Cleveland State Law Review

Volume 15
Issue 2 *Revolution in Law Practice (Symposium)*

Article

1966

Malpractice by Veterinarians

Martin J. Strobel

Malpractice by Veterinarians

*Martin J. Strobel**

VETERINARIANS AND VETERINARY SURGEONS are practitioners of the art of treating diseases and injuries of domestic animals, surgically or medically.[1]

Standard Requirements of the Profession

All states, except Alaska, have licensing statutes for veterinarians.[2] The requirements vary from state to state, but, in general, all states require graduation from an accredited school of veterinary medicine, followed by an examination on certain prescribed subjects in the field.[3] It has been argued unsuccessfully[4] that non-graduate veterinarians constitute one "school" and graduate veterinarians another, and that each has its own standards. Courts have held that a school of medicine relates to the system of diagnosis and treatment rather than to the amount or extent of the learning and information of members of the profession.[5]

In addition to the educational prerequisites to the practice of veterinary medicine, all veterinary biologics, and the firms that produce them are licensed and inspected, thereby guaranteeing the products' safety and potency, as well as insuring accurate labelling as to care, use and limitation.[6]

There are eighteen veterinary medical colleges in the United States,[7] and approximately 22,000 veterinarians. About 65 million dollars a year is spent by the federal government on activi-

---

* B.A., Columbia Univ.; Researcher, Legal Dept. of Cuyahoga County Welfare Dept.; Third-year student at Cleveland-Marshall Law School of Baldwin-Wallace College.

1 Tucker v. Williamson, 229 Fed. 201 (S. D. Ohio, 1915); Lyford v. Martin, 79 Minn. 243, 82 N. W. 479 (1900); 70 C. J. S. *Physicians and Surgeons* § 1 (1951).

2 Note, The Corporate Practice of Veterinary Medicine, 46 Iowa L. Rev. 850 n. 45 (1961) (state by state breakdown on licensing statutes for veterinarians).

3 Staff of Senate Comm. on Govt. Operations, 87th Cong., 1st Sess., Veterinary Medical Science and Human Health (Comm. Print, 1961) [hereinafter cited as Senate Report on Veterinary Medicine].

4 Bekkemo v. Erickson, 186 Minn. 108, 242 N. W. 617 (1932).

5 *Id.* at 619.

6 Senate Report on Veterinary Medicine, *op. cit. supra* note 3 at 9.

7 *Id.* at XXI. (Introduction)

ties of a direct veterinary nature.[8] It is rather surprising that so little has been written in the past thirty years describing the legal duties of the veterinarian.

Duty of Care

Since the major portion of litigation against the veterinarian has been for malpractice and negligence,[9] let us consider the general rules by which he is bound and the standard to which he is held.

The rules governing the duty and liability of physicians and surgeons in the performance of professional services are applicable as well to veterinarians.[10] Thus, a veterinarian is bound to use, in performing the duties of his employment, such reasonable attention and skill as may ordinarily be expected of careful, skillful, and trustworthy members of his profession in his neighborhood or vicinity. And, he is answerable for the result of his lack of skill or care.[11]

Applying this general rule, the courts have held veterinarians liable for negligence in surgical operations,[12] negligence in connection with inoculation or vaccination,[13] injury traceable to improper diagnosis,[14] and injury caused by improper care and treatment of animals.[15]

Although the broad basis of a veterinarian's liability for malpractice is to be tested by the rules applicable to physicians and surgeons,[16] there are aspects of treatment and practice peculiar

---

[8] *Id.* at XI. (Introduction)

[9] Soave, An Introduction to Veterinary Law 65 (1962).

[10] Storozuc v. W. A. Butler Co., 3 Ohio Misc. 60, 203 N. E. 2d 511 (Ohio Common Pleas, 1964). ("Malpractice" in Ohio Rev. Code, § 2305.11 includes practice of Veterinary Medicine); 41 Am. Jur. *Physicians and Surgeons* § 88 (1942); 21 R. C. L. *Physicians and Surgeons* § 31 (1918); See also Hassard, Professional Liability Claims Prevention, 163 J. A. M. A. 1267 (1957) ("malpractice" applies to all professional services furnished on a contract basis).

