

Animal Law Committee

ANIMALS AND BIOENGINEERING CONFERENCE AT DUKE: AN OPEN DIALOGUE ON SCIENTIFIC INNOVATION AND ANIMAL ADVOCACY

Jane Graham

“Six months ago, I would have never imagined being in the same room as scientists and bioethicists,” Gilda Mariani, Chair of the Tort Trial and Insurance Practice Section Animal Law Committee, stated, as she opened the conference *Animals and Bioengineering: A Consideration of Law, Ethics, and Science* at Duke University School of Law. The first of its kind, this conference, last November, engaged the speakers and audience in a calm and informed dialogue on the issues of ethics, bioengineering, and cloning. It was a motley audience, composed of animal rights activists, scientists, government regulators, and a Canadian Supreme Court Justice, among others. One might have expected a riot to break loose due to the variety of opposing

viewpoints in the room. On the contrary; conference attendees cordially exchanged viewpoints and business cards, forging relationships spanning across their fields of expertise. The curiosity of scientific innovations and the love of animals were mutual.

The conference started with a panel about the legal history on the subject. Betty Goldentyer, the Eastern Regional Director of the Animal Care Program of the USDA, traced the history of the Animal Welfare Act from its inception in 1965 to present day, including such issues as the 2002 Helms Amendment. The Helms Amendment has been of concern to animal activists recently because it excludes birds, rats and mice from

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CHAIR'S MESSAGE

"The Committee's inspired leadership is undeterred by obstacles; passionate and creative in its endeavors; and grateful to its TIPS colleagues for their boundless support."

Gilda I. Mariani

Dear Committee Members:

As I reflect on the first half of my term, I am amazed at the development of our young Committee — not merely by the diversity of its endeavors, but by the caliber and the significance of its undertakings.

The Committee convened its first stand alone national program, *Animals and Bio-Engineering – A Consideration of Law, Ethics and Science* (November 8 & 9, 2007), reflecting TIPS' first collaboration with Duke University and one of the few collaborations between TIPS, the ABA Section on Science and Technology Law ("S&T"), and the ABA Special Commission on Bioethics and the Law. In his welcoming remarks, David F. Levi, Dean of the Duke Law School, captured the essence of this event in stating that the conference brought together "distinguished scholars, scientists, citizens, activists, regulators, students and lawyers to discuss, to debate and to study significant issues in animal law and bio-engineering."

Through the efforts of many, especially program co-chairs Professor David Favre, Retired Committee Chair Kristina Hancock, Duke University's Professor William Reppy; the S&T team of Jeannie Perron, Deborah Runkle, and Barb Glenn; and TIPS co-sponsors, Intellectual Property Law Committee Chair Nathaly Vermette, and Media, Privacy and Defamation Law Committee Chair David Furlow, the program drew speakers of international reputation. They included Justice Michel Bastarache of the Supreme Court of Canada, who authored the majority opinion in the *Harvard College v. Canada Commissioner of Patents* (the Harvard mouse case) and Dr. Norka Ruiz Bravo, Deputy Director for Extramural Research of the National Institutes of Health.

This groundbreaking event opened a dialogue between disparate groups which Dean Levi observed provided a platform for "a clarification of some disputes," and an identification of "areas of possible agreement, new public policies and new insights." The Committee is appreciative of (in alphabetical order) the Animal Legal Defense Fund, Covington & Burling, Duke University School of Law (The Bob Barker Endowment Fund for the Study of Animal Rights Law), the North Carolina Association of Biomedical Research, and Womble, Carlyle, Sandridge & Rice, for their financial support. The audio of this program is available at <http://www.law.duke.edu/webcast>.

The Committee can be credited with several other achievements in the past six months. In late November 2007, the TIPS Enterprise Fund awarded our Committee a \$6,000 grant to develop a podcast series called "Insights." These audio files, which will be available on the Committee webpage, will discuss emerging issues in the practice of animal law. Several podcasts are currently in production. The Committee also concluded its first regional conference at New York University School of Law: *Prosecuting Reckless Owners and Muzzling Dangerous Dogs: Common Sense Solutions for Politicians and Practitioners* (December 1, 2007), financially sponsored by the Animal Farm Foundation.

In furtherance of its practice to partner with other TIPS committees, in late March the Committee registered its support as a co-sponsor of the TIPS Workers' Compensation and Employer's Liability Law Committee's Chicago program entitled *National Trends, Emerging Issues, and Cutting Edge Medical Disability Determinations Affecting All State Workers' Compensation Laws*. Founding Committee Chair Barbara Gislason and TIPS Anthony MacAuley gave powerful presentations relating to *Emergency Management and Animal Law Update: Volunteer Healthcare Practitioners' Act and Other Disaster Relief Measures*. The Committee extends its congratulations to Leonard Nason for his masterful organization of such a thought provoking two day conference.

In addition, the Committee has been approved for its third publication, tentatively titled *ABA TIPS Guide to Handling Dangerous Dog Issues*, demonstrating that the Committee is a serious contributor to the ABA publications market. This handbook will (1) summarize local laws that address dangerous dogs; (2) provide lobbying tips for effective dangerous dog laws; (3) analyze constitutional challenges to breed-specific legislation; (4) discuss how to effectively prosecute and defend against dangerous dog laws; and (5) detail methods for challenging restrictive covenants and homeowners insurance policies that discriminate against certain breeds of dogs.

At the Committee's instigation, the TIPS' Council was granted ABA blanket authority to send a letter in support of a pending federal bill that requires the National Incident Reporting System, the Uniform Crime Reporting Program, and the Law Enforcement National Data Exchange Program to list cruelty to animals as a separate offense category. This will provide useful scientific data concerning the link between animal abuse and violence against humans. The Criminal Justice Section is a co-sponsor.

Heartened by the fact that our membership is drawn from at least 44 states and the District of Columbia, and is gaining an international toe-hold through members from Australia, India, China, and Canada, the Committee has invigorated its marketing efforts. We designed an "information flyer" and "membership brochure" for distribution at all TIPS events. In addition, an electronic survey (the first in a series) has been distributed to elicit the thoughts and interests of the membership.

Another mark of the Committee's success is its widespread recognition. In the past four months at least three articles, devoted to the exploding practice of animal law, have made mention of the Committee as an established component in the furtherance of the practice of animal law. See *Animal Law* by Kathryn Alfisi, Washington Lawyer (DC Bar Journal – cover story) (March 2008); *Animal Law, Gaining Ground in the United States* by Paria Kookla, ABA Student Lawyer (February 2008 – cover story); and *Beast Practices*, by Terry Carter, ABA Law Journal (November 2007). The Committee has also been contacted by veterinarian groups, not-for-profits, non government organizations, and other non-lawyer entities for resource material and information.

Yet there remains much to do during the final quarter of my term. The Committee must continue to energize the membership. In furtherance of that goal, former chairs and those in the line of succession are joining me in personally contacting each member to seek your involvement in a project. So expect to receive a call or an email. The Committee's webpage is being upgraded so as to provide links to: a) committee reports; b) the minutes of the Committee's business meetings at the Midyear and/or the Annual ABA meetings; and c) a collection of all publications in which the Committee, its leadership, or its members have been mentioned or featured. As one of our more ambitious initiatives, the Committee is setting up a "web board" to enable our members to discuss selected issues relevant to the practice area of animal law.

The Committee also needs to generate greater interaction among its leadership. In furtherance of this goal, I hope to institute monthly telephone conferences to be held on a designated day each month. Some calls will be for the chairs of the substantive subcommittees, others calls for chairs of the standing committees, and at least two calls for the vice-chairs. I have also communicated with each and every vice-chair and subcommittee chair during my year term (a practice that I recommend to future chairs).

I have many people to thank, including every member, vice-chair, subcommittee chair, and TIPS colleague who organized, participated in, or contributed to a Committee function or project. I must, however, single out the efforts of one person -- membership and diversity chair Marianne McDermott – who was instrumental in the production of the electronic survey and the membership brochure. Kudos to Marianne!

I thank the *ENTIRE* TIPS staff, and several of the ABA staff, for their patience, guidance, and most of all, friendship. They are, in alphabetical order, Sarah Cranley, Faye Dillon, Debra Dotson, Jane Hummons, Nick Michna, Donald Quarles, Susan Nolte, Sonia Schroeder, Alisa Simms, Felisha Stewart, Denise St. Fort, Deborah Weixl, Linda Wiley, Ken Williams, and Wanda Workman; as well as the TIPS and ABA publication staff of Jane Harper-Alport, Neal Cox, Kurt Harzke, Richard Paszkiet, Wendy Smith, and Kathleen Welton.

Finally, I thank TIPS Chair Peter Bennett who has demonstrated his support for our Committee in so many ways – from attending the Duke Conference and agreeing to be interviewed for the first podcast, to praising the Committee at TIPS programs and in his letter to the editor published in the ABA Journal (January 2008) reprinted in this issue.

In closing, I urge you to attend the 2008 ABA annual meeting in Manhattan – my hometown – on August 7 through 12, 2008. TIPS, celebrating its 75th anniversary, will be headquartered at the Waldorf~Astoria Hotel. The programs will be dynamic, especially the Trial Techniques Committee program entitled Art of Impeachment from a Trial Master, featuring the riveting Terence F. MacCarthy, co-sponsored by our Committee. Through the efforts of New York Host Committee Chair and TIPS powerhouse Francine Semaya, TIPS social events promise to be spectacular!

On Saturday August 9, 2008, please join us at the Committee's business meeting (7:30 a.m. to 8:30 a.m.). Later that day (4:30 p.m. to 5:30 p.m.) you are invited to attend the Committee's awards reception sponsored by the American Society for the Prevention of Cruelty to Animals for the presentation of the second annual *Excellence in the Advancement of Animal Law Award* to Raj Panjwani. Mr. Panjwani, an attorney who practices in New Delhi, India, has championed the protection of the parks and animal resources of India and is the author of *Animal Laws of India* used in many of its law schools.

Join your TIPS colleagues for a memorable celebration on Ellis Island -- "From Generation to Generation" -- on Friday evening August 8, 2008, and at the TIPS leadership dinner at the United Nations on Sunday evening August 10, 2008. See you soon! ⚖️

Very truly yours,

Gilda I. Mariani

Chair, Animal Law Committee

SUBCOMMITTEES

The Animal Law Committee boasts several substantive subcommittees given the breadth and scope of animal law. All subcommittees are soliciting members. If you wish to join any of the subcommittees, please contact the Chair of the subcommittee.

The substantive subcommittees and chairs are:

Criminal Law, Chair Amy Maher (amaher@co.madison.il.us)

Dangerous Dog, Chair Ledy VanKavage (ledyv@aspca.org)

Disaster Relief, Chair Barbara Gislason (gislasonbj@aol.com)

Endangered Species, Chair Eric Glitzenstein (eric@meyerglitz.com)

Equine Law, Chair Katy Bloomquist (kbloomquist@earthlink.net)

Great Apes, Chair Paul Waldau at (paul.waldau@tufts.edu)

Humane Education, Chair Meena Alagappan (alagappan.meena@gmail.com.)

Insurance Law, Chair Julie I. Fershtman (fershtman@aol.com)

International Law, Chair Amy Chaitoff at (amy@chaitofflaw.com)

Legislation, Chair David Favre (favre@law.msu.edu)

Linking Animal Abuse and Human Violence, Co-Chairs Megan A. Senatori (ms@dewittross.com); Michelle Welch (mwelch@oag.state.va.us)

Litigation, Co-Chairs Geordie Duckler (geordied@animallawpractice.com); Scott Beckstead (beckatt@pioneer.net)

Pet Custody, Chair Albert Momjian (amomjian@schnader.com)

Veterinary Malpractice, Chair Chris Green (animalpolicy@gmail.com)

Wills and Trusts, Chair Frances Carlisle (francescarlisle@earthlink.net)

Workers Compensation, Chair Benjamin Zvenia (drzvenia@myfedlawyer.com)

UPDATES FROM THE CHAIRS

Criminal Law Subcommittee: CLE on Dog Fighting

The Criminal Law subcommittee is currently working with other animal law subcommittees and private sponsors on a plan to present a CLE course on dog fighting investigations and prosecutions in the wake of the Michael Vick case. The course will focus on the federal prosecution of the Michael Vick case, as well as include information and tips from others who have prosecuted animal cruelty and hoarding cases. This program will include speakers such

as the forensic veterinarian, an Assistant U.S. Attorney, a criminal defense attorney, and the court appointed special master/guardian in the case. Additionally, the head of the behavioral team who was responsible for assessing, caring for, and adopting out the canine victims in Vick's case will speak. Pending approval, the course should take place this fall in the Chicago area. We will pass on more information as soon as the details are finalized.

Dangerous Dog Subcommittee: Prosecuting Reckless Owners and Muzzling Dangerous Dogs Regional Conference

The Animal Law Committee's first Regional CLE conference started out with a bang when a fire forced a venue change. This crisis was averted by the unflappable ABA staffer Debra Dotson, and attendees were able to get to the new location with ease. The conference, entitled "Prosecuting Reckless Owners & Muzzling Dangerous Dogs," lured 66 attorneys from around the country to the Big Apple last December. Attendees came from as far away as Seattle, Washington and Florida.

Participants were warmly greeted by our Chair, Gilda Mariani and welcomed to NYC by Jane Hoffman, our first Animal Law Committee Award recipient for her work with the Mayor's Alliance. Animal Farm Foundation (www.animalfarmfoundation.org) and the New York University Law School Student Animal Law Defense Fund co-sponsored this seminal event.

During the conference Professor Joan Schaffner of George Washington University explained the constitutional implications of canine profiling, while David Furlow of Thompson & Knight explained code-construction, vagueness, and the constitutionality of ordinances and covenants restricting pet ownership. Ledy VanKavage of the ASPCA presented commonsense solutions to enhance public safety, while Adrienne Lefkowitz of the Humane Society of Harford County bemoaned the lessons learned and disregarded in Prince Georges County, Maryland.

The prosecutors then stepped up to the plate with Robert Ferber of the LA City Attorney's Animal Protection Unit and Michelle Welch of the Virginia Attorney General's Office espousing ways to prosecute reckless owner cases. Marci LaHart, a private Florida practitioner responded for the defense by giving suggestions on how to beat the rap if your dog has been deemed "dangerous." Larry Cunningham of the Bronx County District Attorney's office and author of *The Case Against Dog Breed Discrimination by Homeowner's Insurance Companies*, published in 2005 by the Connecticut Insurance Law Journal, analyzed insurance concerns. The climax of the event occurred when Dr. Bernard Rollin delved into the ethical considerations of canine profiling and its impact on the human-animal bond.

The outcome of this memorable event will be a downloadable ABA-TIPS book available by late 2008 thanks to the tenacity of Professor Schaffner.

Humane Education Subcommittee: Humane Education Public Interest Project

The ABA-TIPS' Animal Law and Law in Public Service Committees are collaborating on a public interest project to provide humane education instruction to students at local elementary schools. The project involves educating and training ABA attorneys about humane education so they may serve as teachers in the humane education public interest program. The project will initially be implemented in DC and NY, where the first two teacher training sessions will be conducted, and will later expand to other geographical regions. The NYC Bar Committee on Legal Issues Pertaining to Animals and the DC Bar, Energy and Natural Resources Section's Animal Law Committee will be volunteering to help with this pro bono effort.

