

# VETERINARY LEGAL LIABILITY

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## UNDERSTANDING AND AVOIDING VETERINARY MALPRACTICE LAWSUITS

### I. LAWSUITS AGAINST VETERINARIANS ARE INCREASING.

In 2006, USA TODAY wrote an interesting article on the subject of veterinary malpractice. The article noted that the 64 million pet owners in this country spend an average of \$18 billion on pet health care (citing the AVMA), and that the owner of a typical American dog will spend almost \$6000 on veterinary care on the animal during its lifetime.

The article's author concluded, "The emergence of veterinary malpractice lawsuits is driven not just by Americans' deep emotional bonds with their pets, but also by advances in veterinary medicine that have raised expectations that pets will live longer." Well, maybe. But having defended hundreds of these cases and represented many veterinarians in connection with licensing board disciplinary proceedings, I would like to offer you an alternative theory.

- Ten years ago, lawsuits against veterinarians were rare. Since that time, the number of suits has risen dramatically.
- Why the Increase? Consider:
  - Alexander Pope's *Essay on Criticism*:

"A little learning is a dangerous thing. Drink deep, or taste not  
The Pierian spring. There, shallow draughts intoxicate the brain,  
and drinking largely sobers us again."
  - Pope was essentially arguing in this Essay that "pride" is the greatest obstacle to sound, objective criticism of artistic works. Most pet owners love their pets very much. Generally, owners are proud and protective of their pets. Unfortunately, some owners confuse love of their pet, with medical knowledge.
  - When a pet owner sues a veterinarian, the owner is making a critical judgment about the vet. In the vast majority of lawsuits I've defended, the owners did not retain a veterinary expert before suing. Rather, they just turned on their home computer, and got themselves, "A Little Learning."

- Make no mistake: When a pet owner sues a veterinarian, in most cases, they are telling you, in effect, they know more about veterinary medicine than you do. Why? Because a little learning makes critics susceptible to pride, and pride interferes with the owner's ability to judge your professional conduct objectively. Don't feel picked on. This is happening in all professions (e.g., Legal Zoom.com – "you really don't need a lawyer – just buy my product.")
- So why are people suing veterinarians? Consider the following 5 reasons.

#### 1. INTERNET

- **"If it's on the Internet, it must be true."** Most of these owners, however, only read opinion and commentary. Clearly, they don't read the scientific journals or the studies. The science is over their heads, even if an owner can find it for free on the internet. They certainly don't pay for it.
- Example: "My vet administered a vaccine to my dog. I read on the internet that vaccines cause cancer, so my vet gave cancer to my dog."

#### 2. CHANGING SOCIAL ATTITUDES

- **There has been an explosion in number of animal rights groups seeking expanded damages in vet mal cases.** There is a big "push" around the country to expand the scope of recoverable damages in veterinary malpractice cases to include "sentimental" damages, emotional damages for both owner and pet, and damages for "pain and suffering" generally. More on this later.
- **If my pet dies, I hurt, and somebody's got to pay.** That "somebody" is often the veterinarian, because many pets die after an illness when they are under the care of a veterinarian. Obviously, people love their pets. When pets die, people grieve. People handle grief differently. Unfortunately, some folks turn into heat seeking missiles in search of a target. They don't want justice; they seek revenge.

- **Our culture encourages the anthropomorphization of animals generally, and pets in particular.** Ever since whales won their right to vote in California, there's been hell to pay...If it keeps going this way, a Big Mac will cost \$1500 and my dress shoes will have a "swish."

### 3. VET LIABILITY INSURANCE

- When the folks know or even suspect the professional is probably insured for malpractice, litigation has always increased. E.g., doctors, dentists, lawyers.
- **Example:** The doctrine of governmental immunity from suit ("The King can do no wrong") eroded when insurance companies started writing property and casualty policies for governmental agencies. Explain.

