1982) 43(5) *Stanford Law Review* 957, 968.

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orthodox notions of actionable damage— but crucially, the severed relationship between owner and animal.

Traditionally, negligence jurisprudence has been fairly strict in the types of harm deemed actionable. Established examples include personal injury, property damage, economic loss and certain, restricted forms of psychiatric harm; emotional harm, on its own, is unlikely to succeed.<sup>20</sup> Further, relational losses or harms, as Conaghan argues, have been largely overlooked and dismissed in tort scholarship.<sup>21</sup> This is particularly the case with animal-related claims as though some pressure has been exerted by private individuals, and as Deckha makes clear, it is humans that are placing ‘pressure on the law to catch up to...cultural affections,’<sup>22</sup> the law has primarily disavowed these relational arguments and maintained strict adherence to a commodity-based valuation, as opposed to a relational one.<sup>23</sup> It will be argued below that the criticisms made by Conaghan are justified and that the SCP model is an example of where the law could be developed to accommodate relational damage currently lacking in tort jurisprudence. Building on this, given the strong psycho-social element present in the constitutive aspect and the orthodox aspect contained in the property element, it will also be argued that the SCP model resembles what Priaulx has termed “damage hybrid”<sup>24</sup> claims, or those claims which sit somewhere in between two recognised forms of damage. Admittedly, there are differences in the SCP model as

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<sup>20</sup> Rachael Mulheron, ‘Rewriting the Requirement for a ‘Recognised Psychiatric Injury’ in Negligence Claims,’ (2012) 32(1) Oxford Journal of Legal Studies 77, 77-78. See also: *Rothwell v. Chemical & Insulating Co Ltd.* [2008] AC 281.

<sup>21</sup> Joanne Conaghan, ‘Tort Law and Feminist Critique’ (n10) 192.

<sup>22</sup> Maneesha Deckha, ‘Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm,’ (2013) 50 Alberta Law Review 783, 785.

<sup>23</sup> *ibid.*

<sup>24</sup> Nicky Priaulx, ‘Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law’ (n14) 184.



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compared to damage hybrid claims,<sup>25</sup> however, it is submitted that, in theory, the two can be seen as analogous. Importantly, it is the damage hybrid claims which Prialux argues presents ‘the most serious challenge to established boundaries of the damage concept. Such cases make even more transparent the serious shortcomings of the operation of the damage concept...’<sup>26</sup>

It is these types of damage claims which, according to Prialux, represent the next assault (after pure psychiatric harm) on the damage concept and by challenging orthodox constructs, hybrid damage claims look to broaden the concept of harm to accommodate critical aspects of our humanity.<sup>27</sup> This latter point lies at the heart of what SCP hopes to achieve. Without question, SCP challenges the orthodox notions of damage listed above, however, as our understanding of what constitutes damage expands with time and greater attribution given to the role psycho-social elements present in our lives, challenges to the status quo inevitably follow. As tort is generally conceived of as a body of law whose role it is to both set standards which govern relations between people and encourage positive social relations,<sup>28</sup> it is to be expected that what constitutes those standards are challenged and amended.

#### **3.3 Current Challenges to Orthodox Notions of Actionable Damage**

Thus far, it has been argued that a relational approach to the damage requirement be adopted as between owner and animal, as opposed to the more rigid boundary currently in

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<sup>25</sup> Importantly, the “damage hybrid” claims contemplated by Prialux appear to consider harms which are experienced through the female person, for example, whether pregnancy should be classed as personal injury, loss of personal autonomy or harm occasioned to bodily integrity. So, it is the female body in relation to society, the self, the foetus, etc. The argument will be made below in section 3.3(b) that damage hybrid principles can be extended to cover instances where property forms the orthodox basis of the actionable damage claimed and so constitute two separate, living entities.

<sup>26</sup> Prialux, ‘Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law’ (n14) 184.

<sup>27</sup> *ibid* 184 and 186.

<sup>28</sup> Conaghan (n10) 197-198.

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place between subject and object, property-holder and property. It was, however, highlighted that thus far tort has largely dismissed damage framed in relational terms. With this in mind, the purpose of this section is twofold. First, it will be argued that, though the SCP model does stretch the boundaries of orthodox notions of actionable damage, there is increasing evidence which indicates courts in the UK have been more willing to accept novel forms of damage and have acted creatively in resolving the issues before them. Thus, there is scope to argue that the SCP model, rather than proposing a radical change in the law, represents an evolutionary step in a developing area within the law. Second, it will be argued that in terms of property damage, examples exist where courts have taken a more compassionate and pragmatic approach to the matter before them. Combined, these examples are best seen as judicial recognition for the point that ‘certain items of property [do] form part of the way we constitute ourselves as continuing personal entities.’<sup>29</sup> As Powell has observed, while property law is often slow to change, it does change over time as the moral and ethical perspectives of society change<sup>30</sup> and that these changes ‘represent efforts to workout adaptations to the new problems presented by new ingredients in the political, economic, and philosophical atmosphere of the moment.’<sup>31</sup> This section will begin by looking at the current state of the actionable damage inquiry and argue that new advances in our society are challenging orthodox views of actionable damage. Proceeding on from this, it will be argued that three existing property cases illustrate a trend which indicates a judicial willingness to put aside strict rules of certainty and precedent, and instead adopt a more flexible approach.

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<sup>29</sup> Radin, ‘Property and Personhood,’ (n19) 959.

<sup>30</sup> Michael Allan Wolf (ed.), *Powell on Real Property* (Matthew Bender & Co. 2009) s. 2.06.

<sup>31</sup> *ibid.*

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#### a) *Damage Challenging Orthodoxy*

Until recently, inquiry into the nature of actionable damage has been widely ignored.<sup>32</sup> New challenges to the black and white notions of, in particular, physical damage have altered this conception. Importantly, what the discussion below will highlight is that these successful challenges, specifically in the area of negligence, indicate a judicial climate which would be amenable to the novel SCP model introduced above. While discussion in this area has tended to focus on issues surrounding the limits of personal injury, it is submitted that it is the strong psycho-social elements in each of the examples mentioned that makes these cases unique, not the fact that they appear under the umbrella of physical injury. Thus, the fact that SCP concerns issues relating to property should not diminish the wider impact of these cases. As Witting has noted, for example:

developments [in the actionable damage context] appear to have shifted attention away from the examination of actual changes in physical structures or states of persons or property and towards a more context-specific inquiry into social perceptions of damage.<sup>33</sup>

Areas which have received recent academic and judicial challenge can be seen in wrongful conception and educational negligence. It will be recalled from the previous chapter on vulnerability that courts have accepted educational negligence claims despite the complexities surrounding the physical aetiology of conditions such as dyslexia.<sup>34</sup> Discussion

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<sup>32</sup> Donal Nolan, 'New Forms of Damage in Negligence,' (2007) 70(1) *Modern Law Review* 59, 59 and Witting, 'Physical Damage in Negligence' (2002) 61 *Cambridge Law Journal* 189, 190.

<sup>33</sup> Witting, 'Physical Damage in Negligence' (n32) 190.

<sup>34</sup> See discussion in Chapter 2.4(a).

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will therefore transfer to wrongful conception.<sup>35</sup> This section will not address whether the ultimate decisions reached were correct. What is important for the purposes of this section, however, is how these cases have been subsequently interpreted by various tort scholars and the parallels that can be drawn with the SCP model. After some debate, it has been accepted that wrongful conception can constitute a form of personal injury, however, as Conaghan and Prialux highlight, there is a strong relational<sup>36</sup> and psycho-social element<sup>37</sup> to these claims, which cannot be denied, but for which negligence jurisprudence lacks an appropriate language.<sup>38</sup> Hence, as Prialux has argued, wrongful conception cases offer one of the strongest examples of the damage hybrid category and one that is now deeply challenging our orthodox notions of damage.<sup>39</sup>

Nolan too has recognised the inherently difficult nature of these claims as centring around the subjective nature of viewing pregnancy as a form of damage.<sup>40</sup> What matters, he argues, is not what some (or even most) women think, as the question is not whether pregnancy is damage *in general*, but whether it is damage *to the particular claimant*.<sup>41</sup> This subjective element is also important in the veterinary negligence context. It will be recalled that it will inevitably be the owner's subjective interest in the relationship with her animal which will form the principal aspect of the claim. It will not be the case that every owner will view their animal as being constitutive to their own self-being, however, where this is the case, tort

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<sup>35</sup> See for example: *McFarlane v. Tayside Health Board* [2000] 2 AC 59; *Parkinson v. St. James and Seacroft University Hospital NHS Trust* [2001] 3 All ER 97; *Rees v. Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309.

<sup>36</sup> Conaghan, 'Tort Law and Feminist Critique' (n10) 192.

<sup>37</sup> Prialux, 'Humanising Negligence' (n14) 186.

<sup>38</sup> In this regard, for example, Prialux states that 'the pregnant woman's body is no longer her own; it labours now for another— she is not one person but two— mother and foetus— and society may expect, even demand, that her freedom is curtailed in the interests of the foetus.' See: Nicolette Prialux, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge Cavendish 2007) 15.

<sup>39</sup> *ibid* 187.

<sup>40</sup> Nolan, 'New Forms of Damage,' (n32) 74.

<sup>41</sup> *ibid*.

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ought to protect this interest. Again, what is important here is that in accepting wrongful conception as a form of actionable damage, the courts have shown themselves willing to accept claims which possess an inherently relational element to them. And though it may be overly zealous at this point to agree with Nolan that expansion of these categories into the realm of actionable damage ‘should be welcomed as evidence that courts are not privileging interests’ which are easily discerned in pecuniary terms over those which are not, what it does indicate is ‘quite a significant shift away from a strict conception of damage...towards a broader conception of harm that is more capable of accommodating critical aspects of our humanity.’<sup>42</sup>

#### b) *Property Damage: Entering New Grounds*

Though it appears that innovation regarding what constitutes actionable damage is occurring, it is acknowledged that these changes have largely occurred in the personal injury context; issues surrounding property damage remain largely under-analysed. The purpose of this section is to highlight two examples— *Attia v British Gas*<sup>43</sup> and *Yearworth and others v North Bristol NHS Trust*<sup>44</sup> — which stretch the boundaries of damage in the context of property. In both of these cases, similar to the SCP model advanced in this chapter, the claimant’s claim was rooted in property, but the psycho-social element was really the essence of the damage suffered. In this way, then, these claims mirror the hybrid damage claims discussed by Priaulx, however, the orthodox grounding of the claim lies in property damage, as opposed to personal injury. It is argued that these cases reflect a more flexible approach to the damage inquiry as it relates to property damage and represents a ‘sensitive,

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<sup>42</sup> Priaulx, ‘Humanising Negligence’ (n14) 186.

<sup>43</sup> [1988] QB 304.

<sup>44</sup> [2010] QB 1.

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evolutionary reworking of precedential rules and decisions so as to better account for current realities,<sup>45</sup> which is necessary if the SCP model is to be accepted in its current formulation.

Having said that, what does become apparent in these decisions is the comment made previously by Conaghan that tort lacks a language suitable to deal with harms which possess an inherently relational element. This is perhaps most clearly seen in the recent decision of *Holdich v. Lothian Health Board*,<sup>46</sup> also discussed below. It is submitted that all three cases considered represent damage of a very intimate and personal nature, which, in the cases of *Attia* and *Yeaworth*, is then not fully addressed because the focus is instead placed either on orthodox notions of property and property damage, as opposed to the relational element of property. So, though I would argue the psycho-social element played an important role in these decisions, this was done largely on a tacit basis. In the case of *Holdich*, an “uneasiness”<sup>47</sup> about the doctrinal uncertainty of developing the concept of property to describe the relational interest held by the pursuer resulted in a decision which could have advanced the concept of property damage in this area, but for now, seems to have maintained the status quo, which supports the point that sperm can constitute property damage, but without going further.

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<sup>45</sup> West, *Caring for Justice* (n6) 61-62.

<sup>46</sup> 2014 SLT 495.

<sup>47</sup> James Lee, ‘*Yearworth v North Bristol NHS Trust*: Instrumentalism and Fictions in Property Law’ in E. Waring, S. Douglas and R. Hickey (eds.), *Landmark Cases in Property Law* (Hart 2014) 43.

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#### *i. Attia v British Gas*<sup>48</sup>

In this instance, the claimant had employed the defendant company to install central heating in her home. At some point during the installation, the defendants negligently caused a fire to start, which then destroyed a substantial portion of the claimant's home and personal effects. The claimant witnessed the fire as it engulfed her home for some four hours before fire crews were able to extinguish it. As a result, the claimant claimed to have suffered psychiatric illness. The Court of Appeal in this case refused to strike out the claim.

What is important for these purposes is the judgment offered by Bingham LJ. In asking himself whether to dismiss the claimant's claim or proceed with the knowledge that this area would be breaking new ground, Bingham LJ sided with evolution.<sup>49</sup> To his mind, erecting a boundary line which forbade recovery for psychiatric harm following property damage would, in principle, be arbitrary and, ultimately, unsupportable.<sup>50</sup> Imagining further instances where foreseeable psychiatric harm could follow property damage, Bingham LJ cited the scholar who, before his eyes, witnesses the destruction of his life's work at the hands of the careless defendant, or the householder who returns home to find her cherished possessions destroyed by the carelessness of an intruder.<sup>51</sup> It is submitted that these are all instances where it could be argued that the property is in some way constitutive or bound up with the claimant's self-hood, so that when the property is damaged or destroyed, the owner suffers

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<sup>48</sup> [1988] QB 304. See also decision by the NSW Court of Appeal in *Campelltown CC v. Mackay* (1989) 15 NSWLR 501 cited by James Lee, 'The Fertile Imagination of the Common Law: *Yearworth v. North Bristol NHS Trust*,' (2009) 17 Torts Law Journal 130, 138. Here, it was conceded that the destruction of a couple's "dream home" could sound in damages for psychiatric harm resulting from damage to property.

<sup>49</sup> [1988] QB 304, 320.

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.* A further example could be the laptop containing one's doctoral thesis.

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damage which, unlike the property itself, cannot be easily translated into monetary terms.<sup>52</sup> Indeed, as it has been argued above, the same would ring true in instances involving veterinary negligence where the relationship between owner and animal has been negligently severed and the relationship could be characterised as constitutive. Arguably, the relationship between owner and animal is no different than the examples discussed here; if anything, the relationship would be considerably stronger as SCP is also able to reciprocate feelings and actively participate in the relationship.

From a doctrinal position, *Attia* is admittedly a somewhat difficult case. Again, it is argued that this is the case not because of the decision that was ultimately rendered, but because it shows the inadequacy of the judicial language to articulate the harm where the damage sustained is a mixture between orthodox notions of damage (here, property) and psychiatric harm, and then how that damage affects the duty analysis. With that in mind, Witting has interpreted the decision to mean essentially that in *Attia* the ‘damage to her home ostensibly made her a ‘primary’ rather than a ‘secondary’ victim.’<sup>53</sup> This point is highlighted by the court when it indicated that the claimant was said to have been ‘closely and directly affected’ by their [the defendants’] actions.’<sup>54</sup> Nolan,<sup>55</sup> however, takes issue with this decision in the sense that it was delivered prior to the seminal decision in *Alcock*,<sup>56</sup> which outlined a strict distinction between primary and secondary victims for the purposes of the duty of care

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<sup>52</sup> Radin, ‘Reconsidering Personhood’(n18) 427-429. Interestingly, in describing relationships which could be characterised on the far end of the continuum (ie. strongly constitutive), Radin makes reference to the home and personal papers. See further discussion of this point in section 3.5(c)(i). She further cites from the decision in *Entick v. Carrington* [1765] EWHC KB J98, that ‘papers are the owner’s goods; they are his dearest property...where private papers are removed...,the secret nature of those goods will be an aggravation of the trespass.’

<sup>53</sup> Christian Witting, ‘Distinguishing Between Property Damage and Pure Economic Loss in Negligence: A Personality Thesis,’ (2001) 21 Legal Studies 481.

<sup>54</sup> [1988] QB 304, 318.

<sup>55</sup> Donal Nolan, ‘Psychiatric Injury at the Crossroads,’ (2004) Journal of Personal Injury Law 1, 13.

<sup>56</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.



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analysis.<sup>57</sup> Debating the issues between the adequacy of the primary and secondary victim distinction has been extensively covered by other academic commentary. What is important for present purposes is that perhaps some mileage can be made in better understanding the nature of “damage hybrid” claims. *Attia* is important for present purposes as it does stand for the premise that psychiatric harm can follow the destruction of property, however, had it been argued in a way similar to the SCP model (ie that emotional harm is consequential to the property damage), the thorny debate surrounding the applicability of *Alcock* to the precedential value of this case could have been avoided.

#### ii. *Yearworth and others v North Bristol NHS Trust*<sup>58</sup>

*Yearworth*, like *Attia*, is a rather complex case and though it has generated a large amount of academic debate,<sup>59</sup> its precedential value is somewhat uncertain. Thus, for present purposes, the decision will be utilised for one very specific purpose: to show the courts acting creatively in defining property. Of course, it should also be noted that the case was ultimately decided on principles of bailment,<sup>60</sup> as opposed to negligence; however, I would argue, following Hawes,<sup>61</sup> that the decision could have been reasoned on negligence

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<sup>57</sup> It was then Nolan’s argument that it would be difficult to say on one hand that a claimant could recover for psychiatric harm as a result of watching her home being destroyed, whilst a secondary victim under *Alcock* could not recover after witnessing the death of a close relative. See: Nolan, ‘Psychiatric Injury at the Crossroads’ (n55) 13.

<sup>58</sup> [2010] QB 1.

<sup>59</sup> See in particular: James Lee, ‘The Fertile Imagination of the Common Law: *Yearworth v. North Bristol NHS Trust*,’ (2009) 17 Torts Law Journal 130 and, more recently, James Lee, ‘*Yearworth v North Bristol NHS Trust*: Instrumentalism and Fictions in Property Law’ in E. Waring, S. Douglas and R. Hickey (eds.), *Landmark Cases in Property Law* (Hart 2014). See also: Shawn H.E. Harmon and Graeme T. Laurie, ‘*Yearworth v North Bristol NHS Trust*: Property, Principles, Precedents and Paradigms,’ (2010) 69(3) Cambridge Law Journal 476 and Shawn H.E. Harmon, ‘*Yearworth v. North Bristol NHS Trust*: A Property Case of Uncertain Significance?’ (2010) 13 Med Health Care and Philos 343.

<sup>60</sup> The topic of bailment will not be considered in this thesis. Though it does present an interesting argument, it is submitted that, at best, bailment would only achieve half of what this thesis aims to do. Importantly, arguing a claim against a veterinarian in bailment would relegate the position of the animal patient to a mere thing. Essentially, we lose the argument that animals should be treated as something more than a fungible item.

<sup>61</sup> Cynthia Hawes, ‘Property Interests in Body Parts: *Yearworth v. North Bristol NHS Trust*’ (2010) 73 Modern Law Review 130.

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principles. It also should be stated that, although I would argue the court was not wrong to conclude proprietary rights could be held in this instance, much more needed to be done to explain the nature of those rights and the scope of the interest created.

The claim itself involved several men who, as part of their cancer treatment, undertook chemotherapy. They were advised by medical staff that their treatment may render them infertile and were informed of the opportunity to store samples of their sperm. The Trust negligently maintained the freezing unit used to store the sperm and the samples were destroyed. The men brought claims in negligence, claiming personal injury or property damage. Also brought were claims for the emotional/psychiatric harm sustained over the loss of their sperm and the fear that they may be unable to conceive. For present purposes, what is important is that the court declared that the sperm was capable of being property and second, the facts quite obviously reveal a secondary harm which is of a very intimate and personal nature.<sup>62</sup>

To again cite Priaulx, she views the decision in *Yearworth* as an example of ‘legal inventiveness where the factual variants had failed to squarely fit ‘orthodox conceptions’ of...damage’<sup>63</sup>— in essence, a damage hybrid claim. However, it is submitted that though the court was willing to extend itself in a limited way to hold that sperm could be considered property, it lacked a willingness to tackle the whole problem and fully address the issues surrounding the nexus between property damage and psychiatric harm. What is left, then, is a complex, unresolved question as to the meaning and extent of property in modern negligence. So, though there does seem to be recognition for the point that the idea of

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<sup>62</sup> [2010] QB 1, 21.

<sup>63</sup> Priaulx, ‘Humanising Negligence’ (n14) 186.

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property is something which is continuously changing and evolving to match society's needs,<sup>64</sup> which mirrors Powell's argument at the beginning of this section, and can give a sense of 'coherence and cohesion to our relationship between each other and between us and things,'<sup>65</sup> our current legal language is unable to fully accommodate and develop these realisations. Therefore, though the decision in *Yearworth* was inventive and shows a judicial creativity which helps give force to the argument that the SCP model could be successfully argued, ultimately, the larger argument that advances in our language as it relates to property conceptions and paradigms needs to be addressed in a more holistic manner, remains.

#### iii. *Holdich v. Lothian Health Board*<sup>66</sup>

The argument that more needs to be done to develop the language of relational harms, in particular those relating to property, can be clearly seen in the case of *Holdich*. The facts and claims brought by the pursuer in this case bear a close similarity to that of *Yearworth*. Here, the pursuer was diagnosed with testicular cancer at the young age of twenty-two. Prior to undergoing treatment he was advised to, and later did, deposit three samples of his sperm with the defenders 'to preserve his chances of becoming a father.'<sup>67</sup> When the pursuer later married and wanted to start a family, he was informed that there had been a malfunction in the cooling system used to freeze his sperm. As a result, there was a risk the samples had become damaged. This meant there was an increased risk of chromosomal abnormalities, birth defects, and miscarriages. The pursuer brought several claims all on the Scottish equivalent to those argued in *Yearworth*. The focus of this discussion will therefore concentrate on the claim brought in delict.

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<sup>64</sup> Harmon and Laurie, 'Property, Principles, Precedents and Paradigms' (n59) 480.

<sup>65</sup> Lee, 'Instrumentalism and Fictions in Property Law' (n59) 48.

<sup>66</sup> [2014] SLT 495.

<sup>67</sup> *ibid* 498.

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Following the direction of *Yearworth*, one of the pursuer's claims in delict was framed in terms of property damage, plus consequential emotional harm. In this regard, Lord Stewart came to the conclusion that settled law now indicated that damages for mental injury could be claimed in three potential situations. For present purposes, the third option is salient. Here, the pursuer could claim 'in a range of situations involving mental injury consequent on wrongful harm to the claimant other than bodily injury, the underlying principle being pre-existing legal proximity.'<sup>68</sup> However, according to Lord Stewart, although the pursuer's claim in this regard was framed in terms of property, no value was attributed to the sperm and the sperm itself was not actually destroyed so, arguably, no property damage was sustained in the first place.<sup>69</sup> Instead, it was reasoned that the wrongful harm suffered was to the pursuer's 'procreative autonomy.'<sup>70</sup>

In terms of what this contributes to the discussion on damage to sentient constitutive property, it is unfortunate that a value was not attributed to the sperm in argument before the court. In a separate part of the judgment, Lord Stewart states that 'I do not say that biomatter cannot be property...I can see no private law objection to treating stored sperm as property,'<sup>71</sup> so the willingness to innovate is arguably present. Further, there is nothing to say that wrongful harm in Lord Stewart's third categorisation could not be property damage. Had the sperm been attributed a market value,<sup>72</sup> it seemed that the court would have been

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<sup>68</sup> *ibid* 517.

<sup>69</sup> [2014] SLT 495, 517.

<sup>70</sup> *ibid*. In this way, the claim starts to resemble the decision in *Rees v. Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, however, this does not resolve the definitional complexities faced in this claim.

<sup>71</sup> *ibid* 508.

<sup>72</sup> *ibid* 517. This has been done in the past in the Canadian case of *JCM v ANA* 2012 BCSC 584, cited by Lord Stewart in *Holdich*. In JCM, sperm was capable of being the property of two women in a same-sex relationship. At the time the couple purchased the samples, they paid \$250. On dissolution of the relationship, the court

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prepared to find the damage sustained to the sperm was capable of constituting property damage. This reasoning, however, was then qualified where it was stated that ‘the broader question remains whether it is doctrinally correct, or indeed a useful exercise, to classify stored sperm as “property” even in the minimalist, *Yearworth* sense.’<sup>73</sup> In response to this, it is submitted that developing notions of property whether in sperm or, for the purposes of this thesis, animal ownership, is a doctrinally important exercise. The common law is not static and unchanging, but rather evolutionary. In this instance, insights into evolving perceptions of property damage could have made a significant contribution to developing a discourse around relational elements of property. On this last point, it is also helpful to recall Nolan’s argument, above, recognising the subjective element of damage.<sup>74</sup> Arguably, then, it is a useful exercise to challenge the doctrinal barriers where the claimant argues she has been damaged. In any case, the finding that all claims could be put to proof means that the door is still open to innovate further in this area.<sup>75</sup>

#### c) *Actionable Damage: Reflections on Current Trends and Looking Toward the Sentient Constitutive Property Model*

Based on the above discussion although at one stage in negligence scholarship the concept of actionable damage had been largely forgotten or ignored,<sup>76</sup> it would seem that more recently this has started to change. Strong challenges to orthodox principles have caused courts and scholars to reflect on the changing character of the actionable damage inquiry. Though the road to discovery has been and continues to be a difficult one, what should certainly be

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divided the sperm straws between the parties and JCM was instructed to pay ANA \$125 for the additional half straw she received.

<sup>73</sup> *ibid* 507-508.

<sup>74</sup> See discussion in section 3.3(a).

<sup>75</sup> Indeed, even the point that the court was willing to accept procreative autonomy as a form of damage indicates a general willingness to innovate in the area of actionable damage.

<sup>76</sup> On this point see: Nolan, ‘New Forms of Damage’ (n32) 59-60.

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praised are judicial attempts to tackle these novel problems presented. With regards to the SCP model discussed throughout this chapter, the challenges made in the actionable damage segment of the negligence inquiry signal a legal climate which would be amenable to the legal and normative arguments made.

As a concluding thought, it is submitted that what unifies these theories, concepts, and cases is that the damage is “bound up”<sup>77</sup> with the claimant. Arguably, this is similar to the argument made regarding constitutiveness and the psycho-social element discussed by Priaulx. The constitutive element was introduced into the SCP model to describe the intimacy and importance of the relationship shared between owner and animal and how, even though the animal is still viewed as property, the distinction between owner and animal, subject and object is blurred, if not totally obscured. This idea of the damage being “bound up” could also be made for the wrongful conception claims, and I would argue too for *Attia*, *Yearworth*, and *Holdich*. As society starts re-defining the concept of property and the effects it can have in our lives, a more expansive definition and language, including a representation of the emotional attachments we form with some of our property ought to be recognised.

Ultimately, though, it must be remembered the limits of what actionable damage can achieve in the context of veterinary negligence claims. With regards to SCP, much depends on the construction and particularisation of the duty of care to both ensure the integrity of SCP model is maintained and also to provide adequate protections for both human and animal interests. As the next section will highlight, SCP is not the first model to contemplate an elevated property status for animals. It will be argued, however, that for various reasons

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<sup>77</sup> Radin, ‘Reconsidering Personhood’ (n19) 427.

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discussed below, the authors of these property paradigms fail to consider or clearly delineate the aims of their respective models. Further, the conditions they impose at what would be the damage stage arbitrarily restrict the class of potential claimants. This leads to a level of incoherence which ultimately prevents their full application in negligence, and also perhaps more broadly across other fields of law. Recalling the aims of this thesis, namely to provide veterinarians with guidance as to their liabilities and obligations arising in negligence and advocating the best interests of the animal patient within this relationship, it will be argued that the SCP model, unlike other models discussed below, represents the best way forward.

#### 3.4 Other Paradigmatic Property Models

Within the last ten years, a number of models have been put forward arguing that companion animals should not be given full personhood status, but rather an intermediate or elevated property status.<sup>78</sup> This section will address two models which represent detailed arguments on the subject, however, it will be argued that even these theories lack sufficient doctrinal content. The first model considered advocates for the idea of sentient property, which can be applied in a range of legal areas.<sup>79</sup> The second advances an argument centred on a companion-based property model and is particularly important as the author specifically contemplates application within the tort context and argues that companion animals fitting

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<sup>78</sup> See for example: Mary Margaret McEachern Nunalee, and Robert G. Weedon, 'Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine,' 10 Animal Law 125, 130. Here, the authors briefly discuss in a footnote the possibility of changing companion animals' status to 'companion constitutive chattel,' but do not expand on its parameters or application. Many others have proposed valuing damage to companion animals differently than other property, but do not discuss a change to their property status. See for example: William Root, 'Man's Best Friend: Property or Family Member- An Examination of the Legal Classification of Companion Animals and Its Impact of Damages Recoverable for Their Wrongful Death or Injury,' (2002) 47(2) Villanova Law Review 423 and Debra Squires-Lee, 'In Defense of Floyd: Appropriately Valuing Companion Animals in Tort,' (1995) 70 N.Y.U. L. Rev. 1059. For the point that animals could retain their property status but also obtain rights, see: David Favre, 'Living Property: A New Status for Animals within the Legal System,' (2010) 93(3) Marq. L. Rev. 1021.

<sup>79</sup> Carolyn B. Matlack, *We've Got Feelings Too: Presenting the Sentient Property Solution* (Log Cabin Press 2006) xiv.

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within her paradigm are best conceived of as belonging to a separate legal category.<sup>80</sup> The models chosen represent the prevailing sentiment in animal law discourse which considers the concept of elevated property, however, it will be argued that for various reasons, some of which are directly related to the intricacies of a negligence claim and others related to the obvious privileging of companion animals, these models are deficient.

#### a) *Sentient Property*

##### i. *The Sentient Property Framework*

In her book, which focuses on companion animals, Matlack advocates for a model that centres on a two-part test.<sup>81</sup> The first part, a threshold test, seeks to establish the strength of the bond between owner and animal. The test itself looks at questions relating to the duration and continuity of the relationship, special needs of the owner, regular veterinary visits, medical evidence that the owner suffered emotional distress as a result of an act(s) of cruelty or inhumane treatment toward the animal, and others.<sup>82</sup> Looking at some of the questions that the court can consider in making its initial decision, there are quite obviously some questions which possess a strong relational quality. For example, a record of regular veterinary visits indicates an owner who is attentive and cares for the health and welfare interests of her animal. The fact that Matlack does include elements highlighting the relational aspect between the owner and animal is a point deserving of praise and one which will be developed in the sentient constitutive property model discussed below. Importantly, the threshold test also appears to contain elements which consider the emotional welfare of

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<sup>80</sup> Susan J. Hankin, 'Not a Living Room Sofa: Changing the Legal Status of Companion Animals,' (2007) 4(2) Rutgers Journal of Law and Policy 314, 380.

<sup>81</sup> Matlack, *We've Got Feelings Too: Presenting the Sentient Property Solution* (n79) 88-89.

<sup>82</sup> *ibid* 88.



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the animal beyond the necessities of life (for example, food and water) and take into account the animal's individual feelings. In particular, one of the questions that Matlack puts forward for the court to consider are any 'unique behavioural characteristics or special needs of the animal.'<sup>83</sup>

Once the court determines that the bond between animal and owner is sufficiently strong and meets the threshold requirements, the animal is deemed sentient property and the second stage of the test, namely a substituted judgment assessment, can occur. It is further stated by Matlack that the sentient property model could be applied in instances where: the owner needs to redress a harm that has caused pain and suffering or emotional distress *to the animal*, or where the same has happened to the owner as a result of loss or harm sustained by the animal.<sup>84</sup>

#### ii. *Potential Problems with the Sentient Property Model*

Matlack's model does advance several important arguments such as aspects of relationality and the concept of elevated property, however, problems arise when the model is analysed more closely. The first issue turns on her use of the word 'sentient' to describe those animals capable of being considered sentient property. Matlack does not explicitly define the word "sentient," yet, she *only* contemplates those animals that are warm-blooded, domesticated, non-human, dependent on one or more humans for necessities of life, and kept in or near the household.<sup>85</sup> She also explicitly excludes animals kept for farming or those regulated by the

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<sup>83</sup> Matlack (n 79) 88.

<sup>84</sup> *ibid* 89.

<sup>85</sup> *ibid* 72.

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US federal Animal Welfare Act;<sup>86</sup> hence, it is likely only those animals which have traditionally been conceptualised as companions, such as dogs and cats that will qualify.<sup>87</sup> From this, it can be concluded that Matlack does not base her concept of sentience on scientific understandings. If she had, then she would necessarily have to include animals used for agricultural purposes and those animals which straddle the divide between traditionally conceived ideas of agricultural and companion animals (ie. horses). The problem with this definition, I argue, is simply that there are quite obviously animals that have been deemed to be sentient, which are not accounted for in her model. In sum, Matlack's model as it is conceived is far too limiting. This goes deeper than a semantic debate over the meaning of the word sentience. Though Matlack does include relational elements in her construction, which is to be commended, excluding certain animals from the debate for unjustifiable reasons leads to favouritism of certain animals over others and, ultimately, incoherence.<sup>88</sup> I argue that if Matlack wishes to limit her model to those animals which would by definition be considered "companion animals," then her model should more clearly reflect this distinction and its implications. The fact, for example, that current veterinary negligence case law only considers horses, it is particularly important that boundaries which divide claimable and un-claimable harm are explicitly considered and justified.

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<sup>86</sup> Animal Welfare Act 1966.

<sup>87</sup> Matlack (n79) 72 and see: Animal Welfare Act 1966 §2132(g)(2)(3).

<sup>88</sup> For examples in the literature which address the issue of preferential treatment for companion animals, see: Elizabeth Ann Overcash, 'Unwarranted Discrepancies in the Advancement of Animal Law: The Growing Disparity in Protection Between Companion Animals and Agricultural Animals,' (2012) 90 N.C.L. Rev. 837; Heidi J. Nast, 'Critical Pet Studies?' (2006) 38(5) Antipode 894; Maneesha Deckha, 'Property on the Borderline: A Comparative Analysis of the Legal Status of Animals in Canada and the United States,' (2012) 20(2) Cardozo Journal of International and Comparative Law 313; Peter Sandøe and Stine B. Christiansen, *Ethics of Animal Use* (Wiley-Blackwell 2008) 5; Anca Gheaus, 'The Role of Love in Animal Ethics,' (2012) 27(3) Hypatia 583.

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On a more theoretical level, it is difficult to determine under what circumstances Matlack believes her model can be applied. In her monograph, she uses the example of a custody case involving the placement of a family dog. Whether, then, her model could be applied for the purposes of a veterinary negligence claim is somewhat uncertain. Above, it is noted that Matlack envisions the application of her model in situations where, for example, the owner has sustained a harm (ie. emotional distress) as a result of harm occasioned to the animal. This would seem to encompass instances of veterinary negligence. However, the combination of *ex ante* and *ex post* considerations when considering the harm suffered by the claimant, the particular use of the threshold test to objectively determine the strength of the relationship, and, later, the use of the substituted judgment standard do not fit easily into notions of actionable damage or a negligence claim as a whole.

One of the primary issues that arises in this model is the use of the substituted judgment standard. It is submitted that for the purposes of a veterinary negligence claim, the two do not work harmoniously with one another. Briefly, according to Beauchamp and Childress, substituted judgment has traditionally been used in medical contexts and revolves around:

...the premise that decisions about treatment properly belong to the incompetent or nonautonomous patient, by virtue of his or her rights of autonomy and privacy...[the standard] requires the surrogate decision maker...to make the decision the incompetent person would have made if competent.<sup>89</sup>

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<sup>89</sup> Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (7th ed., OUP 2013) 227.

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In the animal context, however, McMullen accurately states that as regards the substituted judgment standard, ‘it would be hard to imagine what an animal would choose if it were autonomous.’<sup>90</sup> The act, of trying to put ourselves in the shoes of our animal and make for them the choice they would make if autonomous, I argue, would be exceedingly difficult given that animals are exclusively dependent on their owner from the very beginning of the relationship. Further, unlike the best interests model discussed later, the substitutive judgment standard provides a greater opportunity to allow personal judgments and desires to be imprinted on the animal and to cloud the decision-making process, which should remain focused on the animal. Further, substituted judgment is best characterised as a decision taken to *prevent* a harm (ie. ‘what would the patient want in this circumstance?’<sup>91</sup>), whilst a claim in negligence is one which necessarily looks to redress a *past* harm; thus, the focus of the question does not lend itself the temporal qualities of a negligence claim. Putting the pieces together, the question for the court becomes: ‘would *the animal* have chosen ‘x’ treatment in ‘y’ circumstance(s)?’ It is submitted that, ultimately, this would prove too conceptually difficult a task for the courts to undertake and one which would raise the wrong issues in the negligence context. It would appear, then, that the only situation under which such a model could perhaps be successfully applied is a claim in the specific area her monograph contemplates, namely custody disputes where one party is attempting to gain custody of the animal in question; however, even this is contentious. Importantly, Matlack, does not appear to limit her model to these confines and does envision a broader scope for its application, though how far beyond the sphere of custody matters is never fully addressed.

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<sup>90</sup> Siobhan McMullen, ‘The Role of Autonomy in Ethical Decision-Making in Veterinary and Medical Practice,’ (2006) 10(1) Animal Welfare Science, Ethics and Law Veterinary Association 7, 10.

<sup>91</sup> Beauchamp and Childress (n89) 227.

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#### *iii. Concluding Thoughts on Sentient Property Paradigm*

Matlack's model, though interesting in premise and strongly relational, does not fit well into the requirements and inner workings of a negligence claim. Despite the author's claims that her model could be applied in a range of legal circumstances, it was arguably not intended to be applied in negligence. The primary problem with Matlack's model is its ambiguity. It is uncertain, for example, under what circumstances her model is to apply; its scope appears quite far-reaching, but in reality may only work in a very restricted context. Moreover, her attempt to limit the class of animals to only those that would be considered companion animals that live geographically close to the home not only serves to draw incoherent lines between companion animals that live far or close to the home, but also between animals that meet scientific definitions of sentience (ie. cows, sheep, etc.), but fail to qualify under Matlack's definition.

#### *b) Companion Animal Property*

##### *i. Framework and Application*

Consideration of Hankin's companion animal property model is enticing as she considers both the tort context and the effects that her changes could have on the veterinary profession. In essence, Hankin's model is quite basic. She advocates for an elevated property status for some companion animals, in particular dogs and cats.<sup>92</sup> It is argued by Hankin that evidence separating dogs and cats from other animals can be found in the great amount of money and

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<sup>92</sup> Hankin (n80) 386.

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concern we show toward these types of animal.<sup>93</sup> In this way, then, Hankin attempts to separate herself from others who argue an elevated property paradigm for animals by openly and severely curtailing the animals that could benefit from this model. In the tort context, Hankin envisions that damage awards would be increased in recognition of the bond shared between owner and animal. To implement these changes, it is argued that legislation, as opposed to the common law, which is advocated in this thesis and Matlack's model, ought to be implemented.<sup>94</sup> In this regard, a worthwhile observation is made, namely that judges may feel confined by precedent to deny changing the legal status of animals. As this thesis argues, however, one of the common law's greatest strengths is its ability to evolve and reflect changing social sentiment. Further, whilst it should not be expected that the judiciary accept arguments that fundamentally challenge anthropocentrism, positive change for animals can occur without adopting a change in their legal status; indeed, this is what SCP sets out to achieve, but on a much broader scale than Hankin envisions.

#### *ii. Potential Problems with the Companion Animal Property Model*

Throughout Hankin's piece she states that the overarching drive behind the creation of this new model is to enhance coherence<sup>95</sup> and consistency<sup>96</sup> in the law as it relates to the human-animal bond. The question, however, remains as to whether the companion property model fulfils its mandate. It is submitted that Hankin's model ultimately falls foul of the coherent model she endeavoured to create.

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<sup>93</sup> *ibid* 377. Explaining the human-animal bond in this way follows analogies made between children and animals (ie. "furry children"). This is only one way to explain the bond that can be shared between owner and animal and is, arguably, rather myopic.

<sup>94</sup> *ibid* 379. Hankin, however, does not go into detail about what this form of legislation would like, simply that it should recognise her definition of companion animals as a "distinct legal category."

