How the Law Values Our Animal Companions

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In the March edition of *The Advocate,* Amy Lombardo authored *Idaho Law Regarding the Measure of Damages for Animals Need Not Be Revisited*,[1] a response to my article *The Animal World Takes a Special Place in Society and Our Courtrooms*.[2] I seek to evaluate and rebut Ms. Lombardo's contentions so each reader may draw conclusions based on a complete recitation of common and statutory law in Idaho.

The question of value of an animal companion remains one of first impression in Idaho.

<u>Contention</u>: "Accordingly, the current measure of damages for an animal in a lawsuit is the replacement value of the animal. In Idaho, this has been established statutorily and by case law."

To support this contention, Ms. Lombardo quotes I.C. § 25-2807. However, that Section does not specify "replacement value." Rather, it commands application of the "usual rules of evidence relating to values of personal property" to establish value of an animal in any civil or criminal proceeding.[3] The Section cites no specific rule of evidence to limit moving parties to replacement value because no such evidentiary rule exists. If anything, Section 25-2807 endorses the view that authentic, relevant, nonhearsay or hearsay-excepted evidence may be considered to determine an animal's value.

In *Hurtado v. Land O'Lakes, Inc.*, the Idaho Supreme Court confirms that the destruction of personalty yields a measure of damages that "is the value of the property at the time and place of its destruction."[4] Furthermore, "the owner of property" is "qualified to testify to its value."[5]

Ms. Lombardo then cites *Gill v. Brown*,[6] a nearly 30 year-old decision not decided by Idaho's highest court and whose discussion of property valuation is complete *dictum*. In *Gill*, the Court of Appeals explains, "[t]he **<u>sole issue</u>** is whether the Gills' complaint alleges facts that, if proven, would permit them to recover damages for mental anguish."[7] Indeed, there is no evidence that the Gills even assigned error to the issue of whether the value of an animal is market, replacement, or other. They focused exclusively on the *sua sponte* pretrial ruling denying them recovery of any general damages. Accordingly, the question of value of an animal companion remains one of first impression in Idaho.

With no disrespect to the donkey, the animal at issue in *Gill* is not a species typically falling in league with the class of animal companions who sleep at the foot of the bed or lay in one's lap. *Gill* did not touch upon how to value domesticated animals who become members of the family. *Gill* also did not consider the *per se* intrinsic value doctrine for personal effects and household goods. *Gill* is ripe for judicial revisiting and analytical distinction to keep pace with social mores of Idahoans.

But one need not convince the highest court to invoke intrinsic value in the right circumstance. Three decades before *Gill*, the Idaho Supreme Court decided *State ex rel. Rich v. Dunclick, Inc.*,[8] upholding a jury instruction that permitted the jury to consider "special value" of land taken by eminent domain, to ascertain damages. "If the land possessed a special value to the owner which can be measured in money, such owner has a right to have that value considered in the estimation and determination of the damages sustained. The value of the land taken should be estimated with respect to the use to which it is peculiarly adapted and the purpose theretofore made of it by appellant in the operation of its plant."[9]

The Supreme Court of Idaho also acknowledged the *per se* intrinsic value rule, where a plaintiff may recover the intrinsic value of certain types of property as a matter of law, without even needing to allege or prove lack of market value.[10] Typically, this rule of compensation applies to household goods, kept for personal use and not sale, as well as wearing apparel. In *Condie v. Swainston*, the Idaho Supreme Court cited to the Washington Supreme Court case of *Kimball v. Betts*,[11] which applied the rule to such items at a forced sale under void process, and the Oregon Supreme Court case of *Barber v. Motor Inv. Co.*,[12] which applied the rule to such converted items, in support of a holding that reversed the lower court for limiting the claimant to the market value for pieces of galvanized syphon.

