

Companion Animals: A Legislative Proposal to Redefine Their Legal Worth

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I. INTRODUCTION

Angel was a beloved nine-year-old “Maltipoo.” He was just a puppy when he joined the family, which consisted of the parents and two children at the time. As time passed, the children moved out, and the parents divorced. Naturally, Angel and his human “mom,” Joyce, developed a strong emotional bond. They spent every day together and even slept in the same room. They kept each other company and their love for each other was evident. They went on daily walks, and Angel was excited every time Joyce came home. One day, while on their daily walk, a larger dog came out of a house barking and growling. The unimaginable happened. The bigger dog grabbed Angel by the neck and shook him to death in front of Joyce. Angel was dropped to the ground and the larger dog returned to his yard. Joyce was in shock. She screamed and attempted to call for help, but there was nothing she could do. After the incident she was devastated, and even though her home felt empty without Angel, she could not bear the thought of welcoming another dog into her home. Angel was indeed irreplaceable.

Sadly, these events led to an actual legal case.¹ While enduring the emotional trauma of losing her dog under such egregious circumstances, Joyce learned that there is a difference between how people value their

1. McDougall v. Lamm, 48 A.3d 312, 315 (N.J. 2012).

companion animals and how the legal system does. Her emotional injuries from the tragic loss of her dog were meaningless in the eyes of the law.² Angel was an animal, and as such, he is considered property.³ Therefore, she could only recover his fair market value.⁴

Most people consider their companion animals to be members of their family.⁵ They take part in family events, trips, and appear in pictures.⁶ Different studies show that a positive relationship with companion animals positively impacts physical and mental health.⁷ Indeed, companion animals are “the glue” of the family, bringing everyone closer together.⁸ Not only do humans become stressed when a companion animal is sick, but they may grieve a companion animal’s loss as much, if not more than human companion loss.⁹ As the emotional bond between humans and companion animals grows stronger, it is not surprising that we want to reciprocate their unconditional love. Reports show that people spend more money than ever before on their non-human family members to provide them with well-being and happiness.¹⁰ This is reflected in an industry that has steadily grown in the past decades,

2. *Id.* at 314.

3. *Id.*

4. *Id.* at 314, 316.

5. See ANDREA LAURENT-SIMPSON, JUST LIKE FAMILY: HOW COMPANION ANIMALS JOINED THE HOUSEHOLD 27 (2021) (“Without a doubt, American culture has embraced the companion animal as a legitimate family member, extending statuses such as ‘child,’ ‘sibling,’ and ‘grandchild’ to the family dog and cat.”).

6. See generally *id.* (providing several studies and interviews on the various ways people spend their money and time on family pets).

7. See Catherine Amiot, Brock Bastian & Pim Martens, *People and Companion Animals: It Takes Two to Tango*, 66 *BIOSCIENCE* 552, 553-56 (2016).

8. See Cassandra Leow, *It’s Not Just A Dog: The Role of Companion Animals in the Family’s Emotional System* 11-14 (July 26, 2018) (M.S. thesis, University of Nebraska—Lincoln), <http://digitalcommons.unl.edu/cehdiss/317> [<https://perma.cc/QC7S-4YFB>] (on file with University of Nebraska Public Access Theses and Dissertations from the College of Education and Human Sciences).

9. John M. Grohol, *Losing a Pet Can Be Just as Hard as Losing a Loved One*, *PSYCHCENTRAL* (Feb. 27, 2019), <https://psychcentral.com/blog/losing-a-pet-can-be-just-as-hard-as-losing-a-loved-one> [<https://perma.cc/6BGK-JJXA>]; see also Anna Maria C. Behler, Jeffery D. Green & Jennifer Joy-Gaba, “*We Lost a Member of the Family*”: *Predictors of the Grief Experience Surrounding the Loss of a Pet*, 8 *HUMAN-ANIMAL INTERACTION BULL.* 54, 57 (2020) (reporting that participants were found to have similar feelings of bondedness and bereavement to their animal companions as to their human loved ones).

