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Fido is One of a Kind: Looking Beyond Fair Market Value in Damages Against Pets

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Looking Beyond Fair Market Value in Damages Against Pets

Richard Tracy

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I. INTRODUCTION

A. Defining “pets”

The special relationship between humans and domesticated animals has existed for millennia. In 1978, archaeologists in northern Israel uncovered the skeletal remains of a human and a dog that had been buried together approximately 12,000 years ago.¹ The skeleton of the human was situated so that its arm embraced the dog while resting the other hand on the dog’s shoulder.² The earliest accounts of domesticated cats date back to Egypt circa 4,000 BC.³ Cats were kept by the Egyptian royalty in the religious temples and the royal court as a symbol of religious significance.⁴ Additionally, dogs were kept as both assistants and protectors, and special Egyptian burial ceremonies allowed for the embalming and entombing of companion animals with their owners in their own specially designed chambers.⁵

Currently, companion animals are generally defined by activists as “those animals who live and share their lives with human beings, who are responsive to and interact emotionally with their guardians, and who are valued as ends in themselves.”⁶ The term “companion animal” is preferred among animal interest activists, in that “companion animal” best describes the relationship between the human being and the domestic animal. It better reflects the role that

¹ Wilson, Catching the Unique Rabbit: Why Pets Should Be Reclassified As Inimitable Property Under the Law, 57 Clev. St. L. Rev. 167, 171 (2009)

² Id at 1064.

³ The Domestic Cat: The Biology of Its Behavior 152-53 (Davis C. Turner & Patrick Bateson eds., Cambridge U. Press 1988).

⁴ Heini Hediger, Wild Animals in Captivity 165 (G. Sircom trans., Butterworths Sci. Publications 1950).

⁵ Paek, Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute, 25 U. Haw. L. Rev. 481, 485 (2003).

⁶ Id.

such animals play in the lives of their owners.⁷ This definition could include many different types of animals found among American homes: fish⁸, mice, rats, rabbits, birds, etc. However, due to the large statistical prevalence of dogs and cats in America, this paper will refer to domesticated dogs and cats when it refers to “pets” and “domesticated” or “companion animals.”

By the numbers, companion animals have a significant presence in American life. In comparison to the rest of the world, the United States has the highest amount of dogs per capita in a human-animal companion relationship.⁹ There are approximately 68 million people in the United States regarded as a guardian to a dog in their household.¹⁰ About 4 in 10 American households have at least one dog.¹¹ Thirty four million households—about 3 in 10—have at least one cat.¹²

B. The personal value of animals to their owners

Pets fulfill a special and unique role in the modern American family. Whereas in centuries past, domesticated animals were often used for their income-producing ability, pets are generally kept for their personal and emotional value to their host family. They are playmates, friends, and protectors. Pets can improve the quality of life for children, adults, and senior citizens.¹³ Additionally, studies have shown that pet ownership assists in the emotional,

⁷ *Id.*

⁸ In 2004, the Supreme Court of New York held that even a household goldfish was considered a “domesticated animal” in the context of an animal cruelty prosecution. *People v. Garcia*, 3 Misc. 3d 699, 705, 777 N.Y.S.2d 846, 851 (Sup. Ct. 2004).

⁹ American Veterinary Medical Association Task Force on Canine Aggression and Human-Canine Interactions, A Community Approach to Dog Bite Prevention, 218 J. Am. Veterinary Med. Ass'n 1732, 1733 (2001)

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Bernard E. Rollin, *The Moral Status of Animals, in Pet Loss and Human Bereavement*, pages 3, 9-10. (William J. Kay et al. eds., 1984)

psychological, and social development of children.¹⁴ For adults, pets provide companionship to those who might otherwise feel isolated and alone.¹⁵ Pets have been shown to lower systolic blood pressure and triglyceride and cholesterol levels in male owners. In fact, merely petting one's own dog has been shown to significantly lower blood pressure.¹⁶

C. A Proposal for Elevated Status

While the specifics vary from state to state, the general American legal consensus regarding animals is that they are simply property. There may be criminal sanctions that protect animals from mistreatment, but in the event that a pet is tragically killed, a bereaved owner will often only receive fair market value in damages for their lost pet. This is an inadequate remedy and fails to appropriately capture the value of companion animals in the modern household. In this paper, it will be argued that companion animals should retain their status as property, but be granted an elevated status within that conceptualization. As a special class of property, companion animals that are unlawfully killed should afford their bereaved owners more than the generic fair market value in damages. Good

To this effect, companion animals should be treated as living, inimitable property. Retaining the property status allows most of the traditional conception of animals to continue and does not threaten the rights of guardians to own and command their subordinate pets. However, in cases where the animal is injured or killed at the fault of another party, they should be granted two distinct remedies: restorative damages in the amount it takes to make the animal whole (i.e., veterinary expenses) or intentionally/negligently inflicted emotional distress claims in cases

¹⁴ Erik H. Erikson, Childhood and Society 247-63 (2d ed. 1963).

