IN THE COURT OF APPEALS OF THE
STATE OF OREGON

JUSTICE, an American Quarter Horse, by and through his Guardian, Kim Mosiman,	)	Washington County Circuit Court Case No. 18CV17601
Plaintiff-Appellant,	)	CA No. A169933
v.	)	
GWENDOLYN VERCHER,	)	
Defendant-Respondent.	)	

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD

Appeal from the Order of the Circuit Court for
Washington County Entered December 26, 2018 by the
Honorable John S. Knowles, Pro Tem Circuit Court Judge

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TABLE OF CONTENTS

SUMMARY OF THE REPLY ARGUMENT 1

REPLY ARGUMENT 2

I. Justice is the proper plaintiff in this negligence per se action because he is a member of the class of "persons" for whose benefit the animal cruelty laws were passed. 2

II. Defendant confuses statutory liability with negligence per se. 7

III. Defendant's philosophical musings on "rights" and "persons" contradicts the law 9

IV. Defendant mischaracterizes the sought relief and exaggerates the implications of the case. 10

V. The potential for a court to award limited restitution for costs of care connected to a criminal animal cruelty conviction does not justify dismissal of Plaintiff's claim. 11

VI. The guardianship issue is not a part of this appeal. 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Bellikka v. Green,
306 Or 630, 762 P2d 997 (1988) 9

Cetacean Cmty. v. Bush,
386 F3d 1169 (9th Cir 2004) 4, 10

Cowgill v. Boock,
189 Or 282, 218 P2d 445 (1950) 3

Deckard v. Bunch,
358 Or 754, 370 P3d 478 (2016) 8

Doyle v. City of Medford,
356 Or 336, 337 P3d 797 (2014) 7, 8

Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.,
192 Conn App 36 (2019) 5, 6

People ex rel. Nonhuman Rights Project v. Lavery,
31 NY3d 1054, 100 NE3d 846 (2018) 6

People ex rel. Nonhuman Rights Project v. Lavery,
998 NYS2d 248, 124 AD3d 148 (2014) 4, 5, 6, 7

Reter v. Talent Irr. Dist.,
258 Or 140, 482 P2d 170 (1971) 7

Schiffer v. United Grocers, Inc.,
329 Or 86, 989 P2d 10 (1999) 9

State v. Dillon,
292 Or 172, 637 P2d 602(1981) 12

State v. Fessenden,
355 Or 759, 333 P3d 278 (2014) 1, 2

State v. Glaspey,
337 Or 558, 100 P3d 730 (2004) 3

State v. Hess,
273 Or App 26, 359 P3d 288 (2015) 3, 9

State v. Hess,
358 Or 529, 367 P3d 529 (2016) 3

State v. Nix,
356 Or 768, 345 P3d 416 (2015) 3

State v. Nix,
355 Or 777, 334 P3d 437 (2014) 3, 8, 9

State v. Williams,
229 Or App 79, 209 P3d 842 (2009) 3

Taylor v. Bergeron,
252 Or 247, 449 P2d 147 (1969) 5

Torres v. Pac. Power & Light,
84 Or App 412, 734 P2d 364 (1987) 8

Williams v. Briggs,
263 Or 577, 502 P2d 245 (1972) 5

CONSTITUTIONAL AND STATUTORY PROVISIONS

ORCP 27 A 12

ORCP 27 B 13

ORS 161.290 5

ORS 167.310 11

ORS 167.335 11

ORS 167.350 ..... 11, 12

TEXTS

Mark Rowlands, *Animal Rights: A Philosophical Defence* (1998) 10

Martha C. Nussbaum, *Beyond "Compassion and Humanity": Justice for Nonhuman Animals*, in *Animal Rights: Current Debates and New Directions* (Cass R. Sunstein and Martha C. Nussbaum eds. 2004)..... 10

Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (2011)..... 10

T. M. Scanlon, *What We Owe to Each Other* (1998)..... 10

Tom Regan, *The Case for Animal Rights* (1983)..... 10

TREATISES

Restatement (Second) of Torts § 285..... 9

Restatement (Second) of Torts § 286..... 9

Salmond on Jurisprudence § 61 (12th ed. 1966)..... 10

SUMMARY OF THE REPLY ARGUMENT

As the Oregon Supreme Court recently observed: "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." *State v. Fessenden*, 355 Or 759, 769–70, 333 P3d 278 (2014). This case of first impression calls upon this Court to exercise its common law authority to recognize the right of Justice, a victim of animal cruelty, to assert a negligence per se claim. Although Oregon courts have not yet recognized such a right, the extension of the common law that Plaintiff seeks here is limited in scope and modest in impact.

The Supreme Court already recognizes that the animal cruelty statute protects individual animals themselves from cruelty. It follows that those same individual animals hold limited legal rights. Plaintiff's lawsuit seeks a remedy under Oregon's common law for ongoing injuries caused by Defendant's violation of those rights.

Defendant's responsive arguments do not justify the dismissal of Plaintiff's claim. First, Defendant argues that Plaintiff lacks standing, but as a legal person with rights to whom others owe a duty of care, Plaintiff has standing for a negligence per se claim. Second, Defendant argues that Plaintiff does not satisfy the criteria for a claim of statutory liability, but Defendant misapprehends the cause of action here: Plaintiff's claim is one for negligence per se arising from the common law, for which legislative intent to create a right of action is irrelevant. Third, Defendant indulges

in a philosophical disquisition on rights and personhood divorced from common legal usage and inconsistent with Oregon law. Fourth, permitting Plaintiff's claim would not open the floodgates that Defendant and *amici* warn of, because a negligence per se claim requires proof of a violation of an already existing substantive right. Fifth, the potential for a limited restitution award connected to an animal cruelty conviction does not negate the need for a negligence per se claim, especially where, as here, the criminal restitution award does not cover the costs of care. And sixth, the issue of Kim Mosiman acting as Plaintiff's legal guardian is not properly before this court for consideration on appeal.

REPLY ARGUMENT

I. Justice is the proper plaintiff in this negligence per se action because he is a member of the class of "persons" for whose benefit the animal cruelty laws were passed.

The key question on appeal is whether Plaintiff possesses the requisite legal status—*i.e.* standing—under the common law to maintain a negligence per se claim compensating him for the cruelty he suffered. It is true, as Defendant observes, that "there is no state statute or state appellate court opinion in Oregon legislatively defining 'person' to *include* a horse," but she is wrong to conclude that that "ends the analysis." Defendant's Answering Brief ("Defendant Br.") at 19 (emphasis in original). To the contrary, "the legal status of animals has changed and is changing still." *Fessenden*, 355 Or at 769–70. Moreover, "[t]he law is not static. It is a

progressive science. What may have been a wholesome common law rule a hundred years ago may not be adapted to the changed economic and social conditions of this modern age. . . . The genius of the common law lies in * * * its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared." *Cowgill v. Boock*, 189 Or 282, 295, 218 P2d 445 (1950).

