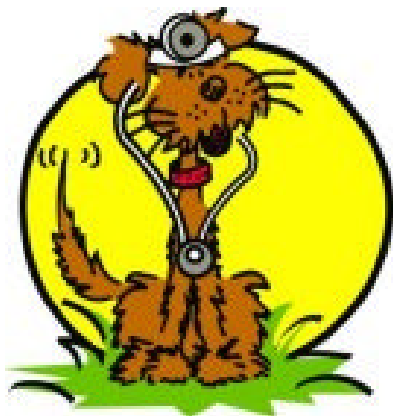


TAKE A BITE OUT OF VETERINARY MALPRACTICE

BY

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Animal health care, particularly small animals, is a multi-million dollar industry.² According to the National Pet Owners Survey, 63% of U.S. households, or 71.1 million homes, own a pet.³ In 2008, it is

estimated that U.S. consumers will spend approximately \$43.4 billion on their pets, including \$10.9 billion on veterinary care.⁴ In a reflection of the special place that pets have come to hold in Americans' hearts, U.S. courts have begun to take claims of veterinary malpractice seriously.⁵ Veterinary malpractice is arguably the most rapidly evolving area in animal law and is considered by many to be the fulcrum for what will happen elsewhere.⁶

While veterinary medicine stands at the zenith of its ability to provide medical and surgical care to over 143 million dogs and cats nationwide, allegations of veterinary malpractice focus unwanted attention on the profession,⁷ and reports of malpractice profoundly harm veterinarians' reputations.⁸ The emergence of veterinary malpractice lawsuits is not just driven by Americans' deep emotional bonds with their pets, but also by advances in veterinary medicine that have raised expectations that pets will live longer.⁹

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² Patrick T. Holscher, *Pets and Professional Liability*, 29-APR Wyo. Law. 18 (2006).

³ http://www.americanpetproducts.org/press_industrytrends.asp (last accessed on Oct. 3, 2008).

⁴ *Id.*

⁵ Laura Parker, *When pets die at the vet, grieving owners call lawyers*, USA Today (Mar. 14, 2005).

⁶ Barbara J. Gislason, *Veterinary Malpractice—Leading the Evolution of Animal Law*, TortSource, Vol. 7, No. 3 (Spring 2005).

⁷ Gerald L. Eichinger, *Veterinary Medicine: External Pressures on an Insular Profession and How Those Pressures Threaten to Change Current Malpractice Jurisprudence*, 67 Mont. L. Rev. 231, 232 (Summer 2006).

⁸ *Id.* at 259-60.

⁹ Parker, *supra* note 5.

More than 2,000 cases alleging veterinary malpractice are filed in U.S. courts annually. The actual number of claims veterinarians file with their malpractice insurance carriers is considered proprietary and is otherwise unknown. However, based on data provided by AVMA PLIT, the leading veterinary malpractice carrier,¹⁰ the frequency of claims rose from one claim for every 25 veterinarians in 1983 to one claim for every 16 veterinarians in 1993. A senior executive at ABD Insurance, the second largest veterinary malpractice carrier, has also noted that the number of claims is continuing to rise. Professional insurance consultants report a dramatic rise in veterinary malpractice claims as well. One attorney who publishes a newsletter tracking animal-related lawsuits claims that veterinary malpractice litigation has increased over 300% in the last five years. Veterinary malpractice settlements have been rising as well. A leading animal rights attorney noted that when he first started practicing in the 1980s, malpractice awards against veterinarians rarely exceeded \$1,000. Today, he reports that \$10,000 settlements are not uncommon.¹¹

What is Veterinary Malpractice?

