

## What a Bite! Veterinary Malpractice Claims

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## More than a Hundred & Twenty-Five Years of Veterinary Malpractice Litigation

*Williams v. Gilman*, 71 Me. 21 (1880)—apparently the earliest published appellate court decision in the United States involving a claim of veterinary malpractice.  
*Barney v. Pinkham*, 29 Neb. 350, 45 N.W. 694 (1890).  
*Latham v. Elrod*, 6 Ala. App. 456, 60 So. 428 (1912)—veterinarian was *not excused* from malpractice claim because he had *performed the services for free*.  
*Morrison v. Altig*, 157 Iowa 265, 138 N.W. 510 (1912)—malpractice action against a *veterinary student* for treatment of a horse.  
*Breece v. Ragan*, 234 Mo. App. 1093, 138 S.W.2d 758 (K.C. 1940)—veterinarian who was hired to vaccinate cattle and who placed the cattle in a pen so that they became frightened, was negligent in continuing to vaccinate the cattle rather than stopping and making other arrangements for their vaccinations.

## Veterinarians are Held to the Same Standard of Professional Care as Physicians

*Morris v. Kohls-York*, 2005 Tex. App. LEXIS 3404 (2005)—alleged negligence in embryo transfers.  
*Anzalone v. Kragness*, 2005 Ill. App. LEXIS 187 (2005)  
*Mierva v. Holmberg*, 2004 WL 1050747, 2004 Minn. App. LEXIS 495 (2004)  
*Kennedy v. Byas*, 867 So.2d 1195 (Fla. App. 1<sup>st</sup> Dist. 2004)  
*Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999) *appeal after remand* 263 Neb. 68, 638 N.W.2d 521 (2001)  
*Williamson v. Prida*, 75 Cal. App.4<sup>th</sup> 1417, 89 Cal. Rptr.2d 868 (1999)  
*Downing v. Gully*, 915 S.W.2d 181 (Tex. App. Ft. Worth 1996)

## Veterinarians are Held to the Same Standard of Professional Care as Physicians (cont.)

*Kimberly v. Ledbetter*, 183 Kan. 644, 331 P.2d 307 (1958) — wrongful death action against a veterinarian for having negligently performed a criminal abortion on a woman allowed to proceed to trial.  
*See also State v. Ledbetter*, 183 Kan. 302, 327 P.2d 1039 (1958)—affirming first degree manslaughter conviction of the veterinarian.  
**Kan. Admin. Reg. § 70-8-1(u)**--it is *unprofessional conduct* to extend the practice of veterinary medicine to the *care of humans*, *except* that any veterinarian may render *first aid or emergency care*, without expectation of compensation, in an emergency or disaster situation.

## Veterinarians are Held to the Same Standard of Professional Care as Physicians (cont.)

*Schwartz et al. v. Neil Anderson, D.V.M. & Kansas State University Veterinary Medical Hospital* (Riley County, Kansas, 94-C-170)—there was an indication the animal owner, upon the advice of a *physician*, had ceased giving a medication to the animal which had been prescribed by the veterinarian. Further, there was testimony the *owner gave other drugs, which had been recommended by the physician*, to the animal. Also, there was testimony that laboratory personnel at a *human hospital* were testing blood samples from the animal which had been drawn by the owner.

**QUESTION:** Unlawful practice of veterinary medicine by a physician?

## Standard of Veterinary Professional Care

A veterinarian is expected to have and to *exercise that reasonable degree of learning and skill possessed by members of his or her profession in the community in which he or she practices, or similar communities.*

*Chandler v. Neosho Memorial Hospital*, 223 Kan. 1, 3, 574 P.2d 136, 138 (1977)  
*Crowley v. O'Neil*, 4 Kan. App.2d 491, 609 P.2d 198 (1980)

### Standard of Veterinary Professional Care (cont.)

*Morrison v. Altig*, 157 Iowa 265, 138 N.W. 510 (1912)--a **veterinary student** who had been requested by the owner of a horse to treat the animal and the student informed the owner he was reluctant to do so because he had not yet completed his veterinary education but, on being pressed by the owner, finally agreed to treat the horse. Iowa Supreme Court declared that *if the student had held himself out to the owner as being a competent veterinarian, he would be bound to bring to the treatment of the horse that degree of learning, care and skill of a competent veterinarian.*

### Standard of Veterinary Professional Care (cont.)

The **elements of professional negligence** are: (1) a **duty** owed by the veterinarian to protect the animal or animals from injury, (2) a **failure** properly to exercise or perform that duty (3) the animal's or animals' injuries proximately **caused** by the veterinarian's failure to exercise the duty of care, and (4) **damage** resulting from the veterinarian's negligence.

A veterinarian has a duty to **exercise ordinary care** in the delivery of veterinary services.

Generally, the question of whether a veterinarian was negligent in his or her care or treatment is one of fact for a **jury** to answer.

### Standard of Veterinary Professional Care (cont.)

#### Negligence on the Part of the Veterinarian is **NOT** Presumed

Negligence is **never presumed**, and may not be inferred merely from a **lack of success** or an **adverse result** from treatment.

*Sharples v. Roberts*, 249 Kan. 286, 292, 816 P.2d 390, 395 (1991)

*Crowley v. O'Neil*, 4 Kan. App.2d 491, 494, 609 P.2d 198, 201 (1980)

### Standard of Veterinary Professional Care (cont.)

A veterinarian is **not a guarantor of good results**, and civil liability does not exist merely from bad results, nor if the bad results are due from some cause other than the veterinarian's treatment.

*Goheen v. Graber*, 181 Kan. 107, 112, 309 P.2d 636, 640 (1957)

**A veterinarian's duty of reasonable skill and care, extends to such things as:**

- **Diagnosis** of animal afflictions and conditions.
- Performance of **surgical procedures**.
- **Administration of medication** proper for the animal's treatment and cure, in proper quantities and concentrations.
- **Vaccinations** and other procedures or instructions for **preventive animal care**.
- **Responsible supervision of assistants**. Appropriate control, direction and regulation of duties involving veterinary services that the veterinarian delegates to other personnel.
- **Providing care and treatment** to an animal **until** such treatment, once begun, is **completed**.
- **Preventing the spread of contagious diseases**.
- **Communications** with client -- informed consent.

### Comparative Fault / Negligence

Kansas, like other states, recognizes **comparative fault**. The **fault of all persons involved** in the wrongful act or omission is **compared** and the **plaintiff** (if its fault does not exceed 50%), recovers **damages reduced by the proportion of its percentage of fault** determined by the jury against each of the other persons.

#### **K.S.A. 60-258a. Hypothetical**

Veterinarian (50.0% fault):	\$50,000.00
Manufacturer (30.0% fault):	\$30,000.00
Other vet (15.0% fault):	\$15,000.00
Plaintiff (5.0% fault):	\$5,000.00
Sub-Total:	\$100,000.00
Minus Plaintiff's 5.0% fault	-\$5,000.00
<b>Net Recovery:</b>	<b>\$95,000.00</b>

### **Burden of Proof is on the Client to Establish the Veterinarian Was Negligent**

The client has the burden of proving by the **preponderance of evidence** (more likely than not) that the veterinarian:

- (1) **failed to exercise ordinary care** in the delivery of the veterinary services;
- (2) that failure resulted in or **caused the injury or death** to the client's **animal(s)**; **and**
- (3) the client sustained **damages** because of the veterinarian's failure.

