

VETERINARY MALPRACTICE LAW IN CANADA

I. INTRODUCTION

In Canada, veterinary malpractice is one area of medical law that has received little attention from the courts judging by the relative scarcity of case law when compared to the case law involving other medical professionals. But despite the low frequency of civil claims, veterinarians are nonetheless carefully regulated through both federal and provincial legislation as well as their governing bodies. Furthermore, as demonstrated below, veterinarians are held to the similarly high standard of care in their treatment of animals that we would expect from our own physicians.

This paper intends to set out the general legislative scheme involved in the regulation of veterinarians in Canada as well as the general principles of the law of veterinary malpractice. It will then conclude with a discussion of the changes seen recently in Canada with regards to animal rights legislation and the effect that may have on the number of civil claims brought against veterinarians in the future.

II. OVERVIEW OF THE LEGISLATIVE SCHEME AND DISCIPLINARY STRUCTURE

A. GOVERNING STATUTES AND REGULATIONS

Across Canada, veterinarians are governed provincially by their respective Acts and Regulations. In British Columbia, veterinarians are regulated by the *Veterinarians Act*, S.B.C. 2010, c. 15. Primarily, *The Veterinarians Act* establishes the College of Veterinarians of British Columbia (the "CVBC"). It also sets out the CVBC's powers to establish the requirements for registration of veterinarians in the province, enforce the standards of practice, and investigate complaints against their registrants.¹ The *Veterinarians Act* prohibits the unauthorized practice of veterinary medicine by any person who is not a registered member of the CVBC. Similar Acts exist across Canada, such as *The Veterinarians Act*, R.S.O. 1990 c. V3 in Ontario, the *Veterinary Profession Act*, R.S.A. 2000, c. V2 in Alberta, and *The Veterinary Medical Act*, C.C.S.M. c. V30 in Manitoba.

In addition to the specific governing statutes, laws of general application also apply to veterinarians and their clinics in Canada. For example, federal legislation such as the

¹ *Veterinarians Act*, SBC 2010 c. 15 s. 3.

Food and Drug Act, R.S.C., 1985 c. F27, regulates the use of drugs in the diagnosis or treatment of animals. *The Health of Animals Act*, S.C. 1990, c. 21, is federal legislation focused on diseases and toxic substances that may affect animals or that may be transmitted by animals to people, as well as the protection of animals.

In addition, every province has also passed its own provincial legislation regulating the documentation and reporting of suspected animal abuse, such as British Columbia's *Prevention of Cruelty to Animals Act*, R.S.B.C 1996, c. 372 and the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990 in Ontario.² These Acts apply broadly to all animals, except wildlife that are not in captivity. Subject to exceptions, the Acts prohibit any person from causing distress to an animal. The general prohibitions in the Acts apply to all individuals, regardless of their legal relationship to the animal in question.

B. STATUTORY BODIES

In Canada, veterinarians are governed provincially by their own statutory body. In British Columbia, the *Veterinarians Act* creates the CVBC and sets out its general powers and duties relating to the regulation and advancement of the veterinary profession in BC. Similar statutory bodies have been established in the other provinces, such as the College of Veterinarians of Ontario (the "CVO") and the Alberta Veterinary Medical Association.³

In addition to the powers granted directly to the CVBC by the *Veterinarians Act*, the CVBC is also empowered to make its own bylaws to govern registrants. These bylaws include those related to the requirements for registration within the province, the procedures by which the CVBC receives and investigates complaints, as well as the process by which registrants are disciplined. Most notably perhaps, Part 4 of the CVBC Bylaws sets out the ethics and standards of practice for every registrant practicing in the Province (the "*Code of Ethics*").

The CVO is granted similar powers under the *The Veterinarians Act*, R.S.O. 1990 c. V3 and *Regulations*, R.R.O. 1990, Reg. 1093. The Act has also enabled the CVO to establish the *Minimum Standards for Veterinary Facilities in Ontario* which sets out, among other

² See also: *Animal Protection Act*, R.S.A. 2000, c. A-41; *The Animal Care Act*, C.C.S.M. c. A84.

