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Legal analysis and ramifications of making veterinary medicine more accessible to consumers

I. Introduction

This paper is in response to a request for comments put out concerning the commercial status of pet medication. As a law school student, these comments are focused on the legal liability of the parties involved in dispensing and prescribing pet medication. Specifically, what would relaxing regulations concerning prescriptions mean for the relationship between veterinarians and their clients (pet owners)? In discussing this relationship, this paper analyzes:

- The status quo of veterinary malpractice claims and damages associated with those claims
- A risk/reward analysis of these available damages against relaxing prescription regulations
- Possibility of expanding liability to beyond the veterinarian

These comments suggest that relaxing regulations on pet medication prescriptions should be strongly considered. Although there may be a slight increase in the risk to veterinarians under veterinary malpractice theory, the relatively minimal damages available to consumers will not be crippling on the industry if these claims do increase. The liability of outside pharmacist should not be any higher when dispensing pet medication than it is when dispensing pharmaceuticals for human use. The price of pet medications should decrease just as the price for disposable contact lenses have, although the price for veterinary care will likely increase.

II. Liability under veterinary malpractice theory and current damages

Any time a professional is in contact with a consumer, the professional takes on a risk of future litigation. Through specialized training and advanced education, the professional has come to be able to reduce this risk they face. Veterinarians are no exception to this standard. Expanding prescription portability practices would add another instance of interaction between veterinarians and their clients, and therefore add another occasion for potential litigation. To understand the impacts of this, the basics of veterinary malpractice should be considered.

The claim for veterinary malpractice mirrors that of medical malpractice in many aspects. In order to prove a claim for veterinary malpractice, a plaintiff must be able to prove: that there was an injury to their pet, there is a standard of care that the veterinarian did not follow, this

breach of the standard of care caused the injury to their pet, and that the plaintiff should be awarded damages as a result of these injuries.[1] Proving injury to the pet and causation should not be difficult in most cases, as there will be a direct correlation in time and location between the injury and the work by the veterinarian. However, these elements may become more troublesome for plaintiffs claiming a faulty portable prescription if a third party pharmacist is involved, as discussed below.

The standard of care varies from state to state. Some states use the "locality rule" standard of care that provides veterinarians are held to the same standards as other veterinarians in their geographical area.[2] A few states, including Texas and Florida, provide for an "ordinary negligence" standard of care for veterinarians.[3] This means that a veterinarian is held to the same standard an ordinary person with no specialized knowledge or training would have. It will be harder to prove a claim in states that use this test, and therefore decrease the risk associated with a veterinary practice. Most state legislatures have passed statutes that regulate the practice of veterinary medicine and create a standard of care, instead of leaving this to the court system. In many cases, the standard of care that existed and the breach of that standard can be proven by calling an expert witness on veterinary medicine, however the plaintiff must be able to prove a breach of this standard and not simply that the treatment failed.[4]

Possibly the most litigated element of a claim for malpractice will be damages. Veterinary malpractice claims present a unique issue in this area because of the legal status of pets. Animals are considered by all 50 states to be the personal property of the owner, and do not possess individual rights. As such, the traditional role of the courts in these cases is to compensate the owner for loss of the use of their property as determined by fair market value of that animal.[5] Some courts have recently been more receptive to including other factors such as utility of the animal, specialized training of the animal, and awards the animal has received.[6] However, even with this expanded view of economic damages, the damages for a loss of a pet remain relatively small.[7] When damages remain small pet owners are economically incentivized to either settle their claim or not litigate their claim at all, making the risk that veterinarians face suits like this smaller.