The committees are utilizing humane education curriculum and training resources developed by HEART (Humane Education Advocates Reaching Teachers), a NY non-profit organization specializing in humane education. HEART's mission is to foster compassion and respect for all living beings and the environment by educating youth and teachers in humane education (www.teachhumane.org).

If you are interested in participating in this humane education project, please contact Meena Alagappan, Chair-Elect of the ABA-TIPS Animal Law Committee.

Linking Animal Abuse and Human Violence Subcommittee: Family Abuse Regional Conference

The subcommittee postponed to the Fall the regional conference at the George Washington University Law School entitled, "*Family Abuse: Linking Domestic Violence, Child Abuse and Animal Abuse.*" This day-long

conference will bring together legal professionals, domestic abuse advocates, veterinarians, psychologists, and other professionals to explore the relationship between violence to animals and violence to humans, with a particular emphasis on violence within families. The subcommittee will seek co-sponsors to enhance registration.

Pet Trust Subcommittee: Exemption from the Rule Against Perpetuities

Thirty-nine states have enacted pet trust statutes. Many of these states have used the language of Uniform Trust Code sec. 408 or Uniform Probate Code sec. 2-907, as amended. These Uniform Codes exempt such trusts from the rule against perpetuities, which normally limits pet trusts to 21 years.


It is important to allow pet trusts to continue for the lives of the animals, as many people have companion animals who live longer than 21 years. Horses, for example, often live to 30 years, and some parrots can live to be 90 years old.

Also while the 21-year limitation is satisfactory for most persons creating a testamentary trust for dogs or cats under a will, it creates a problem for persons who wish to create an inter vivos pet trust. An inter vivos trust is created and takes effect during the life of the pet owner. Such a trust is beneficial as it provides for the care of the companion animal during the incapacity of the pet owner, and continues such care after the death of the pet owner. A person could create an inter vivos pet trust in a state with a 21-year limitation for the care of all of the animals that the pet owner presently has or acquires during the 21 years. But an inter vivos pet trust with a 21-year duration might not even protect dogs and cats. For example, if the pet owner died after the inter vivos trust had been in existence for 15 years, there would be only 6 years left to care for the animals and that period of time might not cover the remaining lives of the pet owner's younger dogs and cats.

Of the thirty-nine states that have pet trust statutes, most state statutes allow the trusts to continue for the lives of the animals. Only four states, including New York, have statutes limiting the duration of a pet trust to 21 years. Frances Carlisle, Chair of the subcommittee, is presently working with the NYC Bar's Committee on Legal Issues Pertaining to Animals on an amendment to the New York pet trust statute to eliminate the 21-year limit and allow New York pet trusts to continue for the lives of the animal beneficiaries.

Veterinary Malpractice Subcommittee: Creation of a New Veterinary Association

There has been a lot of news and activity on the Veterinary Malpractice front in the past few months. In December, the American Veterinary Medicine Association (AVMA) released the *2007 Pet Ownership & Demographics Sourcebook*—a compendium of pet information it compiles every five years. One of the most significant statistics is that U.S. consumers spent \$24.5 billion on companion animal veterinary care in 2006. This represents a veterinary spending increase of 109% in the last 10 years, and an increase of 231% in the last 15. Other sources indicate that this increased spending is coming with an increased expectation in quality of veterinary services. Indeed, in October, the veterinary journal *DVM Magazine* reported the results of a survey it conducted of State Veterinary Boards in all 50 states. The data showed “a steady rise in the number of complaints and disciplinary actions leveled against veterinarians” in the last decade, with “nearly a 12-fold increase in the numbers of sanctions” between 1998 and 2007.

Perhaps the biggest recent news was the January 14, 2008 announcement that the Humane Society of the United States (HSUS) had combined forces with the Association of Veterinarians for Animal Rights to create the *Humane Society Veterinary Medical Association*. This new joint organization intends to “give veterinarians, veterinary students and veterinary technicians an opportunity to participate in animal welfare programs, including disaster response; expanded hands-on animal care; spaying and neutering; and advocacy for legislative, corporate and veterinary medical school reforms.” The stated goal is to provide veterinarians and students with an alternative to the AVMA—which often takes stances on issues that many believe run counter to animal protection and welfare goals. Among these are official AVMA positions that support the slaughter of horses for human consumption, the use of random-source dogs and cats in research, the production of foie gras, the confinement of veal calves, breeding pigs, and egg-laying hens in restrictive crates and cages, and the notion that pet owners should only be compensated for their animal's “market value” when it is killed or injured due to veterinary malpractice. Given that HSUS is one of the largest, most well-funded animal advocacy organizations in America, it will be very interesting to monitor this story as it develops. 



AN INTRODUCTION TO THE HONOURABLE JUSTICE MICHEL BASTARACHE'S ARTICLE

Nathaly J. Vermette¹

As Chair of the ABA's Tort Trial & Insurance Practice Section's Intellectual Property Committee, and as a fellow Canadian, I was very honoured to have had the privilege to introduce a very special guest speaker, the Honourable Mr. Justice Michel Bastarache, Justice of the Supreme Court of Canada at an ABA national conference entitled "*Animals and Bioengineering: A Consideration of Law, Ethics and Science*" (please see <https://www.law.duke.edu/aba-animalconference/agenda> for more details on the conference).

Justice Bastarache² has followed an extremely interesting, diverse and demanding career path that has been recognized by numerous awards. Before being named to the New Brunswick Court of Appeal on March 1, 1995 and later to the Supreme Court of Canada, Justice Bastarache worked in government, in the private sector as an insurance business executive, as an academic, and in the private practice of law. His multifaceted understanding and love of law undoubtedly allowed him to draw from a deep pool of personal experience. On September 30 of 2007, Justice Bastarache celebrated a milestone; his 10th anniversary on the bench of Canada's highest court. On April 9, 2008, Justice Bastarache stunned the legal community by announcing his resignation, 14 years before his mandatory retirement date, to spend time on other pursuits, such as his passion for writing books. His unexpected resignation, effective June 30, 2008 is sure to revive the debate on how Canadian Supreme Court judges should be chosen.

The "*Animals and Bioengineering: A Consideration of Law, Ethics and Science*" conference, held at the Duke University School of Law on November 9th and 10th 2007 and co-sponsored by The American Bar Association Tort Trial & Insurance Practice Section Animal Law, the Media, Privacy and Defamation, and the Intellectual Property Committees together with the ABA Section Of Science And Technology, brought together for the very first time animal law and patent attorneys, litigators, scientists, ethicists, government regulators and industry representatives to explore the evolution and development of laws relating to the use of animals in bioengineering.

Some of the many ways in which animals are currently being used in bioengineering, including producing human medicines in transgenic animals, producing disease resistant farm animals, cloning animals for xenotransplantation and cloning animals for food applications were discussed.

We were indeed very privileged to have Justice Bastarache address the conference and talk about his experience as a member of the 9-judge panel in the Canadian Supreme Court Harvard Mouse case: *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45 and the genetically modified canola seeds case: *Monsanto Canada Inc. v. Schmeiser*, [2004] 1 S.C.R. 902, 2004 SCC 34.

The Harvard Mouse case is one of Canada's most significant patent decisions. The 5 to 4 split decision held that in Canada, an oncogene mouse, or a transgenic mouse with cells genetically altered by a cancer-promoting gene, was a "higher life form" and as such, is not patentable because it is not a "manufacture" or "composition of matter" so as to fall within the definition of an "invention" under section 2 of the *Canadian Patent Act*.

Justice Bastarache was of the general view that patenting higher life forms raises serious ethical, environmental and practical issues that are beyond the scope of the judiciary's mandate and should be addressed by the Canadian Parliament as issues of national policy.

The other side of the Canadian Harvard Mouse debate was addressed by the four dissenting justices who raised several strong arguments in support of providing some form of intellectual property protection to higher life forms speaking to the extraordinary scientific achievement of permanently altering the genes of an animal when such alteration does not occur in nature.

Notwithstanding its comparable intellectual property legislation, in the Harvard Mouse case, Canada arrived at a different legal result than the United States and other countries where similar patent applications for the invention resulted in patents being issued.

Although *Monsanto* does not directly overrule *Harvard College*, and notwithstanding the *Monsanto*

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² For a more detailed biography, please visit the official web site of the Canadian Supreme Court at: http://www.scc-csc.gc.ca/AboutCourt/judges/bastarache/index_e.asp.

majority opinion explanation as to how the two decisions can coexist, these two decisions are nevertheless very difficult to reconcile. In the *Monsanto* case, the majority held that the genetically altered canola seed making up the plant were patentable. The decision was based on the definition of “use” as an “activity furthering business interests.” In doing so, a new test for an “*infringing use*” was introduced and resulted in broadening patent rights.

Justice Bastarache offered to the conference attendees a unique point of view on the Canadian

perspective and analysis of the issues. We are extremely pleased to share the transcript of this presentation. Should you wish to see the video of Justice Bastarache’s presentation, or any other presentation made during this conference, please visit the following web site: <http://www.law.duke.edu/webcast/?match=Animal+Law+Conference>. ⚖️

Nathaly J. Vermette, LL.B., LL.M., Chair, ABA TIPS Intellectual Property Law Committee, njv@vermettelaw.com.



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THE PATENTING OF LIVING MATTER AS SEEN BY THE SUPREME COURT OF CANADA

Michel Bastarache, Justice of the Supreme Court of Canada

In the last five years, the Supreme Court of Canada has rendered two significant decisions in the area of biotechnology patent law. I have been invited to discuss these decisions and to explain what I now believe to be the state of the law on the issue as well as the repercussions of the two decisions in question, *Harvard College v. Canada* and *Monsanto v. Schmeiser*. As you will see, a number of commentators have stated that those two decisions are not reconcilable and that the attention of Parliament to the issue of patenting higher life forms is required.

In Canada, the Patent Office divides living matter into *higher life forms*, defined as multicellular differentiated organisms, i.e. plants, seeds, and animals, and *lower life forms*, defined as essentially unicellular organisms in composition, i.e. bacteria, fungi, cells in culture, transformed cell lines, and hybridomas. The Patent Office has always held that higher life forms are not patentable specially because there is not sufficient control over the invention and no reproducibility in a consistent manner.

The invention at issue in the Harvard mouse case related to a genetically engineered mouse. The mouse was modified to include the gene that makes it more susceptible to developing cancerous tumors. As a result, the animal is particularly useful as a tool in cancer research. There were a total of 26 claims made. Suffice it to say that the Patent Office refused claims 1 to 12 which were directed to a higher life form, basically the animal itself. The Federal Court had upheld the decision of the Patent Office; that decision was later reversed in a two to one decision in the Federal Court of Appeal. It should be noted that by the time the appeal was heard by the Supreme Court of Canada, Harvard had already obtained a patent on the invention in issue in the United States, Japan, and Europe. In the Supreme Court of Canada, the justices were divided five to four.

The main legal issue considered by the Supreme Court was whether the genetically altered mouse was an *invention*, as that term is defined in the *Patent Act*. It is important to note at this point that the word *invention* is defined in the *Act* as “any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter.”

After a long review of the language used in the definition of the word *invention*, and the object and scheme of the *Patent Act*, the majority concluded that higher life forms were not included in the definition of *invention*. With respect to lower life forms, the majority acknowledged that these were patentable since 1982 and that the *Patent Act* did not explicitly differentiate between lower and higher life forms. Such a distinction was nonetheless defensible on the basis of common sense differences between the two. It was obvious to the majority that micro organisms are produced en masse as chemical compounds and are prepared and formed in large numbers in which any measurable quantity can possess uniform properties and characteristics. The same could not be said of plants and animals. The majority also highlighted the capacity of animals to display emotion and complexity of reaction, and to direct behavior in a manner that is not predictable as stimulus and response; these traits are unique to higher forms of life.

I would like to add here that many interveners in the *Harvard College* case argued that the patentability of higher life forms should be precluded on moral and ethical grounds. Certain environmentalists were also opposed to the patenting of higher life forms because they feared that genetically modified life forms could be inadvertently released into the general environment with unforeseen consequences. Both the majority and minority held that the Commissioner has no discretion to refuse a patent on the basis of public policy considerations. The majority insisted that any refusal to grant a patent had to be based on express provisions in the *Patent Act*. I say this because the decision of the majority should be contrasted with the situation in the European Community where article 53(a) of the *European Patent Convention* specifically provides that patent shall not be granted in respect of inventions the exploitation of which would be contrary to public order or morality. I also mention



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public policy considerations here because a number of commentators have argued that the unanimous position of the court on this issue may have been somewhat compromised by the decision of the majority in the *Monsanto* case, of which I will speak shortly.

The dissenting judges in *Harvard College* disagreed with the distinction drawn between higher and lower life forms in terms of patentability. They insisted that most Western jurisdictions had issued patents on the Harvard mouse and that there was no rational line to be drawn between lower life forms and higher life forms. They saw no distinction between the fertilized genetically altered oncomouse egg and the resulting oncomouse.

It is quite clear that what is important to a good understanding of the decision in *Harvard College* is the compelling authority of the interpretive approach in deciding this kind of case. The word *invention*, for the purposes of section 2 of the *Patent Act*, is clearly an expanding concept. The majority wrote: “because the *Act* was designed in part to promote innovation, it is only reasonable to expect the definition of invention to be broad enough to encompass unforeseen and unanticipated technology.” What the majority rejected was the notion that the word *invention* could be as expansive as that suggested in *Diamond v. Chakrabarty*, 447 U.S. 303 (1980). The reason for this is essentially that the definition of *invention* is based on enumerated categories that were held to be exhaustive. Applying the rules of statutory interpretation, the majority held that if an application was captured by one of the mentioned categories, policy grounds and exclusions not provided for in the *Act* could not operate to prevent the granting of a patent. But the definition of *invention* could not be ignored and its terms had to be interpreted according to the usual rules of statutory interpretation. *Invention* could not be “anything new and useful made by man.” Section 2 reads, as earlier mentioned: “any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter.”

In seeking to define the word *manufacture*, the majority stated that this word could commonly be understood to denote that non-living matter can easily be a product or process while the mouse may not be analogized to a *manufacture* when it cannot be produced in an industrial setting; nor did the word in its vernacular sense include a higher life form. Turning to *composition of matter*, the majority noted that its construction must be narrower than that preferred by other courts (*Chakrabarty*) because, given the wording of the *Act*, the other listed categories of invention including

machine and *manufacture* would become redundant. The majority wrote: “the phrase composition of matter is somewhat broader than the term manufacture. It is a basic principle of statutory interpretation that the meaning of questionable words or phrases in the statute may be ascertained by reference to the meaning of the words or phrases associated with them. Also, a collective term that completes an enumeration is often restricted to the same genus as those words, even though the collective term may ordinarily have a much broader meaning. The words *machine* and *manufacture* do not imply a conscious, sentient, and living creature. This provides *prima facie* support for the conclusion that the phrase composition of matter is best read as not including such life forms. This argument is bolstered by the fact that there are a number of factors that make it difficult to regard higher life forms as compositions of matter.” Dictionary definitions were not wide enough to include living creatures within the terms *composition of matter*. A radical extension of the definition would therefore be necessary and this should be left to Parliament.