### **Veterinarian Has *Wide Range of Discretion* in Exercising Veterinary Medical Judgments**

Veterinarians enjoy a wide range of discretion in exercising veterinary medical judgments and will not be found negligent unless it is shown the course of treatment the veterinarian pursued was **clearly against the course recognized as correct by the veterinary profession** generally.

**Turner v. Benhart**, 527 So.2d 717 (Ala. 1988)--fact that veterinarian treated a horse by **other than the preferred method**, **where there was more than one treatment method possible**, did **not** mean the veterinarian had committed **malpractice**.

**Williamson v. Prida**, 75 Cal. App.4th 1417, 89 Cal. Rptr.2d 868 (1999)--**fact that another [veterinarian] might have elected to treat the case differently or use methods other than those employed by the defendant does not of itself establish negligence.** "The merits of this rule is illustrated by the facts of this case. [Plaintiff's expert witness--a veterinarian], who was not a race-track veterinarian, could not see a reason for giving the Oxytetracycline [injections]. Other veterinarians, who did work at race tracks, testified that the [defendant's] treatment was appropriate as a preventive treatment of horses with scratches, who were to race in the near future. *This disagreement does not establish the standard of care [for a veterinarian], or a violation thereof.*" (Italics supplied.)

### **Kan. Admin. Reg. § 70-8-1: Unprofessional Conduct**

The following acts by a Kansas licensed veterinarian shall be considered unprofessional conduct and shall constitute grounds for disciplinary action...

- (a) **failing to meet the minimum standards** for either veterinary premises or **veterinary practice**;.....

**4 Mo. C.S.R. § 270-6.011(5)**--**Veterinarians "at all times shall conform their practice to the currently accepted standards of the profession of veterinary medicine** as these standards are set forth under [the *Missouri Veterinary Practice Act*] or by any rule lawfully promulgated by the board or as otherwise found to be accepted within the profession as gauged by the reasonable conduct of other professionals engaged in the practice of veterinary medicine."

**Question:** How, at all does this regulation impact **C.A.V.M.** practitioners?

### **Requirement of *Expert Testimony* to Establish Veterinary Malpractice**

In a veterinary malpractice lawsuits the plaintiff-client **must have an expert** witness who will testify the veterinarian [1] **committed malpractice** and that malpractice [2] **caused injury**.

**Crowley v. O'Neil**, 4 Kan. App.2d 491, 494, 609 P.2d 198, 201 - 02 (1980)

### Requirement of *Expert Testimony* to Establish Malpractice (cont.)

#### K.S.A. 60-456: [*Expert*] *Testimony in Form of Opinion*

(b) If a witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) *based on facts and data made known to the witness at the hearing* and (2) *within the scope of the special knowledge, skill, experience or training possessed by the witness.*

*Chandler v. Nesoho Memorial Hospital*, 223 Kan. 1, 5 - 6, 574 P.2d 136, 139 - 40 (1977)

### Requirement of *Expert Testimony* to Establish Malpractice (cont.)

*Zimmerman v. Robertson*, 254 Mont. 105, 854 P.2d 338 (1993)--Montana Supreme Court *rejected* argument that *unlike* in human medical malpractice actions, in veterinary malpractice cases expert testimony should *not* be required to establish the veterinarian's negligence.

*Kenny v. Lesser*, 722 N.Y.S.2d 302 (2001)--university veterinary *professor* was *qualified* to testify about the standards of professional care in a *private* veterinary practice even though professor only practiced in a university setting.

*Hamilton v. Thompson*, 23 P.3d 114 (Colo. 2001)--affidavit from veterinary expert even required in *small claims court* action.

### Requirement of *Expert Testimony* to Establish Malpractice (cont.)

*Sumner v. Bridge* (Reno County, Kansas, 04-LA-1489, May 10, 2005)--two individuals holding *B.S. degrees in animal science* were *not qualified* to testify as expert witnesses against a veterinarian on his treatment of an animal.

*Mo. Pac. Rly. Co. v. Finley*, 38 Kan. 550, Syl. ¶ 5, 561, 16 Pac. 951, 957 (1888)--only veterinarians may testify as to animal diseases.

*Rouse v. Youard*, 1 Kan. App. 270, Syl. ¶ 3, 276 - 77, 41 Pac. 426, 248 - 29 (1895)--only a veterinarian may give an expert opinion as to what cause produced diseases in animals, whether the disease is contagious, how the disease may be communicated to other animals, and also as to what disease an animal died of.

*DeCurtis-Slifkin v. Kolbert*, 668 N.Y.S.2d 949 (App. Div. 1998)--plaintiff's dog was neutered by veterinarian in the afternoon and discharged. Later that evening the dog bit the plaintiff in the face.

Plaintiff brought suit alleging her veterinarian had been negligent in discharging the dog as it was still under the affect of the anesthesia.

The veterinarian moved for summary judgment, presenting an affidavit from his expert veterinarian witness that the he had conducted himself in accordance with acceptable veterinary practice. *The plaintiff did not have any evidence from an expert witness to the contrary. The veterinarian's summary judgment motion granted.*

*Collins v. Newman*, 237 Ga. App. 861, 517 S.E.2d 100 (1999)--plaintiff argued it did not need to have an expert affidavit as required by a Georgia statute, when her *veterinarian had left a instrument inside her dog* during a spaying procedure.

The Georgia Court of Appeals, while acknowledging that where malpractice would be obvious to a layman such an action could be presented to a jury, ruled nonetheless that a *plaintiff was still required to provide an affidavit from an expert witness* or suffer dismissal of its action.

*Pruitt v. Box*, 984 S.W.2d 709 (Tex App. El Paso 1999)--*reversal* of a trial court's summary judgment for a veterinarian.

Texas Court of Appeals ruled the affidavit of an expert witness for the the veterinarian did *not rule out* that veterinarian's act had caused a horse's death. Also, the plaintiff offered an affidavit from its expert that contained sufficient information to present a jury question of whether the veterinarian's act had caused the horse's death.

Given the *conflicting affidavits* from the defendant's and plaintiff's veterinary expert witnesses it was for a jury to determine if the defendant-veterinarian's act had or had not caused the horse's death.

**Jahn v. Equine Services, P.S.C.**, 233 F.3d 382 (6<sup>th</sup> Cir. 2000)--plaintiff's equine veterinary experts, because of the defendant-veterinarians' **failure to maintain adequate post-operative records** could not say why horse died, but could surmise what probably happened. Defendants were **not** entitled to summary judgment.