¹⁵ Susan J. Hart et al., Role of Small Animals in Social Interaction Between Strangers, 132 J. Soc. Psychol. 245, 253-55 (1992)

¹⁶ Mara M. Baun et al., Physiological Effects of Petting Dogs: Influences of Attachment, in The Pet Connection: Its Influence on Our Health and Quality of Life 162, 168 (Robert K. Anderson et al. eds., 1984).

where the animal is killed. The restorative claim respects the pet's inimitability: the guardians are not made whole by another generic animal of the same breed, but rather having their unique pet restored. Furthermore, granting award for emotional distress claims will address the reality of the emotional bond between owner and pet as living things. This can be achieved by state legislation or by courts implementing this remedy through common law decisions at the state Supreme Court level.

II. HISTORICAL BACKGROUND

A. Legal history of animals as property

The notion of animals as property dates back to antiquity. Aristotle himself remarked in his *Politics* that man was the steward of the earth and "all nonhuman animals were created for (Great Chain of Being?) the sake of humans."¹⁷ According to the book of Genesis, man is given "dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the earth, and over every creeping thing that creeps upon the earth."¹⁸

William Blackstone, one of the greatest influential figures in Anglo-American common law, articulated two categories that all animals fall under: either? domestic animals or wild animals.¹⁹ Domestic, or "companion," animals were recognized by their tame nature, their tendency to remain close to their owner's homes, and the general lack of sporadic movement across property boundaries.²⁰ Their wild counterparts, on the other hand, were noted for roaming freely across property boundaries, thus making it impractical to assign property ownership to

¹⁷ Id, quoting Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals (2000).

¹⁸ Paek, supra note 5, page 491 (citing Genesis 1:26)

¹⁹ Wilson, supra note 1, page 172.

²⁰ Id.

wild animals.²¹ Domestic animals were regarded as generic property, and thus domestic animals were considered to be owned absolutely.²²

In the agrarian societies of the pre-modern era, the legal status of animals as property was apparently? appropriate. In general, animals were used commercially for their labor or special sensory abilities in agriculture: horses and oxen pulling vehicles, dogs for their tracking, cows for milk, etc. A fair market value approach to the tortuous deaths of these animals accurately reflected their role as income-producing entities. Even domesticated cats and dogs were kept for their valuable, non-companionship roles.²³

However, many of the realities of this era are no longer the case in modern America. During this pre-modern era, approximately 90 percent of Americans were engaged in farming and agriculture.²⁴ By 1990, that number had dropped to 2.6 percent of the labor force engaged in agriculture.²⁵ Broadly speaking, animals are no longer kept for their ability to contribute to commercial farming endeavors; rather, they are used as companion pets in the home.

B. Legal history of wrongful death claims

Wrongful death claims were originally a creation of the legislature. At common law, when victims of tortuous behavior were killed, their personal causes of action died with them.²⁶

This legal schema had the perverse incentive for potential defendants to “finish the job” and kill

²¹ Id. All at the same page??

²² Id.

²³ Dogs, of course, served various functions in the rural home - for example, guarding, herding, and hunting. See, e.g., Heiligmann v. Rose, 16 S.W. 931, 932 (Tex. 1891) (guarding); Bowers v. Horan, 53 N.W. 535, 535 (Mich. 1892) (herding); Mo. Pac. R.R. Co. v. Chase, 23 S.W.2d 256, 257 (Ark. 1930) (hunting). Cats were essential in keeping down the rodent population. Smith v. Steineauf, 36 P.2d 995, 997 (Kan. 1934).

²⁴ Economic Research Service, *A History of American Agriculture, 1607-2000: Farmers and the Land* (2000), available at http://www.agclassroom.org/gan/timeline/farmers_land.htm. Accessed November 6, 2012.

²⁵ Id.

²⁶ W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 125 (5th ed. 1984)

an injured plaintiff in order to extinguish their liability.²⁷ Legislatures moved to remedy this situation by enacting wrongful death statutes, creating survival claims for family members to recover from the loss suffered from the resulting death. These claims were intended to provide the surviving family members with the amount of damages arising from economic and emotional loss of a family member's death.²⁸

In the modern United States, a loss of companionship claim within wrongful death law has been generally distilled to encompass eight different criteria, as suggested by the federal district court in In re Farrell Lines Inc. [But that list only applies to humans—that point should be made clear] That court relied upon a legal treatise to list the eight criteria for the purposes of determining a cause of action, calculating the amount of recovery for, and the loss of society in a wrongful death issue.²⁹ The United States Supreme Court has subsequently adopted these considerations in Sea-Land Services, Inc. v. Gaudet³⁰, and they are sometimes referred to as the Gaudet list:

1. Relationship of husband and wife, or of parent and child (or similar relationship between collateral relatives);
2. Continuous living together of parties at and prior to time of wrongful death;
3. Lack of absence of deceased or beneficiary for extended periods of time;
4. Harmonious marital or family relations;
5. Common interest in hobbies, scholarship, art, religion, or social activities;
6. Participation of deceased in family activities;
7. Disposition and habit of deceased to tender aid, solace, and comfort when required; and
8. Ability and habit of deceased to render advice and assistance in financial matters, business activities, and the like.³¹

²⁷ Id.

²⁸ Id.

