

ECONOMIC

VS.

NON-ECONOMIC

DAMAGES

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ECONOMIC VERSUS NONECONOMIC DAMAGES

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May 2018

As is well known, the law is an ever emerging battleground for change. The materials below are not the final word on the subject of damages awarded for pet loss. Readers of this document are encouraged to check the Michigan State Animal Legal & Historical Center website as a useful resource on this subject.

<https://www.animallaw.info/cases/topic/pet-damages?order=title&sort=desc>

Important Law Review Articles include:

1. Schwartz, VE & Laird, EJ *Pepperdine Law Review*, 20016. Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule animallaw.info/sites/default/files/arus33peplrev227.pdf
2. Barghusen, S, DVM, JD (Publication location unknown) Noneconomic damage awards in veterinary malpractice: using the human medical experience as a model to predict the effect of noneconomic damage awards on the practice of companion animal veterinary medicine. animallaw.info/sites/default/files/lralvol17_1_13.pdf
3. Sirois, Lauren M; *U of Penn Law Review*. June 2015. Recovering for the loss of a beloved pet: rethinking the legal classification of companion animals and the requirements for loss of companionship tort damages. scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=9478&context=penn_law_review
4. Simmons, Schyuler P, *Texas A & M Law Review* 1:1 March 2016. What Is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors. scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1010&context=lawreview

The Emerging Battles Over Expansion of Either of These

To fully understand these issues and their impact on expanding liability for pet loss we must first define each of these terms. .

Economic damages for humans include:

1. Lost wages
2. Health care costs
3. Reeducation
4. Rehabilitation
5. Physical disfigurement and impairment (Colorado)

Economic damages for animal life include:

1. Market value of animal
2. Replacement cost
3. Costs for veterinary care (all costs or only those up to the value of the animal?)
4. Costs for searching for animal
5. Lost use of the animal (i.e., stud and dam fees)
6. Lost income in the form of prizes and production
7. Documented wages lost while caring for the animals and transportation (up to \$900 for these economic damage was awarded in the melamine cases as reported in *Phil Inq. Bus Section*, B-1 & 8, Aug. 23, 2011)
8. Funeral costs
9. The unique, sentimental or "peculiar" value of the property to the owner (case law in some states such as Massachusetts but statutory law in others such as California)

The Strange Texas Case for Sentimental Damages

Although included under “economic” damages, the unique, sentimental or peculiar value sometimes asserted for pets has its origin from case and statutory law that pertains to heirlooms. (See *L & E* book p. 147 and 151-152). The law has recognized that there should be some economic value when irreplaceable items of property have been lost or damaged but that such losses should not rise to the level of those available under the noneconomic damage category. The most recent case, *Kathryn and Jeremy Medlen v. Carla Strickland*, that raised major discussion, began in Texas on November 2, 2011 when Fort Worth’s 2nd District Court of Appeals ruled that some type of noneconomic value can be attached to the love a dog. It overruled a 120 year-old case that held that plaintiff’s can only recover for the market value of their pets.

As noted above, many other states already recognize this unique, heirloom type of damages. Fortunately, the dollar amounts that courts have allowed with this damage claim have been in the range of \$2,500 to a high of \$30,000 in the *Bluestone v. All Care Animal Referral Center* case that originated in Fountain Valley, CA in 1999. *JAVMA*, April 15, 2004.

The interesting concept associated with these types of damages is that there must be a strong emotional attachment to the pet for them to be awarded. Additionally, these dollars provides compensation for the emotional distress associated with losses of heirlooms or pets but remain embedded in the economic form of damages. Some argue that this is a precursor to allowing for noneconomic damages. Only time will tell if that transpires.

On April 5, 2013, the Texas Supreme Court reversed the lower court’s decision and unanimously ruled that Texas’ pet owners can be compensated only for their animal’s market worth – not their sentimental value. “Under Texas common law, the human-animal bond, while undeniable, is uncompensable,” Justice Don R. Willett wrote. The court noted that Texans can’t sue for the loss of family members unless they are close relatives, such as a spouse or parent. Judge Willette continued with a statement that **“it would be odd if Texas law permitted damages for loss of a Saint Bernard but not for a brother Bernard.”**

To date most, if not all, of the **state supreme courts** have struck down lower court rulings allowing non-economic damages for the loss of pets with many saying that it would be up to the legislatures of their states to do this, not the courts.

Update On \$24 Million Melamine Settlement

On August 22, 2011, the *Phil Inq* Business section reported as follows: “Sherrie Savett, a lawyer representing plaintiffs said the case did help advance the legal rights of pet owners. We got a very significant economic recovery. (Note: Dr. Wilson thinks this is the largest recovery ever for a lawsuit involving pets.) The animal was treated almost like a person....Although claimants were not always fully reimbursed for their expenses, they generally got slightly more than 50% of claimed losses.” The article goes on to say that the New Jersey Supreme Court has agreed to rule on whether a dog owner who witnessed the killing of her pet can sue for emotional distress.

Criteria for expanding **economic damage options** for pet loss:

1. Animals would retain their property status but acceptable definitions for “pets” or “companion animals” would be created to provide a threshold so not just any “animal” would qualify.
2. As with the Maryland and Nevada laws, to control costs, reasonable caps would or could be placed on provable economic damages.
3. In the case of **injuries**, costs for “repair” of this special kind of property would be allowed to exceed the market or replacement value of the pet, including:
 - a. **All** costs for veterinary and nursing care, or

- b. Veterinary costs with upper limit “caps” could be created with proof of negligence by the perpetrator of the inquiry. This could include animal behavior training to combat behavior pathology related to a negligent incident and any special transportation needs, etc.?
- c. Animal behavior consultations and training caused by the actions of the perpetrator with proof of intentional infliction of emotional distress (IIED)?
- 4. In the event of an animal’s **death** allow reimbursement for one-time costs related to the pet’s:
 - a. Purchase and/or adoption, spay and/or neuter
 - b. Juvenile vaccinations and dewormings,
 - c. Obedience, field dog, search and rescue, cancer and seizure detection, service dog and/or other training,
 - d. All costs of veterinary care related to the intentional or negligent actions of another person or that person’s property,
 - e. Costs of transportation to obtain unique or specialty veterinary care, and
 - f. Euthanasias, cremations, funerals and burials if death was proximately caused by the negligence or intent of the perpetrator. (Allowed in the \$24 million melamine settlement against Menu Foods)
- 5. **Disallow:**
 - a. Food, treats, and supplements,
 - b. Well and sick veterinary care except for that resulting from the intentional or negligent actions of another person,
 - c. Leashes, collars, harnesses, and seat belts
 - d. Crates, visible or invisible fences
 - e. Toys, kenneling, grooming, transportation, licenses
 - f. Clothing and other paraphernalia
 - g. Note: reimbursement would require reasonable proof of any expenditures.