### 4. DEPERSONALIZATION

- Sad by-product of the computer age.
- Less person-to-person contact.
- Growing levels of mistrust of traditional institutions and relationships.
- Erosion of interpersonal communication skills.

### 5. COMPETITION IN THE MARKETPLACE

- Veterinarians themselves sometimes encourage the filing of veterinary malpractice lawsuits against other vets. This can be intentional or unintentional.

- Vets to whom cases are referred have played a significant role in fomenting veterinary malpractice litigation at times. PETA, for example, encourages pet owners get second and third opinions before making any major veterinary decision. “second opinions.” If Vet B needs the business, he or she may intentionally tell the owner that the referring vet, Vet A, malpracticed, in order to secure future business from that owner.
- This may be unintentional as well. Even if Vet B doesn’t intend to slur the referring vet, Owners will hang on Vet B’s every word which is even remotely critical of Vet A. If the animal dies, and the Owner later sues Vet A, I can guarantee you that Vet B will receive a visit or call from the Owner conveying this message: “Congratulations! You are the lucky winner in my Aggrieved Pet Owner contest. You’ve won the job as my veterinary expert witness in the malpractice suit I just filed against Dr. Doolittle, and you get to tell the world at trial that Dr. Doolittle killed my Muffy, and should be forever barred from practicing veterinary medicine in the Western Hemisphere! And if you decline your prize, I’ll just send you a subpoena!”

## II. WHAT IS VETERINARY MALPRACTICE?

### A. Tort Law in Two Minutes – Maybe Three

#### 1. Definitions

- “TORT” -- Not a dessert, but a “civil wrong.”
- There are two kinds of torts: intentional torts and non-intentional torts.
- Intentional torts include civil wrongs such as assault, battery, fraud, defamation of character, and intentional infliction of emotional distress.

- Unintentional torts include negligence, professional negligence, negligent infliction of emotional distress, and product liability actions based upon principles of strict liability in tort.

## 2. Negligence

- A cause of action entitling a person who has sustained personal injury or property damage to recover money from one who has breached some legal duty owed to that person.
- Negligence has three basic components. Each component must be established by the Plaintiff in order to recover money damages in a negligence case:
  - 1] The plaintiff must demonstrate the existence of a legal duty [common law or statutory] which is imposed upon one person and owed to another person;
  - 2] The plaintiff must prove the defendant breached that duty;
  - 3] The plaintiff must prove the breach of the legal duty caused physical or psychological injury to another person, or physical injury to another person's property, resulting in monetary damage to that person, or to his or her property.

## 3. Professional Negligence

- A sub-category of "negligence." Includes claims against medical doctors, veterinarians, lawyers, nurses, architects, engineers, accountants, and even judges.
- "Malpractice" or "Professional Negligence?"
- Historically, only medical doctors and lawyers could be sued for "malpractice." One year statute of limitations, even today.

- Traditional malpractice actions against medical doctors and lawyers has been extended to various professionals. It is commonly referred to as an action for “professional negligence.” Statute of limitations for non-medical doctor or lawyer professional negligence, in Ohio, is 2 years, usually starting from the termination of the professional relationship, or 2 years from the discovery of the “malpractice” or “professionally negligent act.”
- In order to sue a professional for professional negligence, there must be an underlying express contract, written or oral, creating the professional/client relationship in the first place. In the absence of a contract for professional services, there can be no action for malpractice. Only the client, and those in privity with the client, may maintain an action for professional negligence.
- The single most important difference between an action for ordinary negligence, and one for professional negligence, is the requirement imposed by law requiring the client prove the action for professional negligence through the introduction of expert testimony.

### **III. FOUR ELEMENTS ARE REQUIRED TO PROVE A PROFESSIONAL VETERINARY NEGLIGENCE CASE.**

- Existence of a client owner/veterinarian relationship whereby the veterinarian offers to provide veterinary services to an animal owned by the client in exchange for money.
- Expert veterinary testimony establishing the appropriate veterinary standard of care which should have been applied in the case.
- Expert veterinary testimony averring the defendant veterinarian breached that standard of professional care.
- Expert veterinary testimony establishing a causal link between the breach of the standard of care, and physical injury to the animal which, in turn, results in the diminution of the fair market value of the animal.