10. Sarah Schmidt, *The Top Trends in the U.S. Pet Industry, According to Experts*, *MKT. RSCH. BLOG* (May 19, 2022), <https://blog.marketresearch.com/the-top-trends-in-the-u.s.-pet-industry-in-2022> [<https://perma.cc/5RUF-2F4Q>].

reporting a fourteen percent increase in sales in 2021, a year where more industries struggled due to the COVID-19 pandemic.¹¹

Despite the prominent role companion animals play in the family sphere, the legal system in the United States still classifies them as personal property. In the realm of tort law, this means that when a companion animal suffers harm due to the conduct of another person, regardless of whether it is intentional or negligent, their owner can only recover the companion animal's commercial value. In addition, emotional injuries, such as emotional distress and loss of companionship, are rarely compensated.

While companion animals have historically been considered property by the law, they have not always been considered family members. This social construct has gradually evolved throughout human history, and the worth of companion animals to their humans has changed over many decades.¹² Animals were initially domesticated for many reasons that were rooted in utility purposes. Like many animal species today, the first companion animals were used for labor (e.g., herding, hunting) and to serve as sources of food or clothing.¹³ So, it is logical that the law did not provide protections for this emotional bond many centuries ago.

As society evolved, a recognition emerged that animals are creatures who feel pain and give love. While animals are now protected from harm under criminal law that gap has not been filled at the same pace in civil law. Despite the familial status and economic expense, tort law is a gaping hole for owners.¹⁴ More specifically, regarding the issue of damages, tort law exists to compensate victims of tortious conduct for the wrongdoing done to them and deter defendants from committing the same wrongful acts in the future. However, in the realm of legal compensation for companion animal harm, the legal remedy available continues to be

11. *Id.*

12. *The Human-Animal Bond Throughout Time*, PERSPECTIVES MAG., Fall 2018, <https://cvm.msu.edu/news/perspectives-magazine/perspectives-fall-2018/the-human-animal-bond-throughout-time> [<https://perma.cc/B93R-7XXU>] (explaining that the “bond between pets and their owners was not always so similar to the relationships humans have with each other. According to Bayer, a life science company, the human-animal bond has evolved for more than 15,000 years, and it began as a working relationship”).

13. *Id.*

14. Please note that the term “owner” will be continuously used throughout this Article. This term refers to or is used in lieu of terms such as guardian, caretaker, or human family member in the context of companion animals. Such a choice is made for purposes of brevity, legal and contextual clarity, and alignment with existing legal terminology, common usage, and understanding.

limited to economic factors. Is the economic value of companion animals the primary concern to their human companions? Are companion animals fungible items that can be replaced easily? Science and data suggest they are not.

Companion animal owners face a reality where under the status quo, they are not compensated for emotional injuries, and wrongdoers are not encouraged to act in a way that avoids harming other people's animals (except for criminal actions). Scholars interested in this topic have proposed the expansion of existing legal causes of action to allow recovery of noneconomic damages such as wrongful death, negligent infliction of emotional distress, and personal injury,¹⁵ or to take animals out of the property categorization.¹⁶ However, to this date, courts around the country continue to deny the expansion of these legal doctrines and, therefore, the recovery of noneconomic damages based on public policy.¹⁷

15. See, e.g., Sonia S. Waisman & Barbara R. Newell, *Recovery of "Non-Economic" Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 71-72 (2001) (proposing legislation allowing recovery for mental anguish, emotional distress, and other non-economic injuries; reasonable burial expenses, court costs and attorney's fees, and other reasonable damages resulting from intentional and negligent conduct; and punitive damages for willful, wanton, or reckless conduct); Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 37 (1998) (arguing that companion animal owners should at least be entitled to the same kind, though not necessarily the same magnitude, of common law damages as are parents of young children wrongfully killed).

16. See, e.g., Debra D. Burke, *A Clarion Call for Emotional Damages in Loss of Companion Pet Cases*, 15 TENN. J.L. & POL'Y 251, 296-98 (2021) (proposing to classify some animals under the "property plus" category to allow recovery of emotional damages in loss of companion animal cases); Waisman & Newell, *supra* note 15; Wise, *supra* note 15; William C. Root, "Man's Best Friend": *Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 446-49 (2002) (proposing changing the characterization of animals as mere property to reflect societal views and punitive damages where injury to the animal is willful, wanton, or reckless).