Another factor to consider in the current risk to veterinarians is the ease in which these claims can be defended against. Unlike medical malpractice claims, a veterinarian is under no duty to act outside of an agreement with his client. If the plaintiff cannot show that there was some type of agreement binding the veterinarian to act, then they cannot prove a duty to act at all, much less prove a standard of care was breached when performing this duty.[8] A claim for damages for a pet that has a congenital disease associated with that breed or species will not stand, as the injury to that pet would have occurred regardless of any interference from a veterinarian. The best claim the plaintiff can hope for would be contributory negligence or comparative fault, which decreases the liability of the veterinarian.[9] These malpractice suits also fall prey to the normal pitfalls of malpractice litigation, such as statute of limitations issues and other statutory bars to economic recovery.[10]

There is a rising trend in the number of veterinary malpractice cases being brought and the amount of damages being awarded. [11] However, malpractice insurance for veterinarians has become more widely used and is relatively inexpensive (prices haven't changed since 1994).[12] This information, coupled with the current standard used by most courts to determine damages for loss or damage to a pet, should put veterinarians at ease that expanding portable prescriptions

would expand their legal liability to an unmanageable level. There would be a slight increase in risk to their practice from expanding prescription availability, but the benefit to the consumer would be much greater than the risk.

III. Risk to veterinary practices considering trends in types of damages being awarded

While the increased risk of providing portable prescriptions to pet owners is relatively low by the current standards used to measure damages, there is a current trend in veterinary malpractice suits to award damages for emotional distress of the pet owner. This has come about with a shift in public views of animals. It has shifted from animals being solely personal property to animals having an intrinsic value beyond economic value. Although a majority of courts still only allow for recovery of the economic value of a pet, a trend to award emotional damages is something to be considered as a future mainstay of veterinary malpractice claims.[13]

A survey of cases shows that there are some state courts willing to award damages for emotional distress from loss of a pet. [14] These cases use differing tests to determine when emotional damages are available. Some courts use a foreseeability test while others use the classic "bystander" test for recovery, borrowed from torts for injury/death of a family member. [15] A foreseeability test would allow for recovery if it would be reasonably foreseeable that a veterinarian's negligence would cause emotional distress. What actions could and could not be considered to cause emotional distress would be determined by a jury, but will solidify though increasing case law. The "bystander" test requires that the pet owner be present and witness the negligent actions in order to be able to recover.

Understanding the public policy arguments of those parties both for and against allowing for non-economic recovery will show us the likelihood of huge recoveries under this theory.

A. public policy argument for allowing economic recovery

Parties arguing to allow non-economic recovery say simply that economic damages cannot compensate a pet owner for their loss.[16] Just like the loss of a family heirloom, purely economic damages cannot compensate the pet owner for what their pet has come to represent. It is also argued that negligence and malpractice claims have a wider social use of deterring careless conduct.[17] By not allowing for non-economic damages to be recovered, this tort is not being allowed to have its full deterrent effect.

Following the development of medical malpractice and wrongful death litigation is a good example of how a change such as this would protect consumers. When it began, a tort claim for wrongful death provided family members were only allowed to recover for the loss of economic benefit that person brought to the family.[18] This recovery was substantial if the deceased was a young CEO, president of a company, or was very successful. However, the loss of a child or low-income family member would not produce the same result, thus reducing the deterrent effect of this tort. Modern courts have held that a plaintiff in a wrongful death or medical malpractice suit can recover damages for loss of consortium and loss to a society though the death of the deceased.

Perhaps it is a far stretch to believe that without the availability of non-economic damages, careless medical care for human beings would be more prevalent. However, the group arguing for non-economic damage recovery point out that it is not impossible to imagine more careless care for pets if this remedy is not available. Given that euthanasia is an option for pet care providers and the low market value of most of the pets themselves, increasing the available damages for a malpractice suit would insure the correct level of care.

B. Public policy argument for disallowing non-economic damages

The group advocating to continue to treat veterinary malpractice claims as a claim for loss of property argue that the value of a tort claim is to make the plaintiff whole again, not to deter wrongful conduct.[19] The danger in using torts to deter wrongful conduct is in the abuse of the court system for pecuniary gain.[20] The amount of an award of non-economic damages is determined by a jury, and therefore is very rarely overturned on appeal. This group argues that without the check already built into a claim for veterinary malpractice, a crafty lawyer could get an award far above and beyond what is reasonable for such a claim. Allowing for this type of behavior could cripple the pet care industry and set a bad public policy of excessive litigation.

