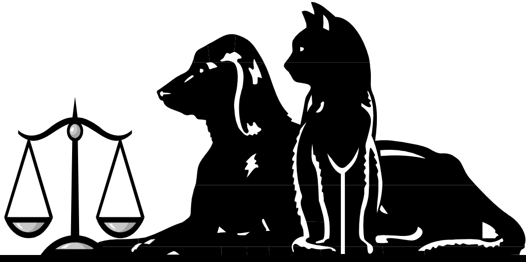

ANIMAL LAW OFFICES
OF ADAM P. KARP, JD, MS
114 W. Magnolia Street, Suite 425
Bellingham, Washington 98225

Bellingham: (360) 738-RARF (7273)
Outside Bellingham: (888) 430-0001
Fax: (360) 392-FYDO (3936)
E-Fax: (866) 652-3832
Email: adam@animal-lawyer.com
Web: www.animal-lawyer.com

SBM: Animal Law Symposium

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Developing an Animal Law Practice

At present estimates, 20-30 attorneys nationwide privately practice animal law exclusively. Another dozen or two work for animal welfare or animal rights organizations like HSUS, PETA, IDA, ASPCA, and ISAR. While hundreds, if not thousands, of other attorneys may dabble in animal-based transactional work or litigation as a *pro bono* or modestly profitable component of their practices, they do not rely on animal cases for a livelihood. This paper provides guidance to those looking to dedicate their 24/7s to animal law.

Stake Your Claim. Over one hundred million Americans love and rely on animal companions. Though people differ significantly across our diverse country, the human-animal bond remains a common denominator most everywhere – rural or urban, poor or rich, Red or Blue, educated or not, regardless of religion, ethnicity, gender, nationality, and orientation. To sustain an animal law practice, however, requires a critical mass of clients. Further, the prospect of full-time animal lawyering can quickly reach a market saturation point. For these reasons, practitioners must adhere to the following **Top Twelve Animal Lawyering List** to survive (and hopefully thrive):

1. ***Location, location, location.*** Headquarter in the largest metropolitan area of the state in which you choose to practice, or be prepared to span distance through virtual technologies like remote officing, toll-free numbers, interactive web interfaces, and heavy use of communication modalities to compensate for lack of in-person availability (e.g., scanning/emailing documents for prompt information sharing, toll-free and electronic faxing, email push technology).

2. ***Let their fingers do the walking.*** Advertise in the yellow pages by requesting a special subcategory of *Attorneys – Animal Law,* alongside the traditional subcategories of *Attorneys – Personal Injury, Attorneys – Bankruptcy, Attorneys – Divorce.* I christened this subcategory in Washington years ago. Now several colleagues are also listed. Maintain a website at all costs and make sure to include a URL pointer in your ad.

3. ***Broaden geographical coverage.*** Expand the geographical area where you will take cases. You will probably have to commit to the entire state, or regions of the state that may be

accessed within a few hours' travel. Expanding your reach too far, however, may visit upon you the fate of Romulus Augustus and the Roman Empire as a whole.

4. ***Make a name for yourself – in the bar.*** If you have not already, create professional institutional memory in the form a state bar association animal law section or committee, and, if sufficiently populated, create a sister section or committee at the county or metropolitan bar association level. In the process of soliciting members and petitioning for section creation, you will enjoy notoriety and face time with bar leaders and plant seeds for referrals that will ripen over time. Then, once formed, install yourself as an executive committee member and get to work!

5. ***Make a name for yourself – in the school.*** If no course exists, offer yourself as an adjunct professor of animal law at law school(s) in your area. In addition to creating an academic institutional memory, you will be establishing "street (or court) cred," giving back to future generations of students (and animals), and keeping your finger on the pulse of animal law jurisprudence. But do not stop at law schools. Offer your talents to community college paralegal, veterinary technician, and veterinary assistant programs, and to undergraduate programs offering courses in political science, law, and public policy, either by offering a seminar or teaching a short course. Finally, go to high schools and provide an overview of animal law.