Pros of expanded economic damages:

1. Avoids trying to place a dollar value on emotional distress
2. Requires authentication of any expenditures to limit owner exaggeration
3. Keeps animals as property, albeit elevated to a new “pet” status
4. Whenever the costs for repair, in this case veterinary care, exceed the animal’s market value, property law principles require that they are “totaled out”. This is not appropriate for the veterinary profession.

Cons of expanded economic damages:

1. Owners of limited means are penalized.
2. Owners who spend lavishly are rewarded – but only if the pet dies!
3. Fails to acknowledge or measure the degree of the bond and the emotional attachment/damage, although some argue that if only “pets” qualify for damages in excess of market value, and that definition includes evidence of the human-animal bond, the law is on the road to acknowledging emotional distress as a component of damage recoveries for property.

Case Law Expanding Economic Damages to Exceed Market or Replacement Value

CA Court Rules Pet Owners Can Sue For More Than Market Value But Not Noneconomic Damages

October 29, 2012

A California appeals court recently sided with pet owners in two cases where the owners were attempting to sue for damages beyond the animals’ market value. The decision sets another precedent in the legal system’s efforts to legally and monetarily define a pet’s value.

The Second District Court of Appeals wrote in its opinion filed Oct. 23: “We hold that a pet owner is not limited to the market value of the pet and may recover the reasonable and necessary costs incurred for the treatment and care of the pet attributable to the injury.”

Instead of tackling the subject of sentimental value, which has been a thorny issue for courts in other states, the appeals court based its decision on the actual costs paid by owners to treat their pets following an injury.

Case summaries

In the first case considered by the Second District Court of Appeals, a woman took her dog to have a small liver lobe removed. According to the court documents, the veterinarian allegedly “nicked and cut” the dog’s intestine during surgery, causing internal bleeding. The veterinarian also reportedly left a piece of surgical gauze inside of the dog.

The woman spent \$4,836 on the initial surgery, and then paid an emergency hospital \$37,766 to stop the resulting internal bleeding and remove the gauze. She filed her lawsuit after the veterinarian reportedly offered to refund the \$4,836 but refused her requests for money related to the emergency hospital fees.

The second case involved a dog that escaped into a yard next door and began barking at the neighbor’s dog. The neighbor shot the dog in the leg and claimed it was self-defense even though the dogs were still separated by a gate. Veterinarians were eventually forced to amputate the leg, and the dog’s owner sued the neighbor for \$20,790 in veterinary bills.

In those two cases, trial courts ruled that the owners could only sue for market value, which prompted them to bring their cases to appeals court.

Ruling details

The rulings from the appeals court reversed the previous decisions and allowed the owners to sue for more than market value — as long as the amount is based on “reasonable and necessary” costs related to the animal’s treatment.

In the court’s written opinion, the judge explained that a previous case — *Kimes, supra*, 195 Cal.App.4th 1556 — heavily influenced the court’s ruling. In that case, the owner of an adopted stray cat sued his neighbors after they allegedly shot the pet with a pellet gun and left it paralyzed. The owner’s lawsuit asked for \$6,000 for the emergency surgery as well as \$30,000 for costs incurred while caring for the cat.

According to the appeals court, the opinion in the *Kimes* case stated: “In this case, plaintiff is not plucking a number out of the air for the sentimental value of damaged property; he seeks to present evidence of costs incurred for [the cat’s] care and treatment by virtue of the shooting — a ‘rational way’ of demonstrating a measure of damages apart from the cat’s market value.”

The Second District Court of Appeals further explained its position by referring to animals using the terms “sentient beings” and “distinct and specially protected form of property,” which are terms that many courts have historically refrained from using.

The court stated: “In California, the Legislature has recognized since 1872 that animals are special, sentient beings, because unlike other forms of property, animals feel pain, suffer and die. Civil Code section 3340 provides that — for wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity, exemplary damages may be given. Laws criminalizing animal abuse underscore the Legislature’s view that animals are a distinct and specially protected form of property.”

Illinois Dog Negligence & Property Damage – Jury Verdict

Summary: Defendant's Siberian Husky managed to get past fences into neighbor plaintiff's backyard and mauled plaintiff's dachshund, Molly. Defendant argued that it was not his dog and unless plaintiff could prove how his dog escaped they could not prove his negligence. The trial court rejected these defenses, but only awarded plaintiff \$200, the amount of Molly's fair market value according to defendant's expert.

Issue: Does the traditional property doctrine limiting plaintiff to fair market value for damaged property when the cost of repairs exceeds such value apply to companion animals?

Result: Reversed and modified judgment. Award, \$4,784.

Court Opinion: Appellate court observed that even if Molly, a 7 ½ year old non-show dog, had \$200 market value she only had a nominal value at the time of her injury. It noted that "it is common knowledge that people are prepared to make great sacrifices for the well-being and continued existence of their household pets...Emotionally, they have no choice but to lay out great expenditures when these animals suffer a serious physical injury." The court found that Molly was worth at least the \$4,784 plaintiffs spent on veterinary care, and modified the trial court's compensatory damage award.

Editor's Insight: Leith is at least the third such decision in recent years to hold that companion animals are worth at least what their owners are willing to spend on veterinary care (See *Burgess v. Shampooch*, 35 Kan.App.2d 458, 131 P.3d 1248 (Kan. App. 2006) and *Hyland v. Borrás*, 316 N.J.Super. 22, 719 A.2d 662 (N.J. Super. A.D. 1998)). This editor views this as an encouraging trend.

