Law and Veterinary Medicine

Malpractice
November 30, 2006

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... a little refreshment ...

- Making sure you’re clear on the **contract-tort distinction** and why it is so important in the legal system
- Chart—civil system broken into two divisions
  - **Contracts**—property and commercial transactions (part of veterinarians’ life) dealt with in civil system
  - **Torts**—social regulation (part of everyone’s life) dealt with in civil system
  - **Crimes**—highly anti-social acts dealt with in parallel criminal system
  - **Equity**—courts, judges try to create fairness
Grappling with malpractice

- Having been through torts and contracts, and now knowing something about the civil law system ...
- ... you now have the ability to grasp the central points of the malpractice problem
- **Key**—the basic legal standard
What is the basic standard by which malpractice is measured?

“A veterinarian must exercise the care and diligence ordinarily exercised by skilled veterinarians”
Malpractice basics—what you should know by end of this lecture

- Malpractice is, as a *legal* matter, an extension of the law of negligence (a tort).
- We have a general “substantive law” rule for everyone in our society about behavior …
- … said negatively, *you don’t get to be “negligent” if it harms others*.
Malpractice basics

- Said positively, **you must act as a reasonably prudent person would**
- Since negligence in the practice of medicine can harm others ...
- ... we have protections against harms done by human and animal doctors ...
- ... and these we put under the name “malpractice”
Malpractice basics

- Clearly, intentional acts can also be the basis for malpractice
- Importantly, **not all negligence found in veterinary settings is malpractice**
- Like any other business, veterinary practices have to act reasonably ("water on floor of clinic entrance" example)
There must be more than a mere mistake in the practice of veterinary medicine for there to be *legally significant* malpractice.

—damages needed

“Malpractice” (a tort) isn’t the only basis for suing a veterinarian when a mistake has been made in the practice of veterinary medicine.

—could also sue for breach of contract
Social basics on malpractice

- Many reasons why the issue is important
- Professional fulfillment, integrity and pride
- State’s concern with its licensed professionals
- Public’s concern—two recent cases
California

- February 24, 2004, Los Angeles Times
- “Jury Awards Dog Owner $39,000 in Malpractice Suit”
Ferment theme

- ... highest amount ever reported awarded by a court in a U. S. dog malpractice case
- In previous cases (e.g., one in which a person was awarded $20,000), the award was not based on the value of the dog, but on the "emotional distress" of the guardian (in other words, what mattered to the court was the suffering of the human)
Ferment—law, the public’s concern

- In the LA case, the jury determined that the Labrador-mix, Shane, would have been worth $10 on the open market.
- Yet the jury agreed that the dog’s vet was liable for the dog’s death … so …
- … so “J urors ordered the veterinarian to compensate Bluestone $9,000 for the veterinary bills and $30,000 for the dog’s ‘unique’ value to his owner.”
Ferment—law, the public’s concern

- The defense attorney, who has asked for a new trial and a court order invalidating the jury’s verdict, said ...

- ... “The dog was 3 years old, a mutt—there was nothing unique about it.”
Implications for malpractice premiums?

- “Noting that placing a high value on the loss of a pet is becoming increasingly common, [plaintiff’s attorney] said that the verdict reflects jurors’ willingness to regard pets as far more than property.”

- Will this make malpractice premiums rise?

Monday, May 9, 2005

“Judge awards $45,480 in cat's death”

NOT a malpractice case ...

... but relevant to value
SURVEY: Do you think a pet’s life is worth more than $45,000?
43% Yes — the judge made the right decision
36% No — the amount is too high
21% Not worth a monetary judgment at all
Total votes: 3,702

NOTE: Unscientific survey
What/Who is driving us toward greater recovery?