#### IV. WHAT IS “THE APPLICABLE STANDARD OF VETERINARY CARE?”

- **“To establish veterinary negligence, a plaintiff must demonstrate the injury complained of was caused by the doing of a particular thing that a veterinarian of ordinary care, skill and diligence would not have done under like or similar circumstances.”**
- Whether the “applicable standard of veterinary care” is a “national” standard, or a “community” standard, has not yet been addressed by Ohio Courts. In human medicine, most states, including Ohio, have been shifting away from a local or community standard in favor of a national standard, generally devolving from the specific medical field. With respect to the applicable standard of veterinary care in Ohio, I have usually argued that a local or community standard should apply, more often than not, and I have generally been successful with that argument.
- It is important to understand that the standard of care is NOT necessarily set by your professors or academicians, under Ohio law, and the law of most states. **Rather, the standard of care is set by “veterinarians who possess similar training, education and experience, practicing veterinary medicine under like or similar circumstances.”** For the purpose of veterinary malpractice suits, and under Ohio law, the standard of care is set in the field, not in the university. But remember that the standard of care is heightened in cases where the defendant veterinarian is a specialist or is board certified.

#### V. RECOVERABLE DAMAGES IN A VETERINARY MALPRACTICE CASE IN OHIO.

- Under Ohio law, animals, large and small, are treated as “personal property.” Ohio law makes no distinction between food animal and companion animals for the purpose of a veterinary malpractice case.
- An action for professional veterinary negligence, therefore, is an action for damage to personal property. The law in most states treats a dog like a Dodge. If the Dodge is rear-ended in traffic and damaged, the measure of damages is the cost of repairing the vehicle, as long as the cost of repair does not exceed the diminution of the Dodge’s fair market value. These kind of damages are called “actual damages.”



- The same measure of damages applies to animals. If an animal is physically injured as a result of a vet's negligence, the law assumes the animal's fair market value is diminished to some degree. A pet owner is then entitled to recover the diminution in the animal's fair market value. So, theoretically, if a horse is worth \$5000, and the vet's negligence results in injury to the animal reducing the fair market value of the horse to \$3000, Ohio law permits the owner to recover a maximum of \$2000.
- There are other "damages" recognized by most states known as "consequential damages." Consequential damages are damages which naturally flow from the negligent act. Currently, Ohio law does not permit the recovery of "consequential damages" in veterinary malpractice cases. They are recoverable in human personal injury actions, and would include things such as lost wages, future medical bills, out of pocket expenses, and future impairment of earning capacity. In veterinary malpractice cases, things like reimbursement of the errant veterinarian's bills, the cost of subsequent veterinary treatment to "correct" the errors of the defendant veterinarian would be considered "consequential damages," and cannot be recovered under Ohio law. They can be recovered, however, under the laws of some other states.
- If an animal dies as the direct and proximate result of veterinary negligence, recovery is limited to the animal's fair market value as it existed immediately prior to the veterinarian's negligent act, absent a showing of some "special economic value" e.g., breeding value, movie contract, race purse winnings, etc.
- Now, most courts in Ohio agree that most pet quality animals have very little, if any, fair market value. **This is the aspect of Ohio law which most animal rights activists and their lawyers seek to change. There is a concerted effort to allow animal owners, particularly companion animal owners, to recover both economic and non-economic damages in veterinary malpractice cases, just as they can in human personal injury cases.**