Citation: *Leith v. Frost*, 2008 WL 5473300 (Ill. App. 4 Dist.) **The Animal Legal Report** January 2009 – Editor, Amy A. Breyer, Esq.

Toledo injured dog, higher than economic replacement, Ohio 6th District Court of Appeals Remanded

Summary: A Pit Bull puppy was taken to the home of the stud dog and subsequently attacked. The puppy suffered 3 broken legs and numerous puncture wounds. Veterinary care with stabilization and orthopedic surgery totaled \$10,731. Plaintiff asked for \$15,000 to cover prior and future veterinary costs. The defendant's dog was euthanized at the request of his home insurance company which is actively defending the case to avoid new precedent law. The trial court awarded the plaintiff merely \$400 for the economic value. (It is unknown as to whether this was for the price of this puppy when purchased from the breeder or the likely cost for a replacement.)

Issue: Pets are legally personal property in Ohio and damage compensation is typically limited to cost of repair or fair market value, whichever is lower. [According to the news article] multiple cases in Ohio and other states have awarded veterinary expenses in excess of the market or replacement value to be included in economic damages to pet owners. These consist primarily of veterinary care where costs often exceed market or replacement value by thousands and even tens of thousands of dollars.

Result: Remanded to Toledo Municipal Court October, 2016 for new determination of economic damages. Court opinion said no noneconomic damages will be awarded.

<http://www.toledoblade.com/Courts/2016/10/21/Appeals-court-remands-Toledo-dog-case.html>

Model Law with Expanded Statutory Caps on Economic Damages

Effective October 1, 2005, the Maryland state statutes Section 11-110 changes the damage awards for pet loss in that state to **allow for a maximum of \$7,500 for compensatory damages**. It defines pets as domesticated animals. It says that compensatory damages means: a) in the case of the death of a pet, the fair market value of the pet before death and reasonable and necessary costs for veterinary care, and b) in the case of an injury to a pet, the reasonable and necessary cost of veterinary care. As for a measure of damages, the statute says that a person who tortuously causes an injury to or death of a pet while acting individually or through an animal under the person's direction or control of the owner of the pet is liable for compensatory damages not to exceed \$7,500.

This would be a far more palatable direction for the law to take than allowing for the provision of noneconomic damages for animals in the form of emotional distress, pain and suffering or loss of companionship in situations where they may very well not be available for the loss of a grandchild, best human friend, domestic partner, niece or nephew.

Maryland Court Upholds \$7,500 Economic & \$200,000 Noneconomic Damages – February 12, 2015

What damages can a dog owner recover if their pet is tortuously injured? That question was recently considered by Maryland's intermediate appellate court in *Brooks v. Jenkins* – 220 Md. App. 444, 104 A.3d 899 (Md. Ct. Spec. App., 2014). In *Brooks*, two Frederick County sheriff deputies went to the home of Roger and Sandra Jenkins to arrest their son. While outside, one of the dogs, named Brandi, walked along the side of the house and approached Deputy Brooks with her tail wagging. Deputy Brooks, feeling threatened removed his gun and fired a bullet into the Brandi's chest. Mr. and Mrs. Jenkins immediately took Brandi to a veterinarian. Although Brandi suffered a serious gunshot wound, she was nursed back to health after the Jenkins' family incurred veterinary bills of \$15,000.

The Jenkins' couple filed suit against Deputy Brooks and his partner, alleging that Deputy Brooks committed a trespass to chattel and violated their rights under the Maryland Constitution when he shot Brandi. The jury found Deputy Brooks acted with gross negligence, but not malice, when he shot Brandi and that he committed a constitutional tort and common law trespass. It awarded the Jenkins couple' \$20,000 in economic and \$200,000 in noneconomic damages for the shooting. **Maryland Code §11-110 caps compensatory (economic) damages** that are recoverable for the death or injury of a pet at \$7,500.

On appeal, Deputy Brooks argues that the award related to the shooting of Brandi should be reduced to \$7,500. The Maryland Court of Special Appeals agreed that the award of \$20,000 for economic damages related to the shooting of Brandi should be reduced to \$7,500 but it **found that the award of \$200,000 for noneconomic damages sustained by the Jenkins' should not be reduced**. In doing so, it found that the cap in §11-110 applies to veterinarian bills sustained as a result of injury to a pet (and the lost value of the pet, if it dies), but not to other noneconomic damages that a pet owner suffers as a result of an injury to their pet. Since Deputy Brooks had **committed a constitutional tort, the award of \$200,000 on noneconomic damages related to the shooting of Brandi was upheld.**

Based on the court's opinion in *Brooks v. Jenkins*, any defendant regardless of whether they are a public officer or private citizen, who **maliciously** injures a pet will be liable to the pet owner for the mental suffering that results. A public officer who commits a *constitutional tort* that injures a pet will be liable to a pet owner for mental suffering related to the injury to their pet. **Neither a public official nor a private citizen who negligently injures a pet will be liable for mental anguish-type injuries.**

It is uncertain if Maryland's highest court would agree with the holding of *Brooks v. Jenkins*. Nevertheless, no petition has been filed with the Maryland Court of Appeals requesting that it review the decision.

Animals Can Be 'Victims' Just Like People, Oregon Supreme Court Says

©By Aimee Green – The Oregonian/OregonLive on August 22, 2014

In two landmark rulings earlier this month, the Oregon Supreme Court said that animals – whether they be horses, goats, dogs or cats -- shall be afforded some of the same basic protections as human beings. The dual rulings are expected to make it easier for police to rush to the aid of ailing animals without first obtaining a warrant. They also could result in harsher criminal repercussions for those found guilty of abusing or neglecting animals.

“These are hugely helpful to the prosecution of animal-cruelty cases,” said Jacob Kamins, a Corvallis-based prosecutor assigned to pursuing such cases across Oregon. Specifically, in *State v. Arnold Nix*, the supreme court ruled that a Umatilla County man who was convicted of starving 20 horses and goats on his property could be sentenced -- not just on one count of second-degree animal neglect – but on 20 different counts, meaning each animal counted as a separate “victim.”

