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The Changing Concept of Animals as Property

Vincent P. McCarthy

Introduction

In a suit brought by a slaveowner against his neighbor in 1827 for the killing of his slave, the court found that the bad character of the slave (caught while stealing potatoes from the defendant's property) should be taken into account by the jury in assessing damages for the wrongful destruction of the slaveowner's property (1). However, the court warned:

But where property is in question, the value of the article, as nearly as it can be ascertained, furnishes a rule from which they [the jury] are not at liberty to depart (2).

Almost 100 years later, another litigant brought suit in Connecticut to recover compensation for the wrongful destruction (3) of his personal property, which was shot while similarly trespassing on a neighbor's property. This time the plaintiff's personal property was his dog. In reaching its conclusion that the plaintiff was entitled to recover for the loss of his dog, the court reaffirmed the well-established common law property status of animals:

It [the statute] attaches to the right of property, including a recovery of damages under circumstances where such a recovery would be allowed for other kinds of personal property (4).

That slaves were viewed as nothing more than the personal property of their owners had never been seriously questioned. One of the earliest treatises on British law makes note of this status, and it adds an interesting comment on animal rights. In distinguishing serfs, who did have recognized legal rights, from slaves, Maitland notes:

In relation to his lord the general rule makes him rightless...the state is concerned to see (only) that no one shall make an ill use of his property. Our modern statutes which prohibit cruelty do not give rights to dogs and horses...(5).

The most well-known legal statement on the personal property status of American black slaves makes it clear that this view was never seriously questioned.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit...This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion (6).

Enforced and maintained by a legal superstructure that regulated every aspect of a black's social, political, economic, and religious life, his property status continued until the middle of the nineteenth century when Congress passed the 13th, 14th, and 15th Amendments to the Constitution, which overturned the

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Dred Scott decision and recognized that a black human being had legally protectible rights.

There are some signs in recent legal decisions that a similar evolution in the status of animals is taking place: judges are beginning to draw distinctions between animals and property.

But can we ever expect that the courts will grant full liberation to animals from their status as property? Blacks, although universally considered inferior to whites, were always considered to be members of the same species as whites. Does this taxonomic distinction between animals and man doom efforts to enhance their legal status? Although most states still view animals as the personal property of their owners (7), recent cases have begun to question this doctrine by rejecting its jurisprudential basis in the context of mounting scientific, sociological, and philosophical evidence to the contrary. More important, these decisions have in common a profound sense of disbelief in the present status of animals as property, based on an experience of animals that does not fit with their status as objects no more valuable than furniture or a television. It is at this most basic level of law as a formalized reflection of experience that the legal rights of animals have begun to grow and take shape.

Sentimental Value

In 1975, a suit (*Stettner vs. Graubard*) was brought in a New York lower court to recover the \$220 cost of veterinary services required for injuries to a dog (8). In opposition to this claim, the defendant argued:

1. That damages cannot exceed the market value of dog regardless of how high the veterinary bills run; and
2. That a dog's market value is its purchase price minus depreciation.

In short, the measure of damages for the death or injury to a dog was asserted to be the same as might be applied in the case of an automobile or any other item of personal property (9).

After noting that the purchase price is only one factor to be considered in ascertaining the market value of a dog, the court listed "other relevant factors" including the dog's age, health, usefulness, and any special traits or characteristics of value. But the court also held that

Sentiment, however, may not be considered since that often is as much a measure of the owner's heart as it is of the dog's worth (10).

Although the actual purchase price of the dog had been \$125 to \$150, the court found that the dog had a market value of \$200. The rejection of sentimental value as a measure of recovery is consistent with the majority view, although many courts have sharply limited their definition of sentimental value in other personal property cases (11). The problem in the issue of sentiment is really an evidentiary one (12); sentimental value can be approached more practically when considered under the rubric of theories such as companionship, loss of use, or mental anguish.

Much of what was lost in *Stettner* has been regained in two more recent New York lower-court decisions. On July 10, 1980 the *New York Law Journal* published a small-claims opinion that expanded the measure of recovery for the death of an animal to include a pecuniary award for loss of companionship (13). The plaintiff, Mrs. Brousseau, delivered her healthy 8-year-old dog for boarding at Dr. Rosenthal's kennel. When she returned to the kennel she learned that her dog had died. In her suit, which charged negligence, the court awarded her \$550, plus costs for her loss.

Despite the fact that the compensable loss was suffered by the owner and

not by the dog, *Brousseau* significantly enhances the basic concept of an animal's value. As another New York lower court stated recently:

This court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.

In ruling that a pet such as a dog is not just a thing I believe the plaintiff is entitled to damages beyond the market value of the dog. A pet is not an inanimate thing that just receives affection; it also returns it (14).

Animals, or at least those animals that we call pets, are to be viewed in legal contexts as more than property, not just because of their special value to their owners but more importantly because, intrinsically, they are considered as being more valuable than mere property. Other kinds of personal property may be important and valuable to their owners, but animals respond—they are alive.