²⁹ Geordie Duckler, The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation, 8 Animal L. 199, 215 (2002)

³⁰ 414 U.S. 573 (1974). The Supreme Court stated in Gaudet that mental anguish or grief is distinguishable from loss of society and is not compensable under the maritime wrongful death remedy.

³¹ Geordie Duckler, The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation, 8 Animal L. 199, 215 (2002)

Using this list as a comparison tool, one can see how it can easily be applied to the relationship that is commonly held with a companion pet. A household pet can potentially have a closer bond to the members host family than collateral relatives. By being a household pet. a companion pet and the potentially aggrieved plaintiffs share a common living experience as well as “participation” in family activities. Perhaps most tellingly, the seventh element—“disposition and habit of deceased to tender aid, solace, and comfort when required”—speaks the most directly to the purposes of a companion pet. In the research cited above, one of the greatest benefits that companion pets such as dogs and cats provide is the calming and supportive effect that they have on children and adults alike.

A century-old case from the Supreme Court of Oregon has dealt with a pet wrongful death claim that uses a rough parallel to the Gaudet methodology.³² In *McCallister v. Sappingfield*, the court articulated a brief rule for the calculation of the value of a deceased companion animal: “The owner of a dog wrongfully killed is not circumscribed in his proof to its market value, for, if it has no market value, he may prove its special value to him by showing its qualities, characteristics and pedigree.”³³

Since that time, the *McCallister* test has been interpreted in two directions. One interpretation, friendly to animal owner plaintiffs, has regarded the “qualities, characteristics, and pedigree” to mean physical attributes (such as gender, breed, size), psychological attributes (such as personality, friendliness, and demeanor), and personal history (the lineage, breeding, and

³² *McCallister v. Sappingfield*, 144 P. 432 (Or. 1914).

³³ Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 *Animal L.* 199, 216 (2002)

specialized training of the pet), respectively.³⁴ The other interpretation has emphasized the “qualities, characteristics, and pedigree” to merely allude to the utility of a pet.³⁵

In light of this second interpretation, we must ask, what does utility mean? The dictionary definition of “utility” would imply that the animals would be judged by their fitness to some purpose or worth to some end. What, then, is the purpose of modern domesticated animals? In the past, these ends may have been for the animals’ labor value on a farm or for food. In the modern day, companion animals are rarely used for “work” in the economic or commercial sense. Under a strict definition of utility in this context, these pets would be considered valueless.³⁶

C. Legal history of emotional distress claims

Some transition to explain the value of this as a means to get extra value for pets]Traditionally, there are three tests for applying emotional distress claims. The first, the impact test, requires that the defendant to cause emotional distress through his conduct which resulted in actual physical contact with the victim. This contact must be the proximate cause for fear, anxiety, and physical injury—regardless the injury’s miniscule nature. Here, the plaintiff can only recover for their own mental distress resulting from the tortious contact.³⁷

³⁴ Id.

³⁵ Id.

³⁶ Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 *Animal L.* 199, 216 (2002)

³⁷ Wilson, *supra* note 1, page 57

The second test is the zone of danger test. There is no physical touch required between the defendant and plaintiff, but the plaintiff must show that he or she was placed into an immediate risk of harm by the defendant's behavior.³⁸

Lastly, the bystander test allows a plaintiff to recover when the defendant could or should have foreseen that his or her conduct would cause emotional distress to bystanders. The plaintiff must witness or physically experience the death or injury of another person—and this must be the proximate cause of the emotional distress.³⁹

III. THE STATUS QUO AND ITS PROBLEMS

In light of the above mentioned trends in law, we must see how they are applied in the current context of animal law; and, specifically, how the general rules concerning valuation of property and the skepticism shown toward granting emotional damages affect the unique situation of harmed and killed pets. Even more importantly, we must see how the status quo is inadequate in addressing these special scenarios.

A. Fair market valuation

Fair market value is generally defined as the amount a willing buyer will pay for, and a willing seller will exchange for, an item when neither party is under compulsion to engage in the transaction.⁴⁰ The fair market value of pets will vary widely depending on certain characteristics of the animal, including its age, breeding, health, behavior, its unique characteristics, etc.⁴¹

³⁸ Id.

³⁹ Id.

⁴⁰ Dan B. Dobbs, Law of Remedies 324 (2d ed. 1993).

⁴¹ Id.

Generally, only specialty and purebred animals will be regarded as having any significant fair market value; for instance, a purebred show animal could be considered to have a fair market value of several hundred dollars.⁴² A successful race horse may be able to generate millions of dollars over its lifetime.⁴³ However, the typical house pet has a negligible market value, usually valued at \$200 or less.