Turning our eyes south to New Mexico yields a nearly 80-year-old decision applying the *per se* intrinsic

value rule to a dog. In *Wilcox v. Butt's Drug Stores, Inc.*,[13] the New Mexico Supreme Court upheld the trial judge's award of $150 for the value of "Big Boy," a King Charles Spaniel who died from strychnine poisoning in a pharmacist malpractice case. The defendant argued that the judgment should be limited to $10, the alleged "market" or "pecuniary" value of Big Boy. The Court disagreed with the conclusion that "damages for the wrongful destruction of a dog must be limited to market value or pecuniary value."[14]

Let us revisit *Restatement of Torts* § 911 (1939) to identify the class of items for which there is only an intrinsic value. Comment *e* to Section 911 ties together the dog, the family portrait, and second-hand clothing and furniture (as addressed by *Kimball* and *Barber*):

> *e. Peculiar value to the owner.* The phrase "value to the owner" denotes the existence of factors apart from those entering into exchange value which cause the subject matter to be more desirable to the owner than to others.
>
> Some things may have no exchange value but may be valuable to the owner; other things may have a comparatively small exchange value but have a special and greater value to the owner. The absence or inadequacy of the exchange value may result from the fact that others could not or would not use the things for any purpose, or would employ them only in a less useful manner. Thus a personal record or manuscript, an artificial eye or a **dog trained only to obey one master**, will have substantially no value to others than the owner. **The same is true of articles which give enjoyment to the user but have no substantial value to others, such as family portraits**. **Second-hand clothing and furniture** have an exchange value, but frequently the value is far less than its use value to the owner. In such cases it would be unjust to limit the damages for destroying or harming the articles to the exchange value.[15]

The phrase "value to the owner" denotes the existence of factors apart from those entering into exchange value which cause the subject matter to be more desirable to the owner than to others.

Contention: "The replacement cost of the animal may include costs related to the purchase of a new animal of the same breed – including immunization, neutering, and comparable training, as well as lost profits of the owner proximately caused by the injury. It may also include evidence of pedigree, breeding, and whether its offspring would be valuable, as well as other reasonable and necessary expenses. Thus, Idaho law provides for recovery of economic losses for the value of an animal."

Take Orbit, our 26-year-old, neutered male, orange tabby whom my wife adopted from a shelter at the age of two for probably less than $50 in 1989. By Ms. Lombardo's calculation, one would be lucky to get more than a few bucks for Orbit. But this presumes that animals can be replaced. Ask any shelter or humane society and they will tell you that not only have they never had such a cat surrendered by owner or found as a stray, but if such a cat were to exist, they would likely find none to adopt him at that age - in part due to the need to treat Orbit with bidaily subcutaneous fluid therapy, oral doses of liquid and pill medication, and transdermal methimazole application to treat his hyperthyroid condition. Specifically, no replacement could ever be found who matches the phenotypic and genotypic characteristics of Orbit, not to mention his personality and the extent to which he enlivened the household, provided stability (my wife described him as her "rock"), and delighted us with his gentle and loving manner, all which made him so precious.

On the other hand, let us take Ms. Lombardo's argument to the logical conclusion, backed by the rules of evidence, IRE 702. A true "replacement" in the genetic sense only (recall the nature vs. nurture debate) would require that the tortfeasor produce a clone. Such evidentiary tack does not suffer forays into a plaintiff's emotional distress, excessive sentimentality, or human-animal bond. Therefore, let Ms. Lombardo's replacement value guide Idaho courts, at six figures per non-human decedent, the price to clone at Sooam Biotech Research Foundation in Seoul, Korea.

Contention: "The overwhelming majority of states have found that an animal owner cannot recover for emotional distress for harm to one's pet, or for loss of companionship."

While this statement accurately reflects the national trend with respect to negligently-inflicted harm to animals, it is egregiously false with respect to other culpable mental states. Consider applicable case law from Alaska, Arizona, California, Delaware, Indiana, Iowa, Kentucky, and Washington.[16] And of course we cannot forget the Idaho Court of Appeals case mentioned above, *Gill v. Brown*.[17]

Last year, the Idaho Supreme Court reaffirmed the cognizability of negligent infliction of emotional distress and the symptomatology requirement.[18]

Contention: "However, *Gill* only outlines that negligent infliction of emotional distress may be a viable cause of action for loss or injury provided an owner can show objective physical evidence of distress… The *Gill* case established only that if a plaintiff meets the stringent criteria for intentional infliction of emotional distress – requiring extreme and outrageous conduct – would an animal owner be awarded damages for emotional suffering."

