

# **The Lawyer's Role in Meeting 21<sup>st</sup> Century Changes in Veterinary Medicine.**

Saturday: 3:45 pm. to 5:00 pm

## **From the Plaintiff Lawyer's Perspective**

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### **Introduction**

As lawyers that primarily take the plaintiffs' side of legal matters, my firm sees a vast range of 21<sup>st</sup> century changes that can or will affect individual veterinarians and/ or their practices in a host of ways. They range from:

- Internet commerce issues
- Data breach issues
- Organizational form issues (corporate, LLC, or other)
- Minimum wage effects on labor
- Contractual retention of other veterinarians
- Other economic pressures

All of those will need to be addressed in the coming years, but for most veterinarians, they will fall under the "business" rather than the legal heading and not develop into litigation, which is what I'm here to talk about.

That's what I do. I file cases on behalf of people who have been physically injured by a host of instrumentalities – from defective products, to negligent driving or police pursuits, to falling dangers caused by negligent floor upkeep, to injuries caused by building maintenance negligence, to the negligent spread of blood-borne diseases, to intentional torts like assault, battery, and defamation, to those injuries caused by medical negligence (or malpractice).

Just like M.D.'s, veterinarians owe a duty of reasonable care in their professional endeavors to the owners who seek their services for a pet or beef herd. But, the largest part of my work over the years has been suing medical doctors. I have never sued a veterinarian or represented anyone against a veterinarian. Part of that is likely group loyalty; part of it is that the medical facts relayed to me by the angry owner on the phone give me no confidence that the veterinarian did anything negligent; and part of it is also the deep-seated memory of the emotionally-challenged clients that anybody in practice learns to dread. So, I tell them that I don't do that kind of work, despite my dual degrees.

After I say that, they always ask me for a reference to another lawyer who does represent people against veterinarians, and I tell them that I honestly don't know anyone who makes that a specialty or habit, which is the truth in Phoenix and Tucson as far as I know.

**Why is that?** Why does the Plaintiffs' bar (an entity whose appetite for suing is often equated with a wild hyena's appetite for decomposing meat) not have lawyers specializing in and advertising their availability to sue veterinarians? It's not a mystery, it's a series of factors:

1. The public image of the profession as "animal lovers" and "good people," which further emphasizes negative juror attitudes towards any plaintiff (everybody knows that most plaintiffs are close to scam artists, "inventing" some supposed wrong to try and win the "litigation lottery"!)
2. The common-sense understanding of most owners that as painful as losing a pet can be, the shorter life span of companion animals of every kind means that the owner may well have gone through this painful "loss" several times already in their life, so it isn't something "big" enough to bring a lawsuit about.
3. The all but universal rejection of allowing recovery for the family's emotional losses from the wrongful death or injury of a pet. The harshest statement of this legal doctrine is grounded in cases that state that pet animals (animals of every kind, actually) are "property," and property loss or damage gives rise to economic damages (repair or replacement) only.

Number three is the critical difference between human medicine and veterinary medicine. When a human is injured or killed by negligent medical care, he or she (or his or her survivors) can generally collect the entire economic and emotional losses caused by the injuries or death (subject to damage caps on the emotional losses in the six figures in some states). What we're going to talk about today in my part of this presentation is what changes may be coming to possibly disturb the current state of affairs.

## **What Do Risk Managers Think Are the Keys to Reducing Malpractice Claims and How Those Keys May Change in the Future**

A partner of mine at the firm that I joined out of law school represented a human hospital and once a year we would go out there to address the medical staff on malpractice. The major Arizona doctor's insurer would have a representative there too, and his or her advice was the same every time. The items on that list is still a pretty good list of talking points for us today, because the unfolding changes in the veterinary industry may have effects on several of them.

**1. Bedside Manner Matters** – the patient and the patient's family's perception of the physician's personality and level of patient caring is the biggest factor in avoiding malpractice claims.

- In a nutshell, MD's patients and your clients don't really understand the medicine the way you do; you're rarely going to get second-guessed on that. They are much more confident and focused on whether the MD or vet is arrogant, dismissive, hurried, or perceived as uncaring.
- If you cross that line, the entire equation changes. Instead of deference to the professional's medical knowledge, a surviving patient, his survivors, or a pet's owners now have something for you that they are very comfortable in expressing and acting on – they dislike you as a person and judge both your competency and performance through that distorting lens.
- If something has gone wrong, the odds of getting sued go way up. In human medicine, those on the patient's side gauge the behavior in light of the fact that they now "know" you shouldn't be allowed to "get away with it." In the mind of patient and her family (as well as potential jurors), the doctor who was all-knowing and all-powerful due to his monopoly on medical knowledge becomes the person who keeps them waiting an hour or more every time they go to his office!
- On the veterinary side, the impact may be even worse. Remember, one of our strengths is a super-powerful "good" image of the profession (both for our loving animals and for how lucky we are in getting to work with them all day long). MDs generate more respect for their knowledge and envy for their income than the almost automatic belief that every veterinarian is be nice, caring, and fascinating. If you break that image and paint yourself as arrogant, uncaring, disinterested, or cold, the disappointed reaction can be multiplied.