Indeed, a 1994 study by the American Association of Pet Product Manufacturers estimates that approximately 2.1 million dogs available for adoption were instead euthanized in shelters every year (though it is not indicated how many of that number are euthanized for health reasons), indicating that there is a surplus of common dogs with no market value?.⁴⁴

B. Skepticism of emotional damages claims

In the majority of tort cases involving the damage or destruction of property, the harm is calculated based merely on the market value of the property.⁴⁵ It is a default rule that, in these cases, there may be no non-economic damages as "the courts in general appear to be extremely reluctant to allow recovery for mental disturbance occasioned by a merely negligent injury to chattels."⁴⁶

As an illustration, the Supreme Court of Nassau County, New York, decided a case regarding a claim for negligent infliction of emotional distress upon the death of a pet. The defendant had negligently driven his automobile at an excessive speed and struck one of

⁴² Alexandra Rockey Fleming, A Breed Apart; Show Dogs Compete for Prizes at Fairfax Event, Wash. Times, Apr. 28, 2002, at D4 (stating that cost of purebred 'pet quality' English setter is more than \$500, a show dog even more)

⁴³ Joe Drape, Triple Crown Legend is Gone: Seattle Slew Dies at 28, N.Y. Times, May 8, 2002, at D1 (noting that famous race horse earned over one million dollars in purses and commanded \$750,000 per breeding).

⁴⁴ <http://www.naiaonline.org/naia-library/articles/are-there-too-many-dogs-and-cats/>, accessed 10/28/2012

⁴⁵ See Victor E. Schwartz et al., Prosser, Wade and Schwartz's Torts 519 (10th ed. 2000), 547.

⁴⁶ W.E. Shipley, Annotation, [Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property](#), 28 A.L.R. 2d 1070 § 2 (2004).

plaintiff's dogs while she was walking them. The dog was killed in front of the plaintiff. The court dismissed these claims, stating:

While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree . . . The court is unaware of any recent case law extending the rule to the loss of a family pet.⁴⁷

The court acknowledged that our society may be prepared to offset case law? in order to correct wrongs, but cited the threat of an "unnecessary burden on the ever burgeoning caseloads of the court." It then noted that this burden might be created if the courts were opened to the emotional damages suffered in cases such as these. The court also seemed to express hesitation at the prospect of being one of the first jurisdictions to break from the traditional position. However, it is submitted that courts might now be more willing to grant claims of *intentional* infliction of emotional distress, since the element of intent would mitigate the potential danger of an "opening of the floodgates."

C. Shortcomings of the system

i. Unique value to owner

Courts are rightfully skeptical of emotional damages claims. However, stripping the remedy to the mere fair market value of the animal does not provide a solution that makes bereaved owners whole again. Simply put, the injury caused by the death of a pet is not related to its economic value. Pets are valued for their unique attachment to the owner and with characteristics that make them appealing to that owner. Therefore, an objective fair market value

⁴⁷ Johnson v. Douglas, 187 Misc. 2d 509, 511, 723 N.Y.S.2d 627, 628 (Sup. Ct. 2001) aff'd, 289 A.D.2d 202, 734 N.Y.S.2d 847 (2001)

standard that asks what a generic buyer and a generic seller would agree to for a generic animal is inadequate—it fails to address the particulars of a pet’s death.

ii. Emotional connection

As stated, the classification of pets as property fails to account for the unique emotional connection shared between pets and their host families or owners. The personal value of property, such as a table or a computer, does not compare to the bond shared between a human and another living thing.

Many studies have shown that the grief due to the death of a pet is not clinically different than that of the death of a family member.⁴⁸ Pet owners often show the same emotional responses when a pet is sick or terminally as if the suffering animal were a human.⁴⁹ Furthermore, a survey of parents reported that seventy-four percent felt that they and their children would experience significant emotional distress if their dog were killed or lost.⁵⁰ The proven emotional distress that pet owners experience when a pet dies shows a shortcoming in the current legal framework: pet owners experience as much distress at the illness and death of a pet as they do a family member, but the law only offers remedies for the latter.

IV. PROPOSED SOLUTIONS

The legal status of children has shifted over the last century.^{fn} In the face of the shortcomings in the law regarding pet harm or death listed above, there are potential solutions that utilize existing legal concepts that can shift the status of pets in the future. Many of these

⁴⁸ Catherine A. Kotch & James E. Quackenbush, The Bereaved Pet Owner and Social-Work Service Referral, in Euthanasia of the Companion Animal, supra note 19, at 164, 165-66.

⁴⁹ E. Gregory MacEwen, The Pet with Cancer: Impact on the Family, in Euthanasia of the Companion Animal, supra note 19, at 97, 98.

⁵⁰ Susan A. Iliff & Jack L. Albright, Grief and Mourning Following Human and Animal Death, in Euthanasia of the Companion Animal 115, 125.

ideas are already in practice in the United States to some degree. The best solution—allowing for the inimitable value above fair market value and emotional damages resulting from negligent or intentional cause of death—would take the best of each proposal and minimize the shortfalls.

A. Subjective Award value to the owner

Given the shortcomings of the objective fair market value doctrine, a better solution might seem to be the flipside of this objective doctrine, and award the bereaved owner in a wrongful pet death the subjective value to the owner. However, this proposal immediately brings to mind many similar problems regarding the emotional damages issue to humans??. Because this test is purely subjective, rather than objective, it may prove impractical to ascertain reasonable limits to personal value.