Allowing for emotional damages here would also lead to potential unlimited liability. When examining liability under similar claims for emotional distress in the death of a family member, courts have already gone down this road and decided that a black line limit on damages such as these better serves the public interest.[21] By limiting recovery to only special circumstances, the court avoids the evidentiary problems of proving emotional distress and limits the potential for defendants to be used to produce windfall decisions.

Since trying to recover non-economic damages from veterinary malpractice through the court system has been widely unsuccessful, state legislatures have tried to step in and provide relief. These too have been widely unsuccessful. These attempts excluded the veterinary practices for the most part. [22] Proposed legislation in at least eight states trying to provide for non-economic damages for loss of a pet have been struck down. [23] A public comment to a proposed bill in Colorado stated that the bill would have unintended consequences and actually result in more inferior care for pets by providing for defensive care instead of active. [24]

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Through this analysis of potential change in damages available to plaintiffs in a veterinary malpractice suit, we can see that the likelihood of damages becoming broader in the future looks slim. Although there are a handful of courts that are willing to recognize emotional distress for loss of a pet, most courts continue to use the fair market value of loss as a measure for damages. The court system is notoriously slow at adapting to new social views and policies, and the legislatures have been unsuccessful at providing for this type of damage through statutory provisions. The court system has resolved on its own the procedure and circumstances in which a person may recover emotional damages for loss of a family member, but those circumstances are fairly limited. If the courts have limited recovery for loss of a family member, they will likely not expand this recovery to the loss of a pet. This suggests that the slight risk a veterinarian currently faces that they will face litigation for writing a portable prescription will still not outweigh the benefit that issuing portable prescriptions will have for consumers.

IV. Expanding liability when a third party pharmacist is involved

As noted in the request for comments, much of the country's prescription pet medications are dispensed through the same veterinary clinics that prescribe them. HR 1406 would require that veterinarians give clients a written prescription that can be filled with any retailer who dispenses veterinary drugs. The current practice is to fill prescriptions in house, so there is not a lot of case law on liability for prescriptions apart from simply veterinary liability. However, there is extensive research on liability for pharmacists dispensing drugs for human consumption. Using the similarities between the claims for veterinary malpractice and medical malpractice, we can consider the potential liability for dispensers of veterinary medicine.

Historically, pharmacists were only held liable for negligence in filling a prescription. These claims could include instances of miscounting doses, dispensing the wrong medication, or putting the wrong labels on the bottles.[25] They had no duty to inform drug users about the drugs they were taking. As long as the prescription was filled in accordance with the physician's orders, the pharmacist was not liable for injury or death of a patient due to the prescription drugs.[26] This is because the patient was considered under the care of the physician and not the pharmacist. This narrow liability has not withstood the test of time.

With the major increase in consumption of pharmaceuticals in the past thirty years came more legislation regulating the dispensing of pharmaceuticals. Major federal legislation mandates that state legislatures pass regulations concerning pharmacists conduct. This conduct includes counseling patients on side effects and giving instructions on drug interactions.[27] These duties are statutorily regulated and cannot usually be defended against if there is a prima facie case established. The duty owed to a customer is similar to that a physician owes to a patient, as defined by the locality rule. However, many jurisdictions have added a duty to protect customers against foreseeable dangers[28]

The most obvious hurdle of proving a negligence claim against a pharmacist is proving causation. In order to prove this, a plaintiff must be able to prove that it was the pharmacist who incorrectly dispensed the prescription and not that the physician improperly wrote the prescription. [29] It must also be proven that the injury resulted from taking the incorrect medication and is not just a side effect of the correct drugs or pains from the condition. [30] Any intervening cause between the sale of the drugs and the injury in question will mitigate or nullify the claim. [31]

Although these standards can be consistently applied in circumstances concerning drugs for human consumption, this causation element presents novel concepts when we apply it to veterinary dispensers. Significantly, the concept that pharmacists would be liable for foreseeable harms by prescribing drugs would not apply to veterinary medicine. It's possible that retail dispensers of veterinary medicine would educate themselves on the drugs they were selling, but it is more likely that liability would simply fall back on the veterinarian who prescribed the drug is something were to go wrong. Also, there would be very little accountability for missing minor details in prescriptions. If a pet does not heal properly or fails to improve on schedule, the drug regimen will simply be changed to something different without knowledge of what the pet is feeling. Anything short of a death that was clearly caused by incorrectly dispensed drugs would leave a causation issue to be debated at trial.