## **VI. ECONOMIC AND NON-ECONOMIC DAMAGES**

- “Economic damages,” in vet mal cases, are currently recoverable, but are limited to the fair market value of the animal, at least in Ohio. However, there is strong political pressure building to permit owners to *also* recover expanded economic damages, which include consequential damages in these cases, such as reimbursement of past and future vet bills, boarding costs, training costs, food, insurance, lost business opportunities, loss of future breeding fees and future profits.
- “Non-economic damages,” within the context of a vet mal case, means money damages for pain and suffering of the owner, and damages for emotional distress.
- Seven states currently permit recovery of non-economic damages in vet mal cases: Alaska, Florida, Hawaii, Idaho, Kentucky, and Louisiana. Bills have been introduced in New York, Oklahoma and Washington. In Tennessee, non-economic damages are allowed by a statute, and in Illinois, an aggrieved animal owner can recover PUNITIVE damages. Generally, there are few limits upon the award of punitive damages, which are rarely awarded in negligence cases. They are usually awarded only in intentional tort cases, to punish intentionally malicious conduct.

## **V. PROBABLE EFFECT OF EXPANDING THE SCOPE OF RECOVERABLE DAMAGES IN VETERINARY MALPRACTICE CASES.**

- Increased malpractice insurance premiums.
- Increased cost of veterinary care.
- More animals will suffer because they won't get the care they need.

## VI. TORT OF “LACK OF INFORMED CONSENT.”

- Lack of informed consent is a tort within the scope of medical negligence. In human medicine, a patient can sue and recover from a physician who fails to **“disclose and discuss with the patient the material risks and dangers inherently and potentially involved with respect to the proposed therapy, treatment, surgery or procedure.”**
- Over the past decade we have argued, successfully, the independent tort of “lack of informed consent” does not apply, and should not apply, to veterinarians. But at least one appellate court has held, however, that a veterinarian’s failure to disclose a material risk is relevant with respect to whether the veterinarian has breached the applicable standard of professional care.
- What is a “material risk?” A risk is material when a reasonable person would consider such risk “important” in deciding whether or not to forego the proposed therapy, treatment, surgery or procedure.
- I have taken the position in vet mal cases that the veterinarian has an obligation to advise or warn animal owners of *material* risks associated with proposed therapies, treatments, surgeries, or medications. I consider such risks to include life threatening risks, or commonly occurring risks. Obviously, there are always risks inherent in every treatment modality or surgical procedure. **But if a risk is “rare” or “remote” or “highly unlikely to occur,” then we have taken the position, successfully, the veterinarian has no duty to warn or inform of such risks.** In my view, a risk that rarely occurs statistically, should never be considered a “material risk.”

## VII. AVOIDING MALPRACTICE SUITS: SOME SUGGESTIONS

1. **Maintain accurate and complete records.** Computerize where possible, and back up. If handwritten, write legibly. Make sure the veterinary professional who performs the work is identified in some manner. If you intend to practice veterinary medicine in Ohio, familiarize yourself with the recordkeeping requirements promulgated by the Ohio Veterinary Medical Licensing Board (OVMLB) in Section 4741-1-21 of the Ohio Administrative Code. I've included a copy of that section in the folder. You should also review the "Do's and Don't's" set forth in Section 4741.22 of the Ohio Revised Code entitled Disciplinary Actions, which is part of Chapter 4741 and generally referred to as "The Ohio Veterinary Act." Good records are a veterinarian's best defense. Judges, in particular, love clean, complete, records. Records serve at least three purposes: 1] They are required by law; 2] Records help you accurately reconstruct actions which happened months if not years before, which you are now being called upon to defend; and 3] Hopefully, your records will be more accurate, complete, and professional than the client's own records which, I can guarantee, they are going to try and introduce into evidence against you!
2. **Fully communicate with the client, and record the substance of the communication in your practice's regular order of business.** Poor communication between veterinarian and client is one of the most common reasons why veterinarians get sued. Good communication, and by that I mean good "bed side manner" cannot guarantee you won't be sued, but it can reduce the risk. Effective communication does not mean you should be obsequious or patronizing. You can be kind and professional at the same time. Don't be pedantic. Return phone calls the same day, if possible. Remember the Golden Rule when dealing with your clients.
3. **Advise clients of the "material" risks to the health of the animal attendant to any prospective therapy, treatment, surgery or procedure, including material risks associated with administration of medications.** Where possible, do this in writing. Consider having the client read and sign a "general" information sheet which provides cautionary language, including identification of one or more of certain risks. Here are two common examples:

- Death may result from the administration of anesthesia regardless of the degree of utmost care used.
- There are always risks inherent in any surgical procedure, including death.