6. ***Pen that prose.*** Make a splash in the state bar bulletin or magazine by authoring an article on animal law and inviting readers to join the new section or committee you are forming (if applicable). Join local bar associations and agree to write an animal law column for their newsletters. Consider writing for non-legal organizations' periodicals, such as animal control officers, shelters, veterinarians, groomers, walkers, and trainers.

7. ***Speak the truth.*** Get on the speaker circuit. Literally dozens of legal issues pertaining to animals exist, with more emerging as attorneys and judges turn their attention to the "unsolved mysteries" that afflict our area of practice. Sometimes being invited (or inviting yourself – but do so with finesse!) to a club, class, committee, agency, or organization will provide the opportunity to conceive of cutting-edge issues worthy of research and discussion, whether proactively or in response to incisive questions from your audience.

8. ***Keep enemies closer.*** When you believe you have mustered adequate resources and knowledge, sell or donate your services to your "usual suspects" – both plaintiffs and defendants. This includes giving lectures to law enforcement officers who neutralize (sloppily) canine threats; animal control officers and kennel workers who fail to keep proper records and accidentally kill the wrong impounded animals; veterinarians who misunderstand the disciplinary process or engage in standard practices that expose themselves to unnecessary liability and charges of unprofessionalism; service animal handlers facing intrusive inquiries by clueless store proprietors; and humane society officers investigating animal cruelty, procuring warrants, and building a winning criminal case.

9. ***Share the intellectual wealth.*** Write for the numerous animal law reviews, either by preparing a formal article or practitioner's note. Then, when you have been published, shop it around to various CLE departments for oral presentation and update. You will then expand your

reputation beyond your state's boundaries and provide invaluable guidance to colleagues facing identical challenges. In the process, you will also advance the state or jurisprudence.

10. ***Embrace the epithet***. Face it, we animal lawyers are an endearingly quirky bunch. To those not sharing our ethical and emotional suasions, we might appear officious, irrational, dangerous, frustrating, and hard to tolerate. On more than one occasion, counsel have remarked that my desire to litigate a case for noncompensatory remedies (i.e., deterrence, a finding of fault, as opposed to just the money) confounds them. Other times, defense counsel may impugn unsavory motives to you (e.g., "Plaintiff's counsel follows in the disturbingly recent trend of promoting fringe animal rights theories, relying on so-called academic articles from fellow travelers in the extremist movement."). Several attorneys have "tipped-off" the judge to my website as a means of evidencing what can only be a brazen attempt to bias the court, even going so far as to print out the more colorful narrative from my site and append the pages as exhibits. One attorney went so far as to introduce docket counts (e.g., "In two of Mr. Karp's cases, the dockets were bloated with over 100 and 200 pleadings, respectively, showing the overly zealous method of litigation that is entirely disproportionate to the nature of the matter at hand.") and examples of prior failures (e.g., "In these three cases, Mr. Karp was smacked down by the trial court when he tried to recover emotional distress damages for the death of a pet. Yet this serves as no deterrent, for he persists in running the empty theory up the flag pole one more time!") One such attorney went so far as to state that there was "no such thing" as animal law, as if it existed purely as a figment of my imagination!

Resist such unprofessional conduct by calmly and politely informing the court of your or others' successes (since the defendant has "opened the door" to your ability to rehabilitate and cure erroneous assertions, even if not of directly evidentiary importance), reminding the court that the common law requires challenges to conventional wisdom, and that so long as the facts can be distinguished or until the highest court fully disposes of the issue, the law encourages, indeed demands, such thoughtful efforts. The key to succeeding in animal law practice is to vigilantly and unapologetically live your creed. Indeed, when you wear the proverbial scarlet letter on your briefcase, certain formalities are excused, assumptions made (not all bad), and it becomes easier to forge ahead without any recrimination. The reason is simple. Historically, when those in power affixed words intended to be derogatory upon those not in power, one way the powerless overcame the name-calling was to re-appropriate the term for self-identification. Become the wild-eyed radical, the "pit bull" litigator, the one who thinks outside the box so frequently that conventional boundaries become unrecognizable and opposing you becomes a costly and wearisome effort. But, most importantly, it means you never have to act chagrinned as you ply your trade. After all, they cannot expect you to be anyone other than who you are. Dogs will be dogs, and animal lawyers will be animal lawyers.