[11] McNew v. Decatur Veterinary Hospital, Inc., 85 Ga. App. 54, 68 S. E. 2d 221 (1951); Barney v. Pinkham, 29 Neb. 350, 45 N. W. 694 (1890); Boom v. Reed, 69 Hun 426, 23 N. Y. Supp. 421 (1893); Annot., 38 A. L. R. 2d 503 at 505 (1954).

[12] Annot., 38 A. L. R. 2d 503 at 511 (1954).

[13] *Id.* at 512.

[14] *Id.* at 509.

[15] *Id.* at 506.

[16] Note 10 *supra.*

to the field of veterinary medicine, which prevent blanket application of these rules. Concern for the personal and confidential relationship that exist between practitioner and client in the legal profession, physician and patient in the medical profession, is not applicable to the practice of veterinary medicine, since no personal secrets are revealed to the veterinarian in order for him to render his services effectively.[17] Yet, this very fact indicates the veterinarian's difficulty in conducting a clinical examination of his patient.

Animals are unable to describe their symptoms; they vary so widely in their reaction to handling and examination that a wide range of normality must be permitted in their physical examination. While some species, such as dogs and horses, because of their size, and because they are accustomed to human company, are relatively good subjects, sheep, goats and pigs are more difficult to handle.[18]

In the case of *Breece v. Ragan,*[19] a veterinarian, engaged to inoculate fifty-nine head of plaintiff's cattle, was charged with negligence in placing all the cattle in one small barn and beginning to inject them while they were loose in the barn, by jabbing a hypodermic needle into their necks or shoulders. In the process of inoculation the cattle became frightened and trampled each other. After some time, the veterinarian ordered the cattle released from the barn, at which time it was discovered that a number of cattle had died from the effects of having been trampled and smothered by the others. The court held that since the veterinarian was supposedly trained in his job, he should have desisted or resorted to some other method as soon as he noticed that his actions were exciting the cattle.

While in *Breece*[20] the veterinarian was held liable for injuries incurred during the course of treatment, the cases on malpractice by veterinarians go even further, and hold the veterinarian liable for negligence preparatory to treatment, where such negligent preparation results in injury.[21] Thus, in the case of *Beck v. Henkle-Craig Livestock Co.,*[22] in order to perform

---

[17] *Op. cit. supra* note 2 at 856.

[18] Blood and Henderson, Veterinary Medicine 2 (2d ed. 1963).

[19] Breece v. Ragan, 234 Mo. App. 1093, 138 S. W. 2d 758 (1940).

[20] *Id.* at 759.

[21] *Op. cit. supra* note 11 at 508.

[22] Beck v. Henkle-Craig Livestock Co., 171 N. C. 698, 88 S. E. 865 (1916).

an operation on a mule for knots in its shoulder, the veterinarian placed the mule in a stall used for the purpose of confining unruly animals. The stall was so constructed as to require three bars to hold the animal inside. Only the top bar was put in position. As a result, while the operation was being performed, the mule backed under the bar and seriously injured its spine. The court held that it was the veterinarian's duty to see that the mule was properly confined, so as not to injure itself, before commencement of the operation.

Again, where the veterinarian was engaged to cauterize a spavin (a disease of the hock joint of horses, producing lameness) on a horse, and threw the horse to the ground, preparatory to the application of the treatment, in such a negligent manner as to cause a rupture of the animal's diaphragm, the court considered the throwing to be part of the treatment, and allowed the plaintiff to recover for defendant's negligence and lack of skill in performing the operation.[23]

The three cases discussed above[24] illustrate that from the time a veterinarian approaches an animal he is about to treat or examine, he may incur liability if he is negligent. Considered to be one who knows animals and their reactions, a veterinarian should know how to restrain them properly. This does not mean that he must anticipate their every move, but he should recognize what actions or methods of treatment are likely to frighten an animal and possibly cause it harm.[25]

Improper Diagnosis

In the area of diagnosis too, there are certain aspects peculiar to the practice of veterinary medicine.