³ See also: the Manitoba Veterinary Medical Association; the Nova Scotia Veterinary Medical Association; and L'Ordre des médecins vétérinaires du Québec.

things, the need for informed client consent and the standards of professional conduct.⁴ All veterinary facilities in Ontario must comply with these standards to establish or operate a veterinary facility, or be granted a specific exemption. Similar bylaws and ethical regulations governing their registrants have been set out by each provincial statutory body.⁵

C. CERTIFICATION

Across Canada, veterinarians must be registered or licensed with their provincial statutory body in order to practice. In general, each Province has similar requirements that must be fulfilled in order to be licensed by each Province's statutory body. As expected, a significant requirement for registration is to be a graduate of a college with an accredited veterinary program, such as from Douglas College in British Columbia, the University of Calgary in Alberta or the University of Guelph in Ontario.⁶

D. DISCIPLINE

The CVBC, like all the statutory bodies, is responsible for establishing and enforcing standards of professional competence and conduct for all veterinarians. As a result, the CVBC also has the authority and duty to investigate complaints about veterinarians in British Columbia. Formal complaints are accepted by the CVBC, which are reviewed before forwarding the complaint to the Investigation Committee made up of fellow veterinarians. A veterinarian against whom a complaint is made must cooperate with an investigation, such as providing information or records requested by the Investigation Committee.⁷ A complaint may ultimately be dismissed, resolved

⁴ See: <https://cvo.org/CVO/media/College-of-Veterinarians-of-Ontario/Resources%20and%20Publications/Acts%20and%20Regulations/MinimumStandards.pdf>.

⁵ See for example: *Bylaws of the Alberta Veterinary Medical Association*, at <http://abvma.in1touch.org/uploaded/web/website/Legislation/ABVMA%20BYLAWS%20February%202017.pdf>; *General By-Law No. 1 of The Manitoba Veterinary Medical Association*, at https://www.mvma.ca/sites/default/files/u355/MVMA%20By-law%3B%20Member%20approval%20Jun13_17%20Council%20Ratification%20Jun22_17.pdf, and *The Manitoba Veterinary Medical Association Code of Ethics*, at <https://www.mvma.ca/sites/default/files/u355/Code%20of%20Ethics%20%28approved%20Feb%203%202012%29.pdf>.

⁶ For additional accredited colleges of veterinary medicine see: <https://www.canadianveterinarians.net/documents/programs/ahtvtpac/colleges-with-accredited-programs>, https://www.avma.org/ProfessionalDevelopment/Education/Accreditation/Colleges/Documents/colleges_accredited.pdf.

⁷ *Veterinarians Act*, SBC 2010 c. 15 s. s. 52(3).

informally, resolved with remedial action or resolved with disciplinary consequences.⁸ On occasion, it may be necessary to conduct a Discipline Hearing or to impose interim suspensions and restrictions.

Under section 59 of the *Veterinarians Act*, S.B.C. 2010 c. 15 registrants are entitled to appear as parties at discipline hearings with legal counsel present. If the discipline panel determines that an allegation in a complaint has been proven against the respondent registrant, it must hold a separate hearing on the question of the appropriate penalty to apply as set out in sections 61(2) to (5) of the Act. The right of a veterinarian to a separate hearing on the question of penalty was similarly upheld in Nova Scotia in *Stasiulis v. Veterinary Medical Assn.*⁹ In his reasons, Justice Davison recognized that a party who is seeking to oppose a finding does not wish to compromise its position by directing its argument to penalty at that stage.¹⁰ Further, Justice Davison stated:

“Nor do I conclude that because counsel for the appellant has included a brief statement on penalty as an alternate ground in his submissions, that the appellant is now precluded from having a full hearing on what sanctions should be imposed... ..The impact of being deprived of carrying on one's profession, even temporarily, compares in severity with many of the sentences handed out following a criminal conviction and the right to make full answer at this stage of the proceeding cannot be waived by reference to a casual paragraph in the written brief, or by tenuous assumptions drawn from the comments of counsel in this proceeding following the main hearing.”¹¹

Therefore, Dr. Stasiulis was entitled to a full hearing on the question of penalty. Because Dr. Stasiulis was not afforded the opportunity to make full answer on this important issue, the Nova Scotia Veterinary Medical Association did not exercise procedural fairness. Similar rights to a separate penalty hearing or the right of appeal have also been instituted by the other statutory bodies.¹²

Decisions following a Discipline Hearing by the CVBC are generally not publically released unless the Discipline Committee has undertaken extraordinary action to protect the public interest under section 65(1) of the *Veterinarians Act*. In these cases, the

⁸ *Ibid*, at s. 61.

⁹ *Stasiulis v. Nova Scotia Veterinary Medical Association Council*, 1993 CanLII 4588 (NS SC).

¹⁰ *Ibid*, at para 10.

¹¹ *Ibid*, at paras 11 and 14.