The other part of the interpretative process was a consideration of the scheme and object of the *Act*. Here, the majority relied on arguments that higher life forms posed problems that were never present with regard to inanimate objects and not anticipated by the *Act*. It relied on the report of the Canadian Biotechnology Advisory Committee and spoke of the problems of innocent bystanders and experimental use exceptions in particular, as well as that of using human tissue with a view to xenotransplantation. In familiar terms, one might ask why would a chimpanzee be a composition of matter and not a human being?

The dissenting judges maintain that the oncomouse qualifies as a composition of matter or even a manufacture. They write: “Composition of matter is an open-ended expression. Statutory subject matter must be framed broadly because by definition the *Patent Act* must contemplate the unforeseeable. The definition is not expressly confined to inanimate matter, and the appellant Commissioner agrees that composition of organic and certain living matter can be patented. In the case of the oncomouse, the modified genetic material is a physical substance and therefore matter. The fertilized mouse egg is a form of biological matter. The combination of these two forms of matter by the process described in the disclosure is thus, as pointed out by Rothstein JA in the Federal Court of Appeal, a “composition of matter.” “What, then, is the justification under the Patent Act for drawing a line between certain

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PEOPLE, PROCESS, AND PAPERWORK: ACTING AS GUARDIAN/ SPECIAL MASTER IN CIVIL ACTION NO.: 3:07CV379 (E.D. Va. 2007)

Rebecca J. Huss

The Appointment of Guardian/Special Master

It began with a telephone message taped to my office door. I had returned from teaching my first class one morning in September 2007 and there was a message waiting for me from my administrative assistant. This was noteworthy in and of itself since I was in my ninth year of teaching and it was the first time that anyone felt strongly enough that they needed to reach me that a voicemail or e-mail would not suffice. Quite frankly, it was one of the benefits I found about having an academic career after practicing law where emergencies, real or imagined, were often part of my work day. The message was from an Assistant U.S. Attorney who was involved in the Michael Vick/Bad Newz Kennels animal fighting case. I called him back and he asked whether I might be interested in acting as the guardian for the American Pit Bull Terriers that were seized in the civil forfeiture action associated with the criminal case. Thus began a very interesting and busy few months.

This article will highlight a few of the issues involved in my experience of acting as guardian/special master (the somewhat awkward title I was assigned) in this case. As the title indicates, the article will discuss the people involved, the process and the inevitable paperwork.

The Team of People

In early September, the federal government had arranged for a team of animal behavior experts put together by the American Society for the Prevention of Cruelty to Animals (ASPCA) to perform individual evaluations on the forty-nine dogs then under the custody of the United States Department of Agriculture-Office of Inspector General (USDA-OIG). The ASPCA evaluation had resulted in the classification of the dogs into five possible disposition recommendations ranging from dogs that could be placed directly into foster homes for observation to one dog deemed an immediate candidate for euthanization. Several of the dogs were “on the border” between categories – such as dogs that exhibited behavior that indicated that they needed significant socialization and a more protected environment (sanctuary) but could possibly be placed in a foster home. The dog deemed an immediate candidate for euthanization exhibited intense aggression

towards humans and could not safely be evaluated. That dog was euthanized prior to my appointment.

One interesting aspect of the process was the number of people that were involved in determining what would happen to the dogs in this case. In the U.S. Attorney’s Office for the Eastern District of Virginia (the U.S. Attorney’s Office) there were two Assistant U.S. Attorneys primarily responsible for the criminal prosecution, another Assistant U.S. Attorney responsible for the civil forfeiture action, and the Public Information Officer. The dogs were under the custody of the USDA-OIG. My contacts at the USDA-OIG were an Assistant Special Agent-in-Charge who had been active in the investigation from the beginning and was amazing about handling all the paperwork in the process and an Assistant Counsel to the Inspector General who was responsible for drafting all the agreements relating to the dogs.

Evaluation and Placement of the Dogs

At the time of my appointment in mid-October, the dogs were at six different municipal and county shelters in Virginia. Many animal welfare, rescue organizations, and concerned citizens had contacted the U.S. Attorney’s Office and the judge hearing the case to express interest and concern about the dogs.

The day after my appointment, I traveled to Virginia to interact with the dogs in the shelters, talk with the caregivers of the dogs, and determine what interim care was appropriate. Tim Racer of Bay Area Dog Lovers Responsible About Pit Bulls (BAD RAP) met me in Virginia. BAD RAP had been involved in the process from the very beginning and BAD RAP representatives had been part of the ASPCA team.

BAD RAP recommended that several of the dogs that had been placed in the category of dogs that could be placed in foster homes for observation, be transferred to experienced foster homes until final disposition was ordered. This would be positive for the dogs because they would be out of the shelter environment, good for the shelters because they would have fewer dogs to care for, and beneficial for the process because the experienced foster homes would provide me with evaluations on the dogs’

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PET HEALTHCARE INSURANCE

David G. Hackett

Pet health care costs are on the rise—in 2007, pet owners spent an estimated \$9.8 billion on veterinary care for their pets, an increase of 6.7% from 2006. *Veterinary Care Drives Growth in Pet Sector, APPMA Study Says*, DVM NEWSMAGAZINE, Apr. 1, 2007. This trend cannot be blamed entirely on inflation, which averaged less than 3% for that same period. *Current Inflation*, www.Inflationdata.com/inflation/inflation_rate/currentinflation.asp (last visited Mar. 5, 2008). The real culprit is owner demand. According to a 2006 American Veterinary Medical Association (AVMA) survey, 77% of owners refer to their pets as children or family members, and 45% of that group would pay any amount of money to save their pet's life. Daniel R. Verdon, *Inside the Consumer Psyche*, DVM NEWSMAGAZINE, July 1, 2007.

Fortunately for those owners, veterinary medicine has advanced dramatically over the past decade. Veterinarians now have access to increasingly sophisticated diagnostic tools (such as ultrasound machines, MRIs, and CAT-scans) and treatment procedures (such as kidney transplants, radiation therapy, and pacemakers). Progress comes with a price tag, of course—vet bills ranging from \$1,000 to \$5,000 are no longer uncommon.

Placed in context, the increase in pet health care costs is a *good* thing. Where shortfalls in veterinary care previously left some owners with only the choice of euthanasia to relieve their pet's suffering, those owners who would "pay any amount" to save their pet's life now have that opportunity.

But what about those who *can't* pay "any amount?" When an owner cannot comfortably afford a life-saving treatment and must instead choose euthanasia, the feelings of guilt, shame, and disloyalty can be a heavy burden to bear. As more expensive options become available, this predicament of "economic euthanasia" will grow in frequency.

Pet health insurance (PHI) provides protection against this predicament. PHI was first offered in the United States in 1982 as catastrophic health and accident insurance to protect pet owners against economic euthanasia. Peter Kerr, *Health Insurance for the Family Pet*, N.Y. TIMES, July 15, 1982. Slow to gain acceptance, PHI is held by less than 4% of pet owners today. *Animal Healthcare Industry Demographics*

Studied, DVM NEWSMAGAZINE, Oct. 2, 2007. But with 26% annual growth since 2001, Karen Halligan, DVM, *Should You Get Pet Insurance?* PARADE MAGAZINE, April 22, 2007, and sales estimated at \$667 million last year, Hartville Group, Inc., *Pet Insurance Timeline*, (citing MarketResearch.com) at www.hartvillegroup.com/pet-insurance-industry-history.aspx (last visited Mar. 5, 2008), there are currently nine U.S. PHI providers poised to capitalize on what they expect will be a spectacular industry boom. See Table 1 *infra* at p. 28.

What is Pet Health Insurance (PHI)?

The basic concept of PHI is simple: the owner purchases an annual policy on the pet by paying monthly or annual premiums, and in exchange the insurer reimburses the owner for part of any covered treatment costs incurred. The conditions covered and the amounts reimbursed may be specified in a benefits schedule, or reimbursement may be at a flat percentage rate of actual covered "reasonable and customary" expenses. Deductibles and co-pays usually apply, and reimbursement is limited for each individual "incident," each annual policy, and/or each animal's lifetime. The amount of the premium is dictated by the extent of coverage and reimbursement, and also by the condition of the pet (e.g., species, breed, and age). Exclusions apply—most common are the "prior existing condition" and the "hereditary/genetic condition" exclusions.

Most insurers also provide "well care" programs, where the owner can pay for coverage of preventive care costs, such as clinic visits, vaccinations, dental care, and even spay and neuter procedures.

The typical accident and illness policy for a young mixed-breed dog in San Diego, CA, with 80% coverage, \$100 deductible and \$3,000 per incident limit, costs \$25 per month, with an additional \$20 per month for the typical well-care policy.

The average annual health care cost for a dog is \$261. APPMA, *2007-2008 National Pet Owners Survey* at www.appma.org/press_industrytrends.asp. Compared with a \$300 average minimum annual premium for major medical insurance, a typical \$100 deductible, and a 20% per incident co-pay, PHI might look like a bad investment. For well-off owners who can cover the costs of a catastrophe up to their own

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ANIMALS v. ANIMALS: A FALSE CHOICE

Wendy M. Anderson and Amy Vaniotis

Harmony with land is like harmony with a friend; you cannot cherish his right hand and chop off his left. That is to say, you cannot love game and hate predators; you cannot conserve the waters and waste the ranges; you cannot build the forest and mine the farm. The land is one organism. Its parts, like our own parts, compete with each other and co-operate with each other. The competitions are as much a part of the inner workings as the co-operations. – Aldo Leopold

In April 2007, a birder in Galveston, Texas shot a feral cat with a .22-caliber rifle, garnering a felony cruelty indictment and national news media attention. Jim Stevenson told *The Wall Street Journal* and many other news sources that he had to kill the cat to protect piping plovers, an endangered bird species that winters in Galveston and shares the beach with feral cats. See, e.g., Barry Newman, *Bird Lover on Trial for Feline Felony*, WALL ST. J., Sept. 1, 2007, at A1. The claims made by Mr. Stevenson and picked up by the news media reflect an attitude increasingly adopted by birding advocates and some government officials, who sidestep the issue of human destruction to focus on trivial but sensational issues, such as the so-called “cat versus bird” debate. Although everyone agrees that ongoing habitat destruction by humans is the number one cause of species loss, some insist that human activity is too overwhelming to attempt to modify, and that instead energies should be devoted to peripheral distractions. Their argument is this: certain bird species are endangered, and cats kill birds; therefore, killing cats will save those bird species.

Animal lawyers need to be aware of this specious argument: it is shaping public policy and the future of animal protection law, and raises a fundamental question about human complicity and willingness to take responsibility. For centuries, on this continent humans have engaged in market hunting and wholesale lethal animal damage control and, in the case of birds, a vast commercial trade in birds and their feathers. In addition to direct slaughter, humans also harm and kill birds through indirect means: human population is swelling, human consumption of resources is growing, and habitat destruction continues unchecked. Using a simplistic and fallacious “cat versus bird” argument to set policy comes at the cost of millions of animal lives—not only of the cats who shoulder the blame of our human mistakes, but of the very birds these individuals aim to protect.

Who Killed the Birds?

The news media, birding advocates, and some government officials claim that cat predation is among the



top causes of bird species loss. This claim is made possible by a semantic sleight of hand: characterizing “habitat destruction” as a single cause of species loss belies the vast human impact encompassed by the term. Logging, crop farming, livestock grazing, mining, industrial and residential development, urban sprawl, road building, dam building, and pesticide use are just a few of the hundreds or even thousands of activities and damages that are captured by this phrase. Lumping these together as the number one cause of species loss allows issues which are inconsequential in comparison—such as cat predation—to be portrayed incorrectly as falling high on the list of threats.

One leading indicator of human impact is the dramatic population growth in the United States. At the time of the American Revolution, fewer than 4 million humans inhabited the United States; by 1900, that number had grown to over 76 million. See U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART 1, A1-A8 (1975), available at <http://www2.census.gov/prod2/statcomp/documents/CT1970p1-02.pdf>. The twentieth century in particular experienced tremendous and unprecedented growth: by the year 2000 the U.S. population had grown 270 percent, to over 280 million people. See U.S. Bureau of the Census, Annual Estimates of the Population of the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2007 (Dec. 27, 2007), <http://www.census.gov/popest/states/tables/NST-EST2007-01.xls>. Current population estimates exceed 303 million individuals. See U.S. Bureau of the

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DUKE, A DEATH-ROW DOG, GOES HOME AT LAST

Amy Chaitoff

The Case

A dog's four-year court battle for justice is finally at an end thanks to the December 11, 2007, order of the New York Appellate Division, Second Department. "Duke," now a six-year-old American Bull Terrier, has been on the dog equivalent of death row at the Islip Town Shelter for an incredible four long years.

Duke, one of two beloved pets of the Menendez family, had been sentenced to death on February 10, 2004 by an order entered by the Hon. Madeline A. Fitzgibbon pursuant to Agriculture and Markets Law ("AML") §121, commonly known as New York's "Dangerous Dog Law." Although it was never alleged that Duke ever threatened a human being, a neighbor, who himself had had several run-ins with animal control including a dangerous dog complaint filed against him, alleged that two dogs, fitting the description of the Menendez's dogs, entered his property and one of them attacked his bull dog on two separate occasions while the other dog just stood by. He also alleged that a "brown dog" chased his horse. However, he was unable to positively identify the alleged aggressor. The Menendez family argued that it was a case of mistaken identity. Nevertheless, the court found Duke was the aggressor and sentenced him to death.

Knowing Duke's innocence, the Menendez family immediately appealed to the Appellate Term which affirmed the lower Court's decision. Thereafter, the Menendez's retained my services to save Duke. I filed two motions to reargue, arguing not only that this was a case of mistaken identity and that the Menendez's first "hearing" was never tried on its merits, but that the law at the time of the alleged incidents excluded dog on dog attacks and thus Duke's harsh sentence was extreme and unjust.

The Argument

The February 3, 2004, hearing which resulted in the February 10, 2004, order to kill Duke was based on an alleged "dog on dog" altercation. "Dog on dog" altercations were specifically excluded from AML §121 at the time of the alleged incident in 2003. At that time, the law only addressed attacks on people and domestic animals and AML §108 (7) specifically excluded dogs and other companion animals from the definition of a domestic animal. The legislature, having the opportunity to include companion animals or other types of dogs

under the protection of Section §108, instead, specifically excluded them at that point in time. Moreover, New York case law at the time of the alleged

incidents repeatedly held that dogs were specifically excluded from the definition of a domestic animal under AML §108 and thus §121. The Appellate Term in *People v. Noga*, 645 N.Y.S.2d 268 (App. Term, 2d Dept. 1996) held that "Section 121 of the Agriculture and Markets Law states that a dog is dangerous if it, inter alia, attacks a person or a domestic animal. For purposes of this statute, a dog is not considered a domestic animal." Thus, the 2003 version of the dangerous dog law only covered attacks on people or an attack on a service dog, guide dog, or hearing dog. Therefore, the act Duke was accused of committing, attacking the plaintiff's pet bull dog, was specifically excluded from the definition of a dangerous dog under the law. As a matter of law, Duke could not be found to be a dangerous dog within the meaning or intent of the statute at the time of the alleged incidents. Nevertheless, the Appellate Term again affirmed the First District Court's decision and order on January 31, 2007.