11. ***Be appealing***. I do not just mean to comport yourself in a way that attracts clientele. I mean start movin' on up to the appellate courts. Part of creating a viable animal law practice involves priming the jurisprudential pump so that case values and outcome predictability will rise. By clarifying the case law, you will (a) make a name for yourself (hopefully good, so pick cases carefully!), thereby enhancing your notoriety and formidability (which will result in quicker and better settlements, less transactional costs, and happier clients), and (b) setting precedents that will help other litigants and your colleagues and, most importantly, the animals. Like Indiana Jones,

your pen slices a path through the legal wilderness. Tread softly but carry a big machete, and if at first you cannot hack a path through to justice, keep whacking away, find new passages, and work with other animal lawyers to engineer an argument that will carry the day.

12. ***Charge for your services***. Yes, you love animals. So do your clients. So what? While money cannot by you love, the converse also does not follow. If clients want you to work for free because you have devoted your career to helping animals, then tell them to hire someone else. You will only be able to stay in business and, therefore, fulfilling your mission, by billing and collecting. In the end, you will balance the equities (and your finances) and decide what makes the most sense, but this will require having a sense of what damages and fees are realistically recoverable based on the state of the law, whether you see this as a test case worthy of investment, and the wherewithal and stamina of the client. If you charge next to nothing, then what does that say about your talent or the seriousness of the area in which you practice? Are animals and their causes worth nothing? If not, then why should you, advocating for them, make nothing? I recommend offering an hourly rate, hybrid hourly-contingency, capped hourly minimum-contingency maximum, or some other fair arrangement.

Veterinary Malpractice

Veterinarians must employ reasonable skill, diligence, and attention as ordinarily expected of careful, skillful, and reputable persons engaged in veterinary medicine. *Price v. Brown,* 545 Pa. 216 (1996). Accordingly, they owe a heightened standard of care to the patient and client. *Ladnier v. Norwood*, 781 F.2d 490 (5th Cir.(La.),1986); *Carter v. Louisiana State University,* 520 So.2d 383, 388 (1988). In 1976, Washington drastically abrogated common law for actions against health care providers by changing the SOL and providing an exclusive statutory mechanism for actions involving lack of informed consent, breach of promise, and standard of care violations. Ch 7.70 RCW. Whether this chapter applies to veterinarians was resolved in the negative in the landmark case *Sherman v. Kissinger,* 146 Wash.App. 855 (I, 2008)(as amended). This should be the first inquiry of any animal law practitioner outside of Washington.

By statute, a plaintiff will typically prevail in a medical malpractice action by proving one or more of three propositions: (1) that the injury resulted from failure to follow the accepted standard of care; (2) that the patient was promised that the injury would not occur; or (3) that the injury resulted from health care to which patient did not provide informed consent. RCW 7.70.030(1)-(3). If a statutory cause of action does not exist, then, when evaluating a claim against a veterinarian, assess the likelihood of a claim for medical battery (lack of consent), negligent misrepresentation (lack of informed consent), standard of care violation (professional negligence), fraud (in the event of doctored records or a cover-up), and the consumer protection act (if the entrepreneurial aspect of practice resulted in unfair or deceptive conduct).

If a veterinarian performs a procedure without any consent – informed or otherwise – the claim should be handled as a conversion or trespass to chattels. Medical battery, a claim involving a human patient, may provide an interesting parallel. If styled as a battery, a claim against a veterinarian will fail unless, perhaps, the patient is a *service animal* acting tantamount to a physical extension of the disabled handler. In the veterinary medical context, conversion is

analogous to battery in the human medical context. In the absence of consent, a physician commits battery. *Physicians' and Dentists' Business Bureau v. Dray,* 8 Wn.2d 38 (1941). Where the patient is nonhuman and legally classified as property, it follows that when a veterinarian operates without consent, she has committed conversion or trespass to chattels. If the conversion is willful (as opposed to innocent), emotional damages may follow.

At common law, the doctrine of informed consent was developed as part of the intentional tort of battery. If the patient consented to bodily touching, no action for battery could lie. To prevent doctors from bypassing tort responsibility by strongarming unknowledgeable patients into assenting to treatment, the courts required consent to be "informed." *See Keogan v. Holy Family Hospital,* 95 Wn.2d 306, 313 (1980). By analogy, where the veterinarian does not obtain consent from the nonhuman animal's owner, an action for trespass to chattels or conversion (the property-based analogues to the intentional tort of battery) could lie.