When an animal is injured as a result of something within a veterinarian's professional knowledge, the legal cause of action is classified as one based in malpractice. For a plaintiff, or animal owner, to recover damages for injury to an animal in a malpractice action, the plaintiff must prove that the veterinarian owed a duty of care to the animal in question. This means that the veterinarian accepted responsibility to treat the animal that the plaintiff brought to his office. Secondly, the plaintiff must prove that the veterinarian, via his actions or inactions, breached that duty of care. Generally, this means that, in treating the animal, the veterinarian did not act with reasonable skill, diligence and attention as would ordinarily be expected of veterinarians. The plaintiff must also prove that the veterinarian's breach of the duty of care proximately caused the animal's injury. With proximate cause, a malpractice plaintiff must show that the veterinarian's

¹⁰ At present, AMVA PLIT provides professional liability insurance coverage for approximately 70% of U.S. veterinarians.

¹¹ Eichinger, *supra* note 7, at 234-35.

actions set in motion a chain of events that brought about the animal's injury. Lastly, the plaintiff must prove that the animal's injury resulted in damages to the plaintiff, not just to the animal in question. While this may seem odd at first blush, it stems from the fact that the animal injured is not a party to the lawsuit. Thus, the owner must show that he or she suffered some loss.^{12 13}

The professional duty of a veterinarian usually begins with obtaining the history of an animal, followed by a physical examination. In treating the animal, the veterinarian must use professional learning, skill and care, beginning with his initial contact with the animal, through diagnosis and treatment of any problems. Throughout this process, the veterinarian has a duty to keep the animal's owner informed and obtain the necessary consent for suggested treatment. In obtaining permission for treatment, the veterinarian should disclose the risks associated with such treatment.¹⁴

Misdiagnosis

As the case of *Lunas v. Stockton* demonstrates, misdiagnosis can serve as the basis of a veterinary malpractice claim. In *Lunas*, a veterinarian was sued for misdiagnosing testicular cancer in the plaintiff's dog. Such misdiagnosis ultimately resulted in the dog's death.¹⁵

Inappropriate Treatment

Provided that a veterinarian accurately diagnoses an animal's problem, then the issue of appropriate treatment must be met. If the treatment is a medical or surgical procedure, the veterinarian is under a duty to perform the procedure competently. If the treatment is a medication or inoculation, the veterinarian is under a duty to prescribe an appropriate medication in an appropriate dosage.¹⁶

¹² David S. Favre, *Veterinarian Malpractice*, http://www.animallaw.info/articles/art_details/print/htm (last accessed on Oct. 2, 2008).

¹³ Rebecca F. Wisch, *Overview of Veterinary Malpractice*, <http://www.animallaw.info/articles/qvusvetmal.htm> (last accessed on Nov. 5, 2008).

¹⁴ Favre, *supra* note 12.

¹⁵ Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, *Animal Law*, Vol. 10 125, 135-36 (2004) (discussing *Lunas v. Stockton*, No. PF 261.90 (Alameda County, Cal. Apr. 2, 2003) (unpublished opinion)).

¹⁶ Favre, *supra* note 12.

As the below cases demonstrate, negligently performed medical and/or surgical procedures can give rise to malpractice claims. In *Carter v. La. State Univ.*, the plaintiff's horse suffered from a stomach disorder. While treating the horse, the defendant veterinarian covered the horse's tail with a plastic protective sleeve bound with a strip of adhesive tape. The horse's tail, however, was wrapped too tightly and gangrene developed, thereby necessitating the tail's amputation. After bringing a malpractice action against the veterinarian for loss of the horse's tail, the plaintiff was awarded \$34,000 in damages.¹⁷ Similarly, in *Knowles Animal Hosp., Inc. v. Wills*, the plaintiff-dog owner was awarded \$13,000 in compensatory and punitive damages after a veterinarian left his dog on a heating pad for nearly two days resulting in burns and disfigurement so severe that the dog had to be euthanized.¹⁸ In *Bluestone v. Bergstrom*, a California jury awarded \$39,000 to an owner whose dog died of complications from seizures.¹⁹ Other large awards for companion animal loss include a 1997 Kentucky case where a pet owner was awarded \$15,000 when his German Shepherd died after being negligently spayed.²⁰ In 2000, a southern California judge awarded a plaintiff \$27,699 after her Rottweiler's teeth were broken and its nails mangled in a surgery gone wrong.²¹

