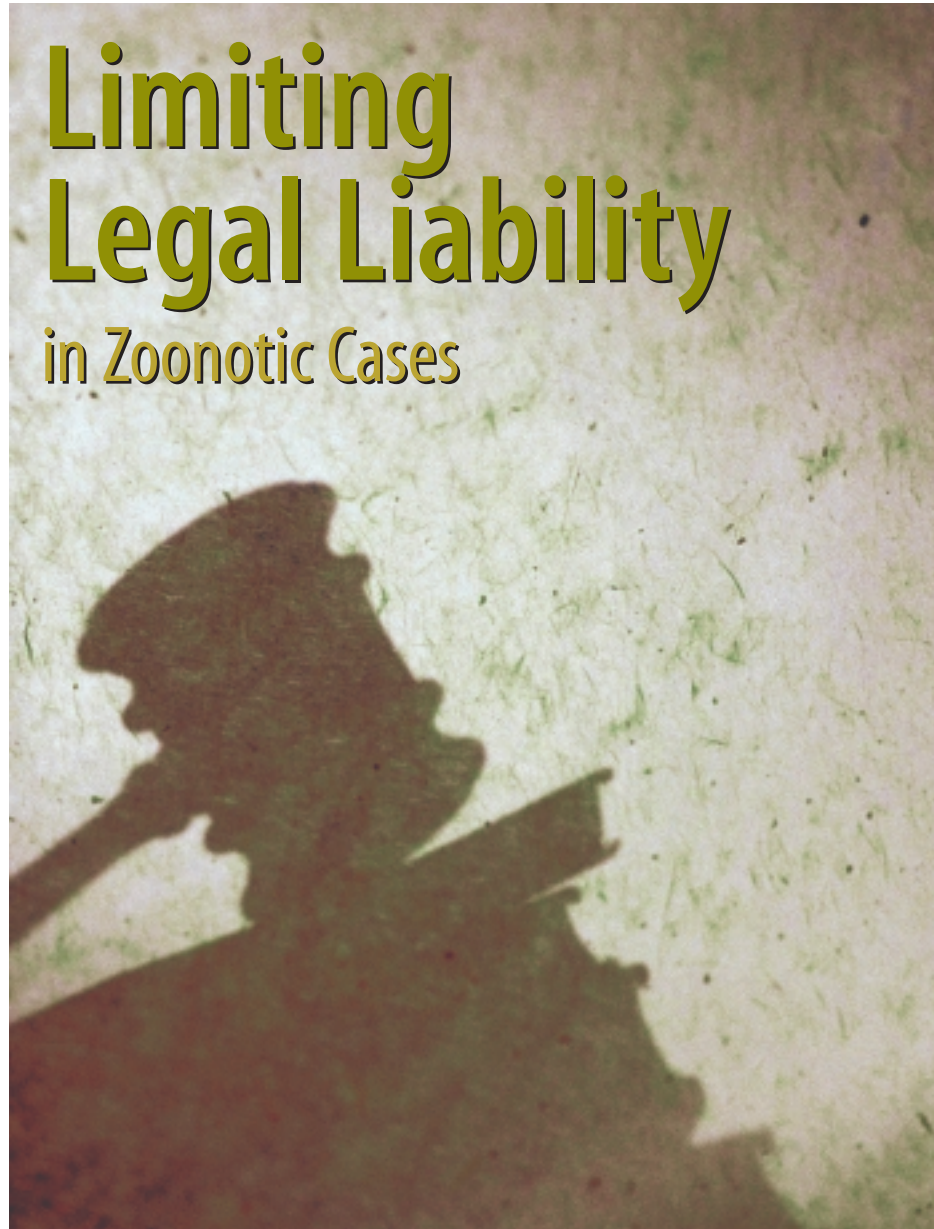




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Limiting Legal Liability in Zoonotic Cases

P Profile

Malpractice litigation is becoming an ever-increasing concern for veterinarians, especially relating to zoonotic diseases. Not only is the general public more likely to consider litigation to address situations with which they are unhappy, but lawyers are becoming more educated about animal law: UCLA, Duke, Columbia, and Stanford currently are each receiving grants of \$1 million from *The Price is Right* TV personality Bob Barker so that they can teach animal law. The University of Michigan and Northwestern are next in line for such grants. Moreover, 42 law schools now offer classes on the subject, and there are two animal law case books that allow law schools to educate the new generation of attorneys.