The true issue does not primarily concern the canine. Instead, much like the driver who leaves his car at the automobile mechanic for an expensive and experimental repair of the transmission, the dog's owner-guardian, before spending a sum many times in excess of the purchase price of the animal, and which could conceivably kill the dog, has a right to know all material facts pertaining to his treatment options.

"Meaningful choice is at the heart of the informed consent doctrine." *Schiff v. Prados,* 92 Cal.App.4th 692, 706 (2001). Washington state courts acknowledge this core tenet:

> None of the authorities nor the already extensive literature on the subject of informed consent … specifies the precise extent or degree of information which must be imparted to meet the medical standards of ordinary care in the practice of medicine. **It is, however, generally recognized by the great weight of judicial and scholarly authority that the law does place this duty upon the physician and that the failure to meet it is characterized as a species of negligence**. … Because the rule declaring the duty cannot be stated with marked precision, the nature and extent of the disclosure required by it depends in each case upon the peculiar circumstances giving rise to the duty. **Thus, our holding can be stated in general terms: a physician's duty to inform his patient is to inform his patient what a reasonably prudent medical specialist would tell a person of ordinary understanding of the serious risks and the possibility of serious harm which may occur from a proposed course of therapy so that the patient's choice will be an intelligent one, based upon sufficient knowledge to enable him to balance the possible risks against the probable benefits.**

ZeBarth v. Swedish Hospital Medical Center, 81 Wn.2d 12, 28-29 (1972)(citations and footnote omitted; emphasis added). The doctrine of informed consent is codified in RCW 7.70.050.

The burden of proving lack of informed consent rests with the plaintiff, at least initially.[1] While it is the patient's province to evaluate all treatment risks, the function of the health care

[1] "The burden rests upon the plaintiff to prove that the health care provider failed to inform her of material information, *i.e.,* potential risks, in connection with the contemplated treatment. The necessary elements of proof in

provider is to furnish the patient with only risks of a serious nature, high risks, grave risks, medically significant risks, or reasonably foreseeable risks.[2] A material risk is sometimes bounded at the lower end, as seen in *Mason v. Ellsworth,* 3 Wash.App. 298 (1970) (finding that 0.75% risk of perforation of esophagus not "material").

To prove materiality requires a two-step test. The plaintiff must first determine the "scientific nature of the risk and the likelihood of its occurrence." *Ruffer,* at 631. In ascertaining the quality and probability of the risk, expert testimony is required. *Id.* Such risks include "[t]he recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment." RCW 7.70.050(3)(d). Next, the plaintiff must demonstrate that such a risk is one a reasonable patient would consider in deciding on treatment. *Id. See also* RCW 7.70.050(2). This materiality step does not require expert testimony, which is of "secondary importance" in considerations of patient sovereignty. *Smith v. Shannon,* 100 Wn.2d 26, 32 (1983).[3]

To prove a standard of care violation requires the practitioner to bring to bear the same techniques utilized in a human medical malpractice case. Expert testimony, stated with reasonable medical certainty, is required to (a) define the standard of care, (b) examine how the defendant breached this standard, and (c) explain how this breach proximately caused the patient's injury. In the absence of this showing, the plaintiff will fail in her endeavor. A claim of professional veterinary negligence does not differ substantially from the mechanics of proving any other claim of professional malpractice (i.e., proving duty, breach, causation, and damage). When proving a standard of care violation, however, it is imperative to have an expert witness who can testify to the standard in the locality or region of the defendant and in the field of expertise relevant to the dispute. *See, e.g., McKee v. American Home Prods.,* 113 Wn.2d 701 (1989)(expert must practice in same profession); *Walker v. Bangs,* 92 Wn.2d 854 (1979)(expert need not be licensed in Washington to testify); *Sanderson v. Moline,* 7 Wash.App. 439 (1972)(locality rule rejected in favor of those "similarly situated" within state). However, if your expert can testify that there is a national standard of care, which mirrors that of the forum state, then out-of-state experts may be sufficient.