Duke was running out of options and the Menendez's were praying for a miracle to save their beloved family member. I then appealed to the Appellate Division, Second Department. Luckily for Duke, the Hon. Robert A. Lifson, of the Appellate Division, Second Department, granted Duke's request for a temporary stay of execution in April 2007 and Duke's case was submitted to the Appellate Division panel of judges to review Duke's exceptional case. The Appellate Division, Second Department granted Duke's appeal and gave Duke and his family their first glimpse of hope in over four years.

On December 11, 2007, the four-judge panel at the Appellate Division, Second Department located in Brooklyn, NY, found that the lower court erred in ordering Duke's destruction, stating that the dangerous dog statute in effect on December 13, 2003, almost four years ago to the day "did not provide that one dog attacking another was conduct subject to the penalty of destruction." See Agriculture and Markets Law former

"This was an exceptional animal shelter, with exceptional staff, and this was an exceptional dog, with an exceptional case."

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THE “MENU FOODS” PET FOOD RECALL UTILIZING CLASS ACTION/ MASS TORT PROCEDURES TO ASSIST DAMAGED PET OWNERS

Jeff Cereghino

The first call came from a veterinarian acquaintance in southern California. She told me that several weeks early she had experienced an inexplicable medical situation. Two cats in her care had died within hours of each other, both from acute renal failure, and both from the same home. Her immediate suspicion was poison, but neither cat was an outdoor cat, and she knew their owner was caring and responsible. She was mystified because renal failure, while not uncommon in elderly animals, is unusual in younger cats.

A few days before, Menu Foods, a manufacturer of pet food distributed and sold throughout the country, had announced a recall of some “wet” pet foods due to reports of several pets dying after consuming the “cuts and gravy” style food. The recall was announced on March 16, 2007, and covered product manufactured between December 3, 2006 and March 6, 2007.

The initial information about the recall was sketchy, but my friend put it together quickly. She asked the bereaved pet owner if she still had or knew what food her cats had eaten. The pet owner did, and it was the recalled food. She asked me if I wanted to speak with the owner, and while I believed not much could be done due to the economics of proving injury for just one owner, I knew the owner would benefit from just talking about her loss. Several months earlier our family dog who was only five, died from cancer, and I understood the pain of suddenly losing one’s companion.

The owner was truly a “little old lady from Pasadena.” She was an elderly widow, living alone in Pasadena, with no nearby family or friends. Her two cats were so much more to her than mere animals she cared for; they were her reason to live. I spent an hour talking with her, but told her I didn’t think it made economic sense to hire a lawyer and experts to pursue her claim, because it was singular and lacked sufficient value to justify pursuing it.

The upshot is, since that first call, my colleagues, staff, and I have spoken with three thousand or so pet owners whose pets were injured or perished because of what they were fed. We presently have almost fourteen hundred clients, some with multiple pets.

In this article I will discuss the genesis of the present multi-district litigation, the procedures available to the pet owners, and the anticipated damage claims.

“I have spoken with three thousand or so pet owners whose pets were injured or perished because of what they were fed.”

What Happened and Why?

The pet food industry has approximately 175 companies with \$11 billion in annual revenue. *See* Hoovers (a D&B company), www.hoovers.com/pet. Menu Foods is a relatively small company, but a niche business; as a supplier of “chunks and gravy,” this results in large amount of product in the marketplace. Menu Foods is not only a manufacturer of pet food. Its manufacturing facilities are “rented” by larger companies. For example Wal-Mart “rents” the production line to make private label product. The problem comes from using the same basic raw product, which is supplied by the manufacturer.

Because formal discovery has been in hiatus, the true story of what Menu Foods knew and when they knew it is not fully known. What has been reported is that Menu Foods received reports of a few pets dying from kidney failure, and then conducted tests on their laboratory animals, feeding them the tainted food. The animals began dying from kidney failure within days. The testing began on February 27th, and the recall was announced on March 16th.

The exact toxin was not immediately known. First reports identified the toxin as rat poison, but that was later determined not to be the contaminant. The FDA conducted tests, and found a compound called melamine in the contaminated food, which is used as a fertilizer in Asia. Melamine has numerous uses, but in the US, it is not registered as fertilizer. The melamine was found in the wheat gluten, which in turn was used as a product in pet food. Subsequent forensic investigations, while not conclusive, began to focus upon the interaction between melamine and cyanuric acid and related compounds, also found in pet food. The FDA maintains a FAQ website at <http://www.fda.gov/cvm/MenuFoodRecall>, which has more information about the toxicology and forensic studies.

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**AMERICAN BAR ASSOCIATION ANNUAL MEETING
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SUNDAY, AUGUST 10, 2008

8:30am – 10:00am

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Moderator:
John P. Buckley, Ungaretti & Harris, LLP, Chicago, IL

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SHARK TOURNAMENTS: UNJUSTIFIABLE CRUELTY

Wendy L. Craft & Evan H. Echenal

We all realize that while our food may magically appear on a plate served to us in a restaurant, or under plastic wrap in a market, that it must come from somewhere...and from some thing. What we all hope, and stubbornly want to believe, is that prior to our food being served to us, the animal, whether from land or sea, is kept in a humane fashion and eventually killed the same way. Unfortunately, this is often not the case.

The steak you are served or bar-b-que you enjoy in the summer is kept by professional farmers who are bound by laws to protect the health and safety of the consumer, and that set minimal requirements to protect the livestock. Commercial fishermen also must follow national and international laws, rules, and regulations regarding their catch. These laws have been instituted to ensure not only the safety of the consumer but, in many cases, to preserve the species and ecosystem.

Relevant Regulations

Sportsmen are bound by regulations whether they are hunting deer, fowl, or fish. In the State of New York, a hunter is prohibited from using an artificial light source, a rifle that is equipped with a laser sight, or an automatic weapon. See NYS Dept. of Environmental Conservation, General Hunting Regs. available at <http://www.dec.ny.gov/outdoor/28182.html>. If you have hunted, you understand the reason for these rules; it is an attempt at "fair play" and to reduce animal cruelty. For example, use of an artificial light source, also known as "shining," causes a deer to freeze in its tracks, making for an easy target, hence no sense of fair play or sport. The manner in which animals have been hunted, captured, and killed, and the weapons and/or equipment used are regulated by all States.

In addition to regulating the equipment used to hunt in order to instill a sense of fair play or sport, the State of New York regulates the manner in which *any animal* is treated. It is a Class A Misdemeanor for a person to "overdrive, overload, torture, cruelly beat or unjustifiably injure, maim, mutilate or kill any animal, whether wild or tame." Agriculture and Markets Law (AML) §353. AML §350 defines an animal as "every living creature except a human being." See *People v. Voelker*,

658 N.Y.S.2d 180 (1997). Therefore, under AML §350, a shark is an animal.

In *People v. Arroyo*, 3 Misc.3d 836 (2004), the Court reassured animal owners and hunters that "even though anti-cruelty laws are meant to protect animals, the statutes are not intended to interfere with the owners' possession, use and enjoyment of their animals...anti-cruelty statutes, including AML §353, do not prohibit causing pain to animals but causing 'unjustifiable' pain." Shark tournaments inflict unjustifiable pain.

"The maiming and torture of sharks with barbed hooks is unjustifiable."

Shark Tournaments

Every year shark tournaments are held for large cash awards in coastal towns throughout America. These tournament supporters argue that such events draw large sources of revenue for the towns and their residents and that the tournaments are educational and contribute to the study of shark species. They even argue that thousands of pounds of meat are donated to charitable institutions, even though the Environmental Protection Agency encourages children and pregnant and nursing women to use care when consuming shark because of the risk that larger fish can contain unacceptable levels of mercury.

During a typical shark tournament, several hundred boats leave the docks filled with recreational fishermen intent on catching the largest shark in order to win the largest cash prize. Many of the sharks caught that day are included on the World Conservation Unions "red list" of shark species that are considered "endangered or vulnerable." These sharks include the Mako and Thrasher which typically are the large cash prize winners. While the rules require sharks which do not meet minimum size standards to be released, there are no rules stating the physical condition these sharks must be in upon their return to the sea. Environmental groups have estimated that 20% of the sharks caught and released die due to maiming of their mouths which, in turn, make it difficult for them to eat and make the sharks more vulnerable to other predators. Members of the East Hampton Group for Wildlife attended the weigh-in of sharks on July 13, 2007 and said that many of the sharks were small; a number failed to clear the 200-pound threshold for entering the competition.

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PUPPIES, PUPPIES, AND MORE PUPPIES— NOT IN VIRGINIA ANYMORE

Michelle Welch

“Every day, I look at you, hoping you will play with me. Every day, I look at you, hoping you will tend my sores. Every day, I look at you, hoping you will clean my cage; I have been lying in my own feces for weeks now. Every day, I look at you, hoping you will feed me more.” These are the thoughts of puppies and dogs that live in puppy mills in Virginia. Last fall, my beloved State of Virginia showed the nation an uglier side to its slogan: “Virginia is for lovers.” We, like many other states, have a huge puppy mill problem. Those of us in law enforcement have seen for years the results of puppy mills. Puppies and dogs were brought into shelters all across Virginia, showing signs of horrific neglect and abuse. These animals were suffering from such severe neglect that it clearly fit our statutory definition of cruelty.

During that time, the Humane Society of the United States performed an undercover investigation of puppy mills in Virginia. The footage they filmed showed inhumane conditions and poured a negative light on Virginia’s lack of enforcement against them. Puppies and dogs were living in cramped cages with hardly any sunlight or room to move. Many of the cages had no barriers between them, such that feces and urine fell onto the dog below. The dogs were bred over and over again for profit. One particular puppy mill in Hillsville had over 800 dogs. Many animal groups answered the call and stepped in and helped place over 600 dogs. But sadly, that operator was allowed to keep over 200 dogs. More than likely, he would be back up to his original number in record time.

Puppy mills in Virginia and nationwide flourish despite strict animal cruelty laws. In fact, Virginia has a good animal cruelty law, with graduated felonies. The problem is that these puppy mills are able to operate in the full light of day. Although they are subject to regulations enforced by the United States Department of Agriculture (USDA), it does not have the resources to enforce in every locality in Virginia. Thus, enforcement of cruelty laws falls to Animal Control. However, because of this regulatory structure, many animal control departments feel they lack the authority to investigate regardless of complaints. The result, these puppy mills operate with reckless abandon. To be clear, Animal Control wants these operations shut down because of their violations of the neglect and cruelty



laws but they are frustrated by investigatory techniques they would have to invest in order to build a case.

After the media frenzy shone the spotlight on Virginia, (although nothing like the latest media spotlight shone by Oprah Winfrey!) animal advocates got busy and enlisted Delegate Bobby Orrock (Spotsylvania), who sponsored puppy mill legislation in January to regulate puppy mills and give animal control more tools to inspect these operations.

Additionally, House Bill 538 has passed both Houses of our General Assembly in Virginia and will become law once the Governor signs the law effective July 1, 2009. With all legislation, compromises have to be made; while the proponents of the bill wanted more stringent standards, the bill that prevailed is a pretty good one. This bill’s provisions deserve a closer look.

The first, most obvious change is to assess penalties upon the breeders for not being licensed by the USDA. A commercial dog breeder, who sells to pet shops in Virginia, must maintain a valid and current USDA dealer’s permit. If such a breeder does not maintain that permit, he will be guilty of a Class 1 misdemeanor. This has real teeth because a Class 1 misdemeanor carries up to 12 months in jail. Similarly, pet shops cannot turn a blind eye and buy dogs from unlicensed breeders. If they buy from a person who is not a dealer or licensed by the USDA, they are subject to the same penalty.

Secondly, there is a legal definition of “commercial dog” breeder now under our Code. During a 12 month period, maintaining 30 or more adult female dogs for

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SUPREME COURT...

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compositions of living matter and other compositions of living matter?" The minority argued in essence that all of the dividing lines proposed by the majority were policy driven and that any such policy should be introduced by Parliament. They never addressed the particular problem of replication.

Myra J. Tawfik and a few other commentators explain that the position of the minority expressed here is inconsistent with their own reference to foreign legislation and judicial interpretation. The minority wrote: "legislation varies but broadly speaking Canada has sought to harmonize its concepts of intellectual property with other like-minded jurisdictions. The mobility of capital and technology makes it desirable that comparable jurisdictions with comparable intellectual property legislation arrive (to the extent permitted by the specifics of their own laws) at similar legal results." It is clear that this case did not involve interpreting provisions of domestic legislation that expressly implemented an international obligation nor did it raise trans-judicial or extraterritorial aspects on its facts. The minority was willing to review a number of non-binding foreign sources and international law principles not as passing references, but in a concerted effort to ensure consistency between domestic law and comparable jurisdictions. The commentators signal that this is contrary to the jurisprudence of the Supreme Court of Canada. Although globalization is having a certain effect on domestic legal affairs, Tawfik notes that there is a clear demarcation between domestic law and international law. She adds that the Supreme Court has been willing to open up the interpretive method to actively include international norms and foreign sources of logic in its deliberations in two quite distinct scenarios. First, it has expanded the rules of interpretation to permit reference to international treaties and foreign judgments in all cases in which domestic legislation under review has been expressively or impliedly enacted or amended in order to implement an international obligation. This was confirmed specifically as the norm in the case of *National Corn Growers*.

Another scenario permits extrinsic sources to be used to interpret domestic legislation where it is expressly interesting or impliedly necessary to look at the international context. Some examples of this are the decisions of the Supreme Court in *Baker v. Canada* and *National Corn Growers*. According to Ruth Sullivan, the recognized authority in the area of statutory interpretation in

Canada, it is nevertheless certain that the Supreme Court has adopted a pragmatic approach to decision-making and that it is now willing to draw on all sources to persuade its diverse audiences that its choices are appropriate. It is also quite clear that commonality of interests among peoples has never envisaged the possibility that courts harmonize interpretations of laws in order to protect like-minded institutions. Tawfik argues that this approach must be rejected for a number of reasons. First, it is not at all clear that there exists a firm international consensus with regard to intellectual property legislation; second, it is not clear that consideration of decisions taken abroad should lead Canadian courts to strive to attain a similar legal result. For the Court to look for a broader interpretive context to raise its knowledge of external aspects of its decisions is laudable, but this is totally different from forcing on domestic laws an interpretation geared to the attainment of similar legal results. Critics agree that the minority treats the expansive approach as self evidently correct. What is most disconcerting is that it completely dispenses with the need to discuss the interpretive method adopted by the Supreme Court. Tawfik also questions the belief that there exists an international normative IP framework that requires harmonization. What is needed is broadening legal discourse, comparative deliberation, not trying to keep up with some kind of international development. Even if that were the case, what would be the like-minded jurisdictions? All common-law systems? All Western systems? All English and French speaking systems? Net importers of IP to Canada? Who should decide? It is interesting to note, on that issue, says Tawfik, that the countries chosen for a comparison by the court in this case and those chosen in the *Théberge* case were not the same! Was this because of some higher degree of persuasiveness?