In fact, subjective value to the owner can reach unbridled heights. In a concrete example, which occurred between 2004 and 2006, the pet cloning company Genetic Savings and Clone offered the ability to duplicate a pet from its DNA. Some pet owners paid \$50,000 a piece to have their cats cloned, and many others paid \$1,000 to have their pet's DNA stored until the price of cloning was within their ability to pay.⁵¹ An appellate court in Illinois adapted a form of the subjective standard. In Leith v. Frost;⁵² in that case the plaintiff's dog was mauled by defendant's dog.⁵³ The court found that the mauling was due to the defendant's negligence. In assessing damages, the Appellate Court found that pets were considered personal property. However, it recognized that "certain items of personal property, such as heirlooms, photographs, trophies, and pets have no market value... Damages for harm to such items of property are not restricted

⁵¹ Wade Roush, Genetic Savings and Clone: No Pet Project, Technology Review, Mar. 2005, available at <http://www.technologyreview.com/Biotech/14215/>.

⁵² Leith v. Frost, 387 Ill.App.3d 430. at ___ improper cite.

⁵³ Id. at 431.

to nominal damages.” Rather, they may be assessed on “the item’s ‘actual value to [the] plaintiff.’”⁵⁴ The court instructed that actual value may be established by the reasonable and customary cost of necessary veterinary care and treatment. In this case, “the plaintiffs [...] demonstrated how much [the pet] is worth to them by paying \$4,784 for the dog’s veterinary care” as a result of the injury sustained.⁵⁵

It is submitted that a subjective value approach that looks to the reasonable cost of restorative care for injured pets is a feasible approach. It could be significant enough to deter behavior that would result in injured animals as well as to permit for the plaintiff to be made whole.

B. Extend wrongful death and related emotional distress damages to pets

The purpose of wrongful death legislation is to allow surviving family members to receive compensation for the loss that they have suffered. In fact, these statutes [please explain] have specific details expounding upon who has standing to sue and the types of damages available to them.⁵⁶ Wrongful death claims have their basis in human relationships and the traditional bonds of family. These claims are human-centric and are statutorily limited to family relations, thus it is unlikely that courts will expand their coverage to companion animals.⁵⁷ Additionally, many jurisdictions deny recovery for negligent infliction of emotional distress in the event of a pet’s death: because pets are considered property they, as such, are denied in many jurisdictions the satisfaction that harm to property cannot be the source of actionable emotional distress.

⁵⁴ *Id.* at 436.

⁵⁵ *Id.* at 437.

⁵⁶ Wilson, *supra* note 1, page 57.

⁵⁷ *Id.*

A few state courts from around the United States have dealt with such issues.???

Better transition

i. Florida

To exemplify that the law may with respect to companion animals may be changing is a case from the state of Florida, which has allowed for non-economic damages for the negligent death of a companion animal.⁵⁸ In Knowles Animal Hospital v. Wills, the Wills family filed an action against the hospital and veterinarian that treated the Wills family dog. While under the care of the hospital, the dog was kept on a heating pad inside a cage for nearly two days. The dog suffered a severe burn and disfigurement due to the negligence of the hospital. A jury was instructed to weigh the mental pain and suffering of the plaintiffs as consideration in their awards. The jury returned a verdict against the hospital for how much?.⁵⁹

The appeals court affirmed the result. However, the status of the animal as a “companion” was not used as a rationale for the affirmation of the mental pain and suffering award; rather, the court stated that the jury could “no doubt view the neglectful conduct which resulted in the burn injury suffered by the dog to have been of a character amounting to great indifference to the property of the plaintiffs, such as to justify the jury award.”⁶⁰

In this case there was no distinction between the pet and any other type of property. Thus, it seems that the Florida court did more to reinforce the scope of negligent infliction of emotional distress generally than it gave any advance or expansion of claims to the relationship between a companion animal and its guardians.

⁵⁸ Knowles Animal Hosp. v. Wills, 360 So.2d 37, 38 (Fla. Dist. Ct. App. 1978)

⁵⁹ Id. at 38.

⁶⁰ Id. at 39.

ii. *Hawai'i??*

The Supreme Court of Hawai'i, similar to the above Florida case, rendered a far more expansive and favorable decision on the negligent infliction of emotional distress claims for the death or injury of a pet.⁶¹

In Campbell v. Animal Quarantine Station, the plaintiffs' nine-year-old pet dog died in a transport van. The dog had been a companion animal to the Campbell family since the pet was a few weeks old. The dog had been flown into Hawai'i ??and was found to be in good health by the Animal Quarantine Station. The dog was then transported in a van with no ventilation devices during a hot afternoon to a pet hospital. The dog died of heat prostration within 15 minutes after the van's arrival. None of the plaintiffs saw their dog die, nor did they ever witness the deceased body of the dog.⁶²

The plaintiffs expressed preoccupation with the death and emotional distress, but never sought psychiatric or medical assistance as a result of the event. They sued the Animal Quarantine Station for negligent infliction of emotional distress. At trial, the plaintiffs were awarded \$1,000, an aggregate of varying amounts for emotional distress.⁶³ What were the "aggreagate amount that were used?]

The Supreme Court of Hawai'i held that the controlling caselaw regarding such negligent infliction of emotional distress was from Rodrigues v. State⁶⁴ and its progeny. The rule that arose in that case deemed that "liability to serious mental distress and held that serious mental distress

⁶¹ Campbell v. Animal Quarantine Station, 63 Haw. 557, (1981)

⁶² Id., at 558.

