SHOULD YOU ALLOW OWNERS TO PARTICIPATE IN TREATMENT

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Dear Legal Briefs:

I am a student member of the Wisconsin Veterinary Medical Association, Inc. Recently, I volunteered at the non-profit rabies vaccination clinic in my area. I had a wonderful time and learned a lot by participating! I am writing to you because someone I was working with at the clinic made some statements regarding liability in a small animal practice and I wanted to clarify. I am graduating from veterinary medical school soon and I want to make sure I have a good understanding of the risks associated with the practice of veterinary medicine.

The following was said:

"Ideally, in all small animal appointments, a tech should assist a veterinarian and the owner should not touch their animal in any assisting way. The reasoning behind this suggestion is if the owner helps the veterinarian by restraining his or her own animal and if that animal bites the owner, the veterinarian is liable for the injury."

Is there merit to this statement? Could you please elaborate on this?

Dear Student Member:

I hear veterinarians say this too- and I am sure there is some liability exposure if the owner is injured and argues that the veterinarian was negligent somehow and caused the bite or injury. That said, the law regarding assumption of risk and comparative negligence comes into play, as do the Wisconsin Statutes, and they provide protections for the veterinarian.

Strong arguments exist that the owner assumed the risk associated with his or her participation in the treatment and that he or she should not be able to recover for damages caused by the animal during the veterinary visit. Likewise, courts may compare the negligence of the owner to the negligence of the veterinarian and weigh who had the most liability for the injury. This may cause the court to reduce the amount of damages the owner may recover against the veterinarian. Comparative negligence is a partial legal defense that reduces the amount of damages that a plaintiff can recover in a negligence-based claim, based upon the degree to which the plaintiff's own negligence contributed to cause the injury.

In addition, the Wisconsin Statutes and caselaw also protect the veterinarian in certain injury circumstances. Under Wisconsin law, a veterinarian typically exercises enough control during treatment to be a "keeper" of a dog within the definition of "owner" under Wis. Stat. § 174.001. An "owner" injured while in control of the dog may not use the statute to hold another owner liable. *Armstrong v. Milwaukee Mut. Ins. Co*., 202 Wis. 2d 258, 549 N.W.2d 723 (1996). It is unclear whether a Wisconsin court would apply this statute to domesticated animals other than dogs.

Notwithstanding the protection afforded by the statute, an injured party may still have common law negligence claims, subject to defenses of assumption of risk and comparative negligence discussed

above. However, under Wisconsin law, if a dog caused the injury, the injured party would be prevented from receiving the double damages available under Wis. Stat. § 174.02, the "dog-bite statutes." *Malik v. American Family Mut. Ins. Co*., 2001 WI App 82, 243 Wis. 2d 27, 625 N.W.2d 640, 00-1129. It is important to note that the Wisconsin statute still allows owners to make claims for contribution against other owners if an innocent third party is harmed. *Fire Ins. Exchange v. Cincinnati Ins. Co*., 2000 WI App 82, 234 Wis. 2d 314, 610 N.W.2d 98, 99-1094.

Illinois, Minnesota, and Ohio have similar definitions in their state statutes, and their courts have held that a person in a position of control over the animal does not have a claim against an owner of that animal. (*See Wilcoxen v. Paige*, 174 Ill.App.3d 541, 124 Ill.Dec. 213, 215, 528 N.E.2d 1104, 1106 (1988); *Tschida v. Berdusco*, 462 N.W.2d 410 (Minn.Ct.App.1990), *Khamis v. Everson*, 88 Ohio App.3d 220, 623 N.E.2d 683 (1993)). Under this line of cases, the owner in control of the dog should be prevented from bringing a claim under the strict liability statue against the veterinarian (or employee of the veterinarian).

Although technically there may be some exposure to liability if a veterinarian allows the owner to participate in the treatment of his or her pet, practically speaking, the owner may be very comforting to the pet and many owners help with their pets during veterinary appointments. The best way for a veterinarian to address these liability concerns, with certainty, is for the clinic to maintain comprehensive liability and malpractice insurance coverage and include a well-drafted liability waiver in its services agreement and to have these agreements signed by all pet owners who use the clinic's services.