Veterinary negligence actions are often regarded no differently than any other professional negligence action. *See Mazon v. Krafchick,* 158 Wn.2d 440 (2006)(noting the

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an informed consent action are: (1) the existence of a material fact relating to treatment unknown to the patient; (2) failure by the health care provider to disclose such material fact; (3) that had the material fact been disclosed, the patient would have chosen a different course; and (4) the treatment resulted in injury. RCW 7.70.050(1). If the plaintiff establishes each of the foregoing elements, the burden then shifts to the defendant to prove a defense justifying the failure to impart that material information. *Miller v. Kennedy,* 11 Wash.App. 272, 284, 522 P.2d 852 (1974), *aff'd,* 85 Wash.2d 151, 530 P.2d 334 (1975)." *Ruffer v. St. Frances Cabrini Hosp. of Seattle,* 56 Wash.App. 625, 629-30 (1990), *rev. den'd,* 114 Wn.2d 1023 (1990).

[2] *Id.,* 630 (citing *ZeBarth,* 81 Wn.2d at 25) and fn. 2. "The working rule for disclosure of a given risk is the test of materiality." *Id.,* at 631.

[3] "The basic question is whether the particular fact sought to be proved is such as is "observable by [a layperson's] senses and describable without medical training." (citations omitted) Whether a reasonable patient would want to know of a given risk is such a fact; however, the existence, magnitude, and other scientific characteristics of the risk are not." *Id.,* at 33.

"familiar standard of care for professionals," quoting *Restatement (2nd) of Torts* § 299A (1965), which states, "[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.") As to physicians, Washington abolished the locality rule in 1967. *Pederson v. Dumouchel,* 72 Wn.2d 73 (1967). *Pederson* was decided *prior* to the enactment of Ch. 7.70 RCW. Importantly, it held that physicians were subject to the standard of care in an "area co-extensive" or in the "community" of the physician. The Supreme Court added, *in refusing to impose a statewide geographic restriction*:

> The comprehensive coverage of the Journal of the American Medical Association, the availability of numerous other journals, the ubiquitous "detail men" of the drug companies, closed circuit television presentations of medical subjects, special radio networks for physicians, tape recorded digests of medical literature, and hundreds of widely available postgraduate courses all serve to keep physicians informed and increasingly to establish **nationwide standards. Medicine realizes this, so it is inevitable that the law will do likewise**.

Louisell and Williams, The Parenchyma of Law (Professional Medical Publication, Rochester, N.Y.1960) p. 183.

We have found no better statement of existing conditions. The 'locality rule' has no present-day vitality except that it may be considered as One of the elements to determine the degree of care and skill which is to be expected of the average practitioner of the class to which he belongs. The degree of care which must be observed is, of course, that of an average, competent practitioner acting in the same or similar circumstances. In other words, local practice within geographic proximity is one, but not the only factor to be considered. **No longer is it proper to limit the definition of the standard of care which a medical doctor or dentist must meet solely to the practice or custom of a particular locality, a similar locality, or a geographic area**.

The 'locality rule' has never been suggested in any English case. (Nathan, Medical Negligence (Butterworth & Co., Led. 1957), p. 21.) **In England, the same standard is applicable throughout the country. The extent of our country is such, however, that we hesitate to fix a definite geographic limit upon the standard of care-be it statewide or expanded to the Pacific Northwest, as suggested by plaintiff's requested instruction.**

A qualified medical or dental practitioner should be subject to liability, in an action for negligence, if he fails to exercise that degree of care and skill which is expected of the average practitioner in the class to which he belongs, acting in the same or similar circumstances. **This standard of care is that established in an area coextensive with the medical and professional means available in those centers that are readily accessible for appropriate treatment of the patient**.

Id., at 78-79 (emphasis added); *see also Stone v. Sisters of Charity of House of Providence*, 2 Wash.App. 607, 611 (1970) ("The national minimum standard is one established 'in an area coextensive with the medical and professional means available in those centers that are readily accessible for appropriate treatment of the patient.'")

