Legal risks in the veterinary apology

by Ian Robertson

Although practitioners would prefer to work without legal risk, professional, ethical and legal standards and expectations do apply to all their professional activities. There are a number of practical measures that the veterinarian may implement to minimise the risk; nonetheless most veterinarians are likely, at some point in their career, to have to deal with an adverse event. It might be a missed diagnosis or a miscalculated drug dose, or one of a multitude of other possibilities that results in the deterioration or even death of an animal. How the veterinarian (and veterinary staff) deal with owners/clients after such an event is likely to have a significant impact on the potential outcomes, including whether or not the matter is referred for disciplinary consideration and/or legal action.

Generally, professionals are expected to diligently perform their duties according to standards set by their professional bodies and veterinarians are no exception. As professionals whose services are expected to be transparent and accountable to the paying public, veterinary practitioners are likely to be under similar legal requirements as their human medical counterparts who have a duty to communicate openly and honestly in the aftermath of an adverse event and, additionally, where the patient (or the owner, as is the case in veterinary medicine) has the legal right to be provided with honest answers and information.

If there is a subsequent inquiry, it is likely that adjudicators will distinguish between issues of competence, performance and conduct that, in turn, may attract different recommendations and rulings with the objective of avoiding repetition. A simple error, for example, might necessitate system changes or education. Alternatively, underperformance might call for further investigation and possibly necessitate formal remedial action. In contrast, circumstances that result in a judgment of professional misconduct may result in penalties being applied by the professional body and/or the courts.

There is a difference between ethical duties and legal duties/obligations. An ethical duty may be viewed broadly as the obligation to apply the standards as set out, and assessed, by representatives of the profession. In contrast, a legal duty is a statutory obligation where the fulfilment (or not) of the corresponding duty is judged by the court. Legal judgments have priority over decisions of disciplinary boards and courts take into account criteria and standards that extend beyond solely what constitutes “usual professional practice”. This is illustrated in B v Medical Council (2005) where Justice Elias commented that the structure of the disciplinary process emphasises that “the best guide to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners”. In addition, however, Her Honour went on to state:

... But the inclusion of lay representatives in the disciplinary process and the right of appeal to this court indicates that usual professional practice, whilst significant, may not always be determinative: the reasonableness of the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only practice but also patient interests and community expectations, including the expectation that professional standards are not to be permitted to lag.

Most veterinarians are seen as good-hearted people who genuinely have the wellbeing of their patients and their clients at heart. Although adverse events are unpreventable, the potential for either disciplinary action by the professional body and/or legal repercussions may go some way to explaining why many practitioners are reluctant to apologise when an adverse event has occurred. Fear of losing clients, or perceptions of an inability to effectively communicate with emotional clients are additional reasons why veterinary practitioners are reluctant to say “I’m sorry”.

Nonetheless, it is recognised that there is power, and benefits for both the practitioner and the client, in a genuine apology. When properly delivered, an apology may help prevent matters from escalating. When a matter does proceed to court, case law indicates that judges have often given due consideration to the existence (or not) of a timely, genuine apology.

In contrast, the absence of an apology, or the presence of a disingenuous one, may escalate tensions. For example, a “so-called” apology might be perceived or recognised by the client as the veterinarian’s attempt to deflect responsibility or imply that the event is the client’s fault. Similarly, inferences that are, or perceived as, dishonest, arrogant or manipulative may result in the client subsequently seeking professional advice resulting in an inquiry that could be costly and time-consuming for the veterinarian.

Lack of effective communication by the veterinarian constitutes a significant number of the complaints forwarded for consideration to the Veterinary Council of New Zealand. While the requirements for an effective apology will vary according to the circumstances, research indicates that legal action against a practitioner following an adverse event is often taken by those seeking an explanation, an apology or at least a sincere acknowledgment of their loss and assurances of corrective action to prevent reoccurrence. The words and actions of the veterinary practitioner (which potentially includes veterinary staff) at this point are considered by some as pivotal to what ensues. The difficulty for many practitioners is the perception that saying sorry equates to admitting legal liability.

About the author

Ian Robertson is the unusual combination of a veterinarian and lawyer who has combined his training and experience to become an internationally recognised animal welfare law specialist. He is a member of the International Advisory Board of Compassion in World Farming, an external advisor to the World Organisation for Animal Health (OIE) Collaboration Centre and the Director of International Animal Law (www.animal-law.biz). He is also a consultant and law lecturer on issues of animal welfare and a prosecutor for the Ministry of Agriculture and Forestry.

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When Things go Wrong
“I’m sorry”

There is every likelihood that most veterinarians want to see things put right as quickly as possible but for the reasons outlined above, veterinarians are reluctant to make a bad situation worse by doing so or saying anything that attracts disciplinary action or potential legal proceedings. To many veterinarians, saying “I’m sorry” is tantamount to admitting fault and therefore surrendering to potential ethical and legal repercussions.

However, saying “I’m sorry” does not automatically imply fault, guilt, or error because any subsequent consideration is likely to take account of all the circumstances and thereby put the apology in context. The qualification in this instance surrounds the question of what constitutes a “properly delivered” apology.

Although it is understandable that veterinarians want to manage and minimise their own ethical and legal exposure, it is helpful if the attending physician is also mindful of the fact that, in the face of unexpected complications or loss of a pet, clients may understandably experience a range of emotions such as anger, betrayal, guilt, or possibly intimidation as a result of the professional’s status or manner. Veterinarians might further consider the number of times they have been asked by an owner if they (the owner) were in some way to blame for their animal’s poor health or condition. It follows that owners will ask the same questions of themselves and the veterinary practitioner in instances where an animal unexpectedly deteriorates or dies. At such times an initial expression of empathy and compassion from the veterinarian illustrates a caring, sympathetic approach to the client’s feelings even if, at the time, the veterinarian is unaware of the cause of the deterioration (or death) of the animal.

