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## COMMENTARY

### Barking Up the Wrong Tree

By Phil Goldberg and Nancy Halpern

**M**ore than 50 years after Patti Page had us singing “How much is that doggie in the window,” a battle has broken out to find out how much a doggie, or other pet, is worth in the courtroom.

The cases, where pets are injured or killed, pull at our heartstrings, with owners asking for pain and suffering, emotional distress and other types of noneconomic damages. In July, the New Jersey Supreme Court weighed in, and fortunately for the welfare of animals, it came up with the right answer: owners can be made economically whole for the loss of their pets, but they cannot seek unlimited, emotion-based damages.

The case, *McDougall v. Lamm*, was brought by Joyce McDougall, who was walking her nine-year-old maltipoo when it was attacked by a neighbor’s dog and died. In New Jersey, as in most states, courts tightly control the circumstances when people, such as McDougall, can be compensated for emotional harm when not injured them-

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selves, namely only when witnessing the brutal death of a spouse or child.

New Jersey courts have denied recoveries for witnessing deaths of other close personal relations, including a neighbor’s boy who a couple treated “as a son.” Here, McDougall asked the court to expand the law so she could recover for the emotional distress of watching the death of her dog.

This is not a novel case. Pet owners have increasingly brought claims for emotion-based damages under many legal theories, for a variety of pets, and in wide-ranging circumstances. In recent years, the Vermont Supreme Court and appellate courts in Washington, North Carolina and California have heard such claims associated with allegations of veterinary malpractice.

Other cases have involved pets injured in car accidents, police actions and, as here, pet-on-pet aggression. Nearly all the claims were denied. Last year, in a case on appeal to the Texas Supreme Court, a couple received national attention when a lower court allowed them to seek their dog’s “sentimental value” after a shelter worker accidentally euthanized it.

This litigation has tracked a rise to prominence of animal law in general, much of which has been for the better. The New Jersey State Bar Association is one of many state bars to have a thriving Animal Law Committee. At the Bar’s conference this past May, for example, the committee hosted a discussion on emotion-based damages in which we and the attorneys who argued

*McDougall* participated. As pet owners and animal lovers ourselves, we fully appreciate why it might appear to some that allowing owners to recover emotion-based damages is the “pro-animal position.”

Nothing could be further from the truth.

Many who prioritize pet welfare and responsible animal ownership have opposed these suits. Their greatest concern is the resulting high costs that will be priced into veterinary care, pet products and other pet services. Veterinarians and others in the pet care industry, insurers and others will have to increase prices to offset threatened or actual litigation.

While some owners may win in court, overall, pets will lose. Pet economics is simple. At litigation-inflated prices, many owners will no longer be able to afford services and products their pets need. The quality of pets’ lives will be lowered, and in some cases, owners may be forced to euthanize their pets if they cannot or will not pay higher costs of care.

Here, McDougall was awarded \$5,000 in economic damages against her neighbor. This is a reasonable sum. In New Jersey, pets are more than mere personal property, meaning that recoveries are not limited to market or replacement value, which are generally the measures of damages for fungible property, such as furniture.

Rather, damages for pets can include the pet’s “intrinsic value,” which is an alternative measure of a pet’s economic worth that can retrieve higher awards, as here, but does not include emotion-based damages. Nationally, awards in

pet injury cases under these or similar rules often reach and exceed \$10,000.

There is no benefit for pets to turn their injuries into high-stakes litiga-

tion. Fortunately, nearly two-thirds of the public, including pet owners, agree, responding to a 2007 Gallup poll that owners should get actual economic dam-

ages, not emotion-based damages, in pet-injury cases. For our pets' sake, other states should continue to stay this course. ■