Here, Oregon law has developed to where the Supreme Court recognizes that Oregon's animal cruelty laws exist to protect "individual animals themselves" rather than humans. *State v. Nix*, 355 Or 777, 796-97, 334 P3d 437 (2014), *vac'd on procedural grounds*, 356 Or 768, 345 P3d 416 (2015); *see also State v. Hess*, 273 Or App 26, 35-36, 359 P3d 288 (2015) (adopting the holding and reasoning in *Nix*), *rev den*, 358 Or 529, 367 P3d 529 (2016).[1] The implication of this development is that nonhuman animals possess substantive legal rights to be free from cruelty, as

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[1] Although the *Nix* and *Hess* holdings that animals are "victims" were made in the context of the anti-merger statute, the implication of their reasoning extends beyond sentencing. For anti-merger purposes, who counts as a "victim" is determined by asking "who suffers harm that is an element of the offense." *Nix*, 355 Or at 789 (quoting *State v. Glaspey*, 337 Or 558, 565, 100 P3d 730 (2004)). The underpinning reasoning for applying the anti-merger doctrine in *Nix* and *Hess* is that Oregon's animal cruelty laws exist to "protect[ ] individual animals themselves from suffering" rather than to protect human property rights or public morals. 356 Or at 796-97. Further, this Court has stated that the anti-merger doctrine applies only to "person crime[s]." *State v. Williams*, 229 Or App 79, 84, 209 P3d 842 (2009). By implication, animal cruelty is therefore a person crime against the individual animal victims.

humans have a legal duty to refrain from inflicting cruelty. As explained in Plaintiff's opening brief, that Plaintiff has substantive legal rights in Oregon makes him a legal person with the ability to recover damages for his injuries. Opening Br. at 10-21. It is Defendant's violation of these legal rights and ensuing damage that this lawsuit seeks to redress.

To make her case that animals can never be plaintiffs, Defendant relies on out-of-jurisdiction case law that mostly involves interpretation of the U.S. Constitution or federal statutes such as the Endangered Species Act and the Marine Mammal Protection Act. *See* Defendant Br. at 21-24. But in cases of statutory interpretation, the primary inquiry is what the legislature intended. *See, e.g.*, *Cetacean Cmty. v. Bush*, 386 F3d 1169, 1176 (9th Cir 2004). The inquiry is different in a common law case like this one in which judges rather than the legislature determine what the law is. As such, cases holding that animals lack *statutory* standing under specific federal statutes shed no light on whether animals should have *common law* standing in a case like this one. In fact, the Ninth Circuit has held that animals do have *constitutional* standing, even if they lack *statutory* standing. *Cetacean Cmty.*, 386 F3d at 1175.

Of the six animal standing cases that Defendant cites (Defendant Br. at 22-23), only *People ex rel. Nonhuman Rights Project v. Lavery*, 998 NYS2d 248, 124 AD3d 148 (2014) involved a common law claim. In *Lavery*, a New York court

determined that a chimpanzee was not entitled to a writ of habeas corpus because he lacked legal responsibilities. 998 NYS2d at 250-51. The Connecticut Court of Appeal reached a similar conclusion regarding elephants in *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn App 36, 45 (2019).

Lavery and *Commerford* do not answer the question before this Court. First, they dealt with a different common law claim: the writ of habeas corpus, which has its own historical precedents and set of rules, different from Plaintiff's claim. That chimpanzees and elephants cannot win habeas corpus claims in New York and Connecticut does not control whether a horse can pursue a negligence per se action in Oregon.

Second, *Lavery* and *Commerford* contradict Oregon law, which does not link the possession of rights with the existence of responsibilities. In Oregon, children have rights, but they are not civilly responsible for their actions until age five and not criminally responsible until age 12. *See, e.g.*, *Williams v. Briggs*, 263 Or 577, 584, 502 P2d 245 (1972) (referring to "the rights of infants"); *Taylor v. Bergeron*, 252 Or 247, 248–49, 449 P2d 147 (1969) (recognizing "the age of five as the age below which a child is not responsible for the consequences of his own conduct"); ORS 161.290 (persons under 12 not criminally responsible). No one would argue that a four-year old child lacks personhood, rights, or the ability to be a plaintiff if

she is injured, simply because she lacks culpability.[2] The fatal flaw in the *Lavery* and *Commerford* cases, espoused by Defendant and *amici*, is that under their reasoning vulnerable humans, including infants or people with developmental disabilities, would not be considered legal persons with legal rights because they cannot accept legal responsibilities.

For this reason, Associate Judge Fahey of the New York Court of Appeals expressed doubt about the reasoning in *Lavery* by acknowledging that an animals' inability to accept legal responsibility does not determine their possession of legal rights: "Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child [ ] or a parent suffering from dementia[.]" *People ex rel. Nonhuman Rights Project v. Lavery*, 31 NY3d 1054, 1057, 100 NE3d 846 (2018) (Fahey J., concurring).

The *Lavery* court and Professor Cupp in his amicus brief respond to this point by arguing that children and people with disabilities "are still human beings."

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[2] *Amici curiae* Oregon Farm Bureau Federation, Oregon Cattlemen's Association, and Oregon Dairy Farmers Association ("Livestock Industry *amici*") frames the same claim as one arising under the "social compact theory" under the Oregon Constitution. Livestock Industry Amicus Br. at 17-20. This argument suffers from the same deficiencies: there is no authority for the frightening notion that anyone mentally incapable of consenting to the compact is left out in the cold.

Lavery, 152 AD 3d at 78; Cupp Br. at 15. But that answer begs the question and reduces the personhood inquiry from a jurisprudential question to a simple biological prejudice, admitting that personhood is not really about responsibility or language or the social contract after all.

There is a better answer: children and humans with disabilities are legal persons not because they are humans; they are legal persons because the law properly recognizes their rights. And the law recognizes that animals possess rights too.

As such, the cases upon which Defendant relies to undercut animal standing are irrelevant, poorly reasoned, or both. Ultimately, this is an issue of first impression because no court has ruled on whether the nonhuman victim of a crime can assert a negligence per se claim. Prior cases involving statutory interpretation are of no applicability here. Rather, this Court must tend to the common law "in light of changing notions of legal relationships." *Reter v. Talent Irr. Dist.*, 258 Or 140, 146, 482 P2d 170 (1971).