<sup>95</sup> *ibid* 404.

<sup>96</sup> *ibid* 376, 380, 399 and 410.

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First, similar to Matlack's model discussed previously, Hankin restricts her elevated property model to a very specific type of companion animal, namely dogs and cats. Though adequately delineating the confines of any novel legal idea, especially those in the negligence context is important for fear that a floodgates or compensation culture argument could be used to destroy its development, such confines ought to meet with standards of reasonableness and logic. Hankin's model, however, requires an arbitrary line to be drawn, relegating those animals (ie. horses, rabbits, sheep, arguably any domesticated animal) which are not dogs or cats to the status of fungible property.<sup>97</sup> This privileging of certain animals over others is to some extent recognised by the author when she states that such a theory 'could admittedly create additional distinctions both between and within animal species,'<sup>98</sup> however, her reason that essentially things are what they are, is overly complacent.<sup>99</sup> There is arguably no reason to limit her model to a narrowly-defined concept of animal companion. The sentient constitutive property paradigm discussed below will similarly possess limitations, however, I argue that a concept which appears to promote a form of favouritism (similar to Matlack's discussed above), lacks a deeper understanding of the roles domesticated animals can play in the lives of humans.<sup>100</sup> This also appears to go against Hankin's model itself, which locates the bond between owner and animal in the animal's dependence on its human owners and its ability to suffer.<sup>101</sup> Quite simply, many animals

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<sup>97</sup> Hankin does appear to concede that the definition could at some point be expanded to animals such as ferrets and hamsters, but offers only a very minimal description of when such departures may be warranted. It would appear that such extensions could only be made if evidence of a sufficiently strong bond was present between owner and animal and the animal lived in close physical proximity to the owner. In this way, then, there seems to be little differentiating Hankin's model with Matlack's discussed earlier.

<sup>98</sup> Hankin (n80) 391.

<sup>99</sup> *ibid.*

<sup>100</sup> This is not to say that it is only domestic animals that can impact humans' lives. Animals deemed wild can have a profound impact on the lives of humans; however, for the purposes of this thesis, only those animals capable of being owned will be contemplated. This is also not to say that wild animals are not entitled to legal protections, simply that as this thesis deals with the private law interests of property and emotional wellbeing, discussion will be restricted to reflect this.

<sup>101</sup> Hankin (n80) 377-378.

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which are not cats and dogs meet this description, however, Hankin does not account in a reasoned way for why they ought to be excluded.

Following from this, Hankin also appears to make the assumption that all owners of companion animals exhibit the qualities which she argues should translate to greater protection under the law. The reality of the matter is that the human-companion bond is not always like the idealised family unit Hankin envisions.<sup>102</sup> Indeed, Corr notes that ‘people’s relationships with their pets differ.’<sup>103</sup> Some are treated as family members, whilst others are used to portray a certain image and some are kept merely as possessions, which can be disposed of when the novelty has dissipated or they have become too expensive to keep.<sup>104</sup> Hankin, and those who contemplate an elevated property status for companion animals, routinely fail to take this issue into account. Indeed, this point underscores the ambiguity with which Hankin distinguishes between those relationships deserving of elevated protection under the law and those that do not. Though an owner may have a long-standing, exceedingly close relationship with her horse, under Hankin’s model, this relationship would not be protected, whilst someone who does not share that animal-human bond, but who does own a dog, would be entitled to elevated damages based solely on the fact that the animal is one characterised as “companion.” Thus, Hankin’s model is apt to produce arbitrary results, whilst at the same time restricting the court’s ability to expand and develop the law beyond the words of the legislation. Importantly, the relational element is not explored in sufficient

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<sup>102</sup> The human-companion bond is never explicitly discussed, however, Hankin focuses on increased spending on veterinary care, providing companion animals with birthdays and day care, and taking steps to ensure companion animals are provided for after death (see: Hankin (n80) 377). On the whole, I would argue this is a rather base interpretation of the human-animal bond. Instead, this characterisation, arguably, infantilises the animal and sees the relationship as being important only in so far as it brings some measure of happiness to the owner.

<sup>103</sup> Sandra Corr, ‘Companion Animals’ in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 188, 190.

<sup>104</sup> *ibid.*



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depth, with the result that her framework lacks a developed core. In the end, approving the companion animal property model in the context of a veterinary negligence context runs the risk of bringing the common law in this area into ambiguity.

Lastly, because Hankin explicitly states that her model could be applied in the tort context and that the purpose of her article is to explore the implications of changing companion animals' status on the veterinary profession,<sup>105</sup> it is important to analyse the feasibility of this submission. Unfortunately, as the following analysis will show, some important considerations have been left out by Hankin. First, the holistic nature of the negligence inquiry makes it difficult to analyse any one aspect in isolation. Put a different way, one cannot view the aspect of damage in a vacuum. I would argue this is even more important as the author cites veterinarians as one group which would be most affected if the status of companion animals were to change. From a corrective justice standpoint it is essential that the claimant's interest— here, her proprietary and emotional interest in her companion animal— forms the object of the defendant's duty.<sup>106</sup> In this way, then, the positions of defendant and claimant are strongly relational.<sup>107</sup> There is little doubt that where the damage claimed is a relational one, there will be some level of purposiveness and interpretation needed at the duty stage; indeed, the sentient constitutive property model adopted in this chapter will necessarily require a somewhat more purposive interpretation of the duty of care. However, deeper consideration of the damage-duty relationship as it relates to Hankin's model of companion animal property is quite difficult as her model does not: a) define or

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<sup>105</sup> Hankin (n80) 318.

<sup>106</sup> Ernest J. Weinrib, 'Corrective Justice in a Nutshell,' (2002) 52 U. Toronto L.J. 349, 352-353. Although I reject the ability of corrective justice to explain the entirety of the veterinary relationship, as between the claimant and the defendant, following corrective justice principles, it must still be the case that the claimant's harm and defendant's duty correspond.

<sup>107</sup> *ibid* 351.

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characterise the bond envisioned; and b) fails to take into account the very disparate quality of the relationships people share with the companion animals, as highlighted by Corr and by a government research paper which disclosed that dogs and cats were the two highest categories of animal to suffer abuse.<sup>108</sup>

#### c) *Concluding Thoughts in Sentient Property and Companion Animal Property Models*

In both cases, despite the emphasis placed on the human-animal bond, the focus of the discussion is very firmly owner-centred (ie. animals are *our* children; we spend considerable sums of money on *our* animals, etc.).<sup>109</sup> Unfortunately, this represents only one piece to the puzzle. Additional consideration needed to be paid to the animal's interests within the relationship and how the respective models interact with current legal practices and relationships. This latter point is especially true of Hankin's model, as it specifically contemplates application in tort and potential changes in the construction of the veterinary profession. If it is only the owner that can bring a claim, the authors in the above pieces and those that are closely related needed to address this dichotomy and consider larger order questions which would look to the impact of arguments made on the animal. Also absent is the legal role and obligations of the defendant. In some instances the authors mention veterinarians, yet their work contemplates many potential types of defendant (ie. defendants on the other side of a custody dispute or an equity dispute involving a trust, etc.), without addressing the fact that depending on the legal relationship between owner and defendant, different legal principles will apply and different considerations highlighted. Instead, the authors focus *only* on the role companion animals play in our lives; companion animals are

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<sup>108</sup> Science and Environment Section, *The Animal Welfare Bill* (Research Paper 05/87, 2005) 12.

<sup>109</sup> In one way this could almost be seen as intensifying the objectification of companion animals and the argument that keeping a companion animal is merely another form of instrumental animal "use."

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consistently likened to children and their importance evidenced by large amounts money spent on veterinary care, day care and birthdays. Whether the models created specifically highlight its application in tort or not, it is submitted that an analysis which contemplates a legal change to the status of animals needs to consider important issues beyond an owner-centred relationship.

Though I would agree that our social climate is changing with regards to the importance of animal welfare, I would contend that these models do not provide a workable framework from which to advance those interests successfully. Not all owners of companion animals treat their animals as beloved family members. Further, these models fail to discuss the point that people can share deep connections with animals falling outside the confines of a traditional companion animal definition. As the next section will highlight, the SCP framework recognises the blurring between subject and object, but argues for a more expansive conception in terms of the animals it contemplates. Further, sentient constitutive property also takes into consideration the importance of the relationship between veterinarian and owner by more clearly articulating the nature of the damage suffered by the owner and thus more clearly outlining and setting the stage for the correlative duty that the veterinarian would owe.

#### **3.5 The Sentient Constitutive Property Model**

It will be recalled that the sentient constitutive property model advocated in this thesis is strongly centred in aspects of relationality, but that tort law has been slow to recognise such harms or special “damage hybrid” claims. This section will detail the intricacies of the SCP model initially introduced at the beginning of this chapter and argue that, unlike the models

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discussed previously, the SCP model provides a strong foundation from which to develop veterinary negligence jurisprudence and provide a normative framework for how we conceive of the human-animal bond.

At the outset, it is important to highlight the point that not every animal will meet the threshold contemplated within the SCP model. From the first chapter, it will be recalled that the “type” of animal is irrelevant for the purposes of the damage requirement in a veterinary negligence claim following the SCP model.<sup>110</sup> However, it will be argued (reluctantly) that to operate successfully within current negligence jurisprudence, SCP will have to be restricted to those relationships which would be considered a constitutive relationship. This argument will become more apparent at the constitutive stage of the analysis, but for present purposes, it is important to recognise and acknowledge the limitations of the SCP itself and the actionable damage component more broadly. In particular, as it currently stands, negligence does not recognise the individual interest of a nonhuman animal; thus, it will necessarily be the case that, at least at the damage stage, it will be the owner’s interest that is protected. Further, because the model advocated here is grounded in ideas of constitutiveness and relationality, it will also be the case that those animals bred and raised for *purely* commercial purposes, for example, cows and pigs raised for slaughter, will be unlikely to fit under the SCP model.<sup>111</sup> It is acknowledged that this is not perfect and that advances which would allow the animal’s interests to be considered at the damage stage would be greatly preferred. Having said this, for the limited aims of this thesis, namely to provide veterinarians with guidance on their obligations arising in negligence and to forward the best

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<sup>110</sup> See discussion in Chapter 1.3(a)(i).

<sup>111</sup> This is not to say that the SCP could never be applied in these circumstances. For example, it may be that an animal originally bred for slaughter does form a bond with its owner and is kept when others from the stock are not, however, it is acknowledged that this would be rare as the time necessary for developing the constitutive bond required may not exist.

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interests of animals so far as possible within the veterinary relationship, it is argued that the SCP model provides the best course going forward.

#### a) *Animals' Status as Property: Retaining an Accepted Model*

This thesis does not seek to change the legal status of animals. In terms of satisfying orthodox notions of property damage for the purposes of the actionable damage requirement, Witting states that courts look to deleterious changes in the nature of the property.<sup>112</sup> Further, '[damage to property is] ordinarily manifest in nature, easily perceptible by the human eye.'<sup>113</sup> Available case law discussed in the previous section dealing with the issue of veterinary negligence continues to treat animals as fungible property.<sup>114</sup> Though the pure market value approach to assessing veterinary negligence cases has been rejected, retaining the property status of animals does allow for two important things. First, it allows the application of the constitutive property framework, which will be discussed in the coming sections. Second, it allows the law in this area to develop in an evolutionary fashion, as opposed to radical. As Radford has observed:

In Britain, even if the senior judiciary could be prevailed upon to accept that the capacities of a particular species were such as to justify a change in their legal status, it is highly improbable that the judges would consider it appropriate for they themselves to introduce such a novel principle into the law.<sup>115</sup>

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<sup>112</sup> Christian Witting, 'Physical Damage in Negligence' (n 32), 190.

<sup>113</sup> *ibid.*

<sup>114</sup> See: *Blass v. Randall* [2008] EWHC 1007; *Calver v. Westwood Veterinary Group* [2001] P.I.Q.R. P11, and *Glyn (t/a Priors Farm Equine Veterinary Surgery) v Jane McGarel-Groves, Erik Grandiere, Clinique Veterinaire Equine De Chantilly* [2005] EWHC 1629 and *Glyn (t/a Priors Farm Equine Veterinary Surgery) v McGarel-Groves* [2006] EWCA Civ 998.

<sup>115</sup> Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (OUP 2001) 104.

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In keeping with this, then, a model which retains the status quo in certain areas, but challenges it others, arguably presents a middle ground approach and the strongest way forward. Having said this, it is also important to emphasise that just as the forthcoming sections on sentience and the nature of the constitutive relationship will highlight the relational element, the property element, for the purposes of a veterinary negligence claim, also embraces a strongly relational quality. To this end, a more modern understanding of property which insists upon a relational dimension is advocated.<sup>116</sup> Following Davies, ‘property is not just about individuals exercising control over external things and (therefore) over others. Rather, property concerns individuals and communities: how they are formed, how they live together...’<sup>117</sup> I would extend this argument further to reflect the unique nature of the relationship that can be formed with sentient constitutive property and that a more nuanced approach, including looking at the animal as more than a mere “thing,” must therefore be adopted.

#### b) *Sentience*

Sentience has been broadly defined as the ability to feel pain and to suffer. These attributes have been behind the law’s attempt to protect animals from intentional infliction of pain and suffering<sup>118</sup> and have provided a footing to argue that animals possess moral status.<sup>119</sup> For the animals contemplated in this thesis, establishing sentience is unlikely to prove problematic. I would argue, however, that to truly embrace the idea that the harm in a veterinary negligence claim is centred in the relationship shared between animal and owner, the ability to feel pain and suffer does not capture the whole picture. Further, articulating a

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<sup>116</sup> Margaret Davies, *Property: Meanings, Histories, Theories* (Routledge-Cavendish, 2007) 2.

<sup>117</sup> *ibid.*

<sup>118</sup> Joan E. Schaffner, *An Introduction to Animals and the Law* (Palgrave Macmillan 2011) 183.

<sup>119</sup> Sarah Chan and John Harris, ‘Human Animals and Nonhuman Persons’ in Tom L. Beauchamp and R.G. Frey’s (eds.), *The Oxford Handbook of Animal Ethics* (OUP 2011) 311.

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more detailed account of sentience as a being capable of experiencing emotions beyond pain and suffering will assist in laying the groundwork for the argument in the next chapter, focusing on duty of care, that animals should have their best interests protected at the duty of care stage. To this end, it will be argued that acting in an animal's best interest goes beyond merely preventing or alleviating pain and suffering, but also taking positive steps to ensure that animal's interests are maintained. Speaking to this issue, veterinarians could, for example, depart from the instructions of the owner should the animal's welfare be brought into question say by providing invasive futile treatment to a terminally ill animal.<sup>120</sup>

It will be recalled that one of the restrictions placed on the type of animal considered to be sentient constitutive property is that the animal and owner must be in some form of constitutive relationship. Though it would only be the owner's interest in the relationship that could be legally represented as forming the basis for actionable damage, the animal must be, I argue, an active participant in that relationship. This would imply a definition of sentience which extends animals' capabilities beyond pain and suffering. In this way, Tannenbaum's description of the human-animal bond provides a good starting point. Here,

The relationship must also derive not just to a benefit, but to a significant benefit, of both parties, and the relationship must benefit *a central aspect of the lives of each*...[it must also] be bidirectional, with each party to the bond offering attention to the other [and] insofar as is possible, each party...must treat the other

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<sup>120</sup> See discussion in Chapter 4.4, in particular Scenarios 3&3 and further analysis in 4.5(b).

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not as a means toward its own ends, but something entitled to respect and benefit in its own right.<sup>121</sup>

To this end, it is submitted that the following two theories conceived of by Broom<sup>122</sup> and Proctor<sup>123</sup> combine to form a definition of sentience that takes on board the relational arguments made by Conaghan<sup>124</sup> and Priaulx<sup>125</sup> and lends credence to the argument that the constitutive element should form the cornerstone of the SCP model. According to Broom, an animal is described as being sentient where it has some ability, ‘to evaluate the actions of others in relation to itself and third parties, to remember some of its own actions and their consequences, to assess risk, to have some feelings and to have some degree of awareness.’<sup>126</sup> Further, according to Proctor, sentient animals are capable of forming lasting friendships and exhibiting empathy.<sup>127</sup> All of this, I argue, provides an independent rationale for the position that the animal’s best interests should be protected, but also lays the groundwork for discussion of the constitutive element. In these instances, courts would be affirming that nonhuman animals are beings which can, in essence, do more than suffer and feel pain and, in fact, lead complex lives involving a wide range of different emotions and thought processes.<sup>128</sup> Importantly, the model of sentience adopted here requires active participation from the animal in the sense that the animal is able to experience, but also share

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<sup>121</sup> Jerrold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (2nd ed., Mosby 1995) 184-185 [emphasis added].

<sup>122</sup> Donald M. Broom, ‘Cognitive Ability and Awareness in Domestic Animals and Decisions about Obligations to Animals,’ (2010) 126 *Applied Animal Behaviour Science* 1.

<sup>123</sup> Helen Proctor, ‘Animal Sentience: Where Are We and Where Are We Heading?’ (2012) 2 *Animals* 628.

<sup>124</sup> It will be recalled that according to Conaghan, tort lacks a relational language (See discussion in Chapter 3.3(a)). It is hoped that SCP could contribute to debate in this area and by offering another unexplored area of relational harm.

<sup>125</sup> As discussed by Priaulx, hybrid forms of damage, of which SCP is new example, represents a form of harm that reveals critical aspects of our humanity (See discussion in Chapter 3.2(b)).

<sup>126</sup> Broom (n122) 8 quoted from ‘The Evolution of Morality,’ (2006) 100 *Applied Animal Behaviour Science* 20.

<sup>127</sup> Helen Proctor, ‘Animal Sentience’ (n123) 636.

<sup>128</sup> See also on this point: Jerrold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n121) 123.



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a wide range of emotions in response to a relationship from which the animal derives meaning.

#### c) *A 'Constitutive' Relationship: Radin's Property and Personhood Argument*

##### i. *Theory and Application of Constitutive Property*

This section will be based largely on the arguments detailed by Margaret Radin, specifically the theory that 'ownership is bound up with self-constitution or personhood.'<sup>129</sup> It is submitted that for the purposes of a veterinary negligence claim, viewing the animal as special form property which contributes and elevates the owner's sense of self (ie. the owner's personhood), captures both the legal relationship that exists as between owner and property, here the owner and animal, but also the deep companion relationship that can exist within this legal relationship, which can positively impact the life of the owner and the animal.<sup>130</sup> In this way, Radin's argument will be utilised to give the SCP model a normative grounding.

In essence, Radin's argument is simple in construction, but has yet to be fully explored in the context of animals and the law, and is not contemplated by Matlack or Hankin discussed previously.<sup>131</sup> Broadly speaking, Radin's argument works on the premise that all property

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<sup>129</sup> Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 1.

<sup>130</sup> I would also argue as an aside, following the discussion above regarding sentience, that animals too receive positive benefits and experiences as result of the relationship shared with her owner. As it is only legal interests that we are concerned with at this stage, discussion will be restricted to the interests of the owner.

<sup>131</sup> Arguably, this is the case because Radin's theory maintains the property status of the object, which contradicts the ends many animal rights theorists seek to achieve. See for example: Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press 2007). There has, however, been brief mentions of Radin in the work of Mary Margaret McEachern Nunalee, and Robert G. Weedon, 'Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine,' 10 *Animal Law* 125, 129 and Steven M. Wise, 'Recovery of Common Law

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can be viewed on a continuum. On one end of the spectrum is fungible property, or property which is viewed as alienable and interchangeable with like items and money. Hence, property which sits on this end of spectrum can be viewed as instrumental. On the other end of the spectrum sits property which is inalienable and, ultimately, intrinsically valuable to the owner. Radin states that ‘since personal property<sup>132</sup> is connected with the self in a morally justifiable and constitutive way, to disconnect it from the person harms or destroys the self.’<sup>133</sup> Further, property on the constitutive end of the spectrum is not valued, or not only valued, in market terms of exchange; thus, they are noncommodified, or incompletely commodified.<sup>134</sup>

Though Radin’s theory of constitutive property does not specifically contemplate applications in the realm of owner-animal relations, I would argue that her theory is quite apt to describe the type of relationship present between owners and animals for the purposes of the actionable damage portion of veterinary negligence claim. Consider the example Radin uses of a constitutive relationship involving the home.<sup>135</sup> She describes the home as a place which is sacred and represents a ‘moral nexus between liberty, privacy, and freedom of association.’<sup>136</sup> Further, the ‘home is a place where intimate things are kept from prying eyes

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Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal (1998) 4 Animal L 33, 67-68.

<sup>132</sup> Radin uses the phrase ‘personal property’ to denote those relationships which exist on the far end of the spectrum towards personhood. In later writings, she describes this relationship as ‘constitutive property.’ See on this point: Radin, *Reinterpreting Property* (n129) 2.

<sup>133</sup> Margaret Jane Radin, ‘Reconsidering Personhood’ (n18) 423, 428.

<sup>134</sup> *ibid* 429.

<sup>135</sup> Radin also uses the example of wedding ring to articulate her intuitive argument of constitutive property. A wedding ring will have a market value based on the market value of its metallic compounds, precious stones, etc. It will also have a value to the jeweller who may place very little constitutive value in it (he or she is merely selling the item), and it may have an intrinsic/ fully constitutive value to the person who receives the ring. Interestingly, Radin then notes that this relationship with the item may change if the relationship with the giver of the ring broke down. See: Radin, ‘Property and Personhood’ (n19) 959-960.

<sup>136</sup> Radin, ‘Property and Personhood’ (n19) 991.

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and intimate relationships are carried on away from prying ears.<sup>137</sup> In essence, the home is a safe zone where people can keep personal possessions, enjoy their privacy, and interact with others. Some of these same sentiments can be seen in the decision of Bingham LJ in *Attia* discussed above.<sup>138</sup> Thus, the home itself embodies for the owner something more than its market value. There is an intrinsic value to the owner which can be attributed to the many ways we are able to develop and grow as people (ie. to constitute ourselves) within the home. In one way, the fact that the court in *Attia* did not strike out the claim for psychiatric harm element illustrates that a similar sentiment may exist in the UK context.

At this point, it is helpful to recall Tannenbaum's articulation of the companion-owner bond being one that is:

...bidirectional.... [and one] which brings a significant benefit to a central aspect of the lives of each...and in which each party treats the other not just as something entitled to respect and benefit in its own right but also an object of admiration, trust, devotion, or love.<sup>139</sup>

Corr further highlights that the companion relationship provides many emotional benefits for humans including love, constancy and a lack of judgment.<sup>140</sup> In essence, the bond created is of a deeply personal and intimate nature. From this, I would contend certain human-animal relationships fit the description articulated by Radin to the extent that certain animals are likely to be of intrinsic value to the owner and when that relationship is broken, for example

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<sup>137</sup> *ibid* 997.

<sup>138</sup> See section 3.3(b)(i).

<sup>139</sup> Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n121) 185.

<sup>140</sup> Corr, 'Companion Animals' (n103) 190.

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by negligence, the disconnection harms the self. Further, the point made above that the constitutive relationship would be stronger in the owner-animal context given the animal's ability to actively reciprocate feelings and emotions, would arguably place this relationship at the far end of Radin's spectrum. The point that constitutive property is noncommodifiable also explains the argument that setting damages in terms of the animal's market value fails to capture the relationship which has been lost and why it is necessary to include an element which accounts for the emotional damage suffered by the claimant.

It is further submitted that when viewing the types of relationships between owner and animal which would be considered constitutive, the distinction between subject and object becomes blurred and is better seen as a reciprocal relationship in which both mutually benefit and contribute positively to the development of the self in each. In describing her theory of constitutive property, Radin too discusses a blurring between the subject and object to the extent that in relationships which can be viewed as constitutive, 'the property is not wholly "outside" the self, in a world separate from the person; but neither is it wholly "inside" the self, indistinguishable from the attributes of the person.'<sup>141</sup> It is this balance between the internal and external which characterises any healthy relationship and certainly one which I would argue can occur between owner and animal.<sup>142</sup>

It will also be recalled that though the type of animal (ie. companion, agricultural, or something in between) is irrelevant in terms of what animals humans can form constitutive

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<sup>141</sup> Radin, 'Reconsidering Personhood' (n18) 426.

<sup>142</sup> Radin goes on to state that when the property becomes too internalised, an unhealthy self-constitution can occur. In this regard she uses fetishism as an example of unhealthy self-constitution. With regards to the human-animal relationship, it could be argued that this relationship becomes unhealthy when, for example, owners insist on their animal receiving life-prolonging treatment because they are unable to contemplate a life without their animal companion. See on the point of overtreatment: P. Sandøe, S. B. Christiansen and Annemarie T. Kristensen, 'Companion Animals' (post-print copy) 10 <<http://curis.ku.dk/ws/files/22431780/CompanionAnimals.pdf>> accessed 8 September 2016.

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relationships with, it will only be those relationships which could be characterised as constitutive relationships that could include the additional emotional harm element within a veterinary negligence claim. In this regard, I agree with Sandøe who argues that ‘it is the *nature of the relationship*, not the species, which identifies an animal as a companion [here, constitutive] animal.’<sup>143</sup> The continuum argument that Radin posits is fitting when attempting to understand this dichotomy and to address the argument that perhaps animals should form a separate category of property wholly unto themselves. Though reluctantly stated, it will likely be the case that those animals born and raised solely for the purposes of slaughter would tend to fit the description Radin gives for *fungible* property. Animals in this category are usually seen as instruments and are seen as commodities with a specific monetary value. In large factory farms, it will be increasingly difficult, though arguably not impossible, to form the close, constitutive relationship necessary to fit the parameters of the SCP model. It is submitted that this and other existing institutions of animal use severely handicaps any argument which seeks to achieve a wholly separate, elevated category of property specifically for sentient animals.<sup>144</sup> Whether these practices are morally permissible is beyond the remit of this chapter. What is salient are the borders within which tort operates and how far those borders can be stretched to accommodate new forms of damage.

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<sup>143</sup> Sandøe et al., ‘Companion Animals’ (n142) 4 [emphasis added].

<sup>144</sup> There would also seem to be an economic component to this, which serves only to increase the difficulty in establishing a public ethic about raising the status of animals. See on this point: John McInerney, ‘Principles, Preferences and Profit: Animal Ethics in a Market Economy’ in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 271, 281. This economic, commodified conception can also be seen, as has been argued throughout this chapter, in the judicial decisions relating to veterinary negligence.

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To this end, it is helpful to briefly re-examine the arguments made by West, Conaghan and Priaulx to the extent that, harm has a social as well as an individual dimension.<sup>145</sup> Radin states that under her model, ‘the court will not be called to determine whether subjectively the owner’s property is constitutive, but rather to decide what type of property cases involve constitutive property.’<sup>146</sup> However, I argue that, as regards SCP, the issues of subjectively establishing constitutive property and critiquing the constitutive property paradigm need not be divorced. The argument that within a constitutive relationship the subject-object relationship becomes blurred—indeed, as between animal and owner that divide may cease to exist entirely—means that an integral part of the veterinary negligence claim will be this subjective determination. Underscoring this is the argument made by West that there must be an element of compassion in the decision-making capacity of the judiciary if justice is to be accomplished and the common law to evolve alongside social realities.<sup>147</sup> Thus, the position advocated here is that the courts have the capability to recognise the subjective element and that within a constitutive relationship, just as the animal property cannot be viewed as being totally external or internal to the self, the harm too will be suffered on a level which is neither totally internal (ie. psychiatric), nor totally external.<sup>148</sup> Though complex, I argue this articulation represents a more complete and holistic picture of the actual damage suffered by the claimant.<sup>149</sup> Further, the discussion regarding new forms of actionable damage discussed above indicates that an erosion of strict boundary lines is already taking place and that judges are willing to innovate and adopt positions which challenge the status quo.

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<sup>145</sup> Joanne Conaghan, ‘Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment,’ (1996) 16 *Oxford Journal of Legal Studies* 407, 408.

<sup>146</sup> Radin, *Reinterpreting Property* (n129) 18.

<sup>147</sup> West, *Caring for Justice* (n6) 61-62.

<sup>148</sup> By ‘external’ I mean an orthodox recognition of the damage. Here, this would likely be represented as a deleterious change to the state of the property.

<sup>149</sup> It is these complex forms of harm which are represented by the discussion above on hybrid damage and by Horsey and Rackley where these harms are characterised as creating ‘messed up’ lives. See: Kirsty Horsey and Erika Rackley, *Tort Law* (3rd ed., Oxford 2013) 160.

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#### ii. *Potential Problems with Utilising a 'Constitutive' Structure for Actionable Damage*

One primary aspect of Radin's theory which could negatively bear on its successful application in articulating the damage suffered between owner and animal is whether the eventual end which Radin articulates in her first article, namely that a person fully constituted has reached a full personhood or autonomy status<sup>150</sup> is desirable when considering an aim of the SCP model is to take seriously *relational* damage models within the tort of negligence.

In this regard, Nedelsky argues that property has traditionally been conceived as the interest which both figuratively and literally provides the strongest symbol of autonomy.<sup>151</sup> Similarly, Conaghan notes that tort law views the fully autonomous individual or person 'in isolation from the relationships which produce, nurture, and protect him.'<sup>152</sup> In essence, the person of tort is 'not someone for whom the boundaries of self and other have ever been blurred, or who experiences his social world, particularly the relations of which that world is comprised, not as something external to self but as something from which self is derived.'<sup>153</sup> In essence, then, utilising Radin's theory would be a regressive step, which rather than challenging the orthodox person of tort, accepts and forwards it. Though I would agree with the statements made by Conaghan and Nedelsky, I argue that the way in which the

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<sup>150</sup> Radin, 'Property and Personhood' (n19) 972.

<sup>151</sup> Jennifer Nedelsky, 'Law, Boundaries, and the Bounded Self,' (1990) 30 Special Issue: Law and the Order of Culture 162, 167. See also: Margaret Davies, 'Feminist Appropriations: Law, Property and Personality,' (1994) 3 Social & Legal Studies 365, 376-377.

<sup>152</sup> Conaghan, 'Tort Law and Feminist Critique' (n10) 200.

<sup>153</sup> *ibid.*

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constitutive model is being applied for the purposes of this thesis differs from the model originally conceived of by Radin. Whilst Radin only contemplates a constitutive relationship with inanimate property, I view the relationship as one between two sentient, participating beings, which more closely resembles a relationship between two humans as opposed to person and thing; subject and object. Indeed, Radin herself points out that as between subject and object there is a blurring of the boundary lines.<sup>154</sup> It is therefore contended that rather than adding to orthodox notions of ownership and property in tort, SCP situates itself within in the relational loss category discussed at the beginning of this chapter and the negligence claims discussed in the previous chapter, which considered vulnerability.<sup>155</sup>

#### *iii. Concluding Thoughts on the Constitutive Property as a Basis for Actionable Damage*

Putting the above arguments together, it is submitted that a strong case can be made that from a normative perspective the constitutive relationship is one that should be protected by the law of negligence. Orthodox articulations of property damage found in the identification of deleterious change fail to explain the damage suffered. Instead, the constitutive relationship embraces a view of sentience which recognises an animal's capacity to enter into complex, constitutive relationships with their human owners and that, from this relationship, owners and animals are capable of deriving intrinsically-valuable experiences. Importantly, it is these experiences which contribute to our own personhood and conceptions of a good life. Further, from the owner's perspective, this relationship is not fully captured by a market value approach when valuing the animal for the purposes of a veterinary negligence claim. As West notes:

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<sup>154</sup> Radin, 'Reconsidering Personhood' (n18) 426.

<sup>155</sup> See Chapter 2.4(a).



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Both through the larger culture of which law is partly constitutive and which it in turn partly constitutes, and through a system of justificatory norms and ethics interrelated with the larger culture but also quite distinct from it, law influences our behaviour and thoughts by affecting the way we think about ourselves, each other, and the larger society of which we are a part. The overall efficacy of legal culture in shaping our behaviour through its impact on our self-concept, in fact, may well be far greater than that of the legal sanction itself.<sup>156</sup>

Important in this is the argument made by Priaulx that the preference tort has shown to physical forms of harm over ‘harms of a psycho-social nature not only serves to draw lines between the between kinds of harm, but entire categories of victim whose biographies express harm in ways that fail to fit the dominant dialogue of negligence law.’<sup>157</sup> Thus, there is legitimacy that comes from the court acknowledging that a claimant has been harmed and has suffered a recognised form of actionable damage— this would arguably occur both on a personal level from the perspective of the claimant (ie. ‘I have suffered a recognised harm’) and from a corrective justice standpoint in so far as it establishes the defendant and claimant are ‘connected as doer and sufferer of the same injustice.’<sup>158</sup> With this in mind, it is submitted that SCP should constitute a recognised form of actionable damage.

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<sup>156</sup> West, *Caring for Justice* (n6) 151.

<sup>157</sup> Nicky Priaulx, ‘Endgame: On Negligence and Reparation for Harm’ in Janice Richardson and Erika Rackley (eds.), *Feminist Perspectives on Tort Law* (Routledge 2012) 40.

<sup>158</sup> Weinrib, ‘Corrective Justice in a Nutshell’ (n106) 350.

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#### 3.6 Conclusion

The purpose of this chapter was to address the principal issue of actionable damage in a veterinary negligence claim. The problem faced by the current model is that a market value approach is too restrictive in the number and nature of possible claimants it embraces. The market value approach fails to take into account the position of the animal patient as a sentient being, intrinsic to the veterinary relationship and, importantly, the constitutive relationship between owner and animal. Further, whilst other alternative property theories have been put forward to address the position of the animal in care and treatment decisions, their inability work successfully within established negligence doctrine and method severely restricts their ability to provide veterinarians with worthwhile guidance on how to fulfil their legal obligations. Second, the authors of the models considered take an overly-restrictive view of the type of companion animal which can be considered. Whilst dogs and cats would no doubt feature strongly in any construct which attempts to understand the bond experienced by owner and animal, denying the possibility of other animals forming similar bonds with their owners leads to unfair privileging of certain companion animals over others and ultimately a bias restriction on who can bring a claim to court and who cannot.

The sentient constitutive property model, however, corrects these misrepresentations by building upon doctrinal developments within property and highlighting the strongly relational elements more characteristic of the actual harm likely to be suffered in veterinary negligence claims. Importantly, it looks to the strength of the bond that exists between animal and owner as one which is constitutive, where both the animal and the owner are active participants in a reciprocal, mutually beneficial relationship. For the purposes of the actionable damage requirement of a negligence claim, then, the animal remains the property

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of the owner, however, the emotional harm suffered when constitutive relationship is negligently severed, forms a consequential (but arguably more important) element to the claim. This chapter, then, takes on board Nolan's construction where it was argued that:

It seems preferable to deal with the questions of whether a given harm is ever actionable under the heading of actionable damage and to deal with the question of whether a sometimes actionable harm is actionable in this particular case under the separate heading of duty of care, since doing so...makes it more likely that the important issues raised...will be addressed openly and comprehensively.<sup>159</sup>

On this note, it is to the duty of care that this thesis now turns.

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<sup>159</sup> Nolan, 'New Forms of Damage in Negligence,' (2007) 70(1) Modern Law Review 59, 61.

## 4. Revisiting Duty of Care

*“It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation.”<sup>1</sup>*

### 4. **Revisiting the Duty of Care: Arguing for a Best Interests Approach**

#### 4.1 Introduction

Whereas the previous chapter focused on the damage aspect of a veterinary negligence claim and argued that the constitutive relationship shared between owner and animal is central to a claim in veterinary negligence, the purpose of this chapter is to explore current duty of care structures and determine whether the sentient constitutive property model can be properly accounted for within these structures. Although it has been argued in the first chapter that veterinarians owe *many* legal duties of care, the exact nature and limits of those duties, especially in complex ethical scenarios, has yet to be explored. No modern secondary literature on this topic exists and the small amount of reported case law fails to provide any meaningful account of the duty component. The purpose of this chapter is to explore these boundaries utilising established negligence principles and analogous case law to come to a more nuanced understanding of a veterinarian’s duty of care.

From the outset, it is important to distinguish between two terms which will appear throughout this chapter. First, the commercial model will be used to represent the current approach to veterinary negligence: a binary relationship (owner and veterinarian), in which the protected interest under consideration is the market value of the claimant’s damaged

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<sup>1</sup> *R v. Instan* [1893] 1 QB 450, 453 per Lord Coleridge CJ.

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property (the animal). Duty under this model, it will be recalled, resembled a singular duty approach stemming from a *Hedley Byrne*-type assumption of responsibility.<sup>2</sup> Conversely, the best interests model which will be developed throughout this chapter argues that, so far as possible, veterinarians ought to protect the best interests of the animal. Thus, the relationship is characterised as triangular and, in certain scenarios discussed later in this chapter, following the best interests model may justify a departure from the express desires of the owner. This approach is advocated not only to protect the integrity of the constitutive relationship, but more importantly, to acknowledge the best interests of the animal patient as a paramount consideration in veterinary medicine. Though, it is acknowledged that some of the veterinarian's duty can be explained by the commercial relationship between owner and veterinarian, the duties that stem from this construct are fairly straightforward and generally uncontroversial.

Where things become complicated, however, is determining what form the duty assumes once the position of the animal features more predominantly within the legal relationship. As arguing for the best interests of the animal patient and providing more accurate legal guidance for veterinarians remains the primary ambition of this thesis, addressing these novel points is crucial. In so doing, it is submitted that the orthodox conception of a veterinarian's duty of care stemming from the commercial relationship between owner and veterinarian masks significantly deeper issues inherent within the triangular veterinary relationship and more specifically within constitutive property relationships. The result is not only that the true nature of the veterinarian's duties in these instances is significantly obscured, but that what information we do have may actually serve to misinform

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<sup>2</sup> See discussion in Chapter 1.3(b)(i).

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veterinarians as to their legal obligations. In addressing these deeper duty of care issues, it is submitted that viewing a veterinarian's legal duties of care through a lens which prioritises the best interests of the animal, in a similar vein to that of a paediatrician, provides a solution to overcome the conflicts created by adhering too strictly to commercial interests.

To illustrate this process, the first section will introduce briefly how I intend to utilise a best interests approach in the veterinary context. From here, the second section will address the veterinarian's legal duties of care in areas which can arguably be determined utilising orthodox tort principles; the doctrinal distinction between positive acts of misfeasance and omissions is particularly relevant here. This section will explore the limits of what negligence is able to accomplish using the commercial relationship as its foundation.

Although analysing the veterinarian's duty in this context is able to provide some guidance for veterinarians, this is at the expense of both forwarding the animal's interests and acknowledging the relationship between owner and animal as something more than simply subject-object; property-holder and property. This section continues by exploring the grey areas that emerge as a result of viewing the veterinarian's duties in a purely commercial context. To demonstrate the limitations of the commercial model in accurately articulating the veterinarian's duty, human medical law will be offered as a body of law from which analogous principles to the veterinary profession can be derived. Ultimately, however, it will be argued that the tension created by the legal status of the animal and the constitutive nature of the relationship between animal and owner gives rise to complex, unique issues which cannot be fully accommodated by either the medical law analogy or the existing commercial articulation. This will be further illustrated by the introduction of several hypothetical scenarios, which, although certainly conceivable in terms of the treatment dilemmas they

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raise, cannot be reconciled using orthodox duty principles as they are currently being applied. Section four offers a solution to the dilemmas discussed in the previous section in the form of a best interests inquiry, placing the animal's interests as the paramount consideration. As this section will make clear, the best interests principle is not a cure-all for all of the issues introduced, however, it is submitted that this inquiry provides a step in the right direction by providing veterinarians with a framework which can better guide their decision making by re-focusing the duty inquiry and taking a fuller account of which interests ought to be protected.