Likewise, negligent administration of medications and inoculations can result in claims of malpractice. In *Ruden v. Hansen*, a veterinarian was found liable of malpractice where, contrary to the manufacturer's labeling, he vaccinated pregnant gilts with a modified live cholera vaccine.²² Similarly, in *Kerbow v. Bell*, the jury's verdict against a veterinarian was upheld where the veterinarian dipped dogs in an improperly mixed solution of lye, sulphur and P&G soap which resulted in the dogs' deaths.²³ In *Durkin v. Equine Clinics, Inc.*, the appellate court vacated a judgment in favor of a veterinarian where a 6-year-old racehorse died approximately 10 minutes

¹⁷ *Carter v. La. State Univ.*, 520 So. 2d 383 (La. 1988).

¹⁸ *Knowles Animal Hosp., Inc. v. Wills*, 360 So. 2d 37 (Fla. Dist. Ct. App. 1978).

¹⁹ Eichinger, *supra* note 7, at 249-50.

²⁰ Eichinger, *supra* note 7, at 251 (discussing *Stephanski v. Wimpy*, No. 96 CI 00118, DEC 261.60 (Ky. Cir. Ct. Apr. 14, 1997)).

²¹ Eichinger, *supra* note 7, at 251 (discussing *Evers v. Palmer*, No. 773909 (Super. Ct. Orange County, Cal. 2000)).

²² *Ruden v. Hansen*, 206 N.W.2d 713 (Iowa 1973).

²³ *Kerbow v. Bell*, 259 P.2d 317 (Okla. 1953).

after the veterinarian injected it with Butazolidin in a dosage which was twice the manufacturer's maximum recommended dosage. Although the veterinarian was aware of the maximum recommended dosage on the package insert, he deliberately chose to prescribe a "double dose."²⁴ Finally, in *Rappaport v. McElroy*, the plaintiff received a \$15,000 settlement when his cat died after being treated for fleas with a pesticide intended for use only in cattle.²⁵

Lack of Informed Consent

A veterinarian who does not fully and properly inform a client of the various types of treatment and care available, or does not properly inform the client of the risks associated with each treatment, may find himself exposed to a malpractice claim.²⁶ In *Loman v. Freeman*, plaintiffs initiated a malpractice action against a veterinarian alleging that he performed an unauthorized surgery on their horse. In upholding the plaintiffs' claim, the appellate court acknowledged that "one of the tenets of veterinary medicine [was] that . . . [a] veterinarian must obtain the owner's consent [before performing non-emergency surgery]." In the court's words, "[v]eterinarians must always remain mindful of client communication. Effective client communication include[d] securing informed consent from the client before performing a procedure."^{27 28}

Malpractice as Basis for Disciplinary Action

Veterinary malpractice may also be a basis for disciplinary action.²⁹ In *Massa v. Dep't of Registration & Educ.*, a veterinarian's license was revoked for gross malpractice arising from the veterinarian's removal of a known healthy uterus from a dog, but his ignorance of a serious lung

²⁴ *Durkin v. Equine Clinics, Inc.*, 459 A.2d 417 (Pa. Super. Ct. 1983).

²⁵ Eichinger, *supra* note 7, at 251 (discussing *Rappaport v. McElroy*, No. 95E09139 (L.A. Mun. Ct., Van Nuys Branch, filed Sept. 25, 1995)).

²⁶ Gregory M. Dennis, *What a Bite! Veterinary Malpractice Claims*, Kansas State University, College of Veterinary Medicine (Sept. 27, 2005).

²⁷ *Loman v. Freeman*, 874 N.E.2d 542 (Ill. App. Ct. 2006) (quoting Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, Animal Law, Vol. 10 125, 150 (2004)).

²⁸ *Tarpy v. County of San Diego*, 1 Cal. Rptr. 3d 607 (Cal. Ct. App. 2003), demonstrates the importance of obtaining informed consent. In *Tarpy*, the plaintiff's dog died of complications from a spay procedure. The plaintiff's veterinary malpractice claim, however, was dismissed because he had signed a form prior to the spay procedure in which he acknowledged that he was aware of the procedure's risks, consented to the procedure's performance and released the veterinarian from liability for any complications arising from the procedure.