II. Defendant confuses statutory liability with negligence per se.

Defendant contends that Plaintiff fails to state a claim for negligence per se, but her argument fails to grasp the distinction between negligence per se and statutory liability. *See, e.g.,* Defendant Br. at 27 (citing *Doyle v. City of Medford*, 356 Or 336, 337 P3d 797 (2014), for the test for statutory liability) and 29 (citing

Deckard v. Bunch, 358 Or 754, 757, 370 P3d 478 (2016) (same)).[3]

Negligence per se is a common law claim in which the standard of care is expressed by a statute, but it is not a statutory claim. *Doyle*, 356 Or at 345. ("Negligence *per se* is a shorthand descriptor for a judicially recognized negligence claim based on a duty that is imposed by a statute or regulation."). "Under the doctrine of negligence *per se,* the violation of a statute or rule raises a rebuttable presumption of negligence if the violation causes an injury to a member of the class of persons meant to be protected and the injury is of a type which the statute or rule was enacted to prevent." *Torres v. Pac. Power & Light*, 84 Or App 412, 415, 734 P2d 364 (1987). As explained in Plaintiff's Opening Brief, Defendant's criminal act of cruelty caused an injury to Plaintiff who under *Nix* is a member of the class of persons meant to be protected, and that injury was of the type–animal suffering–that the statute was enacted to prevent. Plaintiff's Opening Br. at 10 n 1.

Statutory liability is different. *Doyle*, 356 Or at 345 n 7 ("Statutory liability is distinct from the tort theory of 'negligence per se.'" (citations omitted)). As Defendant notes, a statutory liability claim "arises when a statute either expressly or

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[3] Puzzlingly, Defendant—without citing to any record—asserts that the trial court found that Justice failed to satisfy three of the five required elements for statutory liability under *Deckard*. Defendant Br. at 29. However, the trial court did not even reference or apply the *Deckard* standard. *See* Opinion Letter at 1-2 (ER 15-16).

impliedly creates a private right of action for the violation of a statutory duty," which is a question of statutory interpretation and legislative intent. *Id.* at 344. But a negligence per se claim does not require legislative intent to create a private right of action. *Restatement (Second) of Torts* § 285; *Bellikka v. Green*, 306 Or 630, 650, 762 P2d 997 (1988). Rather, the standard created by the statute serves as the standard of care in a common law claim. *Restatement (Second) of Torts* §§ 285-286.

It is therefore irrelevant whether the legislature intended to create a cause of action for nonhuman animals to enforce the cruelty law. The claim arises under the common law, which is unquestionably the domain of the judiciary. *Schiffer v. United Grocers, Inc.*, 329 Or 86, 101, 989 P2d 10 (1999) ("[W]here we have competence to act, we should not hide from our responsibilities with regard to judge-made law just because we share those responsibilities with the legislature.").

III. Defendant's philosophical musings on "rights" and "persons" contradicts the law.

Unable to rebut the implication of *Nix* and *Hess* that animals have legal rights under Oregon's animal cruelty statute, Defendant spends the bulk of the brief philosophically opining about the importance of speech and the ability to accept and bear responsibility. Defendant Br. at 31-56.

Defendant's selective discussion ignores the many philosophers who reject the view that moral and legal status require intellect, shared language, or the ability

to contract. *See, e.g.*, Martha C. Nussbaum, *Beyond "Compassion and Humanity": Justice for Nonhuman Animals*, in *Animal Rights: Current Debates and New Directions* 299-302, 306-07 (Cass R. Sunstein and Martha C. Nussbaum eds. 2004) (Reply SER 1-4, 8-9); Mark Rowlands, *Animal Rights: A Philosophical Defence*, 3 (1998); T. M. Scanlon, *What We Owe to Each Other,* 183 (1998); Tom Regan, *The Case for Animal Rights* (1983); Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (2011).

But more important, Defendant's ruminations ignore how the concepts of rights and personhood are *actually used* by courts and legal scholars: rights are legal protections, and persons are the entities that have them. *See, e.g.*, *Cetacean Cmty.*, 386 F3d at 1175 ("Animals have many legal rights, protected under both federal and state laws."); *Salmond on Jurisprudence* § 61 (12th ed. 1966) ("A person is any being whom the law regards as capable of rights or duties . . . whether a human being or not[.]"). As discussed above, Oregon law recognizes the rights and personhood of those who do not bear responsibilities and cannot voluntarily opt into the social contract. Defendant's view of rights and personhood would banish children, the mentally disabled, and those who cannot speak from the community of legal rights-holders. Mercifully, that is not the law in Oregon.

IV. Defendant mischaracterizes the sought relief and exaggerates the implications of the case.

Defendant and *amici* exaggerate the consequences of Plaintiff's claim by arguing that holding for Plaintiff will unleash lawsuits on behalf of unanticipated species like sponges and challenges to socially accepted practices like horse-racing or meat-eating. Defendant Br. at 54-55, 63-64; Livestock Industry Amicus Br. at 21-23; Cupp Br. at 6-9.

These concerns are meritless. Plaintiff is not asking this court to fabricate brand new rights from whole cloth, but rather to ensure that nonhuman victims of animal cruelty have recourse when their *existing rights* are violated. A negligence per se action will not lie unless the underlying conduct is *already illegal*. Thus, the class of litigants and actionable conduct are already circumscribed by the existing animal cruelty law. *See* ORS 167.310(3); *see* ORS 167.335(1) (exempting conduct from animal cruelty prohibition, including "the killing of livestock").

V. The potential for a court to award limited restitution for costs of care connected to a criminal animal cruelty conviction does not justify dismissal of Plaintiff's claim.

The Livestock Industry *amici* argue that the restitution provision under ORS 167.350 will address the harm that Plaintiff suffered. Livestock Industry Amicus Br. at 11-13. This argument falls short for two reasons. First, the restitution authorized by ORS 167.350 is insufficient to cover all damages. Payment of restitution under that statute is discretionary, depends on a criminal conviction, and contemplates repayment of past costs only. ORS 167.350(1), (3). These inadequacies are

particularly apparent here because Defendant's plea agreement required her to pay restitution only for the cost of Plaintiff's care incurred *before* July 6, 2017, which is insufficient to cover ongoing costs of care caused by the abuse. Complaint ¶ 33 (ER 8). Second, ORS 167.350 is not an exclusive remedy. That a court may award restitution simply provides one avenue for relief but it does not foreclose other avenues. *State v. Dillon*, 292 Or 172, 180, 637 P2d 602(1981) ("[R]estitution must be understood as an aspect of criminal law, not as a quasi-civil recovery device.").

VI. The guardianship issue is not a part of this appeal.

Defendant's argument that Kim Mosiman is an improper legal guardian does not provide a basis for affirming the trial court decision because the issue is not properly a part of this appeal. The circuit court did not cite guardianship in its Opinion Letter dismissing Plaintiff's case; it only considered guardianship in connection to its subsequent ruling awarding Defendant costs, which is not at issue on appeal. *See* Opinion Letter at 1 (ER 15); Opinion Letter on Costs (SER 1-2).

Even if the guardianship issue were properly before this court, it would not justify affirming dismissal because Mosiman is appropriately named as Plaintiff's guardian. Under Oregon law, an incapacitated person may appear automatically through their guardian. ORCP 27 A. Here, Mosiman functions as Plaintiff's guardian because she is responsible for Plaintiff's care and well-being. *See* Complaint ¶ 5 (ER 3).