"[I]t seems patently unfair to allow [the defendants] to **benefit** from what seems to be a deplorable, and perhaps even negligent, absence of record-keeping." "**The party that negligently failed to preserve medical records must 'bear the onus of proving a fact whose existence or nonexistence was placed in greater doubt by [that] negligent party.'**"

**Gross v. Victoria Station Farms**, 578 N.W.2d 757 (Minn. 1998)--horse stables had four veterinarians who submitted affidavits stating a horse's lameness had not been caused by an event at the stables but was attributable to a prior surgery.

Horse owner did not have a veterinarian for its expert witness. Rather, she had an individual who held an *M.S. in geology and a Ph.D. in biology / systematics and ecology* (vertebrate paleontology) and was the owner of a horse who supposedly had an ailment similar to plaintiff's horse. Minnesota Supreme Court upheld trial court's ruling that the horse owner's expert witness was **not** qualified to testify.

**Petrosian v. Connor**, 2004 WL 837997, 2004 Cal. App. Unpub. LEXIS 3861 (Cal. App. 4<sup>th</sup> Dist. 2004)--while legally possible to meet the requirement of having expert witness testimony through the testimony of the defendant-veterinarian, under the facts of the case the defendant-veterinarian's testimony did not establish he had committed malpractice.

#### **Expert Witness Must Also Testify Alleged Negligence Caused Injury or Death**

It is not enough for the plaintiff's expert witness to say the veterinarian committed professional error in its treatment of the animal. The expert must go further and testify that such professional error **caused the injury or death to the animal**.

**Peliter v. McCartan**, 2005 Ohio 3901, 2005 WL 1798543 (Ohio App. 3<sup>rd</sup> Dist. 2005)--alleged misdiagnosis of pregnancy. Although the plaintiffs had an affidavit from an expert that the veterinarian breached the veterinary standard of care, there was **no** evidence that the alleged breach by the veterinarian was the **proximate cause** of the alleged damages.

#### **Expert Witness Must Also Testify Alleged Negligence Caused Injury or Death (cont.)**

**Katz v. Spindel**, 260 So.2d 766 (La. App. 1972)--where veterinarian's expert witness testified that **other circumstances, besides veterinarian's alleged improper de-worming procedures, might have caused the death of a horse** and the owner presented no evidence to rule out these other possible causes of death, veterinarian could **not** be found liable.

#### **Common Knowledge Exception to Requirement of Need for Expert Testimony**

**Crowley v. O'Neil**, 4 Kan. App.2d 491, 494, 609 P.2d 198, 202 (1980)--When, in a given case, the diagnosis, treatment or care of the patient brings bad results that **lack of reasonable care** would be **apparent or obvious**, and using the **common everyday knowledge of lay persons** generally, such facts may be testified to by non-experts. Referred to as the "**common knowledge**" exception.

### Common Knowledge Exception to Requirement of Need for Expert Testimony (cont.)

**Durocher v. Rochester Equine Clinic**, 137 N.H. 532, 629 A.2d 827 (1993)--where veterinarian *operated on the wrong horse*, expert testimony was **not** required as the jury, by its common knowledge, could determine whether operating on the wrong horse was a negligent act.

“Based on common knowledge, jurors may determine that performing the wrong operation on a horse constitutes negligence on the part of the veterinarian.”

**Carter v. Louisiana State University**, 520 So.2d 383, 45 Ed. Law Rep. 454, 71 A.L.R.4<sup>th</sup> 799 (1988)--owner of a registered quarter horse brought a malpractice action for *loss of the horse's tail*. Horse had been delivered to veterinarian to treat for a stomach disorder and diarrhea. Horse's tail was covered with plastic protective sleeve which was bound with a strip of adhesive tape by a veterinary student who was under the veterinarian's control and supervision. The adhesive *tape was wrapped too tight causing gangrene* and thereby necessitating *amputation* of horse's tail.

The Louisiana Supreme Court noted that *since horses being treated for stomach disorders do not ordinarily loose their tails, an inference of negligence arose against the veterinarian.*

### Other Possible Legal Claims Against a Veterinarian

**Price v. Brown**, 545 Pa. 216, 680 A.2d 1149 (1996)--rejecting an attempt to get around the requirement that in a malpractice action the plaintiff must have expert testimony. Plaintiff had delivered her dog to a veterinarian for surgery to correct a prolapsed urethra. Two-days after surgery the dog died. Unable to find an expert witness, the dog owner sued for *breach of a bailment agreement* contending the veterinarian had breached the agreement by not monitoring the dog's postoperative condition and by not returning the dog in good health.

The Pennsylvania Supreme Court found the *plaintiff's claim was really for malpractice, rather than bailment action, and as she did not have an expert witness, the veterinarian was entitled to a judgment in his favor.*

### Other Possible Legal Claims Against a Veterinarian (cont.)

**Hight v. Dublin Veterinary Clinic**, 22 S.W.3d 614 (Tex. App. 2000)--refusing to recognize a claim of *implied warranty for veterinary services.*

### Statute of Limitations for Veterinary Malpractice

Veterinary malpractice lawsuits are subject to Kansas' **two-year** statute of limitations. **K.S.A. 60-513(a)(2): Actions Limited to Two Years.**

- Two years from date of the negligent act; **or**
- Two years from when the fact of injury become reasonably ascertainable to the injured party. **K.S.A 60-513(b)**

*“When the fact of injury become reasonably ascertainable to the injured party”*

**Human medical malpractice** - No more than **four years** after the date of the act giving rise to the cause of action. **K.S.A. 60-513(c)**

**Veterinary medical malpractice** - May be up to **ten years** from the date of the act giving rise to the cause of action. **K.S.A. 60-513(b)**

**Ratush v. Attas**, 3 Misc.3d 763, 2004 N.Y. Slip. Op. 24095 (2004)--human medical malpractice statute of limitations does **not** apply in veterinary malpractice actions.

**Berres v. Anderson**, 561 N.W.2d 919 (Minn. App. 1997) statute of limitations on veterinary malpractice claims is to be *measured from* when the veterinarian *ceased treatment on a herd*, rather than on a particular animal.

See generally, Hannah, *Bars to Malpractice Action—Statutes of Limitations and Res Judicata*, Vol. 217, No. 5 *J.A.V.M.A.* 656 (September 1, 2000).

### Types of Damages That Might be Recoverable by a Client in a Veterinary Malpractice Action

1. **Market or actual value** of the animal(s).
  - Animal's *present fair market value*.
  - *Difference in animal's market value* immediately *before* and *after* injury by veterinarian, as affected by animal's total or partial recovery if any.
  - *Actual value* of the animal to the client.
  - *Pregnant animals*: difference between reasonable market value of bred animal immediately before and immediately after veterinarian's alleged wrongful conduct.
2. **Client's mental anguish**.
  - *Emotional distress* attributable to death or injury of the animal.
  - *Embarrassment* from owning a injured, damaged or deformed animal.

3. Necessary and reasonable **veterinary expenses**.
  - Actual *past expenses* for veterinary treatment services and medicines.
  - Anticipated *future* veterinary medical expenses.
4. **Value of client's time** spent in caring for injured or diseased animal.
5. Expenses for hiring or obtaining a **substitute animal**.
6. Loss of **fetus / offspring**.
7. Expenses for **keeping and feeding** animal during *convalescence* period.
8. Loss of **stud fees** or diminished value for **breeding**.
9. Expenses in **disposing of dead animal**.