In addition, forensic science has improved the ability to connect a veterinarian's failure to provide the standard of care with an adverse outcome. Lawyers are being educated to use DNA markers to look for such proof. Historically, the "low" market value of pets has kept lawyers from focusing attention on lawsuits involving pets. However, with the possibility for substantial jury awards for emotional distress damages, injuries caused by

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This article is based on the "Paw & Order" program presented at the North American Veterinary Conference and the Western Veterinary Conference in 2005. In the format of the television series *Law & Order*, the program detailed a fictitious case in which a veterinarian was sued when a child contracted a serious zoonotic disease and then opened the case to discussion by a panel of legal and veterinary experts: veterinarian/attorneys Drs. Charlotte A. Lacroix and James Wilson; Dr. Kevin R. Kazacos, a parasitologist; and Dr. J. Edward Branum, from the veterinary insurance industry. The idea for this innovative method of teaching veterinarians about liability and animal/veterinary law was formulated by Drs. Colin Burrows, executive director of NAVC, and Charlotte Lacroix. The program, realized through the sponsorship of Merial, will continue in 2006.

dangerous dogs, and the fees generated by custody battles, lawyers who might not have otherwise been interested in animal law cases are now pursuing them.

In a 1989 zoonotic liability case, a child in Connecticut became blind in one eye, allegedly as a result of a roundworm-infected puppy acquired from a negligent breeder through a pet shop. The case eventually settled out of court with an award and annuity totaling \$1.29 million for the injured child. It should be noted that in such cases, animal caregivers or veterinary professionals are not protected by the low value of pets in the eyes of the law. Instead, high values for the injury or loss of human life apply.

CAUSES & RISK FACTORS

Before a plaintiff can be successful in a malpractice case against a veterinarian, four elements must be proven in a court of law: (1) that a duty of care existed between the veterinarian and the victim, (2) that the veterinarian acted below the reasonable standard of care and failed to inform clients of risks and/or to use proper procedures that protect them and their pets, (3) that the injury (damage) was "proximately caused" by the veterinarian's failure to practice within the standard of care, and (4) that the victim suffered measurable damages.

- **Duty of Care.** A duty of care exists the moment the veterinarian–client–patient relationship is established. This is usually the easiest element to prove in a veterinary malpractice case.
- **Standard of Care: Duty to Inform and Procedures that Protect.** One of the most important duties of a veterinarian with regard to zoonosis is to inform clients of the risks for transmission as well as the risks and benefits related to diagnostic procedures (such as fecal testing in the case of roundworm) and treatments for their pet. Clients cannot assume risks of which they are unaware; however, once a veterinarian informs a

client of the risks and documents such efforts, much of the risk is transferred to the client.

A second and equally important duty is for the veterinarian to provide professional services within the recognized standard of care. Questions that focus on the standard of care that may be raised during a trial include:

- ▲ Were the appropriate diagnostic procedures used to test for zoonotic diseases?
- ▲ Were there deviations from the standard of care (i.e., were the appropriate tests performed and were medically appropriate treatments administered)?
- ▲ Were patient history, including normal and abnormal findings, and diagnostic testing protocols recorded?
- ▲ Does the practice's support staff receive any formal training relevant to the tasks they perform and, if so, where is such training documented?
- ▲ Are industry-generated or individual veterinary practice brochures or handouts used to educate clients?
- ▲ Does the practice send timely reminders for heartworm and intestinal parasite control to clients?