For defendants in general, that could result in longer jail or prison sentences, and make it more difficult for defendants to – years later – expunge such convictions off of their criminal records. “To acknowledge that animals are victims of crime, that’s really common sense to us,” said Lora Dunn, staff attorney for the Animal Legal Defense Fund in Portland. Nix, who was 68 at the time of his arrest in 2009, argued that the ordinary meaning of “victims” doesn’t include “non-humans,” and Oregon law defines animals as the property of their human owners.

In *State vs. Linda Fessenden and Teresa Dicke*, the Supreme Court found that Linda Fessenden and Teresa Dicke's horse, pictured here in 2010, had more than 6,000 fans on Facebook at the time it died in July 2011. The horse, named Grace, was 28. The Associated Press a sheriff's deputy was legally justified in 2010 in rushing onto a Douglas County pasture to get medical help for a horse that was so malnourished every one of its ribs was showing. The state's high court ruled that the deputy, who thought the horse was in immediate danger of falling and dying, didn't need a warrant to step onto private property and get the animal to a veterinarian.

As Nix had argued, Fessenden and Dicke also argued that state law defines animals as property -- and police should first have to obtain a warrant before bursting onto private property to prevent harm to property. The high court agreed that animals are still defined by law as “property.” But the court ruled that the deputy didn't violate the constitutional search and seizure rights of its two owners because “exigent circumstance” existed -- that is that swift action was required to prevent harm to people or to property.

The deputy estimated it would take four to eight hours to obtain the warrant, and by then, it might not be possible to save the horse. “We get calls every day from law enforcement in Oregon and other states that say ‘I need help right now. These animals are on the brink of death’ -- whether it's a hoarding case with cats or dogs in a puppy mill or horses that are starving,” said Dunn of the Animal Legal Defense Fund.

“Absolutely, we recommend ‘Get a warrant if you can,’” Dunn said. “Because we don't want to deal with these constitutional issues down the line.” But sometimes, Dunn said, an animal's life might be in jeopardy in the time it takes to get a warrant. Dunn said that's why her organization is “thrilled” about the Fessenden/Dicke case. In making its findings -- some of the strongest favoring animal rights to date -- the high court noted how Oregon law is evolving to reflect the sentiments of society in general.

Justice Martha Lee Walters, who wrote the Fessenden/Dicke opinion for the court, noted that household pets, such as dogs, and even a farm animal -- the horse -- “occupy a unique position in people's hearts” and that's reflected in the development of animal-welfare laws.

Walters referenced a legal fight by American attorneys trying to establish the right of a chimpanzee to sue its owner for poor living conditions, and even a zoo in India that won't allow the exhibition of dolphins because of their advanced intelligence. Walters also cited a 2013 study by the Animal Legal Defense Fund that ranked Oregon second and Washington seventh among states for their laws protecting animals. Among Oregon's strengths, the study said, were laws that increase penalties if the harm to the animal happened in the presence of a child and the power of judges to require mental-health counseling.

"As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects," Walters wrote. "However, we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still..."

Nevada Becomes Second State with a Statutory Cap on Economic Damages

Although punitive and non-economic damages would not be available under this 2005 law, statutory damages up to \$5,000 for each pet could be awarded.

1. Except as otherwise provided in subsection 4, if a natural person intentionally, willfully, recklessly or negligently injures or kills the pet of another natural person, the person is liable for the following:
 - (A) The cost of veterinary care incurred by the owner because of the injury or death of the pet.
 - (B) If the pet is injured, any reduction in the market value of the pet caused by the injury.
 - (C) If the pet is killed, the market value of the pet and reasonable burial expenses.
 - (D) Reasonable attorney's fees and costs incurred by the owner in bringing an action pursuant to this section.**
2. Punitive damages and non-economic damages may not be awarded in an action is brought under this section.
3. In an action brought under this section, the award of damages must not exceed \$5,000 for each pet.
4. The provisions of this section do not authorize an award of damages pursuant to subsection 1 if:
 - (B) The action is based on the killing of a dog that had been or was killing or causing damage to livestock.
5. As used in this section:
 - (B) "Owner" means a natural person who owns, possesses, harbors, keeps or has control or custody of a pet.

Nevada State Statute Chapter 574, Section 574.300 defines a pet as a domestic cat or dog commonly kept for pleasure.

Non-economic damage awards for humans include:

1. Emotional distress but...these are...
 - a. Usually **unavailable** except for close family relationships
 - i. Yes with loss of or harm to a child or parent
 - ii. Not available for loss of a) life partner, b) friend, c) fiancé, d) grandchild
2. Pain and suffering
 - a. In many jurisdictions, only awarded when there has been an "impact" on a person's body or
 - b. When plaintiff actually has witnessed the negligent act.
3. Loss of (human) companionship
4. Loss of consortium (an intimate relationship usually involving sexual intimacy)
5. Physical impairment and disfigurement? (CO - \$300,000 total in this category)

Non-economic damage awards for pet loss include:

1. Unique and/or peculiar value of this property to this particular human as with heirlooms that have no economic value even close to that of the property's owner.
 - a. **California's law that allows for noneconomic damages is buried in** Civil Code Section 3355. Where certain property has a **peculiar value** to a person recovering damages for "deprivation thereof, or injury thereto, that may be deemed to be of its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer."
2. A very few older state court decisions referenced on pages 149-151 of the *Law and Ethics* book have allowed small damage awards that reflect "heirloom" type awards for emotional distress. However, the trend in all appellate court decisions on this issue has been very much toward disallowing noneconomic damages for pet loss except for cases such as Pennsylvania's *Brown v. Muhlenberg Twsp*, 269 F.3d, 205 (3rd Cir. 2001) and Kentucky's **Big-Bang** case *Burgess v. Taylor*, 44 S.W.3d 806, 91 A.L.R.5th 749 (Ky. Ct. App. 2001) cited earlier in these notes.