Moreover, Plaintiff's attorneys expressed their readiness to request Mosiman's appointment as a guardian under ORCP 27 B or through the court's inherent procedural authority if the court did not deem Mosiman as Plaintiff's guardian by operation of ORCP 27 A, but the circuit court did not require such a request. Tr. at 22:3-23:6; Plaintiff's Opposition to Motion to Dismiss at 7-9 (Reply SER 13-15). The guardianship issue is therefore a red herring not properly at issue in this appeal and, if necessary, should be handled only on remand.

CONCLUSION

Plaintiff is the victim of animal cruelty with a right to recover damages under the common law for ongoing injuries caused by that cruelty. As a nonhuman animal, Plaintiff is a member of the class of persons intended to be protected by Oregon's animal cruelty statute with substantive legal rights under that law. As such, Plaintiff qualifies as a legal person with respect to the animal cruelty statute, and should be allowed to seek relief from the ongoing damages caused by Defendant's violation of those legal rights. Allowing Plaintiff's claim to go forward will not grant nonhuman animals any new substantive rights but will provide a procedural vehicle to redress harms caused by conduct already prohibited by the animal cruelty statute.

DATED: February 10, 2020

/s/ Margaret H. Leek Leiberan
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INDEX TO REPLY SUPPLEMENTAL EXCERPT OF RECORD

Pages	Description	Date
Reply SER 1-12	Martha C. Nussbaum, *Beyond "Compassion and Humanity": Justice for Nonhuman Animals* (Excerpt)	2004
Reply SER 13-15	Plaintiff's Opposition to Motion to Dismiss (Excerpt)	2018-09-04

14

MARTHA C. NUSSBAUM

BEYOND "COMPASSION AND HUMANITY"

Justice for Nonhuman Animals

Certainly it is wrong to be cruel to animals. . . . The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way.

—JOHN RAWLS, A Theory of Justice

In conclusion, we hold that circus animals . . . are housed in cramped cages, subjected to fear, hunger, pain, not to mention the undignified way of life they have to live, with no respite and the impugned notification has been issued in conformity with the . . . values of human life, [and] philosophy of the Constitution. . . . Though not homosapiens [*sic*], they are also beings entitled to dignified existence and humane treatment sans cruelty and torture. . . . Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights. . . . If humans are entitled to fundamental rights, why not animals?

—*NAIR V. UNION OF INDIA*, Kerala High Court, June 2000

"BEINGS ENTITLED TO DIGNIFIED EXISTENCE"

In 55 B.C. the Roman leader Pompey staged a combat between humans and elephants. Surrounded in the arena, the animals perceived that they had no hope of escape. According to Pliny, they then "entreated the crowd, trying to win their compassion with indescribable gestures, bewailing their plight with a sort of lamentation." The audience, moved to pity and anger by their

plight, rose to curse Pompey, feeling, writes Cicero, that the elephants had a relation of commonality (*societas*) with the human race.[1]

We humans share a world and its scarce resources with other intelligent creatures. These creatures are capable of dignified existence, as the Kerala High Court says. It is difficult to know precisely what we mean by that phrase, but it is rather clear what it does not mean: the conditions of the circus animals in the case, squeezed into cramped, filthy cages, starved, terrorized, and beaten, given only the minimal care that would make them presentable in the ring the following day. The fact that humans act in ways that deny animals a dignified existence appears to be an issue of justice, and an urgent one, although we shall have to say more to those who would deny this claim. There is no obvious reason why notions of basic justice, entitlement, and law cannot be extended across the species barrier, as the Indian court boldly does.

Before we can perform this extension with any hope of success, however, we need to get clear about what theoretical approach is likely to prove most adequate. I shall argue that the capabilities approach as I have developed it—an approach to issues of basic justice and entitlement and to the making of fundamental political principles[2]—provides better theoretical guidance in this area than that supplied by contractarian and utilitarian approaches to the question of animal entitlements, because it is capable of recognizing a wide range of types of animal dignity, and of corresponding needs for flourishing.

KANTIAN CONTRACTARIANISM: INDIRECT DUTIES, DUTIES OF COMPASSION

Kant's own view about animals is very unpromising. He argues that all duties to animals are merely indirect duties to humanity, in that (as he believes) cruel or kind treatment of animals strengthens tendencies to behave in similar fashion to humans. Thus he rests the case for decent treatment of animals on a fragile empirical claim about psychology. He cannot conceive that beings who (in his view) lack self-consciousness and the capacity for moral reciprocity could possibly be objects of moral duty. More generally, he cannot see that such a being can have dignity, an intrinsic worth.

One may, however, be a contractarian—and indeed, in some sense a Kantian— without espousing these narrow views. John Rawls insists that we have direct moral duties to animals, which he calls "duties of compassion and humanity."[3] But for Rawls these are not issues of justice, and he is explicit that the contract doctrine cannot be extended to deal with these issues, because animals lack those properties of human beings "in virtue of which they are to be treated in accordance with the principles of justice" (*TJ* 504). Only moral persons, defined with reference to the "two moral powers," are subjects of justice.

To some extent, Rawls is led to this conclusion by his Kantian conception of the person, which places great emphasis on rationality and the capacity for moral choice. But it is likely that the very structure of his contractarianism would require such a conclusion, even in the absence of that heavy commitment to rationality. The whole idea of a bargain or contract involving both humans and nonhuman animals is fantastic, suggesting no clear scenario that would assist our thinking. Although Rawls's Original Position, like the state of nature in earlier contractarian theories,[4] is not supposed to be an actual historical situation, it is supposed to be a coherent fiction that can help us think well. This means that it has to have realism, at least, concerning the powers and needs of the parties and their basic circumstances. There is no comparable fiction about our decision to make a deal with other animals that would be similarly coherent and helpful. Although we share a world of scarce resources with animals, and although there is in a sense a state of rivalry among species that is comparable to the rivalry in the state of nature, the asymmetry of power between humans and nonhuman animals is too great to imagine the bargain as a real bargain. Nor can we imagine that the bargain would actually be for mutual advantage, for if we want to protect ourselves from the incursions of wild animals, we can just kill them, as we do. Thus, the Rawlsian condition that no one party to the contract is strong enough to dominate or kill all the others is not met. Thus Rawls's omission of animals from the theory of justice is deeply woven into the very idea of grounding principles of justice on a bargain struck for mutual advantage (on fair terms) out of a situation of rough equality.

To put it another way, all contractualist views conflate two questions, which might have been kept distinct: Who frames the principles? And for whom are the principles framed? That is how rationality ends up being a criterion of membership in the moral community: because the procedure imagines that people are choosing principles *for themselves.* But one might imagine things differently, including in the group for whom principles of justice are included many creatures who do not and could not participate in the framing.