⁶³ Id., at 558-559.

⁶⁴ Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970)

may be found where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.”⁶⁵

The defense in Campbell asserted that the pet is merely property, and as such, the plaintiffs are barred from having a claim of negligent infliction of emotional distress over the destruction of property. The defense citing other jurisdictions to aid its cause.[what jurisdictions?] The court responded by ruling that, under Rodrigues, sufferers of emotional distress do have a claim for the negligent destruction of their property.⁶⁶

The court further dismissed fears of opening the floodgates, the concern that allowing recovery in these circumstances “would lead to a plethora of similar cases, many which would stretch the imagination,” as the defense argued. The Supreme Court responded by pointing out that there was, in fact, no plethora of similar cases resulting in “unlimited liability.”⁶⁷

Furthermore, the court cited the above Florida case as an example where other jurisdictions have ruled favorably? in a similar fashion under similar circumstances. Therefore, it would seem that the notion of expanding the tort of negligent infliction of emotional distress, under the general doctrine of allowing NIED?? for the destruction of property, is slowly being tested and expanded by a few jurisdictions in the United States.

iii. Virginia

By comparison, Virginia has taken the more common stance of denying emotional distress claims for the death of pets due to their status as property. In that state the destruction of pets is generally not afforded a negligent infliction of emotional distress claim.fn?

⁶⁵ Campbell, supra at 560. Improper cite

⁶⁶ Id., at 564.

⁶⁷ Id., at 564.

As an example? in Kondaurov v. Kerdasha⁶⁸, the plaintiff was involved in a car accident with the defendant. The plaintiff previously suffered from generalized anxiety disorder and depression, and so she acquired a pet dog about 18 months prior to the accident to stabilize her emotional state and moderate her “stress attacks.” She had a very strong emotional attachment to the dog and her psychiatrist described their relationship like a “mother/child unit.” During the accident, plaintiff’s vehicle flipped over and her dog, which had been in the vehicle, was ejected out a window. The dog was missing for 14 hours. The dog was eventually recovered, but its tail had been injured and had to be partially amputated.⁶⁹

At trial, the defendants conceded liability, and thus the jury’s function was to award damages. The plaintiff submitted evidence relating to her emotional distress caused by the injury to the dog. Additionally, the court refused to instruct the jury that damages could not be awarded for emotional distress suffered by the plaintiffs. In the end, the jury awarded plaintiff with \$300,000 in damages. Defendants appealed the result, in part, based on the inclusion of emotional distress evidence relating to the pet and the refusal to provide instructions to the jury to disregard such evidence for the purposes of finding damages.⁷⁰

The Supreme Court of Virginia found that the trial court erred in refusing to give the limiting jury instructions. The court acknowledged that companion animals “occupy a position in human affections far removed from livestock,” and that companion animals often sustain relationships with their guardians emotionally similar to that of a “parent and child.” However, the court pointed out that animals are statutorily defined as personal property within the Virginia code. Virginia law, in the court’s view, has never approved an “award for damages of emotional

⁶⁸ Kondaurov v. Kerdasha, 271 Va. 646.

⁶⁹ Id., 650-651.

⁷⁰ Id., 652-653.

distress resulting from negligently inflicted injury to personal property.”⁷¹ Hence it sustained the verdict for the defendant?

Situations like Virginia’s, where there is a statutory definition of animals as property and prohibitions on receiving non-economic damages as a result of that property’s destruction, create a judicial barrier to awarding emotional distress damages in companion pet cases. The solution for advancing reform in these situations must therefore be through legislative change.

C. Legislative accommodation for emotional damages

This approach may be the simplest way to address the harm of emotional damage in the death or injury of a pet. In a Solomonic fashion, state legislatures may easily “split the baby” by allowing some emotional damages but greatly limit the amount and scope of the liability. However, this approach has potential issues as well. Any maximum allowance amount that is legislatively dictated by statute will be an arbitrary amount; however, one could, also observe that the concepts of wrongful death and emotional damages are themselves arbitrary and, to a certain degree, “artificial.” Still, there will need to be a judicial investigation in each case as to the extent of emotional damages: if the argument against emotional damages is the amount of already-overburdened court resources into calculating such damages, and court resources will have to be applied to this calculation anyway, then shouldn’t courts have the discretion to determine emotional damages without an arbitrary ceiling? At any rate, this will allow for progress in states like Virginia, stated above, where the court is prevented from acting in contravention to legislative decisions on the matter. GOOD

⁷¹ Id. at 658.

The following example provides an illustration of a state that has implemented a legislative approach to better deal with the issue of damages for emotional distress to owners of pets

In the year 2000, Tennessee State Senator Cohen's dog, T-Bo, was killed. This prompted the senator to draft a bill aimed at allowing some emotional damage recovery in pet death suits. The "Tennessee T-Bo Act" provides up to \$4,000 in non-economic damages for intentional or negligent acts to compensate owners for the death of a pet.⁷² The act carves out certain exceptions for its application. It only applies to a companion animal that is injured or killed in its own yard or under its owner's control. Secondly, the provisions only apply to the more populous areas of the state: incorporated areas of counties with a population exceeding 75,000 residents. Non-profit entities, government agencies, and veterinarians are exempted from liability under this statute.⁷³ YOU WERE SUPPOSED TO LOOK AT OTHER STATES SINCE YOUR PAPER CALLS FOR A LEGISLATIVE SOLUTION.