Careful questioning of the owner or attendant about the diet, recent vaccination, surgery, or the introduction of newly acquired animals into the group, may provide clues to a successful diagnosis. Thus, rejection of a particular disease merely because there has never been a case of it on the particular farm in question, when, in fact, the patient has been purchased only

---

[23] Staples v. Steed, 167 Ala. 241, 52 So. 646 (1910), later proceedings in 6 Ala. App. 594, 60 So. 499 (1912).

[24] *Ibid.;* Breece v. Ragan, *supra* note 19; Beck v. Henkle-Craig Livestock Co., *supra* note 22.

[25] Soave, *op. cit. supra* note 9 at 71.

a few weeks previous to examination, represents a serious error of omission on the part of the veterinarian.[26]

Problems such as the measurement of the relative humidity of a barn and its importance as a factor in the outbreak of pneumonia, can present insuperable difficulties to the veterinarian. In a case of arsenic poisoning, even the most detailed examination of the animal and the most careful questioning of the owner may fail to elicit the evidence necessary for a correct diagnosis. Only a careful search for a source of arsenic can provide the information. Neglect of one aspect of the clinical examination can render useless a great deal of work and lead to an error in diagnosis.[27]

Proximate Cause and Liability

In order to recover for the negligence of a veterinarian it must be shown that such negligence is the proximate cause of the injury or death of the animals treated by him.[28]

While it is a relatively easy matter to observe the cause and effect where a herd of cattle is frightened when jabbed with needles, it is much more difficult to determine the causal relation where the basis for the malpractice action is improper diagnosis. Generally, in malpractice actions against physicians there is no presumption of negligence from error of judgment in diagnosis or treatment.[29] The same rule applies to veterinarians.[30]

Illustrative of the particular difficulty encountered in connecting improper diagnosis or treatment by a veterinarian with the death of an animal is the case of *Phillips v. Leuth*,[31] in which the defendant veterinarian advised vaccination of plaintiff's entire herd of hogs for hog cholera. Shortly after vaccination the hogs died. Alleging improper vaccination as the cause of death, plaintiff introduced expert testimony to the effect that the hogs did not die of cholera but of septic poisoning. The court held that the presence of a number of swine diseases in the area with

---

[26] Blood and Henderson, *op. cit. supra* note 18 at 2.

[27] *Id.* at 1.

[28] Phillips v. Leuth, 200 Iowa 272, 204 N. W. 301 (1925); Breece v. Ragan, *supra* note 19; Erickson v. Webber, 58 S. D. 446, 237 N. W. 558 (1931); Prahl v. Gerhard, 25 Wisc. 466 (1870); Soave, *op. cit. supra* note 9 at 69.

[29] Nicholas v. Jacobson, 113 Calif. App. 382, 298 P. 505 (1931); Pendergraft v. Royster, 203 N. C. 384, 166 S. E. 285 (1932).

[30] Note 10 *supra*.

[31] Phillips v. Leuth, *supra* note 28.

the same symptoms as cholera, was a presumptive explanation of the cause of the sickness.

Similarly, since in its incipient stages cholera cannot be detected, a high death rate resulting from the application of a remedy for its prevention may lead to an inference that the hogs already had the disease and that a serum, administered after an additional injection of virus, could not counteract the disease.[32]

Thus, the burden is upon plaintiff to produce some evidence to single out defendant's alleged negligence as the cause, and to that extent negate the other possible causes—a difficult undertaking to say the least! But, failure of the veterinarian to comply with vaccination regulations constitutes negligence per se[33] and certainly may serve plaintiff's cause.