**2. Practice Good Medicine** – the fewer bad outcomes, the lower the malpractice claim risks.

- Good medical decision-making and prescribing habits cannot guarantee good outcomes, but they certainly increase the odds of their occurrence. Bad (or outdated) medical decision-making and prescribing habits have the opposite effect.
- Beyond generating fewer claims, practicing also obviously increases the ability to defend those cases where a physician or veterinarian does everything right and there's still a bad outcome.

**3. Good Record Keeping Is Critically Important** – good record keeping is a big help with bedside manner, as it allows memory refreshment of past problems, treatments, and reactions to be refreshed, increasing the owner's belief that she and her pet are not "numbers" to you, but that you care about them.

- Record keeping are also a not infrequent issue in Veterinary Medical Board complaints, so keep yourself familiar with the regulations in your state and make sure your record system meets their requirements.
- Just like practicing good medicine, complete records help enormously in determining whether a lawyer who is a family friend advises an owner to sue you. Before they do, they'll almost certainly ask the owner to get a copy of the record. Reviewing it will often show a very different version of affairs than the owner has told the lawyer (after 30 years, I believe this is more an example of just how little patients or owners really remember or understand what MDs or vets ask them during appointments. That may eliminate the claim when a trusted lawyer explains why a contemporaneously recorded written version will almost always trump any unsupported memory of the events. That is often the strongest defense in veterinary or human medical malpractice cases.

### **How Well Do Those Risk Management Basics Apply to Veterinary Malpractice?**

All three of those risk management basics remain very strong factors in human medicine malpractice cases. They also transfer pretty well to veterinary medicine, so let's take a look at what the coming years may do to heighten or reduce their effects. The public's near-veneration of veterinarians isn't going to disappear overnight. But economic and social realities in coming years may have some eroding effects.

- Demographic/Economic Changes. When I was in active practice from 1980-87, the country was still in the end of the post-World War II economic expansion and had adopted a fairly bi-partisan recognition that a large disparity in the income and wealth of the “top” and “middle” classes was not an important or even desirable goal. As well as other results, there was a broader group of families who could afford veterinary care. Today’s America looks considerably different in terms of disposable income. Even with both partners working, paying a significant vet bill may not be feasible. A shrinking pool of who can afford quality veterinary care may put pressure on practices in terms of professional salary and work-load, and available staff simply to stay in place economically. That could erode the special shine a veterinarian naturally enjoys.
- Practice Organizational Changes. The traditional “find a newly-developing area, lease a building, and open a practice” model from my day and before for small animal practice is far less common today. That kind of practice density and the personal nature of the professional’s connection to his economic and professional life maximized the need to be well-liked by the clients. Those who couldn’t do it soon failed, leaving only those for whom making the customers feel comforted by his or her caring was somewhat natural standing.
- The Effects of New Practice Models. We now see multiple-location practices owned by corporate entities who then employ the veterinarians. The web pages of the largest are loaded with descriptions of the corporation’s love for animals and their care; the rosy rewards for employed veterinarians; the provision of benefits, and the high regard it has for cutting-edge veterinary care. As a lawyer who has sued human medical corporations for years, one thing is certain to me – bottom-line analysis will be ruthless and likely brutal; salaries will be kept as low as they can be; professional fees will be raised as high as possible. Although there may be some economies of scale for medications, the risk of alienating clients could go up, increasing the chance of someone acting on their dissatisfaction by suing.
- Practicing Good Medicine In a Still Mostly-Uninsured Population. As noted above, fewer people can afford what is now the “best available” medicine. That puts a strain on conscientious veterinarians in finding the balance between not going out of business and alienating clients. Unlike people going to the hospital or doctor’s office, our clients have to pay us for what they decide to have done to their animals. More and more, what’s “right” to do according to the Universities isn’t going to be affordable for the client. There is nothing wrong with offering less expensive and less effective alternatives as long as it is documented carefully and approved by the client.

- The Incongruity of the Amount Spent on Pets and The Law’s Belief That Their Only Value is “Economic.” There isn’t any hiding from the fact that veterinary fees for care are likely to continue to rise. As they go up, frustration with the courts limiting veterinary malpractice damage claims to the “economic value” of a pet will likely rise, since it leads to the result that a clear error by a veterinarian that kills a 2 year-old, shelter-adopted, dearly-loved family pet (dog or cat) is “worth” the shelter adoption fee (\$25-\$60) necessary to produce its substitute in many jurisdictions. That doesn’t square well with the economic reality of our national attachment to pets:

“According to the American Pet Product Association, [in 2015] Americans spent a total of \$23.04 billion on pet food, \$14.39 billion on supplies/OTC medicine, \$15.73 billion on vet care, \$2.19 billion on live animal purchases and \$5.24 billion on pet services like grooming and boarding.”

