“Man’s Best Friend?”
Avoiding Veterinary Malpractice Claims

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A Common Theme…

The enhanced status of animals in North American society

A New Reality…?

The Veterinarian as “Health Care Professional”
A Guiding Principle…

Best way to defend is to avoid the problem in the first place

Malpractice Avoidance Strategies

• “Setting the Stage”
  – Veterinary Malpractice Theory
  – Recent Developments in the Law of Damages
• “The Three C’s of Risk Avoidance”

Veterinary Malpractice Theory

• Professional Negligence
  – Duty of Care
  – Breach of Duty
  – Damages
• The standard of care is that a veterinary practitioner must exercise the degree of care and diligence of a reasonable practitioner in similar circumstances.
Veterinary Malpractice Theory

• Duty of Care
  – Hedley, Byrne v. Heller (Victorian England)
  – “hold oneself out to have special skill and expertise…”

• Standard of Care
  – Southwhite Stables Case
  – “The veterinarian must exercise the same care, skill and diligence as a reasonable practitioner in similar circumstances”

The Law of Damages

• The Role of the Veterinarian
  – Preventive
  – Food Safety
  – Zoonotic Disease

• Expanded Obligations
• Expanded Client Expectations
• Animals as “property”

The Law of Damages

• Evolution of Cases
  – Heiligmann v. Rose (1891, Texas)
    • only recovery for loss of dog was the value of the animal unless some special use
  – Klein v. St. Louis Transit (1906, Mo.)
    • reversed trial decision which provided damages for loss of pleasure to owner
  – City of Canadian v. Guthrie (1932, Texas)
    • no damages for sentimental value of horse
The Law of Damages

• The Controversy
  – LaPorte v. Associated Independents (1964, Florida)

The Controversy

“The restriction of the loss of a pet to its intrinsic value in circumstances such as the ones before us is a principle we cannot accept. Without indulging in a discussion of the affinity between ‘sentimental value’ and ‘mental suffering’, we feel that the affection that a master has for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover…”

The Law of Damages

• Post LaPorte
  • Knowles Animal Hospital v. Wills (1978, Florida)
    – dog left unattended on heating pad sustained severe burns
    – court permitted jury to consider the “mental anguish” of the owner
The Law of Damages

• *Peloquin v. Calasine Parish* (1979, La.)
  – cat destroyed in animal shelter
  – damages for mental anguish, inconvenience and humiliation

• *Campbell v. Animal Quarantine* (1981)
  – mental distress was proper head of damages

The Law of Damages

• BUT, then the change…
    • court declined to recognize claim against veterinarian for client’s emotional pain
    • toy poodle injured at kennel, expert evidence
    • damages limited to vet bills and < value

The Law of Damages

• Return to the Beginning
    • Court refused to permit owner to recover emotional pain and suffering damages from veterinarian who vaccinated dog knowing that there was a history of adverse reactions - dog died soon after
    • Court followed *Heiligmann*
The Law of Damages

- Even if “Animals are Property” the damage awards can be quite high
  - Williamson v. Prida (1999 California) - $600K
    - reversed on appeal as Plaintiff failed to show a breach of the standard of care
  - Carter v. Louisiana St. (1988) - $34K
  - Fackler v. Genetzky (1999, Nebraska)
    - held that damages for mental suffering cannot be recovered but silent on the intentional killing issue

The Current State of Affairs

- “Outrageous Conduct” Test
  - Burgess v. Taylor (Kentucky C.A., March 2001)
    - T owned two horses, Poco and P.J. Taylor for 13 and 14 years respectively - described as "children" - medical problems - wanted to find a good home - "free lease" to Burgess - didn’t want to lose contact - visitation - within a few days B sent the horses to slaughter for $1,000.00 - B told T that she had given them to a trail ride - B got R to lie and say he had them - viewed as "outrageous conduct"
    - Court awarded - $1000 for value of each horse, $50K for outrageous conduct and $75K for punitive damages

Current State of Affairs

- Koester v. VCA Animal Hospital (Michigan, 2000)
  - Court rejected claim for emotional pain and suffering of owner - Rottweiler killed during an INS raid
  - Courts dismissed dog owner’s claim for emotional loss and sentimental loss - ruled that the proper measure of damages is the “actual value to the owner, not the price that would be paid for pet in a fair market”
    - Appeal court affirmed the trial judge – only look to things such as breeding potential, special training, original price etc.
Current State of Affairs