Examples of standard of care violations include:

- ❑ Misdiagnosis
- ❑ Lack of informed consent
- ❑ Failure of skill in surgical procedure
- ❑ Incorrect kind or amount of medication
- ❑ Violation of commonly accepted protocols
- ❑ Inadequate supervision ("captain of ship")
- ❑ Dereliction of duty (patient abandonment)
- ❑ Failure to provide preventative care
- ❑ Inadequate record keeping propagating error
- ❑ Leaving foreign object in body. ***McCormick v. Jones,*** **152 Wash. 508 (1929).**

While one can sue a veterinarian for malpractice related to lack of professional skill, one can also state a claim against a veterinarian for shady entrepreneurial practices (i.e., advertising, marketing, prescribing, treating) like charging for unauthorized surgeries or obtaining sham (because uninformed) consent for a costly procedure, or advertising 24-hour care by an "on-site" veterinarian when the veterinarian is, in fact, only "on-call." *See Wright v. Jeckle,* 104 Wash.App. 478 (Div. III, 2001)(permitting CPA claim against doctor for lack of informed consent where health care activities motivated solely by financial gain); see also WAC 246-933-070 (on advertising restrictions for emergency veterinary hospitals).

Animal cases typically involve bailment contracts, often for veterinary services. A bailment "'arises generally when personalty is delivered to another for some particular purpose with an express or implied contract to redeliver when the purpose has been fulfilled.'" *Gingrich v. Unigard Sec. Ins. Co.,* 57 Wn. App. 424, 431-32, 788 P.2d 1096 (1990) (quoting *Freeman v. Metro Transmission, Inc.,* 12 Wn. App. 930, 932, 533 P.2d 130 (1975)). The law recognizes that animals may be subjects of bailments[4] and imposes upon the bailee a presumption of negligence. When the bailed item is lost, destroyed, or compromised while in the bailee's possession, the plaintiff raises a prima facie case, or presumption of negligence. *Chaloupka v. Cyr*, 63 Wn.2d 463 (1963). Where the bailee "can show that he has exercised due care or can show the loss was caused by burglary, larceny, fire, or other causes which of themselves do not point to negligence on the part of the bailee, he can rebut the presumption." *Id.,* at 467. It is for this unique procedural reason that pleading both professional negligence (sounding in tort) and breach of bailment (sounding in contract) is useful in a veterinary malpractice action.

Similarly beneficial to the presumption of negligence offered in a bailment action, the practitioner must be mindful of *res ipsa loquitur*. This is a rule of evidence that warrants the

[4] *Hatley v. West,* 74 Wn.2d 409 (1968) (agistment of horse is kind of bailment); *Anzalone v. Kragness,* 356 Ill.App.3d 365 (2005) (recognizing claim of professional negligence and breach of bailment in veterinary medical malpractice action concerning dog).

court or jury to infer negligence, thereby shifting to the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the inference. *Momer v. Union Pac. R. Co.,* 31 Wn.2d 282 (1948). "The inference which the doctrine permits is grounded upon the fact that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to the defendant but inaccessible to the injured person." *Covey v. Western Tank Lines,* 36 Wn.2d 381, 390 (1950). The doctrine is inapplicable where "there is direct evidence as to the precise cause of the injury and all the attending facts and circumstances appear." *Id.* Here, the Defendants cannot submit evidence that is "so completely explanatory of how the accident occurred that no inference is left that the accident may have happened in any other way, [such that] there is nothing left upon which the doctrine need or can operate." *Id.*

The test for *res ipsa loquitur* turns on the following factors:

(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence;
(2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant; and
(3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

Zukowsky v. Brown, 79 Wn.2d 586, 593 (1971).

Cases worth consulting in the area of veterinary malpractice include:

Hoffa v. Bimes, **954 A.2d 1241 (Pa.Super.Ct. 2008).** Dismissing all claims against equine veterinarians by invoking the Good Samaritan provisions of the Veterinary Immunity Act; and dismissing the bailment and trespass claims, noting that veterinary malpractice requires an allegation of professional negligence.