V. Conclusion

After considering the liability of both veterinarians and the third parties that would be involved if a plan for portable prescriptions were put into place, it would seem that liability for these parties would be fairly minimal. Currently, veterinary malpractice claims can be fairly easily defended against. The damages available for the average plaintiff are generally limited to the small value of their pet. Few jurisdictions have allowed for larger sums under claims for emotional distress, and even in the event these are allowed malpractice insurance has remained inexpensive to maintain. Even though there has been in increase in the claims asserted for veterinary malpractice over the past several years, this trend does not look like it has produced extended liability for veterinary practices.

An analysis of liability of pharmacists reveals that there has been an increase in liability brought on by the social changes in use of pharmaceuticals and facilitated by both the legislatures and court system. However, this liability may not translate into the distribution of veterinary medicine outside of a veterinary practice. Even if it did, the use of theories such as contributory negligence or comparative fault would spread that liability back to the veterinarian. Retailers should not be apprehensive about carrying veterinary medicine. If there is indeed a concern by retailers about their liability to pet owners, HR 1406 could be amended to statutorily reduce that liability.

Given the narrow scope of potential for expanded liability, relaxing regulations on the resale of veterinary drugs and requiring portable prescriptions should be strongly considered. After reviewing some comments previously submitted, it seems that these new requirements will undoubtedly lead to an increase in the price of veterinary services. However, these expenses would be recouped by the consumer in the decrease in cost for pet medication that would come with offering these services in retail chains or online stores. The ability to buy in bulk from the manufacturer and the decreased overhead costs of running a retail facility as opposed to a clinic would make these medications more accessible to everybody. Hopefully, this would lead to increased pet health across the board.

[1] "The elements of such a claim include proof of the applicable standard of care, evidence that the veterinarian did not comply with that standard of care, and proof that the veterinarian's

alleged negligence caused harm to an animal."- 38 Causes of Action 2d 173 (Originally published in 2008)

[2] "Unless he represents that he has greater or less skill or knowledge, one 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."- Restatement (Second) of Torts § 299A (1965)

[3] Pruitt v. Box, 984 S.W.2d 709, 711 (Tex. App. El Paso 1998), Smith v. Hugo, 714 So. 2d 467 (Fla. Dist. Ct. App. 4th Dist. 1998).

[4] Williamson v. Prida, 75 Cal. App. 4th 1417, 89 Cal. Rptr. 2d 868 (2d Dist. 1999), quoting Rasmussen v. Shickle, 4 Cal. App. 2d 426, 41 P.2d 184 (2d Dist. 1935); Sumner v. Bridge, 2005 WL 2414718 (Kan. Dist. Ct. 2005) quoting Tatro v. Lueken, 212 Kan. 606, 512 P.2d 529 (1973)

[5] Courts historically have used "fair market value" to establish the economic cost of an animal.- Rebecca J. Huss, Valuation in Veterinary Malpractice, 35 Loy. U. Chi. L.J. 479, 514 (2004)

[6] McDonald v. Ohio State Univ. Veterinary Hosp., 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994)

[7] Although the court began its analysis with market value, it referenced the time used to train the dog, as well as the efforts to rehabilitate the paralyzed animal, and awarded $5000 in damages for the loss of the dog-Rebecca J. Huss, Valuation in Veterinary Malpractice, 35 Loy. U. Chi. L.J. 479, 516 (2004)

[8] Veterinarians are not legally required to treat any animal before they have accepted a case- Rebecca J. Huss, Valuation in Veterinary Malpractice, 35 Loy. U. Chi. L.J. 479, 511 (2004)

[9] Harold W. Hannah, Common Law and Statutory Defenses to a Veterinary Medical Malpractice Action, 206 J. Am. Veterinary Med. Ass'n 1703, 1703 (1995)