The remaining section will consider issues stemming from the veterinarian's duty to advise and disclose risks. This is currently an area undergoing rapid change, both in the human medical context and veterinary. Whereas the debate over the doctor's duty to disclose in relation to the patient's right to decide has been debated for the better part of thirty years, this topic is just now entering veterinary medicine. Looking at this situation in light of the recent Supreme Court decision in *Montgomery v. Lanarkshire Health Board*<sup>3</sup> provides a special opportunity to determine whether the veterinary profession should try so far as possible to emulate the human medical context, or whether a different framework is to be preferred. It is initially submitted that, at least in this regard, the veterinary profession should not follow suit with human medicine; this is due primarily to the antagonism and distrust that can be created when the relationship is viewed diametrically, stemming from the patient's *right* as an autonomous individual and the detrimental effects that can come when viewing the relationship as consumer-based in nature. As an alternative, a shared decision-making model, which allows for a more holistic assessment taking into account the interests of the

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<sup>3</sup> [2015] AC 1430.

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owner as a participant in a constitutive relationship, and importantly, the best interests of the animal will be offered.

### 4.2 Best Interests: A Step in the Right Direction

Ultimately, this chapter will make the argument that applying a best interests rationale provides a workable framework which veterinarians can utilise to resolve various treatment dilemmas. How best interests ought to be applied and its limitations in the veterinary context will be discussed in greater depth below, however, what is important for present purposes is how I intend to use best interests throughout this chapter to formulate a more robust and representative duty of care. To begin, Corr states that ‘in reality, it is the client who ultimately determines what happens to their animal, and only in cases of cruelty can the vet disregard the owner’s wishes, and have legal protection.’<sup>4</sup> The position that I adopt in this thesis is that veterinarians should try so far as possible to promote the best interests of the animal patient, even if this goes against the owner’s wishes. There are, of course limitations to this which will be discussed, however, the important point is that the owner’s wishes and the commercial relationship between the owner and veterinarian should not always be dispositive.

Looking at the relationship between best interests and the duty of care in veterinary negligence, the point to take away is that best interests is used to determine whether it can be said that the veterinarian has an affirmative duty to act for the animal. Simply put, *if* such a duty does arise, the question becomes what form that duty takes— following the argument

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<sup>4</sup> Sandra Corr, ‘Companion Animals’ in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 188, 193.



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that many duties of care exist— and whether the veterinarian acted appropriately.

Conversely, if no duty to act in the animal's best interests arises, then the veterinarian need not take positive steps to ensure the animal's best interests are protected. In the context of veterinary negligence, affirmative duties of care to act in the animal's best interest may arise in situations broadly described as the duty to diagnose, the duty to provide options, and the duty to treat. In situations where, for example, the animal's best interests are put in jeopardy because of a particular type of treatment chosen by the owner, my argument runs that the veterinarian has an affirmative duty to act in the animal's best interests. This could occur, for example, where the treatment choice sought by the owner results in a poorer quality of life for the animal. In some cases, this occurs because the owner cannot come to terms with the prospect of losing the animal, or has become emotionally detached from the additional suffering that will be caused if such treatment is performed. In these situations, it is argued that the best interests of the animal must come first. In so acting, the veterinarian would not only be advocating for the interests of animal patient, but also acting to maintain the integrity of the constitutive bond shared between owner and animal.

A further area which will be discussed, and where great contention lies, is in the area of euthanasia. Indeed, a recent British Veterinary Association Congress meeting stated that 'increased client expectations, developments in technology, and the drive from new graduates to develop their diagnostic and treatment skills were all pushing back the boundaries of when [euthanasia became the best treatment option]'<sup>5</sup> — the implication being that the boundary between viable treatment options and those that, although technologically

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<sup>5</sup> S. Jarvis, 'Where do you draw the line on treatment?' (2010) 167(17) *Veterinary Record* 636.

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advanced,<sup>6</sup> do not necessarily produce a better quality of life for the animal is becoming increasingly important and contentious. Whereas, for example, euthanasia remains unlawful in the human medical context, it is an accepted treatment option in veterinary medicine.<sup>7</sup> However, the issue of actively taking steps to bring about an animal's death raises complex issues and dilemmas, especially where the owner and veterinarian disagree on its application. It is in these complex boundary scenarios that best interests can play an important role. Addressing the nature of a veterinarian's duty of care in these situations is therefore all the more critical given the pace at which new treatment options are entering the veterinary scene in relation to the available RCVS guidance in this area, and the priority placed in this thesis on the interests of the animal. Before discussing this issue further, however, it is important to first get a sense of how the law currently interprets, or would likely interpret, the veterinarian's duty utilising orthodox, commercial principles.

#### **4.3 Returning to First Principles: Duty of Care Applications in the Veterinary**

##### **Context**

Corr's statement in the previous section illustrates two important points as regards the current approach taken in negligence: first, it is *only* the relationship between owner and veterinarian which would be contemplated; only in extreme cases of cruelty can the veterinarian consider the interests of the animal. Second, as between veterinarian and owner, the owner determines the terms under which the veterinarian can become involved with her property. From this, we can see the beginnings of relationship which mirrors that found in

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<sup>6</sup> Examples of advanced technology being used which may not result in a better quality of life for the animal may be advanced, but invasive, chemotherapy treatment, or the use of prosthetics.

<sup>7</sup> Jerrold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (2nd ed., Mosby 1995) 342.

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general commercial dealings.<sup>8</sup> The problem with this commercial articulation of the duty of care is that it gives rise to a formulation that is too narrow, thus failing to assist the veterinarian and protect the animal. The purpose of this section is to determine how far the commercial articulation extends, whilst also recognising and addressing the more basic point that the nature of the commercial relationship between owner and veterinarian has, in itself, yet to be fully explored within legal scholarship.

At its most broad, the duty question asks us to consider what interests of the claimant's the defendant ought to have been aware. With secondary source material and the courts indicating that the only interests relevant to veterinary liability are those related to the owner's commercial interests, veterinarians can lose sight of the importance of the animal's best interests.<sup>9</sup> Under the current commercial approach, then, it is only cases involving animals with high market values that are likely to be litigated. As the previous chapter on damage illustrated, however, this is an exceedingly narrow conception of the human-animal bond.<sup>10</sup> Owners in a constitutive relationship (ie. those most likely to bring a claim in veterinary negligence) are not primarily motivated by the animal's commercial worth or their financial investment in the animal, thus, going forward, a more holistic understanding of veterinary negligence liability— one which takes into account constitutive relationships and relationships of vulnerability— is needed. Couple this situation with Jarvis's point that viable treatment boundaries are being pushed in unknown directions, it must be asked to

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<sup>8</sup> See Chapter 1.3(b)(i) where it was argued that the few available veterinary negligence cases appear to adopt a similar rationale adopting reasoning consistent with economic loss following *Hedley Byrne*- type principles of assumption of responsibility. See also related discussion below in section 4.3(c).

<sup>9</sup> See for example: *Blass v. Randall* [2008] EWHC 1007 and *Calver v. Westwood Veterinary Group* [2001] P.I.Q.R. P11.

<sup>10</sup> See Chapter 3.2(a) and discussion in Chapter 1.3(a)(ii).

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what extent the current commercial approach to duty for veterinary negligence remains relevant and pertinent.

These two issues provide the catalyst for reconsidering what interests ought really to be protected at the duty of care stage. It is submitted that as soon as more weight is given to the position of the animal— either individually, or as an extension as the owner’s personhood—the commercial construction of the veterinarian’s duty becomes wholly inadequate. This is not to say that a commercial approach should be done away with entirely. Indeed, this model would arguably still apply in uncontroversial situations where the parties come to a formal agreement as to treatment and fees, but rather to make the point that the best interests model should be the dominant model, with the commercial model operating within it. In uncontroversial situations, for example, where the owner and veterinarian are in agreement as to treatment and fees, no affirmative duty to *protect* the best interests of the animal arises. Looking ahead to more controversial situations, this section will address current problems facing the duty of care assessment in veterinary negligence claims. As regards the distinction between acts and omissions, the area of contention is determining how far current negligence principles at the duty of care stage can be extended. To better illustrate these distinctions, analogies will be drawn with human medical cases where there is considerably more information and pertinent legal principles have received greater judicial scrutiny.<sup>11</sup> Ultimately, as the animal becomes a more central focus within the triangular relationship, the commercial relationship and orthodox principles that influence it start to crumble; the focus of this section, then, is to bring to the fore where those boundary lines exist and identify

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<sup>11</sup> Drawing on the human medical context to inform the veterinary has been undertaken by authors in the past. See, for example: Bernard E. Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* (2nd ed., Blackwell 2006); David Williams and Jonathan Jewell, ‘Family- Centred Veterinary Medicine: Learning from Human Paediatric Care’ (2012) 170 *Veterinary Record* 79 and Jerrold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n7).

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ways in which they can be rebuilt to accommodate the best interests model advocated for later in this chapter.

##### a) *Relational Duties of Care, or A Singular Duty of Care?*

It will be recalled from Chapter One that one of the more problematic issues with the current case law on veterinary negligence lies in the fact that the duty of care aspect was largely ignored in favour of a more detailed breach assessment.<sup>12</sup> In this regard the language utilised by the courts resembled a singular duty approach stemming from an assumption of responsibility for the claimant's economic interest; duty, therefore, served only an instrumental means. This simple form of assessment is reflective of a larger trend within negligence scholarship to dispose of an in-depth duty analysis in favour of a more detailed analysis occurring at the breach stage.<sup>13</sup> For reasons which I discuss below, I argue that this trend should be resisted and that determining what a veterinarian owes to their client and their patient is a legal question, which later carries obligatory force, not a factual question dependent of the specific facts of a particular claim.

Whilst some authors have ventured so far as to argue that duty can be deconstructed and its component parts divided amongst other negligence requirements, such as breach and causation,<sup>14</sup> Howarth argues for a slightly different vision for duty.<sup>15</sup> Under this view, there is only one duty— a duty not to harm others by faulty conduct.<sup>16</sup> According to Howarth, 'the duty is always the same, to take reasonable care; what varies is whether the duty to act

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<sup>12</sup> See Chapter 1.3(b)(iii).

<sup>13</sup> See, for example: Donal Nolan, 'Deconstructing the Duty of Care,' (2013) 129 Law Quarterly Review 559.

<sup>14</sup> *ibid.*

<sup>15</sup> David Howarth, 'Many Duties of Care— Or A Duty of Care? Notes from the Underground,' (2006) 26(3) Oxford Journal of Legal Studies 449.

<sup>16</sup> *ibid* 450.

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reasonably applies in the first place and whether if it does, the defendant [has done so].'<sup>17</sup>

Proponents of this view, according to Goldberg and Zipursky, hold that:

Law for the modern world... is law that recognizes that the duty of care in negligence law does not attach to *relationships* (personal, contractual, or otherwise) but to individuals and their actions. In short, it is a simple, nonrelational duty—a duty to act with reasonable care, full stop.<sup>18</sup>

Described as being *ex ante* in nature, the singular duty model also allegedly retains an action-guiding quality.<sup>19</sup> Unlike the unintelligible proposition that we owe many duties of care which are dependent on the relationship we share with a given individual, the duty to act reasonably in all circumstances is something everyone can comprehend.<sup>20</sup> The role of the court, then, is to look at the facts of the given case and upon weighing the issues and identifying the reasons for denying a duty in past cases, determine whether the defendant, in essence, made the correct calculation.<sup>21</sup>

This type of analysis is perhaps most clearly seen in the veterinary negligence case of *Blass v. Randall*,<sup>22</sup> where it will be recalled that the claimant brought an action against the

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<sup>17</sup> *ibid* 452.

<sup>18</sup> John C.P. Goldberg and Benjamin C. Zipursky, 'MacPherson at 100' (Obligations VIII Conference, Cambridge, July 2016) 4 [emphasis in original].

<sup>19</sup> Howarth, 'Many Duties of Care— Or A Duty of Care?' (n15) 452.

<sup>20</sup> Howarth here claims that the singular duty construct is more 'intelligible to non-lawyers.' See: *ibid* 456. I disagree and would submit that this is actually counter-intuitive to how we lead our lives. As such, whilst Howarth may claim that his one duty to act reasonably is more intelligible, I would argue it is far more difficult to comprehend.

<sup>21</sup> *ibid* 451. Goldberg and Zipursky state that if a duty is found not to exist, so whether the defendant was permitted to act unreasonably, such a decision is essentially, 'a judicial grant of an exemption from the default rule that liability will attach when one person carelessly injures another.' See: Goldberg and Zipursky, 'MacPherson at 100' (n18) 5.

<sup>22</sup> [2008] EWHC 1007.

#### 4. Revisiting Duty of Care

defendant veterinarian alleging that she had been negligent in completing a pre-purchase examination for the purchase of a horse. In the analysis that followed, the court was concerned solely with determining whether the veterinarian in, for example, completing the physical examination, recording the history, and communicating the findings and advice, had acted reasonably within the commercial arrangement. Following Howarth's construction, a singular duty to act reasonably arose (as it always does) and so what remained was to determine whether, based on the facts, the defendant had in fact acted reasonably. The tenor of the judgment in *Blass* closely follows this type of analysis. Heavy emphasis was placed on whether the defendant could be said to have acted as a reasonably competent veterinarian.<sup>23</sup>

What is problematic in Howarth's argument, and others that similarly agree with the singular duty construct,<sup>24</sup> is that it only considers the issue of whether, in a given situation, the defendant acted reasonably; it does not address the far more revealing question of *why* this type of assessment is important in the first place. This links with the argument put forward in Chapter One that in its current commercial form, the assumption of responsibility test is utilised as a conclusory phrase, rather than an essential step to arriving at a rationale for why a duty ought to be imposed.<sup>25</sup> In this way it becomes disingenuous to talk about the duty being *ex ante* because there is no rationale or basis provided as to why it is important to act reasonably in the first place. This analysis is avoided by those who adopt a singular duty perspective because, at some point in the reasoning process, a discussion on relationality and

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<sup>23</sup> The last six pages of the judgment contain the court's analysis as to liability. Here, the term 'reasonably competent veterinarian' is discussed thirteen times.

<sup>24</sup> See, for example: Stephen Hedley, *Tort* (7th ed., Oxford 2011) 26. Here, the author states that 'a "duty of care" has no legal consequences until it is broken, and it seems a fiction to say that a duty hangs over D's relations with others...'

<sup>25</sup> See Chapter 1.3(b)(i).

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how this shapes the obligations we owe becomes necessary. Indeed, taking this non-relational approach to duty corresponds with the argument made by Conaghan, discussed in the previous chapter, namely that the ideal, fully autonomous person of tort is viewed ‘in isolation from the relationships which produce, nurture, and protect him,’<sup>26</sup> and with the ideal commercial relationship as one in which both parties are fully autonomous, rational, and capable of enforcing their rights against the other.<sup>27</sup> In a way, the singular duty and commercial model are, therefore, linked in their common rejection of a relational understanding to human interaction.

The reality, I argue, is that we exist in world where we enter into relationships with other people (and animals). Within this web of different relationships, some relationships sit closer to the centre and others more distant sitting along the outer perimeter. The closer to the centre, the closer the relationship; the more we entrust to the other, the more we divulge, the more heavily we rely. Thus, it is not “perverse”<sup>28</sup> to contemplate the relationships we form with others, rather this approach is more in keeping with human experience and the experiential nature of negligence law. How we characterise the closeness or proximity of these relationships is governed by individual sentiment mixed with shared societal understandings.

This relational approach is in keeping with the duty concept posed by Goldberg and Zipursky in Chapter One, where it was reasoned that duties of care are owed to certain

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<sup>26</sup> Joanne Conaghan, ‘Tort Law and Feminist Critique,’ (2003) 56 Current Legal Problems 175, 200.

<sup>27</sup> See: Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart 2009) 22-23 and 155. See also: Ngaire Naffine ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects,’ (2003) 66(3) Modern Law Review 346, 360. ‘To explain: ours is still a predominantly liberal legal culture that values the autonomy of each human being in the sense of the ability to stand alone, independently of all other individuals.’

<sup>28</sup> Howarth, ‘Many Duties of Care— Or A Duty of Care? Notes from the Underground’ (n15) 15-16.



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persons by certain other persons.<sup>29</sup> Thus, duty is a relational construct and the nature of one's obligations will differ depending on the nature of the relationship shared between the parties (termed "relationship-sensitive"<sup>30</sup> by Goldberg and Zipursky). This explains why, for example, a driver owes all other road users a duty to observe the rules of the road, but also why when a paediatrician accepts a patient into her care she owes an affirmative and more onerous duty to act in the child's best interests. The combination of the child's position of vulnerability and the doctor's position as a specialist, with specialist knowledge regarding the child's, care warrants this more detailed duty, which is different in character and kind to that between stranger road users. Indeed, it is determining the boundaries of when a veterinarian can owe an animal an affirmative duty to act in its best interests that forms a central theme within this chapter, but in coming to these conclusions, it is the nature of the relationship between owner and animal being constitutive in nature, and the relationship between owner and veterinarian which will also define the duty.

Developing these types of relational expectations are 'built by the law itself in some measure,'<sup>31</sup> however, more importantly, the law should reflect a developing understanding of the normative relationships at play and crystallising norms that already have currency on certain shared social understandings.<sup>32</sup> In the second chapter, it was argued that this flexible approach would allow greater scope to include vulnerability-based reasoning and relational qualities which reveal more about human notions of responsibility.<sup>33</sup> This is reflective of the duty concept I adopt in this chapter and why I argue that it should form a central role within

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<sup>29</sup> John C.P. Goldberg and Benjamin C. Zipursky, 'The Restatement (*Third*) and the Place of Duty in Negligence Law,' (2001) 54 *Vanderbilt Law Review* 657, 693.

<sup>30</sup> John C.P. Goldberg and Benjamin C. Zipursky, 'The Moral of *MacPherson*,' (1998) 146(6) *University of Pennsylvania Law Review* 1733, 1826.

<sup>31</sup> *ibid* 1816.

<sup>32</sup> *ibid*.

<sup>33</sup> See Chapter 2.5(a). Prue Vines, 'The Needle in the Haystack: Principle in the Duty of Care in Negligence,' (2000) *UNSWLJ* 35, 39.

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the negligence inquiry. It is only when this type of normatively-based, relational inquiry occurs that it can be said negligence is action-guiding. Only when duty is said to be relational can it also be said that the negligence inquiry itself is holistic and linked; that is to say that:

(1) the defendant owed [the claimant] a *duty of care*; (2) the defendant breached that *duty of care*; (3) the breach of that *duty of care* caused [the claimant] to suffer some kind of loss; and (4) the loss suffered by the claimant as a result of the defendant's breach was the kind of loss which the *duty of care* breached by the defendant was imposed on him in order to avoid.<sup>34</sup>

Under the singular duty formulation, there is no linking between other negligence requirements; they are simply separate, discrete factual analyses in which 'yes' or 'no' answers are given to questions which no longer share a common thread. Looking then to the remaining issues regarding duty of care discussed below, in particular the topics of assumption of responsibility and the distinction between acts and omissions, it should be from a strongly relational footing that the topics are approached.

##### b) *Determining the Limits of the Act-Omission Distinction*

It is trite tort law to say that when the courts are confronted with a novel duty of care question they will apply the three-stage test set out in *Caparo Industries plc v. Dickman*.<sup>35</sup>

As outlined by Lord Bridge:

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<sup>34</sup> Nicholas J McBride, 'Duties of Care – Do they Really Exist?' (2004) 24(3) Oxford Journal of Legal Studies 417, 424 [emphasis in original].

<sup>35</sup> [1990] 2 AC 605.

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What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty...<sup>36</sup>

Alongside *Caparo*, courts have recognised a series of exceptional duty of care tests which depend on a particular type of damage being claimed. Damage for pure economic loss, for example, follows with an assessment at the duty stage of the nature of defendant's having assumed responsibility for the claimant's financial interests and the claimant's reasonable reliance.<sup>37</sup> Indeed, it is this type of assessment which is evident in the very limited duty of care analyses in veterinary negligence case law discussed in Chapter One.<sup>38</sup>

Applying *Caparo* in the veterinary context would generally be uncontroversial where there was an active infliction of harm. Foreseeability and proximity would be satisfied and though some argument could be made that the fair, just and reasonable requirement could cause issues relating to indeterminate liability, this argument has found considerably less favour in recent years. Where the application of *Caparo* becomes more complicated, however, is when arguments advancing the interests of the animal come into play. For the most part, *Caparo* concerns bilateral relationships and where property damage is claimed, the property fits into established convention, being fungible, alienable, and inanimate. In veterinary negligence,

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<sup>36</sup> *ibid* 618.

<sup>37</sup> *Hedley Byrne & Co Ltd. v. Heller & Partners Ltd.* [1964] AC 465.

<sup>38</sup> See discussion in Chapter 1.3(b)(i).

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the relationship is not bilateral, but triangular and the animal is not fungible property, but rather a special kind of constitutive property. Thus, applying *Caparo* would do nothing to advance the interests of the animal and would likely take considerable manipulation to harmonise the damage sustained by the owner as discussed in Chapter Three with the duty owed. The situation is further complicated where the damage claimed stems not from a positive infliction of harm, but rather an omission.

Negligence (and private law more generally) draws a fundamental distinction between acts and omissions, imposing liability on those that commit wrongful *acts*, but generally not in instances of an omission, however wrongful or immoral.<sup>39</sup> In describing the distinction between acts and “mere omissions” in the human medical context, Jones states the well-accepted rule that:

One who chooses to act must do so carefully so as to avoid inflicting harm on others; but, as a general rule, the tort of negligence does not compel a person to take positive steps to confer a benefit on others.<sup>40</sup>

Thus, it is generally uncontroversial that where a veterinarian actively inflicts harm upon the owner’s property, a duty of care will be recognised.<sup>41</sup> In veterinary practice, then, a veterinarian would come under this straightforward duty where, for example, she has been called to shoe a horse and negligently drives in a nail laming the animal. If the animal then

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<sup>39</sup> James Munby, ‘A Duty to Treat? – A Legal Analysis’ in Stephen W. Smith and Ronan Deazley (eds.), *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (Ashgate 2009) 179, 180.

<sup>40</sup> Michael Jones, *Medical Negligence* (4th ed., Sweet & Maxwell 2008) 89.

<sup>41</sup> For an interesting historical account, see: O.W. Holmes, Jr., *The Common Law* (London, 1882) pp. 275- 285. Interestingly, the author discusses cases involving animals. This account gives an interesting early insight into our relationship with animals.

#### 4. Revisiting Duty of Care

has to be euthanised as a result, following the damage element argued in the previous chapter, the owner would be able to claim not only for the property value of the horse, but also the constitutive value of the animal to the owner. Having said that, controversial misfeasance scenarios exist. For example, the scenario discussed below exploring the duty of care owed by a veterinarian who has deliberately acted against the wishes of the owner and euthanised the animal would constitute an act of misfeasance, however, the duty question is not easily answered.

Additional complications arise, as Jones's statement makes clear, when omissions come into play. There has been much academic debate on the nature of omissions versus positive acts with some arguing, for example, that the difference lies in the conferral of benefits whilst others argue it is conscious bodily movements which mark the difference.<sup>42</sup> This latter explanation, however, is far too simplistic. It is submitted that the best way forward in this regard is to distinguish between the active infliction of harm versus simply failing to make things better.<sup>43</sup> Thus, failing to confer a benefit on another is not on par with positive acts which cause harm or give rise to the risk of such harm occurring. This rule also provides the basis for the general principle that there is no duty to rescue. In this regard Stuart-Smith LJ, giving judgment for the court in *Capital & Counties Plc. v Hampshire County Council*,<sup>44</sup> stated that "a doctor who happened to witness a road accident "is not under any legal obligation to [assist], save in certain limited circumstances which are not relevant, and the relationship of doctor and patient does not arise."<sup>45</sup>

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<sup>42</sup> Tony Honoré, 'Are Omissions Less Culpable?' in P. Cane and J. Stapleton (eds.), *Essays for Patrick Atiyah* (Clarendon Press 1991) 41.

<sup>43</sup> *Capital & Counties Plc. v Hampshire County Council* [1997] QB 1004. Claire McIvor, *Third Party Liability in Tort* (Hart 2006) 9.

<sup>44</sup> *Capital & Counties Plc. v Hampshire County Council* [1997] QB 1004.

<sup>45</sup> *ibid* 1035.

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Putting this into the veterinary context, once the veterinarian accepts a case, there is said to exist a special relationship between owner and veterinarian. However, as Soave notes ‘there is no obligation on the part of the veterinarian to accept a case. Even in an emergency he is not bound to care for or treat a sick or injured animal.’<sup>46</sup> This statement is again a straightforward application of orthodox tort principle. It makes clear that unless the veterinarian has previously accepted the animal as a patient within the triangular relationship no duty will arise, and further that unless the case is accepted (discussed in greater depth below), a veterinarian will not come under a positive duty to act. Following human medical law, veterinarians in this instance will also generally be protected from harms suffered by the claimant as a result of an omission.<sup>47</sup> To use the paradigm example, it would likely be the case that a veterinarian would not owe to the animal or to the owner a duty to rescue.<sup>48</sup> Even if there is sufficient *physical* proximity, a duty of care will not arise ‘simply because one party is a doctor and the other has a medical problem which may be of interest to both.’<sup>49</sup> It is arguably in this context that the analogy drawn with human medicine separates from the veterinary.

Once the human medical patient is accepted as a patient, the doctor comes under a positive duty of care resulting from the existence of a special relationship. However, this duty is made possible because of the NHS system which currently operates. In the veterinary

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<sup>46</sup> Orland Soave, *Animals, the Law and Veterinary Medicine: A Guide to Veterinary Law* (4th ed., Austin & Winfield 2000) 21.

<sup>47</sup> *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.

<sup>48</sup> An exception to this would arguably lie where the veterinarian and the owner have a strong pre-tort relationship. The nature of what this relationship might look like will be discussed in greater depth below. For additional support on the rule against liability for rescues in the medical profession see: John L. Powell and Roger Stewart et al., *Jackson & Powell on Professional Liability* (6th ed., Sweet & Maxwell 2007) 903. For the exception to the general rule, see: *Kent v Griffiths* [2001] QB 36. *Kent* would be unlikely to apply in the veterinary context due to the lack of an NHS system to provide a devoted ambulatory service.

<sup>49</sup> *Capital & Counties Plc. v Hampshire County Council* [1997] QB 1004, 1035.

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context, this system does not exist. Thus, even in circumstances where the animal has been accepted as a patient, the existing fee-for-service structure in veterinary medicine makes compelling a veterinarian to treat extremely difficult. It may be the veterinarian comes under a more limited duty (say to offer advice or a telephone number for an alternative service provider), however, it is very unlikely that a more comprehensive duty, which would include a duty to administer treatment, would be found to exist.

In reality, then, under current negligence principles, it is highly unlikely that veterinarians owe a duty of care in straight omissions liability situations. Moreover, it is unlikely, given the highly entrenched nature of the rule against liability for omissions in England, that this would change via the common law. As Mulheron has noted, ‘English law is chary of imposing positive duties upon individuals.’<sup>50</sup> Reform in this area would likely have to happen either via statutory amendment, perhaps under the Veterinary Surgeons Act 1966.<sup>51</sup> There are, however, exceptions to the general rule against liability for omissions found within the common law. Termed “distinct duties”<sup>52</sup> by Honoré, when violated, omissions are placed on par with positive acts, or very nearly so.<sup>53</sup> For present purposes, the relevant duty would come into being where it could be said that the defendant undertook, or assumed responsibility for the claimant’s well-being.

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<sup>50</sup> Rachel Mulheron, ‘Duties in Contract and Tort’ in Andrew Grubb et al. (eds.), *Principles of Medical Law* (3rd edn., Oxford 2010) 146.

<sup>51</sup> Veterinary Surgeons Act 1966. Debate already exists as to whether the Veterinary Surgeons Act 1966 is in need of reform. On this point see: Environment, Food and Rural Affairs Committee, *Veterinary Surgeons Act 1966 (sixth report)* (HC 2007-08, 348-I). It is arguable that a more in-depth look at this matter is needed, especially where this would create additional, but arguably limited, duties on veterinarians not currently represented across all professions.

<sup>52</sup> Arguably, these distinct duties are similar in nature to the “relationship-sensitive” duties noted by Goldberg and Zipursky in ‘The Moral of *MacPherson*,’ (n30) 1826, and would include those relationships which are either pre-existing in some way or are justified based on the high level of proximity shared between claimant and defendant.

<sup>53</sup> Tony Honoré, ‘Are Omissions Less Culpable?’ (n42) 42. See also: Munby, ‘A Duty to Treat? – A Legal Analysis’ (n39) 180-181.

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##### c) *Assumption of Responsibility for the Claimant's Well-being, Not Economic Interest*

As Soave noted above, there is no obligation for a veterinarian to accept a case; this is so whether the situation presents as an emergency or otherwise. Soave's statement, however, continues with the point that 'once the animal is *accepted* for treatment the veterinarian cannot leave or abandon the case without being liable...for negligence.'<sup>54</sup> Although this statement will need deeper analysis, it does seem to follow doctrine in the human medical context and professional negligence more generally insofar as it is the language of "undertaking" and "assumption of responsibility" that the courts use when imposing positive duties of care in providing advice, and diagnosis and treatment.<sup>55</sup> A similar sentiment is made by Yeates that '[veterinarians] voluntarily accept a greater responsibility by taking an animal under their care as a patient. This goes beyond not causing harm into mandating positive actions to care for the animal.'<sup>56</sup> Again, although helpful in terms of framing the obligations held by veterinarians as stemming from an assumption of responsibility based on the commercial relationship, there is little content to the statements made by Yeates and Soave, or indeed, elsewhere in the available literature.<sup>57</sup> Veterinarians need more information regarding the nature of what it means to assume responsibility, the extent of the duties they undertake, and why they arise in the first place.

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<sup>54</sup> Orland Soave, *Animals, the Law and Veterinary Medicine: A Guide to Veterinary Law* (n46) 21 [emphasis added]. Acceptance is arguably more of a contractual term, however, later in the same paragraph he uses the word 'undertakes' to further describe the issue and thus appears to treat the two synonymously.

<sup>55</sup> Mulheron, 'Duties in Contract and Tort' (n50) 145. See also: Michael Jones, *Medical Negligence* (n40) 87.

<sup>56</sup> James W. Yeates, 'Response and Responsibility: An Analysis of Veterinary Ethical Conflicts,' (2009) 182 *The Veterinary Journal* 3, 4.

<sup>57</sup> Although there is some information in the case law on the assumption of responsibility point, the information should not be taken too far. It will be recalled that the assumption undertaken by the veterinarian in these cases was for the financial interests of the owner/client, not the well-being of the animal, which would arguably give rise to different considerations.



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As to the *why* the duty arises, broadly speaking, it can be said that positive duties are justified:

Where A places himself in a relationship to B in which B's physical safety becomes dependent upon the acts or omissions of A, A's conduct can suffice to impose on A a duty to exercise reasonable care for B's safety. In such circumstances A's conduct can accurately be described as the assumption of responsibility for B, whether "responsibility" is given its lay or legal meaning.<sup>58</sup>

In the professional negligence context, which views the relationship between client and professional as one characterised by the client's trust and relative dependence on the professional,<sup>59</sup> Lord Phillips's conclusion above remains completely consistent. However, the content of the duty described by Lord Phillips is different in nature to that of the assumption of responsibility in the best interests veterinary model. In this regard, I would argue that it need not be the case that the claimant relied (to her detriment, or otherwise) on the veterinarian to exercise reasonable care.<sup>60</sup> This is important as it differentiates the assumption of responsibility argued here from the assumption of responsibility argued in existing veterinary negligence case law, which follows a commercial approach to the duty of care grounded in damage stemming from pure economic loss.

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<sup>58</sup> *Watson v. British Boxing Board of Control* [2001] QB 1134, 1151 per Lord Phillips MR.

<sup>59</sup> David Mangan, 'The Curiosity of Professional Status,' (2014) 30(2) Professional Negligence 74, 78.

<sup>60</sup> See: Mulheron, 'Duties in Contract and Tort' (n50)144-145 and see also: *Watson v. British Boxing Board of Control* [2001] QB 1134, 1151.

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In the veterinary negligence cases, reliance was an essential ingredient in determining whether it could be said a duty of care existed. In *Glyn v. McGarel-Groves*,<sup>61</sup> for example, Rix LJ stated that:

...Mrs McGarel-Groves wanted Mr Glyn to be present at High Meadows when Anna was examined and treated by Msr Grandiere, because he was Anna's vet and Mrs McGarel-Groves *relied* on him to protect her own interests...<sup>62</sup>

Soave also speaks of an assumption of responsibility by the veterinarian and reliance by the owner resulting in pure economic loss.<sup>63</sup> However, the damage model adopted in this thesis, namely that the claimant has suffered damage to the constitutive relationship with the animal, does not correspond with harm stemming from pure economic loss. Thus, the duty should not be framed in line with a *Hedley Byrne*<sup>64</sup>- type of assumption of responsibility, but rather one which more closely resembles the human medical context. It is submitted that in a veterinary negligence context, when a veterinarian assumes responsibility for the animal's care, this is not to protect the owner's financial interest, for indeed, the vast majority of companion animals have very little financial value. Rather the duty is assumed to maintain the constitutive relationship that exists between animal and owner and, in exceptional cases the animal itself.

It will be recalled from Chapter Two that it was in the assumption of responsibility requirement that a deeper analysis of the proximity between owner and animal and owner

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<sup>61</sup> *Glyn (t/a Priors Farm Equine Veterinary Surgery) v. McGarel-Groves* [2006] EWCA Civ 998.

<sup>62</sup> *ibid* at para 41 [emphasis added].

<sup>63</sup> Soave (n46) pp 14-17.

<sup>64</sup> *Hedley Byrne & Co Ltd. v. Heller & Partners Ltd.* [1964] AC 465 and see also: *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145.

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and veterinarian could be considered. Further, reliance did not feature as a requirement where the claimant was, for example, a vulnerable child.<sup>65</sup> Therefore, saying that the defendant had assumed responsibility would no longer be a conclusory phrase, but rather one in which a much more nuanced, relational assessment of the parties' proximity to one another, guided by normatively-relevant principles, is undertaken. In some instances it may be that the owner is only concerned about the economic loss suffered, however, this is likely to be the minority situation and can be accounted for under the current commercial model. Thus, in the majority of cases, at the very least, it can be said that commercial duty model does not account for the full range of harms suffered, nor the specific duty requirements necessary to protect that interest.

To sum up, then, when a veterinarian assumes responsibility for the owner's well-being by accepting the animal into his or her care, liability for an omission could exist— that is to say positive duties of care are owed— and it would be no excuse for a veterinarian to say that there existed no evidence of reliance on the part of the claimant owner. Now that the basic nature of positive and negative duties of care have been touched upon, the extent of these duties must be explored.

##### d) *The Extent of a Veterinarian's Duty of Care: Testing the Limits of First Principles*

At its most general, the duty of care asks 'whether the defendant owed a duty to the plaintiff to use a particular level of care to avoid the sort of injury the plaintiff suffered.'<sup>66</sup> As already discussed, it is the commercial model which currently animates the veterinary relationship;

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<sup>65</sup> See discussions in Chapter 2.5(b) & 2.4(b) respectively.

<sup>66</sup> John C.P. Goldberg and Benjamin C. Zipursky, 'The Moral of *MacPherson*,' (n30) 1828. See also: Nicholas J McBride, 'Duties of Care – Do they Really Exist?' (n34).

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this is consistent both with how courts have interpreted the duty element and how secondary source material, typically written by practitioners, have interpreted the duty. Following from this, the extent of the veterinarian's duty of care depends on whether the owner has been accepted as a client and the animal as a patient, and what the parties agreed on in terms of treatment and fees. To support the argument that the commercial model cannot account for all the intricacies of the veterinary relationship, I will explore the analogy to be drawn with human medicine.

Broadly speaking, the duties of a medical practitioner fall into three main areas: diagnosis, treatment, and providing advice.<sup>67</sup> Dealing first with diagnosis and treatment, duties to diagnose concern the professional's ability to diagnose the patient under their care given the symptoms presented and techniques available,<sup>68</sup> which means investigating, testing, exploring, checking and verifying<sup>69</sup> the patient's condition. Duties to treat, on the other hand, stem from the defendant's professional knowledge and the professional's skill in executing a particular procedure.<sup>70</sup> The clearest expression of the duty comes from Lord Denning's decision in *Cassidy v. Ministry of Health*<sup>71</sup> where, in discussing the duty of doctors and hospitals to treat, he stated that:

There is no doubt that once the relationship of doctor and patient  
or hospital authority and admitted patient exists, the doctor or the

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<sup>67</sup> See Michael Jones, *Medical Negligence* (n40) 87.

<sup>68</sup> *ibid* 343. Case law examples can be seen in *Hucks v. Cole* [1993] 4 Med. L.R. 393 (diagnosis of septicaemia) and *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (diagnosis of arsenic poisoning). In the veterinary negligence context: *Calver v. Westwood Veterinary Group* [2001] P.I.Q.R. P11 (failure to diagnose infection from retained biomaterial after abortion of foal).

<sup>69</sup> *JD v East Berkshire Community Health NHS Trust* [2005] 2 AC 373, 394 per Lord Bingham.

<sup>70</sup> Jones, *Medical Negligence* (n40) 379. See also: *Glyn (t/a Priors Farm Equine Veterinary Surgery) v. McGarel-Groves* [2006] EWCA Civ 998.

<sup>71</sup> [1951] 2 KB 343.

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hospital owe a duty to take reasonable care to *effect a cure*, not merely to prevent further harm.<sup>72</sup>

This was later upheld by Stuart-Smith LJ in *Capital and Counties Plc. v. Hampshire County Council*<sup>73</sup> stating, *obiter*, that doctors owe positive duties of care to make the situation better, not simply to prevent it from getting worse. The undertaking, then, is to use the special skills which the doctor and hospital authorities have to treat the patient and as far as possible effect a cure.<sup>74</sup>

In the veterinary context, although these duty constructions should guide a veterinarian's conduct, as long as negligence still views the legal relationship as predicated on the existence or non-existence of a commercial relationship based on the payment of fees for services, the analogy drawn with the human medical profession on these points will always be limited; indeed, it is submitted that the issue of fees presents one of the largest obstacles to extending a veterinarian's duty beyond the confines of the commercial context. Thus, although a veterinarian may have assumed responsibility for the care and treatment of the animal this would arguably extend only insofar as the commercial agreement reached between the parties and not necessarily to use the most effective diagnostic tools or, once diagnosed, to take reasonable care to effect a cure. As mentioned in the previous section, there is no equivalent NHS system to ensure that every animal receives care and even if fees are not an issue, the message being sent to the veterinary profession is that 'fees pay for veterinary services, not for animal health.'<sup>75</sup> Therefore, under orthodox negligence

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<sup>72</sup> *ibid* 360 [emphasis added].

<sup>73</sup> [1997] QB 1004.

<sup>74</sup> *ibid* 1035.

<sup>75</sup> James Yeates, *Animal Welfare in Veterinary Practice* (Wiley-Blackwell 2013) 52.

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principles as currently conceived, this is as far as the veterinarian's duty can extend.

Moreover, unlike the human medical context, treatment may vary depending on the *use* of the animal, for example, food-producing or companion and also the "value" of the animal in determining whether the 'treatment is worth the expense or whether the treatment will interfere with the intended use of the animal.'<sup>76</sup> Importantly, then, as long as the courts continue to view the legal relationship in commercial terms, as demonstrated, for example, by the payment of fees, drawing an analogy with the human medical profession will be imperfect, and negligence itself remains similarly limited as a means of redress.

At the beginning of this section, it was argued that once the best interests of the animal started to play a more important and central role, the commercial underpinnings of the veterinary relationship would be rendered inadequate. Ultimately, it is submitted that although the veterinarian is hired by the owner-client, the veterinarian's primary responsibility should be to the animal patient and the integrity of the constitutive relationship, which necessarily depends on the well-being of the animal. To further illustrate this point the next section of this chapter will introduce various hypothetical scenarios involving situational dilemmas which, although currently unaccounted for in the case law or secondary literature, could certainly arise in everyday modern veterinary practice. In line with the secondary objectives of this thesis, it will be argued that the best interest of the animal should be central within the duty assessment. As the below scenarios will highlight, as long as the commercial relationship dictates the extent of the duty owed, however, this aim cannot be fulfilled and a new framework will be needed. Specific examples of the limitations of the commercial model will be discussed in the next section. In response, a best

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<sup>76</sup> Soave (n46) 15.