We have not yet shown, however, that Rawls's conclusion is wrong. I have said that the cruel and oppressive treatment of animals raises issues of justice, but I have not really defended that claim against the Rawlsian alternative. What exactly does it mean to say that these are issues of justice, rather than issues of "compassion and humanity"? The emotion of compassion involves the thought that another creature is suffering significantly, and is not (or not mostly) to blame for that suffering.[5] It does not involve the thought that someone is to blame for that suffering. One may have compassion for the victim of a crime, but one may also have compassion for someone who is dying from disease (in a situation where that vulnerability to disease is nobody's fault). "Humanity" I take to be a similar idea. So compassion omits the essential element of blame for wrongdoing. That is the first problem. But suppose we add that element, saying that duties of com-

passion involve the thought that it is *wrong* to cause animals suffering. That is, a duty of compassion would not be just a duty to have compassion, but a duty, as a result of one's compassion, to refrain from acts that cause the suffering that occasions the compassion. I believe that Rawls would make this addition, although he certainly does not tell us what he takes duties of compassion to be. What is at stake, further, in the decision to say that the mistreatment of animals is not just morally wrong, but morally wrong in a special way, raising questions of justice?

This is a hard question to answer, since justice is a much-disputed notion, and there are many types of justice, political, ethical, and so forth. But it seems that what we most typically mean when we call a bad act unjust is that the creature injured by that act has an entitlement not to be treated in that way, and an entitlement of a particularly urgent or basic type (since we do not believe that all instances of unkindness, thoughtlessness, and so forth are instances of injustice, even if we do believe that people have a right to be treated kindly, and so on). The sphere of justice is the sphere of basic entitlements. When I say that the mistreatment of animals is unjust, I mean to say not only that it is wrong *of us* to treat them in that way, but also that they have a right, a moral entitlement, not to be treated in that way. It is unfair *to them.* I believe that thinking of animals as active beings who have a good and who are entitled to pursue it naturally leads us to see important damages done to them as unjust. What is lacking in Rawls's account, as in Kant's (though more subtly) is the sense of the animal itself as an agent and a subject, a creature in interaction with whom we live. As we shall see, the capabilities approach does treat animals as agents seeking a flourishing existence; this basic conception, I believe, is one of its greatest strengths.

UTILITARIANISM AND ANIMAL FLOURISHING

Utilitarianism has contributed more than any other ethical theory to the recognition of animal entitlements. Both Bentham and Mill in their time and Peter Singer in our own have courageously taken the lead in freeing ethical thought from the shackles of a narrow species-centered conception of worth and entitlement. No doubt this achievement was connected with the founders' general radicalism and their skepticism about conventional morality, their willingness to follow the ethical argument wherever it leads. These remain very great virtues in the utilitarian position. Nor does utilitarianism make the mistake of running together the question "Who receives justice?" with the question "Who frames the principles of justice?" Justice is sought for all sentient beings, many of whom cannot participate in the framing of principles.

Thus it is in a spirit of alliance that those concerned with animal entitlements might address a few criticisms to the utilitarian view. There are some difficulties with the utilitarian view, in both of its forms. As

Bernard Williams and Amartya Sen usefully analyze the utilitarian position, it has three independent elements: *consequentialism* (the right choice is the one that produces the best overall consequences), *sum-ranking* (the utilities of different people are combined by adding them together to produce a single total), and *hedonism*, or some other substantive theory of the good (such as preference satisfaction).[6] Consequentialism by itself causes the fewest difficulties, since one may always adjust the account of well-being, or the good, in consequentialism so as to admit many important things that utilitarians typically do not make salient: plural and heterogeneous goods, the protection of rights, even personal commitments or agent-centered goods. More or less any moral theory can be consequentialized, that is, put in a form where the matters valued by that theory appear in the account of consequences to be produced.[7] Although I do have some doubts about a comprehensive consequentialism as the best basis for political principles in a pluralistic liberal society, I shall not comment on them at present, but shall turn to the more evidently problematic aspects of the utilitarian view.[8]

Let us next consider the utilitarian commitment to aggregation, or what is called "sum-ranking." Views that measure principles of justice by the outcome they produce need not simply add all the relevant goods together. They may weight them in other ways. For example, one may insist that each and every person has an indefeasible entitlement to come up above a threshold on certain key goods. In addition, a view may, like Rawls's view, focus particularly on the situation of the least well off, refusing to permit inequalities that do not raise that person's position. These ways of considering well-being insist on treating people as ends: They refuse to allow some people's extremely high well-being to be purchased, so to speak, through other people's disadvantage. Even the welfare of society as a whole does not lead us to violate an individual, as Rawls says.

Utilitarianism notoriously refuses such insistence on the separateness and inviolability of persons. Because it is committed to the sum-ranking of all relevant pleasures and pains (or preference satisfactions and frustrations), it has no way of ruling out in advance results that are extremely harsh toward a given class or group. Slavery, the lifelong subordination of some to others, the extremely cruel treatment of some humans or of nonhuman animals—none of this is ruled out by the theory's core conception of justice, which treats all satisfactions as fungible in a single system. Such results will be ruled out, if at all, by empirical considerations regarding total or average well-being. These questions are notoriously indeterminate (especially when the number of individuals who will be born is also unclear, a point I shall take up later). Even if they were not, it seems that the best reason to be against slavery, torture, and lifelong subordination is a reason of justice, not an empirical calculation of total or average well-being. Moreover, if we focus on preference satisfaction, we must confront the problem of adaptive preferences. For while some ways of treating people badly always cause pain (tor-

ture, starvation), there are ways of subordinating people that creep into their very desires, making allies out of the oppressed. Animals too can learn submissive or fear-induced preferences. Martin Seligman's experiments, for example, show that dogs who have been conditioned into a mental state of learned helplessness have immense difficulty learning to initiate voluntary movement, if they can ever do so.[9]

There are also problems inherent in the views of the good most prevalent within utilitarianism: hedonism (Bentham) and preference satisfaction (Singer). Pleasure is a notoriously elusive notion. Is it a single feeling, varying only in intensity and duration, or are the different pleasures as qualitatively distinct as the activities with which they are associated? Mill, following Aristotle, believed the latter, but if we once grant that point, we are looking at a view that is very different from standard utilitarianism, which is firmly wedded to the homogeneity of good.[10]

Such a commitment looks like an especially grave error when we consider basic political principles. For each basic entitlement is its own thing, and is not bought off, so to speak, by even a very large amount of another entitlement. Suppose we say to a citizen: We will take away your free speech on Tuesdays between 3 and 4 P.M., but in return, we will give you, every single day, a double amount of basic welfare and health care support. This is just the wrong picture of basic political entitlements. What is being said when we make a certain entitlement basic is that it is important always and for everyone, as a matter of basic justice. The only way to make that point sufficiently clearly is to preserve the qualitative separateness of each distinct element within our list of basic entitlements.