- **Proximate Cause.** Proximate cause requires proof that the failure to practice within the standard of care was a material element and substantial factor in the injury that occurred. In other words, the injury would not have occurred but for a failure to meet the standard of care. Also, the type of injury that occurred must have been a foreseeable consequence of the failure to practice within the standard of care—for example, injury to humans is a known consequence of zoonotic disease.
- **Measurable Damages.** The limited value of pets under the law—equal to their market value—has been the saving grace for veterinary professional liability

as it relates to negligent care for animals. However, proof of medical expenses for injured humans and/or lost income or earning power for these persons results in remarkably higher awards than those for the replacement of pets. Moreover, there are many precedents in the human health care arena that lawyers and economists can use to determine the dollar value of human injury damages.



Prevention

The following discussion outlines steps that veterinarians may take to help prevent suits for malpractice. If veterinarians do face trials but have taken these steps, they will be able to prove that they have acted responsibly and professionally.

INFORMING THE CLIENT

- Communicate risks to clients often and in different ways, including verbally and through brochures.
- Validate client understanding by asking them whether they are aware of the risks associated with zoonotic diseases. It is important to inform clients that children are particularly susceptible to zoonotic diseases. After this discussion, it is appropriate to inform the client that the practice has educational materials to help explain the risks. If clients have further questions, they should be advised to visit the Web site of the Centers for Disease Control and Prevention (www.cdc.gov/healthypets/) and discuss their concerns with a human health care provider.
- If the practice does distribute handouts, brochures, and/or other educational materials, such efforts should be documented in patient records (**see Aids & Resources**). These materials must contain recommendations for timely and frequent hand-washing.
- Make product inserts available to clients

or when dispensing products associated with significant risks to the patient or client.

- Clearly document all oral and written communications. In a legal case, if a communication is not documented, it hasn't occurred.
- Document refusals for referrals to specialists, recommended treatments, or diagnostic procedures. (See www.cliniciansbrief.com for a sample waiver form.)

PROTECTIVE PROCEDURES

- Document staff training, test their competence, and retest them at appropriate intervals.
- Follow manufacturers' instructions for the use of equipment, vaccinations, drugs, and laboratory testing protocols.
- Evaluate and verify quality and accuracy of in-house diagnostic testing procedures, reliability of equipment, and quality assurance tests for in-house laboratory techniques and reagents.
- Record all diagnostic test results in log books and medical records. Do not record fecal test results as "negative"—record them as "No parasites seen (nps)." To a layperson, "negative" means not present, and simply saying there were "no parasites seen" is easier than explaining what is meant by a "false negative" if parasite ova or larvae show up later or when the sample is tested using a different method.
- Record the dates on which reminder notices were sent.
- Test fecal samples for dogs, cats, and exotic pets of all ages.

MINIMIZING PROXIMATE CAUSE

Watch for events and materials that can alter the standard of care:

- New guidelines established by experts (e.g., the Companion Animal Parasite Council guidelines [1-877-CAPC-ORG])
- New expectations—client inquiries

coming from Internet client education sources

- New legal interpretations and precedents (see www.animallegalreports.com) for information that can keep you abreast)
- Read veterinary journals to stay informed of new research discoveries about disease incidence, diagnostic tests, and effective or ineffective drugs.
- News on recently developed forensic technologies—for example, that infectious agents other than parasites are now being tracked and linked via DNA testing procedures.



Facing Legal Action

If faced with a potential lawsuit, veterinarians must first contact their professional liability insurance carriers. They also should determine from such carriers which party has the right to decide whether to settle the case or go to trial. Fortunately, most veterinary professional liability insurance policies require the consent of the named insured to allow for settlements.

Settling cases out of court rather than proceeding to trial may be preferable for the following reasons:

- Damage awards could exceed those offered in a settlement.
- The doctor and practice are less likely to experience the negative publicity inherent in a public trial and jury verdict.
- The potential for an unresolved or protracted civil action for malpractice may precipitate complaints to and disciplinary action by the State Veterinary Medical Board.

