

## LVM: Session 5

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We begin with this fundamental question, “What is malpractice?” We discuss the basic issues and the legal standard (this subject will be raised again later when we discuss malpractice insurance with a representative of the AVMA-PLIT—here we introduce the most basic *legal issues*).

### 1. Summary of Basic Malpractice Issues

True, you need to be vigilant and responsible. The goal is good medicine, and veterinarians deliver this regularly. **If you practice carefully, practice good medicine in a manner consistent with professional ethics and your own ethical values, chances are you will avoid this problem altogether.**

This reading discusses what malpractice is—the theory, how it’s measured, etc. And then we turn to some of the practice tips for avoiding it.

Remember, it’s possible that you will be doing perfectly good medicine, but a client will not know this and thus decide to sue. Or they may get the facts wrong, and for that reason blame you for their own mistake. Or, you may make a mistake, or one of your staff may make a mistake.

You will almost certainly have a good insurer who will defend you—so take confidence in that as you go forward.

**Some general points** from a legal standpoint—malpractice is part of the civil, not criminal, legal system. It is reliant upon the central concept of “negligence.” Although we use this word often, **negligence under the law is hard to define**—in other words, it’s hard to write a short description of it. So people write long ones. A leading veterinary law text (Wilson 1993) tries to explain what negligence is, but those pages have not been assigned because for many of you Wilson’s explanation would seem like mumbo jumbo.

The simplest point to recognize about the legal concept of “negligence” is that you can be held negligent in a particular situation even though you in fact were being very careful. For example, you can be very careful while driving, but still cause an accident. Another way of saying this is that you can, in fact, be very careful and still make a bad decision.

The test of whether an act is negligent or not is always applied after the fact. For example, a jury looks at an act well after it happened, and then they judge what an ordinary person should have done (this is the so-called “reasonable man standard” used most commonly to judge whether negligence exists). The jury’s decision is not controlled by whether a person was truly *trying* to be careful. Subjectively, one can be very vigilant, but objectively still commit a mistake that we reasonably think should have been avoided. And vice versa, we might conclude that someone was not negligent even though we know they weren’t trying to be careful and in fact didn’t care at all about others. Why is this so? Because it is the specifics of how they acted—not their intentions—that are acceptable (or unacceptable) to us and therefore govern whether we hold them negligent or not.

Lawyers usually make this point by saying, “negligence is creating an *unreasonable* risk of danger to another.” Bottom line—negligence is much more than your subjective state—it has to do with the quality of your decisions judged by society after the fact.

**Malpractice, as a legal matter, is an extension of the law of negligence—** this is an important relationship to keep in mind, and doing so will help you see why malpractice is an important problem.

We’ll ask in class, **how many of you have seen what you consider malpractice?** Think about what you have in the past considered “malpractice.” In this session, we are interested in a precise answer about what *professional malpractice* is for a veterinarian.

**It will help to know that “malpractice” has to be more than a mere mistake—**there must also be damage of some kind. One might, for example, use the wrong suture, but there might be no consequences to that mistake. For there to be professional malpractice in a *legal* sense, there has to be some legally recognizable damage. As you’ll learn shortly, a required element for what the law calls a *tort* (that is, a legal wrong on the civil, not the criminal, side of the law), someone has to suffer damages of some kind.

**One way to think of the relationship of negligence and malpractice is this— negligence is the genus, malpractice is one of the species in that genus.**

**IMPLICATION: there are kinds of negligence that a veterinarian could commit that are NOT malpractice.**

Here’s an example. Suppose you are in business as a veterinarian and you offer services to the public. There is, as most of you know, a general requirement that businesses provide safe premises to their customers. If you as a private person visit a store, and there’s water on the floor, you expect them to clean it up reasonably soon. The same is true for people who visit a veterinarian’s office. If someone spilled water on a part of the floor where the public enters a walk-in veterinary clinic, the people in charge of the place can be held negligent if they don’t clean up the danger within a reasonable time.

It should be fairly obvious to you that as a veterinarian serving the public, you are required to provide a standard of care about your business premises equal to that of other business owners and other veterinary practice owners, or you risk being held “negligent” if someone gets hurt by your failure to exercise that kind of care. So veterinarians, just like all other people, have a general duty in society not to be negligent.

Malpractice is a highly specialized version of this obligation, but this special species in the negligence genus plays out only in the arena of your professional obligations.

Here’s the general standard by which professional malpractice is measured. Notice how similar it is to the negligence concept.

**“A VETERINARIAN MUST EXERCISE THE CARE AND DILIGENCE ORDINARILY EXERCISED BY SKILLED VETERINARIANS.”**

(This sentence is in quotes because it is a statement found in many different legal opinions.)

This standard is often easy to apply, but not always. For example, who are the “skilled veterinarians” referred to? Are they local veterinarians, or is there a national standard that applies? What if you are the best veterinarian in your town or county, but you fall short of the national standard?

**Basic rule to know—today, the national standard is almost always used.**

There are a few states where the national rule isn’t completely used, but generally it is because veterinary information travels fast and in many areas of the law a national, rather than a local, standard governs.

But what does it *really* mean that one will (most likely) be held to the standard of care and diligence ordinarily exercised by skilled veterinarians across this large country? Wilson (1993, 136) provides some help:

This standard is not intended to make veterinarians guarantors of the recovery of their patients, provided they do not offer such assurances to clients. Similarly, veterinarians are not presumed negligent if injuries or deaths occur during or after treatment. It does not mean that practitioners must conform to the highest standard of skill nor use extraordinary diligence. It also does not mean that one’s surgical technique or treatment cannot vary from that provided by average veterinarians, so long as it is not unreasonably or blatantly inferior or outdated. The law says that reasonable practitioners, not the best or the most highly skilled professionals, set the standard. Of course, defining the word reasonable can sometimes be a difficult matter requiring the testimony of one or more expert witnesses.