Once we ask the hedonist to admit plural goods, not commensurable on a single quantitative scale, it is natural to ask, further, whether pleasure and pain are the only things we ought to be looking at. Even if one thinks of pleasure as closely linked to activity, and not simply as a passive sensation, making it the sole end leaves out much of the value we attach to activities of various types. There seem to be valuable things in an animal's life other than pleasure, such as free movement and physical achievement, and also altruistic sacrifice for kin and group. The grief of an animal for a dead child or parent, or the suffering of a human friend, also seem to be valuable, a sign of attachments that are intrinsically good. There are also bad pleasures, including some of the pleasures of the circus audience—and it is unclear whether such pleasures should even count positively in the social calculus. Some pleasures of animals in harming other animals may also be bad in this way.

Does preference utilitarianism do better? We have already identified some problems, including the problem of misinformed or malicious preferences and that of adaptive (submissive) preferences. Singer's preference utilitarianism, moreover, defining *preference* in terms of conscious awareness, has no room for deprivations that never register in the animal's consciousness.

But of course animals raised under bad conditions can't imagine the better way of life they have never known, and so the fact that they are not living a more flourishing life will not figure in their awareness. They may still feel pain, and this the utilitarian can consider. What the view cannot consider is all the deprivation of valuable life activity that they do not feel.

Finally, all utilitarian views are highly vulnerable on the question of numbers. The meat industry brings countless animals into the world who would never have existed but for that. For Singer, these births of new animals are not by themselves a bad thing: Indeed, we can expect new births to add to the total of social utility, from which we would then subtract the pain such animals suffer. It is unclear where this calculation would come out. Apart from this question of indeterminacy, it seems unclear that we should even say that these births of new animals are a good thing, if the animals are brought into the world only as tools of human rapacity.

So utilitarianism has great merits, but also great problems.

TYPES OF DIGNITY, TYPES OF FLOURISHING: EXTENDING THE CAPABILITIES APPROACH

The capabilities approach in its current form starts from the notion of human dignity and a life worthy of it. But I shall now argue that it can be extended to provide a more adequate basis for animal entitlements than the other two theories under consideration. The basic moral intuition behind the approach concerns the dignity of a form of life that possesses both deep needs and abilities; its basic goal is to address the need for a rich plurality of life activities. With Aristotle and Marx, the approach has insisted that there is waste and tragedy when a living creature has the innate, or "basic," capability for some functions that are evaluated as important and good, but never gets the opportunity to perform those functions. Failures to educate women, failures to provide adequate health care, failures to extend the freedoms of speech and conscience to all citizens—all these are treated as causing a kind of premature death, the death of a form of flourishing that has been judged to be worthy of respect and wonder. The idea that a human being should have a chance to flourish in its own way, provided it does no harm to others, is thus very deep in the account the capabilities approach gives of the justification of basic political entitlements.

The species norm is evaluative, as I have insisted; it does not simply read off norms from the way nature actually is. The difficult questions this valuational exercise raises for the case of nonhuman animals will be discussed in the following section. But once we have judged that a central human power is one of the good ones, one of the ones whose flourishing defines the good of the creature, we have a strong moral reason for promoting its flourishing and removing obstacles to it.

Dignity and Wonder: The Intuitive Starting Point

The same attitude to natural powers that guides the approach in the case of human beings guides it in the case of all forms of life. For there is a more general attitude behind the respect we have for human powers, and it is very different from the type of respect that animates Kantian ethics. For Kant, only humanity and rationality are worthy of respect and wonder; the rest of nature is just a set of tools. The capabilities approach judges instead, with the biologist Aristotle (who criticized his students' disdain for the study of animals), that there is something wonderful and wonder-inspiring in all the complex forms of animal life.

Aristotle's scientific spirit is not the whole of what the capabilities approach embodies, for we need, in addition, an ethical concern that the functions of life not be impeded, that the dignity of living organisms not be violated. And yet, if we feel wonder looking at a complex organism, that wonder at least suggests the idea that it is good for that being to flourish as the kind of thing it is. And this idea is next door to the ethical judgment that it is wrong when the flourishing of a creature is blocked by the harmful agency of another. That more complex idea lies at the heart of the capabilities approach.

So I believe that the capabilities approach is well placed, intuitively, to go beyond both contractarian and utilitarian views. It goes beyond the contractarian view in its starting point, a basic wonder at living beings, and a wish for their flourishing and for a world in which creatures of many types flourish. It goes beyond the intuitive starting point of utilitarianism because it takes an interest not just in pleasure and pain, but in complex forms of life. It wants to see each thing flourish as the sort of thing it is.

By Whom and for Whom? The Purposes of Social Cooperation

For a contractarian, as we have seen, the question "Who makes the laws and principles?" is treated as having, necessarily, the same answer as the question "For whom are the laws and principles made?" That conflation is dictated by the theory's account of the purposes of social cooperation. But there is obviously no reason at all why these two questions should be put together in this way. The capabilities approach, as so far developed for the human case, looks at the world and asks how to arrange that justice be done in it. Justice is among the intrinsic ends that it pursues. Its parties are imagined looking at all the brutality and misery, the goodness and kindness of the world and trying to think how to make a world in which a core group of very important entitlements, inherent in the notion of human dignity, will be protected. Because they look at the whole of the human world, not just people roughly equal to themselves, they are able to be concerned directly and nonderivatively, as we saw, with the good of the mentally disabled. This feature makes it easy to extend the approach to include human-animal relations.

Let us now begin the extension. The purpose of social cooperation, by analogy and extension, ought to be to live decently together in a world in which many species try to flourish. (Cooperation itself will now assume multiple and complex forms.) The general aim of the capabilities approach in charting political principles to shape the human-animal relationship would be, following the intuitive ideas of the theory, that no animal should be cut off from the chance at a flourishing life and that all animals should enjoy certain positive opportunities to flourish. With due respect for a world that contains many forms of life, we attend with ethical concern to each characteristic type of flourishing and strive that it not be cut off or fruitless.

Such an approach seems superior to contractarianism because it contains direct obligations of justice to animals; it does not make these derivative from or posterior to the duties we have to fellow humans, and it is able to recognize that animals are subjects who have entitlements to flourishing and who thus are subjects of justice, not just objects of compassion. It is superior to utilitarianism because it respects each individual creature, refusing to aggregate the goods of different lives and types of lives. No creature is being used as a means to the ends of others, or of society as a whole. The capabilities approach also refuses to aggregate across the diverse constituents of each life and type of life. Thus, unlike utilitarianism, it can keep in focus the fact that each species has a different form of life and different ends; moreover, within a given species, each life has multiple and heterogeneous ends.

How Comprehensive?

In the human case, the capabilities approach does not operate with a fully comprehensive conception of the good, because of the respect it has for the diverse ways in which people choose to live their lives in a pluralistic society. It aims at securing some core entitlements that are held to be implicit in the idea of a life with dignity, but it aims at capability, not functioning, and it focuses on a small list. In the case of human-animal relations, the need for restraint is even more acute, since animals will not in fact be participating directly in the framing of political principles, and thus they cannot revise them over time should they prove inadequate.