Contributory Negligence

In *Breece*[34] the veterinarian defended on the ground that the farm owner helped him drive the cattle into the barn and was, therefore, contributorily negligent. The court held, in essence, that the farmer's action was not so closely allied with the loss as to bar his recovery for damages sustained since his act was not the direct cause of the casualty, absent which the loss would not have occurred.

On the other hand, the negligent act of an owner or his agent in handling his hogs, after their shipment to him, would preclude recovery, even though he might be able to show the veterinarian of defendant serum company, who had inoculated the hogs, had been negligent in failing to discover that they were unhealthy and unfit for shipment.[35]

Agency

Illustrative of the courts' reliance on basic agency principles in attributing negligence to a veterinarian is the case of *Acherman v. Robertson*,[36] where the veterinarian's son, in the habit of assisting his father in practice, delivered to plaintiff a bottle

---

[32] Erickson v. Weber, *supra* note 28.

[33] Anderson v. Blackfoot Livestock Comm'n Co., 85 Id. 64, 375 P. 2d 704 (1962).

[34] Breece v. Ragan, *supra* note 19.

[35] Sissell v. Sihler Serum Co., 110 Kan. 446, 204 Pac. 988 (1922).

[36] Ackerman v. Robertson, 240 Wis. 421, 3 N. W. 2d 723 (1942).

of what was labelled "Liquor Cresolis Spanetus," thinking it to be the latin term for mange oil. In fact it was lysol and caused the death of plaintiff's hogs. The court held that, since the son had accompanied his father on numerous professional calls to plaintiff's farm, and had assisted in the vaccination of animals, and in other professional operations, there was sufficient appearance of agency to cause plaintiff to rely on his skill and care.

Gratuitous Undertaking

There is no obligation on the part of a veterinarian to accept a case.[37] However, once the case has been accepted the veterinarian may be liable for negligence in treatment even though the services rendered are gratuitous, where the undertaking requires care and skill, and the veterinarian has failed to exercise the degree of skill reasonable for the undertaking.[38]

However, the nature and extent of the duty owed, if any, depends on the circumstances under which the services were undertaken.[39] Thus, where the defendant did not hold himself out to be a competent veterinarian, but was merely a "student" who disclosed this fact to the plaintiff, and undertook the treatment gratuitously, he was not held liable.[40] Yet, the same service if performed by one claiming to be a competent surgeon might justly be characterized as negligent and unskillful.[41]

The intricacy or delicacy of the operation undertaken also may determine the liability or lack of it where the operator pretends no skill. Thus, applying the general rules of bailment, the court in *Connor v. Winton*[42] held that when an act such as lancing is done gratis by one pretending no skill, it is termed a mandate. The mandatory is bound only to slight diligence and is responsible only for gross neglect. He is held only to the exercise of the degree of care to which persons of common prudence are accustomed in looking after their own property.

---

[37] Soave, *op. cit. supra* note 9 at 74; Hannah, Disaster and the Veterinarian's Liability, 141 J. A. V. M. A. 611 (1962).

[38] Latham v. Elrod, 6 Ala. App. 456, 60 So. 428 (1912); Morrison v. Altig, 157 Iowa 265, 138 N. W. 510, reversed on rehearing, 154 Iowa 559, 134 N. W. 529 (1912).

[39] Connor v. Winton, 8 Ind. 315, 65 Am. Dec. 761 (1856); Morrison v. Altig, *supra* note 38; Pecheos v. Johnson, 106 Wash. 163, 179 Pac. 78 (1919).

[40] Morrison v. Altig, *supra* note 38.

[41] Latham v. Elrod, *supra* note 38; Connor v. Winton, *supra* note 39; Morrison v. Altig, *supra* note 38.

[42] Connor v. Winton, *supra* note 39 at 318.