As noted earlier, critics agree that the problem in failing to apply the rules of statutory interpretation by the minority had a spillover effect; it affected the quality of the decision requiring an interpretation of the word *use* in the *Monsanto* case. *Harvard College* cannot be considered, as I have mentioned, without also addressing the decision in *Monsanto*. *Monsanto* held the patent that claimed a chimeric gene, a method for inserting the gene into a plant's DNA, the plant cell in which the chimeric gene had been inserted, and a method for regenerating resistant plants from the genetically modified cell. As the founder plant propagates, all the cells and its progeny will contain the patented gene, but the patent claims did not extend to the whole plants or seeds produced by the plant. Such a claim would have been inconsistent with Canadian patent law and in particular the decision

in *Harvard College*. Monsanto sells the seeds of genetically altered canola through its distributors; distributors resell under the trade name Roundup Ready to farmers who must agree to buy only from authorized agents, to use only Roundup herbicide, to sell the crop only to a commercial purchaser authorized by Monsanto, and not to sell or give the seed to a third party or to use them for replanting. These restrictions are necessary because of the replicatory nature of the invention. Typically, the doctrine of exhaustion would permit farmers to save and reuse the seed purchased by the distributor. Schmeiser operated a commercial farming operation and had identified a small number of canola plants on his land growing from Roundup Ready canola seeds. He harvested these plants, collected their seeds, replanted them, and eventually produced 1000 acres of Roundup Ready plants. Schmeiser was not a party to a technology use agreement with any distributor and Monsanto brought an action against him for patent infringement.

The majority found in favor of Monsanto basing its decision primarily on principles of statutory interpretation which required that the inquiry into the meaning of the word *use* must be grounded in an understanding of the reasons for which patent protection is accorded. Commentators were quick to note that the majority made reference to the standard utilitarian justification for patent protection but that its interpretation of *use* however bears no relationship with this utilitarian justification rationale. Wendy Adams argues that this is demonstrated by the fact that the majority's interpretation radically transforms the established test for determining an infringing use.

Traditionally, consideration of infringing use in patent law is an uncomplicated matter; a court must decide whether an ostensibly infringing use falls within the scope of the claims. The emphasis is on the textual analysis of the claims, given the significance of interpretation in defining the scope of those claims. The majority however held that the purpose of the statutory monopoly granted by the *Patent Act* is to protect the patentee's business interests. *Use* is therefore defined as any activity by the defendant that furthers its own commercial interests given that if there is a commercial benefit to be derived from the invention it belongs to the patent holder. Adams suggests that "what had been a straightforward comparative analysis of equivalency, literal or substantial, between the impugned activity and the scope of the patentee's claims, now includes an abstract inquiry into the inherent nature of the disputed activity itself." She argues that what is at issue now is whether the activity results in a commercial benefit that can be causally

connected to the use of the invention. "The normative acceptance of Monsanto's claims derives not from its reference to the necessity of a statutory monopoly to protect private investment in public goods, but in the functions that patents are expected to perform in the changed political economy of the market." What we see here is that the use of the form of intellectual property is to perform the function typically carried out by property. Property is related to fully exploiting the commercial potential of the corporate asset.

Full commercial exploitation requires exclusive rights over the whole of the asset at the discretion of the corporation and not simply over particular uses that are determined by the State to be an appropriate balance of public and private interests in the creation and dissemination of new technology. Richard Gold explains that these claims exceeded the utilitarian rationale of patent rights as a mere statutory directive designed to grant control over that portion of the commercial potential necessary to address the market failure associated with the public goods nature of intangible assets. He says: "The argument for greater patent protection should be understood for what it is: an attempt to maximize profit, not to maximize levels of innovation. Clearly, the company would prefer to have as large a monopoly as possible. But patent law is not about individual profit maximization; it is about maximizing the overall level of innovation in society. The two do not necessarily go together."

As in the *Harvard College* dissent, Adams argues that there is slippage here. In the political economy of the market, the profit motive has come to have normative acceptance. Adams states that the demands of individual actors in the market, however valid within the political economy, must be reconciled with one or more of the accepted rationales of patent protection. In Adams' view, the majority in *Monsanto* held that a patentee is entitled to any commercial benefit that can be derived from an invention; the same majority reasoned that its decision was based on the utilitarian rationale of patent protection which justifies the protection of incentives only, not profit maximization.

In *Monsanto*, the majority found genes and modified cells making up a plant to be patentable. *Monsanto* does not directly overrule *Harvard College*; the majority opinion explains how the two decisions can coexist. As later discussed, the two decisions are nevertheless very difficult to reconcile. At issue was whether Mr. Schmeiser had used the patented invention by harvesting Roundup Ready canola plants found on his land, replanting their seeds, and then selling the Roundup

Ready canola grown from these seeds. Mr. Schmeiser argued that deciding the case in favor of Monsanto would be in effect granting Monsanto patent protection not only over the genetic genes and cells comprising the gene as claimed in the patent, but also over the whole plant. This result would be inconsistent with the earlier decision in *Harvard College*.

The majority inquired into the meaning of the word *use* by stating that it must be grounded in an understanding of the reasons for which patent protection is accorded. The majority wrote: "Huge investments of energy and money have been poured into the quest for better seeds and better plants. One way in which that investment is protected is through the *Patent Act* giving investors a monopoly when they create a novel and useful invention in the realm of plant science, such as genetically modified genes and cells." The problem noted by most commentators is that the majority's interpretation bears little or no relationship with this utilitarian justificatory rationale. In fact, the majority's interpretation results in an entirely new test for an infringing use. Under the present law, a patent does not provide a patentee with an affirmative right of use. As noted by Adams, negative rights are not equivalent, in either form or function, to the affirmative rights granted by property. If it is clearly understood that the Commissioner of patents has no discretion to refuse a patent on the basis of public policy considerations, it is hard to understand how public policy considerations can be said to justify this interpretation of the word *use*.

While the majority states that it is not inclined to the view that Mr. Schmeiser had made the cells within the meaning of the *Patent Act*, it finds it unnecessary to decide the point having concluded that Mr. Schmeiser used the patent genes and cells, thereby infringing the patent. The majority came to the conclusion that "saving and planting seed, then harvesting and selling the resultant plants containing the patented cells and genes appears, on a common sense view, to constitute utilization of the patented material for production and advantage, within the meaning of section 42." The reason for this, as stated earlier, is that these actions have deprived Monsanto of the full enjoyment of the monopoly. The majority affirms that Schmeiser's involvement with the disputed canola is clearly commercial in nature. As mentioned earlier, it was held that irrespective of whether or not the defendant benefits or profits from the patented invention, the use of the plant which contains a patented element constitutes an infringement as long as the invention is significant to the defendant's commercial interests. The majority opined that use was not dependent upon the

defendant actually using the patented element commercially. The patent holder was entitled to protection as long as the element was significant or important to it. This meant that Schmeiser's saving, planting, and harvesting the Roundup Ready canola seeds found on his land constituted use even though he never took commercial advantage of the special utility that the invention offered. It was sufficient that Schmeiser be aware of the presence of Monsanto's invention on his property. He was then required to rebut the presumption of use.

The minority position, of course, is that the majority's reasoning permits a patent which would otherwise have been denied. Monsanto's patent is specifically for genetically modified genes and cells in the laboratory prior to regeneration, nothing more. The minority would not have interpreted the word *use* as broadly. *Use* is properly limited to depriving the patentee of the monopoly over the use of the invention as construed in the claims. To hold that there is a right to the commercial exploitation of the entire plant on the basis of the replication of the gene and cell throughout the plant would result in a finding inconsistent with the Supreme Court's decision in *Harvard College* which denied the patentability for higher life forms.

In this case, the majority did address the question of replication. It simply stated that plants reproduce through the laws of nature rather than through human intervention. It noted that this argument ignores the role of human beings in agricultural propagation. It observed that many inventions make use of natural processes in order to work. Morrow and Ingram provide this comment: "the observation that many inventions make use of natural processes in order to work is interesting in that it demonstrates the majority's incomplete understanding of technology. In fact, every invention makes use of natural processes in order to work. The human race and its works are part of the natural world, and everything that we do is conditioned by, and depends on, the natural world, its laws, and the behavior of matter and energy in accordance with those laws."

Robert Stack reminds us that one of the interesting aspects of the *Monsanto* case is whether Monsanto could similarly restrict Schmeiser's use of his own crop based on its rights under the Act alone and in the absence of the Monsanto Technology User Agreement. As noted earlier, commentators find it disturbing to see how the majority could ignore the historical meaning of *use*, how they could ignore the French version of the Act which uses the word *exploiter*, which is not as ambiguous as the English term. Stack says this: "In the author's view, the law of patent infringement is complex enough

without confusing acts of infringement with a mere intention to infringe. An injunction against future use is all the FCTD and the FCA should have applied to Schmeiser (assuming they have a reasonable apprehension of future operation). Their suggestion instead of a possible ignorance defense likely creates more problems than it solves: about what does the farmer have to know to be an infringer - the patent, the invention, the presence of an odd characteristic in a crop? How will the ignorance defense work as farmers increasingly assume as a matter of course that some modifications have spread into their land and seed supply?"


In the present case, Schmeiser never operated the invention and never benefited from the presence of the transgene. Critics argue that the majority's definition is a long way from the idea that *use* means to work or operate the device as the inventor intended. The majority use the commercial concept to broaden patent rights. It tied the infringement to the detriment to the commercial interests of Monsanto despite the fact that the *Act* only empowers patentees to require licenses for the exercise of exclusive statutory privileges. Stack comments as follows: "if mere possession of an invention, the use of which the patentee usually licenses, is sufficiently detrimental to its commercial interests to constitute infringement, then possession is use, despite the old rule to the contrary." The majority noted that there was no rebuttal of the presumption of use because Schmeiser presented no evidence of an attempt to invest himself of the transgene. It is not clear why the majority would have held that Schmeiser had to cede his own personal property when the *Patent Act* does not grant Monsanto a right to possess it. Stack notes that general control of the plant not only exceeds the scope of the patent but the scope of the right to use. This is a clear extension of the position taken by both the majority and minority in *Harvard College* (see the dissent at paragraph 97).

What then is the present state of the law in Canada? I believe the law is in a state of uncertainty and that Parliament should intervene. It is my view that the decision in *Monsanto* in particular may have unforeseen effects on the ownership of conventional crops that are exposed to genetically modified reproductive materials. Bruce Ziff explains that "seeds that germinate will contain genetic material from both the donor and recipient plants, and those seeds may themselves migrate in various ways. Canola seeds are lightweight and can easily become airborne. As the commercial value of the plant is reposed in the seeds, most are harvested. However, there is inevitably some residual spillage in the harvesting or transportation of the crop. Canola seeds have

been found to subsist for up to 10 years in undisturbed soils. Moreover, a Canadian research paper suggests that Roundup Ready canola seeds are used as chicken feed and spread within manure remained viable one year later. . . The movement of pollen can lead to the merging of the genetic materials among different strains of sexually compatible canola. On the Canadian prairies there are at least six varieties of cultivated canola, and any one of these varieties can cross with the others. In rare cases, genetic transfer to other plant species can also occur." As noted in a recent New York Times editorial, these results demand a careful reassessment of how such plants are regulated.

There are also very important legal implications. The majority view in *Monsanto* provides that first-generation seeds that make their way onto someone's land provide that Monsanto rights are never lost. This is a change in the law of property; as Ziff would say, some rights are now common law resistant. There is also a problem where Roundup Ready pollen fertilizes a canola plant owned by Schmeiser. Who owns the plant? The ordinary rules of accession cease to apply. The majority in *Monsanto* refused to deal with accession on the basis that the issue was not about property rights. But are patent rights not property rights? Does the ruling not introduce a new accession rule? As Ziff remarks, "the infusion of every seed or speck of pollen into the crops of someone else renders Monsanto a co-owner of every plant thereby affected. You cannot use your property to damage me unless of course I permit it." This is simple enough to understand; although the seeds belong to the farmer, the patent still exists and the right of use is now placed in the hands of both the farmer and Monsanto. Furthermore, it is impossible to purge the gene from the plant. This is why *Monsanto* is said to be inconsistent with *Harvard College*. According to *Harvard College* it is the gene and cell that were patentable, not the plant. As noted by Ziff, unless a discrete patent defense is allowed for such situations, the property rights of otherwise innocent farmers can be affected by blow-by reception of certain types of patented genetic material.

The legal considerations resulting from *Monsanto* as well as the various scientific and economic concerns associated with genetic patenting should prompt a reconsideration of these issues by Parliament.

Thank you for your attention and interest in our jurisprudence. 

Justice Michel Bastarache of the Supreme Court of Canada presented this paper at the ABA-TIPS National Conference entitled "Animals and Bioengineering: A Consideration of Law, Ethics and Science" at Duke Law School on November 10, 2007.

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PEOPLE, PROCESS...

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behavior to assist in determining final disposition options. BAD RAP had also agreed to provide evaluation services for the dogs that would remain in the Virginia shelters. Nicole Rattay, the BAD RAP representative that performed this service for a six week period, provided me with notes daily about her interactions with the dogs. In addition to the dogs moved to foster homes, additional dogs were moved among the Virginia shelters and to the Washington Animal Rescue League, a private shelter, during the interim process to facilitate their ongoing evaluation and in response to an unexpected staffing shortage at one of the Virginia shelters.

Once the interim care arrangements were made I focused on the application process. The U.S. Attorney's Office and I had discussed the process prior to my appointment and the court order appointing me had set out minimum standards for the rescue organizations. I prepared the application for the rescue organizations and, once I received completed applications, researched the organizations using both the references that the organizations provided as well as independent contacts.

My second trip to Virginia was to facilitate the interaction between some of the dogs and interested rescue organizations and to make final decisions on the disposition of the dogs. Nicole Rattay accompanied me on the visits. I prepared a report for the court and the U.S. Attorney's Office filed a motion asking that the court adopt the report to provide for the dogs to be transferred to eight different rescue organizations.

The paperwork involved in this process was considerable. I reviewed documents and made recommendations for language but the drafting was the responsibility of the government. The Assistant Special Agent-in-Charge handled all the documents between the government and third parties – including but not limited to: agreements with each of the six Virginia shelters, agreements with the interim care providers, and agreements with the eight rescue organizations that received the dogs pursuant to the order of the court. In addition, each organization (and myself) that had physical contact with the dogs was required to execute a hold harmless agreement. Of course, the U.S. Attorney's Office handled all the court filings relating to the process.

Future Recommendations

I have a few recommendations for anyone asked to act in a similar capacity. First, get involved as early in


the process as possible. This will allow you to shape the process as much as feasible given the circumstances.

Second, make sure your role is well defined. Unfortunately during the interim period, one dog, Rose, was required to be euthanized for medical reasons. Although the U.S. Attorney's Office agreed on a process to authorize her euthanization, it would be useful to have that as part of the initial court order.

Third, providing for interim care is vital. The dogs involved in this case were seized in late April 2007 and the last dogs were transferred out of the shelters on January 2, 2008. Although in my opinion the dogs in this case were amazingly resilient, I believe the municipal and county shelters would be among the first to say that a shelter environment is not ideal for the long term care of animals. In addition, having ongoing evaluations from the interim care providers was very useful when I was preparing my recommendations to the court.