¹² See for example: *Veterinary Profession Act*, R.S.A. 2000 c. V2, s. 43.1; *Veterinarians Act*, R.S.O. 1990 c. V3, s. 35(1).

College will publish a summary of the facts of the case, including the name of the veterinarian, the actions taken by the Discipline Committee and a summary of the reasons.

An example of such extraordinary action was the CVBC's disciplinary proceeding against the veterinarian, Dr. Etherington. Dr. Etherington had previously been the subject of many complaints and disciplinary hearings and had been suspended by order of the CVBC. He later resigned. Regardless, Dr. Etherington was again summoned before the Discipline Committee on several additional complaints. Among these complaints were allegations of sexual harassment, improperly performed surgical procedures, failure to discuss the risks of the surgical procedures and treatment options with clients, and failure to prepare adequate medical records documenting any diagnosis, or treatment. The Committee ordered Dr. Etherington to pay a penalty of \$40,000 and prohibited him from applying to re-register as a veterinarian in British Columbia for at least 5 years.¹³

Statutory bodies such as the CVO similarly make their discipline hearing decisions available to the public, complete with details on the nature of the misconduct and the penalties levied against the veterinarian.¹⁴ Other statutory bodies, such as the Alberta Veterinary Medical Association, do not publish their decisions except to give reasons to the investigated member and the complainant. However, disciplinary hearings, like those in other provinces are generally open to the public, and veterinarians who have had their licenses suspended or cancelled by the Hearing Tribunal are listed online.¹⁵

III. CLAIMS IN NEGLIGENCE

In general, complaints advanced against veterinarians have been reported to the governing statutory bodies for investigation instead of being brought as a civil claim. To establish a claim in professional negligence, a plaintiff must prove that: 1) the defendant owed him or her a duty of care, 2) the defendant breached that duty, and 3) the breach caused a loss or injury that is compensable.

A. DUTY OF CARE

It is well established in Canadian tort law that medical professionals owe a duty of care to their patients. This duty arises as soon as a doctor-patient relationship comes into

¹³ College of Veterinarians of British Columbia, Hearing File Number: H12-05.

¹⁴ See: [https://cvo.org/For-Licensed-Members/Investigations-Resolutions/Discipline-\(1\)/Discipline-Proceedings.aspx](https://cvo.org/For-Licensed-Members/Investigations-Resolutions/Discipline-(1)/Discipline-Proceedings.aspx).

¹⁵ See: http://www.abvma.ca/document/2299/ABVMA_Complaint_Process.pdf.

existence.¹⁶ For our purposes, the courts have recognized that this duty of care also exists in a veterinary-client relationship.¹⁷ Unlike the traditional doctor-patient relationship however, the veterinarian owes that duty to both to the patient (animal) that is being treated as well as to the animal's owner.

The duty of care owed in a veterinary-client-patient relationship is also established in the CVBC's *Code of Ethics*:

204(1) *When a veterinarian-client-patient relationship is established, a registrant must uphold the duties pertaining to such a relationship, including but not limited to those set out in the Code.*¹⁸

A similar obligation is set out in Alberta's *Veterinary Profession General Regulation*, which states that veterinarians owe "a duty to clients to be competent to perform the services undertaken."¹⁹

B. STANDARD OF CARE

In a medical context, it is accepted that physicians have a duty to conduct their practice in accordance with the conduct of a normal and prudent practitioner in the same circumstances.²⁰ A doctor's conduct must be judged according to the knowledge he ought reasonably to have had when the alleged negligence occurred. Physicians that fail to conform with this standard, thereby causing injury, can be found guilty of negligence.²¹

The principles of a veterinary standard of care have not received as much attention when compared to the standard applied to other medical professionals. Because of this, the courts have generally applied the same standard of care to veterinarians that is applied to other medical professionals.²² For example, in *McNeil v. Weste*,²³ the Provincial Court stated that the standard of care is that of a "reasonable veterinarian."²⁴

¹⁶ *Reynard v. Carr* (1983), 50 BCLR 166 (SC).

¹⁷ *Wheeler v. Muri*, 1996 CarswellSask 767; *Mowrey v. Johnson & Johnson*, 1996 Carswell Que 1136; *Brettell v. Main West Animal Hospital Ltd.*, 1992 CarswellOnt 4943; *Priest v. Williams Lake Veterinary Hospital Ltd.*, 2011 BCPC 63.

¹⁸ College of Veterinarians of British Columbia Bylaws, *Part 4: Ethics and Standards*, s. 204(1).