This generalized statement is helpful, but the devil is, as they say, in the details. The following human-on-human hypothetical should offer some insights into why your clients are likely to expect that you will know, when treating their treasured family member, what is going on nationally.

- Suppose you go to a doctor or a lawyer because you have a problem.
- That doctor or lawyer handles your problem, but they don’t solve the problem because they fail to address the problem the way most of their colleagues around the country would have addressed it.
- Suppose you challenge them about this failure, and they reply, “Well, all of the doctors/lawyers in *this county* do it my way.”
- How many of us would say, “Oh, then your failure is excused”?

We generally hold professionals to a high standard, and in this day of mass communication there is no excuse for not knowing what is happening nationally in one’s professional practice.

**How is one to know what standard of care is applicable to professionals generally?**

- JAVMA and other publications are very valuable for this.
- Conferences within your profession and specialty will be very helpful.
- Continuing education is an obvious key.
- The specific provisions of your state's practice act and regulations may come into play—for example, Regulation 7.01 (4) in Massachusetts reads, "A veterinarian's practice shall conform to the currently accepted standards in the profession of veterinary medicine."
- It might also be the case that your state veterinary medical association has standards or requirements that suggest what the standard of care should be in a particular situation.
- Or perhaps some portion of the AVMA's Principles of Veterinary Medical
- Ethics will be relevant.
- Expert witnesses are often employed to testify to what the standard of practice is. At some point in your career you may be asked to be an expert witness.

### **SOME SPECIFIC PROBLEMS**

- **What is the relevance of *changing, evolving* standards of care?**  
Since a national standard will likely be applied, how do you know what that is if treatments, problems, and other things are in flux? Clearly, you must stay informed about developments.
- **What is the standard for specialists?**  
Importantly, the term "specialist" does NOT *always* = board certified (Wilson 140). Is the ordinary veterinarian held to the standard of the specialist or a veterinarian who is board certified?
- **What about the RDVM?**  
Can referral to another veterinarian, who later commits malpractice, create liability for the RDVM?
- **And what of emergency services?**  
What if you, in an emergency where you choose to act, provide a standard of care that is lower than that which a veterinarian in her/his office would provide? (We'll talk about the following difference—legal duty v. ethical duty imposed by professional ethics.)

**Consider this hypothetical:** You perform a spay, and you don't do it as well as the most skilled veterinary surgeon in your town. Have you committed malpractice? Have you failed to "**exercise the care and diligence ... ordinarily exercised by skilled veterinarians**"?

## **2. Readings and Resources**

- Summary of Basic Malpractice Issues

- Fitzgerald case (Massachusetts 1987)
- JAVMA, April 2001, “What is the standard of care for a veterinarian, and does departure from it always spell liability?”
- JAVMA, May 1, 2001, “When can a failure to inform support a malpractice claim?”

## 2.1 Observations on This Session’s Assigned Readings

- **Fitzgerald case** (Massachusetts 1987)  
A local case that should reveal to you why it is, from all angles, foolish in the extreme ever to lie to a client—it is **ethically problematic** by every measure, **imprudent**, and, as this case shows, **illegal** to such a degree that one’s license and right to practice are at stake. This reading is difficult because it utilizes the incredibly complex and jargonized vocabulary used by courts and administrative bodies when talking about the legal aspects of veterinary matters.
- **JAVMA article, April 2001, “What is the standard of care for a veterinarian, and does departure from it always spell liability?”**  
This JAVMA article (2001) exemplifies the kind of discussion that occurs in your profession’s principal journal—note how the author assumes a high level of familiarity with the legal system and its vocabulary.

## 3. Recommended Readings

- JAVMA, February 1999, “For what may damages be awarded in a malpractice action against a veterinarian?”
- JAVMA, June 1995, “Common law and statutory defenses to a veterinary medical malpractice action”
- JAVMA, January 1997, “Knowing the limits of one’s skills—referrals”
- JAVMA, September 1996, “Seven malpractice traps—a page from the legal profession”
- JAVMA, September 1, 2000, “Bars to a malpractice action—statutes of limitation and res judicata”

### 3.1 Observations on This Session’s Recommended Readings

- **JAVMA article, February 1999, “For what may damages be awarded in a malpractice action against a veterinarian?”**  
This older JAVMA article, like the January 2000 article “Emotional distress, punitive damages, and the veterinarian—some judicial responses,” is no longer current in all its details—but both articles speak to important areas of veterinary/malpractice law that are changing at a rapid pace and in ways that aren’t easily predicted, as

we'll discuss elsewhere in the course. These two articles exemplify, though, that a plaintiff can, in a malpractice action, seek to recover some very diverse kinds of loss that go well beyond mere financial loss.

- **JAVMA article, June 1995, “Common law and statutory defenses to a veterinary medical malpractice action”**  
A JAVMA discussion from 1995 that assumes an extraordinary amount of knowledge about legal terminology.
- **JAVMA article, January 1997, “Knowing the limits of one’s skills—referrals”**  
An important reality—veterinarians make and receive referrals—this JAVMA article sets out some important principles regarding who is and who is not liable in such situations.
- **JAVMA article, September 1996, “Seven malpractice traps—a page from the legal profession”—**  
Read this for your own protection—it reveals that some important risks of malpractice come from non-medicine aspects of your practice.