• Lewis v. DiDonna (NY Appellate Court, 2002)
  – Plaintiff took 9 year old dog to veterinarian who prescribed an anti-inflammatory – scrip filled by pharmacist who mislabeled the drug – toxicity
  – Court did not permit a claim for loss of companionship

Current State of Affairs

• Oberschlake v. Veterinary Associates Animal Hospital (Ohio Court of Appeals, 2003)
  – Court rejects a veterinary malpractice claim brought by owners who described themselves as “pet guardians”
    • Dog taken for teeth cleaning – while “under” the vet tried to spay her even though she had already been spayed
    • Claim brought for the actual pain felt by the dog

Current State of Affairs

• Krasnecky v. Meffen (Mass, 2003)
  – Appeal court rejects claim for wrongful death and emotional pain and suffering brought by sheep owners killed by neighbors dogs
    • Sheep referred to by owners as their “babies” – spent 6-7 hours per day with them – celebrated birthdays with special food and balloons, baked snacks for them – when young they stayed in house for 4 weeks, bottle fed
Current State of Affairs

• Rees v. Flaherty (Conn, 2003, Superior Court)
  – Court rejected claim for negligent infliction of emotional distress for loss of dog – plaintiff boarded dog with defendant – dog lost while in defendant’s care
  • “plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress … which might lead to illness or bodily harm”

Current State of Affairs

• Harasymiv v. Veterinary Surgical Associates (California, September 2003)
  – Surgical repair of ruptured disc – discharge instructions in error – second surgery followed by post-operative infection – dog dies – no claim for emotional distress unless “outrageous conduct”
• Schuster v. Petco Animals Inc. (November, 2003)
  – Lost dog after grooming – killed in traffic – US$47K in damages for “emotional anguish”, “loss of companionship” and punitive damages
  – BUT, Reversed on Appeal following Heligmann

Current State of Affairs

• Bluestone v. All Care Animal Referral Center (2003, California)
  – Labrador mix treated for persistent seizures
  – Prescribed zinc supplements by Dr. Bergstrom
  – Eventual liver disease and death
  – At Trial - $30K damages for “unique value of the animal”
  – Reversed on appeal
Current State of Affairs

• Anzalone v. Kragness Animal Hospital, Ltd (March, 2005, Illinois Appeals Court)
  – Plaintiff’s cat was attacked by boarding rottweiler and killed – sued for $100K
  • At trial, dismissed claim for intentional distress
  – Procedural case – reviewed the claims for recovery – compared to “loss of a child” – no Illinois law relating to animals and animal is an item of personal property – viewed the claim as “excessive”

Current State of Affairs

• Roemer v. Gray (Washington, May, 2005)
  – Dog mauled cat to death
  – Awarded $45K in damages – evidence was that the loss left owner with sleep disturbances, panic attacks and depression causing her to smoke heavily
  – $30K for the “pets special value” and $15K for emotional distress

McMahon v. Craig

• Action against veterinarian for malpractice and “intentional infliction of emotional distress”
• “Tootsie” – purebred Maltese show dog, diagnosed with laryngeal paralysis, defendant recommended corrective surgery, plaintiff had advised defendant of “strong bonds” between them
• Defendant advised plaintiff pre-surgery of risk of aspiration pneumonia
• Post-surgery, technician gave dog mixture of water and baby food, immediately aspirated into lungs – client advised that only water was given and that Tootsie had fallen to pneumonia – Tootsie left in cage unmonitored, died about midnight the day after surgery – client advised that Tootsie “never left alone” – necropsy found Tootsie died from the aspirated food
• Lawsuit followed claiming damages of intentional infliction of emotional distress
  – Court found that the plaintiff was not present at the scene – not a “bystander” in California law
• “Thus, a veterinarian’s malpractice does not directly harm the owner in a manner creating liability for emotional distress”
Goodby v. VetPharm Inc.