¹⁹ *Veterinary Profession General Regulation*, Alberta Regulation 44/1986, s.16 (1)(c).

²⁰ *Wilson v. Swanson*, [1956] SCR 804.

²¹ *Ter Neuzen v. Korn*, [1995] 3 SCR 674.

²² *Wheeler v. Muri* 1996 CarswellSask 767.

²³ 2011 NSSM 42. ("*McNeil*").

²⁴ *Ibid*, at para 14.

Similarly, in *Brettell v. Main West Animal Hospital Ltd.*,²⁵ the Superior Court determined that the duty of care is fulfilled only if the veterinarian acts in accordance with a practice rightly accepted as proper by a body of skilled and experienced veterinarian practitioners. However, the Court also recognized that a veterinarian is not expected to be an expert in every instance.²⁶ In *Brettell*, a veterinarian removed loose teeth of a Bichon Frise without informing the owner and without knowledge that the animal was a show dog. Based on expert testimony, the Court accepted the fact that there were no policies set by the governing body at the time with regard to tooth extraction, and that “once a dog is under anaesthetic it becomes a judgment call whether to remove the teeth or not if they are loose”.²⁷ Therefore, the veterinarian was found to have met the standard of care and the claim was dismissed.

The CVBC and the CVO disciplinary panels have also adopted this same standard of care. For example, in one decision the CVBC stated that the standard of care was that of a “reasonable and competent veterinarian.”²⁸ Similarly, in another decision a veterinarian was fined and issued a formal reprimand by the CVBC because he “failed to use a level of care, skill and knowledge of a reasonably competent practitioner” by inadequately creating and maintaining medical records pertaining to his clients.²⁹

The CVO has used similar language to describe the standard of care expected by veterinarians. For example, in the CVO’s summary of the disciplinary hearing of Dr. Khakh, the Panel determined that Dr. Khakh had failed to “maintain the standards of practice regarding proper medical records, anesthetic protocols, analgesia, drug logs, radiograph safety and the proper use of vaccines.”³⁰ As a result, Dr. Khakh’s conduct had “placed the entire profession into disrepute,” and he was suspended as a result³¹

Conformity with a standard practice will generally exonerate medical professionals, including veterinarians, of any negligence.³² The courts have accepted that this conformity shows what other medical professionals consider to be sufficient practice,

²⁵ 1992 CarswellOnt 4943. (“*Brettell*”).

²⁶ *Ibid*, at para 27.

²⁷ *Ibid*, at para 29.

²⁸ College of Veterinarians of British Columbia, Hearing File Number: 13-026.

²⁹ College of Veterinarians of British Columbia, Hearing File Number: 09-03.

³⁰ See: <https://cvo.org/CVO/media/College-of-Veterinarians-of-Ontario/Resources%20and%20Publications/Discipline%20Summaries/DSKhakh.pdf?ext=.pdf>.

³¹ *Ibid*.

³² *Supra* note 21, at para 54.

that the defendant could not have learnt how to avoid the injury through the example of his peers, and that no other practical precautions could have been taken.³³

In *Southwhite Stables Inc. v. Ingram Veterinary Services Ltd.*,³⁴ the Court of Queen's Bench accepted that this test as it is applied to medical personnel is the same that applies to veterinarians. Here the veterinarian who carried out a pre-purchase examination of a horse did not inform the purchaser that he had treated the horse three years previously for an eye injury. The veterinarian took special care to conduct a three phase eye test on the animal, but did not carry out any additional tests. The horse did not exhibit any signs of blindness and evidence strongly suggested that the horse was well-functioning. However, a year after the purchase, the horse went blind in one eye from cataracts.

As the Court stated, the test in this case was whether "reliance by most veterinarians on the three phase eye test accepted by the veterinary profession an adequate test for equine opacity of the lens?" Because there was no evidence that additional tests would have detected any fault with the horse's vision, the Court determined that the veterinarian's conduct had been sufficient. Therefore, the veterinarian was not found to be negligent, as he had followed the standard accepted practice.

As mentioned above, the CVBC has drafted its own bylaws and standards of practice by which they govern a veterinarian's conduct. For example, section 204(2) of the CVBC's *Code of Ethics* states:

*(2) In every veterinarian-client-patient relationship, a registrant must strive to use the level of care, skill and knowledge expected of a competent practitioner.*³⁵

Registrants are required to provide only those services for which they are reasonably qualified and competent to provide, and, when doing so, must not misrepresent their qualifications or competence.³⁶

The Alberta Veterinary Medical Association also places an obligation on its members to "serve clients in a conscientious, diligent and efficient manner and provide a quality of service at least equal to that expected from a competent member of the profession."³⁷ The CVO places a similar requirement on its members, as failing to maintain the

³³ *Supra*, note 21.