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interests rationale will be explored as a means of resolving the problems encountered in the hypothetical scenarios discussed.

##### **4.4 Limitations of the Commercial Model: Difficult Practice Scenarios Introduced**

*Scenario 1: Owners disagree with veterinarian, hence, no consensus as to treatment path. Can the veterinarian take positive steps to remedy the situation?*

The animal is senior in years and has recently been diagnosed with leukaemia and is in considerable pain. The owners do not want the animal euthanised. Emotionally distraught, the owners have placed the animal in the care of the veterinary hospital. After conducting a best interests assessment, the veterinarian has determined that in this situation, euthanasia is the best option for the animal. Chemotherapy would only prolong the animal's suffering and constitute futile treatment,<sup>77</sup> and surgery is not an option. In these circumstances the question is whether the veterinarian, acting in what she professionally feels is the best interests of the animal, can euthanise the animal. In this scenario, the act of euthanising the animal would constitute an act of misfeasance against the owners' property. Further, although the veterinarian has undertaken a duty to act in the best interests of the animal, in so doing, she will have acted in contradiction to the owners' express instruction. Thus, if the owners brought a claim against the veterinarian because they desired that their animal live out its natural lifespan, what interest ought the veterinarian to have protected?

In this instance, as the veterinarian has accepted the case she owes a positive duty of care, but does this extend to euthanising the animal even though euthanasia is regarded as a valid

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<sup>77</sup> Sarah Elliston, *The Best Interests of the Child in Healthcare* (Cavendish 2007) 166-167. 'Futile' treatment is used to describe treatment which, though it *may* physiologically affect a result, administering the treatment would achieve no overall benefit to the patient.

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treatment method?<sup>78</sup> Similar situations arise in the human context with children where the parents disagree with the treatment recommended by the doctor. In these circumstances, doctors are able to apply to the court for guidance,<sup>79</sup> however, this is not the case with veterinarians. Under current legal constructs, the commercial relationship between the owners and veterinarian dictates that the owners' instruction is decisive; the interests of the animal and the interests of the constitutive relationship therefore fall to the wayside. Thus, if the clients indicate that they do not want the animal euthanised, under the commercial model, the veterinarian cannot euthanise. This situation, however, is clearly not in the best interests of the animal or the constitutive relationship, so the veterinarian is caught in a dilemma.

*Scenario 2: Owner seeking treatment that does not properly consider animal's quality of life (ie. overtreatment)*

In this scenario, the owner presents to the veterinarian with her nine-year-old dog and it is determined that the animal is suffering from a severe form of epilepsy; there is no drug which can cure the condition and with each seizure the animal's cognitive and bodily functions worsen. The veterinarian has recommended that euthanasia would be appropriate in this situation, but has also noted the availability of drugs which can keep the animal alive. These drugs, however, place the animal in a permanent semi-comatose state and severely impair its quality of life. After doing some reading on the Internet, the owner has decided that drugs be administered and demanded that the animal be put through a battery of MRI and neurological testing. These additional tests, however, would likely cause the animal

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<sup>78</sup> Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n7) 342.

<sup>79</sup> Typically this will occur by way of a specific issue order under s.8 of the Children Act 1989, or a declaration may be sought through the exercise of the High Court's inherent jurisdiction.



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stress and anxiety and offer no additional medical benefit.<sup>80</sup> The veterinarian refuses the owner's direction and one week later the animal dies after suffering an epileptic seizure. The owner brings a claim in negligence against the veterinarian.

Following the commercial model, 'clients have the right to decide what shall be done to their animal, based on the doctor's assessment of the case and the information presented to them.'<sup>81</sup> It is uncertain under the commercial model how far a veterinarian could be compelled to act in these circumstances or whether it could be said the veterinarian was under a duty to administer the desired treatment. What is important, however, is that if the animal's interests are not considered, as is consistent with the current commercial model, there is little scope for the veterinarian to make the argument that refusing to treat the animal in line with the owner's wishes was a justified course of action. In this scenario, if the animal's interests are considered, the veterinarian could argue that she came under an affirmative duty to act in the best interests of the animal and refuse the desired treatment, at which time the question shifts to consideration of the type of duty owed.

*Scenario 3: Veterinarian volunteers to provide best treatment option, but owners refuse*

In this scenario, the animal presents at the veterinary hospital with a broken leg and the veterinarian volunteers to provide surgery to reset the leg, which she has reasoned is in the animal's best interests. The owners opt for placing the animal's leg in a splint, which would

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<sup>80</sup> 'Overtreatment,' it will be recalled, was defined by Corr to mean treatment that is sought by the owner which either, 'results in a poorer quality of life than no treatment or euthanasia...or a treatment or test that makes no difference in the animal's condition or quality of life.' See: Sandra Corr, 'Companion Animals' (n4) 195.

<sup>81</sup> Soave (n46) 19. This also raises important questions regarding the veterinarian's duty to disclose available options. This issue will be addressed to some extent in section 4.6, but for present purposes what is important is that a failure to sufficiently inform owners of various treatment options could also constitute negligence.

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permanently and severely limit the animal's mobility. Future surgery may also be needed to amputate the leg. After starting the treatment process, the veterinarian ultimately decides to operate without obtaining the client's agreement believing she is compelled to act in the animal's best interests, but in the process, the animal cannot be brought out from anaesthesia. Again, and quite clearly, orthodoxy would suggest that the wishes of the owner remain dispositive within the commercial relationship. Under the commercial model, the veterinarian would come under a duty of care to act in accordance with the client's wishes. As between the owners and veterinarian, a treatment plan was decided and fees agreed to. This would be classified as an active infliction of harm (ie. the death of the animal). The question remains, however, whether the veterinarian who is acting in the best interests of the animal, can argue that she had a positive duty to do so and, as a result, should not be found liable. Under the commercial model, this would not be the case.

The above scenarios are just a sampling of some of the complex legal and ethical dilemmas that veterinarians can and do face. Although it is submitted that a best interests approach can do some of the work in providing veterinarians with guidance as to where their duties of care ought to lie, as will be detailed in the next section, this is also not a perfect solution and one that cannot be employed in every circumstance. Some solutions will have to be sought outside of the tort system. Having said this, there is much value in determining how far the present tort system can be extended.

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### 4.5 Best Interests: Parameters and Practical Applications

#### a) *Best Interests: Providing a Structure for the Veterinarian's Duty of Care*

Before discussing to what extent best interests can assist veterinarians in assessing the nature and extent of their duties of care, it is first important to set out how I intend to utilise best interests. In the veterinary context, the commercial relationship and, in some cases, the professional views of veterinarians themselves,<sup>82</sup> have hindered the development of a best interests approach. In other areas, such as the law relating to the paediatric relationship, best interests is a well-known construct. In the first chapter of this thesis, it will be recalled that an argument was made that veterinarians should view their duties in line with that of a paediatrician and not those of a garage mechanic. In support of this view, Main states that:

Veterinary surgeons should offer to their clients and, if necessary, advocate to them, the 'best' veterinary care. Using appropriate prevention and treatment methods, this best veterinary care should aim to maximise the best interests of the animal in terms of both quality and quantity of life...and should be based on clinical experience, scientific knowledge and, most importantly, the needs of the individual animal.<sup>83</sup>

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<sup>82</sup> Carol Anne Morgan, 'Stepping up to the Plate: Animal Welfare, Veterinarians, and Ethical Conflicts,' (DPhil thesis, University of British Columbia 2009) 99-102. In this regard Morgan found that some of the veterinarians she interviewed believed strongly that it is the client whose interests remain primary, not the animal's.

<sup>83</sup> D.C.J. Main, 'Offering the Best to Patients: Ethical Issues Associated with the Provision of Veterinary Services,' (2006) 158 *Veterinary Record* 62, 65. This resembles the paediatrician model discussed at the beginning of this thesis and is important as it advocates giving the best veterinary care. See: Bernard Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* (Iowa State University Press 1996) 58.

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Though I agree with Main's account, it requires further clarification. As a framework, Main's statement provides a solid foundation from which to work, however, it must be highlighted that this is an ethical statement and will require further development if it is to act as an articulation of a veterinarian's legal duty. To be defensible in a way that would displace the legal duty owed to the client-owner, a veterinarian's reasoning needs to be more firmly grounded in legal principle. It is submitted that some headway can be made by analysing the practices adopted in the human medical context regarding best interests, in particular those practices adopted for deciding treatment issues relating to children.

Some of the most detailed judicial discussions of best interests occur in cases where paediatric doctors wish to withhold treatment regarding the child patient and the parents disagree. There are some similarities here with the triangular veterinary relationship, yet, there is the obvious hurdle that the child patient has legal status and the animal does not. The question for this section, then, is to determine whether the sentient constitutive property model argued in the previous chapter and the best interests approach argued here can do some work to improve the interests of the animal patient, which is currently neglected under the commercial approach.

When making a decision regarding best interests, Elliston notes that determining whether to withhold treatment in situations involving children requires a weighing up of relative burdens and benefits.<sup>84</sup> This typically involves an assessment of the utility (or futility) of treatment and the child's prognosis with or without treatment, often termed a quality of life

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<sup>84</sup> Elliston, *The Best Interests of the Child in Healthcare* (n77) 146.

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judgment,<sup>85</sup> but also emotional and other welfare issues.<sup>86</sup> This mirrors the statement made by Main, but makes explicit the need for a weighing up or balancing of the various interests, including emotional considerations.<sup>87</sup> If veterinarians are to feel empowered to act in ways which protect the best interests of the animal then they need to feel confident that the conclusion arrived at is defensible, both on a personal level and a professional. This is not to say that a strict test should be developed and indeed, I would argue much of what is good about the best interests evaluation is its flexibility and ability to take into consideration particular qualities of the patient, however, I would also argue that the assessment is best undertaken within a framework of principles applicable to a particular context. In this way, then, I support the argument made by Coggon that best interests should be viewed as a set of action-guiding principles, not a specific test and not a singular concept.<sup>88</sup> In particular, viewing best interests as sets of action-guiding principles ties in with the argument adopted in Chapter One, which argued that the duty of care should carry obligatory normative force in how people interact with one another, and that that obligatory force stems from a deep concern for the well-being of others.<sup>89</sup> This accords with more general notions that negligence aims to uphold, namely protection of the vulnerable, regulating conduct, and encouraging good behaviour.

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<sup>85</sup> *ibid.* See also more generally: Beauchamp and Childress, *Principles of Biomedical Ethics* (7th ed., OUP 2013) 19-24.

<sup>86</sup> Beauchamp and Childress, *Principles of Biomedical Ethics* (n85) 19.

<sup>87</sup> 'Emotional considerations' could, for example, include the veterinarian's assessment of how well she feels the animal will be able to mentally cope with the proposed treatment and its effects. In some cases, the cure may be worse than the ailment itself (perhaps temporarily, perhaps long-term) and so consideration needs to be given to the animal's emotional well-being. This consideration also borders with issues surrounding overtreatment.

<sup>88</sup> John Coggon, 'Best Interests, Public Interest, and the Power of the Medical Profession,' (2008) 16 *Health Care Anal* 219, 220.

<sup>89</sup> See discussion in Chapter 1.3(b)(ii).

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Putting this into practice, it is important to note from the outset that some of the principles which complicate best interests determinations, for example, sanctity of life<sup>90</sup> and autonomy<sup>91</sup> are not applicable in the veterinary context and thus, again, the analogy with human medicine is not a perfect one. However, this is actually an advantage for veterinarians who find themselves in a dilemma similar to the scenarios listed above.<sup>92</sup> Euthanasia is an accepted form of treatment and, although I argue that animals within a constitutive relationship possess an intrinsic value, this does not preclude a determination that acting in the best interests of the animal in a given situation means the animal should be euthanised. Further, although the discussion below focuses on how the veterinarian could approach a best interests assessment, the process itself should be one which is made in conjunction with the owners and should take into account their abilities and desires. As Elliston accurately highlights:

[Doctors] will also be, in the first instance at least, the ones who are expected to question decisions made by parents...where they feel these raise issues of concern. Doctors are of course expected to promote and protect health and to offer the care they believe most appropriate.<sup>93</sup>

Elliston's statement raises two important points going forward. First, the proceeding discussion addresses the question of best interests primarily from the perspective of the

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<sup>90</sup> See for example: *Re A (Conjoined Twins)* [2001] 2 WLR 480 and *Portsmouth NHS Trust v. Wyatt* [2005] 1 WLR 3995.

<sup>91</sup> See for example: *R (On the Application of Burke) v. GMC* [2005] QB 424, but then see the Court of Appeal decision at: [2006] QB 273 reversing the lower court decision.

<sup>92</sup> Although it is somewhat of an "advantage" not to have to weigh and consider issues surrounding sanctity of life, autonomy etc. as animals lack the necessary status, this obviously brings to the fore the fact that as long as animals remain legal "things" there really is only so far we can advocate for their well-being.

<sup>93</sup> Elliston (n77) 42. See also Jo Bridgeman, 'Because we Care? The Medical Treatment of Children' in Sally Sheldon and Michael Thomson (eds.), *Feminist Perspectives on Health Care Law* (Cavendish 1998) 99-100.

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veterinarian. Although a best interests assessment will involve the perspective of the parents (here the owner), it is ultimately the practitioner who assumes the middle position and who, in relation to their own best interests assessment, must scrutinise and balance the wishes of the owner(s) as against those of the patient, execute the decision, and defend it upon legal challenge. Second, Elliston notes that doctors are *expected* to promote and protect the health of their patient; this is presumed in the human medical context given the legal status of the patient and various ethical principles associated with human life. In the veterinary context, where the commercial model continues to operate, this position is not so presumed. I therefore argue that this same expectation directed to the animal's best interests should be developed in the veterinary context and that, in so doing, veterinarians will have a clearer picture of their legal obligations.

Taking this forward, principles which could be applied in the veterinary context include, for example: the best interests of the animal patient must be the veterinarian's primary concern, the animal patient must be treated as a sentient entity with interests which extend beyond the alleviation of pain and suffering<sup>94</sup> and, in determining best interests, veterinarians must have regard for the animal's quality of life. In assessing the best interests of the animal patient the veterinarian could consider the following in determining quality of life issues: the ability of the animal to express its natural functioning as a member of a specific species (ie. the animal's *telos*<sup>95</sup> or the unique and special features and behaviours that make a dog a dog or a horse a horse), the animal's ability to actively participate within the constitutive relationship

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<sup>94</sup> See Chapter 3.5(b) for the definition of sentience adopted in this thesis. Important considerations would be, for example, the animal's ability to see its life over time, form friendships, and exhibit its full range of emotion (ie. empathy, love, displeasure, etc.).

<sup>95</sup> This is extensively discussed by Bernard Rollin. See, for example: Bernard Rollin, 'Telos' in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 75, 76.

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between owner and animal (both cognitively and physically),<sup>96</sup> and the veterinarian's knowledge of the *individual* animal and its lifestyle. Importantly, I would also agree with the statement that 'quality of life considerations can permit...life-prolonging treatment to be withheld, even if the treatment would not itself be unduly burdensome'<sup>97</sup> where the patient is no longer deriving a benefit.

It is also widely acknowledged that a best interests assessment is holistic one and ought to take into account the views and abilities of involved third parties, such as family members. Importantly, assessing best interests must take into account the web or nexus of relationships in which the patient exists.<sup>98</sup> Given the exclusive dependence of the animal, as discussed in Chapter Two, attempting to separate the interests of the patient from those relationships would be highly artificial.<sup>99</sup> Recalling the nature of the constitutive relationship advocated in the previous chapter, taking on board the views and wishes of the owner would be wholly consistent with this approach. Additionally, the owner's ability to comfortably pay for the treatment and after-care could be a relevant consideration.

A related point is the extent to which putting forward the argument that veterinarians should have the option to vary or refuse to give a specific treatment on the basis that it goes against the best interests of the animal conflicts with the fact that animals are ultimately the property

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<sup>96</sup> See: *Portsmouth NHS Trust v. Wyatt* [2005] 1 WLR 3995. Best interests includes not just physical health, but also emotional and other welfare interests.

<sup>97</sup> Elliston, *The Best Interests of the Child in Healthcare* (n77) 168 quoting from John Harris, 'Not all babies should be kept alive as far as possible' in R. Gillon (ed.), *Principles of Health Care Ethics* (Wiley, 1994).

<sup>98</sup> Jonathan Herring and Charles Foster, 'Welfare Means Relationality, Virtue and Altruism,' (2012) 32(3) *Legal Studies* 480, 494.

<sup>99</sup> *ibid.* See also: Rob Heywood, 'Parents and Medical Professionals: Conflict, Cooperation, and Best Interests,' (2012) 20 *Medical Law Review* 29, 35. Having said this, there is also the concern, as Chapter 2.5(c)(ii) highlighted, that the decision becomes too focused on the nexus of relationships or, inadvertently, solely on the owner and not on the interests of the individual animal. There is certainly a delicate balance to be achieved, however, what is most important is that an animal's interest(s) cannot be wholly abstracted from that of its owner.



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of their owners. First, it must be remembered that the duty contemplated here would only arise when dealing with sentient constitutive property. In this regard, it will be remembered that animals falling under this category assume a special property status, one in which the relationship is mutually constitutive and reciprocal. It is therefore submitted that acting positively in the best interests of the animal, the veterinarian is also acting to maintain the integrity of the constitutive relationship. Thus, acting for the animal, by placing central importance on the animal as a sentient being capable of experiencing a wide range of feelings and emotions, is also acting to maintain the integrity of the bi-directional, constitutive relationship. Importantly, the constitutive relationship works from the premise that both parties derive a mutual benefit; this is eroded or destroyed when one party is suffering because of the other, or when party is exercising power over or coercing the other.

When making a best interests assessment, then, the relative weight and the specification the veterinarian gives to each consideration will necessarily vary, however, it will be recalled that flexibility in this assessment is an advantage. Having said this, I would also argue that although flexibility in decision-making is a good, the veterinarian must also be prepared to defend their rationale and not allow the decision to be based wholly on intuition; this is both for their own personal and professional growth, but is also important should the veterinarian face legal scrutiny. This point raises a further issue for discussion and though full consideration cannot be given here, the issue of external scrutiny seems particularly pertinent. It has already been mentioned that in the human context, where parents (or legal guardians) disagree with the medical team in charge of the child's care, applications can be made to the High Court, likely under s.8 of the Children Act 1989, for determination. There is no such avenue available for veterinarians. As treatment options and thus best interest

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determinations become more complex, there is scope to argue that the Royal College of Veterinary Surgeons (“RCVS”) as official regulator should introduce a mechanism allowing veterinarians to pre-emptively bring complex treatment issues to an impartial third party and request formal guidance. Indeed, this argument is made stronger when one considers the amount of source material indicating that veterinarians face increasing personal and professional pressure in making complex treatment decisions.<sup>100</sup>

##### b) *Can Best Interests Resolve all of the Problems Created by the Commercial Approach?*

The short answer to this question is ‘no’. Best interests is not a cure-all to the issue that more weight should be given the welfare interests of the animal patient. This will become clear presently when we return to the scenarios introduced above. What best interests can do, however, is provide a step in the right direction by focusing and, in some cases, empowering veterinarians to act, or at the very least consider, the best interests of their patient. At this stage it is helpful to return to the scenarios discussed previously and see how far best interests can be utilised to give substance and effect to the veterinarian’s duty of care.

In scenarios 1 (disagreement between veterinarian and clients) and 3 (veterinarian provides “better” treatment owners do not want), it is submitted that a best interests argument could be utilised to effect a positive development in the law by better protecting animal interests and providing more accurate guidance for veterinarians. In essence, the question for the court in applying a best interests argument would be whether the veterinarian has fulfilled

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<sup>100</sup> See for example: C. E. M. Batchelor, D. E. F. McKeegan, ‘Survey of the Frequency and Perceived Stressfulness of Ethical Dilemmas Encountered in UK Veterinary Practice,’ (2012) 170 *Veterinary Record* 19 and D. J. Bartram, D. S. Baldwin, ‘Veterinary Surgeons and Suicide: A Structured Review of Possible Influences on Increased Risk,’ (2010) 166 (13) *Veterinary Record* 388.

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her duty in the circumstances. Although the veterinarian does owe a duty of care to the owners stemming from their commercial relationship, the question here is whether an argument can be made that in scenarios where the animal's best interests are being compromised, a duty to the animal can work to protect that particular interest. In both scenarios, the veterinarian has acted with care and concern toward the animal in question. They have put their minds to the well-being of the patient and exercised professional judgment in weighing and balancing the relative risks and benefits in coming to their conclusions. Arguably, their positions would be defensible.

In scenario 1, the animal is in severe pain and though its quantity of life is unknown, the animal's quality of life is arguably non-existent. The animal would be unable to exhibit, for example, its *telos*<sup>101</sup> or the lifestyle it had prior to illness. There is also concern that the owners are having a difficult time coming to terms with their animal's condition and are perhaps, unwittingly, utilising their position of power as owners, detrimentally affecting the animal. The animal itself would also be unable to actively participate and derive benefit from the constitutive relationship shared with its owners. By euthanising the animal, then, the veterinarian performed what was in her opinion the best treatment option for the animal. It should be recalled that in a conflict situation (ie. where the desires of the owner conflict with the welfare interests of the animal), the best interests model asserts that the veterinarian would come under a specific positive duty to act in the interests of the animal. Assuming the veterinarian did not then go on to breach that duty regarding performance, there would be no liability. It has been maintained throughout this thesis that although animals remain property, some exist as a special form of property in which their own sentience is both developed and

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<sup>101</sup> Rollin, 'Telos' (n95).

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intrinsically-valuable. If the status of the animal is to be elevated in this way, there needs to be a mechanism in place to see that their interests are protected. One of the ways of doing this is to argue the owner's proprietary interest within the triangular relationship is not absolute; in some cases, the interests of the animal must take precedence. Scenario 1, I would argue, provides a strong example of where the owner's interest is secondary to the animal's interest in maintaining a high quality of life, free from suffering.

Scenario 3, which deals with the veterinarian volunteering to perform the best treatment option against the owner's wishes, is somewhat more complex. The animal is initially in pain, having suffered a broken leg, however, the treatment desired by the owners does not place the animal in continuous pain, but would severely limit the animal's mobility for the rest of its life. Thus, the animal's quality of life is compromised, but not necessarily its quantity of life. There is an indication that the additional risk of complication is heightened by the owner's choice, but at what level that risk operates is not fully known. The veterinarian acted in a way which she believed represented the best interests of the animal by attempting to provide what she professionally felt was its best treatment option. It is argued that because the surgical option provided the best opportunity in terms of affecting a positive quality of life for the animal, the veterinarian came under a positive duty which compelled her to provide that treatment and protect the animal's best interests. As the veterinarian completed a balanced and reasoned assessment of the animal's best interests, it is submitted that the veterinarian has fulfilled her duty to the animal and absent any negligence on her part for the actual execution of the surgery, should escape liability. It is appreciated that these arguments carry important ramifications. However, for the best interests argument to have bite, it must be that in certain circumstances the animal's interests take precedence over

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the commercial interests between owner and veterinarian. If this position is not adopted, then it will always be the case that the commercial relationship is superior. In acting for the best interests of the animal, the veterinarian is not only acting to protect the animal, but as a corollary, the interests the owner and animal share being in a constitutive relationship.

It is also important here to consider that permitting a veterinarian's behaviour in these situations, although done with the animal's interests in mind, would allow the profession a large amount of power. Where, for example, in the human context, parents' wishes conflict or a decision by all involved parties cannot be reached, doctors must continue to act in the best interests of their patient and can thus petition the court for guidance on these matters.<sup>102</sup> This currently does not exist in the veterinary context and re-emphasises the point made earlier that an alternative option where a legal body attached to or within the RCVS could act as an independent arbiter in conflict situations. Importantly, however, whilst this presents as an interesting way in which to develop the veterinary profession, it has never been considered by the RCVS and would represent a significant change in its regulatory structure. The best interests option discussed here provides an option which can, at the moment, achieve a measured result for both veterinarians and animals by opening the decision-making process to external legal scrutiny.

The remaining scenario (scenario 2- possible overtreatment of animal suffering from epilepsy), is the most complex. Here, the veterinarian has essentially conscientiously refused to administer treatment which according to the veterinarian is not in the animal's best interests, but is desired by the owner. In *Portsmouth NHS Trust v. Wyatt*,<sup>103</sup> Hedley J noted

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<sup>102</sup> See for example: *Portsmouth NHS Trust v. Wyatt* [2005] 1 WLR 3995.

<sup>103</sup> [2004] EWHC 2247.

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four “stages” or ways in which a clinician can be in disagreement with the parent(s) of the child patient. The last stage is where ‘to do what the parents want is not possible in good conscience.’<sup>104</sup> This is the situation the veterinarian finds herself. The question, then, is what type of duty arises? This section argues that veterinarians only owe the animal a duty to act positively if it is in their best interests, otherwise the basic rule against liability for omissions applies. The veterinarian in this scenario has determined that it would not be in the best interests of the animal to undergo the treatment sought by the owner. In these circumstances, then, there is arguably no positive duty to provide that treatment as this would conflict with the veterinarian’s duty to act in the animal’s best interest.

In some ways, this situation mirrors that of Charlotte Wyatt’s case.<sup>105</sup> Charlotte was born prematurely and faced numerous life-threatening ailments. At one stage Charlotte’s respiratory condition worsened significantly. A judicial order was sought to determine whether Charlotte should receive artificial ventilation in the event that her respiratory system failed. It was the opinion of the medical team that it was not in Charlotte’s best interests to receive artificial ventilation,<sup>106</sup> whilst her parents believed it was their duty to maintain Charlotte’s life as they did not believe she was ready to die.<sup>107</sup> In determining whether treatment should be withheld, Hedley J had regard to the Court of Appeal decision in *Re: J (A Minor) (Wardship: Medical Treatment)*<sup>108</sup> where Taylor LJ stated:

Clearly, to justify withholding treatment, the circumstances would have to be extreme...I consider the correct approach is for the court

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<sup>104</sup> *ibid* at 18.

<sup>105</sup> *Portsmouth NHS Trust v. Wyatt* [2004] EWHC 2247.

<sup>106</sup> The medical team was, however, prepared to administer treatment if ordered by the court. This is different from the veterinary scenario in that the veterinarian has refused to administer treatment.

<sup>107</sup> *Portsmouth NHS Trust v. Wyatt* [2004] EWHC 2247 at 12.

<sup>108</sup> [1991] 2 WLR 140.

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to judge the quality of life the child would have to endure if given the treatment and decide whether in all the circumstances such a life would be so afflicted as to be intolerable to that child. I say "to that child" because the test should not be whether the life would be tolerable to the decider.<sup>109</sup>

Although the analogy here is not perfect— the doctor's legal duty being to act in the best interests of the child as a subject under the law— in the present context it is submitted that this is something which should be aimed for, both by veterinarians and the courts. In cases where the question to be decided is one of withholding treatment (ie. because administering such treatment would amount to overtreatment, or futile treatment<sup>110</sup>), focus must be on the welfare of the patient. Thus, if the approach adopted by Taylor LJ is applied, the veterinarian has, arguably, fulfilled her duty. The veterinarian has conducted a best interests assessment and determined that the treatment sought by the owner would provide no benefit to the animal and would actually cause it increased suffering. Thus, if the owner in this scenario had brought a claim against the veterinarian, utilising the best interests approach would find that the veterinarian would not owe a duty to provide treatment in this case and a claim against the veterinarian under these circumstances would not, arguably, proceed past preliminary stages. It is submitted that this is a particularly strong example of where best interests can make a positive change to the law regarding veterinary negligence

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<sup>109</sup> *ibid* at 55. There was some discussion about whether 'intolerability' should act as some form of threshold question when deciding best interests. It was later confirmed as a helpful, but not determinative, consideration to the assessment of best interests. See: *Portsmouth NHS Trust v. Wyatt* [2005] 1 WLR 3995. It may be the case, however, that in the animal context where euthanasia is considered an acceptable treatment option, that an intolerability standard is more acceptable and instructive, however, space precludes full consideration of this topic.

<sup>110</sup> Elliston (n77) 166-167. One sense in which 'futile' is used to describe treatment is where, though physiologically, the treatment *may* effect a result, administering the treatment would achieve no overall benefit to the patient.

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Recalling the statement that more advanced diagnostic and treatment options are pushing back the boundary of when euthanasia becomes the best treatment (the implication being that diagnostic testing and treatment options are greatly, and perhaps haphazardly expanding), the argument in favour of a best interests approach serves to re-focus veterinarians' decision-making. For the courts, this approach would allow for a more nuanced and balanced assessment of all interests involved, not simply deferring to the rights of the owner as property-holder. In order to facilitate this development, it may be that changes to the RCVS may need to occur, however, this is something which would arguably be welcomed by veterinarians. This will be discussed in greater depth in the next chapter.

### 4.6 The Duty to Disclose Risks: Decision-Making in Veterinary Medicine

From the outset, it is important to note that the issues relating to the duty to disclose risks are different in nature from the duties discussed thus far in this chapter. Whilst in the human medical context disclosure of risks is important to promote patient autonomy and self-determination, these principles do not apply to animals. In the veterinary context, risk disclosure is important to facilitate the owner's ability to make a treatment decision for the animal, but also, in a way, to protect the integrity of the constitutive relationship she shares with her animal.<sup>111</sup> This section will ultimately argue that the human medical model be

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<sup>111</sup> As Tannenbaum argues, for example, the owner's relationship with the animal should be a source of entitlement to make an informed decision as to its care. Apart from the strong emotional bond shared between owner and animal which has occurred over time, Tannenbaum notes that:

The client has undertaken the care of the animal, he has made the personal and financial sacrifices, he has arranged his life and that of his family around the life of his animal. Having made these commitments, and decisions...he is entitled to decide...how his life and that of his animal will proceed in the future.

See: Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n7) 182-183. A similar argument is made by Tony Milligan who argues that owners *can* be in privileged position



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rejected and a shared decision-making model which is compatible with the best interests model discussed throughout this chapter be adopted.

Recent debate in the human medical negligence context over the importance of issues pertaining to client autonomy, medical deference, and ethical principles relating to bodily integrity and embodiment, has led to increased discussion regarding obtaining informed consent. Indeed, Jones notes, ‘lack of communication is often said to be at the heart of many medical negligence actions.’<sup>112</sup> In the veterinary context, lack of communication or problems in communication featured in two out of the three reported cases.<sup>113</sup> As Jackson<sup>114</sup> highlights, however, legally, informed consent is used as a shorthand for *two distinct duties*: the duty to obtain the patient’s consent before treatment and the duty to ensure that the patient has been properly informed about its risks and benefits’.<sup>115</sup> This blending of legal and ethical principles provides a rich area for discussion, however, it should also be appreciated that establishing concrete conclusions relating to the nature of the duties discussed cannot take place given the rapidly changing and controversial nature of the law at present.

Central to this debate is a point made by Jones that:

Part of the imbalance between doctor and patient is due to the patient's lack of information, and, on one view, it is the function of

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when it comes to end-of-life decisions based on their ‘narrative appreciation’ of the animal’s life. See: Tony Milligan, ‘Dependent Companions,’ (2009) 26(4) *Journal of Applied Philosophy* 402.

<sup>112</sup> Jones, *Medical Negligence* (n40) 362.

<sup>113</sup> *Glyn (t/a Priors Farm Equine Veterinary Surgery) v McGarel-Groves* [2006] EWCA Civ 998 and *Blass v. Randall* [2008] EWHC 1007 (veterinarian examined horse for purposes of pre-purchase examination; question over whether previous surgery was verbally disclosed to claimant; if verbally communicated, was this sufficient to fulfil duty of care owed?).

<sup>114</sup> Emily Jackson, ‘“Informed Consent” to Medical Treatment and the Impotence of Tort’ in S.A. McLean (ed.), *First Do No Harm: Law, Ethics and Healthcare* (Ashgate 2006) 273.

<sup>115</sup> *ibid* quoting from P.D.G. Skegg, ‘English Medical Law and “Informed Consent”: An Antipodean Assessment and Alternative,’ (1999) 7 *Medical Law Review* 135, 138 [emphasis added].

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the law to redress the imbalance by providing patients with the ‘right ‘ to be given that information, or perhaps more accurately imposing a duty on doctors to provide it.<sup>116</sup>

This imbalance of power and knowledge is shared in the veterinary context and indeed across professional negligence jurisprudence more widely.<sup>117</sup> It will be recalled that knowledge and power imbalances featured in Chapter Two, where it was argued that one of negligence’s functions was to redress the imbalance between claimant and defendant and protect the vulnerable party. Regardless of whether the commercial or best interests model is adopted, the knowledge imbalance is highly likely to exist; it is this imbalance which the doctrine of informed consent seeks to mitigate. Importantly, this section will address whether a rights-centred, autonomy-based approach is something which ought to be emulated in guiding veterinary-owner relationships.<sup>118</sup> Ultimately, though it will be emphasised that similar duties of care exist for veterinarians, development following an autonomy-based approach in line with current debates within the human medical context is unhelpful. Rather, it is submitted that although the duties will remain similar in terms of content, the ultimate rationale for this is to achieve a shared decision-making model and that it is this model which better provides for the various interests within the triadic relationship shared between owner, animal, and veterinarian and better reflects the position that the best interests of the animal should be promoted within these relationships.

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<sup>116</sup> Michael A. Jones, ‘Informed Consent and other Fairy Stories,’ (1999) 7 Medical Law Review 103, 129.

<sup>117</sup> Mangan, ‘The Curiosity of Professional Status,’ (n59).

<sup>118</sup> This arguably gets into the issue of whether negligence should develop alongside human rights jurisprudence. This is topic is beyond the scope of this thesis, however, see: Donal Nolan, ‘Negligence and Human Rights Law: The Case for Separate Development,’ (2013) 76(2) Modern Law Review 286.

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##### a) *The Duty to Disclose in the Veterinary Context*

Dealing specifically with veterinarians, the tension between client autonomy and veterinary care has become increasingly important. As May states, it is the balancing of patient needs with the ethical principle of client autonomy that is at the heart of veterinary ethical dilemmas.<sup>119</sup> In the veterinary context, much of the tension arguably stems from the position of animals as property, even if it is the special constitutive property discussed in this thesis. The position of the animal as property, at first glance appears to make things easier for veterinarians: the owner is a paying customer for services concerning a piece of property, however, I agree with Tannenbaum that ‘veterinary clients are not just consumers but are animal owners who entrust a particular *kind* of property to the care of their veterinarian.’<sup>120</sup> Further, because some owners place strong emotional and sometimes economic value on their animal, the nature and weight of the client’s interests can be profoundly affected.<sup>121</sup> Importantly, focusing only on the client’s autonomy interest prevents an assessment of the animal’s best interests; indeed, the animal’s interest full stop. Once again, it is finding some balance between the interests of both the animal and client which creates uncertainty for veterinarians.

Arguably the most detailed account of a veterinarian’s duty to disclose is articulated by Soave where it is stated that:

It is a legal duty of the veterinarian to give sufficient information to  
the client to allow them to make a rational decision on whether to

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<sup>119</sup> Stephen A. May, ‘Veterinary Ethics, Professionalism and Society’ in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 50- 51.

<sup>120</sup> Tannenbaum (n7) 179.

<sup>121</sup> *ibid.*

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proceed with the care of an animal. Informed consent means that the owner understands what the animal's problem is, what can be done to remedy it, the risks and dangers of the treatment and how much the fee will be. Failure to adequately inform the client of all of the medical aspects of a case may constitute negligence...<sup>122</sup>

There are, however, two potential problems with this statement. First, this was written from an American perspective and does not necessarily represent the current state of affairs in the UK. Second, it must be asked whether this statement solves the balancing dilemma stated by May at the beginning of this section, and relatedly, whether the statement does enough to fully inform the veterinarian of the legal duty of care owed. It is argued that although Soave's statement is quite detailed and can get us some of the way, failing to address the animal's interest as a specific consideration maintains the orthodox perception of the veterinary relationship as being purely commercial in nature, and the only interest which ought to be protected is that of the owner.

Turning to the current situation in the UK, the matter is complicated by the fact that there is no reported case law detailing the duty to disclose risks and obtain consent in the veterinary context. It may seem a fortunate surprise then to find that the RCVS has recently published guidance on the importance of obtaining consent. Section 11.1 of the RCVS Code of Professional Conduct<sup>123</sup> provides that, 'informed consent, which is an essential part of any

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<sup>122</sup> Soave (n46) 42-43.

<sup>123</sup> Royal College of Veterinary Surgeons, 'Code of Professional Conduct for Veterinary Surgeons and Supporting Guidance' (RCVS 2012).

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contract,<sup>124</sup> can only be given by a client who has had the opportunity to consider a range of reasonable treatment options, with associated fee estimates, and had the significance and main risks explained to them.<sup>125</sup> This statement appears to match that articulated by Yeates who, in the context of determining what should be disclosed to clients states that ‘veterinary professionals should offer only reasonable options.’<sup>126</sup> Both the RCVS guidance and the quote by Yeates highlight that only reasonable treatment options should be disclosed, however, no further guidance is given as to what a ‘reasonable’ option would be and whose perspective that assessment is determined. In some ways this perspective resembles the now-rejected *Bolam* approach to disclosure. Here, the doctor’s duty to disclose extends only to what she feels is necessary for the patient to make a decision as to treatment and, following *Bolam*, the profession later determines whether the disclosure itself was sufficient.<sup>127</sup> If it is only those which the veterinarian believes the client can afford or wants to hear, then this conflicts with the argument made previously that veterinarians should advocate the best interests of the animal. The question thus remains: what is the veterinarian’s duty of care in these circumstances?

##### b) *The Human Medical Context: Providing Clarity or Complicating the Picture?*

Throughout this chapter human medicine has provided a foundation from which to frame veterinary duties of care. Sometimes those foundations were unstable whilst in others the human medical context provides meaningful goals to be worked toward. The current

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<sup>124</sup> It is interesting that the RCVS frames its guidance on consent in terms of the contractual obligations it creates, as opposed to those interests protected by negligence. Though contract may in some circumstances represent a viable course, the discussion in this section and the sections before highlight the inability of contract to protect all of the interests which may be adversely affected by a veterinarian’s carelessness.

<sup>125</sup> Royal College of Veterinary Surgeons, ‘Code of Professional Conduct for Veterinary Surgeons and Supporting Guidance (RCVS 2012) s 11.1.

<sup>126</sup> Yeates, *Animal Welfare in Veterinary Practice* (n75) 103.

<sup>127</sup> This is similar to the conclusion drawn in *Sidaway v. Bethlem Royal Hospital* [1985] AC 891, 895 per Lord Diplock.

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situation as regards disclosure of risk, however, is still quite uncertain, even in light of the recent Supreme Court decision in *Montgomery v. Lanarkshire Health Board*.<sup>128</sup> This is not to say that human medicine is unhelpful, indeed, it is quite the opposite. Valuable lessons can be learned from tracing the path human medical law has taken. To illustrate the current position in human medical negligence, four primary cases will be briefly discussed: *Sidaway v. Bethlem Royal Hospital*,<sup>129</sup> *Pearce v. United Bristol Healthcare NHS Trust*,<sup>130</sup> and *Chester v. Afshar*<sup>131</sup> and *Montgomery*. The first three cases, though frequently discussed in terms of their novel breach of duty and causation issues, are also important for how (if at all) they alter the doctor's duty of care from one based on paternalistic grounds to a duty which prioritises the patient's right to decide what is best for him or herself.

Prior to this line of cases, it was generally accepted that a doctor's duty in terms of disclosure of risk and obtaining consent fell largely to what he or she felt was best for the patient in line with a course of treatment envisaged by the doctor. Consent was still obtained (failing to obtain consent could result in charges of battery alongside negligence<sup>132</sup>), however, it was the doctor that determined what risks should be discussed and the profession itself which determined whether the discussion was sufficient.<sup>133</sup> Indeed, this seems to represent the current picture with veterinarians. Generally speaking, as long as risks were discussed in broad terms, the consent received was valid.<sup>134</sup>

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<sup>128</sup> [2015] AC 1430.