An heirloom while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection; it has no brain capable of displaying emotion which in turn causes a human response. Losing the right to memorialize a pet rock, or a pet tree or losing a family picture album is not actionable. But a dog; that is something else... (15).

Punitive Damages

Punitive damages are awarded to a party who has established that his loss was caused by a willful or malicious act or an act of reckless indifference to the rights of others (16). Such damages are normally recoverable for the willful or wanton killing of an animal (17), and it is

not essential to gaining a recovery for punitive damages that the owner of the animal establish any special value for it. It is the nature of the act that provides the grounds for awarding the measure of relief, although the compensatory or punitive nature of the relief may differ among jurisdictions (18).

Recently, larger awards for punitive damages reflect an increased awareness of the value of animals. In one case the court affirmed a jury verdict for punitive damages against a policeman who maliciously killed the plaintiff's cat (19). In another decision (*La Porte vs. Assoc. Independents, Inc.*), the Supreme Court of Florida affirmed a punitive award of \$1,000 for the malicious killing of a pet dog by a garbage collector (20).

Mental and Emotional Distress

In the *La Porte* decision referred to above, the court was called upon to decide whether damages for mental and emotional distress should be permitted in a suit for the killing of an animal. The plaintiff saw a garbage collector kill her dog by hurling an empty garbage can at him, and a physician testified that a pre-existing nervous condition of the plaintiff was exacerbated by the incident. After noting, with deference to tradition, that it was improper to allow recovery for the sentimental value of the dog, the court concluded:

The restriction of the loss of a pet to its intrinsic value in circumstances such as the one before us is a principle we cannot accept. Without indulging in a discussion of the affinity between "sentimental value" and "mental suffering," we feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal be-

cause of its special training such as a Seeing Eye dog or sheep dog (21).

Similarly in Texas, a court recently upheld an award of \$200 for mental pain and suffering when an owner's dog was wrongfully shot by a policeman on the property of the owner (22). The dog had been raised by the owner since he had been purchased at the age of 11 days.

These two cases represent a significant departure from the traditional forms of recovery for "property" loss. An individual is not permitted damages for mental and emotional distress for the destruction of her car or her furniture. Property, by its very nature, is assumed not to evoke this kind of emotional response. It does not have life and therefore cannot respond, and cannot provide friendship or companionship. The focus of the harm in all of these cases is admittedly some human who has suffered a loss, but it is the changing way in which we view animals that has altered the definition of that loss. So the courts are being forced to address the legal status of animals as a prerequisite to granting relief to human claimants.

Guardianship

But what about the question of harm to animals themselves? Can an animal gain recovery for injury sustained through a wrongful act? What about the practical problems involved in bringing a suit and distributing recovery? Not members of our species, animals would need a representative through which their claims could be presented. Such an approach was suggested by Justice Douglas of the United States Supreme Court when he urged that standing be granted to governmental or public interest groups to litigate on behalf of

The pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams (24).

A similar "guardianship" model al-

ready permits suits to be brought on behalf of ships and corporations (25). The interests of fetuses are considered in granting the right to abortion (26), and the right of parents to sue for prenatal injuries (27). Are fetuses or corporations more deserving of legal recognition and protection than animals? On what grounds? That the fetus may suffer? That the corporation may be deprived of some economic interest without due process? Do we explain the differences in protection by noting the *human* ownership of corporations and the fetus's potential for *human* life?

To do so would be to beg the question of the bases on which we assign the ownership of such rights. Why do we limit legal interests to humans or human creations? Henry Salt, Peter Singer, and others have argued persuasively that the biological, behavioral, and cognitive differences between the human and other animal species are hollow justifications for the continued failure to recognize the interests of animals.

Conclusion

Although the cases discussed above mark a significant departure from the traditional common law approach toward animals, the focus of harm and protectible interest remains with the human who is asserting ownership of the animal. It is the owner who is considered to have suffered some loss through the invasion of a *legally* cognizable interest, and it is the owner who receives compensation for his or her loss. In order to fully liberate animals from their status as personal property, courts must begin to look for interests which are inherent to the animals themselves that have been invaded, and then fashion some legal protection for those interests.

However, I am confident that courts will continue to expand the domain of animal rights through the "owners' rights

bootstrap" approach. As the owners of animals assert more aggressively their rights to the friendship, companionship, and assistance of animals, courts and legislatures will become more sensitive to the importance and value of animals. And, while this article has focused principally on companion animals, with a few exceptions it can be argued that changes in the rights of companion animals will effect corresponding changes for all animals.

When this process has reached the point at which the interdependence of human and animal becomes clear, the law will begin to focus on the specific interests of animals themselves, considered separately from their value as subordinates. An animal will then be seen as an autonomous being, with interests that are worthy of consideration equal to those of human beings; these will not be the same interests, but rather, different ones that are similarly deserving.