³⁴ [1984] AWLD 461. ("*Southwhite*").

³⁵ College of Veterinarians of British Columbia Bylaws, *Part 4: Ethics and Standards*, s.204(2).

³⁶ College of Veterinarians of British Columbia Bylaws, *Part 4: Ethics and Standards*, s. 205(1).

³⁷ *Veterinary Profession General Regulation*, Alberta Regulation 44/1986, s. 16(1)(d).

standard practices of the profession is consider professional misconduct under the *Regulations*, R.R.O. 1990, Reg. 1093.

The various statutory bodies across Canada also place a particular emphasis on the importance of record-keeping. A veterinarian is generally required to create and maintain a current medical record containing medical information of each patient that is accurate, complete, and properly organized.³⁸ As can be seen from the published summaries of disciplinary hearings, oftentimes the reason a veterinarian is sanctioned by a disciplinary committee is for poor or incomplete record-keeping. For example, in the CVO's decision against Dr. Torabi, the Discipline Committee found he had committed a number of infractions including failing to make or maintain proper records and making alterations to records after-the-fact and submitting those records to the CVO.³⁹ Similarly, in the CVBC's File Number 09-03, the veterinarian was formally reprimanded and fined \$10,000 because he:

[F]ailed to use a level of care, skill and knowledge of a reasonably competent practitioner in the advice and management of treatment and failed to create, maintain and keep current a medical record containing appropriate detail of the history, examination, diagnosis, recommendations and other treatment, including medications prescribed and administered, and other pertinent information pertaining to the client.⁴⁰

Due to the complexity of most cases in a medical malpractice context, courts often look to the help of multiple experts to determine the standard of care.⁴¹ The same holds true with veterinarians. For example, in *Murray v. Mouris*,⁴² the Nova Scotia Supreme Court determined based primarily on the testimony of two experts that "failure to diagnose the pregnancy and the giving of the opinion that the animal would never reproduce,

³⁸ See: College of Veterinarians of British Columbia Bylaws, *Part 4: Ethics and Standards*, s. 245(1); Alberta Veterinary Medical Association Practice Inspection and Practice Standards Bylaw, s. US-7; College of Veterinarians of Ontario *Minimum Standards for Veterinary Facilities in Ontario; General By-Law No. 11 of the Manitoba Veterinary Medical Association*, s.4-6-3.

³⁹ See: <https://cvo.org/CVO/media/College-of-Veterinarians-of-Ontario/Resources%20and%20Publications/Discipline%20Summaries/DSTorabi.pdf?ext=.pdf>

⁴⁰ College of Veterinarians of British Columbia, Hearing File Number: 09-03. See also: <https://cvo.org/CVO/media/College-of-Veterinarians-of-Ontario/Resources%20and%20Publications/Discipline%20Summaries/DSVerma.pdf?ext=.pdf>.

⁴¹ *Supra*, at note 21.

⁴² 1980 CarswellNS 325.

resulted from a failure to exercise the care which a reasonably prudent doctor of veterinary medicine would show in conducting such an examination".⁴³

C. INFORMED CONSENT

It is well established that healthcare professionals have a positive duty to disclose the full nature of proposed treatments and procedures, including their inherent risks. For example, CVBC has adopted this principle under their *Code of Ethics*, which requires that valid consent must be related to the proposed veterinary service and given voluntarily. Consent must not be obtained through misrepresentation or fraud.⁴⁴ In addition, section 211(3) of the *Code of Ethics* requires that:

- (3) A registrant must ensure that the client giving consent is
- (a) capable of making a decision about whether to give or refuse consent to the proposed veterinary service, and
 - (b) has the legal authority to give or refuse consent to provision of veterinary services to the patient.⁴⁵

Along with the other statutory bodies, the CVO has mandated similar requirements for informed consent. For example, under the CVO's *Regulations*, written consent from the client must be obtained before performing any surgical procedures.⁴⁶

To obtain informed consent from a client for proposed veterinary services, a registrant must ensure that the client is provided with material information a reasonable person would require in order to understand the proposed veterinary service. Information that should be provided must include, among other things: information about the condition for which the veterinary services are proposed, the expected risks and benefits to the treatments, reasonable alternative courses of action, the need for follow-up care, and the expected costs of the veterinary service.⁴⁷

The issue of informed consent features heavily in veterinary malpractice cases and disciplinary hearings. In *Sharma v. Veterinary Medical Assn. (British Columbia)*,⁴⁸ Dr. Sharma appealed the decision of what was then the British Columbia Veterinary

⁴³ *Ibid*, at para 45.