However:

> What would be simply negligence as to one thing would be gross negligence as to another. What might have been due diligence on the part of Winton in thrusting his lance into a vein of the horse's neck, might have been very gross negligence in lancing the complicated and delicate machinery of the hock joint.[43]

Express Warranty

We have been discussing the liability of a veterinarian from the standpoint of negligence as predicated upon the violation of a duty of care. The common law liability requires only performance with reasonable skill and care,[44] and under ordinary circumstances the prudent veterinarian will not guarantee a cure, nor does he in the absence of a special contract to do so undertake to perform a cure.[45] By expressly warranting that an animal will get well the veterinarian absolutely engages to make good the loss, even if the animal dies without anyone's negligence. As warrantor the veterinarian chances the hazards of weather, intervening diseases, and the like, and renders himself liable for the damage caused thereby.[46] The issues as to whether a contract to perform a cure exists or has been performed are questions of fact.[47]

Abandonment

Although, as has been mentioned earlier,[48] a veterinarian is not legally bound to accept a case, once an animal has been accepted for treatment, the veterinarian is clearly liable for abandoning the treatment without reasonable notice or special agreement to do so.[49] The veterinarian's duties are not terminated until his contract is revoked by his dismissal, terminated by mutual consent, or his services are no longer required.[50]

---

[43] *Id.* at 319.

[44] Prosser, Handbook of the Law of Torts 133 (2d ed. 1955).

[45] *Ibid.*; Barney v. Pinkham, *supra* note 11; Kuehn v. Wilson, 13 Wis. 116 (1860).

[46] Kuehn v. Wilson, *supra* note 45 at 121.

[47] Lyford v. Martin, *supra* note 1.

[48] See cases cited note 38 *supra*.

[49] Williams v. Gilman, 71 Me. 21 (1880); Boom v. Reed, *supra* note 11.

[50] Soave, *op. cit. supra* note 9 at 74. See generally, Annot., 56 A. L. R. 818 (1928); Annot., 60 A. L. R. 664 (1929).

Expert Testimony

Ordinarily, expert testimony is required in a malpractice action to show that the damage or injury was caused by an unskillful or negligent act.[51] For example, expert testimony was required to hold a veterinarian liable for failure to diagnose such conditions as pregnancy.[52] And the testimony of a veterinarian has been used in reference to the question of whether a particular bathing solution prescribed by defendant veterinarian was strong enough to cause the death of dogs bathed in it.[53] It is improper and incompetent for a witness qualified as an expert to state his opinion that the injury resulted from improper vaccination by use of an unclean needle where the witness has no personal knowledge of the method of vaccination adopted and the question has not been put to him hypothetically.[54]

Conclusion

We have seen that the veterinarian's liability is measured by the same basic standards applicable to physicians and surgeons.[55] In both fields the technical nature of the malpractice action creates special problems. To determine the issue of liability the jury must identify both the historical facts and the standard of care. Attempting to resolve issues of medical fact may be difficult for a lay jury; such resolution demanding as it does, not merely an appraisal of the witnesses' demeanor and character, but an evaluation of their stories in the context of the situation giving rise to the cause of action. Thus, in a malpractice action arising out of an alleged improper injection, the jury analysis would require some understanding of the results of giving the injection in various places, the skill required in pinpointing a particular area, and the likelihood of an unwarranted injection.[56] The courts, in the relatively few reported cases, have realistically applied the standards for liability, recognizing the problems encountered by the veterinarian in examination, diagnosis and preparation for treatment.

---

[51] Olander v. Johnson, 258 Ill. App. 89 (1930).

[52] Brockett v. Abbe, 3 Conn. Cir. 12; 206 A. 2d 447 (1964).

[53] Kerbow v. Bell, 259 P. 2d 317 (Okla. 1953).

[54] Phillips v. Leuth, *supra* note 28; Annot., *supra* note 11 at 508.

[55] Note 10 *supra*.

[56] Note, Malpractice and Medical Testimony, 77 Harv. L. Rev. 333 (1963).