CONSEQUENCES

- **Emotional and Monetary Issues.** Although negative publicity can occur with settlements or court trials, protracted battles in court are likely to cause



Courtesy Dr. Tom Klein, Hilliard, Ohio

more negative publicity than expeditious settlements. Financial issues that affect veterinarians and practices include settlement or "damage" awards, lost work time, the emotional distress of defending one's reputation in court, and legal defense and court expenses.

- **Risk to the Entire Profession.** Court decisions can establish beneficial or detrimental legal precedents for future animal law cases and, in some situations, may determine that the entire profession has acted below the standard of care. This occurred in the famous T.J. Hooper case in 1934. The entire maritime industry was determined to be operating below an acceptable standard because it failed to place inexpensive two-way radios on ships and barges. Had such technology been the norm, a major shipping barge accident would have been avoided. This precedent can be and has been applied to the health care profession.
- **State Veterinary Board Complaints.** In some jurisdictions, when a state board learns that a licensee has been found liable for negligence and a settlement greater than \$10,000 has been awarded to a plaintiff, the professional liability insurance carrier is required to notify the Board. In California, veterinary

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medical board complaints are rising at a rate of 5% per year. Because of the increased risks associated with defending state board complaints, some professional liability insurance carriers offer "veterinary license defense riders" as supplemental coverage for their insured policy holders. For \$69/year, the additional coverage helps pay up to \$25,000 of the costs for legal counsel, consultants, and expert witness fees needed to defend State Board allegations of professional misconduct or negligence. Ask your carrier about such coverage.



Prevention at a Glance...

- Educate yourself and others.
- Remain aware of public relations issues related to the profession.
- Actively participate in local, state, and national veterinary organizations to keep abreast of new issues and support their efforts to respond to them.
- Routinely perform malpractice and license defense insurance "health checks."



Follow-Up

VETERINARIANS & MEDICAL DOCTORS

An opportunity for future growth and recognition exists as veterinarians and veterinary associations make the effort to educate pediatricians, family health care practitioners, and human health care specialists in this area. Knowledge of zoonotic disease is increasing, there is a growing amount of client and staff educational materials and guidelines available to the veterinary profession, and risk for professional liability is also increasing. As a result, it is imperative that veterinarians and their health care teams focus on reducing their risk for liability before they fall victim to the legal profession and its new precedents.

CONCLUSION

The easiest way to protect yourself from possible legal action related to zoonotic disease transmission from a pet in your care to a person is to take the preventative steps outlined in the Prevention section and the Box (Prevention at a Glance). In addition, having the proper insurance coverage can help to keep the process from turning into a nightmare. Remember, each court case not only affects the veterinarian involved, it affects the entire profession. ■

Zoonotic Disease

Not the Only Area Where Veterinarians Need to Beware

In 2004, an Arizona court held that a licensed veterinarian who did not adequately evaluate the quality of services performed by a local cremation provider before using its services was guilty of misrepresenting services rendered to a client (*Novak v Ariz State Vet Med Examining Board*). The veterinary practice's office manager called one other practice that had used this business and determined that the practice had not experienced any problems. Under ordinary circumstances, such reference checking on a subcontractor most likely would have been within acceptable norms. However, in this case, the vendor used a weed-burning propane torch over a fire pit in the desert as the crematorium and failed to burn the dog's entire body. The pet owner received an urn containing partial ashes mixed with sand and other debris, and complained to the Board. After an investigation and administrative hearing, the Board found Dr. Novak guilty of three instances of unprofessional conduct and placed him on probation for 6 months. The appellate court affirmed the verdict.

With this opinion, at least one court has held that the standard of care for veterinarians now requires that Arizona practitioners investigate the quality of their subcontractors, even though that has not traditionally been the standard of care in the industry.

See Aids & Resources, back page, for references, contacts, and appendices.