Finally, each dog must be considered as an individual. On my first trip to Virginia, Tim Racer and I named each of the dogs that hadn't already received a "call name" from their caretakers. I felt it was important, no matter what my final recommendation would be, that each dog had his or her own name, not just a kennel number. Each dog had his or her own unique personality and challenges that would need to be taken into account when determining the appropriate rescue organizations that would be used for the placement of the dogs.

Acting in the capacity of guardian/special master for these dogs was an experience I will always remember. It took many people working together to give these dogs a second chance.

Copies of many of the court documents relating to this case are available at: www.valpo.edu/law/faculty/rhuss. 

Rebecca J. Huss is a Professor of Law at *Valparaiso University School of Law*. Professor Huss' focus in research and writing is on the changing nature of the relationship between humans and their companion animals and whether the law adequately reflects the importance of that relationship. Her most recent publication is *Issues Relating to Companion Animals and Housing*, in *Animal Law and the Courts: A Reader* (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008). In 2007, Professor Huss was appointed by the District Court of the Eastern District of Virginia as the guardian/special master in Civil Action No.:3:07CV397, *United States v. Approximately 53 Pit Bull Dogs (the Bad Newz Kennels case)*.

PET HEALTHCARE...

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emotional stop-treatment limit without suffering any financial hardship, this might be true. But for those owners who cannot self-insure, the real benefit of PHI is peace of mind. For them, \$300 a year to avoid the heartache of economic euthanasia can be a bargain.

Policy Terms & Conditions

With nine insurers each offering up to six different plans, the terms and conditions of actual PHI policies vary widely. Several of these terms and conditions are notable for the legal issues they raise. A few are discussed below in broad strokes.

Two providers cover the treatment of illness or injury, medications, diagnostic procedures, surgery, and hospitalization, all only when “medically necessary” (AKC & Vsurance), defined as “appropriate and accepted according to good veterinary practice standards.” See, e.g., AKC policy MPH100 - EP (12/07), available at www.akchp.com/bhia/r/documents/terms_ep.pdf. Two carriers specifically exclude services that are not medically necessary (Embrace and Pets Best). Two other insurers do not mention necessity at all (Pet Care and VPI)—they do include exclusions for elective procedures, but this does not serve the same purpose.

It is common for *human* health insurance policies to limit coverage to “medically necessary” services, a standard evaluated by the California Supreme Court in *Sarchett v. Blue Shield of California*, 43 Cal. 3d. 1 (1987). There, the Court upheld the carrier’s decision not to cover Sarchett’s hospitalization for a leukemia test recommended by his doctor because the policy allowed for a review of the doctor’s decision by an impartial review committee, and that committee had found the doctor’s recommendations to be unreasonable. This case relied heavily on the facts, but it does raise a question: if a doctor’s recommendation may not qualify as “necessary” for humans, what is the necessity threshold for pets?

Most providers limit their reimbursement to the “usual, customary, and reasonable rate,” defined as the typical fees charged for a particular treatment by veterinarians in the general geographic area. See, e.g., AKC policy, *supra*. This clause protects insurers from excessive risk exposure and fraud, but a “typical fees” limitation would seem to be a *de facto* but unpublished schedule of benefits, and would allow a discretionary basis for the denial of coverage.

All policies exclude pre-existing conditions, generally defined as any disease, illness, or injury that occurred or existed prior to the date of the policy, whether or not the condition was previously diagnosed or treated. The initial application for coverage typically asks owners to disclose any relevant initial conditions and to affirm that their pet is otherwise in good health and free of illness or injury. Permanent pre-existing conditions are excluded from coverage, but some temporary conditions may be covered if they have been cured for a defined period of time. Certain conditions (e.g., cancer and diabetes) may preclude coverage not just of that condition but of *all* illnesses.

Hereditary and congenital conditions are specifically excluded as “pre-existing,” (i.e., existing at birth), as are “bilateral” conditions that have already been diagnosed on one side of the body (a previous cruciate tear in a dog’s left leg, for example, excludes a right leg cruciate tear as pre-existing).

Anecdotally, “pre-existing condition” is the most often cited reason for denial of claims, and one that exasperates and disgruntles owners. This is not unique to PHI—pre-existing condition clauses have been major issues in human health insurance and are subject to regulation. Congress’s Health Insurance Portability and Accountability Act of 1996 (HIPAA), for example, addressed the problem of “job lock” where people with existing health conditions could not change jobs because the move would require changing health insurance providers, and the new insurance excluded as “preexisting” any conditions currently being treated. PUB. L. 104-191, 100 STAT. 1936 (1996).

Under California Insurance Code § 533, a loss is not covered if an insured intentionally causes damage to his/her own property. Furthermore, an insured has an implied obligation to exercise reasonable diligence in protecting the insured property. Similarly, if the insured fails to take reasonable steps to preserve the property after it is damaged, the additional loss is not covered.

Most PHI policies incorporate some or all three of these principles. Several insurers expressly exclude treatment for injuries caused by intentional or deliberate acts by the insured (AKC, Vsurance, and Embrace). Some policies further exclude treatment arising from acts that are “neglectful or preventable” (AKC) or “illegal, criminal or wrongful (Pets Best).”

Several insurers obligate the owner to be proactive in caring for the pet. Two insurers exclude coverage when an insured failed to follow a veterinarian’s advice to

take preventive measure (Pet Care and Pets Best); three require vaccinations and annual exams to remain covered (Pet Care, Pets Best, and Embrace); and one dictates that owners must arrange for veterinary care as soon as a pet shows signs of injury or illness (Embrace).

Comparing PHI to Other Insurance

Exactly what type of insurance is PHI? It is legally classified as “miscellaneous” insurance because it does not fit into any other established insurance category. *See, e.g.*, CAL. INS. CODE § 22 (2007). But PHI is *health* insurance and obviously lends itself to comparison with *human* health insurance. Then again, animals are considered property under the law, inviting a comparison of PHI to property insurance. So, which is it?

PHI and human health insurance (HHI) have many similarities. Both cover expenses caused by illness or accident, reimbursing the insured for medical and hospital expenses. Both have significant exclusions or limitations that often are similar—pre-existing conditions and medical necessity clauses have already been discussed. Both segregate by risk, charging higher-risk insureds more as a group than the lower-risk insureds.

There are also significant differences between HHI and PHI. HHI originated with Blue Cross in 1929, and used the “fee-for-service” model similar to PHI, with insurers reimbursing patients for their direct payments to the physicians. *See generally* BlueCross BlueShield Assoc., *Blue Beginnings*, www.bcbs.com/about/history/blue-beginnings.html (last visited Mar. 5, 2008). But human health care has evolved into managed care—most patients now receive health care through health management organizations (HMOs) as part of a job benefit and rarely pay more out of their own pocket than a co-pay.

The nature of the covered risk is also inherently different. Human economic euthanasia does not exist—there is no financial “stop-treatment point” for people—and few people make life-or-death medical decisions based primarily on the cost. The difference between the risks addressed by HHI and PHI might be summarized as that of the human’s health versus the human’s bond with both the pet and his/her pocket-book.

There are major policy differences as well. Human health care is viewed by many as a right or an entitlement, and consequently attracts significant government attention, heavy government regulation, and direct government involvement through subsidization and direct participation (e.g., tax breaks and Medicare/Medicaid, respectively).

Finally, the size and expenses associated with each health care industry is another obvious difference. The

potential medical bill for a catastrophic human illness is hundreds of thousands of dollars rather than the few thousand for pets. Because the consequences are greater for humans, HHI costs are greater. In 2006, national human health care expenditures exceeded \$2.1 trillion, U.S. DEPT. OF HEALTH & HUMAN SVCS., *National Health Expenditure Account (NHEA), 2006 Highlights*, Centers for Medicare and Medicaid Services, www.cms.hhs.gov/nationalhealthexpenddata/downloads/highlights.pdf (last visited Mar. 5, 2008), over 200 times the 2007 veterinary figures of \$9.8 billion. APPMA, *Pet Owners Survey, supra*.

PHI also bears similarities to property insurance. With property insurance, the policyholder makes a claim if the property is damaged. PHI similarly covers “damage” to pets upon injury or illness. People purchase insurance for their homes and automobiles because the cost of replacing a house or a car could be financially devastating. Where a veterinary medical bill would be similarly ruinous, PHI serves the same function.

There are differences from property insurance as well, and one in particular raises an interesting issue. Both PHI and property insurance are contracts of indemnity, and the goal of indemnity is to reimburse the insured for the loss sustained. But with property insurance, the objective is to return insureds to the position they would have occupied had no loss occurred—the insured is not entitled to recover more than the decline in value of the damaged property. The insurance company may pay the insured the lesser of several alternative limitations: the policy limit; the value of the property; the amount of the insured’s interest in the property; or the lesser of the cost to repair or replace the property. *See generally*, ROBERT H. JERRY, UNDERSTANDING INSURANCE LAW 676-77 (2002).

The conflict this “make whole” policy creates between property insurance and PHI arises where pets, as property, do not carry much value. Even in cases where a court has awarded damages to a pet owner, usually for the death of the pet, such awards do not approach the average cost of catastrophic care. *See, e.g.*, *Corso v. Crawford Dog & Cat Hospital, Inc.*, 415 N.Y.S.2d 182 (1979) (awarding an owner \$700) and *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285 (1980) (awarding \$550). PHI, however, covers medical costs without considering any but the “policy limitation” alternative. The goal of PHI is not to restore the insured to the pre-injury value of the *property* but to restore a portion of the owner’s actual expenditure. In effect, the “property” insured by PHI is not the pet but the pocketbook.

PHI's Impact on Care Providers

There is much speculation and controversy about the impact PHI will have on pet care providers as it increases in popularity. For its part, the AVMA “recognizes that a viable companion animal health insurance program will be important to the future of the veterinary profession’s ability to continue to provide high quality and up-to-date veterinary service.” AVMA, *Guidelines on Companion Animal Health Insurance and Other Third Party Animal Health Plans*, May, 2003, www.avma.org/issues/policy/insurance_companion.asp (last visited Mar. 5, 2008). But many people believe that human health insurance and HMOs have negatively affected the quality and expense of human health care, and they fear that PHI (and PHMOs) will eventually have the same impact on pet care.

Conclusion

Pet Health Insurance is still a new frontier. To emphasize this point, a search on LexisNexis for appellate cases involving pet health insurance issues produces no results for any U.S. jurisdiction, a fact all the more surprising considering the quantity of litigation involving other types of insurance. This is not to say there have been no complaints or litigation over pet health insurance, only that no issues of law have been carried through to appeal. This is likely due to a combination of binding arbitration clauses and the relatively small amount of money involved in the underlying claims.

As a result, PHI almost raises more questions than answers, and unanswered questions lead to confusion and false expectations. To that end, a quick perusal of the Internet blogs and bulletin boards shows that not all policyholders have been satisfied with their pet insurance providers. Many owners mistakenly believed they were making an investment, then were disappointed when they “lost money” on the deal. Others bought into the insurers’ marketing and failed to read the fine print or consult with their veterinarian, then were disappointed to have their claims rejected under the “pre-existing condition” exclusion. Others overlooked that insurers are not in business to lose money, no matter how much they love animals.

As the industry matures and evolves, and as pet owners grow more sophisticated, answers will appear, boundaries will be found, and rough spots will be smoothed out. Consequently, pet health insurance is positioned to become a booming business, to the benefit of insurers and insureds alike. Aside from questions as to the long-term impact on the veterinary profession, PHI is an effective way to reduce at least one specific type of risk—economic euthanasia—and is relatively cheap peace-of-mind for those in danger of ever needing it. As the human-pet bond continues to grow and the cost of veterinary services continues to rise, that class of people is certain to expand. ⚖️

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Table 1. U.S. Pet Health Insurance Companies

Company	Website URL
Embrace Pet Insurance	www.embracepetinsurance.com
Hartville Pet Insurance	www.hartvillepetinsurance.com
<i>Also marketed under . . .</i>	
Petshealth Care Plan	www.petshealthcareplan.com
ASPCA	www.aspcapetinsurance.com
Premier Pet Insurance	www.premierpetinsurance.com
Pet Care Pet Insurance	www.petcareinsurance.com
Pet Partners, Inc.	www.petpartnersinc.com
<i>Also marketed under . . .</i>	
AKC Pet Health Insurance	www.akcpethealthcare.com
Farm Bureau Pet Healthcare	www.fsbphp.com
Pet Plan	www.gopetplan.com
Petfirst Healthcare	www.petfirsthealthcare.com
Pets Best	www.petsbest.com
Vsurance, Inc.	www.vsurance.com
Veterinary Pet Insurance (VPI)	www.petinsurance.com

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Census, U.S. POPClock Projection, <http://www.census.gov/population/www/popclockus.html> (last visited Mar. 19, 2008).

Resource consumption has grown even faster than the population: between 1982 and 1997, while the U.S. population increased by 17 percent, urbanized land increased by 47 percent. See WILLIAM FULTON ET AL., WHO SPRAWLS MOST? HOW GROWTH PATTERNS DIFFER ACROSS THE U.S.? 1 (2001), available at <http://www.brookings.edu/es/urban/publications/fulton.pdf>. There are few places in the country that have not been transformed by humans. The Natural Resources Defense Council reports that the amount of U.S. land lost to development more than doubled in the three decades between 1960 and 1990, despite the fact that the population increased by less than 50 percent. See National Resources Defense Council, In Contrast: Smart Growth versus Sprawl, <http://www.nrdc.org/cities/smartGrowth/contrast/contr5.asp> (last visited Mar. 19, 2008). Over 430 thousand miles of roads—more than 8 times the mileage of the Interstate Highway System—crisscross U.S. national forests, fragmenting and destroying animal habitat, as well as causing soil erosion, water sedimentation, and mudslides. See Natural Resources Defense Council, Forest Facts, <http://www.nrdc.org/land/forests/fforestf.asp> (last visited Mar. 19, 2008). Beach pollution is a problem in every coastal state; in 2006, pollution resulted in over 25 thousand days of beach closings and warnings at ocean, bay, and Great Lakes beaches. See Natural Resources Defense Council, Beach Pollution, <http://www.nrdc.org/water/oceans/qttw.asp> (last visited Mar. 19, 2008).

These statistics, along with many others, exemplify the devastating impact humans have on the environment, and in turn on many bird and animal species. A 2007 World Conservation Union report indicates that of the close to 8,000 animal species threatened with extinction, 99 percent are at risk from human activities; habitat loss and destruction is the most important threat, affecting 83 percent of the bird species sampled. The World Conservation Union, 2007 IUCN Red List of Threatened Species: Facts About Threatened Species, http://www.iucn.org/themes/ssc/redlist2007/threatened_species_facts_2007.htm (last visited Mar. 19, 2008). Human activities have already led to the extinction of 10 percent of the world's bird species. See Rodolfo Dirzo and Peter H. Raven, *Global State of Biodiversity and Loss*, 28 ANN. REV. ENVTL.

RESOURCES 137, 161 (2003). More than a thousand bird species are listed as threatened today; in the next fifty years, scientists predict at least half of those will become extinct. *Id.* at 162.

In short, the argument made by Mr. Stevenson and likeminded people is grossly misleading: humans, not cats, are responsible for all of the major threats to bird life, and indeed all animal life, today.