17. See, e.g., *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (sympathizing with plaintiff's position but holding that there is no Michigan precedent that permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage); *McDougall v. Lamm*, 48 A.3d 312, 314 (N.J. 2012) (holding that while many individuals develop close, familial bonds with their pets, expanding a cause of action for emotional distress due to the loss of a pet would create "an ill-defined and amorphous cause of action that would elevate the loss of pets to a status that exceeds the loss of all but a few human beings."); *Scheele v. Dustin*, 998 A.2d 697, 698 (Vt. 2010) (upholding the award of economic damages for the intentional destruction of their dog by the defendant and holding that the owners could not recover noneconomic damages for emotional distress under Vermont common law); *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 723 S.E.2d 352, 357-58 (N.C. Ct. App. 2012) (holding that the

To address this issue, this Article proposes a legal framework based on counteracting public policy considerations in favor and against the expansion of damage recovery in companion animal cases. First, it is based on the tort principle of fair compensation. In addition, it considers the unique position of companion animals in today's families, recognizing that the value of companion animals is predominantly emotional rather than economic. Finally, it addresses public considerations cited by courts¹⁸ and scholars,¹⁹ such as the danger of unlimited liability where limitless frivolous and fraudulent claims might be filed in court, asking for excessive recovery from tortfeasors, and proposing liability limitations based on them. This will allow courts to change existing precedent by applying a new rule that is more logical, convenient, and ultimately fair for all parties involved.

The core of this legal framework is the recognition of a unique and meaningful emotional bond between humans and their companion animals. It does not seek to elevate animals to the status of human beings or to take them out of the current property classification. Instead, it creates a new cause of action based on their unique position—tortious harm to a companion animal—and proposes to limit liability through the creation of judicial tools, such as factors for the jury to assess the existence and extent of damages of noneconomic injuries and statutory caps on the recovery of noneconomic damages. These proposed liability limitation tools are based on public policy, legal reasoning, science, and current moral values concerning companion animals. Ultimately, this Article aims to create a reasonable legal path to recovery of damages when companion animals are intentionally or negligently harmed, and the owner suffers emotional injuries from the unexpected disruption of a meaningful relationship. It delineates a “how-to” that moves from the mere recognition of such a relationship to a contemporary reform that derives from sound public policy and law principles.

replacement value of the dog was the appropriate measure of damages and that owners' emotional bond with the dog was not compensable under North Carolina law).

18. See cases cited *supra* note 17.

19. See generally Sebastien Gay, *Companion Animal Capital*, 17 ANIMAL L. 77 (2010) (presenting a theory of the economic value of companion animal life based on an economic model that conceptualizes companion animals as an employee-investment hybrid); Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227 (2006) (allowing non-economic damages ignores established common law principles in tort law and will potentially harm animals by raising the cost of veterinary care).

Part II gives an overview of the status of companion animals in the legal system and society. Part III discusses the treatment of animals in tort law and the different approaches utilized by different states; explores examples of how some areas of the law have started to step away from the property frame to treat companion animals more like family members; and delves into public policy considerations alluded to by courts and scholars in opposition to the expansion of damages in companion animal cases. Lastly, Part III proposes a statutory model suggesting that noneconomic damages are awarded based on the existence of a meaningful human-companion-animal relationship. It proposes a new cause of action, defines who can recover damages, and suggests the criteria for an animal to be considered a companion animal for recovery purposes. In addition, this Part delineates the standards that will limit liability to assure that the court system, and the defendants are not unreasonably burdened in providing compensation.

II. COMPANION ANIMALS IN SOCIETY AND THE LEGAL SYSTEM

The relationship between humans and their animal companions is complex and fascinating. It has evolved and continues to gain relevance even after thousands of years. Scientists have yet to determine how far back this relationship goes, but scientific evidence dates back nearly 32,000 years to a skull identified as a Paleolithic dog found in a cave in Belgium.²⁰ Other data estimate that animals grew into the domesticated role they are known for today beginning in the post-modern period as part of the diversification of the American family in the early 1970s.²¹ Even though companion animals have been around for a long time, our relationship with them has adapted to society's changes. In fact, this relationship looks very different than it did in the beginning.