⁴⁴ College of Veterinarians of British Columbia Bylaws, *Part 4: Ethics and Standards*, s. 211(1).

⁴⁵ College of Veterinarians of British Columbia Bylaws, *Part 4: Ethics and Standards*, s.211(3);

⁴⁶ *Regulations*, R.R.O. 1990, Reg. 1093, s. 22(1). See also: Alberta Veterinary Medical Association Practice Inspection and Practice Standards Bylaw; Manitoba Veterinary Medical Association Practice Inspection and Practice Standards By-laws, s 2.12.2.6.

⁴⁷ College of Veterinarians of British Columbia Bylaws, *Part 4: Ethics and Standards*, s. 211(6).

⁴⁸ 2008 BCSC 240.

Medical Association's (BCVMA) decision to suspend him from practice. The decision was based on a finding by the BCVMA that Dr. Sharma had engaged in misconduct and was in violation of the *Veterinarians Act* and the BCMVA Code of Ethics by, among other things, failing to obtain informed consent as to the services to be provided and "failing to use a level of care, skill and knowledge expected of a reasonably competent practitioner."⁴⁹

In the CVBC's disciplinary proceeding in File Number 10-071, the Discipline Committee found that a veterinarian's conduct amounted to professional misconduct because the veterinarian had failed to discuss the risks of surgical procedures and treatment options with the pet owner and therefore failed to obtain properly informed consent prior to performing surgery.⁵⁰ Similarly, the CVO's Discipline Committee found that a member had failed to obtain informed consent to treatment, miscommunicated or failed to properly communicate test results and treatment options to the client and failed to maintain proper medical records. For these reasons, the member's license was suspended for 6 months with conditions imposed upon reinstatement.⁵¹

The issue of informed consent most notably arises in cases where veterinarians are forced to euthanize the animals in their care. As recognized in *College of Veterinarians (Ontario) v. Greenberg-Blechman*:

*[A]nimal euthanasia is much more than simply administering a needle. It involves the veterinarian establishing rapport with both the pet owner and the animal. Further, it requires full and frank discussion of treatment options so that a pet owner can feel "validated" about his treatment decision for his pet such that he can give the veterinarian truly "informed consent" about the treatment [euthanasia] chosen for his particular animal. Finally, there is a need for proper record-keeping of medical records to insure proof of ownership and informed consent and proper controls on the use of the restricted drugs used to euthanize animals.*⁵²

Overall, much like in the doctor-patient context, informed consent is considered a crucial requirement in the veterinarian-patient-client relationship. Failure to meet the standard of informed consent before undertaking a course of treatment will likely result

⁴⁹ *Ibid*, at para 41.

⁵⁰ College of Veterinarians of British Columbia, Hearing File Number: 10-071.

⁵¹ See: <https://cvo.org/CVO/media/College-of-Veterinarians-of-Ontario/Resources%20and%20Publications/Discipline%20Summaries/DSKhahra.pdf?ext=.pdf>.

⁵² 2010 ONCJ 35, at para 40.

in a finding of negligence against the veterinarian if damage to the patient occurs as a result.

D. CAUSATION

If a court finds that a medical practitioner has breached the standard of care to the patient, the plaintiff must then prove that the breach caused the injury and resulted in damages.⁵³ In a case of veterinary malpractice, a court will ask whether the client would have suffered the loss but for the veterinarian's negligence rather than the patient.

To succeed in negligence, the plaintiff must also prove that the loss was a foreseeable consequence of the breach. It has been well-established that when considering causation, the court must consider only the knowledge that was available to the veterinarian at the time the treatment took place. Veterinarians, like medical professionals in general, are not expected to be all-knowing. The courts have recognized that hindsight is 20/20, and to review the treatment given to a patient using the benefit of hindsight would establish an unreasonable standard.⁵⁴

In *McNeil*, the plaintiffs brought their dog to Dr. Weste, a veterinary surgeon, with symptoms that included vomiting and an inability to eat or drink. Dr. Weste was found by the Court to have proposed tests, such as an x-ray and blood work, but did not "push them aggressively" because the tests were expensive. Furthermore, the dog's behavior during the examination was normal. The plaintiff alleged that because of the veterinarian's advice, he took a more "conservative, wait and see approach", resulting in the dog's death the next day.⁵⁵

The Court found that based on what was known at the time, it was obvious that the veterinarian could not have been aware of how serious the underlying problem was. The standard of care was that of a reasonable veterinarian. Therefore, because Dr. Weste suggested the tests, even though she did not push them aggressively, her approach to treatment had been reasonable. Furthermore, the Court stated that

It is easy in hindsight to say that something was terribly wrong - like a ticking time bomb in this poor dog's insides - but the test is what a reasonable veterinarian should have done with what was known at the time. On all of the

⁵³ *Hanke v. Resurfice Corp.*, 2007 SCC 7.