Killing Cats Won't Save the Birds

The argument represented by Mr. Stevenson fails in another important way: even if cats *did* pose a real threat to bird species, removing and killing those cats would have no positive effect. Humans created and have maintained an environment that is highly advantageous to cats. Indeed, current scientific research shows that the species *Felis catus*—which includes all cats variously described as domestic, pet, house, stray, and feral—came into existence 8,000 to 10,000 years ago when humans became a sedentary and agricultural species. See Stephen J. O'Brien and Warren E. Johnson, *The Evolution of Cats*, SCIENTIFIC AMERICAN, July 2007, at 74-75. Today, humans maintain an environment which continues to provide abundant food and shelter to cats, but which has become increasingly harmful to other species, such as piping plovers.

Killing a population of any adaptive species, while leaving in place the advantageous habitat in which it thrives, merely leaves an ecological void which is quickly refilled by members of that species. There is grim evidence of this: millions of stray and feral cats are killed every year in U.S. shelters and pounds, as they have been for over a century, yet their populations continue to thrive. See, e.g., National Council on Pet Population Study & Policy, The Shelter Statistics Survey, <http://www.petpopulation.org/statsurvey.html> (last visited Mar. 19, 2008). Even if cats did pose a threat to certain bird species, removing those cats—much less allowing individual people to shoot individual cats—would not succeed in protecting the endangered birds.

Looking Forward

What is the fate of endangered bird species, if birding advocates and some government officials continue to focus on irrelevant matters such as cat predation? In the coming decades, human population and resource consumption are projected to increase unabated. Experts predict the total U.S. population will grow by 27 million people each decade for the next three decades. See ALAN BERUBE AND BRUCE KATZ, STATE OF THE ENGLISH CITIES: THE STATE OF

AMERICAN CITIES, 26 (2006), available at <http://www.communities.gov.uk/documents/citiesandregions/pdf/153442>. America is becoming increasingly urbanized, and the demand for resources is increasing even faster: researchers at the Brookings Institution predict that by 2030, half of the buildings in which Americans live, work, and shop will have been built after the year 2000. *Id.* at 7. To ignore not only current but projected human population growth, habitat destruction, and consumption guarantees the deaths of millions of birds and animals, and may well cause the extinction of today's endangered species.

The Role of Animal Lawyers

This is merely a taste of the complexity of the issues surrounding species preservation and animal protection. The news media attention to Mr.

DUKE...

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§108, 121; *People v Noga*, 168 Misc. 2d 131. The Court also stated that “there was no testimony adduced at either of the hearings to demonstrate that Duke ever attacked or threatened to attack any person.” The Court did, however, find the alleged incidents sufficient to warrant the permanent, secure confinement of Duke.

Current Status of the Law

Today, AML §121 includes attacks on companion animals as a result of its 2004 amendment. Fortunately, the current version of the Dangerous Dog Law not only provides added protection for companion animal victims, but it also provides safeguards to protect the human defendant's due process rights, and, in turn, the accused animal, by providing judges with sufficient alternatives to permanent confinement and making the killing of the alleged accused animal a last resort rather than a knee-jerk reaction. If satisfied that the dog is a dangerous dog, the judge or justice must order neutering or spaying of the dog, microchipping of the dog, and one or more of the following: (a) evaluation of the dog by a certified applied behaviorist, a board certified veterinary behaviorist, or another recognized expert in the field and completion of training or other treatment as deemed appropriate by such expert; (b) secure, humane confinement of the dog for a period of time and in a manner deemed appropriate by the court; (c) restraint of the dog on a leash by an adult of at least twenty-one years of age whenever the dog is on public

Stevenson's claims serves as a warning that supposed “animal versus animal” conflicts may well be a diversionary tactic to evade human responsibility. Perhaps the greatest contribution lawyers can make to animal protection is to keep law and policy focused on the real causes of animal death. With skills in factual discovery and critical thinking, lawyers can play a leading role in creating new, more just solutions to the problems caused by human activities—solutions that don't include mass killing, and that allow humans to coexist with the other species on the planet. ⚖️

Ms. Anderson is the Legal Director of *Alley Cat Allies*, and Ms. Vaniotis is its legal writer. To learn the details of the Texas felony cruelty trial, visit www.alleycat.org/anticruelty.

premises; (d) muzzling the dog whenever it is on public premises; and/or (e) maintenance of a liability insurance policy. See AML §121(2)(a-e).

The law also requires that a hearing must be held within five days of the filing of a complaint, and that permanent confinement or euthanasia may be ordered only upon proof of the following by clear and convincing evidence: (a) the dog, without justification, attacked a person causing serious physical injury or death; or (b) the dog has a known vicious propensity as evidenced by a previous unjustified attack on a person, which caused serious physical injury or death; or (c) the dog, without justification, caused serious physical injury or death to a companion animal, farm animal, or domestic animal, and has, in the past two years, caused unjustified physical injury or death to a companion or farm animal as evidenced by a “dangerous dog” finding pursuant to the provisions of this section. AML §121(3)(a-c). An order of humane euthanasia shall not be carried out until expiration of the thirty-day period in order to allow the defendant sufficient time to appeal a dangerous dog finding.

Note that the law states the dog is not dangerous if the dog's conduct was justified. Justification includes if the injury or damage was sustained by a person who at the time was committing a crime or offense upon the owner or custodian of the dog or upon the property of the owner or custodian of the dog; if the dog was protecting itself from being tormented, abused, or assaulted; if the dog was protecting its offspring from being physically threatened, or if a person has in the past tor-

mented, abused, assaulted or physically threatened the dog or its offspring; or if the dog was responding to pain or injury. *See* AML §121 (4).

A Happy Ending

While at the Islip Town shelter, Duke garnered much support from the public as well as individuals who cared for him during the four years. Several of Duke's caretakers at the Islip Town Shelter, including the recently retired Islip Town Shelter Supervisor, Assistant Shelter Supervisor, and kennel aides, grew to love Duke and his sweet nature and filed affidavits, along with others, in support of Duke regarding their observations of Duke's well-mannered disposition. Through their four-year relationship with Duke, the Islip Shelter staff found Duke to be a very friendly dog who had never shown any aggression toward other animals or people. This was an exceptional animal shelter, with exceptional staff, and this was an exceptional dog, with an exceptional case.

Hopefully what happened to Duke will never have to happen to another animal. Unfortunately, procedures regarding dangerous dog cases needlessly and unjustly vary widely from town to town, judge to judge, and town attorney to town attorney. Unfortunately many dog owners do not understand the law. Even if the owner does have a good case, they sometimes choose not to fight it and just move on with their lives, not realizing the repercussions. For example, an injury may be exaggerated by the complainant and miraculously accelerate from a tiny accidental scratch from a dog simply playing with a child to claims of an aggressive mauling. If the dog is of a breed that has a bad reputation in the press, the owners are afraid to take any chances at fighting the charge. Many owners do not understand their rights and often sign a stipulation admitting that their animal is "dangerous" or has "vicious propensities" for fear of their animal being euthanized. In addition, many times owners fear that

even if they have a good case, they will lose, and they don't want their beloved animal being kept in an animal shelter, where their animal will feel abandoned, lonely, and fearful. These animals are family members, not just pets, and they don't want to leave their family members sitting in the equivalent of "jail" without the possibility of bail. One solution would be to provide for a conditional bond or bail that would allow the animal to come home pending the outcome of the appeal, conditioned, of course, on the owner keeping the animal confined. That would allow more people to challenge a dangerous dog charge and provide more justice for them and their animal.

The good news is that more and more law schools around the country are teaching animal law, and more state and local Bar Associations are developing animal law committees. Here, in New York, we have the New York State Bar Association's Special Committee on Animals and the Law, the NYC Bar's Committee on Legal Issues Pertaining to Animals, and the Suffolk County Bar Association Animal Law Committee. The more CLE programs and seminars that are provided by Bar Associations to educate attorneys about the laws that effect animals and their guardians, the better those laws will be applied and enforced, and the better animal guardians and their companion animals can sleep.

The Menendez family is so very grateful to the judges of the Appellate Division, Second Department, for finally bringing some justice to what seemed to be a never-ending emotional and financial nightmare for them, and for, most of all, allowing them to bring home their beloved boy, Duke. ⚖️

Amy Chaitoff, of *Chaitoff Law*, is a solo practitioner located in Smithtown, NY. Her practice focuses on representing clients with animal-related legal issues. Ms. Chaitoff is co-founder and Co-Chair of the Suffolk County Bar Association's Animal Law Committee, Chair of the Publications subcommittee for the New York State Bar Association's Special Committee on Animals and the Law, and Chair of the International Law Subcommittee of the ABA-TIPS Animal Law Committee.

What we do know is that thousands of pets suffered serious injury or died. Whether the number is ten thousand or eleven thousand remains to be finally determined.

The Lawsuits Begin

Not surprisingly, within days of the recall, litigation was filed. Some suits were for individual owners and others multi-plaintiff and/or class actions. We decided to take the class action route. Cases were filed across

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There is no absolute certainty about the number of pets who were injured or died. Because many, in the early months, were not autopsied, the evidence is circumstantial—albeit strongly circumstantial. For example, what are the odds that two young dogs, both healthy, both living in the same home (as companions to an autistic boy) both die within hours of each other from the same ailment?

the country, and at last count there were more than fifty. Encouraging the spread of litigation was the ever-expanding recall. Initially the suits were only against a few brands, and a few sellers. The list got larger and larger. As more product brands and lines were included within the recalled food, pet owners linked their pets' injuries with recalled products. For example, Chem-Nutra was the alleged primary importer of the Chinese wheat gluten. Early recall efforts focused upon its imports, but within two months the list of products was far greater than just Chem-Nutra imported wheat gluten.

As most manufacturers know, a product recall is always a risk, and the key to minimizing the adverse consequences to future marketing is to act decisively, promptly, and completely. One of the worst things is to do a recall that continues to expand. It shakes consumer confidence and keeps the issue in the press. The more adverse publicity, the more injured plaintiffs decide to contact a lawyer.

We elected to approach the case in two ways. First, because we have experience in nationwide class actions, this seemed the best way for the putative class to obtain relief. Of course class actions are governed by Federal Rule of Procedure 23, and this case fits within sections (b)(2) and (b)(3) class definitions. F.R.C.P. 23a(b) – (c). As Menu Foods' insurance and asset picture emerged, arguably a (b)(1) class, or limited fund emerged.

At the risk of oversimplification, there are three basic mechanisms for certification of a class action: a limited fund where the defendants' assets are inadequate to pay fair compensation to each class member in an equitable manner, thus creating a first-come-first-pay situation (b)(1); a class where injunctive or declaratory relief is appropriate on a class-wide basis (b)(2); and the more common class basis that the class mechanism is superior to individual resolutions (b)(3).

Several years ago Congress enacted the Class Action Fairness Act (CAFA), which was heavily promoted by business interests. CAFA expanded federal jurisdiction over class and mass tort actions. CAFA amended Title 28 Judiciary and Judicial Procedure, Sections 1332, 1453, and 1711 - 1715. Any class action with more than five million in aggregated class claims, more than 100 putative class members, and with multi-state class members and defendants is within the exclusive jurisdiction of the federal courts. There are some exceptions, but relative to the pet food class, none were applicable.

CAFA also addresses mass tort situations where multiple plaintiffs band together because their claims arise from common facts and they have similar injuries. Because many claims were filed on a multiple basis, in Federal Court, they were ultimately aggregated via a Multi-District Litigation procedure (MDL) into one court: the U.S District Court for District of New Jersey.

Present Status and Relief Sought

At present the parties are engaged in settlement discussions. It is premature to venture a guess on the success of those discussions. One element of relief, that is very important to all of the pet owners we have spoken with, is to ensure this tragedy doesn't happen again. Injunctive remedies, while attractive, may not be applicable here, unless discovery determines a course of conduct that violated government regulation and rules. Given the relatively unregulated nature of the pet food industry, that result may not happen. We remain optimistic that the industry, as part of any settlement, will agree to inspection and research protocols that will decrease the risk of future food contamination. Importation of raw material from countries whose agricultural regulations are less stringent than ours will remain a potential source of contamination for our pets and humans.

The primary thrust of this action remains the issue of damages. The determination of damage amounts is challenging. The laws regarding pet "valuations" are mired to an extent in antiquated notions that treat pets as mere property, indistinguishable from a sofa or a car. The subject of pet valuation is complicated and beyond the scope of this article. In this case however, the compelling evidence regarding the lack of adequate testing, the timeliness of the recall, and the sheer number of pets and families affected, suggests that the Court will subject pet valuation formulas to serious scrutiny.

In conclusion, it is safe to predict that within the next few months, we will all know more about the direction this case will take: either the largest pet injury case ever resolved, or the largest to go forward to trial.



Mr. Jeff Cereghino is a principal in the law firm of *Berding and Weil* located in Northern California. His practice is primarily in the representation of plaintiffs, in consumer and product class actions, and large multi-family construction defect cases. He has been practicing law since 1982, in both state and federal courts in numerous jurisdictions across the US.

SHARK TOURNAMENTS...

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The “Catch and Release” Program is Unjustifiable Cruelty

While these tournaments proclaim a “catch and release” policy that sounds humane, The Humane Society of the United States has stated that shark tournaments “cause more sharks to suffer and die than is immediately apparent. ... [T]he greatest cause of death is swallowing hooks [leading to] ... badly torn mouths, and subsequent infections.” Moreover, the gear used by sport fishermen are barbed hooks, which cause these injuries, unlike the readily available round hooks, which cause significantly less harm to the sharks. Given these alternative methods to catch sharks are readily available, the maiming and torture of sharks with barbed hooks is unjustifiable.

The question you are surely asking yourself now is “so what?” “These sharks are cruel and ugly creatures that repeatedly ruin my day at the beach.” While sharks have been demonized in pulp fiction, you are more likely to be attacked by the neighborhood dog than a shark. However, if you ask people which they fear more, it is always the shark. The way sharks have been portrayed by the media seems to justify the unjustifiable cruelty and torture of these great beasts. Sharks, much like dolphins and whales, give birth to live offspring, not eggs. However unlike dolphins or whales, sharks do not have a good public relations department. The best we can offer sharks is to enforce laws that prevent cruel and unjustified torture. AML §353 clearly prohibits the torture and maiming of any animal. However, shark tournaments, with the rush for grand prizes, create a hunt for the largest shark and a disposal of severely injured sharks that do not hold the promise of money. While deer hunters hope to swiftly kill their prey with one clean shot, shark tournaments, by the nature of the competition, seem to encourage bringing in the largest single shark without any apparent concern for the smaller sharks that are maimed or killed to acquire that one large shark.

Further, the Humane Society of the US states that sharks, as the chief predators of the Oceans, play an essential role in the balance of the marine ecosystem. The over-fishing of sharks leads to collapsing populations which, in turn, will lead to serious consequences for many other ocean species. Moreover, as stated

above, many of the sharks hunted at tournaments are listed as critically endangered. In fact, some shark populations have an estimated 50-80% decline. As this situation becomes more critical, purses at shark tournaments grow.