That’s a total of \$60.59 billion dollars that Americans spend on pets that for the most part earn them no income, provide no services to them, and require them to adapt our lives to their needs! There has to be something that makes that make economic sense to Americans, and that something is the emotional comfort, support, amusement, and love of owners for their pets, yet that something goes uncompensated.

## **Should We Panic? Are We Going to Be Bigger Malpractice Targets?**

That’s the \$64,000 question. While there are factors that push towards an erosion of the “pet as property” legal framework and could undercut the existing general bar of emotional damages for pet injury and death, there are also those that support the continuation of a damage-limiting legal system as applied to pets.

### **Factors That Could Favor Recovery of Human Emotional Damages for Pet Loss**

- The financial fortune that society spends on pets who produce almost exclusively emotional benefits is flatly inconsistent with barring emotional damages for their loss. The idea that the humans who spend billions for the emotional comfort provided by their pets don’t “lose” anything when the pet dies due to negligence is patently false, so barring recovery for that loss is flatly illogical.

- Evolving ideas about pets being sentient beings that may have rights of their own instead of “property.” American case law has articulated the sentiment, *see State v. Newcomb*, 359 Oregon 756 (2016)(“animals are sentient beings capable of experiencing pain, stress, and fear”), but usually in contexts of animal cruelty laws, and, in *Newcomb*, whether the dog was “property” the “search“ of which (a blood test to prove that his physical state when seized was not due to disease, but his owner’s failure to feed him. Even in a Red State like Arizona, the 2015 legislative session saw dogs dropped from A.R.S. §1-215(29)’s longstanding list of what is “personal property.”

### **Factors That Will Resist Recovery for Human Emotional Damages for Pet Loss**

- “The wheels of justice grind slowly, but exceedingly fine.” Fundamental changes in tort law come slowly. It is largely driven by common law principles shaped to come out with a product that makes social sense.
- The cases that have enlarged recovery to allow emotional recoveries almost always have an appreciable degree of intentional “bad” conduct. When garbage men or police officers kill pets in the presence of their families, it is easy to allow the recovery in terms of punitive damages or because the conduct was intentional and not negligent. Such damages easily reach six-figures even in settlement.<sup>1</sup>
- Conversely, in the practice of veterinary medicine, intentional harming or killing of a pet is extremely rare. Outside of mistaken understandings of a client’s wish for euthanasia, there is almost never an intentional act, simply a negligent one.
- Our image. The societal constituencies who elevate and celebrate pets usually include veterinarians as allies (at least until they suffer a veterinary mishap and discover the limited compensation available!), making it difficult to raise a public surge in favor of relaxing the law to make emotional damages recoverable against them. As lawyers, we also recognize that judges’ interpretations of the law cannot help but be colored by their feelings about the parties before them, which probably works in our favor a bit.

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<sup>1</sup> Detroit, Maryland, California, Connecticut, and Colorado all have had cases that ended (in settlements or trials) in payouts for emotional harm from \$100,000 to \$895,000. An ASPCA President describes the results as “part of a trend of recognizing that pets are beloved and valuable members of the family whose emotional value is indeed inestimable.”

## The Legal Theories Available – Strengths and Weaknesses

In assessing ways to recover emotional damages for injury or loss of a pet, it is always good to remember that NO claim is possible without a legal theory of recovery. The theories vary in their likelihood of allowing emotional damages.

- Negligence. This is an important vulnerability, because it is simple, not professional, negligence – wet floors, dangerous curbs, and letting owners help with treatment or restraint of their pets in ways that expose them to injury are constant problems, unavoidable, and not changing going forward. BE AWARE OF THEM . . . AND BUY GOOD INSURANCE!
- Professional Negligence. Currently, the bar of emotional damages remains fairly strong here. One of the most well-known cases allowing damages in a medical setting against a vet is the *Knowles* case, 360 So. 2d 37 (App. 1978), in which emotional damages were allowed for a small dog left too long on a heating pad. The opinion demonstrates, however, that the court felt something more than “just” negligence, citing an earlier case in which a chihuahua was badly injured when a garbage man threw the emptied can at it and laughed, and noting “the jury could, and no doubt did view the neglectful conduct which resulted in the burn injury suffered by the dog to have been of a character amounting to great indifference to the property of the plaintiffs such as to justify the jury award.”)<sup>2</sup>
- Consent. Consent opens a potential window for emotional damages because it is one the few theories that even in a veterinary setting may be an intentional tort. In states that recognize medical battery and lack of informed consent as separate causes of action, the first occurs when the actor has no consent (or fails to inform the patient/owner of the basic nature and effect of the proposed treatment). In that case, anything that happens, whether due to negligence or not during the treatment is compensable damage. The second occurs when a risk that a reasonably prudent vet would disclose is not disclosed and the risk occurs. Because the battery theory focuses on having violated the owner’s right to direct the treatment of the pet, the legal theory is protecting something personal to the owner. Plaintiff lawyers could argue the resulting injury or death of the pet less as a damage and more as a facet of the tort itself, hoping to convince a court to allow compensation for the injury caused by the usurpation of the owner’s.