10. **Punitive damages**.
  - Gross negligence.
  - Intentional, wanton, willful, malicious or outrageous infliction of injuries to or death of animal.
11. Monetary **interest** of malpractice judgment award.
12. **Litigation fees and costs**.

Mackie, *Veterinary Malpractice* 32 *Am. Jur. P.O.F.* 3d 351, § 10: *Elements of damages, Checklist*, 378 (1995).

**Wright v. Edison**, 619 S.W.2d 797 (Mo. App. E.D. 1981)—the *measure of damages* of injury to an animal is the difference between the *fair market value of the animal immediately before and immediately after the purported injury*.

**Ponder v. Angel Animal Hospital, Inc.**, 762 S.W.2d 846 (Mo. App. S.D. 1988)—client was not entitled to an award of damages for alleged *negligent castration* of her dog where there was *no evidence of reduction in value* of the dog or showing of a *monetary loss* to the client.

**Mierva v. Holmberg**, 2004 WL 1050747, 2004 Minn. App. LEXIS 495 (Minn. App. 2004)—judgment for veterinarian where *owner presented no evidence* as to the *monetary value of its dog*.

**Julian v. DeVincent**, 155 W. Va. 320, 184 S.E.2d 535 (1971)—plaintiff, whose dog was killed by defendant's dog, could not recover damages in the *absence of evidence showing the value of its dog*.

**Bueckner v. Hamel**, 886 S.W.2d 368 (Tex. App. Houston 1994)—while owner could be entitled to the value of an animal wrongfully killed and for the *breeding value* of such animal, owner was *not entitled to damages for the loss of future progeny* from the animal.

**Ruden v. Hansen**, 206 N.W.2d 713 (Iowa 1973)--measure of damages for loss of livestock was the difference between the reasonable market value of the animals *immediately before and after* the veterinarian's negligent act. Farmer could recover the expense of feeding gilts from date of purchase until farrowing but could not recover the cost of extra pig feed allegedly made necessary to raise unhealthy pigs. Farmer could *not* recover for *loss of anticipated future profits*.

**Greives v. Greenwood**, 550 N.E.2d 334 (Ind. 1990)--while recognizing that cattle breeder had a claim against a veterinarian for *negligent inoculation* of two cows that led to the *entire herd of cattle being labeled suspect or reactors to brucellosis*, the damages which the cattle breeder could recover were limited.

**Levine v. Knowles**, 218 So.2d 217 (Fla. App. 1969)--verdict of \$1,000.00 against a veterinarian for *negligent disposal* of the *body* of a dead dog was *excessive* where the only evidence before the jury was that the dog, when alive, was worth \$100.00.

### **Emotional Pain & Suffering Claims of a Pet Owner for Loss of or Injury to a Pet**

While there has been a lot of publicity in recent years about trial courts allowing pet owners to sue for emotional pain & suffering damages, state appellate courts have consistently been refusing to recognize such claims when *negligence* or *malpractice* is alleged.

**Sumner v. Bridge** (Reno County, Kansas, 04-LA-1489, May 10, 2005)--sentimental value damages *not* recoverable for loss of a pet.

**Klein v. St. Louis Transit Co.**, 117 Mo. App. 619, 93 S.W. 281 (St. L. 1906)--dog owner *not* allowed to recover damages for the loss of pleasure and amusement that his dog gave him; dog was hit and killed by a train.

**Byas v. Kennedy**, 867 So.2d 1195 (Fla. App. 1st Dist. 2004)--emotional distress damages *not* recoverable if the animal owner was not actually physically impacted by the wrongful act.

**Myers v. City of Hartford**, 84 Conn. App. 395, 853 A.2d 621 (2004)--*not* allowing infliction of emotional distress claim for improper and premature euthanasia of a stray dog.

**Petco Animal Supplies, Inc. v. Schuster**, 2004 WL 903930, 2004 Tex. App. LEXIS 3752 (Tex. App. 3<sup>rd</sup> Dist. 2004)--mental anguish, intrinsic value for loss of companionship, lost wages and punitive damages *not* recoverable; replacement value, reimbursement of training expenses recoverable.

**Oberschlake v. Veterinary Associates Animal Hospital**, 151 Ohio App.3d 741, 785 N.E.2d 811 (2<sup>nd</sup> Dist. 2003)--*rejecting* [1] owners' emotional pain & suffering claim and [2] *dog's pain & suffering* claim against a veterinarian brought by his "pet guardians." Followed--**Pacher v. Invisible Fence of Dayton**, 154 Ohio App.3d 744, 798 N.E.2d 1121 (2003).

**Lockett v. Hill**, 182 Ore. App. 377, 51 P.3d 5 (2002)--*rejecting* Steven Wise's "quasi-children" thesis for pets.

**Johnson v. Douglas**, 187 Misc. 2d 509; 723 N.Y.S.2d 627 (2001)

**Rabideau v. City of Racine**, 243 Wis.2d 486, 627 N.W.2d 795 (2001)--*no* liability for intentionally killing a dog.

**Soto v. U.S.A.**, 2001 U.S. Dist. LEXIS 10743 (W.D. Mich. 2001)--*no* liability for intentionally killing a dog.

**Brown v. Muhlenberg Township**, 269 F.3d 205 (3<sup>rd</sup> Cir. 2001)--there may be *liability* for *intentionally* killing a dog.

**Burgess v. Taylor**, 44 S.W.3d 806, 91 A.L.R. 5<sup>th</sup> 749 (Ky. App. 2001)--liability for *intentionally* killing a horse.

**McAdams v. Faulk**, 2002 WL 700956, 2002 Ark. App. LEXIS 258 (2002)--*allowing* mental anguish claim against a veterinarian for loss of a dog.

**Lewis v. Di Donna**, 2002 N.Y. Slip Op. 04327, 2002 WL 1067290, 2002 N.Y. App. Div. LEXIS 5549 (2002).

**Fackler v. Genetzky**, 257 Neb. 130, 595 N.W.2d 884 (1999) *appeal after remand* 263 Neb. 68, 638 N.W.2d 521 (2001).

**Zeid v. Pearce**, 953 S.W.2d 368 (Tex. App. El Paso 1997).

**Nichols v. Sukaro Kennels**, 555 N.W.2d 689 (Iowa 1996).

**Jason v. Parks**, 224 App. Div.2d 494, 638 N.Y.S.2d 170 (1996).

**Carroll v. Rock**, 220 Ga. App. 260, 469 S.E.2d 391 (1996).

**McDonald v. Ohio State Univ. Veterinary**, 67 Ohio Misc.2d 40, 644 N.E.2d 750 (1994).

**Wilcox v. Butt's Drug Stores**, 38 N.M. 502, 35 P.2d 978 (1934).

**Ammon v. Welty**, \_\_\_\_ S.W.3d \_\_\_\_, 2002 WL 1488673, 2002 Ky. App. LEXIS 1400 (2002).

**Holbrook v. Stansell**, 254 Ga. App. 553, 562 S.E.2d 731 (2002)--*no* claim for negligent emotional distress having *witnessed dog attack and injure a foal* that later had to be put to sleep.