Problems with allowing non-economic damages include:

1. It would allow for damage awards in relationships **where they are not** allowed for humans. In most jurisdictions, these damages are not allowed except with relationships such as parent/child, siblings and husband/wife. In some jurisdictions they are not allowed unless there has been an "impact" on the plaintiff's body as part of the incident that led to his or her emotional distress.
2. It encourages great acting by and sob stores from people who claim that the animal in question was their all-time favorite pet.
3. Is it really possible for judges or juries to place realistic dollar values on emotional distress?!
4. It allows juries to run wild with damage awards, depending on their level of sympathy for plaintiffs and/or distaste for veterinary defendants and/or their legal counsel.
5. Statutory caps on damages would be needed if state statutes were to allow this type of damages for pet loss (and trial lawyers always fight such efforts with vigor)
6. Large damage recoveries would seriously impact the cost of professional liability insurance, increase the need to practice defensive medicine and result in higher costs for veterinary care. This, in turn, would increase the number of economic euthanasias veterinarians are forced to perform, more pets without appropriate veterinary care and/or a serious increase in the number of pets abandoned at shelters.

No Non-Economic Emotional Distress or Loss of Companionship Damages in Washington Another Example of How Reluctant the Courts Have Become to Expand Noneconomic Damages to Pet Loss

Washington State plaintiffs may not recover for significant and ongoing emotional distress resulting from a fire that injured the family dog. The U.S. District Court, applying Washington State law, in *Stephens v. Target Corp.*, (U.S.D.C., W.D. Wash., 3/16/07), determined that the couple's recovery was limited to the value of their property.

In July 2004 a reading lamp manufactured by Tensor and sold by Target allegedly caused a fire. Plaintiffs asserted various product liability claims under the Washington Products Liability Act, and sought damages for damage or destruction of irreplaceable personal items and injury to the family dog which required veterinary care and resulted in emotional injury to the family. Defendants filed a motion for judgment on the pleadings which if successful would dismiss plaintiffs' claims for emotional harm. Defendants contended that emotional harm occasioned by damage to personal property and injury to the family dog is not compensable under Washington law.

The District Court found the holding in *Mieske v. Bartell Drug Co.*, 92 Wn.2d 40, 593 P.2d 1308 (Wash. 1979), to be controlling. The Washington State Supreme Court in *Mieske* described the standard for the measure of damages in relation to personal property:

- (1) personal property which has been destroyed may have a market value, in which case that market value is the measure of damages;
- (2) if destroyed property has no market value but can be replaced or reproduced, then the measure is the cost of replacement or reproduction;
- (3) if the destroyed property has no market value and cannot be replaced or reproduced, then the value to the owner is to be the proper measure of damages.

The court concluded that the plaintiffs' claim to "ongoing emotional harm" arising from damaged or destroyed personal property cannot stand as a matter of law. However, the court further observed that if a personal item has no market value or is irreplaceable, its value may include a subjective element – i.e., value to the owner. However, sentimental or fanciful value is not compensable.

Plaintiffs argued that if there is no separate claim for emotional distress or loss of companionship the jury may nevertheless consider the impact on the reasonable value of their dog's companionship in determining the loss of the dog's intrinsic value. The court rejected this argument stating:

Plaintiffs' recovery is nevertheless limited to the value of the dog itself. Washington law does not permit plaintiffs to separately recover for loss of companionship or emotional harm occasioned by their dog's injury. In holding that Washington law treats dogs in the same manner as other chattel, the court limited plaintiffs' recovery to an amount that does not exceed the value of the dog itself.

Vermont Court: Man's Best Friend Is Mere Property – No Noneconomic Damages Awarded

May 21, 2010, Montpelier, VT – The owners of a dog that was shot to death have lost their bid to win financial damages for loss of companionship. The Vermont Supreme Court on Friday affirmed a lower court ruling saying Vermont doesn't recognize noneconomic damages for the malicious destruction of personal property, even if it's a beloved pet.

Denis and Sarah Scheele sued Lewis Dustin after their mixed-breed dog Shadow wandered onto Dustin's property and he shot it. That was in 2003. Dustin said he was aiming at the dog's rear end and trying to shoo it away, never intending to kill it. The Scheeles say the dog was part of their family, not mere property.

State Laws Continue to Surface in Attempts to Allow Non-Economic Damages for Loss of Pets

Over the years, many states have seen proposed law aimed at allowing non-economic damages. In 2000, Tennessee became the first state to enact legislation that allows companion animal owners to recover for emotional injuries. The measure allows pet owners to recover up to \$5,000 in non-economic damages if a person's pet is killed or sustains injuries which result in death caused by the unlawful and intentional, or negligent, act of another. In addition, the statute compensates for loss of expected society, companionship and love and affection of the companion animal. Interestingly, the Act includes a provision that **excludes veterinarians from noneconomic damage liability** for professional negligence.

Legislation for non-economic damages has been introduced in the following States: CA, CO, MA, MI, MS, NJ, NY, OR, PA, and RI. Connecticut and Illinois specifically authorize punitive damages, but not non-economic damages. Judges have rarely awarded non-economic damages. See, for example, <http://www.animallaw.info/articles/qvuspetchdamages.htm> for a discussion of cases that have departed from traditional damage awards. Click on <http://www.animallaw.info/cases/topiccases/catopd.htm> for the best known list of all lawsuits for damages suffered by pet owners.

A recent Massachusetts Bill, if ultimately passed, would allow non-economic damages only in cases of *malicious injury* or *the killing of a pet*, as with the Illinois “aggravated cruelty” law, not in cases alleging mere *negligence*.

Do you think that this distinction is enough to disregard the potential consequences of allowing non-economic damages or do you think that this could lead to a slippery slope allowing for other non-economic damages? Or, do you think that non-economic damages should be allowed no matter what?

Colorado Appeals Court Considers Noneconomic Damages Owed to the Owners of Dogs Poisoned by Neighbor

October 2011 – The Colorado Court of Appeals has heard oral arguments in a case regarding the damages owed to several pet owners whose five dogs were killed in 2006 after eating poisoned meat left near their property by a neighbor who said he was attempting to kill coyotes. The Animal Legal Defense Fund filed a brief in the appeal after the trial court instructed the jury that the dog owners’ economic damages should be measured by the market value “cost” of their dogs, rather than the true “value” of their dogs. As a result of this and other rulings of the trial court, the monetary damages awarded to the plaintiffs at the trial court level did not adequately compensate the plaintiffs for their noneconomic losses that resulted from the deaths of their irreplaceable companion animals.