Unlike today, humans did not always view their dogs, cats, birds, and other animals as members of their families. For instance, animals like these were first kept to serve humans.²² It was a working relationship where animals provided some service to people while hunting, farming, or performing other tasks necessary for day-to-day life.²³ Dogs and cats

20. Mietje Germonpré, Mikhail V. Sablin, Rhiannon E. Stevens, Robert E.M. Hedges, Michael Hofreiter, Mathias Stiller & Viviane R. Després, *Fossil Dogs and Wolves from Paleolithic Sites in Belgium, the Ukraine and Russia: Osteometry, Ancient DNA and Stable Isotopes*, 36 J. ARCHEOLOGICAL SCI. 473, 481 (2009).

21. See LAURENT-SIMPSON, *supra* note 5, at 47-70.

22. See *The Human-Animal Bond Throughout Time*, *supra* note 12.

23. *Id.*

would usually live outside, dogs would track and herd, and cats would control the rodent population.²⁴ Animals also served people during wartime.²⁵

So how did dogs and cats go from outdoor working animals to bedside companions? Some suggest World War II contributed to the intensification of the bond between humans and their animals,²⁶ while others suggest it was the advancements in veterinary medicine.²⁷ Others indicate companion animals became family members when humans moved from agrarian to urban households.²⁸ As a result, the attachment between humans and companion animals began to rapidly strengthen. Soon, our animal companions entered the home, climbed on the couch to watch T.V. with us, and even jumped in our beds to cuddle throughout the night. Today, the human-companion-animal bond has evolved beyond sharing a warm spot in the house. They are distinguished from other animals because they “are named, live inside the human home, and are never eaten.”²⁹ However, for those who consider their companion animals to be family members, these relationships go well beyond the definition of a “pet.”³⁰ Today, the most common reason for keeping a companion animal is the companionship they bring to the table.

Many factors make the strength of this relationship evident in today’s society. For instance, companion animals are part of important

24. *Id.*

25. *Id.*

26. See Monika Baár, *From Working Animals to Cherished Pets: Canine Histories Across the Centuries*, 206-207 *HISTORISCH TIJDSCHRIFT GRONIEK* 47, 54-55, <https://www.semanticscholar.org/paper/From-Working-Animals-to-Cherished-Pets.-Canine-the-Ba%C3%A1r/1ea817016cfd5a8c1a888564f1f5db17aab96f08> [<https://perma.cc/DD87-K3BK>] (“[P]articularly because dogs shared the same fate as soldiers on the fighting front. Not only did canines perform important jobs in the war—for example by tracking injured soldiers and delivering messages—but they also provided emotional support for the combatants who were compelled to spend lengthy periods of time away from the families.”); David Grimm, *Dogs and Cats Became Family—and Got Their Shot at Heaven—After World War II, Gravestones Reveal*, *SCIENCE* (Oct. 26, 2020), <https://www.science.org/content/article/dogs-and-cats-became-family-and-got-their-shot-heaven-after-world-war-ii> (“After World War II, however, Tourigny noticed some big changes. Gravestones began to denote owners as ‘Mummy’ or ‘Dad.’ ‘Here Lies My Darling Pixie, Mommy’s Little Angel,’ reads a 1976 marker. And ‘Fluffy’ became ‘Fluffy Smith,’ as pets took on the family name.”).

27. David Favre & Thomas Dickinson, *Animal Consortium*, 84 *TENN. L. REV.* 893, 912 (2017) (explaining that before vaccines and dewormers became available, it was more common for companion animals to live outdoors).

28. See LAURENT-SIMPSON, *supra* note 5, at 41 (stating that the shift in the way humans perceive animals started in the United States during the industrialization and urbanization period).