Loman v. Freeman, **890 N.E.2d 446 (Ill. 2008) and 874 N.E.2d 542 (Ill.App.2006).** The defendant veterinarian performed an allegedly unauthorized right stifle surgery on plaintiffs' racehorse, causing permanent incapacitation. A professor at a state university, the defendant was not in private practice and did not have a veterinary license due to a statutory exemption. The trial court dismissed the claim for negligence for lack of subject-matter jurisdiction, noting that the defendant performed the surgery in his capacity as a state employee and requiring the matter to be litigated in a different forum. The appellate court reversed and remanding, finding that the defendant owed a duty independent of his state employment based on veterinary common law. The appellate court also reversed dismissal of conversion, noting that materially altering the physical condition of chattel so as to change its identity or character states a claim and that "permanent deprivation" of possession is not a necessary condition to sustain conversion. The Illinois Supreme Court affirmed Court of Appeals and added that permanent incapacitation of a horse through an unauthorized procedure constitutes conversion, even where possession of the horse is not withheld.

Pette v. Burton, **2005 WL 3164632 (Cal.App.2005).** 10-yo Yorkie named Monte brought in for exam and vaccinations. Dr. Burton recommended tooth cleaning. Pette consented. Bailey, an unlicensed vet assistant, anesthetized Monte. Another unlicensed assistant, Durham,

did cleaning. Apparently Monte survived but collapsed hours later and died en route to the ER. Necropsy suggested collapsed trachea or alveolitis. Pette's expert, Dr. Emswiller said aspiration was probable cause of death, with aspiration pneumonia and anaphylaxis as alternatives. He said it was unusual for this to occur. A res ipsa loquitur instruction was rejected and the court directed a defense verdict. On appeal, the court held that res ipsa loquirtur applies only if the rarity of occurrence can be linked up with evidence that this outcome occurs more likely than not due to negligence. **Rarity alone will not suffice without other evidence indicating negligence.** Inadequate recordkeeping and monitoring and use of unlicensed vet techs in and of itself does not show cause of death. The court notes that while unlicensed status could rise to negligence per se, Dr. Emswiller did not causatively link the lack of licensing to death of Monte.

Price v. Brown, **545 Pa. 216 (1996).** Plaintiff claimed breach of bailment against Defendant regarding a prolapsed urethra surgery on her English Bulldog. Price alleged implied bailment and breach occasioned by failure to monitor dog's condition and failure to return dog in good health. Plaintiff claimed FMV of $1200. Professional negligence apparently not alleged. The trial court dismissed without prejudice for failing to state a claim. Superior court reversed, finding that existence of breach of bailment agreement was matter of fact. Supreme Court reverses, replacing breach of bailment cause of action with professional negligence for veterinary procedures, and reinstates trial court's dismissal. Professional negligence concepts extend to veterinary medicine. Court articulates elements of such action:

1. Plaintiff employed vet or created another basis for duty of care;
2. Vet failed to exercise appropriate standard of care;
3. Vet's departure from standard was proximate cause of animal's injury or death.
4. *Plaintiff must specifically allege vet was negligent in performing professional services.

Similar to legal or medical practice, the profession of veterinary medicine "involves specialized education, knowledge, and skills." The court also recognizes substantial regulation by Department of Health. The Plaintiff may avail self of breach of bailment agreement where animal delivered for "particular purpose of surgical procedure" if negligence also pled and proved.

> "We agree with the trial court that the purpose for which an animal is entrusted to the care of a veterinarian is a material fact that must be considered in determining whether a plaintiff's complaint states a cause of action as a matter of law, and that Price's complaint failed to state a cause of action for professional negligence. The allegations relating to the professional services rendered by Dr. Brown cannot be deliberately excised from the complaint as if the veterinarian's services were no different than those offered by a kennel operator or dog groomer. **There are significant differences between surgical services provided by a veterinarian and grooming or caretaking services."**

Justice Castille, dissenting, maintains that the breach of bailment doctrine adequately addresses situations like those at bar and it is a mistake to create veterinary medical malpractice as cause of action. "**Bailment**" is *delivery of personalty for the accomplishment of some purpose upon a contract, express or implied, that after the purpose has been fulfilled, the personalty shall be*

redelivered to the person who delivered it in the same or an agreed to altered form. A cause of action for breach of a bailment agreement arises if the bailor can establish that personalty has been **delivered** to the bailee, a **demand for return** of the bailed goods has been made, and the bailee has **failed to return** the personalty. Dogs are capable of being subjects of bailment agreement, based on case law and statute. By creating veterinary medical malpractice cause of action, one equates nonhuman animals with patients, who do not have standing to sue. Judge Nix, also dissenting, held that both negligence and bailment claims were cognizable.