And yet there is a countervailing consideration: Human beings affect animals' opportunities for flourishing pervasively, and it is hard to think of a species that one could simply leave alone to flourish in its own way. The human species dominates the other species in a way that no human individual or nation has ever dominated other humans. Respect for other species' opportunities for flourishing suggests, then, that human law must include robust, positive political commitments to the protection of animals, even though, had human beings not so pervasively interfered with animals' ways of life, the most respectful course might have been simply to leave them alone, living the lives that they make for themselves.

The Species and the Individual

What should the focus of these commitments be? It seems that here, as in the human case, the focus should be the individual creature. The capabilities approach attaches no importance to increased numbers as such; its focus is on the well-being of existing creatures and the harm that is done to them when their powers are blighted.

As for the continuation of species, this would have little moral weight as a consideration of justice (though it might have aesthetic significance or some other sort of ethical significance), if species were just becoming extinct because of factors having nothing to do with human action that affects individual creatures. But species are becoming extinct because human beings are killing their members and damaging their natural environments. Thus, damage to species occurs through damage to individuals, and this individual damage should be the focus of ethical concern within the capabilities approach.

Do Levels of Complexity Matter?

Almost all ethical views of animal entitlements hold that there are morally relevant distinctions among forms of life. Killing a mosquito is not the same sort of thing as killing a chimpanzee. But the question is: What sort of difference is relevant for basic justice? Singer, following Bentham, puts the issue in terms of sentience. Animals of many kinds can suffer bodily pain, and it is always bad to cause pain to a sentient being. If there are nonsentient or barely sentient animals—and it appears that crustaceans, mollusks, sponges, and the other creatures Aristotle called "stationary animals" are such creatures—there is either no harm or only a trivial harm done in killing them. Among the sentient creatures, moreover, there are some who can suffer additional harms through their cognitive capacity: A few animals can foresee and mind their own deaths, and others will have conscious, sentient interests in continuing to live that are frustrated by death. The painless killing of an animal that does not foresee its own death or take a conscious interest in the continuation of its life is, for Singer and Bentham, not bad, for all badness, for them, consists in the frustration of interests, understood as forms of conscious awareness.[11] Singer is not, then, saying that some animals are inherently more worthy of esteem than others. He is simply saying that, if we agree with him that all harms reside in sentience, the creature's form of life limits the conditions under which it can actually suffer harm.

Similarly, James Rachels, whose view does not focus on sentience alone, holds that the level of complexity of a creature affects what can be a harm for it.[12] What is relevant to the harm of pain is sentience; what is relevant to the harm of a specific type of pain is a specific type of sentience (e.g., the ability to imagine one's own death). What is relevant to the harm of dimin-

ished freedom is a capacity for freedom or autonomy. It would make no sense to complain that a worm is being deprived of autonomy, or a rabbit of the right to vote.

What should the capabilities approach say about this issue? It seems to me that it should not follow Aristotle in saying that there is a natural ranking of forms of life, some being intrinsically more worthy of support and wonder than others. That consideration might have evaluative significance of some other kind, but it seems dubious that it should affect questions of basic justice.

Rachels's view offers good guidance here. Because the capabilities approach finds ethical significance in the flourishing of basic (innate) capabilities—those that are evaluated as both good and central (see the section on evaluating animal capabilities)—it will also find harm in the thwarting or blighting of those capabilities. More complex forms of life have more and more complex capabilities to be blighted, so they can suffer more and different types of harm. Level of life is relevant not because it gives different species differential worth per se, but because the type and degree of harm a creature can suffer varies with its form of life.

At the same time, I believe that the capabilities approach should admit the wisdom in utilitarianism. Sentience is not the only thing that matters for basic justice, but it seems plausible to consider sentience a threshold condition for membership in the community of beings who have entitlements based on justice. Thus, killing a sponge does not seem to be a matter of basic justice.

Does the Species Matter?

For the utilitarians, and for Rachels, the species to which a creature belongs has no moral relevance. All that is morally relevant are the capacities of the individual creature: Rachels calls this view "moral individualism." Utilitarian writers are fond of comparing apes to young children and to mentally disabled humans. The capabilities approach, by contrast, with its talk of characteristic functioning and forms of life, seems to attach some significance to species membership as such. What type of significance is this?

We should admit that there is much to be learned from reflection on the continuum of life. Capacities do crisscross and overlap; a chimpanzee may have more capacity for empathy and perspectival thinking than a very young child or an older autistic child. And capacities that humans sometimes arrogantly claim for themselves alone are found very widely in nature. But it seems wrong to conclude from such facts that species membership is morally and politically irrelevant. A mentally disabled child is actually very different from a chimpanzee, though in certain respects some of her capacities may be comparable. Such a child's life is tragic in a way that the life of a chimpanzee is not tragic: She is cut off from forms of flourishing that, but

for the disability, she might have had, disabilities that it is the job of science to prevent or cure, wherever that is possible. There is something blighted and disharmonious in her life, whereas the life of a chimpanzee may be perfectly flourishing. Her social and political functioning is threatened by these disabilities, in a way that the normal functioning of a chimpanzee in the community of chimpanzees is not threatened by its cognitive endowment.

All this is relevant when we consider issues of basic justice. For a child born with Down syndrome, it is crucial that the political culture in which he lives make a big effort to extend to him the fullest benefits of citizenship he can attain, through health benefits, education, and the reeducation of the public culture. That is so because he can only flourish as a human being. He has no option of flourishing as a happy chimpanzee. For a chimpanzee, on the other hand, it seems to me that expensive efforts to teach language, while interesting and revealing, are not matters of basic justice. A chimpanzee flourishes in its own way, communicating with its own community in a perfectly adequate manner that has gone on for ages.

In short, the species norm (duly evaluated) tells us what the appropriate benchmark is for judging whether a given creature has decent opportunities for flourishing.

EVALUATING ANIMAL CAPABILITIES: NO NATURE WORSHIP

In the human case, the capabilities view does not attempt to extract norms directly from some facts about human nature. We should know what we can about the innate capacities of human beings, and this information is valuable, in telling us what our opportunities are and what our dangers might be. But we must begin by evaluating the innate powers of human beings, asking which ones are the good ones, the ones that are central to the notion of a decently flourishing human life, a life with dignity. Thus not only evaluation but also ethical evaluation is put into the approach from the start. Many things that are found in human life are not on the capabilities list.

There is a danger in any theory that alludes to the characteristic flourishing and form of life of a species: the danger of romanticizing nature, or suggesting that things are in order as they are, if only we would stop interfering. This danger looms large when we turn from the human case, where it seems inevitable that we will need to do some moral evaluating, to the animal case, where evaluating is elusive and difficult. Inherent in at least some environmentalist writing is a picture of nature as harmonious and wise, and of humans as wasteful overreachers who would live better were we to get in tune with this fine harmony. This image of nature was already very

legal right of action); 67A CJS Parties § 188 ("A party's lack of capacity to sue or be sued does not deprive the court of subject-matter jurisdiction.").