(10CA1578 Kathleen Sullivan et al v. Daniel Bowen)

2013 UPDATE – At trial, Plaintiffs voluntarily dismissed their negligence per se claim. Plaintiffs’ trespass, intentional or reckless infliction of emotional distress (IED), and remaining nuisance claims were dismissed on directed verdict, although the Defendants’ ultrahazardous activity and punitive damages and Plaintiffs’ negligence claims were allowed to go forward to the jury. The jury found in Defendant Bowen’s favor on the ultrahazardous activity claim and request for punitive damages and found in the Plaintiffs’ favor on negligence.

Plaintiffs appealed, citing for issues including the comparative evidentiary standards for punitive damages and IED and the failure of the Trial Court to read the evidence in the light most favorable to the Plaintiffs in entering a directed verdict on the IED claim. The Court of Appeals affirmed the Trial Court’s decision. Plaintiffs submitted a Petition for Rehearing which was denied on December 15, 2011.

New Jersey Supremes Bar Emotional Distress Claim for Seeing Pet Mauled to Death

August 1, 2012 – ABA Journal – By Debra Cassens Weiss

Pet owners in New Jersey can’t sue for emotional distress caused by seeing their animals killed, the New Jersey Supreme Court has ruled.

The court ruled in a suit by Joyce McDougall, whose was walking her maltipoo in June 2007 when a larger dog attacked and shook her pet to death. The trial judge awarded \$5,000 to replace her dog but denied emotional distress damages. The New Jersey Supreme Court affirmed in a 5-0 opinion, report the New Jersey Law Journal, the Wall Street Journal Law Blog and the New Jersey Star-Ledger.

The court said that New Jersey allows emotional distress damages for witnessing a traumatic death only in narrow circumstances. “Although we recognize that many people form close bonds with their pets, we conclude that those bonds do not rise to the level of close familial relationship or intimate, marital-type bond,” the court said.

Allowing a cause of action would require the court to “vastly expand the class of human relationships” qualifying for damages, or would “elevate relationships with animals above those we share with other human beings,” the court said. “We conclude that neither response to the question presented would be sound.”

D.C. Lawyer Sues Kennel After Bigger Dog Killed Her Pet

By Tom Ramstack

A Washington, D.C. lawyer returned from week-long cruise recently to find that her pet dog was killed by a bigger dog at the kennel where she left him. Now she is suing the Wagtime Too dog-boarding kennel for \$150,000, claiming negligence in the death of her 4.5-pound teacup Yorkie at the company's Navy Yard facility.

The Yorkie's owner, Falen LaPonzina, says the money she claims in damages is not only for financial loss. It also reflects the important role pet dogs can play in their owners' lives, she says. LaPonzina told The Washington Post she will advocate for regulatory reform in the D.C. government to improve standards for dog-boarding facilities. Wagtime Too officials say the dog's death was a freak accident. The dogs are allowed to roam in a cage-free environment.

One of the other dogs was a Labrador mix four times the weight of LaPonzina's dog, who was named Dax. A Wagtime Too employee was watching the dogs but didn't realize the Labrador mix had picked up Dax in his teeth until it was too late. When the employee checked on Dax, he had stopped breathing. Employees then left messages for LaPonzina, who described her dog as a loyal companion.

Wagtime Too operates facilities in the Shaw and Navy Yard neighborhoods in D.C. The company charges owners \$55 a night to board the dogs. They said they screened the Labrador before letting it run around with the other dogs. It showed no signs of aggressive behavior. LaPonzina's lawsuit says Wagtime Too lacked an appropriate license for its Navy Yard facility. The D.C. Department of Consumer and Regulatory Affairs requires only a basic business license for dog-boarding facilities.

Calif. Appeals Court Allows Emotional Distress Damages for Pet Owners in Intentional Injury Case

September 5, 2012 – ABA Journal – By Debra Cassens Weiss December 12, 2012.

<http://jacksonandwilson.com/tag/appeal/>

In the case of Plotnik v. Meihaus, Jr., a California appeals court has upheld **\$50,000 in emotional distress damages** for pet owners who claim their neighbor **intentionally injured** their dog (Intentional Infliction of Emotional Distress - IIED). The Fourth District Court of Appeal said that such **damages may be allowed for intentional injury**, but **NOT** for negligence (Negligent Infliction of Emotional Distress - NIED), the Recorder reports. The plaintiffs, David and Joyce Plotnik, had claimed they had to pay \$2,600 in veterinary bills for surgery to repair their dog Romeo's leg after the April 2009 incident.

The opinion noted that courts in Washington, Florida and Louisiana have also allowed damages for mental suffering caused by a defendant's wrongful acts resulting in a pet's injury or death.

David Plotnik testified about the day Romeo was injured, according to the opinion issued last week. Plotnik said he opened his gate because he heard banging on the fence, and Romeo ran into his neighbor's yard. Plotnik then lost sight of Romeo and assumed the dog had run to the front of his house. When Plotnik returned to his lot, he said, he heard a bark and a squeal and then saw Romeo roll through the gate and hit a tree.

The neighbor, Plotnik said, was holding a baseball bat and told Plotnik to stop his dog from barking. The neighbor, however, contended he felt threatened by Romeo and used the bat merely to guide the dog back home. "We believe good cause exists to allow the recovery of damages for emotional distress under the circumstances of this case," the court said.

On December 13, 2012 the CA Supreme Court DENIED the defendants' petition for review and depublication of a jury trial verdict. The end result is that this case has made new California law! **For the first time in California history, damages are now available to pet owners when they experience emotional distress, injury and harm after perceiving (watching, hearing or otherwise observing) their pet(s) being intentionally harmed by another person.**

See and read more at: <http://jacksonandwilson.com/new-california-law-emotional-distress/#sthash.2oyHxjk9.dpuf>.

Since there are so many cases emerging and being decided every few months, click on <http://www.animallaw.info/cases/topiccases/catopd.htm> for further case law showing which states authorize and deny the recovery of non-economic damages.

Maryland Court Upholds Noneconomic Damages of \$200,000 for Commission of a Constitutional Tort

Based on the court's December, 2014 opinion in *Brooks v. Jenkins* - 220 Md. App. 444, 104 A.3d 899 (Md. Ct. Spec. App., 2014), cited previously under the "economic damages" heading and here, any defendant regardless of whether they are a public officer or private citizen, who **maliciously** injures a pet will be liable to the pet owner for the mental suffering that results.