<sup>129</sup> [1985] AC 891.

<sup>130</sup> (1999) ECC 167.

<sup>131</sup> [2005] 1 AC 134.

<sup>132</sup> *Chatterton v. Gerson* [1981] QB 432. Generally speaking, in the medical context, consent is utilised more as a defence for doctors who perform some type of treatment on an unconscious or incapacitated patient, which is deemed to be in their best interests.

<sup>133</sup> *Sidaway v. Bethlem Royal Hospital* [1985] AC 871, 893 and 895 per Lord Diplock.

<sup>134</sup> *Chatterton v. Gerson* [1981] QB 432, 443 per Bristow J.

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More recent case law, however, has sought to move toward a patient-centred, autonomy-based model. Thus in *Sidaway*, it was not with whether the broad risks had been disclosed, but whether a small 1-2 per cent risk of spinal cord and nerve damage should have been disclosed so as to allow the claimant to make a fully informed decision as to treatment. Although the majority found for the doctor and held that the doctor's duty to disclose rested on what he believed the patient ought to know, in a landmark judgment, Lord Scarman's dissenting decision recognised a more patient-centred approach. In Lord Scarman's words, 'the doctor's duty should be to disclose that which a reasonable, prudent person in this patient's position would want to know.'<sup>135</sup>

The patient-centred approach was affirmed by Lord Woolf where, in *Pearce*, it was held that a doctor's duty was to disclose to her patient that risk information which a reasonable patient would consider significant in deciding on a course of treatment and not whether other reasonable doctors might conclude the patient should be informed.<sup>136</sup> And finally in *Chester*, on facts very similar to *Sidaway*, the House of Lords held that the risk of paralysis should have been disclosed. In his decision, Lord Steyn stated that 'the right to autonomy and dignity can and ought to be vindicated'<sup>137</sup> and Lord Bingham firmly stated that the doctor's duty to advise existed in order 'to enable adult patients of sound mind to make for

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<sup>135</sup> [1985] 2 WLR 480, 493 and 495.

<sup>136</sup> See for example: *Pearce v. United Bristol Healthcare NHS Trust* (1999) ECC 167, 174.

'...if there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk, if the information is needed so that the patient can determine for him or herself as to what course he or she should adopt.'

See also: David Meyers, 'Chester v. Afshar: Sayonara Sub Silentio Sidaway?' in S.A. McLean (ed.), *First Do No Harm: Law, Ethics and Healthcare* (Ashgate, 2006) 255, 259. See also: Alasdair Maclean, 'From Sidaway to Pearce and Beyond: Is the Legal Regulation of Consent Any Better Following a Quarter of a Century of Judicial Scrutiny?' (2012) 20(1) Medical Law Review 108.

<sup>137</sup> [2005] 1 AC 134, 146.

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themselves decisions immediately *affecting their own lives and bodies*.<sup>138</sup> Although the tenor of the decision in *Chester* is one in which patient autonomy is quite strong, Meyers states that there remains an inherent tension between the doctor's legal duties of care and the patient's right to exercise fully informed consent.<sup>139</sup>

The challenge for *Montgomery*, in essence, was to resolve this line of jurisprudence.

*Montgomery* is an important decision, however space precludes a full consideration of its potential effects. The pursuer's argument was that she ought to have been advised of a specific mechanical risk<sup>140</sup> during the delivery of her child and that a cesarian section should have been offered, as opposed to vaginal delivery. The Supreme Court found for the pursuer. Two points are important for the purposes of this chapter. First is how the court constructed the doctor's duty. Lords Kerr and Reed JJSC, with whom all agreed, stated:

The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk,

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<sup>138</sup> *ibid* 140 [emphasis added].

<sup>139</sup> According to Meyers, the courts have sided with the patient. See: Meyers, '*Chester v. Afshar*: Sayonara Sub Silentio *Sidaway*?' (n136) 265. This tension can also be seen in: Tom L. Beauchamp and John F. Childress *Principles of Biomedical Ethics* (n85) 125. Here, the authors state whilst civil litigation has emerged over informed consent because of injuries that doctors negligently caused by their failure to disclose, from a moral viewpoint, informed consent has little to do with the legal liability of professionals and everything to do with the autonomous choices of patients.

<sup>140</sup> In this instance the complication referred to is known as shoulder dystocia. Here, the baby's head is able to descend through the birth canal, but the shoulder(s) are unable to pass through the pelvis. This can lead to physical abnormalities and disabilities and, if the baby's oxygen supply is cut off during the process of delivery, can also lead to neurological disability. This condition is more common in women of petite stature or those known to be delivering larger than normal babies; the pursuer met both of these criteria.



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or the doctor is or *should reasonably be aware that the particular patient would be likely to attach significance to it.*<sup>141</sup>

As regards the veterinary context, the subjective element introduced at the duty of care stage imposes an additional burden on the practitioner to guard against those risks or harms stemming from disclosure, which she should reasonably be aware the client would find significant. In some ways this subjective determination requirement mirrors the statement made by Tannenbaum that ‘veterinary clients are not just consumers but are animal owners who entrust a particular *kind* of property to the care of their veterinarian,’<sup>142</sup> and the broader point in this thesis that veterinarians need to achieve a more holistic understanding of the various relationships in play and the harms that can be suffered. Thus, in one way, adding a subjective element is not in itself something to be discouraged, however, the reasoning behind this requirement in *Montgomery* (ie. to promote a very strong patient autonomy model), is ultimately not helpful. In the context of shared decision-making discussed below, the subjective element has a positive role to play in determining what the best interests of the animal would be in a given situation.

The second point can again be taken from Tannenbaum’s statement; in this instance describing the owner as a ‘consumer.’ *Montgomery* too found a similar relationship existing between doctor and patient where it was stated that ‘[patients] are also widely treated as consumers exercising choices.’<sup>143</sup> Of course, much of this thesis has sought to move away from this commercial understanding as it tends to commodify the relationship and fails to take into account the emotional realities of both the triangular relationship and constitutive

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<sup>141</sup> [2015] AC 1430, 1463 [emphasis added].

<sup>142</sup> Tannenbaum (n7) 179.

<sup>143</sup> [2015] AC 1430, 1459.

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relationship. Importantly, this model also fails to allow any scope to consider the animal's best interests. In the human medical context, Teff stated thirty years ago that viewing the doctor-patient relationship from a consumerist perspective is consistent with a society distrustful of the medical profession and focused on a right-based, patient-centred approach.<sup>144</sup> Again, although great detail cannot be fully devoted to this point, I argue the statement in *Montgomery* is a regressive step and serves to further polarise the relationship between doctor and patient. The relationship between doctor and patient as rights holder and doctor, consumer and provider fails to provide the foundation needed for shared decision-making based on mutual trust. In the veterinary context, this articulation paints the picture that veterinarians are acting in line with other analogous professions, when in reality, the veterinary dynamic requires something altogether different if the goals of this thesis are to be met.

##### c) *A Better Way Forward: Framing the Veterinarian's Duty of Disclosure Around a Shared Decision-Making Model*

From the outset, Beauchamp and Childress appear sceptical that truly informed consent and shared decision-making can work harmoniously. They state:

If shared decision making is presented as a plea merely for patients to be allowed to participate in decision making about diagnostic and treatment procedures, it continues the legacy of medical paternalism by ignoring patients' rights to consent or refuse those procedures.<sup>145</sup>

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<sup>144</sup> Harvey Teff, 'Consent to Medical Procedures: Paternalism, Self-Determination or Therapeutic Alliance?' (1985) 101 Law Quarterly Review 432, 445-446.

<sup>145</sup> Tom L. Beauchamp and John F. Childress, *Principles of Biomedical Ethics* (n85) 122.

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The type of shared decision-making advocated here is not one which simply pays lip service to the patient's interest in determining treatment options, rather the role of the patient (in the veterinary context, the client) is central to the decision-making process and ultimately the nature of the doctor's duty of care. Taking the above into consideration, I adopt the definition of shared decision-making utilised by Moulton and King, which describes disclosure as process whereby the doctor and the patient:

...use unbiased and complete information on the risks and benefits associated with all viable treatment alternatives and information from the patient on personal factors that might make one treatment alternative more preferable than the others to come to a treatment decision.<sup>146</sup>

Thus, properly understood, disclosure of risk and 'informed consent entails genuine dialogue, focusing not on technical medical detail but on facilitating a broad appreciation by the patient of the seriousness of his illness.'<sup>147</sup> Importantly, this includes a holistic assessment of the patient's condition and plays a crucial role in developing mutual trust. For the purposes of disclosure of risk in the veterinary context, it is submitted that the same position applies.

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<sup>146</sup> Benjamin Moulton and Jaime S. King, 'Aligning Ethics with Medical Decision-Making: The Quest for Informed Patient Choice,' (2010) 38(1) *Journal of Law Medicine & Ethics* 85, 89. In the veterinary context, this discussion with the owner would also likely have an impact on the veterinarian's best interests assessment.

<sup>147</sup> Teff, 'Consent to Medical Procedures: Paternalism, Self-Determination or Therapeutic Alliance?' (n144) 443. See also: Margaret Brazier, 'Patient Autonomy and Consent to Treatment: The Role of the Law?' (1987) 7 *Legal Studies* 169.

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Further, it has been argued above that veterinarians should try so far as possible to forward the best interests of the animal. It is submitted that framing the duty to disclose around shared decision-making is necessary not only to ensure that full and open discussion takes place between owner and veterinarian, but also because it allows greater scope for the veterinarian to advocate for the animal with regards to what she feels represents the best option. This is not the same thing as saying that veterinarians should in any way coerce the client, this is simply to say that a veterinary relationship created under a shared decision-making model arguably provides greater scope to allow for all interests to be more fully represented. Thus, the role of shared decision-making should not, at least in the triadic relationship envisioned here, be thought of as incongruous to the veterinarian's duty to disclose risks and ultimately obtain informed consent. Rather, it ought to be viewed as a mechanism to ensure that so far as possible qualities intrinsic to the constitutive relationship such as the constitutive relationship itself and the animal's best interests are preserved.

In terms of what this means for the veterinarian's duty of care, Maclean's statement that the law has focused more on the outcome of the process rather than the process itself<sup>148</sup> and that the court 'is more concerned with whether or not a particular risk has been disclosed rather than with whether the healthcare professional engaged the patient in a partnership approach,'<sup>149</sup> is analogous to the argument that focus needs to shift from breach to duty: was the standard met versus ought the practitioner have disclosed X and why. In this regard, I argue that courts should engage more fully with the duty question and not place sole emphasis on the outcome of process. Instead, when dealing with disclosure of risk, courts should take on board the arguments made at the beginning of this chapter, and in Chapters

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<sup>148</sup> Maclean, 'From *Sidaway* to *Pearce* and Beyond' (n136) 127.

<sup>149</sup> *ibid.*

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One and Two, which highlight the central importance of the duty analysis in formulating principles of right conduct and how those decisions should be arrived at. It is this information which veterinarians, professionals, and the general population can take forward and apply in their everyday interactions with others, but it must start with the courts and their willingness to more fully engage with these issues.

##### **4.7 Conclusion**

The purpose of this chapter was to advocate for a more robust duty of care assessment in which the animal's best interests could be more fully represented. As it currently stands, almost no attention is given to the duty of care within the veterinary context. Where duty is discussed, the focus placed on the veterinarian's assumption of responsibility for the claimant's financial wellbeing prevents a more revealing normative assessment of the relational elements within the veterinary relationship from taking place. Importantly, this type of analysis also prevents consideration of the animal's best interests. To rectify this situation, re-visiting the duty of care is necessary.

Within the context of treatment and diagnosis, a more detailed analysis of the assumption of responsibility component is necessary. In situations where the issue concerns harm to the constitutive relationship, focus should be placed on assessing the proximity between the parties and the nature of what was undertaken by the veterinarian. Where, however, the focus changes to the best interests of the animal, the crucial point to decide is whether it could be argued that the veterinarian came under an affirmative duty to protect the interests of the animal. Depending on the nature of the wrong alleged, it may be that the veterinarian could argue the owner's wishes were not determinative in articulating the nature of her duty.

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When dealing with disclosure of risk, it is submitted that a shared decision-making model, as opposed to an autonomy-based, consumerist model, would allow greater scope for the animal's best interests to be forwarded and a relationship of trust between owner and veterinarian fostered.

With all of these considerations in mind, the singular duty of care model adopted in current veterinary negligence case law and increasingly throughout negligence law more generally, is wholly inadequate and fails to provide assistance to veterinarians caught in complex dilemmas. With this more robust duty analysis in place, however, focus can be properly ascribed at the duty stage to investigating whose interests the defendant ought to have had in mind and why, and then turning to breach to determine whether, based on the facts, that standard was met.

### **5. Assessing Breach of Duty: Remedying Practical Difficulties with the Sentient Constitutive Model Framework for Veterinary Negligence**

This final substantive chapter is concerned with addressing the practical obstacles and challenges involved in implementing the new veterinary negligence model presented in this thesis. To date, legal actions for veterinary negligence have only appeared within a very narrow commercial context, which has arguably stifled consideration of obligations stemming from the relationship between owner and animal and the animal's best interests. Whilst the previous three chapters argued that negligence can, theoretically and doctrinally, accommodate a more holistic interpretation of the veterinary relationship, no forward movement can realistically occur without a similar discourse happening at the professional and judicial levels when issues of breach are considered.

The breach assessment is highly fact-sensitive and relies heavily on the determination of professional standards of care elicited through expert witness opinion and increasingly on guidance issued by professional regulatory bodies. In the veterinary negligence context this equation is particularly problematic given the current commercial model in place, which views the animal as a fungible commodity and the veterinarian's duty centred on the owner's financial interest(s); indeed, this approach is the antithesis of that advocated in this thesis. Further problems can arise on a doctrinal level in that decisions centred on the breach assessment possess a one-off quality consistent with an analysis which focuses on the facts

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of a particular case. For this reason, decisions based on breach fail to create precedents,<sup>1</sup> or cases from which meaningful guidance as to proper conduct can be derived. Chapters One, Three, and Four have already argued that providing veterinarians with greater guidance as to their legal obligations and shifting their perspective to focus on the best interests of the animal can be best achieved by adopting a more robust duty of care analysis, however, the success of this change is also largely dependent on their being in place a professional mindset (both at the regulatory and individual level) on expected standards of care which support these changes, and a judiciary willing to scrutinise expert testimony. It is on these latter points that this chapter will focus.

The point that veterinarians approach their practice in sometimes very divergent<sup>2</sup> ways makes the current breach assessment problematic. It will be argued that to meet the objectives of this thesis, it first needs to be the case that veterinarians support a professional change which would place the constitutive relationship and best interests of the animal at the centre of the veterinary relationship. It is only when this approach receives institutional support that courts can take the next step and work to refine the professional standard of care to reflect the kind of legal expectations being advocated in this thesis. The purpose of this chapter, then, is to address these two issues and devise a solution to what is arguably the more problematic of the two: changing the professional mindset to accommodate the sentient constitutive model. For although there is evidence to the effect that an increasing number of veterinarians see their role evolving to consider more the welfare position of the animal

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<sup>1</sup> Donal Nolan, 'Varying the Standard of Care,' (2013) 72(3) Cambridge Law Journal 651, 680.

<sup>2</sup> See on this point: Bernard E. Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* (2nd ed., Blackwell 2006) and Carol Anne Morgan, 'Stepping up to the Plate: Animal Welfare, Veterinarians, and Ethical Conflicts' (DPhil thesis, University of British Columbia 2009).



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patient,<sup>3</sup> this is not universal. Further, how to meet evolving expectations is becoming increasingly problematic for veterinarians. First, it is submitted that the most effective way to instigate this change would be to take on board frameworks utilised by analogous professions and revise existing professional guidance to provide the veterinary profession with authoritative and objective information. Building upon this, it will be argued that the Royal College of Veterinary Surgeons (“RCVS”), as governing body, should become a more representative body and, to this end, focus increasingly on academic and lay involvement to gain a more accurate and nuanced picture of the interests involved within the veterinary relationship.

The second point detailing the role of the courts is, as a result of doctrinal developments in breach discussed in the final section of this chapter, somewhat more straightforward, but still of great importance. As Campbell and Cranley Glass point out, a decision by the courts to include professional guidance in its reasoning can elevate the status of that guidance to that of a legally-binding expectation, however, this is likely to occur only when the guidance is *first* supported by expert testimony.<sup>4</sup> Thus, as ‘final arbiters of the standard of care’<sup>5</sup> expected by veterinarians, the judiciary play a crucial role in advancing the profession to meet a society with evolving expectations.

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<sup>3</sup> See: Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (London, November 2015) 19-20 <<http://vetfutures.org.uk/launch-of-the-vet-futures-report/>> accessed 24 November 2015.

<sup>4</sup> Angela Campbell and Kathleen Cranley Glass, ‘The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research,’ (2001) 46 McGill L.J. 473, 488 [emphasis added].

<sup>5</sup> *ibid* 480.

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### 5.1 Assessing Breach of Duty: The Reasonable Professional and The *Bolam* Test

#### a) *Establishing the Standard of Care in Professional Negligence Claims*

It is trite tort law that breach is determined by applying the test of the reasonable person. Quite simply the question to be answered is: did the defendant meet the standard of the reasonably competent person in the situation? Barring very few exceptions, the test is an objective one.<sup>6</sup> When dealing with professionals, however, the standard changes to meet the higher expectations of those working within a given profession. Again, this is well-established negligence doctrine, which stems from the fact that professionals hold themselves out to the public as possessing a specialised skill. The test is of the reasonably competent professional working in that specialism.<sup>7</sup> Determining the required standard of care was given further specification in the case of *Bolam v Friern Hospital Management Committee*.<sup>8</sup> Here, Lord McNair directed that a professional person is:

...not guilty of negligence if he has acted in accordance with a practice accepted as proper by a *responsible body* of medical men skilled in that particular art...Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.<sup>9</sup>

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<sup>6</sup> See for example: *Blyth v. Birmingham Waterworks* (1856) 11 Ex 781 and *Glasgow Corporation v. Muir* [1943] AC 448.

<sup>7</sup> John L. Powell and Roger Stewart, *Jackson and Powell on Professional Liability* (6th ed., Sweet & Maxwell, 2007) 72-73.

<sup>8</sup> [1957] 1 WLR 582.

<sup>9</sup> *ibid* 587.

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Although the claim speaks specifically to the medical profession, it is accepted that *Bolam* can apply across all professional negligence jurisprudence.<sup>10</sup> The applicability and validity of the *Bolam* test was later challenged in the case of *Bolitho v. City and Hackney Health Authority*,<sup>11</sup> where it was held that evidence given to the court must be both logical and reasonable.<sup>12</sup> As Jackson and Powell make clear, courts will interrogate standards in line with the specific profession being considered to ensure their continued integrity and evolution.<sup>13</sup> For the veterinary profession, as there is very little information to draw from, an important opportunity exists for the court to be involved in positively shaping the profession. Before the full extent of the court's involvement can occur, however, two interconnected issues must be addressed: the role of expert witnesses and the role that regulation plays in shaping professional mindset. Importantly, the power of the individual professional to instigate change on a legal level stems, in large part, from their role as an expert witness.

### **5.2 The Role of Expert Witnesses Within Judicial Analysis: The Importance of Changing Professional Sentiment**

#### *a) The Role of Expert Witnesses in the Breach Assessment*

In professional negligence cases, including veterinary negligence cases, it is very likely to be the case that courts rely on opinions given by expert witnesses.<sup>14</sup> Indeed, the *Bolam* test was

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<sup>10</sup> Margaret Brazier and José Miola, 'Bye-Bye *Bolam*: A Medical Litigation Revolution?' (2000) 8 Medical Law Review 85, 87.

<sup>11</sup> [1998] AC 232.

<sup>12</sup> *ibid* 242-243.

<sup>13</sup> See: *Jackson and Powell on Professional Liability* (n7) 9. Courts have tended to develop the liability of professionals along their own, independent lines. There is, arguably, some continued chariness as regards the medical profession, however, as a result of *Montgomery v. Lanarkshire Health Board* [2015] AC 1430, it is likely the medical profession will come under increasing pressure.

<sup>14</sup> The exception would be where, for example, the act falls into the category of *res ipsa loquitur* or, as discussed previously, in medical negligence cases involving disclosure of risk, even though it is highly likely that courts will still regard expert opinion as an influential factor when determining breach.

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initially developed because it was understood and believed to be the case that those working in the professional sphere possessed specialised skills which extended beyond lay, or even judicial understanding. Expert witnesses are expected to ‘give evidence based on his or her knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works’;<sup>15</sup> this is in addition to their own opinion given as an expert in their respective field(s). In an American case entitled *Juhnke v Evangelical Lutheran Good Samaritan Society*,<sup>16</sup> for example, it is stated that:

Whether expert testimony is necessary to prove negligence is dependent on whether, under the facts of a particular case, the trier of fact would be able to understand, absent expert testimony, the nature of the standard of care required of defendant and the alleged deviation therefrom.<sup>17</sup>

For the expert, Rule 35.3 (1) and (2) of the UK Civil Procedure Rules further indicates that it is the duty of experts to help the court on matters within their expertise and that this duty overrides any obligation to the person from whom experts have received instructions or by

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<sup>15</sup> *Kennedy v. Cordia (Services) LLP* [2016] 1 WLR 594, 609-610. See also: *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] FSR 563, 565-56 cited in *Kennedy* where Cresswell J stated the duties and responsibilities of expert witnesses in civil cases as:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise ... An expert witness in the High Court should never assume the role of an advocate. 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. 4. An expert witness should make it clear when a particular question or issue falls outside his expertise. 5...

<sup>16</sup> 6 Kan. App. 2d 744 (1981)

<sup>17</sup> *ibid.*

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whom they are paid.<sup>18</sup> The court in the recent decision in *Kennedy*<sup>19</sup> also made clear that whilst the expert witness may express an ‘opinion about whether, for instance, an individual suffered from a particular condition or vulnerability,’<sup>20</sup> it remains the role of the court to come to decisions on ‘matters that are central to the outcome of the case.’<sup>21</sup>

In the veterinary context, from the perspective of the claimant, it would be important that the expert comment not only on the clinical aspects of the case, but also on the potential for the claimant to have suffered harm related to the constitutive relationship and the position of the animal itself. As discussed in Chapter Four, when the animal’s best interest is compromised by a treatment decision made by the owner, for example, the veterinarian may be justified in departing from the owner’s wishes. Thus, it might also be the case that the expert provides testimony on behalf of a defendant veterinarian who acted in this particular way.<sup>22</sup>

Problematically, as has already been highlighted numerous times throughout this thesis, how veterinarians approach their professional and legal obligations straddles a wide spectrum with some seeing themselves as paediatricians and others as simply garage mechanics fixing a machine.<sup>23</sup> If the sentient constitutive property model and the duty requirements argued in the previous chapter of this thesis are to stand a chance of developing, then the evidence provided by expert witnesses needs to be consistent, at least insofar as they have professional knowledge and understanding of the constitutive relationship and the importance of

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<sup>18</sup> Civil Procedure Rules 1998, SI 1998/3132, Rule 35.3(1) and (2)

<<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35>> accessed 18 May 2016.

<sup>19</sup> *Kennedy v. Cordia (Services) LLP* [2016] 1 WLR 594, 612.

<sup>20</sup> See: *Pora v. The Queen* [2015] UKPC 9 cited in *Kennedy v. Cordia (Services) LLP* [2016] 1 WLR 594, 612. Although *Pora* is a criminal case dealing with the criminal investigation of a rape, this principle applies generally to expert witnesses.

<sup>21</sup> *ibid.*

<sup>22</sup> See for example, the scenarios discussed in Chapter Four of this thesis, in particular scenarios 1&3. See discussion in Chapter 4.4 and 4.5(b).

<sup>23</sup> Bernard E. Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* (2nd ed., Blackwell 2006). See also: Morgan, ‘Stepping up to the Plate: Animal Welfare, Veterinarians, and Ethical Conflicts’ (n2).

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supporting the animal's best interests. This consistency in approach is necessary given the importance attributed to the role of expert witness testimony in professional negligence cases and supports the argument made at the beginning of this chapter that a change in professional sentiment is needed before the arguments made thus far can take full effect.

When considering the position of the courts regarding the role of expert witnesses, the judiciary should also take on board the points discussed above and be alive to the position adopted by Lord Browne-Wilkinson in *Bolitho* to the effect that:

The court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice.<sup>24</sup>

Although Mulheron<sup>25</sup> has noted the uptake of *Bolitho* to challenge expert opinion has been patchy, it must be remembered that 'the importance attached to expert opinion...should not obscure the underlying basis for a finding that the defendant has been negligent.'<sup>26</sup> Until professional sentiment, and thus expert testimony, is consistent in its approach to the veterinary relationship, there will remain a need for the judiciary to scrutinise evidence given to ensure it meets with standards of reasonableness, which is reflected in the premise

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<sup>24</sup> *Bolitho v. City and Hackney Health Authority* [1998] AC 232, 241. There is some evidence that courts in the veterinary context may be paying too much deference to expert testimony provided in support of the defendant. Although in one respect it is good that the court was willing to engage so deeply with the professional opinion provided, I would argue the result arrived at points in the wrong direction, and rather represents a regression to a time where the status of the defendant's witness seemed to in some way evidence the reasonableness of defendant veterinarian's opinion. See: *Calver v. Westwood Veterinary Group* [2001] P.I.Q.R. P11. See discussion in Chapter 1.3(c)(i).

<sup>25</sup> Mulheron, 'Trumping Bolitho: A Critical Legal Analysis of *Bolitho*'s "Gloss,"' (2010) 69 Cambridge Law Journal 609.

<sup>26</sup> Michael A. Jones, 'The *Bolam* Test and the Responsible Expert,' (1999) 7 Tort Law Review 226, 239.

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that a veterinarian's professional obligations stem from the nature of the constitutive bond between owner and animal, and the primacy of the animal's best interests. Indeed, the need to scrutinise expert evidence exists even if or when the triangular veterinary relationship, including the prominence given to the animal's best interests, is accepted. The main point, for present purposes, is that external scrutiny by the courts is especially important when the profession itself is in a period of transition; this will be more fully explored in the final section of this chapter.

### b) *An Incomplete Picture: The Need for a Profession-wide Change in Mindset*

As things currently stand, although orthodox breach assessments and principles can accommodate the arguments made in throughout this thesis, there is no guarantee they will be appropriately applied. *Bolam* focuses heavily on expert evidence to negate a finding of fault and is therefore limited in this respect. Further, even with *Bolitho* in place, the risk of perpetuating old practice and old ideologies remains, given the inconsistent way in which it has been applied in recent case law.<sup>27</sup> Although courts have shown themselves willing to interrogate expert evidence, it is uncertain what level of deference, if any, will be attributed to the veterinary profession given how few cases there are in the area and the transformative nature of the arguments submitted throughout this thesis.<sup>28</sup> Much of the breach assessment also depends on the context in which the defendant's conduct occurred, including the complex web of relationships which underlie it.<sup>29</sup> Indeed, this would be particularly important when dealing with a veterinary negligence claim as the relationship between

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<sup>27</sup> Mulheron, 'Trumping *Bolam*: A Critical Legal Analysis of *Bolitho*'s "Gloss" (n25).

<sup>28</sup> Recall discussion in Chapter 1.3(c)(i) on the issue of deferring to the opinion(s) of a 'distinguished expert in the field.'

<sup>29</sup> Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (2nd ed., Pluto Press 1999) 53.

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owner and animal exists on a broad spectrum,<sup>30</sup> with the veterinarian's duty adapting to fit. As Conaghan and Mansell note, however, this type of analysis is rarely undertaken and hence an important ingredient in the breach assessment is left out.<sup>31</sup> Importantly, this uncertainty surrounding the breach assessment fails to serve animal patients, owners, and veterinarians.

Miola is therefore correct to state of the breach assessment that 'power is implicit in who gets to define what is 'reasonable.''<sup>32</sup> When dealing with breach in veterinary negligence cases, it should be the case that the courts are the ultimate arbiters of what constitutes the reasonable standard of care, however, the first step needs to come from a shift in professional ideology and belief. Key in this scenario, then, remains the role played by other veterinarians. Without the profession largely on board with the changes advocated for, very little forward movement can realistically be made. The next two sections of this chapter, then, will focus on two inter-connected methods by which this change could be effected: the development of new professional guidelines which specifically speak to the changing nature of the veterinary relationship and a restructuring of the RCVS Council as the regulatory body tasked with developing and implementing professional guidance.

### **5.3 The Role of Professional Guidelines in Negligence: Development and Application in Veterinary Negligence**

The purpose of this section is to discuss the primary way in which I argue professional mindset can be developed and altered in favour of the arguments made in this thesis.

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<sup>30</sup> See, for example, the introductory discussion on the nature of the constitutive relationship in Chapter 1.3(a)(i).

<sup>31</sup> Conaghan and Mansell, *The Wrongs of Tort* (n29) 53.

<sup>32</sup> José Miola, 'The Standard of Care in Medical Negligence– Still Reasonably Troublesome?' in Janice Richardson and Erika Rackley (eds.), *Feminist Perspectives on Tort Law* (Routledge 2012) 135.



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Underscoring much of the discussion in this section is the normative potential that professional guidelines carry in terms of their ability to effect change. In this regard, Lee states that ‘breach of regulation comes very close to feeding directly into the identification of common law breach...[and further, that these] external norms make clear pragmatic and epistemic contributions to the tort standard.’<sup>33</sup> In this way, guidelines can provide pragmatic information on the availability of certain precautions,<sup>34</sup> but also carry normative and epistemic potential by ‘encourag[ing] others to change their thinking and...reflect on how the profession is developing,’<sup>35</sup> when considering what the reasonable professional ought to have done in the circumstances. These points will be elaborated in the sections that follow, however, what is important for present purposes is the dual purpose professional guidelines serve and in particular the normative potential that guidelines can carry, being a product of developing sentiment both at the professional, but also, importantly, the societal levels.<sup>36</sup> In so doing, the guidance arguably comes to reflect an objective standard by taking seriously the expectations and interests of both public and private spheres. As I argue at the end of this section, the RCVS was largely unsuccessful in meeting this balance and so was unsuccessful in providing veterinarians with useful professional guidance.

### a) *The Nature of Professional Guidelines: Aspirations and Limitations*

Broadly understood, professional guidelines relating to the provision of medical care (including veterinary medicine) encompass two forms of guidance: professional or ethical and clinical or evidence-based. Clinical guidance, according to Campbell and Cranley Glass,

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<sup>33</sup> Maria Lee, ‘Safety, Regulation and Tort: Fault in Context,’ (2011) 74(4) *Modern Law Review* 555, 572.

<sup>34</sup> *ibid* 563.

<sup>35</sup> Jerold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (2nd ed., Mosby 1995) 86.

<sup>36</sup> For this last point on taking seriously societal viewpoint and also their shared values, see: Lee, ‘Safety, Regulation and Tort: Fault in Context,’ (n33) 578.

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provides an “authoritative reference point”<sup>37</sup> founded on evidence-based medicine and concerns matters of technical skill. Further, it is only when the profession accepts the standard as a *scientific* principle governing the proper performance of their duties will they accept the standard as determinative.<sup>38</sup> Ethical guidance, on the other hand, can assist in determining the underpinning morality of professional decisions and behaviour, and illuminate principles valued in a given community.<sup>39</sup> Because this chapter and indeed the thesis as a whole is about changing professional and legal sentiment with regard to the veterinary relationship, it is in the area of ethical guidance that this section will focus. From the outset, it should be noted that guidelines of this nature tend to reflect aspirational standards; however, as Campbell and Cranley Glass explain, in developing professional guidelines, professional bodies set practice guidelines that establish normative standards of conduct for members of the given professional body and that...these guidelines aim to establish the legal standard of care.<sup>40</sup> Thus, for the purposes of this chapter, it is envisioned that discussion will be confined to guidance which could theoretically be applied in the veterinary negligence context<sup>41</sup> and which would carry the potential to inform on both the professional and legal standard of care.

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<sup>37</sup> Campbell and Cranley Glass, ‘The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research’ (n4) 478.

<sup>38</sup> *ibid* [emphasis added]. See also: Ash Samanta, Michelle M. Mello, Charles Foster, John Tingle and Jo Samanta, ‘The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the *Bolam* Standard?’ (2006) 14 Medical Law Review 321, 355.

<sup>39</sup> Campbell and Cranley Glass (n4) 480.

<sup>40</sup> *ibid* 477 quoting from: T.R. LeBlang, ‘Medical Malpractice and Physician Accountability: Trends in the Courts and Legislative Responses’ (1994) 3 Ann. Health L. 105.

<sup>41</sup> For example, the relationship between the claimant and defendant, and the triangular relationship between owner, veterinarian, and animal.

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### b) *Development and Implementation of Professional Guidelines*

Although it is the case that professional guidelines can serve useful and productive ends, much of the guidance's value and potential to effect a change in professional mindset depends on how the guidance itself is developed and implemented. One of the great advantages to professional guidelines is that they can react quickly to changing social and professional sentiment.<sup>42</sup> As Brazier and Miola point out, where practice is evolving rapidly in a new speciality or sub-speciality of a profession, identifying responsible practice will be demanding.<sup>43</sup> Indeed, I would argue that this is similarly the case in any area of practice where evolution is happening rapidly; it need not be in a speciality area. Veterinary medicine is changing rapidly and these advances challenge previous practice and approaches to decision-making.<sup>44</sup> Guidelines, it is submitted, can act as an objective marker against which the defendant's actions can be assessed and can also reflect how the profession is developing in light of new ideals.

At the beginning of this section an argument made by Campbell and Cranley Glass stated that whilst guidelines establish normative standards of conduct, these guidelines also aim to establish the legal standard of care.<sup>45</sup> In this way, professional guidance aims to protect the professional from legal liability, but also inform patients, or others within the given relationship.<sup>46</sup> Looked at in this way, professional guidance is forward-looking and though perhaps not universally accepted across the profession, is likely to indicate changing

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<sup>42</sup> Campbell and Cranley Glass (n4) 476. Other advantages include, for example, their more flexible nature when compared to legislation, which is far more prescriptive and less amenable to change.

<sup>43</sup> Margaret Brazier and José Miola, 'Bye-Bye *Bolam*: A Medical Litigation Revolution?' (n10) 87.

<sup>44</sup> See for example: S. Jarvis, 'Where do you draw the line on treatment?' (2010) 167(17) *Veterinary Record* 636 and Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (n3) 8.

<sup>45</sup> Campbell and Cranley Glass (n4) 477.

<sup>46</sup> *ibid.*

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sentiment.<sup>47</sup> Although the orthodox, commercial approach still appears strongly influential in the veterinary context, both at a professional and legal level, there is certainly evidence that sentiments are changing.<sup>48</sup> Fundamental to this shift is the acknowledgment of a triangular veterinary relationship and whilst there is evidence that acceptance of this model is growing,<sup>49</sup> this development must be cultivated and the ideals entrenched in professional mindset. Unfortunately, to date, the triangular veterinary relationship has not been reflected in the professional guidance issued and therefore its ability to advise veterinarians on the professional and legal obligations stemming from this relationship is missing.

With regard to the process of developing and implementing professional guidance, the first point must be that guidelines undergo a rigorous and robust development phase, taking into account opinions from diverse backgrounds outside of the veterinary profession to hold both professional and legal credence.<sup>50</sup> In the process of developing the guidance, I agree with Shaw and Downie that:

...decision-makers must meaningfully factor in others' perspectives, thereby 'enlarging their perspective' beyond their own subjective intuitions. In this process, responding to others'

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<sup>47</sup> Tannenbaum (n35) 86.

<sup>48</sup> See for example: C. E. M. Batchelor, D. E. F. McKeegan, 'Survey of the Frequency and Perceived Stressfulness of Ethical Dilemmas Encountered in UK Veterinary Practice,' (2012) 170 *Veterinary Record* 19. See also: Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (n3) 19.

<sup>49</sup> Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (n3) 18-19.

<sup>50</sup> Ash Samanta et al., 'The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the *Bolam* Standard?' (n38) 355. A more detailed account of whose opinions should be factored into the development of guidance is considered in the next section.

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views and objections — especially to rejected views — is important.<sup>51</sup>

Moving forward, the orthodox/commercial view of the veterinary relationship continues to play an important role within the profession and so whilst it is argued that the triangular relationship and best interests approach should feature as the overarching models, any move to change professional opinion and guidance should take commercial considerations and approaches into account.<sup>52</sup> In this regard, for example, it may be beneficial for the RCVS to hold open consultations or forums for members of the profession to voice their opinion, in particular, on the idea of the constitutive relationship and the best interests approach. Importantly, consultations should also include opinions from outside the profession such as animal charities and animal welfare groups.<sup>53</sup> Without this holistic consultation process, any suggested change would be likely met with scepticism and obstinance. It would also fail to take into account those veterinary relationships which still exist, for valid reason, on purely commercial terms.<sup>54</sup>

Further, ‘to be meaningful, [development and implementation] must include consideration of the relative power of the parties, the reciprocal social obligations of [the professional]

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<sup>51</sup> Jacquelyn Shaw and Jocelyn Downie, ‘Welcome to the Wild, Wild North: Conscientious Objection Policies Governing Canada’s Medical, Nursing, Pharmacy, and Dental Professions,’ (2014) 28(1) *Bioethics* 33, 45 adopting Jennifer Nedelsky’s view on legitimate process as discussed in Jennifer Nedelsky, ‘The Reciprocal Relation of Judgement and Autonomy: Walking in Another’s Shoes’ in J. Downie and J.J. Llewellyn (eds.), *Being Relational: Reflection on Relational Theory and Health Law* (UBC Press 2011) 35.

<sup>52</sup> In this regard, the commercial model would not necessarily reflect a “rejected view,” but a different approach which would still apply where the relationship is commercial in nature.

<sup>53</sup> Examples of animal welfare groups could be the Universities Federation for Animal Welfare and the All-Party Parliamentary Group for Animal Welfare.

<sup>54</sup> This would apply where the relationship between owner and animal is not considered constitutive. This is more likely to occur in the agricultural context, but as discussed in Chapters 1.3(a)(i) and 3.5(c)(i), what matters is the relationship between owner and animal and so this could also occur where, for example, the owner is a dog breeder and views the dog merely as a commodity.

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incurred by virtue of their monopoly, self-regulation, [and] clinical independence.’<sup>55</sup> In this regard, then, power imbalances within the triangular veterinary relationship should be addressed and more consideration given to the constitutive relationship which can exist between owner and animal. Moreover, consideration should also be given to the continued importance and role of veterinary professionals in regulating their profession as well as their ability to exercise some degree of clinical and ethical independence. It would be unhelpful and counterproductive to, in one fell swoop, instigate changes which would remove significant amounts of professional discretion. Indeed, this would likely have a overall negative impact on the trust relationship between owner and veterinarian, which was considered so important at the duty of care stage and could further negatively impact the reflective thought processes which may initially lead veterinarians to question the commercial approach in the first instance. Practically speaking, where the guidance concerns a practice or a principle new to the profession, or where the principle is accepted by some members of the profession but not others, which is likely to be the case with the veterinary profession, the guidance ‘must be accompanied by other factors for it acquire normative status. For instance, guidelines must be widely disseminated to bring them to the attention of [veterinarians] and to allow for a discourse’<sup>56</sup> on their effects on current practice and be well written and presented. In the end, the guidance will only be accepted by the profession if it is viewed as presenting an overall net benefit to the profession as regards the execution of their day-to-day practice.

One final issue relates to the point made above that once developed, professional guidance aims to establish the legal standard of care. This is important as one of the primary aims of

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<sup>55</sup> Jacquelyn Shaw and Jocelyn Downie, ‘Welcome to the Wild, Wild North: Conscientious Objection Policies Governing Canada’s Medical, Nursing, Pharmacy, and Dental Professions’ (n51) 46.

<sup>56</sup> Campbell and Cranley Glass (n4) 478-79.