Recognizing that "lack of capacity" does not mean "lack of judicial protection," courts use a variety of procedural mechanisms to overcome the practical problems that arise when a plaintiff lacks capacity, thereby allowing suits by "incapacitated" interest-bearers, such as young children, mentally incompetent adults, fictional legal entities, and even the dead.[6] Lack of capacity, unlike lack of standing, is properly cured by the involvement of a guardian, guardian ad litem, next friend, or other legal representative.

Justice does not contend he possesses legal capacity to sue independently. For this reason, Justice brings this case by and through his guardian, Kim Mosiman, as is proper for parties who possess a legally cognizable interest but lack the capacity to sue. So long as Justice's interests are adequately represented, his lack of capacity has no bearing on the justiciability of this case and is not grounds for dismissal. *See Wimber v. Timpe*, 109 Or App 139, 142, 818 P2d 954 (1991) (explaining, "[t]hat [a] child appears without a guardian *ad litem* does not defeat our jurisdiction").

3. Justice may pursue his claim through his guardian, or, in the alternative, the Court may appoint a guardian for him.

Oregon law provides that where a party lacks capacity to sue they may appear through an individual who will represent the party's interests in the case. Under ORCP 27 A, "[w]hen a person who has . . . a guardian is a party to any action, the person shall appear by the . . . guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought."

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[6] *See, e.g., Grandy v. Williams*, 147 Or 409, 418, 34 P2d 622 (1934) (surety bond dispute brought by minor plaintiff as the real party in interest); *Jones v. Mitchell Bros. Truck Lines*, 273 Or 430, 434, 541 P2d 1287 (1975) (husband brought negligence action on behalf of mentally incompetent wife for personal injuries she sustained in automobile collision); *Joy v. N. Texas Compress & Warehouse Co.*, 151 SW2d 342, 343 (Tex Civ App 1941) (cause of action for mismanagement of corporation belongs to the corporation itself); *Thomas v. Inman*, 282 Or 279, 281, 578 P2d 399 (1978) (negligence action by personal representative of deceased minor's estate).

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Here, Ms. Mosiman is Justice's guardian and has agreed to appear in this case on Justice's behalf. As the complaint alleges, Ms. Mosiman functions as Justice's guardian as the individual "responsible for Justice's care and well-being." Compl. ¶ 5. Through Sound Equine Options, Ms. Mosiman took custody of Justice after he was surrendered by Defendant and transported him for emergency medical care and hospitalization necessitated by Defendant's extreme neglect. *Id.* at ¶ 14. After a 10-day hospitalization, Ms. Mosiman took Justice in at her rescue and training facility, where she continued to care for him, feeding him so he could recover from his near starvation, and treating his frostbite, lice, and rain rot. *Id.* at ¶¶ 22-23. Ms. Mosiman continues to care for Justice and pay for his costly care, and has established a trust in his name to provide funding for his lifetime expenses. *Id.* at ¶¶ 31, 35. Ms. Mosiman has thus been acting as Justice's "guardian," because she has been providing for the "care and management" of his "person or property." *Webster's Third New International Dictionary*, 1961 (unabridged ed 2002).[7] Indeed, the court implicitly recognized this relationship when it required defendant to pay restitution to Ms. Mosiman as the person caring for Justice for the costs of Justice's care incurred prior to July 6, 2017. *Id.* at ¶ 33; *State of Or. v. Gwendolyn Dawn Vercher*, Case No 17CR36590, Judgment (July 7, 2017) (ordering payment of restitution to Sound Equine Options).

Ms. Mosiman has clearly been acting in the role of Justice's *de facto* guardian. The only remaining question is the mechanism through which she would need to be recognized as a legal guardian for the purposes of this action. Justice contends that Ms. Mosiman, as his guardian, may appear on his behalf under ORCP 27 A. However, Justice's counsel concedes this is uncharted territory. If the court determines that guardianship status for animal guardian requires a court

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[7] In common parlance, the term "guardian" is frequently used to describe one who is responsible for an animal's care and well-being. *See, e.g.*, Oregon Zoo, *Animals in the Classroom*, https://www.oregonzoo.org/sites/default/files/downloads/Animals%20in%20the%20Classroom_OregonZoo_0.pdf (last visited 9/4/2018) ("When you bring a pet into the classroom, you are making a commitment to care for its health and safety. *You are the animal's guardian.*") (emphasis added)); Oregon Humane Society, *Roger*, https://www.oregonhumane.org/adopt/details/168955/ (last visited 9/4/2018) ("Roger came to OHS because his previous *guardian* was spending time overseas[.]") (emphasis added)).

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appointment, Justice is prepared to seek judicial appointment of Ms. Mosiman as his guardian ad litem under ORCP 27 B.

ORCP 27 provides for the appointment of a guardian ad litem "by the court in which the action is brought," either "on the court's motion," or, in the case of an incapacitated person, by motion of "a relative or friend of the person, or other interested person."[8] ORCP 27 A & B(3). Contrary to Defendant's assertion, ORCP 27 does not require a plaintiff to seek appointment of a guardian ad litem prior to the filing of a complaint, and the failure to do so is not fatal to a plaintiff's claim. *See Perez v. Providence Health*, No. 0809-12833, 2009 WL 8708622 (Or Cir Mar 31, 2009) (holding that misidentifying a parent as a guardian ad litem in the complaint and amended complaint was not grounds for dismissal when the guardian ad litem was subsequently appointed).

Finally, even if the Court were to conclude that ORCP 27 does not provide the appropriate mechanism for the appointment of a guardian ad litem in this action, the Court should use its inherent authority to adopt appropriate procedures to ensure "[n]o right is ever permitted to go unvindicated through lack of a procedural statute." *Lefler v. Lefler*, 218 Or 231, 248-49, 344 P2d 754 (1959) (citing ORS 1.160). Where a court has jurisdiction over a matter but no delineated procedure for its adjudication, "the court is not helpless." *Id.* In such a situation, the Oregon Supreme Court explained, courts of this state "will pursue, under those circumstances, the course which the common law courts have taken from the earliest of times, that is, devise the needed procedure." *Id.* In this case, the lack of a procedural statute guiding the appointment of an appropriate guardian under these circumstances should not prevent Justice from seeking compensation from Defendant for his injuries and the cost of his continued care.

[8] Defendant again makes much of ORCP's reference to "persons," but as discussed above, legal "persons" are not limited to human beings, and the Court should thus not interpret the word "person" in ORCP 27 to preclude appointment of a guardian ad litem for Justice.

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I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 3,253, and that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

I further certify that service of a copy of this brief has been served on the following participant(s) in this case by email, and will be served electronically through the Oregon Judicial eCourt filing portal:

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I further certify that I filed this brief with the Appellate Court Administrator on this date.

DATED: February 10, 2020

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