The law in this Maryland case is unique in that the court held that Deputy Brooks acted with gross negligence as he violated the Jenkins' **constitutional rights**. Having decided that, the court went on to say that a public officer who commits a **constitutional tort** that injures a pet will be liable to the pet's owner for mental suffering related to the injury to the pet. **Neither a public official nor a private citizen who negligently injures a pet will be liable for mental anguish-type injuries.** This is an amazing new twist on how important courts see pets as extensions of families.

Could/Should the Veterinary Profession Ever Support Noneconomic Damage Awards?

When considering all of these damage concepts in a veterinary context, one must differentiate between the awards for economic damages and those for noneconomic damages. With respect to the latter, the veterinary profession must understand the difference between **intentional infliction of emotional distress (IIED)** vs. **negligent infliction of emotional distress (NIED)**. IIED is linked to intentional efforts to harm animals. An example of language that defines this can be found in the Illinois statutes included later in this hand out under the animal cruelty section, where perpetrators must be shown to have induced **extreme physical pain, motivated by an intent to increase or prolong the pain, suffering, or agony of the animal.**

Using this as a model definition for situations in which noneconomic damages might be awarded, especially in IIED cases, it should be relatively easy for veterinarians and other animal care givers to support this concept. Why? Because **very few of them will engage in this type of egregious conduct and, thus, would never be subjected to its coverage of their actions unless they did.** On the other hand, including noneconomic damages under the NIED precedent would have major deleterious effects on veterinarians and all animal caregivers, even though it would bring with it increased accountability.

The application of "caps" on noneconomic damages is a way some states have limited the costs of liability for professional negligence that results in human injuries. This does, though, bring with it many legislative concerns about the appropriate top for the cap. Should it be \$5,000, \$25,000, \$50,000 or \$100,000 per incident? The AVMA has developed its own position paper on this subject which follows in this handout. Dr. Wilson has published his research on statutory caps in DVM Magazine's May 2005 (p. 1), June 2005 (p. 38-43), and July 2005 (p. 48) issues. In Colorado it is unconstitutional for the legislature to place caps on damages.

To date, only Maryland and Nevada have expanded economic damages to allow damage rewards that exceed replacement or market value although, because it limits damages to reasonable, provable dollar amount, this may be a trend that we will see growing in the future.

Why Confusion Reigns!

Virginia State Statute Section 3.2-6585

Dogs And Cats Deemed Personal Property; Rights Relating Thereto

All dogs and cats shall be deemed personal property and may be the subject of larceny and malicious or unlawful trespass. Owners, as defined in § 3.2-6500, may maintain any action for the killing of any such animals, or injury thereto, or unlawful detention or use thereof as in the case of other personal property. The owner of any dog or cat that is injured or killed contrary to the provisions of this chapter by any person shall be **entitled to recover the value thereof or the damage done thereto in an appropriate action at law** from such person. (1984, c. 492, § 29-213.95; 1987, c. 488, § 3.1-796.127; 1988, c. 537; 1998, c. 817; 2008, c. 860.)

<https://law.lis.virginia.gov/vacode/3.2-6585/>

Pros and Cons of Allowing Recovery of Non-economic Damage (as Opposed to Punitive Damages) for Injuries to or Loss of Animals **Approved June 2005**

A summary of this AVMA issue brief can be found at

<https://www.avma.org/Advocacy/StateAndLocal/Pages/non-econo-damages.aspx>.

The American Veterinary Medical Association (AVMA) believes the interests of animals and their owners are best protected by the current legal framework that allows for potential recovery of economic damages in negligence litigation involving animals. Any extension of available remedies beyond economic damages would be inappropriate and ultimately harm animals. The AVMA opposes recovery of non-economic damages.

The AVMA recognizes that American society has evolved from an agrarian one in which the animals most of us owned primarily had economic utility, to an urban one in which most of us derive some emotional value from our animals. The veterinary profession and others who care for animals have long acknowledged the importance of the human-animal bond and emotional attachments between pets and their owners. However, the AVMA believes the unintended consequences of any extension of potentially available damages beyond economic damages outweigh any potential benefits.

The AVMA recognizes and supports the legal concept of animals as property. Animals enjoy various protections and benefits under state and federal laws (e.g., anti-cruelty laws, animal welfare laws, pet trusts, animal control laws, and mandatory vaccination laws) that are not available to other kinds of property.

In the text that follows, the AVMA delineates reasons for not allowing recovery of non-economic damages, as well as the purported benefits of doing so. Comments on purported benefits are also provided.

Recovery of non-economic damages for injuries to or loss of animals should not be allowed because:

- *Increased costs associated with recovery will reduce owners' interest in seeking animal-related services* — Expansion of available remedies in litigation involving animals beyond economic damages will increase costs for delivery of veterinary care. These increased costs will be passed on to the consumer. Cost increases, however, will not be limited to those associated with veterinary care. Consumer costs for any animal-related service or product will increase, including those for boarding, grooming, training, medication, food and transportation. Increased costs are likely to reduce interest in seeking animal-related services and products, harming animals in the process.