This change will take place as a consequence of efforts to enlarge the sphere of human interests assigned to the owners of animals and to thereby increase the pecuniary rewards for the successful assertion of these interests. In order to address this issue, the law will have to focus on precisely what the human has lost. A thorough investigation and evaluation of this loss will result in better understanding of the sentient, cognitive, and biological relationships between human and animal (28). Inevitably, some owner or animal group will eventually introduce a breakthrough case, on behalf of an animal, in which a court will award damages for the loss to the animal himself. These damages will be awarded as compensation for losses relative to interests that will have become legally recognized as established interests of animals, according to the precedents set by the "bootstrap" analysis (29). Some of these interests are already in the process of being defined; for ex-

ample, the rights to life and humane treatment, which were established in the cases described above. Other interests will probably be defined soon—these include adequate food and shelter and some standard for freedom of movement.

Ironically, this process in the legal sphere will find its culmination when human and animal recognize what has always been true: that they are mutually dependent on each other for survival, meaning, and happiness, on an unknown, and mysterious planet.

References

1. *Richardson vs. Dukes*, 7 S.C.L. (4 McCord) 156 (So. Ca. 1827).
2. *Id.* at 157.
3. Pollock & Maitland, *The History of English Law* 599 (2nd ed. 1898).
4. *Scott vs. Sanford*, 60 U.S. (19 How.) 393, 407 (1857).
5. Note that personal property is destroyed and not killed. Killing implies the status of life, which is at odds with the status of personal property as an object and possession.
6. *Sonny vs. Wysocki*, 139 Conn. 622, 96 A.2d 225, 228 (1953).
7. See also, Conn. G.S. §22-350, (Dogs as personal property); Cal. Rev. Code §491 (Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property); *Sentell vs. New Orleans Railroad Co.*, 166 U.S. 698 (1897).
8. *Stettner vs. Graubard*, 82 Misc.2d 132, 368 N.Y.S.2d 683 (Harrison Town Ct., Westchester Co. 1975).
9. *Id.* at 132.
10. *Id.*
11. *Mieske vs. Bartell Drug Co.*, 92 Wash.2d 40, 593 P.2d.1308 (1979) The Washington Supreme Court decided to allow recovery for the intrinsic value of 32 50-ft reels of developed film that were lost or destroyed by a processor, the court based its hold-

- ing on the fact that the owner would be unable to replace the lost film on the market. In *Wertman vs. Tippling*, 166 So2d. (Fla. Dist. Ct. App. 1964), the court permitted a \$1,000 recovery for the peculiar value of a dog to his owner. The court distinguished recovery here from recovery for sentimental value, which the court defined as being "affectedly or mawkishly emotional."
12. On the distinction between proof of damage and difficulty in proving the extent of damage, See, *Brousseau vs. Rosenthal*, N.Y.L.J. 11 (July 10, 1980).
 13. *Id.*
 14. *Corso vs. Crawford Dog & Cat Hospital, Inc.*, 97 Misc. 2d 530 (1979).
 15. *Id.*
 16. *Collens vs. New Canaan Water Co.*, 155 Conn. 477, 234 A.2d 825.
 17. 1 ALR 3d. 1022 (Dogs); 4 Am. Jur. 2d. *Animals* §147; 3 C.J.S. *Animals* §234.
 18. For Connecticut's "compensatory" rule, See, *Lomas and Nettleton Co. vs. Wterbury*, 122 Conn. 228, 188 A. 433 (1936).
 19. *Wilson vs. Eagan*, 297 N.W.2d 146 (Minn. 1980).
 20. *LaPorte vs. Assoc. Independents, Inc.*, 163 So.2d 267 (Fla. 1964).
 21. *Id.* at 269. See also, *Banasczek vs. Kowalski*, 10 D.&C.3d 94 (Luzerne Co. 1979).
 22. *City of Garland vs. White*, 368 S.W.2d 12 (Tex. Civ. App. Eastland 1963).
 23. The cases still refer to an animal with an objective pronoun, while most pet owners I know refer to the gender and names of their pets. One rarely names his or her chair, rug, painting or television set.
 24. *Sierra Club vs. Morton*, 405 U.S. 727, (1971) (dissenting opinion).
 25. Tischler, *Rights for Non-Human Animals: A Guardianship Model for Dogs and Cats*, 14 *San Diego L. Rev.* 484 (1977). See also, Burr, *Toward Legal Rights for Animals, Environmental Affairs* 205.
 26. *Roe vs. Wade*, 410 U.S. 113 (1973).
 27. *Presley vs. Newport Hospital*, 365 A.2d 748 (Rhode Island 1976).
 28. Salt, *Animal Rights* (1980).
 29. An analysis of the relationship between animals and the elderly has already led to some important legal developments. Other statutes and cases based on these statutes deal more directly with animal loss but are not the subject of this paper, such as state anti-cruelty statutes and humane slaughter laws, as well as the federal Animal Welfare Act, 15 U.S.C. §2131, et seq.