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this thesis is to provide veterinarians with guidance which will inform them on the legal obligations. Maria Lee's survey of the relationship between tort and regulation indicates that in some circumstances regulation (or guidance) tracks very close to expected tort standards.<sup>57</sup> In this regard, Lee states that 'sometimes breach of regulation comes very close to feeding directly into the identification of common law breach.'<sup>58</sup> Further, mirroring the points made by Campbell and Cranley Glass, and Downie and Shaw, Lee states that the overall strength or authority of the guidance is enhanced when development of the regulation embraces multiple values and relies on a range of techniques, such as public consultation and social value judgments.<sup>59</sup> Additionally, the substantive appropriateness of the regulation as determined by the courts in the given case is heavily dependent on the purpose of the guidance being consistent with the purpose of the tort action.<sup>60</sup> Having said this, acceptance of professional guidelines as establishing the legal standard of care ultimately involves hearing expert evidence which corroborates the guidance.<sup>61</sup> Thus, guidance will only be considered legally binding when acknowledged and accepted in court. This links in with the previous discussion on the importance of expert witnesses in professional negligence claims and how witness testimony impacts the breach assessment. As the final section of this chapter will highlight, courts have been willing to utilise professional guidance in their determination of breach and have also found that in some instances the General Medical Council ("GMC") standard matches the tort standard.<sup>62</sup> Based on this analysis, if the points discussed at the development and implementation stages are

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<sup>57</sup> Maria Lee, 'Safety, Regulation and Tort: Fault in Context,' (2011) 74(4) *Modern Law Review* 555, 572.

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid* 574.

<sup>60</sup> *ibid* 575.

<sup>61</sup> Campbell and Cranley Glass (n4) 488.

<sup>62</sup> For this latter point, see *Montgomery v. Lanarkshire Health Board* [2015] AC 1463, 1464.

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complied with, guidelines issued by the RCVS carry the potential to be legally-dispositive, or come very close.

Related to the issue of development and implementation is the content and language of the guidance itself. For without clear and specific guidance, which makes known the obligations owed by the professional, there is little chance of effecting change within the profession and little chance the courts would adopt such guidance as setting a legally-enforceable standard of care. With this in mind, the forthcoming sections will evaluate the content of the RCVS Code as compared to that produced by the GMC and argue that to affect professional mindset, greater clarity within the guidance consistent with that found in the GMC is necessary.

### c) *The Language and Content of Professional Guidance Issued by the GMC: The Distinction Between Professional Duties (and Potential Legal Duties) and Merely Best Practice*

This section will explore the content and language utilised by the two sets of GMC guidance: *Good Medical Practice*<sup>63</sup> and *0-18 Years: Guidance for all Doctors*.<sup>64</sup> Both represent the current official guidance on professional practice standards articulated by the GMC and, as will be seen, can reflect developments in the common law with regards to the legal standard of care expected of a medical professional. Guidance issued by the GMC is salient to this discussion as the RCVS explicitly stated that their goal in producing new guidelines was to

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<sup>63</sup> General Medical Council, *Good Medical Practice* (GMC 2013).

<sup>64</sup> General Medical Council, *0-18 Years: Guidance for all Doctors* (GMC 2007).



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bring the veterinary profession in line with the regulatory codes of analogous professions.<sup>65</sup>

The GMC's guidance in the field of paediatrics is particularly salient to this discussion.

Paediatricians, for example, must advocate for a patient who may not be able to speak for themselves and must prioritise the best interests of the patient over the wishes and desires of the parent or guardian. Later, the current RCVS Code will be explored in relation to the conclusions reached here. It is submitted that, in contrast to the RCVS Code, the GMC guidelines not only provide a more clear and concise articulation of professional standards, but that the drafters included vital legal information gained from years of malpractice litigation in order to better protect and inform its doctors. Thus, not only do the guidelines issued by the GMC include detailed professional guidance to arguably prevent malpractice litigation before it happens, but also that the information has been specifically written with the aim of protecting doctors should they find themselves involved in a malpractice suit and their standard of care called into question by the courts.

Looking specifically at the content of both the general and paediatric guidance, one important aspect which they both share is that the documents are prefaced with a very clear “key” to understanding the modal verbs *must* or *should* used throughout. For example, both sets of guidelines clearly state that when *must* is used before a statement, or the provision of guidance, that statement is to be viewed by the doctor as indicating an ‘overriding duty or principle.’<sup>66</sup> For example, in the communication, partnership and teamwork section of the *Good Medical Practice* guidance, paragraph 49 states that:

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<sup>65</sup> Royal College of Veterinary Surgeons, ‘New Codes of Professional Conduct Launched,’ *RCVS News* (London, 12 April 2012) <<http://www.rcvs.org.uk/news-and-events/news/new-codes-of-professional-conduct-launched/>> accessed 29 July 2015.

<sup>66</sup> GMC, *Good Medical Practice* (n63) 5.

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You must work in partnership with patients, sharing with them the information they will need to make decisions about their care, including: their condition, its likely progression and the options for treatment, including associated risks and uncertainties...<sup>67</sup>

Paragraph 32 of the same guidance also states that, ‘you must give patients the information they want or need to know in a way they can understand...’.<sup>68</sup>

The key also states that guidance prefaced with the word *should* indicates information on how to fulfil an overriding duty, where an overriding duty would not apply, or where there are factors outside the doctor’s control that affect how the guidance can be complied with.<sup>69</sup> Thus, following the guidance in paragraph 19 which reads to the effect that a doctor *must* keep clear and legible patient notes, the provision also states, ‘you [the doctor] *should* make records at the same time as the events you are recording or as soon as possible afterwards.’<sup>70</sup> Thus, this latter statement gives guidance on how to fulfil the overriding duty. Framing the statement around the *should* modal also reflects the practical reality that a separate overriding duty may occur which could affect the execution of when notes can be realistically completed.

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<sup>67</sup> *ibid* 16.

<sup>68</sup> *ibid* 13. Note that the wording of the section resembles the dissenting opinion of Lord Scarman in *Sidaway v. Board of Governors of the Bethlem Royal Hospital Governors* [1985] AC 871, which dealt with the issue of informed consent, but note the guidance also includes the provision of working in partnership, which reflects the shared decision-making discussed in Chapter 4.6(c). Importantly, this was also developed and specifically referenced in the recent Supreme Court decision in *Montgomery v. Lanarkshire Health Board* [2015] AC 1430, 1464 which found this guidance to be legally dispositive in forming the expected standard of care in a disclosure of risk claim.

<sup>69</sup> GMC, *Good Medical Practice* (n63) 5.

<sup>70</sup> *ibid*.

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The argument that case law influenced how the GMC developed its guidance can be seen in the Introduction of the *0-18 Years: Guidance for All Doctors* document. Paragraph 9 explicitly states that, ‘the purpose of this guidance is to help doctors balance competing interests and make *decisions that are ethical, lawful* and for the good of children and young people.’<sup>71</sup> Importantly, this statement indicates that one of the purposes of the paediatric guidance is to inform doctors on how to make medical decisions that accord with the law; in essence, therefore, to protect doctors’ professional *and* legal welfare. Providing such protection, it is contended, can only be effected if the GMC keeps itself abreast of legal developments, particularly within tort, and then updates its guidance to reflect those changes.

What is evident, therefore, is an attempt to clearly and concisely define where a duty is owed to a patient and where one is not. The preface to both the *Good Practice Guidance* and *0-18 Years Guidance* can therefore be viewed as an attempt to define areas where doctors ought to interpret a professional duty with potential to create legally-enforceable effects and where such information is merely indicative of best practice recommendations. As emphasised earlier, it is due in large part to the extensive body of malpractice litigation that the GMC is able to more clearly define and conceptualise the modern role of a doctor in present-day society.

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<sup>71</sup> General Medical Council, *0-18 Years: Guidance for all Doctors* (n64) 5 [emphasis added].

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### d) *Current Guidance Implemented by the RCVS: A Missed Opportunity*

In 2012, the RCVS introduced its new Code of Professional Conduct.<sup>72</sup> As part of the official release statement two goals of the new guidance were highlighted: first to bring the RCVS Code into line with other analogous professions and second to ‘ensure the public and their animals continue to receive the level of professional service they have come to expect from veterinary surgeons.’<sup>73</sup> I disagree, however, that these goals have been accomplished. It has been observed that:

Codes of ethics for veterinarians focus mainly on professional conduct in relation to colleagues and clients, such as advertising and the adoption of one another's clients. Meanwhile, the interests of animals are considered implicit rather than being discussed explicitly.<sup>74</sup>

It is submitted that the new codes introduced by the RCVS follow a similar course and further, fail to address the complex issues surrounding decision-making within the triangular veterinary relationship. In its current form, a great deal of attention is paid to the commercial relationship between owner and veterinarian and the professional relationship between the veterinarian and other veterinarians and the RCVS itself; however, there is no mention of the owner-animal bond and scant reference to the best interests of the animal.<sup>75</sup> Where these issues are mentioned, the discussion is so vague or inappropriate to be of any real assistance

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<sup>72</sup> Royal College of Veterinary Surgeons, *Code of Professional Conduct for Veterinary Surgeons and Supporting Guidance*, (RCVS 2012) <<http://www.rcvs.org.uk/advice-and-guidance/>> accessed 11 November 2015.

<sup>73</sup> Royal College of Veterinary Surgeons, ‘New Codes of Professional Conduct Launched’ (n65).

<sup>74</sup> Martje Fentener van Vlissingen, ‘Professional Ethics in Veterinary Science: Considering the Consequences as a Tool for Problem Solving,’ (2001) 1 *Veterinary Sciences Tomorrow* 1, 2.

<sup>75</sup> The Code itself is divided into six areas termed “Professional Responsibilities” and twenty-eight categories termed “Supporting Guidance.”

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to veterinarians facing difficult legal and ethical decisions. Moreover, of six categories addressed by the RCVS in the “Professional Responsibility” section, only one addresses the care of the animal.<sup>76</sup> Importantly, then, because the Code lacks necessary clarity on how to balance competing interests, its ability to inform veterinarians and the courts is already severely limited. Therefore, whilst it may be the case that professional guidelines are traditionally aspirational in nature when compared to legal standards, my argument is that the RCVS Code as currently formulated fails to achieve any raising of standards whatsoever.

It will be recalled that with the GMC guidance, both explicitly noted the different responsibilities that flowed from the use of *must* or *should* in a given statement of guidance, particularly the *must* modal which carried with it the imposition of a duty or overriding principle. It will also be recalled that the paediatric guidance specifically stated that one of the purposes of the guidance was to assist doctors who care for children to make balanced decisions that accorded with the law. The main impetus behind such explicit guidance, it was argued, was the recognition by the GMC that their responsibility lay not merely in the provision of best practice, but the provision of tailored guidance which would protect doctors in the event of malpractice litigation.

In the RCVS Code, the modal verbs *must* and *should* are frequently found throughout the document. For example, paragraph 1.1 reads, ‘veterinary surgeons *must* make animal health and welfare their first consideration when attending to animals’<sup>77</sup> and paragraph

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<sup>76</sup> The remaining five sections deal with clients, the profession, the veterinary team, the public, and the RCVS. Although the section addressing animals does state that ‘veterinary surgeons must make animal health and welfare their first consideration when attending to animals,’ as I argue in the body of this chapter, statements like this, lacking in specification, do little to assist veterinarians in complex situations. Further, the Supporting Guidance only addresses the animal in a relationship with its owner when the topic of euthanasia is discussed.

<sup>77</sup> Royal College of Veterinary Surgeons, *Code of Professional Conduct* (n72) 13 [emphasis added].

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1.3, ‘veterinary surgeons *must* provide veterinary care that is proper and adequate.’<sup>78</sup> In addition to the important point that both paragraphs, I submit, are on their own ambiguous and lacking in specification,<sup>79</sup> nowhere in the Code is it described what is meant by a veterinarian *must*; this is important when deciding whether a duty is being imposed or whether the provision merely outlining a best practice recommendation. The word *should* is also used, however, again, there is no explanation as to what the RCVS is trying to convey by its use. It would appear, based solely on the meaning the English language attributes to each, that *must* implies a stronger force of action than *should*, but this is nowhere stated in the Code. Further, and unlike the GMC guidelines, *must* is used for every piece of guidance in the Code; therefore, as it would seem unlikely that the RCVS intended to apply an overriding duty in every one of the contemplated scenarios, it could be argued that no duty applies at all.

To address this concern, the RCVS ought to have produced guidance which clearly articulates a veterinarian’s professional obligations. Guidelines should not only inform accurately on the content and extent of professional duties owed, but also provide protection for practitioners to the extent that they aim to establish the legal standard of care expected within that profession.<sup>80</sup> If guidelines are not produced with sufficient clarity and precision because words used are not specifically defined or information is thought to be too obvious to need stating, quality of care will almost certainly suffer. Unfortunately, the RCVS appears to have followed this path and produced a document which not only makes questionable

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<sup>78</sup> *ibid* [emphasis added].

<sup>79</sup> ‘Specification’ here takes on a particular meaning. In this regard, specification ‘is a process of reducing the indeterminacy of abstract norms and generating rules with action-guiding content.’ See: Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (7th ed., OUP 2013) 17. Unfortunately, space precludes full consideration of the issue of specification and how this principle could be incorporated within a new draft Code, for example. However, this process would constitute the next step, once it is acknowledged that change in the area of veterinary regulation needs to occur if the aims of my thesis are to be met.

<sup>80</sup> Campbell and Cranley Glass (n4) 480.

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assumptions as to the extent and detail of guidance required, but also fails to address other areas of importance, such as the animal's interest as a patient.

Drawing from the discussion above, several propositions can be put forward to explain the RCVS guidance. First, the lack of clearly-delineated guidance illustrates that the RCVS believes its veterinarians do not require such information to competently and professionally carry out their obligations to an accepted standard. From this, it is further suggested that the Code was developed as a piece of professional etiquette,<sup>81</sup> or at best, best practice literature only. Due to its lack of precision and specification, it could be argued that the Code does not contemplate protection for veterinarians in a legal forum. Whereas the GMC has access to a vast number of malpractice claims and has recognised the importance of staying current and in-step with societal and judicial developments, the RCVS has had almost no experience in the legal arena.<sup>82</sup> Though the RCVS stated that they wished to emulate guidance produced by analogous professional bodies, the exclusion of this information in the Code indicates that, even on the most generous interpretation, the RCVS may not have contemplated the importance of providing such protections. Making such errors and assumptions, however, results in a situation where neither the owner of an animal nor the veterinarian knows what standard of care is expected, and the level of care received by the animal is ultimately brought into question.

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<sup>81</sup> May describes that where professional behaviour is reduced to etiquette, the profession fails to understand the fundamental principles on which they operate or the rationale behind the creation of the RCVS Code in the first place. See: Stephen A. May, 'Veterinary Ethics, Professionalism and Society' in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 45.

<sup>82</sup> There is also the argument that RCVS simply did not wish to adopt the whole model utilised by the GMC—including legal and ethical protections—because veterinarians currently face very little threat in terms of malpractice litigation. If, therefore, the RCVS was seen to be adopting the GMC Guidelines in full, the worry might be that litigation at a rapid rate would ensue and the proverbial “floodgates” would be opened.

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Evidence of this point can be seen in the RCVS Fact sheets for the last five years. First inquiries by veterinarians into general practice standards soared from 40 inquiries in 2010 to 766 in 2014.<sup>83</sup> Thus, even as a piece of advisory literature only, the 2012 Code arguably falls short of the mark. This finding is affirmed in a recent statistical publication entitled, *Survey of the Frequency and Perceived Stressfulness of Ethical Dilemmas Encountered in UK Veterinary Practice*.<sup>84</sup> In this study, the authors concluded first that veterinarians face a significant number of ethical dilemmas per week and that veterinary surgeons find these dilemmas highly stressful.<sup>85</sup> Importantly, a second finding of the study was that ‘one of the reasons that veterinary surgeons may find these situations highly stressful is that they have not been given any guidance on how to make difficult ethical decisions.’<sup>86</sup> What this evidence appears to show is that instead of utilising the professional guidance to, as Tannenbaum highlights, ‘encourage others to change their thinking and...reflect on how the

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<sup>83</sup> For these statistics, see annual reports issued by the RCVS: Royal College of Veterinary Surgeons, ‘RCVS Facts: The Annual Report of the Royal College of Veterinary Surgeons: Part 2’ (RCVS 2014) 18 <<https://www.rcvs.org.uk/publications/rcvs-facts-2014/>> accessed 26 October 2015; Royal College of Veterinary Surgeons, ‘RCVS Facts: The Annual Report of the Royal College of Veterinary Surgeons: Part 2’ (RCVS, 2013) 18 <<http://www.rcvs.org.uk/publications/rcvs-facts-2013/?destination=%2Fpublications%2F>> accessed 6 May 2014; Royal College of Veterinary Surgeons, ‘RCVS Facts: The Annual Report of the Royal College of Veterinary Surgeons: Part 2’ (RCVS, 2012) 18 <<http://www.rcvs.org.uk/publications/rcvs-facts-2012/?destination=%2Fpublications%2F%3F%26p%3D2>> accessed 20 November 2012; Royal College of Veterinary Surgeons, ‘RCVS Facts: The Annual Report of the Royal College of Veterinary Surgeons: Part 2’ (RCVS, 2011) 19 <<http://www.rcvs.org.uk/publications/rcvs-facts-2011/?destination=%2Fpublications%2F%3F%26p%3D3>> accessed 20 November 2012 and Royal College of Veterinary Surgeons, ‘RCVS Facts’ (RCVS, 2010) 19 <<http://www.rcvs.org.uk/publications/rcvs-facts-2010/?destination=%2Fpublications%2F%3F%26p%3D4>> accessed 20 November 2012. Inquiries into standards of care routinely the highest of any other category. In 2011 the number of inquiries was 170; in 2012, 390, and in 2013, 372.

<sup>84</sup> C. E. M. Batchelor, D. E. F. McKeegan, ‘Survey of the Frequency and Perceived Stressfulness of Ethical Dilemmas Encountered in UK Veterinary Practice,’ (2012) 170 *Veterinary Record* 19.

<sup>85</sup> Highly stressful was noted by the researchers as being anything above an 8 out of 10 on their questionnaire. In the study these ethical dilemmas arose primarily as a result of the various treatment options available in a particular case; for example, whether life prolonging treatment or euthanasia were appropriate. Also considered was whether or to what extent the animal’s welfare or quality of life was being upheld. It will be recalled that it was these and similar issues that were considered in the previous chapter, detailing complex duty of care scenarios. See Chapter 4.4 and 4.5(b).

<sup>86</sup> Batchelor and McKeegan, ‘Survey of the Frequency and Perceived Stressfulness of Ethical Dilemmas Encountered in UK Veterinary Practice’ (n84) 3.



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profession is developing,<sup>87</sup> the RCVS has simply codified customary professional practice in areas it believes to be important. Put another way, in areas concerning care and treatment, the Code establishes only the *ordinary* standard required, which in the veterinary context means that emphasis has been placed on commercial relations between veterinarians and the commercial relationship between owner and veterinarian. However, the RCVS Fact sheets and the statistical survey appear to indicate that the RCVS have missed the mark and failed to consider valuable information veterinarians need.<sup>88</sup>

Secondly, complaints of inadequate care submitted by clients has risen steadily in the last four years. Indeed, in 2014, the number of complaints made regarding alleged inadequate care was approximately 352, up from 275 in 2011.<sup>89</sup> Though perhaps not as drastic as the number of inquiries made by veterinary practitioners, any number close to or surpassing 300 is quite significant in comparison to other areas considered by the study.<sup>90</sup> This point emphasises not only that the RCVS has been receiving an increasing number of complaints and that this is a consistent trend, but also that the care delivered, even after the new Code was released, is not always meeting clients' expectations. This point was confirmed in a DEFRA Response, which noted that owners of companion animals are becoming increasingly dissatisfied with the level of veterinary care delivered.<sup>91</sup>

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<sup>87</sup> Jerold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (2nd ed., Mosby 1995) 86.

<sup>88</sup> Arguably the two areas that needed particular attention are the position of the animal patient within the veterinary relationship and whose interests the veterinarian should prioritise, the animal or the owner.

<sup>89</sup> See RCVS Facts Sheets in (n83). Complaints in 2012 numbered 335 and in 2013 were recorded at 340.

<sup>90</sup> For example, in the 2014 RCVS Fact Sheet, the number of complaints regarding fees was 56 and complaints regarding the use of veterinary medical products was a mere 25.

<sup>91</sup> Environment, Food and Rural Affairs Committee, *Veterinary Surgeons Act 1966: Government Response to the Committee's Sixth Report of Session 2007–08: Report, together with formal minutes, oral and written evidence* (HC 2007-08, 348) EV-57 < <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmenvfru/348/348.pdf> > accessed 13 December 2012.

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With such a narrow focus and objective seemingly in mind, the RCVS Code can indeed be seen as a missed opportunity. In cases where a code merely reproduces professional custom or etiquette as the RCVS has arguably done, ‘one may question whether [guidelines of this nature] ever result in changing professional norms.’<sup>92</sup> I agree and submit that although the RCVS promised a more modern set of guidelines to reflect changing expectations, in the end, the guidance has left veterinarians uncertain of how to fulfil the standard of care expected, clients are becoming increasingly disappointed and, most importantly, the animal patients are caught in the middle, potentially receiving sub-standard care. Having said this, it is submitted that none of the changes to the guidance advocated thus far could be effectively introduced if the regulatory body itself fails to see the importance of this and take the steps necessary to effect change. The next section of this chapter will analyse the extent to which the current regulatory structure of the RCVS provides a solid foundation from which to introduce the changes advocated for and argue that if the guidance is to reflect the changing nature of the veterinary relationship, the Council too must evolve.

### **5.4 The Role of the RCVS in Effecting Change within the Veterinary Profession: Gaining Insight and Addressing Gaps**

It will be recalled that in introducing new guidance in 2012 the RCVS had two goals in mind: to bring the RCVS Code into line with other analogous professions and to ensure that ‘the public and their animals continue to receive the level of care expected from their veterinarian.’<sup>93</sup> Although it was argued that the RCVS was largely unsuccessful in attempting to meet these goals, a further issue lying at the heart of the argument that the veterinary profession must undergo a profession-wide change in sentiment is to what extent

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<sup>92</sup> Campbell and Cranley Glass (n4) 478.

<sup>93</sup> RCVS, ‘New Codes of Professional Conduct Launched,’ (n65).

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the RCVS, as the sole regulator for the veterinary profession, is capable of undertaking this task. I argue that in its current form, the RCVS Council would be unable to effect the changes necessary to take greater account of the animal's best interests and inform veterinarians as to their potential legal liability stemming from a claim in negligence.

The first part of this section will analyse the current regulatory model governing human medicine. As an analogous profession, reforms in this area can act as a framework from which to assess the future of veterinary regulation. Central to this discussion is to what extent, if any, the RCVS should be modelled after the GMC. It is initially submitted that despite certain differences that exist between the GMC and RCVS as official regulators, valuable lessons can be learned from recent changes made to the GMC; specific attention will be given to council representation and the influential role that lay involvement plays in modern professional regulation. It is submitted that an equal representation of lay and professional members within the RCVS Council would provide the foundation necessary to affect professional mindset in favour of the specific aims of this thesis. At this point it should be recalled that one of my purposes for addressing professional regulation and the role of councils within a regulatory framework is to address ways in which veterinarians can be better informed as to their legal obligations arising in negligence. As the body responsible for creating professional guidance, councils represent a voice through which societal and professional expectations are articulated.

The final section will address a specific area of professional importance, namely best interests, and look to how the RCVS has interpreted this assessment within its guidance. Throughout this thesis, I have argued that acting in the best interests of the animal should be

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fundamental to how veterinarians approach their practice and the lens through which the courts should view the veterinary relationship and construct the duty of care. However, best interests received almost no attention in the latest guidance issued to veterinarians. In addition to highlighting this missed opportunity for forward-thinking reform, this final section will demonstrate some ways in which the RCVS could have incorporated best interest reforms and, in the process, elevated the position of the animal within the veterinary relationship.

### a) *Learning Lessons from the GMC: Tracing the Road to Council Reform*

Before discussing the composition of the GMC's Council, it is important to address its principal role. This will not only provide a more clear understanding of the Council's role within society as the country's primary medical regulator, but it will also provide a comparator from which to analyse the jurisdiction of the RCVS. Currently, the GMC derives its power solely from statute, originally the Medical Act 1858, now the Medical Act 1983 (as amended).<sup>94</sup> The Council's primary objective is, simply, to protect, promote and maintain the health and safety of the public.<sup>95</sup> The GMC is therefore responsible for keeping an updated register and licences for all practitioners,<sup>96</sup> and set the extent of knowledge and skill required to obtain UK qualification.<sup>97</sup> Importantly, the GMC is also responsible for setting standards and guidelines of good medical practice and ethics,<sup>98</sup> and investigates situations where a

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<sup>94</sup> Medical Act 1983 c.54. Section 1(1).

<sup>95</sup> Medical Act 1983 s.1(1A). See also: Health and Social Care (Safety and Quality) Act 2015, s.5.

<sup>96</sup> GMC (Licence to Practice and Revalidation) Regulations Order of Council 2012, SI 2012/2685 (amended 2015/1375)

<sup>97</sup> General and Specialist Practice (Education, Training and Qualifications) Order 2010, SI 2010/234.

<sup>98</sup> Medical Act 1983, s 35 as amended by The Medical Act 1983 (Amendment ) Order 2002.

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complaint about a doctor's fitness to practice has been made or where the GMC itself instigates the investigation.<sup>99</sup>

In terms of Council representation, just under fifteen years ago, the GMC Council had one hundred and four members, of which a near entirety were doctors: fifty-four were elected by those on the medical register, twenty-five were fully registered medical practitioners appointed by the Royal College and various universities and, of the remaining spaces, up to half could be medically qualified and were appointed by the Queen on advice from the Privy Council.<sup>100</sup> This was not only a considerably large Council with arguably little to no executive accountability, but one in which, of the one hundred and four members, up to ninety-one (87.5%) were medical practitioners or trained in the science of medicine.<sup>101</sup> This high degree of self-regulation was, however, not to be and the proceeding years saw radical changes in the structure and governance of the GMC.

It is not relevant for the purposes of this section to go into great depth as regards the motivations which lie behind the current structure of the GMC Council; however, some explanation is helpful insofar as it provides insight into areas which could foreseeably affect the RCVS in the future; as the well-known adage goes, history repeats itself. The goal here is to take a pre-emptive stance to reform, recognising not only that societal views are changing with regards to the legal and ethical standard of care expected of veterinarians, but also that

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<sup>99</sup> The Medical Act 1983 (Amendment) Order 2002, SI 2002/3135 s.35CC(3). If it is decided that the investigation warrants adjudication by a judge, jurisdiction then falls to Medical Practitioners Tribunal Service which was given statutory footing under the GMC (Fitness to Practice and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015, SI 2015/794.

<sup>100</sup> Jonathan Montgomery, *Health Care Law* (2nd ed. OUP 2003) 138.

<sup>101</sup> Indeed, the Medical Act 1858, which established the General Medical Council allowed for only 84% of the Council members to be medically trained. Further amendments allowed for greater numbers of medically trained individuals to sit on the Council.

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providing veterinarians with as much useful information as possible could prevent instances of sub-standard or improper care from the start.

The catalyst behind the current re-structuring of the GMC Council finds its genesis in three incidents; combined they showed not only to the public, but also the government, that the GMC, and doctors generally, were unable to self-regulate to a sufficient standard. In 2012, the Law Commission published a consultation paper on the regulation of health care professionals, which summarised these incidents.<sup>102</sup> One of the stated reasons for this change from self-regulated profession to greater state oversight was a shift in government policy.<sup>103</sup> This can be seen in the creation of clinical regulatory bodies which produce guidelines on certain areas of clinical decision making such as the National Institute for Health and Clinical Excellence (“NICE”), and also instances of government de-regulation in the push to achieve greater market liberalisation.<sup>104</sup> Secondly, the Commission noted three events within the medical community which had far-reaching, serious consequences and which toppled public confidence in the profession generally. In order of occurrence, they are: the Bristol Royal Infirmary Inquiry which investigated unacceptably high rates of infant death after cardiac surgery; the Alder Hey Inquiry which investigated unauthorised incidents of organ and tissue retention following the deaths of children while under hospital care; and lastly, the Shipman Inquiry which followed the criminal investigation of Dr. Shipman who murdered two-hundred and fifteen of his patients by injecting them with lethal amounts diamorphine (also known as heroin).<sup>105</sup> Last, and most importantly, the Commission noted ‘shifting social

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<sup>102</sup> Law Commission, *Regulation of Health Care Professionals, Regulation of Social Care Professionals in England*, (Law Com No 202, 2012) <<http://www.scotlawcom.gov.uk/files/5813/3051/2520/dp153.pdf>> accessed 17 June 2016.

<sup>103</sup> *ibid* para 1.13.

<sup>104</sup> *ibid*.

<sup>105</sup> *ibid* at para 1.15.

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and political attitudes which have reflected a decline in trust in expert and governing elites to safeguard public interests.’<sup>106</sup> This incident is particularly interesting as it reflects a changing social perception of a profession and that as a result of that change people are taking a more proactive role with regards to the level of care they receive. As will be discussed in greater depth shortly, owners demanding higher levels of care for their animals<sup>107</sup> is arguably the strongest catalyst for reforming the RCVS and the veterinary profession generally.

It is also important to emphasise that the GMC itself has not always been viewed in a positive light and, until recently, its relationship with other bodies such as the British Medical Association — the official trade union and voice of British doctors<sup>108</sup> — was strained to say the least.<sup>109</sup> Commentators and practitioners were critical of the way in which the GMC operated, arguing that its paternalistic ideology, antiquated structure, lack of respect for patients’ rights, and its secrecy and complacency about poor practice contributed to a falling public confidence. More importantly, these practices allowed the overall standard of care provided by the profession to fall by failing to act quickly enough against poorly performing doctors.<sup>110</sup> As the discussion in the previous section revealed, a combination of increased stress levels, in part attributed to the lack of professional guidance outlining

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<sup>106</sup> *ibid* para 1.14. This also mirrors the developments in medical negligence jurisprudence; for example, the introduction of the *Bolitho* ‘logic test’ to temper the highly deferential treatment of doctors under the *Bolam* test.

<sup>107</sup> See for example: Mary Margaret McEachern Nunalee and Robert G. Weedon, ‘Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine,’ (2004) 10 *Animal Law* 125, 139.

<sup>108</sup> See the ‘About Us’ section on the BMA website: <<https://www.bma.org.uk/about-us>> accessed 15 June 2016.

<sup>109</sup> Mark Davies, *Medical Self-Regulation: Crisis and Change* (1st ed., Ashgate 2007) 297 and 298. See also: Irvine, D., ‘The Changing Relationship Between the Public and Medical Profession,’ (The Lloyd Roberts Lecture, Royal Society of Medicine, January 2001).

<sup>110</sup> *ibid*. Though at the time it was argued that the medical profession was under-regulated, the converse argument now exists with doctors needing to conform to standards and guidelines issued by multiple regulatory bodies. This has lead commentators to argue that, as a result of this over-regulation, doctors now undertake defensive medicine tactics as a way of limiting their potential legal liability. See, for example: Vivienne Harpwood, *Medicine, Malpractice and Misapprehensions* (Routledge-Cavendish 2007) 153.

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professional obligations<sup>111</sup> and an increasing number of complaints received by the RCVS regarding the level of care received,<sup>112</sup> it is certainly arguable that indicators exist showing similar cracks are starting to surface within the RCVS.

Particularly relevant for the purposes of this chapter, an example of a GMC reform which did not initially meet expectations can be seen in how the Council was composed. After a controversial vote of no confidence from the British Medical Association in 2000, the GMC sought to restructure itself in the hopes of maintaining public confidence and rebuilding professional confidence. One of the main criticisms leading to the vote was the lack of patient protection and involvement in the provision of medical care.<sup>113</sup> In 2002, the GMC responded by increasing the number of lay members sitting on the Council from 25% to 40%, however, this change was not well-received. Both the 2004 Fifth Report of the Shipman Inquiry<sup>114</sup> and the 2007 White Paper on *Trust, Assurance and Safety: The Regulation of Healthcare Professionals*<sup>115</sup> stated that further reforms to the GMC composition needed to be implemented, with the 2007 report recommending parity between professional and lay membership. Reforms in 2008 saw 50-50 membership created.

In a press release issued by the GMC in November 2012, the Council stated that further reform would occur in January 2013 reducing the number of Council members from twenty-

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<sup>111</sup> Batchelor and McKeegan (n48).

<sup>112</sup> See RCVS Fact Sheets (n83).

<sup>113</sup> Celia Hall, 'Scandals bring vote of no confidence in GMC' *The Telegraph* (London 30 June 2000) <<http://www.telegraph.co.uk/health/1345729/Scandals-bring-vote-of-no-confidence-in-GMC.html>> accessed 19 April 2013.

<sup>114</sup> Secretary of State for the Home Department and the Secretary of State for Health, *The Shipman Inquiry Fifth Report, Safeguarding Patients, Lessons from the Past – Proposals for the Future* (Cm 6394, 2004) para 163 <[http://webarchive.nationalarchives.gov.uk/20090808154959/http://www.the-shipman-inquiry.org.uk/images/fifthreport/SHIP05\\_COMPLETE\\_NO\\_APPS.pdf](http://webarchive.nationalarchives.gov.uk/20090808154959/http://www.the-shipman-inquiry.org.uk/images/fifthreport/SHIP05_COMPLETE_NO_APPS.pdf)> accessed 12 December 2012.

<sup>115</sup> Secretary of State for Health, *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century* (Cm 7013, 2007) paras 1.10- 1.12 <<http://www.official-documents.gov.uk/document/cm70/7013/7013.pdf>> accessed 7 December 2012.



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four to only twelve.<sup>116</sup> Importantly, the rationale for reducing the current GMC Council can easily be applied to the current RCVS Council with the aim of creating a tighter, more accountable and transparent regulatory body. Both the Law Commission in its consultation paper<sup>117</sup> and the Secretary of State for Health in her White Paper Report on *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century*<sup>118</sup> recommended that a smaller board-like model of appointed professional and lay members be preferred over a large, elected and, arguably, inefficient body. This, according to the reports, would result in a body which is more accountable to the government and other councillors, and also require consistent attendance and a high level of commitment from Council members.<sup>119</sup> Ultimately, the goal in reforming membership was to achieve more efficient, transparent, and targeted regulation.<sup>120</sup>

Thus, the GMC, like many professional regulatory bodies, has endured its own set of growing pains. In response to a growing lack of confidence from both practitioners and the public, the GMC initiated reforms which now ‘deliver greater independence, transparency and accountability, while still being workable and legitimate in the eyes of medical professionals.’<sup>121</sup> As discussed in the next section, the current structure of the RCVS mirrors that of the GMC before its extensive reform. Although proposals have been submitted to change this in the future, important issues such as lay involvement continue to be an issue of

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<sup>116</sup> The General Medical Council, ‘Historic Change at the GMC’ (GMC, 22 November 2012) <<http://www.gmc-uk.org/news/14172.asp>> accessed 7 December 2012.

<sup>117</sup> Law Commission, *Regulation of Health Care Professionals* (n102) paras 4.25- 4.27.

<sup>118</sup> Secretary of State for Health, *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century* (n115) paras 1.19- 1.21.

<sup>119</sup> *ibid* paras 1.20- 1.21

<sup>120</sup> See: Law Commission, *Regulation of Health Care Professionals* (n102) paras 4.25- 4.27 and Secretary of State for Health, *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century* (n115) paras 1.19- 1.21.

<sup>121</sup> Justin Waring et. al., ‘Modernising Medical Regulation: Where Are We Now?’ (2010) 24(6) *Journal of Health Organisation* 540, 549.

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concern.<sup>122</sup> Importantly, the RCVS could have adopted the current structure of the GMC and this would have acted as a good first step, reflecting both the changing sentiments with regards to the level of care expected by animal owners,<sup>123</sup> and an acknowledgment that all professional bodies ought to be regulated to a standard which reflects modern professional responsibilities and duties.

### *b) Changing the RCVS: Using Lessons Learned from the Human Medical Context and the GMC*

#### *i. The Regulatory Landscape: Understanding What and Who is being Regulated*

Lessons learned in the human medical context can provide valuable insight into the reform objectives of the veterinary profession. Central to establishing this point in the veterinary context is first understanding what and who is being regulated. Discussion of *why* parity is important forms the subject matter of the next section.

In general terms, it is the combination of a high degree of specialised expertise focused on the execution of a public good and a high level of autonomy which marks not only the qualities consistent with a profession, but also justification for self-regulation.<sup>124</sup> In practice, this creates a type of social contract whereby trust is given to the profession to regulate themselves in a way which preserves not only the integrity of the profession, but also the

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<sup>122</sup> See: RCVS, 'RCVS Council Agrees Wholesale Reform to the College's Governance' *RCVS News* (London, 11 March 2016) <<http://www.rcvs.org.uk/news-and-events/news/rcvs-council-agrees-wholesale-reform-to-the-colleges-governance/>> accessed 17 June 2016.

<sup>123</sup> See for example: McEachern Nunalee and Weedon, 'Modern Trends in Veterinary Malpractice,' (n107) 139.

<sup>124</sup> See: David Mangan, 'The Curiosity of Professional Status,' (2014) 30(2) *Professional Negligence* 74. See also: Bernard Rollin, 'Animal Rights as a Mainstream Phenomenon,' (2011) 1 *Animals* 102, 103. On the topic of self-regulation, Rollin states: '...society basically says to professions it does not understand well enough to regulate, "you regulate yourselves the way we would regulate you if we understood what you do, which we don't..."'

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professional (and legal) relationships entered into.<sup>125</sup> For a considerable amount of time since its inception, the GMC faced a 'relatively compliant state' which was non-interventionist<sup>126</sup> and a public which was resistant to legally challenging medical decision-making. However, the various high-profile scandals discussed previously which involved the care of some of society's most vulnerable, alongside a shift of patient perspective toward the provision of medical care and the doctor patient relationship forced a change in how the profession as a whole was regulated.<sup>127</sup> In particular, the public were increasingly less trusting of the medical profession<sup>128</sup> and were prepared to litigate perceived breaches of duty. In addition, government, whose role it is within the bargain to 'control the individualism which may be viewed as counter-productive to society',<sup>129</sup> intervened to redress increasing power imbalances which existed between doctors and patients. In short, the GMC had breached its side of the contract.

In terms of *what* is being regulated, then, unlike the RCVS which has multiple regulatory and professional focuses,<sup>130</sup> the GMC's primary objective is to protect, promote and

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<sup>125</sup> *ibid.* See also: Mark Davies, 'The Demise of Professional Self-regulation? Evidence from the "ideal type" Professions of Medicine and Law,' (2010) 26(1) *Professional Negligence* 3.

<sup>126</sup> *ibid.* 6.

<sup>127</sup> A further influencing factor was arguably the creation of the NHS and the end of the commercial relationship between doctor and patient in the majority of cases. This is interesting for the veterinary profession as they have yet to move past the commercial construction of the legal relationship.

<sup>128</sup> Law Commission, *Regulation of Health Care Professionals* (n102) para 1.14.

<sup>129</sup> Mangan, 'The Curiosity of Professional Status,' (n124) 77. Examples of this can be seen in the creation of the Professional Standards Authority for Health and Social Care, which externally regulates the GMC by virtue of the Health and Social Care Act 2012 and the push, as a result of the government white paper on *Trust, Assurance and Safety: The Regulation of Healthcare Professionals* (n115), which addressed, among other matters, the continued practice of the medical profession electing members of the GMC Council. The practice maintained the belief that although the GMC was to act as an independent regulator (professional representation being vested in various Royal Colleges and the British Medical Association), electing the members of the GMC Council meant that medical interests were still being promoted above patient interests. See also: Davies, 'The Demise of Professional Self-regulation?' (n125) 31.

<sup>130</sup> The RCVS, for example, looks at matters of education, keeping the veterinary register, and discipline. See *Veterinary Surgeons Act* ss 5(1), 9, and 15&16 respectively.