**Harabes v. The Barkery, Inc.**, 348 N.J. Super. 366, 791 A.2d 1142 (2001)--**rejecting** emotional pain & suffering damages for negligent death of dog.

**Koester v. VCA Animal Hospital**, 244 Mich. App. 173, 624 N.W.2d 209 (2000) *appeal denied* 631 N.W.2d 339 (2001).

**Frost v. Taylor**, 649 S.W.2d 264 (Mo. App. S.D. 1983)--**\$1,500.00 damage award** for death of a 14-month old female Walker dog; no specification or breakdown how amount was arrived at.

**Ramey v. Collins**, 2000 WL 776932, 2000 Ohio App. LEXIS 2540 *appeal dismissed* 90 Ohio St.3d 1428, 736 N.E.2d 25 (2000)--**rejecting** claim the plaintiffs had a **constitutional right** of freedom of expression in or association with a family pet.

Annot., *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5<sup>th</sup> 545 (2001).

## IT IS **NOT LIMITED TO DOGS & CATS**

**Sher v. Countrywide Home Loans, Inc.**, 2003 Fla. App. LEXIS 10224 (Fla. App. 4th Dist. 2003)--claim for emotional distress for loss of pet **turtles** dismissed as pet owner sued wrong party.

**Krasnecky v. Meffen**, 56 Mass. App. 418, 777 N.E.2d 1286 (2002) *rev. denied* 438 Mass. 1106, 782 N.E.2d 516 (2003)--**rejecting wrongful death and emotional pain & suffering** claim brought by **sheep** owners.

**American Soc. for the Prevention of Cruelty to Animals v. Ringling Bros. et al.**, 317 F.3d 334 (D.C. Cir. 2003)--former circus employee allowed to maintain action under the federal **Endangered Species Act** for **aesthetic and emotional injury** from allegedly having seen **elephants** mistreated.

## **Intentional, Outrageous or Malicious Injury or Killing of Animal Exception**

Some states do allow emotional distress damages for an **intentional** maiming or killing of an animal or **outrageous or malicious** conduct.

**Bakay v. Yarnes**, 2005 WL 1677966 (W.D. Wash. 2005)--**no** action for **negligent** infliction of emotional distress, but **could be for intentional**.

**Burgess v. Taylor**, 44 S.W.3d 806, 91 A.L.R. 5<sup>th</sup> 749 (Ky. App. 2001)--liability for **intentionally** killing a horse.

**Brown v. Muhlenberg Township**, 269 F.3d 205 (3<sup>rd</sup> Cir. 2001)--Pennsylvania allows emotional distress claim if animal **intentionally** killed in the owner's presence.

**Copenhaver v. Borough of Bernville**, 2003 U.S. Dist. LEXIS 1315 (E.D. Pa. 2003)--no claim as dog owners **did not actually see the killing** of their dog.

## **REPLACEMENT COST TO OWNER, RATHER THAN FAIR MARKET VALUE, MAY BE RECOVERED AS DAMAGES**

**Mitchell v. Heinrichs**, 27 P.3d 309 (Alaska 2001)--"Where...there may not be any fair market value for an adult dog, the 'value to the owner may be based on such things as the **cost of replacement, original cost, and cost to reproduce.**' Thus, an owner may seek reasonable **replacement costs**--including such items as the **cost of purchasing a puppy** of the same breed, the **cost of immunization**, the **cost of neutering** the pet, and the **cost of comparable training**. Or an owner may seek to recover the original cost of the dog, including the purchase price and, again, such investments as immunization, neutering, and training. ... it may be appropriate to consider the **breeding potential** of the animal, and whether the dog was purchased for the purpose of breeding with other purebreds and selling the puppies." (Italics supplied.)

## **REPLACEMENT COST TO OWNER, RATHER THAN FAIR MARKET VALUE, MAY BE RECOVERED AS DAMAGES (cont.)**

**Mercurio v. Weber**, 2003 N.Y. Slip Op. 51036U, 2003 N.Y. LEXIS 801 (2003)--action by a 9/11 widow for loss of dog. Defendant failed to appear and therefore default judgment entered. Trial judge ruled plaintiff was entitled to replacement value of her dog. Also said:

"Pricing companionship is inherently difficult, but since plaintiff has presented us with a figure that reasonably approximates the cost of replacing [her dog] (\$1,513.58), the court accepts that as the fair market price of [her dog]. Even though it is substantially higher than what plaintiff paid for [her dog], **the court presumes that it encompasses the loss of companionship as well.**" (Italics supplied.)

## **Turning to State Legislatures**

As state appellate courts have been declining to allow a pet owner to recover emotional pain & suffering damages for loss of or injury to a pet, state legislatures are now starting to look at the issue and enact legislation.

Already, **Connecticut, Maryland and Tennessee** have such statutes. In recent years, Bills have been introduced before other legislatures including, but not limited to, **California, Colorado, Massachusetts, Michigan, New York, New Jersey, Oregon and Rhode Island** that would have permitted a pet owner to recover monetary damages for its emotional pain & suffering for the loss of or injury to a pet.

## Veterinary Practice Act & Veterinary Malpractice

Veterinary *malpractice* may be a basis for *disciplinary action*.

*Massa v. Department of Registration & Educ.*, 116 Ill.2d 376, 107 Ill. Dec. 661, 507 N.E.2d 814 (1987)--revocation of veterinarian's license for *gross malpractice* arising from veterinarian's removal of a known healthy uterus from a dog but ignoring a serious lung condition.

*In the Matter of Kerlin*, 151 N.J. Super. 179, 376 A.2d 939 (1977)--lack of professional interest, compassion and empathy on the part of a veterinarian did *not* constitute *gross malpractice* or neglect to justify a monetary fine.

## Kansas Veterinary Practice Act & Negligence

A license may be *denied* or a Kansas veterinarian's license may be *revoked, suspended, limited, conditioned* or *restricted*, or a veterinarian may be *reprimanded* or *fined* because of *negligence*. **K.S.A. 47-830(r)**

**Note:** A fine *and* one of the disciplinary actions may be imposed.

## Kansas Veterinary Practice Act & Negligence (cont.)

### Kan. Admin. Reg. § 70-8-1: Unprofessional Conduct

(a) failing to meet the minimum standards for either veterinary premises or veterinary practice; ...

(y) failing to refer a client when additional expertise is advisable, a second opinion is desirable or upon the client's request; ...

(ff) delegating activities within the practice of veterinary medicine in violation of K.A.R. 70-7-1(o) [Employee supervision];....