²⁹ Dennis, *supra* note 26.

condition.³⁰ Like the veterinary boards of other states, the West Virginia Board of Veterinary Medicine may suspend or revoke a veterinarian's license for "[i]ncompetence, gross negligence or other malpractice in the practice of veterinary medicine."³¹

Respondeat Superior

Under the doctrine of *respondeat superior*, veterinarians are also responsible for the negligence of associate veterinarians and others working under their supervision.³² In *Boswell v. Iowa Bd. of Veterinary Med.*, a veterinarian's license was revoked where, among other things, he allowed his assistants to perform unsupervised surgical procedures, such as neutering, declawing and anesthetizing dogs and cats.³³ Similarly, in *Riegel v. Ohio Veterinary Med. Bd.*, a veterinarian's license was suspended when he permitted a veterinary technician to perform surgery.³⁴ In a particularly egregious 2002 Arkansas case, a dog owner stated claims for ordinary negligence and malpractice against a veterinarian where, among other things, office personnel choked a dog in order to quiet it.³⁵ This case illustrates why veterinarians should remain diligent in selecting qualified personnel and in supervising such personnel. Otherwise, veterinarians risk exposing themselves to liability under the doctrine of *respondeat superior*.³⁶

Non-Economic Damages

Under West Virginia law and that of many other states, animals are considered personal property.³⁷ Consequently, non-economic damages, such as mental anguish, pain and suffering and loss of companionship, are generally not allowed as compensation for a pet's negligent injury or death.³⁸ Veterinarians should not, however, lull themselves into believing that as long as animals are accorded personal property status they are safe from liability for non-economic

³⁰ *Massa v. Dep't of Registration & Educ.*, 507 N.E.2d 814 (Ill. 1987).

³¹ W. Va. Code § 30-10-11(f) (2008).

³² Nunalee, *supra* note 15, at 150.

³³ *Boswell v. Iowa Bd. of Veterinary Med.*, 477 N.W.2d 366 (Iowa 1991).

³⁴ *Riegel v. Ohio Veterinary Med. Bd.*, 655 N.E.2d 220 (Ohio Ct. App. 1995).

³⁵ Nunalee, *supra* note 15, at 157 (discussing *McAdams v. Faulk*, 2002 WL 700956 (Ark. Ct. App. Apr. 24, 2002)).

³⁶ *Id.*

³⁷ W. Va. Code § 19-20-1 (2008).

³⁸ Eichinger, *supra* note 7, at 242-43.

damages as a result of professional malpractice.³⁹ As courts openly struggle with the seeming harshness of denying animal owners non-economic damages for their emotional pain and suffering after they have wrongfully lost a loved pet, non-economic damages are coming under increasing consideration.⁴⁰

As recently as 2005, Justice Starcher urged the West Virginia Supreme Court to alter common law prohibiting pet owners from recovering non-economic damages in connection with the negligent injury or death of their pet. In Justice Starcher's words, "[w]hen the common law of the past [was] no longer in harmony with the institutions or societal conditions of the present, [the] Court was constitutionally empowered to adjust the common law to current needs."⁴¹ Since the trend toward allowing non-economic damages in companion animal cases reflects society's attitude toward companion animals in general, the trend is unlikely to reverse itself.⁴²

How to Avoid Veterinary Malpractice

Obviously, the best way for a veterinarian to avoid malpractice claims is to simply not perform his or her duties in a negligent manner.⁴³ While that is easier said than done, there are a number of simple steps that veterinarians can take to protect themselves against malpractice claims.

Purchase malpractice insurance. Compared to other types of insurance, veterinary malpractice insurance is relatively inexpensive. Coverage for small animal practitioners typically only costs several hundred dollars per year. In spite of its affordability, however, 10%-20% of veterinarians are without professional liability insurance.⁴⁴

Maintain accurate medical records. Veterinary medical records may constitute important evidence in veterinary malpractice actions, and veterinarians should take great care in properly

³⁹ Nunalee, *supra* note 15, at 133.