Bismark (2009) provides an example of how a conversation might go for a medical practitioner, which has equal application in principle and content for veterinarians: “I am so very sorry this happened and this is not the outcome that we expected or hoped for ... we are carrying out an investigation to find out what happened and we will share that information with you as soon as we can. Is there anything else we can do for you or your family at this point? I will be back in touch with you in the next day or so. In the meantime, if you have any questions, you can call me on this number at any time of day”. (This passage is also discussed by Vince Peterson on page 9 of this issue.)

Bismark points out that the practitioner “has said sorry without admitting fault, assigning blame, making guesses, or jumping to conclusions.”2 Contrast this approach with, for example, the number of times that veterinarians have themselves stated, or heard a veterinary colleague state, “it’s one of those things” as part of an explanation to a distressed owner whose animal has deteriorated or died.

The expression of regret is one of five recognised steps in what is regarded as an effective apology.

Prudent steps to minimise risk

Veterinarians frequently counsel their clients to seek early advice and intervention in preference to making choices that will require costly remedies later. The principle is frequently quoted as “prevention is better than cure”. The same principle applies to veterinarians themselves. A timely, considered, and “properly delivered” apology may provide the understanding the client needs, avoid potential disciplinary/legal complications and, almost paradoxically, may actually strengthen the trust and professional relationship between veterinarian and client. In contrast, ill-prepared and erroneous admissions may have costly consequences for all involved.

Where there may be questions of responsibility, accountability and/or liability then the veterinarian is well advised to apply the “prevention is better than cure” principle by seeking early advice from their lawyer, senior colleagues and professional indemnity insurance provider before offering an apology that may be difficult, or even impossible, to subsequently retract.

Just as there is a variance of skills and specialties in particular disciplines and species within the veterinary profession, so too will there be a variance between practitioner’s abilities in communication skills and styles. Nonetheless, it is important that veterinarians and veterinary staff who deal with the public possess at least basic competency in communication, including the ability to understand and provide an effective apology. In recognition of the importance of such skills, a number of institutions have instigated training programmes.17

Understanding the elements of what constitutes an effective apology, and the ability to give an apology without complicating matters and attracting potentially costly consequences, is of significant relevance to the repute of the profession, members of the veterinary practice and the clients. Like so many things, the outcome is dependent not just upon “what” you do, but also “how” you do it. Training and/or early advice to ensure apologies are correct in both substance and form is one of those practical things veterinarians can do to minimise their legal risk and enable all parties affected by any adverse event to move forward as quickly and painlessly as possible.

Summary

- In a properly constructed apology, saying “I’m sorry” does not necessarily equate to “I’m at fault”.
- In situations involving issues of responsibility, accountability and potential liability, get early advice from your lawyer, senior colleague and/or professional indemnity insurer.
- A properly constructed apology may avoid time-consuming and costly disciplinary and/or legal proceedings.

Note

Issues of veterinary management constitute one of the ongoing modules with VetScholar and include attention to issues such as providing an apology, reporting, and client confidentiality. For more information please see http://vetscholar.vetspace.org.nz/node/19573

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Disclaimer

This article is intended for informational purposes and should not be construed as legal advice. Readers with questions regarding specific situations should contact their legal adviser for assistance.

References

2. “Adverse event” in this article utilises the definition provided by Marie Bismark in her paper “The Power of Apology”, The New Zealand Medical Journal, 122, 2009, defined as harm caused by medical management rather than the patient’s underlying disease.
Book Review:

How to train your barking, howling, jumping up, pulling on the lead & won’t come when it’s called dog, by Wendy Graydon, Barking Mad Press, Wellington. $25

In every public library there are dozens of books on dog training and retraining, dog management and the treatment of canine behaviour problems. There are many websites on the same topics. So when a new book on dog training is published, it has to have a target audience and be sufficiently different to be worthwhile.

This new book with a long title is short, easily read and useful for someone who either has never had a dog before or is having some minor behaviour problems with their dog. It is a very small book and therefore it is limited in range and depth but many people won’t read a longer text on dog training.

It does emphasise a few of the key elements in dog training: control if necessary by lead and crate, the reinforcement of desired behaviour and the ignoring of unwanted behaviour. It makes suggestions about greeting and leaving, feeding and walking the dog. There are many things missing from this book, such as using a Halter or Gentle Leader, but it has much useful advice.

This is not a textbook on dog training; it is a quick, brief, easily understood book which I read in less than 30 minutes. I enjoyed it and believe that it will be useful for some people. It is not a book for people who own a dog with a serious behaviour problem but might be useful for owners with a new puppy who won’t be attending puppy school. It retails for $25 and $1 goes to the SPCA.

Reviewed by Kevin Stafford, Specialist in Animal Behaviour, Massey University

Cardiology focus for Auckland gathering

Dr Richard Woolley BVetMed, Dip ECVIM – Ca (cardiology) was a captivating and entertaining guest speaker for the Auckland Veterinary Society recently at an evening generously sponsored by Boehringer Ingelheim. The talk was on cardiology and the evening a case-based presentation.

A key tip to take away from the evening was that counting resting respiratory rates at home is a great indicator of progression into pulmonary effusion. If the resting respiratory rate is 30bpm or less it is unlikely the cat or dog is in congestive heart failure. Many interesting cardiology cases were discussed and Dr Woolley had plenty more in store, stopped only by the late hour.

Pictured are Jonathan Leslie, National Sales Manager Boehringer Ingelheim (left) thanking Dr Richard Woolley for his presentation to the Auckland Veterinary Society.