## Missouri Veterinary Practice Act & Veterinary Malpractice (cont.)

**4 Mo. C.S.R. § 270-6-.011(8)**--Veterinarians "shall provide all clients with a *diagnostic assessment and treatment plan, to include recommendations and medications when appropriate, prior to rendering the treatment, except in cases of emergencies* where the client cannot be reached for consultation within a reasonable time frame as dictated by the patient's condition. All clients shall be informed of any required followed-up treatment. *All diagnostic assessments, treatment plans, medications and other pertinent information regarding the treatment of the patient shall be recorded in the patient's medical record and a copy of the record shall be made available to the client upon request.*"

## Kansas Veterinary Practice Act & Negligence Per se

The elements of negligence *per se* are:

(1) violation of a statute, ordinance, or regulation; and

(2) the violation must cause the damages resulting therefrom.

In addition, the plaintiff must establish that a private right of action for injury arising out of the violation was intended by the Legislature.

**Cullip v. Domann**, 266 Kan. 550, Syl. ¶ 3, 927 P.2d 776 (1999).

## Informed Consent in Veterinary Medicine

Like physicians and dentists, a veterinarian who (1) does not fully and properly inform a client of the various *types of treatment and care available* or (2) does not properly inform the client of the *risks* associated with each such treatment may find itself exposed to a claim that the client's consent to the recommended treatment was *not* an "informed consent." Therefore, the veterinarian committed malpractice.

See generally, Fettman et al., *Modern Elements of Informed Consent for General Veterinary Practitioners*, Vol. 221, No. 10 *J.A.V.M.A.* 1386 (November 15, 2002); Hannah, *When Can Failure to Inform Support a Malpractice Claim?* Vol. 218, No. 9 *J.A.V.M.A.* 1419 (May 1, 2001); Annot., *Veterinarian's Liability for Malpractice*, 71 *A.L.R.* 4th 811, § 29: *Failure to Warn or to Obtain Informed Consent* (1989).

### **Informed Consent in Veterinary Medicine (cont.)**

**Kan. Admin. Reg. § 70-8-1(dd)**--It is unprofessional conduct for a veterinarian to fail to obtain the client's consent before [1] placing an animal under *anesthesia*, [2] performing any *surgical procedure*, or [3] *transporting* the animal to another facility *except in emergency* situations.

### **Informed Consent in Veterinary Medicine (cont.)**

**Missouri Board of Veterinary Medicine v. Schatzman**, 2003 Mo. Tax LEXIS 113 (Admin. Hearing Comm. 2003)--clients' *verbal consent* to anesthesia but *no* written consent.

veterinarian "violated 4 C.S.R. § 270-6.011(19) in that he *failed to obtain written consent* prior to administering anesthesia, *even though he had the owners' oral consent*." (Italics supplied.)

<[www.oa.mo.gov/ahc/Suff00460001.html](http://www.oa.mo.gov/ahc/Suff00460001.html)>

### **Informed Consent in Veterinary Medicine (cont.)**

**Charley v. Cameron**, 215 Kan. 750, 756, 528 P.2d 1205 (1974)-- "[T]he duty of a physician is limited to those disclosures *which a reasonable medical practitioner would make under the same or similar circumstances*." "[W]hat is a reasonable disclosure upon which an informed consent may rest *depends upon the facts and circumstances of each case*."

**Wecker v. Amend**, 22 Kan. App.2d 498, 918 P.2d 658 *rev. denied* 260 Kan. 1002 (1996)--the doctrine of informed consent may also involve, depending on the circumstances, telling the client that *no treatment is an option*. Physician who recommended to patient laser surgery to remove a noncancerous cervix wart without telling patient she could also have no surgery and see if the wart disappeared by itself.

**Zimmerman v. Robertson**, 254 Mont. 105, 854 P.2d 338 (1993)--while acknowledging *veterinarians are subject to the informed consent doctrine*, the Montana Supreme Court refused to reverse the trial court's decision not to allow the client to argue to the jury that a veterinarian had failed fully and properly to inform the client so to have obtained its informed consent.

The Montana Supreme Court ruled that a "malpractice claim premised on a theory of lack of informed consent is a *separate cause of action* rather than an 'element' in an otherwise professional negligence" action. (Italics supplied.) 854 P.2d at 342.

**Emes Stable v. University of Pennsylvania**, 1988 U.S. Dist. LEXIS 2972 (E.D. Pa. 1988)--racehorse owner contended that two veterinary surgeons had committed malpractice when they did not tell the owner of all alternatives to surgery.

Testimony presented to the jury showed before speaking to the two surgeons, the owner had the horse examined by two other veterinarians. The other veterinarians had told the owner about a laryngotomy procedure and explained it involved a risk from making an incision in the horse's neck and placing the horse under general anesthesia. The other veterinarians told the owner about an alternate procedure being done by the defendant veterinarians.

The defendants did not tell the horse owner would be placed under a short-acting general anesthesia. The *jury concluded the short-acting general anesthesia was not an alternative procedure that a person such as the owner seeking to avoid the risks of general anesthesia, would have considered significant*.

**Hull v. Tate**, 45 O.B.A.J. 2455, 1974 Okla. LEXIS 423 (1974)--reversing a judgment against a veterinarian because he had not informed the owner of a bull that a penicillin injection could cause an *anaphylactic reaction*. The Oklahoma Supreme Court noted the evidence before the trial court was that such an adverse reaction only happened *one in 10,000 injections* in large animals. Further, that *at the time of the surgery, penicillin was the best antibiotic available*.

**Ladnier v. Norwood**, 781 F.2d 490 (5<sup>th</sup> Cir. 1986)--veterinarian had not breached duty to warn a racehorse trainer about the possibility of a fatal reaction from the administration of vitamin E to a horse to treat anhydrosis, in view of testimony unequivocally establishing that equine specialists did not consider the risk of a fatal reaction (estimated at as *one in every 25,000 dosages*), substantial enough to warrant a warning and that nearly all drugs used in equine medicine had a similar remote chance of a fatal reaction.

## Informed Consent (cont.)

- Is the human medical informed consent doctrine appropriate for veterinary medicine?
- James F. Wilson, advocating / suggesting that courts should apply instead a “*risk-management*” standard.
- Flemming *et al.*, *The Informed Consent Doctrine: What Veterinarians Should Tell Their Clients*, Vol. 224, No. 9, *J.A.V.M.A.* 1436 (May 1, 2004).

## Client Injuries From Improper Restraint of Animal During Veterinary Care or Allowing Client to Participate in a Procedure

“One of the most frequent--and potentially most serious--sources of malpractice claims is injury to *clients who assist veterinarians* by restraining their own animals during examination or treatment.” *Shielding Clients from Injury Protects Against Malpractice Claims*, Vol. 201 *J.A.V.M.A.* 1681 (December 1, 1992).

See also, *Liability Exposure: Restraint of Animals by Clients*, Vol. 187, No. 12 *J.A.V.M.A.* 1313 (December 15, 1985).

*Melnychuk v. Ronaghan*, 1999 ca.ab.ca. 170 (Alberta App. 1999)--a veterinarian has *no duty to warn a client of a known or obvious risk of injury*.