- *An increase in available damages will drive an increase in claims and litigation and create associated additional costs for defense, settlement, and administration*—these costs will be passed on to the public. The experience of the human medical community indicates that non-economic damage awards drive increases in litigation, verdicts and premiums.
- *The value of human-animal relationships will be placed above that of most human-human relationships*—Allowing recovery of non-economic damages in litigation involving animals will place the value of human-animal relationships above that of most human-human relationships. Recovery would be allowed for injury to or loss of an animal, whereas recovery would be denied for injury to or loss of a grandparent, cousin or best friend. Indeed, awards are often difficult to obtain for injury to one’s spouse or child.
- *Non-economic damages are not available for property*—Animals are property. Non-economic damages are not available for the loss of property. Expanding the law to allow recovery of non-economic damages for animals would erode their current classification as property and could lead to many unintended consequences.
- *Administrative obstacles are created*—If non-economic damages were available for injury to or loss of animals, administration and oversight of claims would be difficult and burdensome. Evaluation of such claims and qualifying and quantifying potential exposure would be extremely difficult and would have to be done on a costly case-by-case basis. In rejecting non-economic damages in the context of animals, the courts have noted, among other things, difficulties in authenticating the degree of the emotional bond between animals and owners and in determining the number and identities of the owner(s).
- *Experience in human medicine with large non-economic damage awards has discouraged the practice of medicine*—The consequences of large non-economic damage awards and increased litigation have been dramatic for the human medical profession. In some geographic areas physicians have simply quit practicing, making it difficult for patients in those areas to obtain needed care. Across the country, other physicians have chosen to leave practice due to the expense and/or disruption in their practices caused by litigation. This has occurred despite attempts to build protections into the law (e.g., statutes of limitations, expert affidavits, and damage caps); these protections are not typically available to veterinarians. The AVMA believes the veterinary profession will be faced with similar issues should recovery of non-economic damages be allowed for animals.
- *Adverse impacts on society*—Awarding non-economic damages will impact the public as well as animal care providers. For example, an individual who hits a dog with their car may be liable for large non-economic damages. Society will bear the burden of increased costs resulting from recognition of additional remedies. Included are higher insurance costs (e.g., automobile, homeowners’, general liability) and higher operating costs for animal control agencies and animal shelters.

Proponents support allowing recovery of non-economic damages for injuries to or loss of animals because they believe such awards will:

- *Improve care for animals by deterring provision of substandard care*—The AVMA does not believe allowing non-economic damage awards will improve the quality of animal care. Evidence from peer-review of human medical practice demonstrates the absence of a correlation between legal liability and substandard care. In other words, physicians whose peers believed they were practicing appropriately were often found liable to a plaintiff for damages in litigation, whereas physicians believed by their peers to be practicing below the standard of care were often not sued. This leads us to question the premise that liability awards have a deterrent effect.

- *Bring damage awards in line with the value society has placed on relationships between people and their pets* —The AVMA believes the interests of animals and their owners are best protected by the current legal framework that allows for potential recovery of economic damages in negligence litigation involving animals. Allowing recovery of non-economic damages by some animal owners would perversely have the ultimate effect of harming animals in the process of enriching some people’s pocketbooks.

AVMA Position Regarding Damages in Litigation Involving Animals (2015)

<https://www.avma.org/KB/Policies/Pages/Recovery-of-Monetary-Damages-in-Litigation-Involving-Animals.aspx>

The American Veterinary Medical Association recognizes and supports the long-standing legal classification of animals as the property of their owners. The AVMA recognizes that, in some lawsuits, economic compensation may exceed an animal's fair market value, which is the traditional measure of damages for property, in order for the owner to be made economically whole

In determining the economic loss associated with an animal, courts should consider, when appropriate, the purchase price, age and health of the animal, breeding status, pedigree, special training, and any particular economic utility the animal has provided to the owner. It may also be appropriate to award reasonable and necessary veterinary expenses for the care of the animal's injury or sickness that was caused by the defendant during the incident in question.

Any extension of compensatory remedies beyond these economic damages would be inappropriate and ultimately harm animals by reducing the availability of affordable veterinary care services. Therefore, the AVMA opposes any recovery of non-economic damages.

The AVMA acknowledges the awarding of punitive damages when warranted in accordance with a state's punitive damage law.

Newest Bombshell Information About Animals and Pain

Although unrelated to economic and noneconomic damages, the world of science continues to change the view humans have of animals, their brains, their emotions and their ability to feel pain. This article furthers the argument that they are sentient beings and, in the years ahead, we are likely to continue to see the evolution of animal law and its impact on the rights and welfare of the animal kingdom.

Washington Post Article, May 24, 2018

Tim Carmen

https://www.washingtonpost.com/news/food/wp/2018/05/24/scientists-say-fish-feel-pain-it-could-lead-to-major-changes-in-the-fishing-industry/?noredirect=on&utm_term=.c95b17e80dc5

The idea that fish suffer runs counter to almost everything Americans have been taught about creatures of the sea. That their brains are not complex enough to experience pain. That their behaviors when stressed — such as wriggling violently on a hook — are just unconscious reactions, disconnected from the suffering of sentient beings. That they’re, more or less, unfeeling little meat sticks that don’t deserve animal welfare protections.

Greg Abrams, a longtime commercial fisherman in Florida, perhaps best sums up the classic American attitude about fish and their potential to suffer: “God put these animals on the earth for us to survive on,” he says. “Whoever’s coming out with ‘fish are tortured’ or ‘fish feel pain,’ they’re not playing with a full deck. I don’t want to be rude.”

Yet, in recent years, scientists, researchers and biologists — all presumably with their decks intact — have been pushing back on our old ideas about fish pain. One professor has argued that the brains of certain ray-finned fishes are “sufficiently complex to support sentience.” Other academics wrote — in a paper confronting fish-pain skeptics, no less — that fish and other aquatic species “meet [the] criteria for sentience, including the ability to experience positive and negative emotions.”

Switzerland Makes It Illegal to Boil a Lobster

Helena Bachmann, USA TODAY, Feb. 16, 2018

Switzerland's unique animal welfare laws are miles ahead of the rest of the world

GENEVA — When it comes to cooking fresh lobster, the Swiss are now saying: We feel your pain. A law takes effect March 1 that bans the common cooking method of tossing a live lobster into a pot of boiling water, quickly killing the tasty crustacean. That practice is being outlawed because the Swiss say it's cruel and lobsters can sense pain.

The first such national legislation of its kind in the world calls for a more humane death for lobsters: “rendering them unconscious” before plunging them into scalding water. Two methods are recommended: electrocution or sedating the lobster by dipping it into saltwater and then thrusting a knife into its brain.

The same law also gives domestic pets further protections, such as dogs can no longer be punished for barking.

The measure is part of the broad principle of “animal dignity” enshrined in Switzerland’s Constitution, the only country with such a provision. The Constitution already protects how various species must be treated and specifies that animals need socialization.

For the full article visit <https://www.usatoday.com/story/news/world/2018/02/16/new-swiss-law-pain-free-deaths-lobsters-flushing-goldfish-down-toilet-breaking-law-according-new-swi/341412002/>