

## **A Brighter Future for Veterinary Malpractice Claims**

Pursuing a veterinary malpractice claim is increasingly a cause-of-action that supports itself. Not only are trailblazing attorneys obtaining a wider variety of damages, but also pet owners are becoming more willing to foot the bill to pursue claims involving animals that many owners today essentially view as members of the family. These changing attitudes hold true in many respects whether you live in New York City or Nevada ranching country.

While many states have codified the veterinary-client-patient relationship, not all have. However, irrespective of whether in your state veterinary malpractice is formally defined, it pays, whenever possible, to pursue as many legal causes-of-action as possible due to the shifting legal landscape and attitudes underpinning courts' treatment of animal-related issues. Possible claims in a "veterinary malpractice" case may include negligence, professional negligence, bailment, breach of contract, conversion, trespass to chattel, breach of express and/or implied warranties, breach of fiduciary duty, outrage, fraud, intentional or negligent misrepresentation, intentional or negligent infliction of emotional distress, and violations of respective state consumer protection laws.

It also must be pointed out that it very arguably works to a plaintiff's advantage when a state lacks a formal legal definition of veterinary malpractice. For example, in the Washington state case of *Sherman v. Kissinger*, 146 Wn. App. 855 (2008), the court found Washington's medical malpractice statute did not apply in cases alleging veterinary malpractice. The medical malpractice statute was being invoked in certain veterinary malpractice cases. The statute sharply confines the causes-of-action that can be brought against physicians to negligence, breach of an express promise, and lack of consent. The court's decision also freed veterinary malpractice claims from mandatory mediation and a shorter statute of limitations.

Potential damages in veterinary malpractice cases may include the replacement/market value of the animal, the animal's special or pecuniary value to the owner, veterinary expenses, consequential damages, punitive damages, loss of companionship, breeding losses, burial costs, lost income and time, the intrinsic value of

the animal, extra expenses related to caring for the animal, and emotional damages. Courts still are loath to award damages related to the animal's suffering.

As with malpractice cases involving humans, expert testimony will be necessary in most cases to demonstrate the veterinarian deviated from an accepted standard of care. The normal rules regarding expert testimony apply. Many states now also require within a certain amount of time after the filing of the suit the filing of an affidavit from an expert that says that the defendant transgressed from the appropriate standard of care and that such transgression was the cause of the injury or death. The common-knowledge exception to required expert testimony still exists in cases where it is assumed that the trier-of-fact can deduce, for example, that a breeding stallion having its teeth worked on by a veterinarian should not have been mistakenly castrated.

However, overall, I believe it is even more important to err on the side of using ample expert testimony in veterinary malpractice cases than in medical malpractice cases. Humans have a much greater understanding or feeling for what they think are "appropriate" outcomes for humans than they have for animals. An experienced veterinarian-defendant also can be quite effective in further clouding the picture.

Another issue to be mindful of is making sure that your experts truly are experts in the matters-at-issue. Animals come in many more shapes, sizes, and varieties than humans. It appears courts and opposing counsel are more effective in knocking out or discrediting expert witnesses in animal-related cases than in similar cases involving humans. Watch out also for self-designated "experts." As the world of animal-related issues and practices explodes, those who consider themselves expert are becoming legion. Perhaps nowhere is this more apparent than among those who consider their "service animals" to have been "expertly" trained for purposes of the animal meeting the legal requirements necessary for entrance to many previously forbidden settings.

Determining your damage figures is as much a work of art in this evolving area of law as it is a science once you have affixed the easier-to-determine damage amounts. The key is building up the value the animal represented combined with the plaintiff's personal damages. For example, in 2004 an Orange County, California jury, in a veterinary malpractice case, found a Labrador Retriever mixed-breed had a "special value" of \$30,000 to the owner, even though the jury assessed the market value of the

dog at \$10 and the dog performed no special tasks. This finding of “special value” also finessed the issues of loss of companionship and emotional damages—which many courts still will not allow—while also tracking some of the underpinnings of what one might argue for in seeking damages related to an animal’s intrinsic value to the owner. (See *Bluestone v. Bergstrom*).

In a Washington state case not touching specifically on veterinary malpractice, but touching on damage arguments that an attorney wants to make in a veterinary malpractice case, a King County District Court judge awarded \$45,000 to the owner of a cat killed by a neighbor’s dog. The court determined the “intrinsic” value of the cat was \$30,000. The judge awarded \$15,000 for emotional distress, although this award clearly was based at least in part on the fact the owner witnessed the attack. (See *Roemer v. Gray*, Case No. 45-09514).

As indicated, veterinary malpractice litigation is an area with burgeoning potential to continue to grow into a consistently profitable niche for an interested practitioner. Not only are the valuations of damages rising, but also the pool of prospective clients willing to foot the bill. Veterinary malpractice also provides a practitioner with the opportunity to play a role in shaping this evolving field of law. Good luck!