Ms. Lombardo ignores the plain language of the opinion of *Gill*, which permits the claim of negligent infliction of emotional distress and only upheld dismissal of the negligent infliction of emotional distress claim because the Gills could not show physical injury, not because they suffered distress over the death of a donkey. And last year, the Idaho Supreme Court reaffirmed the cognizability of negligent infliction of emotional distress and the symptomatology requirement.[18] Accordingly, provided a plaintiff can furnish evidence of physical manifestation arising from the negligent injury or death to an animal, negligent infliction of emotional distress remains cognizable. And most plaintiffs predictably and understandably suffer several of the enumerated ailments upon death of an animal.

Contention: "Idaho courts would be wise to decline to revisit the debate regarding the value of damages for a domestic animal, and to follow the reasoning of courts all over the country which have found that 'the claim for emotional distress arising out of the malicious destruction of a pet should not be confused with a claim for the sentimental value of a pet, the latter claim being unrecognized in most jurisdictions.'"

As noted above, the debate never took place in Idaho. Furthermore, devaluation proponents like Ms. Lombardo assume that the word "sentimental" sweeps far more broadly than as actually defined. Consider the Washington Supreme Court's reasoning in *Mieske v. Bartell Drug Co*.,[19] in which the Mieskes brought developed movie film to Bartell Drug for splicing onto larger rolls. Dozens of canisters filled with irreplaceable memories were subsequently lost or destroyed due to the negligence of the defendant, who deemed rolls of raw negative sufficient compensation. Plaintiffs argued that the memories, while contained on the film, had no market value, and could not be replaced or restored. They added, however, that the memories were so unique that some other measure of damages must exist to ensure full compensation. The Washington Supreme Court agreed, affirming the jury's award of $7,500[20] as the actual value of the film to the plaintiff. Wrestling with the question of establishing the "value to the owner" under the intrinsic value measure of damages, the Court addressed the recoverability of "sentimental value." In upholding the trial court's jury instruction, it noted that:

> In essence it allowed for recovery for the actual or intrinsic value to the plaintiffs but denied recovery for any **unusual** sentimental value of the film to the plaintiffs or a fanciful price which plaintiffs, for their own special reasons, might place thereon.[21]

By distinguishing "usual" sentimental value from "unusual" sentimental value, however, the Court expressly permitted some element of sentimental value. *Mieske* emphasized that the measure of damages is determined by the "value to the owner," which is intrinsic value.[22] Further, the *Mieske* court was careful to narrowly interpret the phrase "sentimental value" so as not to exclude usual and customary sentiment:

> What is sentimental value? The broad dictionary definition is that sentimental refers to being "governed by feeling, sensibility, or emotional idealism ..." **Obviously that is not the exclusion contemplated by the statement that sentimental value is not to be compensated.** If it were, no one would recover for the wrongful death

> of a spouse or a child. Rather, the type of sentiment which is not compensable is that which relates to "indulging in feeling to an unwarranted extent" or being "affectedly or mawkishly emotional ... ."[23]

Contention: "Therefore, it is an incorrect assumption from the animal law article that a higher valuation under the law would benefit animals and their owners. If damages increase, so too does the cost of litigating. Ultimately, the cost of veterinary services would likely increase, and owning a fully-insured and fully cared-for pet may become cost-prohibitive."

This refrain occurs with alarming frequency despite a complete lack of empirical evidence. And Ms. Lombardo's citation to Schwartz et al., *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*,[24] does nothing to change this, for nowhere in the entire article do the authors cite to one study that proves the probability (or even the very real possibility) that the sky will actually fall in the form of a mass exodus of veterinarians from the field or skyrocketing costs of care. Instead, Schwartz (like Ms. Lombardo) just recycles the fits of unsupported doomsaying by lawyers and veterinarians who substitute their own opinions for actual evidence.