D. Declassify pets as property

Some animal rights activists have advocated the position of declassifying pets as property entirely. This view shifts focus away from the rights of the owner to that of the animal directly. Activists argue that this would streamline the legal conceptual framework to benefit the animal's welfare directly, rather than relying on the guardian to protect the animal's interests.⁷⁴ Some animal rights proponents point to the shifting trend in terminology that their views are becoming

⁷² Roukas, Marcella S., DETERMINING THE VALUE OF COMPANION ANIMALS IN WRONGFUL HARM OR DEATH CLAIMS: A SURVEY OF U.S. DECISIONS AND AN ARGUMENT FOR THE AUTHORIZATION TO RECOVER FOR LOSS OF COMPANIONSHIP IN SUCH CASES.

http://www.animallaw.info/articles/ddus50statesurvey_companion_animals.htm

⁷³ Id.

⁷⁴ Wilson, supra note 1, page 57

more widely supported: over the last decade, numerous municipalities have changed their legal terminology from “animal owner” to “animal guardian,” in places such as Boulder County, Colorado; San Francisco and Berkeley, California; and Amherst, Massachusetts. On the other hand, in all of these instances, there were no other ramifications other than a shift in terminology.⁷⁵

There are two general justifications given for this viewpoint. First, many pet owners consider their pets to be “family members.” Secondly, activists argue that the animals’ sentiency elevates them above the entire property classification schema altogether. This view presents the most radical problems. Primarily, it would open a Pandora’s box of issues on myriad important areas of modern society. Plainly speaking, animals that are not considered property will no longer have owners. Food production would come into question: which animals can no longer be killed against their will for the purposes of human consumption, if they are not considered property? Furthermore, any argument based on the theory of sentience will complicate any potential distinction between sentient companion animals and sentient farm animals, such as cattle or chickens, in awarding protected status.

Also, scientific research with animals would likely become much more difficult, thus hampering any medical or cosmetic advances from animal research that humanity has come to rely on. For the same reasons that there would be no exemptions? for food, any argument for protection based on animal sentiency would probably prohibit distinctions for lab mice and other traditional research animals. The potential to cripple biomedical research into cures for diseases like HIV/AIDS and cancer is a grave concern, and likely not a tradeoff that modern American society is willing to make.

⁷⁵ Paek, *supra* note 5, pages 486-487.

E. Treat pets as inimitable property

The best solution offered would be to treat pets as inimitable property. Pets should still retain their status under the general category of property, but have a conceptual distinction within that category that reflects their unique aspects as living beings with intimate ties to their human owners. Pets are, after all, sentient creatures with a consciousness that is capable of feeling pain and satisfaction. These animals can display human-like emotions or reactions similar to fear, loyalty, loneliness, and love. Pets are capable of making choices based on their experiences and wants, and not out of mere instinctual reaction.

Pets also develop unique personalities based on their interactions throughout life. For example, if, during a kitten's developmental two- to seven-week old period the kitten is handled by humans frequently, it will likely develop a friendly demeanor.⁷⁶ On the other hand, if, during this same period, a kitten is not given human interaction, it will likely remain unsociable for the rest of its life.⁷⁷ Furthermore, the primary reason that pets should be classified separately from inanimate personal property and livestock is because of "their unique personalities and genetic structures that cannot be duplicated or replaced through the purchase of another animal of the same breed, age, color, weight, etc."⁷⁸

Some states have already begun to develop a special, elevated class of property for pets, as shown below:

i. New Jersey

⁷⁶ Anmarie Barrie, *Cats and the Law* 9 (TFH Publications 1990).

⁷⁷ *Id.* page?

⁷⁸ Wilson, *supra* note 1, p. 57.

Recently, the Supreme Court of New Jersey has classified pets as a special class of property. It did so while simultaneously denying emotional damages for the plaintiff as being out of line with the Wrongful Death Act.⁷⁹ In McDougall, the plaintiff was the doting owner of a small “maltipoo” breed dog named Angel. The plaintiff was walking her dog in a suburban neighborhood in Morris Plains, New Jersey, when a large dog belonging to the defendant ran out from defendant’s house. The dog snarled at the plaintiff, picked up Angel in its teeth, and thrashed it about. The plaintiff allegedly screamed and called for help, but plaintiff’s dog died on the pavement where defendant’s dog dropped it.⁸⁰

The plaintiff advanced three arguments in her suit against the defendant for emotional distress?. First, she argued that companion animals should be considered a “close familial relationship,” which would allow a cause of action for emotional distress by witnessing the death of a loved one under *Portee*.⁸¹ Put in fn Secondly, plaintiff argued that the court should follow other jurisdictions that have allowed emotional distress claims relating to the death of a pet and apply such logic to the *New Jersey’s* “close familial relationship” standard. Finally, the plaintiff alleged that the public policy concerns with regard to “opening of the floodgates” are unwarranted.⁸²

The defendant in this case asserted that New Jersey law treats pets as chattel, thereby limiting the amount of compensatory damages to a mere fair market valuation of the dog.