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maintain the health and safety of the public.<sup>131</sup> This may seem an obvious point, however, unlike non-human animals, discourse surrounding human patients centres around the idea of the sanctity of human life, regarding this principle as the basis from which to endow patients with basic human rights including the right to life, but also protected interests dealing with bodily integrity.<sup>132</sup> As a result, regulation which was once focused on professional collegiality, now focuses heavily on the care provided to the individual patient. To stay informed as to how to best meet those expectations, doctors are advised by the GMC itself and, increasingly, the courts, to stay abreast of current guidance.<sup>133</sup> It was arguably this shift in emphasis to a more patient-centred approach and the breaches of trust discussed above which drove (and continues to drive) regulatory change in the direction of patient safety and autonomy.

By comparison, the RCVS's regulatory body is considerably smaller in size, however, the College as a whole possesses a more complex power structure as it acts as both professional regulator and representative,<sup>134</sup> unlike the GMC and BMA. Further, and again unlike human

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<sup>131</sup> Medical Act 1983 s.1(1A).

<sup>132</sup> See: Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart 2009) 7.

<sup>133</sup> An example of this can be seen in the decision and reaction of the GMC to the decision in *Chester v. Afshar* [2005] 1 AC 134.

<sup>134</sup> In its role as Royal College, the RCVS is responsible for conferral of degrees, setting the educational curriculum, and disciplinary matters, whilst its role as regulator centres on the development of professional guidance. Although proper administration at the Royal College level would normally travel hand-in-hand with proper administration at the regulation level, transparency and accountability are crucial in ensuring that the veterinary profession remains accountable to the public and free from conflicts of interest. An example of the latter situation can be seen in the disciplinary process undertaken by the RCVS. Until very recently, for example, the disciplinary committee contained members that also sat on the Council; clearly this led to a conflict of interest. See for example: Marie Fox, 'Veterinary Ethics and Law' in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 245. For confirmation of the recent change to disciplinary procedures, see: Royal College of Veterinary Surgeons, 'Independent Disciplinary Committees – Veterinary Surgeons Act Amended,' (RCVS 9 April 2013) <<http://www.rcvs.org.uk/news-and-events/news/independent-disciplinary-committees-vsa-amended/>> accessed 2 May 2013 and Royal College of Veterinary Surgeons, 'New Chairpersons and Members for RCVS Disciplinary Committees,' (RCVS 9 July 2015) <<http://www.rcvs.org.uk/news-and-events/news/new-chairpersons-and-members-for-rcvs-disciplinary-committees/>> accessed 23 November 2015.

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medicine, because of the commercial dynamic found in veterinary relationships, owners are in much stronger position to demand a particular type of treatment, whether it be euthanasia or, for example, a less costly and less effective treatment option. Keeping with the commercial model, because the animal itself is still considered an object of property and thus the potential for actionable negligence quite low, the impetus to change the guidance and focus on the animal and constitutive relationship is arguably not as pressing for the RCVS. Lastly, it must not be forgotten that there are different types of veterinarian and different types of human-animal relationship. Whilst some veterinarians believe strongly in putting the animal patient at the centre of the relationship (the paediatric model), others treat the relationship as commercially-centred (the garage mechanic model).<sup>135</sup> This may depend not only on the inclinations of the veterinarian, but also the owner of the animal and, recalling discussion in Chapter Three, the animal's purpose. Importantly, these variations create a very different regulatory environment than that of the human medical context and would need to feature in reforms undertaken by the RCVS. Having said this, veterinarians are still bound by the same social contract entered into by other professions. According to Rollin, 'veterinarians, like all other professionals, have obligations to society in general. Society grants professionals special privileges...[and] gives a considerable degree of autonomy to professionals.'<sup>136</sup> Ultimately, the successful discharge of these obligations is entrusted to the veterinary profession because both legislators and the lay public lack the requisite knowledge necessary to do so. Problematically, however, it is only the commercial-centred approach which is currently being regulated, leaving the animal and the constitutive relationship discussed throughout this thesis unaccounted for.

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<sup>135</sup> See: Morgan, 'Stepping up to the Plate: Animal Welfare, Veterinarians, and Ethical Conflicts' (n2).

<sup>136</sup> Bernard E. Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* (n2) 95.

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The reasons for this current state of affairs are arguably to be found on the one hand a lack of state intervention and on the other the inability of the RCVS to regulate with multiple objectives in mind. With regards to state intervention, unlike the GMC, the RCVS has been privy to far less intervention. It is likely the case that this stems from the position of animals as property under the law, as opposed to a legal subject, and the state's desire to promote a liberal economy, which includes the freedom of parties to enter into private relationships free from governmental oversight.<sup>137</sup> For the purposes of this thesis, property is private, as are the commercial relationships considered. Further, the dual role that the RCVS serves as both regulator and professional representative arguably gives rise to conflicts of focus as between the veterinarian, client, and animal with the result that the RCVS's most recent attempt to produce professional guidance has led to a disproportionate focus placed on professional collegiality and client relations.<sup>138</sup>

Importantly, however, the point that veterinarians have yet to experience professional scandal or face negligence litigation on a larger scale should not place the profession in a position of thinking that regulatory reform is unnecessary. Indeed, Fox cautions that any form of complacency on the part of the profession or the RCVS as regulator should be resisted and that a failure to initiate structural reform 'leaves the veterinary profession in a potentially vulnerable position due to its continued dependence on individuals fulfilling ill-defined professional obligations.'<sup>139</sup> In the worst case, the RCVS and veterinary profession

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<sup>137</sup> Further evidence of the State's non-interventionist position can be seen in its unwillingness to reform the Veterinary Surgeons Act despite it being acknowledged that the Act has been in dire need of reform for at least eight years. See on this point: Environment, Food and Rural Affairs Committee, *Veterinary Surgeons Act 1966: Government Response to the Committee's Sixth Report of Session 2007–08* (HC 2007-08, 1011) <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmenvfru/1011/1011.pdf>> accessed 7 December 2012.

<sup>138</sup> Discussion on the demerits of having a mixed regulatory and representative body are beyond the confines of this chapter, however, it is acknowledged that this is an area which would benefit from academic scrutiny.

<sup>139</sup> Fox, 'Veterinary Ethics and Law' (n134) 255.

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as a whole face the possibility of having reforms externally forced upon them,<sup>140</sup> compromising their ability to have a say in the evolution of their profession. In this way, Fox's statement supports the argument that despite some of the differences discussed above, valuable lessons can still be learned from the regulatory history and experience of the GMC. As the next section will discuss, council composition reflects a reform undertaken by the GMC which should be adopted by the RCVS.

### ii. *The Importance of Lay Representation in Driving Professional Change*

Lay representation takes many different forms in professional regulation. In some cases, lay representatives sit on disciplinary panels, or sometimes act as official Lay Observers.

‘Whatever the role of the lay participants, there is clearly an international trend towards enhancing their number and effectiveness in the regulation of profession[als].’<sup>141</sup> In considering the role of lay representatives in professional regulation, Devlin and Heffernan note that consideration should be paid to the ‘necessary qualifications for appointment [...and] their relative numbers so that they are an effective and critical mass, not just tokens.’<sup>142</sup>

Importantly, lay representation featured as a primary objective within *Trust, Assurance and Safety* as it helps ensure that purely professional concerns are not thought to dominate the

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<sup>140</sup> *ibid.*

<sup>141</sup> Richard F. Devlin and Porter Heffernan, ‘The End(s) of Self-Regulation?’ (2008) 45(5) *Alberta Law Review* 169, 205.

<sup>142</sup> *ibid.* Although appointment mechanisms cannot be considered in this chapter, it should be the case that members are appointed by an independent process. As discussed in the previous section, recent reforms to the GMC saw appointment to the Council by other medical professionals discontinued as a means of ensuring transparency and equal representation. The same should occur within the RCVS.

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Council's work,<sup>143</sup> to command public confidence,<sup>144</sup> and to better reflect the society on whose behalf [doctors] operate.<sup>145</sup> In addition to these considerations, it could also be argued that including lay representation goes some way to eliminating the mystical quality that doctors, veterinarians, and other professionals possess as a result of their specialised knowledge. As Mangan notes, although 'there is interaction [between lay individual and professional] (purposeful though it is), there remains an inherent aloofness perpetuated by a mystification of the knowledge possessed by the professional.'<sup>146</sup> Lay involvement in the regulatory process is therefore important in breaking down the metaphorical wall that exists between professional and lay public to achieve a more open, trusting dialogue. It is submitted the same arguments can be applied in the veterinary context in providing a rationale for significantly increasing lay membership within the RCVS Council. This argument is particularly pressing given that a recent consultation run by DEFRA indicates a lack of lay representation on the RCVS Council is having an adverse effect on its reputation with the public,<sup>147</sup> and that the Veterinary Surgeons Act 1966 'does not include a statutory requirement for lay people to be included in the Council.'<sup>148</sup>

Having said this, unlike the GMC's twelve-member committee, of which 50% are now lay members, the RCVS Council is currently comprised of forty-two members, thirty-three (78.5%) of whom are practising veterinary surgeons.<sup>149</sup> Recalling Shaw and Downie's

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<sup>143</sup> Secretary of State for Health, *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century* (n115) 5. See also: Davies, 'The Demise of Professional Self-regulation?' (n125) 13.

<sup>144</sup> *ibid* para 1.10

<sup>145</sup> *ibid* para 1.14.

<sup>146</sup> Mangan, 'The Curiosity of Professional Status' (n124) 82.

<sup>147</sup> Department for Environment, Food, and Rural Affairs, *Consultation on Proposals to Amend the Governance Structure of the Royal College of Veterinary Surgeons, and Amend the Veterinary Surgeons Act 1966 using a Legislative Reform Order* (October 2015) para 3.5 <[https://consult.defra.gov.uk/animal-health-and-welfare/rcvs\\_council\\_reform](https://consult.defra.gov.uk/animal-health-and-welfare/rcvs_council_reform)> accessed 12 November 2015.

<sup>148</sup> *ibid* para 1.21.

<sup>149</sup> Veterinary Surgeons Act 1966 s 1.



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argument that alternative perspectives are crucial to the re-development of guidance to more accurately reflect changing sentiment,<sup>150</sup> one area in which the RCVS could make positive regulatory change would be in the size and composition of its council. Although it must be remembered that unlike the GMC, which is a wholly independent regulatory body with multiple, independent branches, itself regulated by the Professional Standards Authority for Health and Social Care,<sup>151</sup> the RCVS is a body whose principal responsibilities lie not only in professional regulation, but also support for the veterinary profession.<sup>152</sup> According to a recent DEFRA consultation, this places the RCVS in a unique position and that, as such, parity between veterinary professionals and lay individuals should be questioned.<sup>153</sup> There is

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<sup>150</sup> Shaw and Downie, 'Welcome to the Wild, Wild North: Conscientious Objection Policies Governing Canada's Medical, Nursing, Pharmacy, and Dental Professions' (n51) 45.

<sup>151</sup> This Authority was formally known as, the Council for Healthcare Regulatory Excellence. The role of the Professional Standards Authority is to supervise and scrutinise the work of the eight other regulatory bodies (ie. the General Dental Council), sharing good practice and knowledge with the regulators, and 'advising the four UK governments' health departments on issues relating to professionals regulation.' See: Law Commission, *Regulation of Health Care Professional, Regulation of Social Care Professionals in England* (n102) para 1.6.

There is also a separate argument here that the human medical profession is currently being over-regulated and that as a result doctors are losing their ability to exercise their own judgment in making certain medical decisions. Instead, much of this discretion has now been taken up by the law acting in a more interventionist capacity and official guidance coming from multiple, sometimes contradictory, sources such as the BMA and NICE. It is submitted, however, this situation would be unlikely to affect the veterinary profession, largely because of the legal status of non-human animals. For arguments on the over-regulation of the medical profession, see: José Miola, 'Making Decisions about Decision-Making: Conscience, Regulation, and the Law,' (2015) 23(2) *Medical Law Review* 263 and Sara Fovargue and Mary Neal, 'In Good Conscience': Conscience-based Exemptions and Proper Medical Treatment,' (2015) 23(2) *Medical Law Review* 221.

<sup>152</sup> See generally, 'The role of the RCVS' <<http://www.rcvs.org.uk/about-us/the-role-of-the-rcvs/>> accessed 13 December 2012. Of course, whether this current setup *should* be maintained is an important, albeit separate, question which is beyond the scope of this chapter. A separate organisation called the British Veterinary Association exists, however, unlike the BMA, the BVA does not hold any official status as a professional regulator.

<sup>153</sup> DEFRA, *Consultation on Proposals to Amend the Governance Structure of the Royal College of Veterinary Surgeons, and Amend the Veterinary Surgeons Act 1966 using a Legislative Reform Order* (n147) para 2.8. In March of 2016 the Consultation was reviewed and analysed by DEFRA and reviewed by the RCVS Council. Preliminary changes have been adopted by the RCVS Council and largely accepted by DEFRA, but this is still to be reviewed by government. Initial proposals, which reduce the size of the Council to twenty-four members and formalise a minority lay involvement, represent obvious change, however, it is uncertain to what extent this will create the change necessary to modernise the veterinary profession and bring it in line with analogous professions. There are still many questions which remain unanswered, for example, who will form the lay component of the Council and it is still far too early to come to conclusions about how the profession will be affected, if at all, by these reforms. For more on this, see: DEFRA, *Informal Consultation on Proposals to Amend the Governance Structure of the Royal College of Veterinary Surgeons: Analysis and Response to Consultation* (June 2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/533775/rcvs-governance-](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/533775/rcvs-governance-)

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some weight to this argument. The RCVS is unique in its position and whilst I would submit that ultimately the best way to resolve this tension would perhaps be to separate professional support matters from regulatory, this would require larger-scale reform to the Veterinary Surgeons Act 1966 and is therefore perhaps better viewed as a long-term regulatory goal that extends beyond matters relating to the negligence liability of veterinarians.

As it stands, I agree with DEFRA that the regulatory structure places the veterinary profession in a unique situation, but disagree that this should frustrate legitimate attempts to develop the profession along modern lines. There are cogent reasons, explained above, which prompted the human medical profession to change. These reasons apply equally to the veterinary context and if the arguments made in this thesis are accepted, as I think they should, and (as discussed below) the desires of the profession to become well-placed, ethical decision-makers within the veterinary relationship are to be taken seriously, then strong involvement from both the professional and the lay population is required. Thus, a smaller council with parity between professional and lay, and with members drawn from diverse backgrounds provides the foundation from which to start the process of modernising the veterinary profession.

Turning then to *who* should feature on the RCVS Council apart from veterinary practitioners, it is submitted that a combination of animal welfarists and academics would provide the Council with a diverse, but also targeted opinion. This will be discussed in greater detail

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[informal-consult-sum-resp.pdf](#)> accessed 30 June 2016; DEFRA, *Consultation on Proposals to Amend the Governance Structure of the Royal College of Veterinary Surgeons: Analysis and Response to Consultation* (March 2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/508308/rcvs-governance-consult-sum-resp.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508308/rcvs-governance-consult-sum-resp.pdf)> accessed 15 April 2016. For changes to the RCVS Council see: RCVS, 'RCVS Council Agrees Wholesale Reform to the College's Governance' (11 March 2016) <<http://www.rcvs.org.uk/news-and-events/news/rcvs-council-agrees-wholesale-reform-to-the-colleges-governance/>> accessed 15 April 2016.

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below, for present purposes, it is important to note that in a recent report detailing the future ambitions of the veterinary profession, it was highlighted that 89% of veterinarians feel their largest contribution is to animal health and welfare.<sup>154</sup> Indeed, ‘veterinary leadership on animal welfare was the most important goal cited for 2030.’<sup>155</sup> Further, when asked to envision their profession in fifteen years’ time it was stated that:

All veterinary surgeons have a good knowledge of animal welfare issues — including how these should be assessed and ethically appraised – and feel equipped to articulate the profession’s unique role here. [Further,] ethical decision-making, in both veterinary and animal ethics, is mainstreamed and all vets are skilled in moral decision-making.<sup>156</sup>

For the purposes of this chapter and indeed this thesis as a whole, it is submitted that though laudable, this statement needs to find a counterpoint in the law. This endeavour requires, as a starting point, a breadth of professional and lay council opinion devoted to a re-articulation of professional guidance. Thus, it would arguably be beneficial to include members from official organisations such as the Royal Society for the Prevention of Cruelty to Animals (“RSPCA”). Organisations like the RSPCA work to ensure the welfare and ethical treatment of animals within society and could contribute specialised evidence-based knowledge on the welfare of companion and farm animals outside of the clinical context.<sup>157</sup> Moreover, the

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<sup>154</sup> Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (n3) 19.

<sup>155</sup> *ibid* 20.

<sup>156</sup> *ibid*.

<sup>157</sup> See for example: Royal Society for the Prevention of Cruelty to Animals, ‘Advice and Welfare,’ <<http://www.rspca.org.uk/adviceandwelfare>> accessed 18 December 2015. Recently, the RSPCA has come under investigation regarding its prosecutions procedure, which led to a Parliamentary inquiry. As it stands, the RSPCA is still able to bring prosecutions, however, the types of cases chosen to be prosecuted will likely change. This, however, would be unlikely to change its ability to comment and contribute to discussions regarding animal welfare and societal ownership trends. On changes to prosecutions, see: Matt Payton, ‘Police Chiefs Call for RSPCA to be Banned from Prosecuting Animal Cruelty Cases,’ *The Independent* (London, 10

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RSPCA would arguably be in good position to comment on societal trends affecting animal ownership and welfare.

In addition to this, it is submitted that academic involvement on the Council should be refined. As it currently stands, two members from each veterinary school sit on the Council.<sup>158</sup> As part of the aim to become a more targeted and proportionate<sup>159</sup> regulator, it has been suggested by DEFRA and the RCVS that the new Council should see a significant reduction in the numbers of serving academics.<sup>160</sup> If recommendations made by the Veterinary Legislative Group in 2009 are accepted, university representation would fall to *one* individual holding a veterinary degree.<sup>161</sup> More recent proposals, however, have suggested a rise in university participation, but that members should come only from veterinary schools.<sup>162</sup> It is submitted that either course should be strongly resisted. Going forward, there needs to be a voice on the Council which can speak to the rapidly-evolving legal and ethical issues surrounding the triangular (*not* bipolar) veterinary relationship, and ways in which the profession can be developed to meet this change. To this end, academic involvement, specifically in the areas of law and bioethics, should be encouraged. Importantly, bioethicists and legal academics working in areas such as Tort, with specialist expertise in veterinary negligence, understand not only the principles which constitute

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April, 2016) <<http://www.independent.co.uk/news/uk/home-news/police-chiefs-call-rspca-banned-prosecuting-animal-cruelty-cases-a6977101.html>> accessed 11 April 2016 and MRCVS, 'RSPCA Makes Changes to its Prosecutions' (March 2016) <<http://mrcvs.co.uk/en/news/14248/RSPCA-makes-changes-to-its-prosecutions>> accessed 22 August 2016.

<sup>158</sup> Veterinary Surgeons Act 1966 s 1(c).

<sup>159</sup> This was stated as one of the five principles of better regulation stated in the consultation. The remaining three have been discussed throughout this chapter and are: transparency, accountability, and consistency. See: DEFRA, *Consultation on Proposals to Amend the Governance Structure of the Royal College of Veterinary Surgeons* (n147) 11.

<sup>160</sup> *ibid* 12.

<sup>161</sup> Royal College of Veterinary Surgeons, 'Review of the Veterinary Surgeons Act: Consultation on Recommendations of the Veterinary Legislative Group' (RCVS July 2009) 4 <<http://www.rcvs.org.uk/about-us/consultations/our-consultations/vsa-review-2009/>> accessed 12 June 2016.

<sup>162</sup> RCVS, 'RCVS Council Agrees Wholesale Reform to the College's Governance' (n122).

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positive and negative medically-related professional obligations, but are familiar with important legal and ethical constructs which this thesis has argued should animate the veterinary relationship, such as best interests. As this thesis has sought to highlight, the triangular veterinary relationship is complex. Ethical and legal questions frequently occur in tension with one another. Academics working specifically in negligence understand the nature of professional and legal obligations, the doctrine which underpins relevant legal principles, and the relationships that are created within the professional context.<sup>163</sup> This knowledge places bioethicists and legal academics specialising in professional negligence and medical law in a unique position to be able to inform on the development of professional guidance.

### c) *The Best Interests Approach: The RCVS versus the GMC*

Although it is not contested that at a base level a veterinarian owes to their clients and patients the duty to practise veterinary medicine in such a manner so as to meet the standards expected of the profession,<sup>164</sup> when the regulatory body that develops the standards has fallen ‘significantly out-of-step with the arrangements in place at other professional regulators and Royal Colleges,’<sup>165</sup> what is produced will be unlikely to adequately protect and inform all parties involved. An example of this, I argue, is found in how the RCVS Council addressed the animal patient’s welfare, in particular, their best interests.

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<sup>163</sup> On this last point, understanding the arguments made in Chapter Two (‘Harm to Sentient Constitutive Property: Developing Nascent Innovations in Actionable Damage’) and Chapter Four (‘Revisiting the Duty of Care: Arguing for a Best Interests Approach’) of this thesis would be of particular importance in advancing the veterinary profession as it conceptualises the legal relationship as one centring on notions of vulnerability and the veterinarian’s legal duty of care as stemming from unequal power relationships that exist between the veterinarian and the owner, and owner and animal.

<sup>164</sup> McEachern Nunalee and Weedon (n107) 140.

<sup>165</sup> DEFRA, *Consultation on Proposals to Amend the Governance Structure of the Royal College of Veterinary Surgeons* (n147) 11.

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This final section, then, will focus on best interests and how this construct could be practically developed to feature more prominently within professional guidance. As this next section and final section of this chapter will discuss, courts increasingly look to professional guidance to inform them as to the expected standard of care; therefore, guidance in this area could prove particularly helpful, in conjunction with expert testimony. Although I argue a best interests approach is central to how veterinarians ought to approach their legal and professional obligations and how the courts approach veterinarians' legal duties, it was only briefly addressed in the new RCVS guidance. It was highlighted in Chapter Two of this thesis that power and knowledge imbalances are inherent in the veterinary relationship and that understanding the tensions that result from the triangular veterinary relationship are vital to understanding the role of the veterinarian and the courts in ensuring the interests of the vulnerable party are protected.<sup>166</sup> Embracing a best interests approach is interlinked with this approach, serving as a prioritising mechanism for the benefit of the animal, which can be utilised both in how the negligence inquiry is framed, but also, importantly, in formulating the veterinarian's duty of care and expected standard of care.

Within the RCVS guidance, however, best interests is only mentioned in four areas: the transportation of sick and/or injured animals, artificial insemination, the provision of telephone advice, and when the owner lacks capacity. Although the issue of capacity and consent in the veterinary context raises interesting questions, for the purposes of this thesis, this section would be unlikely to play a key role. Whilst sections 75 and 76 in the GMC guidance<sup>167</sup> for doctors and sections 8-9 and 12-13 for paediatricians reference *when* the best interests assessment must be undertaken and *how* to undertake it, there is no assessment

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<sup>166</sup> See discussions in Chapter 2, in particular: 2.3(b) and 2.5(b).

<sup>167</sup> See also: Mental Capacity Act 2005, s4.

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which allows veterinarians to determine whether or when it would be professionally permissible to act in the best interests of the animal, or how a best interests determination is to be arrived at. Recalling the link that professional guidance aims to establish the legal standard and can track closely to it,<sup>168</sup> this lack of detailed and applicable guidance in this area paints the picture that the RCVS believes its veterinarians do not require such information to competently and professionally carry out their legal obligations to an accepted standard. However, this does not appear to correspond with growing professional sentiment which sees the veterinarian's greatest contribution being to animal health and welfare,<sup>169</sup> nor with empirical evidence, which indicates a growing need for professional guidance on expected standards<sup>170</sup> and practice-related dilemmas.

Looking pragmatically at how best interests could be incorporated into new professional guidance for the benefit of veterinarians, as discussed throughout this thesis, the best interests assessment should be holistic in approach, taking into account both quality and quantity of life issues, including the owner's wishes and capabilities. In this way, a best interests assessment in the veterinary context could be similar in structure to the test found in s.4 of the Mental Capacity Act 2005,<sup>171</sup> the Welfare Checklist found in s.1(3) of the

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<sup>168</sup> Lee (n57) 572.

<sup>169</sup> See for example: Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (n3).

<sup>170</sup> See RCVS Fact Sheet (n83)

<sup>171</sup> The Mental Capacity Act 2005, however, is less likely to fit with veterinary practice. In terms of focus, s.4 of the Mental Capacity Act has been interpreted as a test which borders closely to a substituted judgment standard, in that decisions should be made in line with what the incompetent patient would have wanted if competent (see: Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (7th ed., OUP 2013) 227) supplemented by a best interests test where substituted judgment does not yield a conclusive steer (see: Shaun D. Pattinson, *Medical Law and Ethics* (4th ed., Sweet & Maxwell 2014) 528). On the face, this does not fit well with the veterinary model advanced thus far, its focus being too strongly rooted in preserving notions of autonomous self-determination and on making decisions which the animal would have made if autonomous. As McMullen states, 'it would be hard to imagine what an animal would choose if it were autonomous. Are animals able to have desires to extend life, for example, or just to be free from pain and suffering?...' See: Siobhan McMullen, 'The Role of Autonomy in Ethical Decision-Making in Veterinary and Medical Practice,' (2006) 10(1) AWSELVA 10). Recall too the caution issued by the court in *Wyatt* that factors

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Children Act 1989, and the best interests assessment found in para 12 of the *0-18 Years: Guidance of All Doctors* issued by the GMC. Legislation and guidance concerning children, however, is arguably best suited to the veterinary context as this guidance looks to protection of the child and is alive to aspects of vulnerability, whilst also being grounded in ideals relating to obligation and responsibility.<sup>172</sup> Including a best interests assessment within the RCVS professional guidance in line with that found in guidance concerning the best interests of children would arguably have gone some way to acknowledging and resolving issues surrounding the animal's position of exclusive dependence<sup>173</sup> within the veterinary relationship.<sup>174</sup>

Making these changes would also allow courts to utilise the RCVS guidance when determining issues of breach in a veterinary negligence claim where the best interests of the animal was at issue. For example, in the previous chapter which considered various duty of care scenarios, one of the more complicated concerned the veterinarian acting against an owner who was unable to come to the treatment decision which would have promoted the animal's best interests. Acting against those wishes, the veterinarian acts *for* the animal's best interest and euthanises the animal. The owner in this scenario would certainly be entitled to sue a veterinarian in this circumstance, however, official guidance that makes the animal's best interests of primary importance alongside expert testimony supporting the conduct of the veterinarian may result in a finding that the defendant did not breach her

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relevant to the treatment of adults may not sit well with those questions relating to children. See: *Portsmouth Hospitals NHS Trust v. Wyatt* [2005] 1 WLR 3995, 4023.

<sup>172</sup> Jo Bridgeman, 'Because we Care? The Medical Treatment of Children' in Sally Sheldon and Michael Thomson (eds.), *Feminist Perspectives on Health Care Law* (Cavendish 1998) 97.

<sup>173</sup> Jane Stapleton, 'The Golden Thread at the Heart of Tort Law,' (2003) 24 Australian Bar Review 135, 142.

<sup>174</sup> See discussion in Chapter 2.4(b).



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expected standard of care.<sup>175</sup> Importantly, without this information, veterinarians (and courts) would be lost. Situations like this are obviously emotionally-charged and, from a legal perspective, highly fact-sensitive. Guidance here should be aimed at providing targeted information and support, much like the GMC guidance on best interests, but also allowing sufficient space for the veterinarian to make decisions based on a robust balancing exercise, supported by clear professional guidance.

### 5.5 The Role of the Courts as Final Arbiters of the Standard of Care

Once it is the case that professional sentiment broadly supports the changes advocated for thus far, the courts, as final arbiters of the standard of care,<sup>176</sup> stand in a better position to scrutinise the cogency of expert opinion and develop the law in line with the arguments made in this thesis. Key to this assessment, however, is to what extent the breach assessment is one that ought to set a normative standard and how courts could utilise professional codes to advance this perspective.

#### a) *Breach: Setting a Normative or Descriptive Standard*

In any professional context there is the possibility that courts decide standards based on current practice. In this regard, standards are set which, although consistent with the evidence given by the defendant and her experts as to what they *do*, removes the normative component from the breach assessment and ultimately allows the profession to set its own standard.<sup>177</sup> Importantly, this is different from establishing standards stemming from

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<sup>175</sup> This links back to the arguments made that professional guidance aims to establish the legal standard of care and can track very close to the tort standard. See: Lee (n33) 572.

<sup>176</sup> Campbell and Cranley Glass, (n4) 480.

<sup>177</sup> José Miola, 'The Standard of Care in Medical Negligence – Still Reasonably Troublesome?' (n32) 129. See also: Alasdair Maclean, 'Beyond *Bolam* and *Bolitho*,' (2002) 5 Medical Law International 205. This was also

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reasonableness. Where this latter standard is sought, the court is able to retain its role in determining what conduct is acceptable.<sup>178</sup>

Speaking to the veterinary profession, Soave notes that the standard of care to be met by veterinarians is to ‘use the *ordinary* and *reasonable* degree of skill and care expected from the average licensed professional.’<sup>179</sup> This statement, taken as a whole, is somewhat contradictory as it blends descriptive and normative standards, without differentiating between the two or reaching a conclusion as to which is required of the veterinarian. To Norrie, there is more at play here than merely semantics; the words used distinguish two very different standards: *ordinary* refers to what professionals do and is descriptive, whilst *reasonable* refers to what should be done.<sup>180</sup> The concern, here, is that courts would opt for the less demanding standard when determining questions of breach; indeed, this is arguably the standard articulated in the RCVS guidance discussed previously. It is submitted that when confronted with these two options, the court should hold the defendant to a reasonable standard and develop the legal standard expected, intervening where, for example, a veterinary expert clearly embraces an outmoded practice inconsistent the arguments made throughout this chapter and the aims of this thesis.

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arguably the case in the decision in *Calver v. Westwood Veterinary Group* [2001] P.I.Q.R. P11. It will be recalled that the defendant veterinarian was called to attend the claimant’s mare that had aborted her foal. After analysing the savaged afterbirth and attempting to get vitals from the agitated mare, the veterinarian satisfied himself that the mare was healthy and did not require antibiotics or uterine flush. As it turned out, the mare had retained biomaterial and soon after developed laminitis and had to be destroyed. In Chapter One it was argued that the decision of the Court of Appeal, reversing the trial judge, was premised largely on what veterinarians *do* based on the testimony provided by a distinguished expert, as opposed to a normative assessment of what ought to have been done.

<sup>178</sup> *ibid.*

<sup>179</sup> Orland Soave, *Animals, the Law and Veterinary Medicine: A Guide to Veterinary Law* (4th ed., Austin & Winfield 2000) 17 [emphasis added].

<sup>180</sup> Kenneth Norrie, ‘Common Practice and the Standard of Care in Medical Negligence,’ (1985) 97 Juridical Review 145 quoted in José Miola, ‘The Standard of Care in Medical Negligence— Still Reasonably Troublesome?’ (n32).

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As Montrose argued almost sixty years ago, ‘the question of negligence is one of what ought to be done in the circumstances, not what is done in similar circumstances by most people or even by all people.’<sup>181</sup> It may be the case that judges are attracted to the descriptive standard, however, it is argued that this should be resisted. Even if more modern guidance is issued which reflects the triangular veterinary relationship and the best interests of the animal, and professional sentiment has altered to reflect this, external scrutiny and regulation by the courts is still necessary to ensure reasonable standards are being complied with.

Furthermore, failing to adopt a normative standard in the breach assessment carries the risk of that information gap persisting whilst also allowing old practices to continue unchallenged. A crucial part of changing the professional mindset and advancing the veterinary profession, I argue, rests with the judiciary and its ability to set the reasonable standard of care expected. Importantly, that standard should be one which reflects a normative standard of care.

An example of this type of analysis being undertaken in the medical context can be seen in the recent Supreme Court decision in *Montgomery v. Lanarkshire Health Board*,<sup>182</sup> where the majority of the court found that the standards set by the GMC regarding disclosure of risk, although higher than the standard ordinarily practiced by the profession, was the correct standard to be adopted. It was reasoned that:

...the guidance issued by the General Medical Council has long required a broadly similar approach [an open dialogue between patient and doctor, which allows the patient to come to an informed decision about treatment]. It is nevertheless necessary

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<sup>181</sup> J.L. Montrose, ‘Is Negligence an Ethical or Sociological Concept?’ (1958) 21(3) Modern Law Review 259, 259.

<sup>182</sup> [2015] AC 1430.

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to impose legal obligations, so that even those doctors who have less skill or inclination for communication, or who are more hurried, are obliged to pause and engage in the discussion which the law requires. This may not be welcomed by some healthcare providers; but the reasoning of the House of Lords in *Donoghue v Stevenson* [1932] AC 562 was no doubt received in a similar way by the manufacturers of bottled drinks.<sup>183</sup>

Although *Montgomery* concerned the issue of disclosure of risk, which has arguably developed along different lines than treatment and diagnosis,<sup>184</sup> I argue that because of the animal's position of exclusive dependence and vulnerability within the veterinary relationship and the ethically and legally complex nature of veterinary decision-making that exists, the court could take a similarly forward-thinking approach. Indeed, this would especially be the case when dealing with best interest assessments undertaken by veterinarians.

### b) *Utilising Professional Guidance as a Tool to Clarify the Reasonable Standard of Care Expected*

Where there is disagreement or uncertainty in the experts' opinions, guidance can be utilised as a tool to more closely scrutinise the expert evidence and provide objective footing to advance the legal standard of care in a particular direction. As Maria Lee states,

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<sup>183</sup> *ibid* 1464 [emphasis added].

<sup>184</sup> *Bolitho v. City and Hackney Health Authority* [1998] AC 232, 243 per Lord Brown-Wilkinson. One of the possible reasons for this differentiation between disclosure of risk and treatment and diagnosis is that the issues concerned with disclosure go beyond a question of whether the defendant was negligent 'to whether the doctor infringed the patients' ethical right to self-determination.' See: José Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Hart 2007) 55.

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‘...guidelines...provide a source of ‘reasonableness’ other than practice, which might either compete with or support that practice.’<sup>185</sup> In this regard, Samanta et al.<sup>186</sup> make the argument that clinical guidelines can, in essence, act as a tool utilised by the courts to help evaluate breach.<sup>187</sup> The authors state that the first step is to determine whether the expert evidence given at trial is *Bolam*-defensible, meaning that guidelines could be utilised either to ‘conclude that the conduct is such as no reasonable doctor could have held, and *prima facie* the defendant has failed to meet the standard of care’<sup>188</sup> or, conversely, that the defendant’s conduct was such that a reasonable doctor could have acted similarly. The second stage, the authors contend, is to determine whether the defendant’s conduct or departure from the guidance was *Bolitho*-justifiable. Here, the authors draw on the speech of Lord Browne-Wilkinson in *Bolitho* itself where it was stated that:

...the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a *logical basis*. In particular, in cases involving, as they often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of *comparative risks and benefits* and have reached a defensible conclusion on the matter.<sup>189</sup>

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<sup>185</sup> Lee (n33) 570.

<sup>186</sup> Ash Samanta, et al., ‘The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the *Bolam* Standard,’ (n38).

<sup>187</sup> *ibid* 334 and 360. Although the authors focus on clinical, as opposed to ethical guidance, I submit that the same arguments can be made.

<sup>188</sup> *ibid* 360. It should also be noted that the authors consider too the situation where the defendant is *protected* by the same equation; therefore, guidance can be utilised by both parties.

<sup>189</sup> [1998] AC 232, 242 (emphasis added).

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If the guidance is capable of contributing to this type of assessment, then it follows from Samanta et al.'s argument that it is capable of informing on the reasonable standard of care. Following guidance which aims to facilitate proper decision-making on both a professional and legal level by taking into account, for example, the magnitude of risk<sup>190</sup> and the gravity of potential harm would arguably demonstrate that the expert has directed herself to the determination of professional expectations. For the courts, this guidance could be utilised as an objective tool to measure expert opinion and serve as a reminder that ultimately 'it is the court's function to judge, not to take refuge in bodies of professional opinion.'<sup>191</sup> A similar point was also raised by Brazier and Miola that:

In claims for medical negligence the emergence of sources of neutral and independent guidance on good practice will empower judges to utilise *Bolitho* and assess whether the opinion advanced by each party's experts is logical and defensible.<sup>192</sup>

Recalling Mulheron's statement that the judiciary's uptake of *Bolitho* has been patchy, the message that professional guidance can be utilised as an objective tool to check or balance opinion advanced by experts is an important one. Two case law examples can be used to demonstrate this point.

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<sup>190</sup> *Glasgow Corp. v. Muir* [1943] AC 448, 456. See also *Paris v. Stepney BC* [1951] AC 367 and *Bolitho v. City and Hackney Health Authority* [1993] P.I.Q.R. P334, 342 where it was stated that it was for the judge to 'decide whether that clinical practice puts the patient unnecessarily at risk' and *Hucks v. Cole* (1968) [1993] 4 Med. L.R. 393 per Sachs LJ:

When the evidence shows that a lacuna in professional practice exists by which risks of grave danger are knowingly taken, however small the risk, the court must anxiously examine the lacuna...(at 397).

<sup>191</sup> Michael A. Jones, 'The *Bolam* Test and the Responsible Expert' (n26) 250.

<sup>192</sup> Margaret Brazier and José Miola, 'Bye-Bye *Bolam*: A Medical Litigation Revolution?'(n10) 113.

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First, in *Airedale NHS Trust v. Bland*,<sup>193</sup> the court had to decide whether Anthony Bland, who had suffered catastrophic physical injury at Hillsborough, should be kept on artificial feeding. Anthony Bland had been in a persistent vegetative state (“P.V.S”) since his injury and there was no hope of this reversing. As artificial feeding is regarded as a form of medical treatment, the Trust sought a declaration by the court confirming that it would be lawful to withdraw life support in this instance. In his judgment, Lord Goff considered guidance found in a Discussion Paper on Treatment of Patients in Persistent Vegetative State, issued by the Medical Ethics Committee of the British Medical Association.<sup>194</sup> His Lordship stated that:

Study of this document left me in no doubt that, if a doctor treating a P.V.S. patient acts in accordance with the medical practice now being evolved by the Medical Ethics Committee of the B.M.A., he will be acting with the benefit of guidance from a responsible and competent body of relevant professional opinion, as required by the *Bolam* test.<sup>195</sup>

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<sup>193</sup> [1993] AC 789.

<sup>194</sup> *ibid* 870.

<sup>195</sup> *ibid* at 871. The guidance discussed in this paper indicated that in making a decision of this nature, the doctor(s) should consider the following: (1) every effort should be made at rehabilitation for at least six months after the injury; (2) the diagnosis of irreversible P.V.S. should not be considered confirmed until at least 12 months after the injury, with the effect that any decision to withhold life-prolonging treatment will be delayed for that period; (3) the diagnosis should be agreed by two other independent doctors; and (4) generally, the wishes of the patient's immediate family will be given great weight (at 870-871).

There are two additional points to be said about the use of the BMA guidance in this context. First, it will be recalled that the weight guidance is given in a particular case is closely connected to the specific issue considered by the case at hand (Lee, (n33) 575). Here, the issue at hand was certainly a legal one, but also a strongly ethical one. Thus, the use of guidance developed by the BMA's Ethics Committee on the topic of PVS was particularly salient. Second, the only standard that needed to be met was the one set by *Bolam* (ie. the profession), so again, utilising guidance by the BMA seemed particularly instructive. Whether guidance would now need to be taken from a more objective source, for example, the GMC, to meet with *Bolitho* is uncertain, but arguable.