Canadian veterinarian was retained to abort a dead calf carried by a heifer owned by the plaintiff-client. While assisting in the caesarean procedure, the client suffered a serious injury to his right hand when it struck a scalpel held by veterinarian in his mouth. The trial court held the injury was caused by the veterinarian’s negligence in failing adequately to warn the client of the risk of injury. The Alberta Court of Appeal reversed, ruling the *veterinarian had no duty to warn when the client was already aware of the risk of injury the scalpel posed*.

## Workers' Compensation and Employee Animal Injuries

Veterinary *employees--rather than clients--should be used to restrain animals* during examination and treatment as such injuries sustained by the employee are more than likely going to be covered by workers’ compensation.

Animal bites, scratches and kicks to veterinary employees account for *sixteen per cent of the workers’ compensation claims* made against veterinary practices.

*Wheeler v. Couret*, 2001 U.S. Dist. LEXIS 16545 (N.Y.S.D. 2001)--veterinary practice manager’s personal injury action for dog bite against veterinarian barred by workers’ compensation law. However, manager could prosecute her personal injury action against the dog owner.

*Hass v. Money*, 849 P.2d 1106 (Okla. App. 1993)--animal clinic employee was allowed to prosecute a civil action under Oklahoma’s vicious dog statute against dog’s owners who had left the dog for boarding. Employee was successful in its claim, even though at the time she was bitten, the dog was under veterinary clinic’s exclusive care while the owners were out of town.

*Zeanah v. Stewart Animal Clinic, P.C.*, 752 So.2d 505 (Ala. Civ. App. 1999)--workers’ compensation claim by a veterinary clinic receptionist wherein the court ruled that *osteoarthritis was not an occupational disease in a veterinary practice*.

*Whitham v. Parris*, 11 Kan. App.2d 303, 720 P.2d 1125 (1986)--an assistant of a horse breeder who was injured while holding a horse as a veterinarian drew a blood sample was covered by workers’ compensation.

*Chavez v. Syracuse Feed Yard, Inc.*, 1994 WL 749326 (Kan. Workers’ Comp. App. Bd. Docket No. 160,005, July 29, 1994)--employee, who worked in a feedlot as a *veterinarian’s helper*, was subject to a thirty-five pound *weight lifting restriction* as result of a prior injury. Employer, directed the worker to unload hay bales weighing between eighty to ninety pounds.

## Extra-Label Drug Use & Veterinary Malpractice

Besides federal and state laws and F.D.A. / C.V.M. regulations governing extra-label / off-label use of drugs, off-label use of drugs can be a matter of a veterinary malpractice claim.

For example, a straight-up claim of negligence, negligence *per se*, failure to obtain informed consent, fraudulent representation, negligent representation, *etc.*

**Ruden v. Hansen**, 206 N.W.2d 713 (Iowa 1973)--veterinarian found liable where he vaccinated pregnant gilts with modified live cholera vaccine *contrary to manufacturer's label directions*.

**Durkin v. Equine Clinics, Inc.**, 313 Pa. Super. 75, 459 A.2d 417 (1983) *aff'd* 376 Pa. Super. 557, 546 A.2d 665 (1988) *appeal denied* 524 Pa. 608, 569 A.2d 1367 (1989)--veterinarian deliberately chose to *administer twice the manufacturer's maximum recommended dosage* of Butazolidin to a race horse. Ten minutes after administration the horse collapsed and died. The court noted the fact the veterinarian had administered twice the recommended dosage was crucial evidence in establishing the veterinarian's malpractice.

## Liability for Failure to Warn of Risk of Possible Transmission of Zoonotic / Parasitic Diseases from Animal To Human?

In recent years malpractice lawsuits have been filed against veterinarians upon the *allegation* that in treating an animal which had a *zoonotic / parasitic disease* which was capable of being transmitted from animals to humans they *failed to warn the animal owner* of this potential risk and the animal owner, or a family member, contracted a parasitic disease from the animal, usually a pet.

**Sloan v. Canadian Valley Animal Clinic, Inc.** 719 P.2d 474 (Okla. 1985)--volunteer at a veterinary clinic sued for having been exposed to and contracting brucellosis

**McNew v. Decatur Veterinary Hospital**, 85 Ga. App. 54, 68 S.E.2d 221 (1951)--*unsuccessful* malpractice action against a veterinarian for alleged *failure to warn* animal owner of the dangerous condition that pup, *suspected of rabies*, posed to animal owner.

**Placko v. Fawver**, 55 Ill. App.3d 759, 13 Ill. Dec. 492, 371 N.E.2d 187 (1977)--veterinarian who *failed to take steps to assure the body of a suspected rabid cat was not disposed of*, found liable because no test could be performed to determine whether in fact the cat was rabid, child had to undergo series of painful rabies injections.

**Life for God's Stray Animals, Inc. v. New North Rockdale County Homeowners Ass'n**, 253 Ga. 551, 322 S.E.2d 239 (1984)--*animal shelter* was found to be a *public nuisance*, in part, because of the *spread of various zoonotic agents* via the release of large amounts of animal waste giving rise to the possibility of transmission of zoonotic diseases to humans through well water.

**City of Fort Scott v. Brown**, 133 Kan. 401, 300 Pac. 1093 (1931)--*veterinary clinic declared a public nuisance* because of unsanitary conditions which included, among other things, the veterinarian permitting *diseased tissue* from sick animals to remain on the premises.

**Baylis v. Wilmington Medical Center, Inc.**, 477 A.2d 1051 (Del. Super. 1984) *aff'd* 567 A.2d 418 (Del. 1989)--medical malpractice action for improper treatment of patient who was suspected of having *toxocariasis* probably contracted from her dog.

**Steele v. United States**, 463 F. Supp. 321 (D. Alaska 1978)--*optometrist* found negligent in *failing timely to refer a four-year child to an ophthalmologist*. The court found the child lost his eye because of *toxocara canis* and if the optometrist had promptly referred the child to an ophthalmologist, the child might not have lost his eye.

**Latham v. Wal-Mart Stores, Inc.**, 818 S.W.2d 673, 676 (Mo. App. E.D. 1991)--store and store manager were *not strictly liable* under products liability law for injuries to purchaser's husband caused by contracting *psittacosis* from a bird purchased at the store where the evidence revealed the purchaser was an employee of the store who had the bird specially ordered, store was not in the business selling birds, and the store had the bird for less than an hour before it was sold to the purchaser.

**Malicki v. Koci**, 121 Ohio App.3d 723, 700 N.E.2d 913 (1997)—plaintiffs who received a parakeet as a gift and thereafter contracted *psittacosis* were allowed to maintain a negligence action against the pet store.

Plaintiffs presented an affidavit from their expert witness that pet store owners knew that parakeets may carry chlamydia and yet exhibit no outward signs of illness or symptoms. Also, that *psittacosis* is a potentially deadly public health hazard. That purchasers of parakeets should be notified by the seller at the time they buy the bird that it may carry chlamydia and that sellers should recommend the buyers have the bird examined by an avian veterinarian especially for zoonotic diseases.