⁷⁹ McDougall v. Lamm, 211 N.J. 203.

⁸⁰ Id., 208-09.

⁸¹ Portee v. Jaffee, 84 N.J. 88 (1980). In this case, a mother watched her son become trapped in an elevator and his subsequent suffering and dying as a result. She sought damages for mental and emotional distress from the landlord and elevator companies. The Supreme Court of New Jersey held that there was a cause of action for the death or serious physical injury of another caused by the defendant’s negligence of a *marital or intimate, familial relationship* between plaintiff and injured person, coupled with observation of the death or injury at the scene of the accident which resulted in emotional distress.

⁸² McDougall, supra note 78, at 212.

Furthermore, the defendant referred to the New Jersey Wrongful Death Act, which statutorily limits the recovery for the death of a human to economic loss, arguing that the court should not give more expansive rights to recovery in the death of a pet than that of a human. Finally, the defendant argued that the previous decision in *Portee* referred solely to emotional distress claims arising from personal relationships between humans.⁸³

In its decision, the court analyzed the circumstances⁸⁴ in the *Portee* line of cases regarding the relationship between the plaintiff and the victim in an emotional distress matter. In Eyrich ex rel. Eyrich v. Dam, 193 N.J.Super. 244, the Appellate Division had rejected a claim for emotional distress based on the plaintiff witnessing the death of a five-year-old neighbor that plaintiff viewed as “the son [she] never had.” The claim was barred in part because plaintiff was not, in fact, “bound to the child by intimate ties.”⁸⁴

The court also reiterated a point made in *Portee* that the connection between the plaintiff and victim must be a “marital or intimate[] familial” one, and that the existence of this particular relationship bond is the “most crucial” of the four elements of the cause of action.⁸⁵ Thus the issue at hand in *McDougall*⁸⁶ was whether the plaintiff’s pet dog fell within the “marital or intimate familial” relationship in order for her to justify her claim of right.

In comparing relationships with companion animals to familial bonds, the court analyzed the role pets play in the lives of their owners. Furthermore, the court noted that there were myriad examples of jurisdictions that had rejected or declined to create a cause of action for the emotional distress caused by the death of a pet.⁸⁶ Some courts have denied the claim based on

⁸³ Id., 212-213.

⁸⁴ Id., 214.

⁸⁵ Id., 215.

⁸⁶ Id., 219-220.

statutory limitations that define dogs or other pets as property. [YOU ARE MISSING MANY FOOTNOTES] Other courts have cited public policy concerns, such as man’s “enormous capacity to form bonds with dogs, cats, birds, and an infinite number of other beings that are non-human” that would make it difficult to restrain the impact of such a change.⁸⁷

Ultimately, the court found pets to be property—but an elevated status of property. As such, there may be no claims for emotional distress arising from the destruction of this property. Citing previous caselaw in New Jersey, the Supreme Court emphasized the longstanding classification of animals as property.⁸⁸ However, the court chose to extend the development of a special classification in the instances of companion animals.⁸⁹ The court cited to Hyland v. Borrás, a case in which the Appellate Division noted that “a household pet is not like other fungible or disposable property, intended solely to be used and replaced after it has outlived its usefulness;” hence the defendant was required to pay the medical expenses of plaintiff’s injured dog resulting from an attack by defendant’s dog.⁹⁰

Thus, the fair market value test was rejected because, in fact, companion animals are not generic or fungible. This is an important distinction between ordinary property and companion animals. The court emphasizes that “pets have a value in excess of that which would ordinarily attach to property, because unlike other forms of personal property, they are not fungible.”⁹¹

V. SUMMATION

⁸⁷ Id., 222.

⁸⁸ Id., 223.

⁸⁹ The court referred to Hyland v. Borrás, 316 N.J. Super. 22

⁹⁰ Hyland, supra, 23.

⁹¹ McDougall, supra note 78, 224.

In conclusion, there currently are significant shortcomings in the legal system with regard to assessing and correcting the harms when a companion animal is injured or killed. The prevailing fair market value assessment, in its formalistic valuation of pets as generic animals, is significantly insufficient in capturing the reality of the modern pet's value to Americans. This approach fails in two ways: by not accounting for the unique and inimitable qualities of each companion animal, and the emotional bond that is typically formed between a host or host family with the animal.

The legislative or court elevation of animals from generic property to inimitable property allowing for an assessment of damages to injured pets at the reasonable restorative veterinary cost will satisfy the first issue. In the case of injured or killed companion animals, state legislatures or courts must allow a cause of action for negligent or intentional infliction of emotional distress in order to acknowledge the significant emotional and mental connection that pets have with their hosts.

YOU WERE SUPPOSED TO LOOK AT OTHER STATE legislatures beyond Tennessee SINCE YOUR PAPER CALLS FOR A LEGISLATIVE SOLUTION.

You don't really explain the way in which society will reach your preferred position.

Still somewhat sloppy, and many fns are improper.

B+