Ruden v. Hansen, **206 N.W.2d 713 (Iowa 1973).** Dr. Hansen was sued by Ruden for lost piglets following administration of modified live vaccine to pregnant sows ("gilts"). Dr. Conley (from same county) testified that this did not meet the standard of care and did cause the deaths and deformations. Conley relied upon lab results from Diagnostic Laboratory at ISU-Ames and deposition of Dr. Hansen, as well as other facts concerning dates of being bred and farrowing/birth date.

1. Standard of Care: locality rule rejected in favor of similarly-situated rule.
2. No directed verdict: Conley states question of fact.
3. William Mills – who similarly lost piglets after Hansen administered vaccine – should not have been permitted to testify as to causation since he was no expert.
4. Conley's reliance on Diagnostic Lab was hearsay.
5. Conley did have sufficient factual foundation to express opinion on cause.
6. Conley did have basis to testify to SOC.

Sherman v. Kissinger, **146 Wash.App. 855 (I, Nov. 18, 2008, as amended, pub**.). Declaring that Ch. 7.70 RCW, the state law dictating all procedural and substantive aspects of litigating a medical malpractice claim against any human health care provider, does not apply to veterinarians; that a defendant may not "plead" plaintiff's damages under $10,000 in order to trigger the fee-shifting statute RCW 4.84.250 *et seq.*; and that the value of a companion animal depends on plaintiff's evidentiary showing as to lack or presence of fair market, replacement, and/or actual/intrinsic value.

Sexton v. Brown, Wash. App. Div. I No. 61363-4, 2008 WL 4616705 (Oct. 20, 2008, unpub.): Applying holdings of *Sherman* to case where veterinarian euthanized a dog within hours of being found by Good Samaritans, adding that conversion claim was appropriately not dismissed on summary judgment, that emotional distress damages are recoverable upon proof of a willful conversion of an animal, and that no breach of bailment claim applied.

Freedeen v. Stride, **269 Or. 369 (1974).** A veterinarian treated and then gave plaintiff's dog to another person after plaintiff authorized euthanasia rather than to pay for treatment. The Plaintiff claimed mental anguish because her children might see the dog with the other person and because she feared that the dog would be injured if it tried to return to her home as she lived in the same neighborhood as the new owners. The court held mental distress was an element of damages if it was "the direct and natural result of the conversion." *Id.,* at 373. It further commented that the act need not be "inspired by fraud or malice" for mental suffering to be an element of damages "where evidence of genuine emotional damage is supplied by aggravated conduct on the part of the defendant." *Id.* In addition to awarding general damages for mental

anguish, the court awarded punitive damages for the veterinarian's course of conduct in giving the dog to another person without plaintiff's consent, calling the veterinarian's conduct a "sufficiently aggravated violation of societal interests to justify the sanction of punitive damages as a preventative measure." *Id.,* at 375 (quoting *Noe v. Kaiser Foundation Hosp*., 248 Or. 420, 425 (1967)). The court quipped, "In other words, a veterinarian should not give a client's dog to a third person without the consent of the owner." *Id.*

Conclusion

The finest advice I can offer comes from a murderer by the name of Clayton Butsch. Heed his words of wisdom, and befriend a cat immediately. See *State v. Butsch,* 2008 WL 353225 (Div. I, Feb. 11, 2008), unpub.: Clayton Butsch was convicted of first-degree murder for killing Chad Vavricka on January 24, 2004. The reason? "[B]utsch's cat seemed to dislike him." *Slip op. at 1.* Butsch said that his "cat senses good and bad out of people," adding that "if the cat doesn't like you, I don't like you," and "[h]is cat didn't lie." *Id.* Lesson: make friends with a man's cat before the man.

Fiat justicia ruat coelum,

ANIMAL LAW OFFICES

By: Adam P. Karp, Esq.