- Plaintiff had two cats being treated for hypertension – veterinarians used drug compounded by defendant – cats died and claimed malpractice seeking non-economic damages – “loss of companionship” and “negligent infliction of emotional distress”
- Vermont court held that pets are “personal property” and that damages are limited to fair market value
- The Vermont “Wrongful Death Act” only applies to spouses
- “emotional distress” claims requires the plaintiff to be “within the zone of danger”

Naples v. Miller

- Plaintiff owned three dogs including a Yorkie named “Peanut” – the defendant lived next door owning a “three legged Bloodhound named “Ricky” – Ricky attacks Peanut and the veterinary bills were $14K
- Plaintiff sued
- Delaware court determined that Peanut is personal property and damages are limited to the market value
- No “reckless, extreme or outrageous conduct” on the part of the defendants
  - But see Obershlake (Ohio, 2003)

Phillips v. North Carolina State

- Broodmare at horse breeding management facility – temperature rose in facility – horse died within one hour of being released from facility – necropsy showed “heat stress”
- Damages limited to value of the animal plus one foal ($50K plus $9K) – expert evidence of Knabstrupper horse
- 2010 case
Canadian Perspective

• Two Cases
  – Mid 80s – Cat Adoption Case
  – Mid 00s – Kennel Case
    • Both Small Claims Court
    • Both provided nominal awards for non-economic damages
    • No precedential value

Current State of Affairs

• At Common Law
  – “animals are property”
    • Perhaps moving towards a “special form of property” based on their sentient nature
  – No damages for “lack of companionship”
  – Damages for “intentional infliction of mental suffering” if the conduct was “outrageous” or within the “zone of danger”
  – Referred to the legislatures for change

Human/Animal Bond

• Volumes of Materials
  – Cornell Study
  – Geneva Conference - cardiac 9X
  – Pet Assisted Therapies
  – Industry Advertising
  – “Family Member Concept”
    • AAHA 1995 Study, 1999 AVMA Study
    • 70% - “Pets as Children”
The Issue

- Whether or not there is a causal link for damage calculation
  - Arguably, Yes
  - Must one consider human health?
- Parasitic Zoonotic Disease
- Immunosuppressed Client
  - HIV, AIDS, Cancer etc.
The Debate on Enhanced Damages

- **PRO**
  - “gross undervaluation”
  - Improve veterinary skills

- **CON**
  - True if only objective is compensation but also policy
  - “no hue and cry”
  - Fear of lawsuits introduces defensive practices
  - “emotional distress” leapfrogs other human relationships
  - Will increase price in services which are more elastic than human medicine
  - Cap on damages will only be a starting point

The Bond?

- Nevada Bill allows pets to be buried with their owners
  - Can charge a fee but not more than that for the owner
- Pet “Guardianship”
  - California White Paper
- Pet Trusts
  - Pet is the actual beneficiary of the trust

Avoidance Strategies

- Records Management
- Informed Consent to Treatment
- The Three C’s of Malpractice Avoidance
  - Competence
  - Communication
  - Compassion
Risk Management Protocols

- The Three C’s of Risk Avoidance
  - Competence
  - Communication
  - Compassion

Competence

- Continuing Education of Professional Staff
- Continuing Education of Lay Staff
  - Principles of Respondeat Superior
- Maintenance/Replacement of Equipment
- Telemedicine and Telecare
- Duty to Refer

Communication

- Be Candid when something goes wrong
- Don’t assume negligent conduct
- Necropsy
- Report to Insurer
- Keep accurate notes – see discussion regarding ethics – “dishonorable conduct”
- Advise staff not to discuss with anyone
- Secure evidence
Informed Consent To Treatment

- Must have the consent of the client – it’s not the form, it’s the consent
  - Material Risks
  - Probable Risks
  - Possible Risks if Catastrophic
- Emergency Privilege
- Who is the Owner”
- The Consent Spectrum

Records Management

- Statutory requirements for minimum standards
- Contemporaneous
- Legible
- No Editorial Comments
- Timing of Transfer of Records

Compassion

- Apologies are not Admissions
- Three Step Approach
  - Apologize
  - Do what you can to fix it
  - Do something else
- Be considerate of the client’s feelings
- Don’t over-react
“Man’s Best Friend?”