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<sup>2</sup> Of course, the professional negligence theory also provides the shelter of the necessity of the plaintiff obtaining the testimony of an expert veterinarian to establish the standard of care and its breach in order to even reach damages.

- Negligent Infliction of Emotional Distress. This is a key battleground and includes three fact patterns.
  - Zone of Danger/Physical Impact Cases. In these, the owner seeking emotional damages for pet loss needs to have been at risk for injury or injured by the same conduct that killed or injured the pet. This works well in a case where a car swerves off the road, killing the dog on the leash while also hitting or narrowly missing its owner. It's not very likely in veterinary settings.
  - No Physical Impact Cases. Absent dramatic change, these cases are not likely to change to allow emotional damages for pet loss. The law has long sought "gatekeepers" to avoid the system and defendants from being overwhelmed by claims that conduct caused them emotional distress. The courts are sensitive to the fact that life is too full of emotional reaction, disappointment, and angst to other's less-than-perfect conduct to allow legal compensation all of it. The physical impact rule suits that function.
  - When Emotional Impact Can Satisfy the Physical Impact Rule. Arizona, while a very conservative legal example, illustrates one way in which NIED claims can meet the requirements of "physical" injury without physical impact. In *Monaco v. Health Partners of Southern Arizona*, 995 P.2d 735, 196 Ariz. 299 (App. 1999), avoided the physical impact requirement by recognizing that jurors could find that some significant emotional damages were "bodily harm" if they were not "temporary," "transitory," "inconsequential," or "harmless in themselves." Restatement § 436A cmt. c. Since that analysis is based on the Restatement, it represents a possible expansion in many jurisdictions. It only applies to the kind of emotional impact that is far beyond the usual sadness of losing a pet.
- Intentional Infliction of Emotional Distress. Emotional damages for loss of a pet are common for this tort, which seems to underlie many of the examples in the handout listing the University of Michigan's collection of animal injury and death legal cases. Little wonder. Because the actor *intends* to cause emotional distress in the victim by injuring or killing their pet, it is not surprising that the law would seek both to deter such conduct and compensate the victim when the intended effect (emotional pain) occurs. Luckily, this is another tort unlikely to be found in a veterinary practice setting.
- Punitive Damages. By much the same thinking that underlies IIED damages, the deterrent and punitive underpinnings of punitive damages may be available to compensate emotional injury caused by loss or injury of a pet. By legal definition, they are not compensatory damages based on the Plaintiff's injuries, but aimed

solely at influencing the behavior of the current defendant and influence the conduct of others in the future. Also like IIED, the average veterinarian is unlikely to engage in conduct that even raises a risk of punitive damages.<sup>3</sup>

- Calling Emotional Damages by Another Name. A couple of other interesting concepts of the “value” of a lost pet may present additional ways for lawyers to try and recover emotional damages for the loss of a pet.
  - “Intrinsic Value.” Some jurisdictions have softened the harsh-sounding “it’s just a piece of property” definition while avoiding acceptance of full compensation of the emotional impact of losing a pet by introducing a concept of the “intrinsic value” of the pet. This allows some recognition of many animals’ profound impact on their living quarters and those who share them while avoiding an open compensation of human emotional reaction to losing property.
  - Why should the system fear compensation of emotional reaction to the loss of property? It’s a slippery slope to the legal system. As appealing as the arguments are for pets, the “emotional value” of other property (cars, houses, favorite clothing, books, etc.) is a floodgate that the system doesn’t want to open.
  - Economic Experts on “Value.” Just like the famous Ford Pinto memos provided an economic measure of human life to measure against faulty gas tank design, it isn’t hard to imagine an economist using the pet-spending economic data above to come up with a model of the economic (not emotional) “worth” of a pet. At the very bottom, that figure would identify what the average pet owner is willing to invest to receive the emotional benefits of the animal. Again, since it avoids direct compensation of emotional loss, this kind of approach might satisfy some courts.

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<sup>3</sup> Similarly, other catch-all, inchoate torts like the “Tort of Outrage” require conduct by a defendant that is very very unlikely for veterinary practitioners.