⁵⁴ *Supra*, note 23.

⁵⁵ *Supra*, note 23, at para 6.

*evidence, I cannot say that Dr. Weste should have foreseen what eventually happened.*⁵⁶

In order to succeed on proving causation, a plaintiff must prove that had the medical professional upheld the standard of care, and not acted negligently, a more favourable outcome would have resulted.⁵⁷ In *McNeil*, no tests were done to determine why the dog died. Without knowing the cause of death, the Court reasoned that there was no way to establish if the dog's life could have been saved even if the tests were performed. Therefore, there was no evidence that even if the defendant had been found negligent, that the negligence had been the proximate cause of the loss.

E. DAMAGES

Based on the availability of case law, it is clear that it is still rare for a case of veterinary malpractice to see the inside of a courtroom. Even rarer still is a finding of negligence that results in an award of damages to the plaintiff. Damage awards for veterinary malpractice are often purely compensatory in nature and are awarded when an animal is killed or injured. Since animals are property in law, the calculation of compensatory damages is based on the market value of the animal. In the few cases where damages have been awarded, or even discussed, courts have shown themselves to be unwilling to offer any monetary value to the plaintiff beyond the value of the animal itself.

For example, in *Brettell*, where damages were discussed, though not ultimately awarded, the Court determined that damages in this case would be assessed on the patient's value as a show dog and breeder. The plaintiff argued that because the veterinarian had removed several teeth from the Bichon Frise, fewer people would want their dogs to breed with it. The plaintiff submitted that the dog's value would have been \$14,000 to \$16,000 prior to the teeth being extracted. Evidence however, showed that the plaintiff had bred her dog nine times since the removal of the teeth with each puppy selling for around \$500. Therefore, the plaintiff had suffered no loss. In any event, the Court declined to award damages because negligence had not been proven on the part of the veterinarian.⁵⁸

In *Murray*, the plaintiff farmer purchased a breeding heifer on the condition that the animal would be sterile. Veterinary surgeons examined the animal on two different occasions and gave the opinion that she would never reproduce. However, it was later

⁵⁶ *Ibid*, at para 15.

⁵⁷ *Brough v. CRHA*, 2006 ABQB 559.

⁵⁸ *Supra*, note 25, at para 36.

discovered that the animal was pregnant during the second examination. The Court issued damages to the plaintiff in the amount of the purchase price of the animal as well as quarantine fees, transportation costs, insurance, and veterinary fees.⁵⁹

F. DEFENCES

As has been established in cases such as *Brettell* and *Southwhite*, oftentimes the strongest defence to a veterinary malpractice claim is to show that the veterinarian fulfilled his or her duty of care by acting in accordance with accepted practices.⁶⁰ Generally, if a veterinarian can establish that the course of treatment undertaken, whether or not it led to the patient's injury or death, was in compliance with the customary practice rightly accepted as proper by a body of skilled and experienced veterinarian practitioners, the veterinarian will be presumed to have acted reasonably given the information at the time.

Many veterinary malpractice claims or disciplinary investigations turn on whether the veterinarian had fully informed the client of both the nature of the proposed treatment and the potential risks involved. In other words, did the practitioner obtain fully informed consent before embarking on a course of treatment? In addition, the various disciplinary bodies have placed great importance on the keeping and maintenance of a patient's medical records. Specifics as to what these records should contain have been laid out in detail by the various statutory bodies.⁶¹ Therefore, the best defence to malpractice claims, and indeed, avoiding them altogether, is to ensure the proper maintenance of medical records and the obtaining of informed consent.

IV. CONTEXT: FUTURE TRENDS IN VETERINARY MALPRACTICE LAW AND RISK MANAGEMENT

Relative to other professions, few actions have been brought against veterinarians for professional negligence in Canada. This is especially interesting, given the number of animal veterinary interactions that occur daily, and given the reality that not all these interactions will have a successful outcome. Therefore, the possibility of lawsuits is

⁵⁹ *Supra*, note 42, at para 47.