Erudite sources have acknowledged the two basic functions of the law of torts – to deter future conduct through a finding of liability and to compensate the injured person for damages sustained.[25] Yet some veterinarians disingenuously rely on the human-animal bond for their livelihoods but contend that their malpractice should be economically fixed at fair market value. To restore equilibrium to this doctrinally unfair alignment, and to use the civil justice system to provide both compensation and deterrence, requires discipline.

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Private litigation is a poor and highly costly substitute for discipline. Financial recovery will both entice lawyers to proceed on contingency and incur tens of thousands of dollars in expert fees and litigation costs, as well as effectively deter misconduct by the class of defendants who might have to pay such judgments.

Permitting veterinarians to prey upon intrinsic valuation in the operating room (charging many times over the cost to adopt or purchase the patient) but insisting upon market value in the courtroom, and a depreciated one at that, is inimical to the public interest to protect humans and animals from unprofessional health care providers when those charged with so doing shirk their statutory mandates.

Fiat justicia ruat coelum,[26]

Endnotes

1. The Advocate, March/April, 2013, p.51.
2. The Advocate, Aug. 2012, p.68.
3. Idaho Code Section 25-2807.
4. 153 Idaho 13, 21, 278 P.3d 415, 423 (2012).
5. *Id.*
6. 107 Idaho 1137, 1138 (Ct. App.1985).
7. *Id.* (emphasis added).
8. 77 Idaho 45, 54 (1955).
9. *Id.*
10. *Condie v. Swainston,* 62 Idaho 472, 112 P.2d 787 (1940).
11. 99 Wash. 348 (1918).
12. 136 Or. 361 (1931).
13. 38 N.M. 502, 35 P.2d 978 (1934).
14. *Id.* at 979.
15. *Restatement of Torts* § 911, cmt. *e* (emphasis added).
16. *See* Alaska: *Mitchell v. Heinrichs*, 27 P.3d 309, 311-12 (Ak. 2001); Arizona: *Kaufman v. Langhofer*, 223 Ariz. 249, 254 and 256 fn.13 (2009); California: *Plotnik v. Meihaus*, 146 Cal. Rptr.3d 585, 598-99 (Cal. App. 4, 2012); Delaware: *Naples v. Miller,* 2009 WL 1163504 (Del. Super. 2009), at *3 and fn.9; Indiana: *Lachenman v. Stice,* 838 N.E.2d 451 (Ind. App. 2005); Iowa: *Nichols v. Sukaro Kennels,* 555 N.W.2d 689 (Iowa 1996); Kentucky: *Ammon v. Welty,* 113 S.W.3d 185, 188 (Ky. App. 2002); Washington: *Sherman v. Kissinger,* 146 Wash.App. 855, 873 fn.8 (2008) allows recovery of emotional distress damages for intentional torts to animals and remarks it is consistent with the modern rule; *Womack v. von Rardon,* 133 Wash.App. 254 (2006) creates cause of action for malicious injury to a pet.
17. 107 Idaho 1137 (1985).
18. *Carrillo v. Boise Tire Co., Inc.,* 152 Idaho 741, 750 (2012).
19. 92 Wn.2d 40 (1979).
20. In 2013 dollars, this figure approaches $27,000.
21. *Mieske,* 92 Wn.2d at 45 (emphasis added).
22. *Id.* at 44-45 (citing *Rest. of Torts* § 911 (1939)).
23. *Id.* (emphasis added, citations omitted).
24. 33 Pepp. L. Rev. 227 (2006).
25. See *Restatement* (2nd) *Torts* § 901 (1979), Learned Hand, 3 A.B.C.N.Y. Lectures on Legal Topics 87 (1926).
26. I write this rebuttal in the memory of Orbit, who died at our home on Mar. 2, 2013. His veterinarian for most of his life came out in the middle of the night to perform the euthanasia. With deep gratitude for his devotion and expertise and intuitive grasp of the topics conveyed herein, I write this rebuttal in his honor, as well.