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4. Gender? 1 Male 2 Female

5. Number of years in practice?

- 1 Less than 5 yrs 2 5-10 yrs 3 11-15 yrs
- 4 16-20 yrs 5 20+ yrs

10. **Endocarditis in a dog due to infection with a novel *Bartonella* subspecies.** Breitschwerdt EB, Kordick DL, Malarkey DE, et al. *J Clin Microbiol* 33:154-160, 1995.
11. ***Bartonella vinsonii* subsp. *berkhoffii* and related members of the alpha subdivision of the *Proteobacteria* in dogs with cardiac arrhythmias, endocarditis or myocarditis.** Breitschwerdt EB, Atkins CE, Brown TT, et al. *J Clin Microbiol* 37:3618-3626, 1999.
12. **Peliosis hepatis in a dog infected with *Bartonella henselae*.** Kitchell BE, Fan TM, Kordick D, et al. *JAVMA* 216:519-523, 2000.
13. **Granulomatous disease associated with *Bartonella* infection in 2 dogs.** Pappalardo BL, Brown T, Gookin JL. *J Vet Intern Med* 14:37-42, 2000.
14. **Clinicopathological abnormalities and treatment response in 24 dogs sero reactive to *Bartonella vinsonii* (*berkhoffii*) antigens.** Breitschwerdt EB, Blann KR, Stebbins ME, et al. *JAHA* 40:92-101, 2004.
15. **Aortic valvular endocarditis caused by *Bartonella vinsonii* subsp. *berkhoffii* in 2 dogs presenting for fulminant pulmonary edema.** Smarick SD, Jandrey KE, Chomel BB, et al. *J Vet Emerg Crit Care* 14:42-51, 2004.

Resources

Labs that conduct canine bartonellosis testing:

Veterinary Public Health Laboratory
 Department of Population Health and Reproduction
 School of Veterinary Medicine
 University of California, Davis
 Davis, CA 95616
 530-752-2377

Vector-Borne Disease Diagnostic Laboratory
 College of Veterinary Medicine
 North Carolina State University
 4700 Hillsborough Street
 Raleigh, NC 27606
 919-513-6357

See www.capcvet.org to print out all guidelines and the background materials to implement them.

See www.aafponline.org/resources/practice_guidelines.htm for a great 42-page booklet outlining feline zoonotic diseases.

See www.vet.cornell.edu/fhc/resources/brochure/zoonoticdisease.html for a brochure that may be purchased from the Cornell Feline Health Center.

See Merial's 2005 publication, Merial EDU, a four-course continuing education workbook for veterinarians and clinic staff. Register for these free courses at www.vetmedteam.com.

LIMITING LEGAL LIABILITY • James E. Wilson

Resources

- CDC/Merial handouts** on zoonotic diseases are available at www.cdc.gov/healthy pets/health_prof.htm and from Merial technical services representatives.
- Client brochures and reminder postcards** about zoonotic diseases are available from Marketing Communications in San Diego, CA, at www.philwinter.com.
- Companion Animal Parasite Council Protocols (CAPC)** for administering parasite prevention medications and guidelines for performing fecal parasite analyses are available from Novartis Animal Health technical services representatives (1-877-227-2674).
- Handouts** about zoonotic diseases and client consent forms to be used for clients who decline diagnostic work-ups or parasite prevention medications are available from Bayer's technical services representatives.
- Merial's 2003 publication** with CD-rom videos entitled, *Protecting Pets. Protecting People*, and its 2004 booklet, *Protecting Your Patients. Protecting Your Practice*, are available from Merial technical services representatives.
- Online courses** in which veterinarians and staff members can enroll are available at www.vetmedteam.com/classes.
- Refusal of Testing/Treatment Waiver Form** available at www.cliniciansbrief.com.

MEDIAL PATELLAR LUXATION • Brian S. Beale

Reference

1. **Patellar luxation.** Hulse DA. *Small Animal Surgery*. Fossum TW, et al.—Philadelphia: WB Saunders, 2002, pp 1110-1122.