29. *Id.*

30. *Id.*

family events such as birthdays, weddings, gender reveals, family photos, and vacations.³¹ Living arrangements are also planned around the comfort and well-being of our non-human family members.³² In addition, the companion animal sales industry is booming, with people spending more money on their companion animals than ever before—food and veterinary care represent the most significant expenditures.³³ In 2020, pet industry sales exceeded \$100 billion and are expected to keep growing.³⁴ In 2021, owners spent \$34.3 billion in veterinary care and product sales.³⁵ Additionally, it is not uncommon to see owners take their companion animals to daycare and have pet sitters.³⁶ More owners are purchasing pet health insurance,³⁷ and options such as CareCredit cards³⁸ allow financing not just for human health treatment but also for veterinary services for those that cannot afford expensive treatment.³⁹ Evidently, companion animal health is a primary concern for today’s families. The industry is taking note of the significance of this bond and is capitalizing on it.

A wealth of scientific research shows that this mutually beneficial relationship between people and their companion animals has significant

31. See LAURENT-SIMPSON, *supra* note 5, at 36-38.

32. *Id.* at 27.

33. Harriet Meyers, *Current Trends in Pet Spending 2021-2022*, AM. KENNEL CLUB (Sept. 29, 2021), <https://www.akc.org/expert-advice/lifestyle/current-trends-pet-spending-2021-2022/> [<https://perma.cc/A26M-NEFS>].

34. *Id.*

35. *Id.*

36. *Id.*

37. Kari Steere, *How Many Pet Owners Have Pet Insurance in 2021?*, PAWLICY ADVISOR: PET INS. BLOG, <https://www.pawlicy.com/blog/how-many-pet-owners-have-pet-insurance/> [<https://perma.cc/6EGV-9BXN>] (last visited Mar. 26, 2024) (explaining that in the United States alone, 3,101,956 pets had health insurance by the end of 2020—a 23.2% annual increase in the number of dogs and cats with pet insurance—which is substantially higher than the annual growth witnessed in 2019 (16.7%), 2018 (18%), and 2017 (17.5%)).

38.

Veterinary Financing, CARECREDIT, https://www.carecredit.com/vetmed/?utm_source=SA360&utm_medium=paidsearch&utm_campaign=SR_HW_CCD2C_G-NB-MF-Veterinary-SFI_Restructure_AQ_EVG_EVG&utm_content=animal+credit+card&sitecode=HDMSGOIPN6&gelid=EA1aIqobChMI3ZiNx-vshAMV-y57Bx1GKQRCEAAAYASAAEgLO_fD_BwE&gclid=aw.ds (last visited on Mar. 11, 2024) (stating that “CareCredit knows pets are family too. That’s why we offer veterinary and pet financing to help keep your most cherished family members in top shape”).

39. Jamie Whittenburg, *What is CareCredit for Pets?*, USA TODAY, <https://www.usatoday.com/money/blueprint/pet-insurance/what-is-carecredit/> (Jan. 30, 2024, 6:50 PM) [<https://perma.cc/XXR9-N5X3>].

physical and mental health benefits.⁴⁰ On a physiological level, companion animals have been found to lower blood pressure, serum triglycerides, and cholesterol levels.⁴¹ They have a more positive effect than a spouse or a friend in reducing the cardiovascular effects of stress.⁴² Heart attack patients with companion animals had a higher one-year survival rate than those without them.⁴³ Research has also shown that simply petting a dog “has been found to significantly reduce blood pressure in both the person and the animal.”⁴⁴ Author Froma Walsh discusses a number of similar physiological benefits of bonding with companion animals.

Interactions with companion animals increase and they improve human immune system functioning. [Additionally, several] studies demonstrate the positive impact of pets on coping with chronic conditions and on the course and [efficacy of] treatment of heart disease, dementia, and cancer. . . . [When it comes to mental health benefits, scientific studies have found that companion animals] influence the course and optimal functioning [for those] with pervasive developmental disabilities and mental health disorders, including schizophrenia, depression, anxiety, and ADHD. For instance, those with schizophrenia had less apathy, a better quality of life, and increased motivation [when they lived with a companion animal]. In part, interactions with pets alter the tendency of those with mental problems to focus negatively on themselves. They become more involved in their environment in non-threatening ways with a companionate animal.⁴⁵

This animal-human health connection has even resulted in recognition under housing policies and animal-assisted therapy in institutional settings like hospitals and nursing homes.⁴⁶

As if all these benefits were not enough to prove the importance of companion animals, studies have also shown that companion animals play an active role in the family’s emotional system as well. As author Cassandra Leow explains:

40. See Froma Walsh, *Human-Animal Bonds I: The Relational Significance of Companion Animals*, 48 FAM. PROCESS 462, 466-69 (2009) (discussing health benefits of companion animals).