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Second, in *R (On the application of Oliver Leslie Burke) v. General Medical Council*<sup>196</sup> the Court of Appeal had to decide whether guidance issued by the GMC entitled, ‘Withholding and Withdrawing Life-prolonging Treatments: Good Practice in Decision-Making,’ contravened Mr. Burke’s article 2, 3, 6, 8 and 14 rights under the ECHR. Mr. Burke was suffering from a degenerative brain condition, which, in its final stages, would likely render him fully dependent on others to provide care. Throughout, Mr. Burke expressed his desire to have his care continued and for ANH to continue, even if or when he lapsed into a coma. At first instance, it was held by Munby J. that the GMC guidance was unlawful and contravened his Article rights.<sup>197</sup> The Court of Appeal, however, reversed Munby J’s decision upholding the common law construction that a ‘doctor has a positive duty, so long as the treatment is prolonging the life of the patient, to provide ANH in accordance with the patient’s expressed wishes.’<sup>198</sup> As the GMC guidance did not depart from this standard, there was no reason to declare it unlawful.<sup>199</sup> According to Samanta et al. this implied that:

...in the context of withholding or withdrawing life-supporting treatment in the incompetent patient, a doctor’s practice in acting in conformity with guidance from a responsible professional body would be in keeping with reasonable practice.<sup>200</sup>

Admittedly, the conclusion arrived at by Samanta et al. is slightly different than the argument introduced above in that it appears it was the guidance itself that was being challenged in *Burke*. Although this appears the case, in reality, the guidance was still being

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<sup>196</sup> [2006] QB 273.

<sup>197</sup> [2005] QB 424.

<sup>198</sup> Claire McIvor, ‘Bursting the Autonomy Bubble: A Defence of the Court of Appeal Decision in *R (On the Application of Oliver Leslie Burke) v. GMC*’ in Stephen W. Smith and Ronan Deazley (eds.) *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (Ashgate 2009) 189.

<sup>199</sup> *ibid* 189-190.

<sup>200</sup> Samanta et al., ‘The Role of Clinical Guidelines in Medical Negligence Litigation: A Shift from the *Bolam* Standard?’ (n38) 335.



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used to assess the standard of care question. Having said this, in both cases the court utilised professional guidance to determine not only the scope of a medical practitioner's professional duty, but also the legal. In *Bland*, for example, Lord Goff clearly stated that complying with the ethical guidance issued by the BMA meant that the practitioner would similarly meet the legal standard established by *Bolam* and likewise in *Burke* that the legal standard mirrored the professional standard established in the GMC guidance.

### c) *The Courts Helping to Drive Regulatory Reform*

Just as the courts can utilise professional guidance as a tool to determine the reasonable standard of care, so too can courts highlight that a gap in existing professional guidance exists. With a responsive regulatory council, this information can be taken on board and used to refine or develop new guidance in line with changing social expectation.

An example of the GMC applying litigation lessons to its guidance can be seen in the doctrinal and professional development of the best interests test in children that lack capacity. Arguably, the move to develop the best interests test now in place began in earnest with the case of Charlotte Wyatt<sup>201</sup> — a case discussed earlier in Chapter Four of this thesis.<sup>202</sup> Although the decision in *Wyatt* is somewhat contested, I use it here only to demonstrate the professional and legal development of a best interests approach in relation to the standard of care expected by medical practitioners. Recalling the facts, Charlotte was born premature and as such, suffered from extensive health problems and disabilities. It was the judgment of the medical team supervising Charlotte's care that if she entered into a critical state, it would be in her best interests not to resuscitate. Charlotte's parents, on the

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<sup>201</sup> *Portsmouth NHS v. Wyatt* [2005] 1 WLR 3995.

<sup>202</sup> See best interests discussion in Chapter 4.5(b).

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other hand, wanted every effort undertaken to preserve her life. In the court's decision, it was held that the best interests of the child were paramount, however, a review of the best interests case law revealed a confusing and inconsistent approach to assessment.<sup>203</sup> In its reasoning, the court undertook a thorough examination of the case law with regards to the various tests which had been applied and concluded that:

In making [the decision of what is in the best interests of the child] the welfare of the child is paramount, and the judge must look at the question from the assumed point of view of the patient...The term "best interests" encompasses medical, emotional, and all other welfare issues. The court must conduct a balancing exercise in which all the relevant factors are weighed...<sup>204</sup>

Further, the court stated that in determining the best interests of a child, caution in the application to children of factors relevant to the treatment of adults should be exercised,<sup>205</sup> however, at the time, there was little more to work from.

Importantly, what emerged was that a gap in the professional guidance provided to paediatricians existed and that this posed a present and serious issue for doctors and medical teams wanting to stay on the right side of the law when making complex decisions regarding the medical care of a child. It was arguably this hole in the guidance, along with the introduction of the Children Act in 2004 and the Laming Inquiry<sup>206</sup> into the death of young Victoria Climbié who was physically abused and neglected until eventually succumbing to

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<sup>203</sup> *ibid* 4013-4022.

<sup>204</sup> *ibid* [case citations omitted].

<sup>205</sup> *ibid* 4023.

<sup>206</sup> Secretary of State for Health and the Secretary of State for the Home Department, *Report on the Victoria Climbié Inquiry* (CM 5730, 2003).

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her injuries, which prompted the GMC to begin the process of developing professional codes.<sup>207</sup> In 2007, the *0-18 years: Guidance for all Doctors* was introduced. The new guidance specifically highlights the singular importance of the best interests principle and in sections 12 and 13, expands upon the holistic assessment adopted in *Wyatt*. Importantly, what this shows is the ability of regulatory councils to act quickly and develop guidelines which reflect quickly-changing professional, legal, and societal expectation. Further, the development of the *0-18 Years: Guidance* should be viewed within the larger regulatory environment. It will be recalled from the previous section that the GMC was facing scrutiny from the public and that a more representative and responsive GMC Council was being developed. Presently, then, courts and paediatricians now have a more accurate idea of what is occurring within the profession, what the professional, and importantly, what the legal standard of care includes. This development within the law reflects not only the evolutionary nature of negligence, but also the central role that courts play within it.

### 5.6 Conclusion

For most professions, ‘the common law standard of care evolves collaboratively through codified regulations, prevailing societal notions of reasonableness, and the current consensus of the actor’s professional peers.’<sup>208</sup> This quote highlights the interconnected and multifaceted nature of the breach assessment in a professional negligence claim. Although it was argued that the first step in changing the standard of care to meet the expanded obligations argued for in this thesis has to come from the profession itself, it is the courts

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<sup>207</sup> See for example: General Medical Council, ‘The Development of *0-18 years: Guidance for all Doctors*,’ (September 2007) <[http://www.gmc-uk.org/Development\\_Report\\_of\\_0\\_18\\_years.pdf\\_25416708.pdf\\_60371538.pdf](http://www.gmc-uk.org/Development_Report_of_0_18_years.pdf_25416708.pdf_60371538.pdf)> accessed 25 November 2015.

<sup>208</sup> Christopher Green, ‘The Future of Veterinary Malpractice Liability in the Care of Companion Animals,’ (2004) 10 Animal Law 163, 195.

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that remain the ultimate arbiters of the standard of care.<sup>209</sup> Central to this development is the increasingly important role of professional guidance both to inform veterinarians as to their changing obligations, but also to assist the court by providing an additional source of objective and current information.

In the veterinary context, however, although the RCVS stood in a position to modernise the delivery of veterinary care and reflect a more holistic account of the veterinary relationship, including the best interests of the animal, movement in this direction was not achieved. As a result, its most recent attempt to reform and modernise the RCVS Code is, I argue, more accurately characterised as a missed opportunity. Invaluable lessons could have been taken from the human medical profession, however, the experience of the GMC appears to have been largely ignored. Problematically, as evidenced by fact reports issued by the RCVS, this increasingly leaves veterinarians uncertain as to the standards they are meant to achieve and clients increasingly displeased with the standard of care delivered.<sup>210</sup> In essence, this collaborative process does not yet exist in the veterinary profession.

More broadly, organisations such as the Veterinary Defence Society are extremely reluctant to reveal any information on the nature of veterinary negligence claims or how many negligence-related claims are initiated against veterinarians, thus leaving the picture further obscured.<sup>211</sup> It would be unwise, however, for the veterinary profession to ignore the past experiences of analogous professions. Though the changes advocated here are not straightforward and would take time to implement, it is submitted they present the best way

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<sup>209</sup> Campbell and Cranley Glass'(n4) 480.

<sup>210</sup> See: Royal College of Veterinary Surgeons, 'RCVS Facts' (n83).

<sup>211</sup> This point comes from personal experience. When I began work on this chapter, I was hoping to include statistics from the VDS, however, after sending numerous emails and attempting to contact individual committee members within the society, I was unable to obtain a response.

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forward for veterinarians, owners, and animals. At the heart of professional regulation and the breach assessment performed by courts lies an obligation to ensure that both the professional and the profession as a whole are accountable, and that decisions made are transparent. Thus, to ensure proper weight is given to the triangular veterinary relationship and ensure that veterinarians are better informed about their legal obligations, regulatory changes aimed at achieving a more representative RCVS Council and guidance which prioritises information pertaining to constitutive relationship and the best interests of the animal should be adopted.

## Conclusion

### Conclusion

This thesis has two primary aims. First, to advocate in favour of changes to the law and professional guidance that would see veterinarians better informed as to their legal obligations stemming from the triangular veterinary relationship and second, to argue that so far as possible, veterinarians should act to protect the best interests of the animal within that relationship.

Since undertaking this thesis, the veterinary profession has slowly started its own process of reform. The recent Vet Futures Project, for example, highlights that the veterinary profession ‘has experienced a period of rapid change in the environment within which it operates.’<sup>1</sup> In response, the project was initiated in partnership with the RCVS and British Veterinary Association so that veterinarians could be involved in ‘shap[ing their] own future.’<sup>2</sup> As I have argued in this thesis, however, the scope to create holistic change will always be limited if important questions about changing the veterinary profession are only addressed by veterinarians themselves. Many of the questions relating to whose interests in the veterinary relationship matter or how competing interests should be balanced are, I submit, legal questions that are best captured through the lens of a negligence action.

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<sup>1</sup> Vet Futures Project, *Taking Charge of our Future: A vision for the Veterinary Profession for 2030* (London, November 2015) 8 <<http://vetfutures.org.uk/launch-of-the-vet-futures-report/>> accessed 6 June 2016.

<sup>2</sup> *ibid.*

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As Chapter One highlighted, historically, once it had been largely accepted by the animal owning populous that it was veterinarians who were best placed to determine the best interests of an animal, as opposed to lay “experts,” focus within the emerging profession shifted to veterinarians meeting the evolving needs of their clients. Multiple external forces such as the intensification of farming practices, the sharp increase in companion animal ownership and a growing distrust of the professions, however, weakened the profession’s ability respond to their clientele. Problematically, the increasingly disparate ways in which clients experience ownership and the ways in which veterinarians personally approach their professional role created a tension which prompted what is now considered the primary question of veterinary ethics: whom does the veterinarian serve, the animal or the owner?<sup>3</sup> Are veterinarians paediatricians or garage mechanics?<sup>4</sup> This tension continues to the present day. In response, I have argued that in order to provide veterinarians with the guidance needed to resolve this dilemma, the question also has to be considered from a legal standpoint and that going forward, both the law and the veterinary profession should adopt the paediatric perspective which focuses on the triangular relationship and the importance of advocating in favour of the patient’s best interests.

Chapter One, however, went on to highlight that because of the prominence given to the breach assessment in existing veterinary negligence case law, very little legal guidance exists for veterinarians. Instead, the heavy emphasis placed on breach means that each decision is, in essence, confined to its own facts. The decisions in these cases give the impression that courts are capable of reasoning veterinary negligence cases; however, it was argued that as

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<sup>3</sup> Bernard Rollin, *Putting the Horse Before Descartes: My Life’s Work on Behalf of Animals* (Temple University Press 2011) 35. See also: Bernard Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* (Iowa State University Press 1996).

<sup>4</sup> *ibid* 35-36.

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regards the actionable damage suffered and duties that may have been owed, the negligence inquiry was addressed in a very narrow, confined way, addressing only commercial concerns. The more illuminating question of veterinary liability arising from the damaged *relationship* between owner and animal, as opposed to the animal's economic value, remains unanswered. In this way, then, decisions reached by the courts concerning veterinary negligence have served only to entrench the idea that the veterinary relationship is solely commercial in nature and supports the view that Lord Scott espoused in *Rees*, namely that the relationship between owner and animal is as between owner and property; subject and object. The remainder of the thesis set out to present a solution through which a relationally-robust veterinary negligence claim could be argued. This approach calls for increased legal guidance on the state of the veterinary relationship, the legal obligations stemming from this relationship and, in keeping with the paediatric model, forwarding the best interests of the animal patient.

As a way of framing the discussion, I first set out the lens through which I argued veterinary negligence should operate; this was the purpose of Chapter Two. When presented with novel questions relating to damage or the duty of care, courts often look at negligence's theoretical underpinnings to help guide and ground their reasoning.<sup>5</sup> It was argued, however, that the three dominant models found in negligence jurisprudence and case law could not be utilised as explanatory models to help give effect to or ground veterinary negligence claims premised on a paediatric approach. The primary obstacle shared by the corrective, distributive, and rights-based models was to be found in their strict adherence to a structurally binary

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<sup>5</sup> See for example: Benjamin N. Cardozo, 'The Need of a Philosophy of Law as an Aid to Growth: The Problems of Legal Philosophy. The Meaning and Genesis of Law' in *The Growth of Law* (Yale Univ. Press 1924) 25-30. See also: *White v. Jones* [1995] 2 AC 207, *Phelps v London Borough of Hillingdon* [2001] 2 AC 619, *Rees v. Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, just to cite a few.



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relationship between claimant and defendant in which both parties possess legal personality. Therefore, regardless of whatever laudable aims these theories seek to achieve, all are premised on a requirement that automatically removes from consideration the position of the animal, thus failing to promote the second aim of this thesis.

Even if animal interests could be considered, it was argued that the privileging or ranking of human interests over those of the animal would likely result in the animal's interest being secondary in distributive justice and rights-based analyses, thus failing to forward the best interests of the animal. Dealing specifically with a rights-based perspective, it was argued that this position failed on a number of additional grounds. First, the definitional ambiguities which accompany rights-based discourse and the antagonistic nature of rights being held against or over another<sup>6</sup> contribute nothing of value to a veterinary negligence claim and were instead argued to be detrimental to its development along relational lines. More pressing, however, the rights-based approach was incapable of adequately explaining hybrid damage constructions, which I submitted were integral to conceptualising a veterinary negligence claim and meeting the dual aims of the thesis.

In the alternative, it was argued that an instrumental approach, in which the courts aim to protect the interests of the vulnerable party should be adopted. At first glance, adopting an instrumental approach appeared incongruous to the strongly relational, duty-centred approach to the negligence inquiry I presented in the first chapter. In this regard, it was highlighted that instrumentalist approaches, according to Keating, fail to capture the nature of a negligence claim, which must look backward to the wrong that was committed not

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<sup>6</sup> Christian Witting, 'The House that Beaver Built: Corrective Justice, Principle and the Law of Negligence,' (2008) 71(4) *Modern Law Review* 621, 627 and Tom L. Beauchamp, 'Rights Theory and Animal Rights' in Tom L. Beauchamp and R.G. Frey (eds.), *The Oxford Handbook of Animal Ethics* (OUP 2011) 198, 201.

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forward to the social impact of a particular decision.<sup>7</sup> I, however, rejected this view of instrumentalism and instead took on board West's assertion that 'a robust instrumentalism should illuminate— and surely should also interrogate— all the ways in which law impacts upon harm...'.<sup>8</sup> With this in mind, I argued that an instrumentalist account which views the court's role as protecting the vulnerable satisfies West's argument and addresses Keating's concerns. Following this account means that courts would look backward to the nature of the relationship that existed between the parties at the time of the tort, but also forward to address changes in social norms. Thus, harms are interrogated, as are the relationships that give rise to them.

It was argued that this approach mirrors van Rijswijk's account of Lord Atkin's decision in *Donoghue v. Stevenson*<sup>9</sup> to the extent that his decision reflects a relational analysis centred on proximity (embodied in the neighbour principle), but also serves an instrumental means insofar as it addressed growing power imbalances between consumers and manufacturers characteristic of increasing market industrialisation. This discussion led to an explanation of the vulnerability approach adopted and to a doctrinal analysis of the various ways in which courts had either tacitly or explicitly utilised a vulnerability-based approach in their reasoning. Put simply, my approach to vulnerability, as discussed in Chapter Two, adopts and expands upon its doctrinal usage. It is based on relational imbalances which place the claimant or a third party in a position of disempowerment or dependence. In this way, vulnerability and best interests are linked in the mutual premise that their relevance is to be

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<sup>7</sup> Gregory C. Keating, 'The Priority of Respect Over Repair,' (2012) 18(3) Legal Theory 293, 302.

<sup>8</sup> Robin West, *Caring for Justice* (NYU Press 1997) 97.

<sup>9</sup> [1932] AC 562.

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found in cases where ‘a level of paternalism is necessary, or at least justified.’<sup>10</sup> Although academic commentary has addressed the possibility of vulnerability acting as an underlying determinant or rationale in tort cases, the accompanying analysis is sparse.<sup>11</sup> Therefore, section 2.4 of this chapter was devoted to developing and analysing this under-theorised area within negligence jurisprudence. Utilising Stapleton’s discussion on exclusive dependence, whereby the individual is wholly dependent on another’s care,<sup>12</sup> it was submitted that this could be expanded to accommodate the position of the animal within the veterinary relationship. Animals, in this regard, are vulnerable being exclusively dependent on both their owner and their veterinarian for their proper care and emotional wellbeing.

Evidence of the vulnerability-based reasoning I adopt can be found in instances where the damage claimed is not straightforward<sup>13</sup> and where the duty of care analysis is complicated by multiple party scenarios.<sup>14</sup> In many cases, some form of professional-lay relationship is also present. I therefore agree with Stapleton’s conclusion on the role of vulnerability in negligence that it acts as a centralising feature<sup>15</sup> linking otherwise disparate pockets of liability. I also endorse points raised by Manderson regarding proximity that ‘a distinct capacity to control particularises the defendant, while a distinct vulnerability to harm particularises the plaintiff’<sup>16</sup> and Vines that proximity ‘operate[s] not only inside a category

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<sup>10</sup> John Coggon, ‘Best Interest, Public Interest, and the Power of the Medical Profession,’ (2008) 16 Health Care Analysis 219, 224. Here, Coggon is only speaking of best interests, however, I submit that vulnerability, as applied by the courts, works on the same premise.

<sup>11</sup> See, for example: Jane Stapleton, ‘The Golden Thread at the Heart of Tort Law,’ (2003) 24 Australian Bar Review 135 and Paula Giliker, ‘Making the Right Connection: Vicarious Liability and Institutional Responsibility,’ (2009) 17 Torts Law Journal 35.

<sup>12</sup> Stapleton, ‘The Golden Thread at the Heart of Tort Law,’ (n11) 142.

<sup>13</sup> See for example: *Phelps v London Borough of Hillingdon* [2001] 2 AC 619.

<sup>14</sup> See for example: *Woodland v. Essex County Council* [2014] AC 537 and *Smith v. Eric S. Bush (A Firm)* [1990] 1 AC 831.

<sup>15</sup> Stapleton, ‘The Golden Thread at the Heart of Tort Law (n11) 142.

<sup>16</sup> *ibid* 133 [emphasis added]. See also: *Dorset Yacht Company v Home Office* [1970] AC 1004.

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of negligence, but also outside whichever category of negligence was being considered.’<sup>17</sup>

Drawing on these arguments, I concluded that it was through these various proximity inquiries that vulnerability could be most robustly considered. In this way, the use of vulnerability-based reasoning could be extended on both a macro level capable of guiding, in an instrumental way, the negligence assessment as a whole, and also on the micro level within the duty of care assessment. Applying this to the veterinary relationship, I contend that in deciding negligence cases involving veterinarians, judges should explore the nature of the relationship between owner and veterinarian utilising vulnerability in assessing the duty of care owed. Importantly, unlike other theoretical approaches to negligence, the best interests of the animal can be considered on the macro, instrumental level, giving effect to the recognition of the changing veterinary relationship and the animal’s exclusive dependence.

With the vulnerability framework in place, Chapter Three went on to consider the damage requirement in a veterinary negligence claim. The current approach taken by the courts in veterinary negligence case law views the animal as a commodity with an ascertainable market value. It was accepted, following Liebman, that ‘we should not expect judges to adopt far-reaching...arguments that fundamentally challenge anthropocentrism.’<sup>18</sup> However, positive change could be effected by adopting a new form of hybrid property damage based on Radin’s theory on property and personhood and Prialux’s conception of hybrid forms of damage. What differentiates this model from Prialux’s, however, is that the hybrid element focuses on the spectrum between property and psycho-social harm, as opposed to personal

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<sup>17</sup> Prue Vines, ‘Proximity as Principle or Category: Nervous Shock in Australia and England,’ (1993) 16 UNSWLJ 458, 466.

<sup>18</sup> Matthew Liebman, ‘Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness,’ (2011) 18 Animal Law 133, 150.

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injury and psycho-social harm. This chapter sought to contribute in a new way to this developing area of scholarship by expanding the idea of damage hybrid claims to include property, whilst taking on board both Conaghan's argument that relational losses have been largely overlooked by tort<sup>19</sup> and Nedelsky's articulation of property that it figures as the strongest literal and figurative symbol of individual, masculine ideas of autonomy.<sup>20</sup>

The sentient constitutive property ("SCP") model itself, it will be recalled, focuses on Radin's theory of constitutive property and the role that property can play in developing our own personhood. Here, constitutive property is described as being closely bound up with personhood because the property forms part of the way we constitute ourselves as continuing personal entities in the world.<sup>21</sup> Thus, property that is constitutive in nature lacks a commodity-based value and to be separated from this property harms or destroys the self.<sup>22</sup> Building on Radin's argument, I argued that the theory relating to constitutive property is stronger when the relationship between owner and animal is considered because it contemplates a relationship with property that can interact and reciprocate emotion. Sentience under SCP, therefore, requires more than an ability to feel pain or suffer, and depends instead on a relationship between owner and animal, which contributes a benefit to a central aspect of the lives of each;<sup>23</sup> both must therefore actively participate and contribute. Key to the SCP argument, then, is the point that the type of animal is irrelevant. Therefore,

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<sup>19</sup> Joanne Conaghan, 'Tort Law and Feminist Critique,' (2003) 56 Current Legal Problems 175, 192.

<sup>20</sup> Jennifer Nedelsky, 'Law, Boundaries and the Bounded Self,' (1990) 30 Representations 162, cited in Joanne Conaghan, 'Tort Law and Feminist Critique,' (2003) 56 Current Legal Problems 175, 200. As an example of this, Conaghan cites the adage that 'an Englishman's home is his castle.' For this latter point see: Lord Bingham of Cornhill, 'Tort and Human Rights' in P. Cane and J. Stapleton (eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford 1998).

<sup>21</sup> Margaret Jane Radin, 'Property and Personhood,' (1982) 43(5) Stanford Law Review 957, 959.

<sup>22</sup> Margaret Jane Radin, 'The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood,' (1995) 74 Oregon Law Review 423, 428.

<sup>23</sup> Jerrold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (2nd ed., Mosby 1995) 184-185.

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because the SCP model is focused on the nature of the relationship and its ability to be classed as constitutive in nature, the owner may suffer actionable damage whether the animal involved is a dog, a horse, or a cow.

Although SCP is not the first property model put forward which contemplates advancing owner-animal relationships within the law, this chapter revealed the deficiencies of other existing models similar in scope to SCP. In particular, it was noted that unlike SCP which looks to the strength of *relationship* between owner and animal, Matlack's model focuses on the *type* of animal concerned and surrogate decision-making, whilst Hankin's focuses solely on the type of animal concerned as justification for increased damage awards. Importantly, it was argued that centring a model on the type of animal unfairly privileges traditional companion animals, such as dogs and cats. Within this analysis, I also criticised the inability of these models to work within a negligence framework, despite both authors claiming this was possible. Lastly, it was argued that accepting the SCP model would be an evolutionary step, representing nascent innovation occurring within property law. As evidenced by *Attia v British Gas*<sup>24</sup> and *Yearworth and others v North Bristol NHS Trust*,<sup>25</sup> courts are willing to reason cases creatively in the face of novel arguments.

Looking beyond the confines of my thesis to the development of negligence on a broader scale, an area that would benefit from increased academic and judicial scrutiny is the actionable damage requirement. Whilst Chapter Three highlights that courts have demonstrated a willingness to act creatively and find new categories of property, for example, in sperm, when this is placed alongside other novel areas of damage relating to

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<sup>24</sup> [1988] QB 304.

<sup>25</sup> [2010] QB 1.

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personal injury, such as wrongful conception and educational negligence, there is an argument to be made that courts should now be more explicit about the process undertaken to elevate a harm to a protected interest or recognised form actionable damage. In essence, the once well-defined categories of personal injury and property damage appear to be losing their straight edge. Yet, there is very little consensus from the judiciary about how, for example, autonomy-based and relational forms of damage, in particular, can be explained within the actionable damage requirement. Traditionally, neither have been protected in negligence, however, a number of recently-decided cases,<sup>26</sup> whilst going against orthodoxy, conversely offer little detailed analysis on the damage point.

It has been argued throughout this thesis that the experience of negligence law is one of reformulation and evolution, but that the process does not always follow a linear path.<sup>27</sup> The reformulation phase is vital and serves to drive the law forward,<sup>28</sup> however, movement toward a coherence which articulates what interests negligence protects is also vital. *What* harms matter in negligence and *why*<sup>29</sup> are perennial questions that require dedicated and explicit attention. These questions centre on complex issues relating to our subjective experience of existing in the world and what should be considered a vicissitude of modern day life and what goes beyond this to constitute damage. These autonomy-based and relational harms raise questions of proximity at the damage stage; autonomy looking (in general terms) at protecting one's freedom and chosen detachment from something or

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<sup>26</sup> See discussion in Chapter 3.3(b).

<sup>27</sup> See: David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999) 294.

<sup>28</sup> A similar development phase can arguably be seen in the development of a relational duty of care. Prior to *Donoghue v. Stevenson* [1932] AC 562, the English courts had decided on similar issues in *Winterbottom v. Wright* 152 ER 402 and later in *Heaven v. Pender* (1883) 11 QB 503 before the decision in *Donoghue* set out the general principle.

<sup>29</sup> See: Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge Cavendish 2007) 5 and Nicky Priaulx, 'Humanising Negligence: Damaged Bodies, Biographical Lives and the Limits of Law,' (2012) 33 *Adel. L. Rev.* 177, 181.

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someone and relationality looking at protecting one's attachment or connection to someone or something (whether voluntary or involuntary). Looking to the future, I would argue that courts should look to start forming a separate category of damage based on relational harms and that instead of turning to rights-based arguments or legislation, courts should look to their own reasoning to determine its boundaries and whether a new, exceptional duty category is also needed—perhaps in line with the duty construct argued in this thesis.

Chapter Four, then, turned to the duty of care requirement. Duty, it will be recalled, holds a central place within the holistic negligence inquiry I argue for and so I reject the position that the duty owed is singular in nature, demanding only that the defendant act reasonably in her dealings with the claimant. Importantly, the singular construction denies the central role relationality plays within negligence. Within the veterinary context, the court's use of *Hedley Byrne*<sup>30</sup>-type reasoning to impose a duty has the dual negative effect of further entrenching a commercial approach to the veterinary relationship, which this thesis rejects, whilst also giving effect to the singular duty approach.<sup>31</sup> Instead, it was argued that duties are relational and relationship-specific.<sup>32</sup> To this end, when making findings as to the duty of care, I supported Oliphant's position that courts should look to the individual factors of the case at hand and to normatively-relevant considerations which point to or reveal underlying values within the law.<sup>33</sup> Central to the assessment is that it should reflect norms which already have

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<sup>30</sup> *Hedley Byrne & Co. v Heller & Partners Ltd.* [1964] AC 465.

<sup>31</sup> For this latter point, recall that utilising *Hedley Byrne*-type reasoning to impose a duty in scenarios akin to contract were seen by Longmore LJ as a 'conclusory phrase to describe the result of the imposition of a duty of care rather than an essential step in the reasoning to be used in progressing the argument on the question of whether a duty of care should arise.' See: *Customs and Excise Commissioners v. Barclay's Bank plc* [2005] 1 WLR 2082, 2093-2094.

<sup>32</sup> John C.P. Goldberg and Benjamin C. Zipursky, 'The Moral of *MacPherson*,' (1998) 146(6) *University of Pennsylvania Law Review* 1733, 1826.

<sup>33</sup> Ken Oliphant, 'Against Certainty in Tort Law' in Stephen GA Pitel et al (eds.), *Tort Law: Challenging Orthodoxy* (Hart 2013).



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currency on certain shared social understandings.<sup>34</sup> Therefore, duty should reflect both inner aspects of relationality as between claimant and defendant and outer social understandings. In this way, duty can be seen to correspond with the instrumental view of negligence discussed in the second chapter in that a strong duty model should encompass assessments addressing both elements of principle and pragmatism, morality and instrumentalism, and that this does not weaken the concept of duty, rather, it strengthens it.

The second argument advanced in the duty chapter revolved around the veterinarian's acceptance of a case. In this regard, once the veterinarian accepts a case, I argued that positive duties of care arise both to the owner and to the animal. Importantly, this duty is not absolute. Because veterinary medicine lacks an equivalent to the NHS, it was determined that veterinarians cannot be compelled to act where, for example, the owner is unable to pay for what may turn out to be the best, but also most costly, treatment. However, the point that a veterinarian comes under a positive duty of care to an animal impacts the argument made in the first chapter of this thesis, namely that veterinarians should adopt a paediatric approach to the care of the animal and in this regard should seek to act in the animal's best interests. Thus, for example, where the owner seeks treatment that is both futile and will increase the animal's suffering, the veterinarian's positive duty to the animal requires that she refuse this course and act in the animal's best interests. Thus, the owner's instructions or wishes will not always be dispositive. It was highlighted that adopting this course of argument would have a significant impact on the veterinary profession, however, for the best interests argument to be legitimate, it has to be the case that veterinarians are able to act to protect the animal. Where the decision to act is well reasoned and balanced, veterinarians

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<sup>34</sup> John C.P. Goldberg and Benjamin C. Zipursky, 'The Moral of *MacPherson*' (n32) 1816.

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should be protected from legal sanction. To assess best interests, it was argued that veterinarians should look to both quality and quantity of life considerations, the wishes of the owner, the animal's *telos*<sup>35</sup> and that such an assessment would be in line with balancing exercises currently undertaken in cases involving children.<sup>36</sup>

The last component of the duty analysis looked to disclosure of risk. At the heart of this discussion was determining what model should guide courts deciding disclosure of risk cases in the veterinary context. It was argued that although the recent Supreme Court ruling in *Montgomery v. Lanarkshire Health Board*<sup>37</sup> has provided doctors with a firm articulation of the duty owed by doctors when disclosing risks and later the standard they must achieve to avoid breaching their duty, the court's reasoning behind the re-articulation, namely to promote a strong patient autonomy model premised on the view that patients are consumers,<sup>38</sup> ought to be strongly resisted in the veterinary context. Importantly, there already exists a strong commercial element to the veterinary relationship. As such, I argued that in order to achieve the two aims set for this thesis, the commercial approach should be rejected. Instead, efforts should be directed to developing a shared decision-making model between owner and veterinarian, which does not simply pay lip service to owner participation, but rather centres on a holistic discussion encompassing unbiased and complete information on the animal's condition and treatment alternatives. The owner's knowledge of her animal and its lifestyle is also crucial to the shared decision-making model advocated.

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<sup>35</sup> Here, *telos* is taken to mean the essence that makes a dog a dog or a pig a pig. For this point, see: Bernard Rollin, 'Telos' in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 75.

<sup>36</sup> An exception would be that euthanasia constitutes a valid treatment option in veterinary medicine. See: Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n23) 342.

<sup>37</sup> [2015] AC 1430.

<sup>38</sup> *ibid* 1459.

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Finally, Chapter Five focused on the issue of breach. Central to developing the breach analysis was determining how the courts, as final arbiters of the standard of care,<sup>39</sup> could continue to develop the law and give further effect to the arguments made throughout this thesis. Before courts could make decisions as to the expected standard of care, however, the integral role that expert witness testimony continues to play in professional negligence litigation means that in addition to a willing judiciary, broad professional support for the triangular veterinary relationship and best interests has to be in place. Thus, a change in professional mindset from a commercial-based to best interest-based model would be needed. To effect this change, it was submitted that new professional codes of conduct which reflect a more nuanced and varied approach to the provision of veterinary care<sup>40</sup> and take on board the triangular relationship and best interests approach should be introduced and widely disseminated. Although the RCVS introduced new codes only four years ago, it was argued that they ultimately fail to deliver on their goal of bringing the veterinary profession in line with other analogous professions and instead only serve to continue the priority attributed to commercial interests. Further, any recommendations made within the guidance were viewed as just that, best practice *recommendations*. The argument for new codes, therefore, serves a dual aim. First, as professional guidance can reflect both evolving sentiment within the profession itself,<sup>41</sup> for example to a best interests-based approach, and track very close to

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<sup>39</sup> Angela Campbell and Kathleen Cranley Glass, 'The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research,' (2001) 46 McGill L.J. 473, 480.

<sup>40</sup> It will be recalled that this thesis does not reject the commercial model outright. Instead, I acknowledge that the commercial approach may be the more appropriate fit depending on the relationship between owner and animal. Importantly, though, codes of professional conduct in the veterinary profession, I argue, should include guidance on the commercial and best interest approaches, and information on the triangular veterinary relationship and constitutive relationships, which it currently does not.

<sup>41</sup> Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* (n23) 86.

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expected tort standards,<sup>42</sup> new guidance could assist in developing professional mindset and provide professional guidance as to legal obligations.<sup>43</sup> Secondly, new professional guidance could also be utilised by the court as an additional tool, alongside both expert testimony and the defendant's evidence, to assess whether the defendant met the expected standard of care.<sup>44</sup>

To effect this change, however, it was argued that the RCVS Council required reform if updated guidance was to reflect the arguments made above. Importantly, it was submitted that valuable lessons could be learned from reforms made to the GMC. Here, it was highlighted that after a series of scandals and government papers detailing changing expectations and areas of professional concern, the GMC reformed its Council by lowering member numbers and introducing parity of lay membership to reflect the need for a smaller, more accountable membership base. During this same time, new guidance, in particular the *0-18 Years Guidance*,<sup>45</sup> was introduced which took on board changing social sentiment and lessons learned from previous litigation. Thus, the guidance was specifically developed 'to help doctors balance competing interests and make decisions that are ethical, lawful and for the good of children and young people.'<sup>46</sup> As regards the veterinary profession, it was argued that the RCVS should not wait for similar issues to befall them and that complacency<sup>47</sup>

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<sup>42</sup> Maria Lee, 'Safety, Regulation and Tort: Fault in Context,' (2011) 74(4) *Modern Law Review* 555, 572. See also: Angela Campbell and Kathleen Cranley Glass, 'The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research,' (n39) 477.

<sup>43</sup> There is also evidence to indicate that the standard set by professional guidance does transfer to the expected legal standard. See: *Montgomery v. Lanarkshire Health Board* [2015] AC 1430.

<sup>44</sup> Margaret Brazier and José Miola, 'Bye-Bye *Bolam*: A Medical Litigation Revolution?' (2000) 8 *Medical Law Review* 85, 112. In this way, we can say the evidence is *Bolitho*-justifiable in that it aids in determining whether expert testimony is logical and defensible.

<sup>45</sup> General Medical Council, *0-18 Years: Guidance for all Doctors* (GMC 2007).

<sup>46</sup> *ibid* 5.

<sup>47</sup> Marie Fox, 'Veterinary Ethics and Law' in Christopher M. Wathes and others (eds.), *Veterinary Ethics and Law in Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Wiley-Blackwell 2013) 255.

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should, in essence, be transformed into pre-emptive action. Evidence taken from RCVS data already illustrates that veterinarians are increasingly concerned about practice standards and that complaints from clients regarding inadequate care are rising.<sup>48</sup>

To address this, it was argued that the RCVS Council should be reduced in size and contain 50-50 lay-professional membership. Lay involvement in this regard should represent a diverse range of non-clinical expertise, in particular the participation of legal and bioethical academics as a way of addressing matters relating to legal and professional obligations and best interests. Whilst this may seem like an extensive reform agenda for the RCVS, it was argued that the Council actually stands in a strong position in that they can learn from the reform choices made by analogous professions, in particular the medical profession. In effect, the Council can choose those decisions made by analogous professions in the past which it believes will have the greatest overall benefit to their profession. In this way, veterinarians can have a say in the future of their profession, as opposed to running the risk of having ‘reforms externally forced upon them.’<sup>49</sup> From here professional guidance, which has the ability to be developed quickly in response to changing professional and social sentiment, can be utilised to reflect the arguments made in this thesis. With these ideas in place, the chapter concluded with the argument that courts could then assume their role as

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<sup>48</sup> See annual reports issued by the RCVS: Royal College of Veterinary Surgeons, ‘RCVS Facts: The Annual Report of the Royal College of Veterinary Surgeons: Part 2’ (RCVS 2014) 18 <<https://www.rcvs.org.uk/publications/rcvs-facts-2014/>> accessed 26 October 2015; Royal College of Veterinary Surgeons, ‘RCVS Facts: The Annual Report of the Royal College of Veterinary Surgeons: Part 2’ (RCVS, 2013) 18 <<http://www.rcvs.org.uk/publications/rcvs-facts-2013/?destination=%2Fpublications%2F>> accessed 6 May 2014; Royal College of Veterinary Surgeons, ‘RCVS Facts: The Annual Report of the Royal College of Veterinary Surgeons: Part 2’ (RCVS, 2012) 18 <<http://www.rcvs.org.uk/publications/rcvs-facts-2012/?destination=%2Fpublications%2F%3F%26p%3D2>> accessed 20 November 2012; Royal College of Veterinary Surgeons, ‘RCVS Facts: The Annual Report of the Royal College of Veterinary Surgeons: Part 2’ (RCVS, 2011) 19 <<http://www.rcvs.org.uk/publications/rcvs-facts-2011/?destination=%2Fpublications%2F%3F%26p%3D3>> accessed 20 November 2012 and Royal College of Veterinary Surgeons, ‘RCVS Facts’ (RCVS, 2010) 19 <<http://www.rcvs.org.uk/publications/rcvs-facts-2010/?destination=%2Fpublications%2F%3F%26p%3D4>> accessed 20 November 2012.

<sup>49</sup> Fox, ‘Veterinary Ethics and Law’ (n47) 255.

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arbiters of the expected standard of care and that in this regard, ‘the question of negligence is one of what ought to be done in the circumstances, not what is done in similar circumstances by most people or even by all people.’<sup>50</sup>

In the introduction of this thesis, I cited Lord MacMillan’s famous quote that ‘the categories of negligence are never closed.’<sup>51</sup> Negligence, as a body of law, is continually undergoing evolutionary change and this is due in large part to the realisation by the judiciary that, ‘the criterion of judgment must adjust and adapt itself to the changing circumstances of life.’<sup>52</sup> It has been my endeavour in this thesis to demonstrate that animal ownership has become increasingly complex and that to reflect this change, the law as it relates to negligence must evolve. In this way, I hope to have contributed to research being done on relational harms by bringing to the fore a form of gender un-specific harm linked to property damage, therefore expanding the reach of relational harms beyond physical harm, whilst at the same time addressing how our approaches to duty, breach, and negligence as a whole can be developed and adapted to meet this new perspective. Taking all of this on board, an expanded view of veterinary negligence which gives effect to the more nuanced ways in which owners relate to their animals can be largely supported within existing negligence frameworks. Thus, in both theory and practice, the dual aims set out in this thesis are achievable. All that is required is for courts to approach novel arguments in creative, flexible ways and to develop existing law compassionately.<sup>53</sup>

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<sup>50</sup> J.L. Montrose, ‘Is Negligence an Ethical or Sociological Concept?’ (1958) 21(3) *Modern Law Review* 259, 259.

<sup>51</sup> *Donoghue v. Stevenson* [1932] AC 562, 619.

<sup>52</sup> *ibid.*

<sup>53</sup> For the last point that the law should be developed compassionately, see: West, *Caring for Justice* (n8) 61-62.

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