⁶⁰ *Supra*, note 25; *Supra* note 34.

⁶¹ See for example: *Regulations*, R.R.O. 1990, Reg. 1093, s. 22(1); College of Veterinarians of British Columbia Bylaws, Part 4: *Ethics and Standards*, s. 4.5; Alberta Veterinary Medical Association Practice Inspection and Practice Standards Bylaw, s. US-7.

always present. Yet despite this fact, the number of veterinary malpractice cases seeing the inside of a courtroom remains low.⁶²

Likely the biggest bar to a negligence lawsuit in veterinary malpractice cases is the lack of any significant monetary damages for the owner. It goes without saying that lawsuits can be extremely costly and as long as the damages awarded continue to compensate the owner only for the value of the animal itself, the number of medical malpractice cases will likely remain low. Instead, many owners seem to prefer to bring their complaints to their provincial veterinary college, who then handle each complaint as a disciplinary matter.

Recently however, the profession has been put under increasing scrutiny and is becoming subject to much greater accountability than in the past. Since 1999, frequent efforts have been made to update Canada's archaic animal cruelty legislation. In Quebec, legislation was passed to change the status of animals from their prior status as property to "sentient beings".⁶³ Furthermore, in a larger animal context, the requirements on safe food products have created new avenues for liability related to the transmission of parasitic disease. Having regard to the recent jurisprudence, procedures performed on show animals or service animals also carry a higher risk of litigation.

In line with this shift, *Ferguson v. Birchmount Boarding Kennels Ltd.*⁶⁴ was the first Canadian decision, upheld on appeal, to award damages for mental distress associated with the loss of an animal.⁶⁵ Although it was not a case involving a veterinarian's negligence, it will likely have significant financial implications for those who accept animals into their care, including veterinarians. In *Ferguson*, the plaintiffs boarded their dog at a kennel where it later escaped from the enclosed play area by squeezing between 2 boards in a fence. The dog was never found. The plaintiff submitted that she was emotionally distraught when she heard the news and suffered from insomnia and nightmares, which required her to take time off work. The Court held that the kennel had not taken reasonable steps to ensure that the fence was secure.⁶⁶ The Fergusons were awarded \$2,527, which included \$1,417 in general damages for pain and suffering associated with the loss of the dog. The kennel appealed. The Divisional Court held that

⁶² D. S. Favre, *Detailed Discussion of Veterinarian Malpractice*, 2002.

⁶³ See: *Quebec passes animal protection law*, Toronto Star, at <https://www.thestar.com/news/canada/2015/12/04/quebec-passes-animal-protection-law.html>.

⁶⁴ *Ferguson v. Birchmount Boarding Kennels Ltd.* (2006), 79 O.R. (3d) 681 (Div. Ct.).

⁶⁵ A. F. Walker, *Ontario courts award compensation for emotional distress associated with the loss of a pet*, 2007 *The Canadian Veterinary Journal*, 48-9.

⁶⁶ *Ibid*, at para 19.

the trial judge had not erred in awarding the plaintiffs damages for pain and suffering. Instead, they agreed that based on the evidence of the plaintiffs' relationship with the dog, and the dog's unique abilities and nature, the plaintiffs had experienced pain and suffering upon learning of the dog's escape from the kennel.⁶⁷ This decision was later followed in *Nevelson v. Murgaski*.⁶⁸ Therefore, mental distress caused by the loss of a pet, if proven to exist, is also compensable.

V. CONCLUSION

It is clear from the case law that veterinary malpractice law has received little to no attention from the courts in the past. This is likely to change given the recent developments in animal rights law. The advancing legal status of animals in Canada will no doubt create corresponding legal pitfalls for the veterinarians that treat them.

To diminish the chance of both a disciplinary investigation and/or a civil claim it is important that veterinary practitioners comply with the guidelines set out by their respective statutory bodies. In general, veterinarians are expected to conduct their practice in accordance with the conduct of a normal and prudent practitioner. As apparent from the summaries of numerous disciplinary hearings and the available case law, the respective statutory bodies place great importance on the creation and maintenance of medical records as well as on obtaining informed consent from the client. Complying with these standards before undertaking any course of treatment will enable the veterinarian to better avoid disciplinary investigations from their statutory body and the advancement of civil claims.

⁶⁷ *Ibid*, at para 24.

⁶⁸ [2006] O.J. No. 3132 (QL).