Along these lines, you may wish to have the client acknowledge and sign a blanket authorization permitting you to exercise your independent professional judgment as you deem necessary if the owner is unavailable to provide the necessary consent for service.

With respect to “material risks,” always note client was “advised of risk,” on the chart. Writing is always best, in some form, because while verbal warning is acceptable, you want to avoid the proverbial “he said/she said” situation wherever possible.

4. **When in doubt, keep your mouth shut.** This area is tricky, and requires your thoughtful professional consideration. If you encounter an adverse consequence or unfavorable result, resist the temptation to immediately apologize or admit “guilt.” Don’t confuse “empathy” with the client’s loss with accepting “guilt” for a negative result. Always acknowledge “what happened” to the owner, but resist the temptation to immediately identify the “cause” of a negative result. Give yourself some time. Your initial disappointment might prompt you to “confess” to something you did or failed to do *which may have had nothing to do with the result*. Be patient. Second, if you do “confess,” and it turns out you were not at fault, your case will go to the jury, guaranteed. Only then will you have a meaningful opportunity to explain your “confession” was a mistake. Good luck. In such cases, you are probably better off immediately acknowledging a complication occurred, and then give yourself the benefit of the doubt regarding “causation,” pending further study and review of the case by you or by your colleagues. Be certain, or at least reasonably certain, of your position before communicating *anything* regarding “causation” to the owner. Don’t speculate. It’s better for the owner, and it’s better for you, particularly if you are ultimately sued.
5. **Never lie to your client or your peers.** Do not alter records. Ever. However, you may supplement your records. And **NEVER** lie to the OVMLB!

6. **Always be professional.** Listen to the client. Do not be judgmental. Stay “cool” and keep a level head. Show compassion and understanding. Suggest referrals, where appropriate. Take the time to explain “why” the Owner’s pet died, or took a turn for the worse, if you know. Sometimes, the owners simply want to understand “what happened.” A little time spent with a grieving owner, perhaps a little off the bill, can go a long way to avoid a suit. Never be defensive, and don’t shift the task of “dealing” with the grieving owner to a subordinate. Try to do it yourself.
  
7. **Observe the boundaries imposed by law regarding veterinary functions to be performed by Veterinary Assistants and Registered Veterinary Technicians.** Remember, you are legally responsible for others in your employe who are acting under your supervision and control. Alternatively stated, “Blaming Your Subordinates Avails You Nothing.” They will probably still be employed in the veterinary field while you’re still serving your license suspension, or paying that jury award.

#### VIII. YOUR ENCLOSURES

- **Ohio Revised Code 4741.22 Disciplinary actions**
- **Ohio Administrative Code 4741-1-21 Record Keeping**
- **Stainbrook v Holfinger, D.V.M., Lucas County Common Pleas Court Case No. CI-02005-705530, decided September 28, 2006**
- **Ullman v Duffus, 2005-Ohio-6060 (10<sup>th</sup> Appellate Dist.)**
- **Lawrence v Big Creek Veterinary Hospital, 2007-Ohio-4627 (11<sup>th</sup> Appellate Dist.)**
- **Peltier v McCartan, 2005-Ohio-3901 (3<sup>rd</sup> Appellate Dist.)**
- **Oberschlake v Veterinary Associates Animal Hospital, 151 Ohio App.3d 741, 2003-Ohio-917**

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