- Is it just greedy attorneys and disgruntled patients?
Human-animal bond

- Veterinary profession, particularly through its emphasis on the human animal bond, is itself creating a compelling argument in favor of increased value for companion animals …
Be prepared …

- Be prepared: hot letters, heavy rhetoric from attorneys
Background

- Some good news …
- … numbers-wise, veterinary malpractice is \textit{NOT} a huge issue
- PLIT has 2600 claims per year out of 43,000 insureds
- Human injuries are 6\% of the claims, and 12\% of the dollars paid out
The basics

- Drs. Linda Ellis of AVMA-PLIT next year will discuss malpractice insurance.
- Will emphasize how much judgment is involved in practicing veterinary medicine.
- And how important it is to document that good judgment.
- And how important it is to respond well – PLIT’s Winter 2006 newsletter → →
“Three ‘Dos’” when malpractice strikes

1. Be honest
2. Express empathy and sympathy
3. If the patient is still alive, do what is in the best interest of the patient
The basics

Standard of care can be broken down into these components:

- Exam
- Diagnostics
- Treating Options – informed consent
- Procedures
- Aftercare
- Records
Access to information

- We’ve already learned that the practice owns the records
- **BUT** client access is critically important
  - copies, summaries
Satisfying the urge for certainty

- During the following, be in the mode of mental ‘fact-downloading’
- “Black letter law”
Malpractice standard

- “A veterinarian **must** exercise
- the care and diligence
- ordinarily exercised
- by **skilled veterinarians**”
The legal standard

- This is a common-sense standard for professionals of all kinds
- … and it is a moving target → →
MA Regs

- MA Reg. 7.01 (4) “A veterinarian’s practice shall conform to the currently accepted standards in the profession of veterinary medicine.”

- Notice that both refer to a standard that is general, not specified in any detail.
Discussion/ruminating mode

- The ethics side – the AVMA, in II H of the PVME, says

- “Veterinarians should … follow acceptable professional procedures using current professional and scientific knowledge.”
Consider this hypothetical

- You perform a spay
- 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”?
Readings for this session

- 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?”
Fitzgerald case
(Massachusetts 1987)

- Nightmare facts—poor medical decisions, intentional withholding of information, and deliberate misleading of clients
- Description—the trial court is asked to review decision of the administrative body (Board of Registration in Veterinary Medicine)
- This is civil matter
- Case reports are exceedingly jargonized
Fitzgerald case (Massachusetts 1987)

- Trial court holds that “substantial evidence” supported the Board’s decision to suspend Fitzgerald’s license for two years …

- … because “conduct reflecting unfavorably on profession of veterinary medicine, malpractice and gross misconduct in practice of veterinary medicine.”
“Revision of the age-old legal standards of animal valuation for the sake of companion animals will have unintended consequences that ramify far beyond mere malpractice insurance rates.”

→ “biomedical research activities, production medicine, the use of sporting animals, animal agriculture at large”
PLIT’s Vaughn

- Consider facts of Fitzgerald case …
- Why should the owners of Kushka be unable to recover for their own emotional distress caused by the veterinarian?
- Should this veterinarian be able to hide behind the fact that most other veterinarians are honest and competent?
- Why would these clients’ recovery for emotional distress naturally lead to problems for biomedical, agricultural uses of animals?
“What is the standard of care for a veterinarian, and does departure from it always spell liability?”

- Local versus national standard discussed
- Today, the national standard is almost always used
“When can a failure to inform support a malpractice claim?”

- “Informed consent” is raised as a central issue in malpractice claims.

- Notes that meeting standard of care is only one issue … must inform clients as well.

- Don’t worry about details of this article – the more recent JAVMA articles that we looked at in Session 4 are far more detailed.
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”
Summary 1: Know the legal standard

“A veterinarian must exercise the care and diligence ordinarily exercised by skilled veterinarians”
Summary 2

- The standard—care and diligence ordinarily exercised by skilled veterinarians—can and will change during your lifetime ...
- Malpractice, in the eyes of the law, requires more than a mere mistake—damages needed
- There are different kinds of damages that might be awarded by a court
- A malpractice lawsuit is definitely NOT the ONLY LEGAL RECOURSE for an aggrieved client
FYI

- Legislation proposed in 2003 in MA re damages for companion animals
- Not passed but … stay tuned …
- You will likely see more of this kind of legislation (we review Tennessee’s “T-Bo” act in Session 7) →
- Likely you will be asked your opinion on such changes …
See what we are doing in next three sessions

- **December 4—**
  - First Hour—Wildlife and law
  - Second Hour—Research animals and law

- **December 6—**
  - First Hour—Farmed animals and law
  - Second Hour—Companion animals and cruelty

- **December 8—**
  - Controlled substances