**Osburn v. Anchor Laboratories, Inc.**, 825 F.2d 908 *reh. denied* 834 F.2d 425 (5<sup>th</sup> Cir. 1987) *cert. denied* 485 U.S. 1099, 99 L. Ed.2d 705, 108 S. Ct. 1476 (1988)—while *not* a zoonotic parasitic disease case, defendant, who manufactured veterinary chloramphenicol, contended the veterinarian who had prescribed the chloramphenicol, had an obligation to inform the plaintiff of the potential *risk to humans* of the product. In **rejecting** this contention the court said:

“...it seems unreasonable to expect a veterinarian...to have the *medical* expertise necessary to make him in all instances a ‘learned intermediary’ with regard to dangers to *humans* who are exposed to a drug in the process of administering it to animals.”

### Liability of Employer-Veterinarian for Negligent Acts or Omissions of Employees

Veterinarians, like other employers, may be held accountable for the negligent acts or omissions of their workers--whether they be veterinarians, veterinary technicians, lay employees, *etc.*--under a *legal doctrine known as vicarious liability or respondeat superior*.

Also, a veterinarian, like other employers, could be found liable for having been **negligent in hiring** the worker in the first place or, after hiring the worker coming to know, or should have known, the worker was not competent to perform the assigned task or job it was hired to do--**negligent retention**

**Boswell v. Bd. of Veterinary Medicine**, 477 N.W.2d 366 (Iowa 1991)--veterinarian's license **revoked** where he had allowed his assistants to (1) **perform unsupervised surgical procedures** such as neutering and declawing cats and anesthetizing dogs and cats; and (2) allowed veterinary assistants to draw and test blood for U.S.D.A. certification contrary to federal regulations.

See, **United States v. Boswell**, 270 F.3d 1200 (8th Cir. 2001)--some years after license reinstated, convicted for submitting false blood samples and certifications to the U.S.D.A.

**Gorlitsky v. Ohio Veterinary Medical Board**, 1992 WL 14410 (Ohio App. 1992)--veterinarian **suspended** from practice for, in part, **employing unregistered animal technicians**.

**Riegel v. Ohio Veterinary Medical Bd.**, 101 Ohio App.3d 148, 655 N.E.2d 220 (1995)--veterinarian's license **suspended** for six months when he **permitted a technician to perform surgery**. No defense that technician had previously performed such surgery under veterinarian's supervision.

**Ohio Veterinary Medical Board v. Singh**, 1994 WL 158914, 1994 Ohio App. LEXIS 1818 (1994)--veterinarian **suspended** for **permitting untrained and unqualified employees to engage in work that should have been performed only by a licensed veterinarian**, a veterinary student extern, or a registered veterinary technician.

**Evans v. Hoffman** (Butte County, South Dakota, 00-190, 2000)--jury found that a woman who **assisted in rounding up cattle** on her father's ranch to be tested by a veterinarian was **not** a gratuitous **employee of the veterinarian**. Consequently, the veterinarian had no liability for her personal injury.

## False Entries in Veterinary Medical Records

Do **NOT** make false entries in veterinary medical records. Such conduct can expose you to (1) disciplinary action, (2) significantly hinder your defense against a malpractice claim; (3) possibly give your client another cause of action--spoliation of evidence; (4) result in loss of insurance coverage; and/or (5) lead to a criminal prosecution and conviction.

*Missouri Veterinary Medical Board v. White*, (Mo. Admin. Hearing Comm. 89-001566VM, March 8, 1991)--disciplinary action taken against veterinarian for, among other things, *giving false reports on whether cattle tested brucellosis free*.

*United States v. Boswell*, 270 F.3d 1200 (8th Cir. 2001)--Iowa veterinarian convicted for *submitting false blood samples* and certifications to the U.S.D.A.

**K.S.A. 47-830(r)**--grounds for disciplinary action for a Kansas veterinarian to commit a *fraud or deception* in the practice of veterinary medicine.

**Kan. Admin. Reg. § 70-8-1(b)**--it is *unprofessional conduct* to have engaged in *conduct that is likely to deceive or defraud* or (c) to have *claimed to have performed* an act or treatment that was not performed or given.

*Kaufman v. Ohio Veterinary Med. Bd.*, 69 Ohio App.3d 79, 590 N.E.2d 50 (1990)--veterinarian who *fabricated* white blood cell count in veterinary medical records, *suspended* for one year.

*Britton v. Ohio Veterinary Medical Board*, 1990 WL 138488 (Ohio App. 1990)--license *suspended* where, in part, veterinarian had made *false entry* in medical record that *radiographs were taken*, when, in fact, they were not.

*Foster v. Lawrence Memorial Hosp.*, 809 F. Supp. 831 (D. Kan. 1992)--treating *physician destroyed medical records*, legal action for spoliation recognized.

*DiGrazia v. Atlantic Mut. Ins. Co.*, 944 S.W.2d 731 (Tex. App. Texarkana 1997)--reinstating a lawsuit by a horse owner against an insurance company that had misrepresented or withheld information during the horse owner's earlier malpractice action against his veterinarian (insurance company's insured) on why the horse had died.

*Fitzgerald v. Bd. of Reg. in Vet. Med.*, 399 Mass. 901, 507 N.E.2d 712 (1987)--two year *suspension* for *giving deliberately misleading information to client* concerning seriousness of animal's condition.

*People v. Peters*, 714 N.Y.S.2d 818 (App. Div. 2000)--veterinarian *convicted of issuing false statements to a local government* saying he had buried the carcasses of three dogs when he had not. Carcasses were found along a road side by the police officer who had delivered the dogs to the veterinarian. The veterinarian was also convicted of *petit larceny* and two counts of *littering*.

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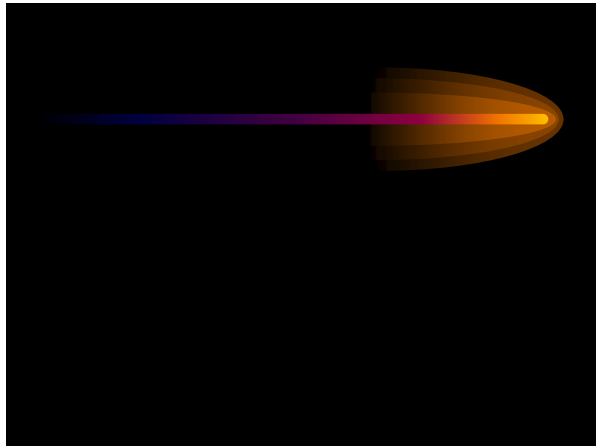
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### ***Common Knowledge Exception to the Requirement of Expert Testimony***

There is a *well-recognized exception* to the general rule that expert testimony is usually required in a professional malpractice action to establish that the professional was negligent. Such expert testimony is not required when, by common knowledge, the jury could know whether or not the complained of error was negligent.

“Where the matter is regarded as within the common knowledge of laymen, as where a surgeon saws of the wrong leg, or there is injury to a part of the body not within the operative field, it is often held that the jury may infer negligence without the aid of expert testimony.” Keeton, *et al.*, *Prosser and Keeton on the Law of Torts*, § 32, p. 189 (5<sup>th</sup> ed. 1984).