⁴⁰ Eichinger, *supra* note 7, at 244-45.

⁴¹ *Carbasha v. Musulin*, 618 S.E.2d 368 (W. Va. 2005).

⁴² Nunalee, *supra* note 15, at 136.

⁴³ *Veterinary Malpractice Lawsuits: How To Avoid & How To Sue*, <http://www.bestforpet.com/pet-laws/1590-veterinary-malpractice-lawsuits-how-avoid-how> . . . (last accessed on Oct. 2, 2008).

⁴⁴ Eichinger, *supra* note 7, at 235.

maintaining them.⁴⁵ The importance of documentation cannot be over-emphasized. Even exemplary advice and patient care is difficult to prove without documentation.⁴⁶

Develop an informed consent policy. A prudent veterinarian should develop a policy to secure informed consent prior to performing any procedure.⁴⁷ While securing informed consent does not guarantee that there will not be a lawsuit, such written documentation does indicate that a client was made aware of the risks involved with a particular procedure.⁴⁸

Client communication. One of the most important factors in a client's decision to sue his or her veterinarian has nothing to do with negligence, but rather his or her veterinarian's inability to communicate with passion and concern.⁴⁹ Communication breakdowns cause many problems in the relationships between veterinarians and their human clients. These breakdowns generally occur either before-the-fact or after-the-fact. Before-the-fact communication problems generally include clients' mistaken perceptions or unrealistic expectations regarding outcomes and veterinarians' failures to inform clients on these issues. After-the-fact communication problems generally include the failure on the part of the veterinarian or the veterinarian's staff to show adequate compassion and failure to give adequate and direct answers to difficult questions.

Hire qualified employees and properly supervise them. Since veterinarians, like other employers, may be held accountable for the negligent acts and omissions of their employees, it is essential that veterinarians develop employment policies that result not only in the hiring of qualified employees, but in employees' proper supervision.

Revise business entity. Due to the rise in veterinary malpractice claims, veterinarians may also consider abandoning sole proprietorships or partnerships in favor of professional associations, corporations or limited liability companies designed to minimize personal liability.⁵⁰

⁴⁵ Nunalee, *supra* note 15, at 150.

⁴⁶ *Id.* at 146.

⁴⁷ *Id.* at 153.

⁴⁸ *Id.* at 146.

⁴⁹ Eichinger, *supra* note 7, at 238.

⁵⁰ Nunalee, *supra* note 15, at 159.

Conclusion

At one time, veterinarians were not exposed to the threat of lawsuits. However, that's no longer the case. Veterinarians can and do get sued, and malpractice lawsuits have become a significant issue for veterinarians.^{51 52} There is a growing tendency of courts to allow non-economic damages in cases involving the loss of companion animals.⁵³ As the law expands to allow non-economic damages for pet loss, the incidence of veterinary malpractice suits is likely to increase.⁵⁴

If the current trends continue, veterinary malpractice lawsuits will become more frequent.⁵⁵ For veterinarians, this means an increased vigilance in their practices in general. Like other professionals, veterinarians must be careful to avoid falling into one or more of the following common malpractice traps: lack of documentation; substantive error; administrative or clerical error; and bad client relations.⁵⁶ Veterinarians will, out of necessity, need to form closer personal relationships with attorneys who can advise them regarding entity formation, record keeping, client communication systems and other risk management policies.⁵⁷

If you have any questions regarding veterinary malpractice or would like to meet with an attorney to discuss ways in which your exposure to veterinary malpractice can be minimized, please contact Jenkins Fenstermaker at 304-523-2100.

⁵¹ Holscher, *supra* note 2, at 19.

⁵² *Supra* note 43.

⁵³ Nunalee, *supra* note 15, at 134.

⁵⁴ *Id.* at 137.

⁵⁵ *Id.* at 159.

⁵⁶ *Id.* at 150.

⁵⁷ *Id.* at 159.