

All Bark and May Bite, Revisited

By Daniel L. Baxter, Esq.

Thirteen years ago, we presented an article in *California Veterinarian* discussing the professional and legal obligations of veterinarians relative to warning about an animal's dangerous propensities. In that article and an immediately succeeding piece, we attempted to define the parameters of the "duty to warn," and identify ways to discharge that duty.

In the years that have passed, the relevant legal landscape has—interestingly—not changed in any significant way. Thus, the warning-related guidelines we provided 13 years ago still remain operative today.

Defining the Duty to Warn

Although there are certain statutory and regulatory provisions regarding veterinary notification duties in particular circumstances, there are no California statutes or regulations dealing with a duty to warn of an animal's dangerous propensities, and the scanty body of case law that we referenced in our 2002 article has not significantly expanded. Still, the few existing cases on the subject do provide some guidance.

For example, in *McNew v. Decatur Veterinary Hospital, Inc.* (Ga. 1951) 85 Ga. App. 54, the court concluded that the plaintiff owner did not prove that the veterinarian failed to exercise the appropriate degree of care in instructing the owner on how to care for his dog, which had been treated for injuries and examined for rabies after itself being bitten by another dog. Although the veterinarian did not provide a specific warning about the dog's dangerousness, the veterinarian did advise the owner to keep the dog confined for a period of 21 days. This instruction was deemed sufficient to preclude a finding of liability.

In *Branks v. Kern* (N.C. 1987) 320 N.C. 621, the North Carolina Supreme Court held that there was insufficient evidence for a jury to find that the veterinarian defendant violated a duty of care to the plaintiff owner by failing to restrain the plaintiff's cat during a catheterization or by failing to warn the plaintiff of the risks of remaining in close proximity to the cat during the procedure. The court found that the plaintiff, who had observed the procedure in its entirety, was in as good of a position as the veterinarian to appreciate

the risk that the cat would try to bite someone in its immediate vicinity. This conclusion was bolstered by the fact that the cat had previously tried to bite the veterinarian's assistant in the plaintiff's presence, and was therefore clearly revealed as a hazard at that point. The veterinarian was held not to have a duty to warn of a danger about which the plaintiff had equal knowledge.

In *Fazio v. Martin* (N.Y. 1996) 227 A.D.2d 809, the owner of a dog was held not to have knowledge of the dog's vicious propensities prior to the dog's attack on a four-year-old child, and therefore not liable for the injuries suffered by the child. The previous day, the dog had been treated by a veterinarian after a nail had become stuck in the dog's paw. The veterinarian supplied a dosage of antibiotics, but released the dog with no special restrictions or warnings. The next day, while the dog was being walked, the child attempted to pet the dog and was attacked after accidentally stepping on the dog's injured foot. The defendant owner's case was aided by an affidavit from the veterinarian, in which the veterinarian indicated that the dog displayed no aggressive tendencies when discharged, the antibiotics prescribed for the dog would not cause mood swings, and the only instructions given to the owner were routine and related to the cleaning of the dog's bandages. Notably, the veterinarian was not named as a defendant in the lawsuit.

Certain general principles may be culled from the above decisions. First, where an animal's dangerous propensities are as readily apparent to the owner as the veterinarian, it is unlikely that an owner would have a legally cognizable claim against the veterinarian for a failure to warn. Stated differently, a veterinarian probably cannot be held liable for a failure to warn an owner who already has knowledge of an animal's dangerous propensities.

Second, if the veterinarian has no knowledge, or cannot reasonably be said to have known, of an animal's dangerous propensities, it is highly unlikely that the veterinarian could be held liable for a failure to warn. Although a veterinarian will be held to a higher standard of constructive knowledge than a layperson, there will be some circumstances when an animal's future conduct cannot be predicted, even by a veterinarian.

Third, a veterinarian may not have to utter certain “magic” warning words in order to fulfill his or her duties. Other types of instructions or directions, such as the instruction to keep the pet confined in the above-referenced *McNew* case, may suffice.

Discharging the Duty to Warn

With the above principles in mind, we now evaluate how veterinarians can fulfill their “duty to warn.” In that regard, there are three categories of individual to whom such a duty may be owed.

Staff

The most important step veterinarians can take to limit potential liability to staff is to follow clear internal policies with respect to the intake and examination of dangerous animals. Written policies and good recordkeeping are the key. If a veterinarian examines an animal patient whom he or she believes poses a bite risk or other serious risk to humans, that veterinarian should observe a defined process for identifying the animal as dangerous. This process should be followed each and every time such an animal is examined. For example, in order to prevent injuries to veterinary technicians and other staff, a veterinarian might consider having owners fill out forms for each new animal patient containing information regarding the animal’s behavior. For animals identified as dangerous (either by the owner or by the veterinarian during examination), veterinarians might consider labeling the pet’s file with a warning such as “handle with care—bite risk” or a similar indication so

Vigilance for dangerous animals should not end with the veterinarian. Staff should be encouraged to notify the veterinarian and other staff members in order to better inform each and every person in the office about the potential risk.