Hunting and fishing have not been prohibited by anti-cruelty statutes even though they are arguably the ultimate form of cruelty because these activities are found to be justified. *See People v. Voelker*, 658 N.Y.S.2d at 676. However, catch and release, as practiced now, is unjustifiably cruel. Shark tournaments seeking the largest catch and using barbed hooks cannot be defended, vindicated, or excused. Such cruel practices are avoidable without infringing on the interests of sports persons. *See People v. Curtiss*, 116 Cal. App. Supp. 771 (Cal. Super. Ct. 1931); *People v. Downs*, 136 N.Y.S. 440, 445 (NYC Mag. Ct. 1911). Laws pertaining to protecting “any animal” must do just that and not just protect those animals we find interesting, cute, or cuddly. ⚖️

Ms. Craft is the Senior Vice President of *Hudson Land Company, LLC*, a title insurance company specializing in commercial property transactions. Having received her BA from Kalamazoo College MI, Ms. Craft continued her education at Thomas Cooley Law School with a concentration in international law. She then attended Georgetown University Law School and attained her LL.M. in Taxation. Ms. Craft is a member of several prominent bar associations. Additionally, she is a member of many accounting and related associations. She frequently speaks for the various bar associations including the state bar and is the Chair of the tax section for New York County Lawyers Association for the 2006-2007 term. Ms. Craft is also a long time member of American Mensa and Greater New York Mensa, wherein she is involved in several special interest groups and think tanks throughout the region.

Mr. Echenthal is a Litigation Attorney for the Law Firm of *Harrington, Ocko and Monk* in White Plains, New York which represents plaintiffs and defendants regarding Toxic Tort, Labor Law (240, 241(6)), premises liability, and automobile liability from inception through verdict. He additionally represents clients in the fields of personal injury and criminal defense calling on his many years of experience in those fields. Prior to working in those fields, Mr. Echenthal worked as an Assistant District Attorney for Westchester County, NY, where he prosecuted misdemeanors and felonies from inception to verdict. Having received his BA from Long Island University, Mr. Echenthal continued his education at Thomas Cooley Law School. Mr. Echenthal is a member of the bar of the United States Supreme Court, the United States District Court for the Southern District of New York, the New York Bar, the New York County Lawyers Association, and the Westchester County Bar Association.

PUPPIES...

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the primary purpose of the sale of their offspring as companion animals, places one in the class of a commercial dog breeder in Virginia. The proponents of the bill originally wanted 20 dogs as the limit, but as with much legislation, the bill would have been defeated without the amendment. Even so, this is a huge step for our state. This will stop the puppy mill operations that HSUS discovered in our state as those operations clearly fall under this definition of commercial dog breeder.

Moreover, a business license is now required of commercial dog breeders. The Bill sets up requirements for commercial dog breeders. They may not maintain more than 50 dogs over the age of one year at any time for breeding purposes. Localities are allowed to adopt ordinances allowing more than this number, and they may include additional requirements. Again, proponents wanted a lower number of dogs, but until this legislation, there were no checks at all on the amount of animals. Thus, we had puppy mill operations that were breeding over 800 dogs per site. This is at least a step in the right direction.

However, the devil is always in the details. The additional requirements imposed upon commercial dog breeders show the real work of the proponents of this legislation: commercial dog breeders now have some humane requirements they must meet. Among them, is the condition that they can breed female dogs only (i) after annual certification by a licensed veterinarian that the dog is in suitable health for breeding; (ii) after the dog has reached the age of 18 months; and (iii) if the dog is under 8 years of age. In the puppy mill world, breeders literally breed dogs to death. For example, a female dog brought into one of the local shelters had to be euthanized because they had bred her so many times that her female organs were deteriorating. Having this certification of good health is a huge step forward. The age limits on the young dogs and the older dogs also will limit the abuses of these breeding operations. Breeding really young animals and really old animals is a common, abusive practice of these breeders.

The bill tightens requirements regarding disposal of living and deceased dogs, which again gets at the abusive practices of puppy mills. Furthermore, dog waste must be disposed in accordance with state and federal laws. Our state laws do not allow dogs to lie or be kept in feces encrusted cages and enclosures. This was another astute addition to the bill. There are many requirements that deal with accurate record keeping

and the disposition of the animals along with medical care and vaccinations. These requirements will stop the abuses. These puppy mills have no written or electronic records of any of their dogs and basically warehouse dogs without any regard to the animal cruelty laws. The new requirements are designed to make them accountable for the welfare of these dogs. These details should ultimately capture the bad breeders.

Finally, the law enforcement provisions of this new bill are trailblazing. There is a right of entry provision that allows the State Veterinarian or his agents, animal control officers, and any public health or safety official to investigate a commercial dog breeder operation. They have this right of entry upon receiving a complaint or may enter on their own initiative. Thus, they can investigate at will. This certainly shines a spotlight on these operations. Plus, the investigating agent can inspect the records of breeder, the companion animals owned by the breeder, and any place where animals are bred and maintained. The officer in carrying out the inspection may enter any premises where animals are bred or maintained during daytime hours. This gives the officers the ability to investigate thoroughly for the first time. It is an inspection scheme that allows the breeding operations to be exposed for what they really are: cruelty factories. The officers are not hamstrung by the breeders hiding behind the USDA permitting process. Additionally, these breeders will be subject to inspection by animal control at least twice annually and additionally upon receipt of a complaint or their own motion to ensure compliance with state animal care laws and regulations. This is truly progressive—not just for our state but also for the nation. It brings the puppy mills out into the light of day for the world to see how they operate.

For so many years, consumers have complained of these operations. Yet, they would purchase sick animals from them and were often frustrated by it. But the darker side is that these animals are living in a nightmare. The final blow to these abusive operations is that if a person has been convicted of a violation concerning abuse, neglect, or cruelty and then sells, offers for sale, or trades any companion animal, that person will be prosecuted for a Class 1 Misdemeanor, carrying up to 12 months in jail. This means that abusers cannot operate as a commercial breeder. If a breeder is convicted of abuse, this should be a means to stop them permanently from breeding animals.

I am very proud of the Virginians who worked together to get this bill passed. Virginia is now a leader

in stopping puppy mills and I am confident that we will put an end to them. These dogs can now be saved from this living nightmare. Other states should follow Virginia's lead. Virginia is "now" for puppy lovers. ⚖️

Reference: Virginia HB 538 which amends or enacts: Virginia Code Ann. § 3.1-796.66; 3.1-796.71:1; 3.1-796.77:1; 3.1-796.77:2; 3.1-796.77:3; 3.1-796.77:4; 3.1-796.77:5; 3.1-796.77:6; 3.1-796.104, 3.1-796.122:1; and 58.1.3-109 (effective July 1, 2008).

BIOENGINEERING...

Continued from page 1

definition of "animal." Goldtentyer concluded with policy goals of the USDA. Next, Rachel Lattimore, a partner at Arent, Fox LLP, explained the history of government oversight. She described how the framework of government oversight is coordinated among the different federal agencies, but is quite complicated. For example, the FDA has oversight over issues regarding transgenes, whereas the USDA has administrative control over animal health and welfare.

The next panel gave the audience an introduction to the science of animal genetics. Dr. Paul M. VanRaden, a research geneticist for the USDA, described how artificial selection can change populations for the better. He gave the example that dairy breeders have used artificial selection for centuries. Next, Dr. Robert Wall, a research physiologist, described the science of making clones and transgenic animals. He shared success stories of cloning and transgene modifications, and their positive effects on the human populations.

During lunch, Dr. Norka Ruiz of the National Institute of Health gave a speech on Bioengineering Research and Health. Ruiz said that in research, we need to weigh the benefits to people against the risks to animals. Ruiz then described the process by which research involving animals is reviewed. Finally, she looked at the successes of biomedical engineering research, from advances in organ repair to breast cancer research. There is a fundamentally different way we look at animals today, Ruiz concluded. To illustrate this point, Ruiz showed two photographs: one from the 1800's, showing a dog powering a treadmill to churn butter, and the other from more recent times, depicting a dog trotting on his own mini-treadmill alongside his owner's treadmill.

After lunch, a panel showcased different perspectives on public policy. Joyce Tischler, cofounder of the Animal Legal Defense Fund, spoke about the patenting of animals. She described the 1980 case *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), and how subsequent cases have reinterpreted and extended its holding.

Michelle Welch is an Assistant Attorney General in the Virginia Attorney General's Office. She is the Assistant charged with responding to all animal law questions in Virginia. She frequently advises local law enforcement authorities and prosecutors throughout Virginia and across the nation. Formerly, Welch was a Deputy Commonwealth's Attorney in the City of Richmond in charge of all animal abuse and dog fighting prosecutions, among other things. She is the point person for all animal law questions and is considered an expert on animal law. She may be contacted at mwelch@oag.state.va.us.

Tischler urged dialogue between scientists and lawyers, and hoped they will find middle ground. Then, Cathy Liss, the President of the Animal Welfare Institute, described the strengths and weaknesses of the Animal Welfare Act. She asserted that the act has reduced the sum total pain and fear inflicted on animals by people. She noted, however, the Helms Amendment excludes rats, mice, and farm animals from this protection. Dr. B. Taylor Bennett gave a veterinarian's perspective on regulation of animal care. Bennett said the goal is for animal welfare while advancing biologic knowledge and an enhanced quality of medicine. Following Dr. Bennett was Dr. Barb Glen, the managing director of Animal Biotechnology in the Food and Agriculture section. Glen spoke about priorities and the status of the biotechnology industry. Whereas some products are on the market for public health and safety, other products are strictly ornamental, such as the zebrafish. The last panelist was Professor William A. Reppy, of Duke University School of Law. Prof. Reppy argued that every state should redesign its law so that torture in labs can be prosecuted by the state, because federal oversight might miss it.

The fourth panel highlighted developments in the field. Dr. Eddie Sullivan, Chief of Operations of HemaTech, spoke about transgenesis for human health and resistance of bovine spongiform encephalopathy (BSE), commonly known as mad-cow disease. Sullivan described biopharmaceuticals, animal made pharmaceuticals, and research regarding AIDS, Anthrax, and Malaria. Dr. Irina Polejaeva of ViaGen, Inc. then spoke about enhancing genetic improvement. She asserted that cloning really is "assisted reproductive technology." Joseph McGonigle of Aqua Bounty Technologies explained transgenesis for food application. He talked about transgene Atlantic salmon, which are currently on the market. The next morning, the panel continued with Dr. Thomas Coffman, from Duke School of Medicine. Coffman described the process of gene modification in detail, and explained how gene targeting works.

The first panel of the second day took the stage, discussing the ethical issues in the use of animals.

Professor Bernard Rollin of Colorado State University addressed three ethical issues of genetic engineering of animals: 1) the claim it is intrinsically wrong; 2) its danger to society and nature; and 3) its likelihood to produce a good deal of suffering to the animals. Rollins argued that the only real issue is that of animal welfare. Next, Professor Margaret Riley of the University of Virginia School of Law spoke about the ethics of animal biotechnology. Riley said ethics is a process, and described an approach to ethical analysis.

Justice Michel Bastarache of the Supreme Court of Canada spoke in the next panel about his majority opinion in *Harvard College v. Canada Commissioner of Patents*, 4 S.C.R. 45, 2002 SCC 76. According to the Canadian Supreme Court's majority opinion, the mouse was not patentable because higher life forms cannot be an invention. Justice Bastarache then discussed *Monsanto Canada Inc. v. Schmeiser*, 2004 A.C.W.S.J. 6173, where the court opined that a patent for a special plant gene does not extend to seeds. Justice Bastarache compared the *Harvard College* decision with *Monsanto Canada Inc.* decision, and stated that these two cases are hard to reconcile. Justice Bastarache recommended that the Canadian Parliament intervene on this issue in the future.

During lunch, Dr. Charles Hamner gave a speech about the influence of bioengineering and alternatives to the use of animals. During his speech, Dr. Hamner gave a detailed scientific explanation of bioengineering methods.

The final panel of the conference discussed future prospects for law and regulation. Professor Stephen

Wise spoke about legal control over the genetic modification of animals. He warned that we need to be careful of exploiting the weak for our own purposes. Jeannie Perron, an attorney at Covington & Burling, argued that there should not be more regulations or a larger bureaucracy. Instead, she maintained, regulations need to be better organized. Professor David Favre of Michigan State University College of Law spoke about developing public policy for genetic manipulation of animal genes. Favre has devised an eight step method to determine whether genetic modifications are tinkering with the animal's being.

As this conference demonstrated, there is a delicate balance between scientific innovation, ethics, and law. Professor Favre likened humans to gods, with the power to create and destroy. David Furlow, the Media, Defamation and Privacy Committee Chair, expanded upon Professor Favre's metaphor: "In Hindu mythology, there is Shiva the Destroyer, Vishnu the Sustainer, and Krishna the Creator. This is a tripartite analogy for humanity's relationship with animals." Humanity destroys rainforests and populations of animals, sustains through conservation, and creates with bioengineering. As the guardian of both innovation and other species on Earth, humanity has a special duty to use these powers in a responsible and judicious manner.

Jane Cynthia Graham is a second-year law student on scholarship at the *University of Miami School of Law*. She is the law student vice chair of the Animal Law Committee of the ABA Tort Trial and Insurance Practice Section, and is the vice president of events of the University of Miami Student Animal Legal Defense Fund.

AN ENCOURAGING WORD FROM ABA TIPS CHAIR, PETER BENNETT


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In reading the November issue of the *ABA Journal*, I was happy and proud to see the article *Beast Practices*, on one of the newest emerging areas of practice, animal law. This topic is of particular interest to me as the Tort Trial and Insurance Practice Section is the only entity in the association with an Animal Law Committee.

In fact, most of the people interviewed for the article are leaders in this committee and some were panelists for the TIPS 2007 ABA animal law program "How to Represent Petey: Animals in Entertainment," which was the 2007 ABA Annual Meeting program referred to in the article.

While this very active group only has been a TIPS committee for just over three years, it has grown substantially, with an international membership. This highly energized entity has been instrumental in presenting CLE programs (with prominent speakers

such as animal scientist and author Temple Grandin), delivering teleconferences, conducting committee meetings and presenting an Excellence in the Advancement of Animal Law Award at the ABA Annual Meeting.

In addition, this entity has partnered with many other related organizations and has engaged in animal rescue work during the natural disasters we have recently experienced on both coasts. I invite you to visit the TIPS Animal Law Committee website at www.abanet.org/tips/animal/home. For information on joining the TIPS Animal Law Committee, please contact Linda Wiley at lmwiley@staff.abanet.org. 

Peter Bennett Portland, Maine 2007-2008 Chair Tort Trial and Insurance Practice Section

2008-2009 TIPS CALENDAR

August

7-12 **ABA Annual Meeting** **Waldorf~Astoria Hotel
New York, NY**

September

30 – Oct 5 **TIPS Section Fall Meeting** **The Westin Resort
Hilton Head Island
Hilton HeadIsland, SC**

November

6-7 **Fidelity and Surety Law Committee
Fall CLE Program** **Renaissance Harbor Place
Baltimore, MD**

2009

January

22-23 **Fidelity and Surety Law Committee
Midwinter Meeting** **Waldorf Astoria
New York, NY**

February

11-17 **ABA Midyear Meeting** **TBD
Boston, MA**

26-28 **2009 Insurance Coverage Litigation
Committee Meeting** **Millennium Biltmore
Hotel
Los Angeles, CA**

March

5-6 **Transportation MegaConference IX** **Sheraton New Orleans
New Orleans, LA**