[10] Berres v. Anderson, 561 N.W.2d 919, 922-23 (Minn. Ct. App. 1997)

[11] It is clear that the number of claims, at least in some jurisdictions, is increasing. There are concerns that the average dollar amount of veterinary malpractice claims is increasing as well.- Rebecca J. Huss, Valuation in Veterinary Malpractice, 35 Loy. U. Chi. L.J. 479, 492 (2004)

[12] Am. Veterinary Med. Ass'n, Professional Liability Insurance Trust (2001) (listing annual premiums effective January 1, 2001), available at http://www.avmaplit.com/index.cfm?cont=nonmember/data/Professional.htm

[13] Carbasho v. Musulin, 618 S.E.2d at 371. (citing cases from nine states that only allow for economic damages)

[14] "On the other hand, there are ample cases supporting recovery." (citing cases from Hawaii, florida, and the third circuit)- John Diamond, Rethinking Compensation for Mental Distress: A Critique of the Restatement (Third) Ss 45-47, 16 Va. J. Soc. Pol'y & L. 141, 153 (2008)

[15] Campbell v. Animal Quarantine Station, 632 P. 2d at 1067

[16] "Compensating for the market value of the pet simply does not reflect the loss or value to the owner or even to society's recognition of its value"- John Diamond, Rethinking Compensation for Mental Distress: A Critique of the Restatement (Third) Ss 45-47, 16 Va. J. Soc. Pol'y & L. 141, 154 (2008)

[17] "Perhaps one of the strongest arguments for compensating for negligence is the deterrence against unreasonable careless actions."-Id at 156.

[18] Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards, 25 Law & Soc'y Rev. 263 (1991).

[19] "Allowing Non-Economic Damages in Pet Cases Often Twists the Fundamental Purpose of Non-Economic Damages"- Victor E. Schwartz & Emily J. Laird, Non-Economic Damages in Pet Litigation: The Serious Need to Preserve A Rational Rule, 33 Pepp. L. Rev. 227, 249 (2006)

[20] Id. at 251

[21] Thing v. La Chusa, 771 P.2d 814 (Cal. 1989)

[22] Schwartz & Laird at 248. Citing Tenn. Code Ann. § 44-17-403(e).

[23] Id at 249.

[24] Editorial, Pet Law Barks Up Wrong Tree, Denver Post, Feb. 12, 2003, at B6.

[25] 41 Causes of Action 2d 297-Cause of Action Against Pharmacist for Injury or Death Caused by Prescription Drugs (Originally published in 2009)

[26] Id.
[27] Id.
[28] Id.

[29] Calogerakos v. City of New York, 22 A.D.3d 407, 802 N.Y.S.2d 448 (1st Dep't 2005); Clayton v. Carroll Drug Co., 136 N.J.L. 407, 56 A.2d 732 (N.J. Sup. Ct. 1948); Thomsen v. Rexall Drug & Chemical Co., 235 Cal. App. 2d 775, 45 Cal. Rptr. 642 (1st Dist. 1965); Potter v. Krown Drugs, 214 So. 2d 198 (La. Ct. App. 4th Cir. 1968); French Drug Co., Inc. v. Jones, 367 So. 2d 431, 3 A.L.R.4th 259 (Miss. 1978); Johnson v. Primm, 74 N.M. 597, 396 P.2d 426 (1964); Runyon v. Reid, 1973 OK 25, 510 P.2d 943, 58 A.L.R.3d 814 (Okla. 1973); Speer v. U.S., 512 F. Supp. 670 (N.D. Tex. 1981), judgment summarily aff'd, 675 F.2d 100 (5th Cir. 1982)

[30] Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 79 P.3d 922, Prod. Liab. Rep. (CCH) 16767 (Utah 2003), Boeck v. Katz Drug Co., 155 Kan. 656, 127 P.2d 506 (1942)

[31] Krueger v. Knutson, 261 Minn. 144, 111 N.W.2d 526 (1961), Jacobs Pharmacy Co. v. Gipson, 116 Ga. App. 760, 159 S.E.2d 171, 4, 4 U.C.C. Rep. Serv. 909 (1967)