Owners

As one might conclude based on the above discussion, it is also important for veterinarians to notify animal owners when there is reason to believe the animal poses a risk. Although it is never pleasant to inform an owner that his or her animal is dangerous, providing the owner with such a notification creates a shield against liability in the event the owner is later injured by the animal.

Documentation of warnings provided to owners is well-advised. There are two ways in which such documentation might be accomplished. First, a veterinarian may simply make a written notation in the animal’s chart that a warning was given to the owner. Second, a veterinarian may also provide an actual written warning to the owner, confirming the warning that was provided in person. (In this regard, note that veterinarians should not substitute such a written warning for one given personally to the owner. From a public relations perspective, it is important that the warning be communicated orally so that the owner does not feel blindsided by a later-received written warning.) The advantage of providing written notice to the owner, of course, is that there can be no debate later on about whether and to what extent a warning was given.



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that staff is placed on notice of the animal’s propensities. In instances when a dangerous animal patient is being examined, advance notice should be provided to staff so as to raise awareness of the potential danger while the animal is in close proximity. If necessary, physical restraints on dangerous animals, such as muzzles, should be used.

One thing to keep in mind with respect to the nature of the warning given to an animal owner is to avoid being unduly narrow or vague in describing the potential danger posed by the animal. By acting affirmatively to provide a warning, the veterinarian may be assuming a duty to disclose all potential dangers. Providing a narrow description of the danger posed may be problematic in the event that injury is later caused by an action by the animal that would have been subsumed within a broader “category” of warning. The owner may be able to argue

that while the veterinarian discharged his or her duty with respect to warning of Risk A, the veterinarian failed to warn of Risk B (which was the risk that manifested itself), and was therefore negligent. Therefore, when in doubt, err on the side of providing a broad, as opposed to narrow, warning regarding the animal's dangerous propensities. Similarly, do not minimize the danger posed by the animal in order to soften the blow on the owner or otherwise make the news more palatable.

As was the case with regard to minimizing potential liability to staff, following clear guidelines is also important in the veterinarian/owner context. Veterinarians should avoid situations when a warning is given to one owner about the danger posed by an animal, but not given to another owner whose animal poses the same or similar danger. Be consistent in how you handle individual cases. Adopt written policies defining what tendencies are sufficiently dangerous to require a warning. Persistent and violent attempts at biting will likely give the veterinarian reason to provide a warning. For less aggressive (but still dangerous) behavior, veterinarians will have to make judgment calls on whether the particular quantum of animal conduct should generate a warning. Of course, do not lose touch with common sense. If an animal shows no dangerous tendencies, do not feel that a warning is necessary just to protect yourself from liability.

Third Persons

A veterinarian's duty of care with respect to third persons (i.e., those other than staff or owners) is generally the same as the duty owed to owners. Obviously, it is highly infeasible for veterinarians to somehow safeguard the public at large from each and every dangerous animal that passes through a veterinarian's office. Although given the scarcity of law on the issue it is difficult to say with absolute certainty, it is likely that a veterinarian's fulfillment of his or her duty to warn the owner will protect that veterinarian from liability to a third person.

For example, if a veterinarian examines a particular animal and determines during that examination that the animal poses a substantial bite risk to humans, the veterinarian, as indicated above, should warn the owner of this risk. If the veterinarian does not provide such a warning, he or she could be held liable based on negligence principles to an ignorant owner who is subsequently attacked by the animal. Liability could flow to third persons on the same theory. If the owner was not informed by the veterinarian of the observed dangerous propensities and has no knowledge of those propensities, an injured third person (or the owner if the owner is sued) could charge that it was the veterinarian, not the owner, who acted negligently. On the other hand, if the owner is duly warned, there is no basis for assigning liability to the veterinarian, rather than the owner. It is the owner, not the veterinarian, who has the primary responsibility for the control of the animal.

Conclusion

No matter what specific steps you feel are best utilized to protect yourself from potential liability for a failure to warn, the most important thing is to document and stick to whatever policies you implement. One relative luxury veterinarians have with respect to this issue is the lack of any clearly-defined standard to which veterinarians must adhere in the duty to warn context. This circumstance essentially allows veterinarians to create their own "standard of care" by instituting internal policies such as those mentioned above. While the drawback is that a failure to adhere to this self-created standard may be used as evidence of negligent conduct when a staff member, owner, or third person is injured by a dangerous animal patient, the institution of internal policies is, in the aggregate, a desirable and perhaps necessary tool to combat veterinary liability, even though documenting and following such policies may be inconvenient.



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