41. *Id.*

42. *Id.* at 466.

43. *Id.*

44. *Id.*

45. *Id.* (citations omitted).

46. *Id.*

Companion animals are often described as the “glue” in the family; they are said to bring family members together and increase cohesion in the family. Companion animals are also commonly included in family rituals and ceremonies such as buying gifts for them on their birthdays or Christmas. Given the companion animal’s role in the family, the loss of the companion animal can destabilize the family system. . . . [Therefore,] [t]he loss of [a] companion animal[] may illuminate the roles they play in the family’s emotional system and the impact they have on the family.⁴⁷

The modern cultural construct of animals playing an active role within the family presupposes the legal protection of the human-companion-animal bond. Has the legal system evolved to reflect current moral values regarding the relationship with our nonhuman family members? What is the value of companion animals to the legal system when they are tortiously injured or killed? Unlike what an average companion animal owner might think, the legal outlook is not as encouraging.

III. LEGAL BACKGROUND

Traditionally, companion animals have been and still are treated as property in the common law system.⁴⁸ In the United States, only courts of four states out of fifty have treated pets as something more than property.⁴⁹ The issue with this strict interpretation is that the damage or destruction of an inanimate object cannot be compared with the injury or death of a companion animal. Courts often recognize the emotional value of

47. See Leow, *supra* note 8, at 4-5 (citations omitted).

48. See, e.g., Soucek v. Banham, 524 N.W.2d 478, 481 (Minn. Ct. App. 1994) (holding that under Minnesota law, dogs are personal property); Anne Arundel Cnty. v. Reeves, 252 A.3d 921, 933 n.10 (Md. 2021) (noting that under the common law, domestic animals such as pets have been legally classified as personal property).

49. See La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964) (A leashed dog died as a result of a garbage collector hurling a can at her. The court stated, “the affection of a [dog owner] for [their] dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal . . .”); Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981) (The plaintiffs’ dog died after being left in a hot van during transport from the Hawaii Quarantine Station to the veterinarian’s office. The court held that plaintiffs did not need to witness the dog’s death to recover for mental severe distress and that medical testimony was not necessary to substantiate plaintiffs’ claims of emotional distress); Burgess v. Taylor, 44 S.W.3d 806 (Ky. Ct. App. 2001) (The couple in charge of the care of two horses sold them to the slaughter industry. The court allowed plaintiff owner to recover noneconomic damages under IIED); Womack v. Von Rardon, 135 P.3d 542, 546 (Wash. Ct. App. 2006) (A cat was set on fire by plaintiff’s neighbors. The court stated “malicious injury to a pet can support a claim for, and be considered a factor in measuring a person’s emotional distress damages.”).

companion animals but refuse to change precedent stating that their hands are tied by common law.⁵⁰ A Connecticut case helps to illustrate this problem. Here, the plaintiff brought a claim against the officer who removed the plaintiff's dog from her premises and subsequently ordered euthanasia without notifying the owner.⁵¹ The court stated:

Although dogs are considered property; . . . this term inadequately and inaccurately describes the relationship between an individual and his or her pet. That having been said, there is no common-law authority in this state that allows plaintiffs to recover noneconomic damages resulting from a defendant's alleged negligent or intentional act resulting in the death of a pet, nor does the plaintiff refer us to any.⁵²

As law follows societal changes and the relevance of companion animals in the family structure continues to be widely recognized, key areas of the law distinguish animals from other property. Examples include the increase in custody battles over companion animals, will provisions, and the existence of pet trust laws in all fifty states.⁵³ These areas have significantly moved from exclusively categorizing animals within the property frame and, in fact, have recognized that companion animals are family members.

Criminal laws have evolved to recognize the "special status" of animals, with now all fifty states providing felony animal cruelty for intentional acts to companion animals.⁵⁴ However, the same cannot be said with civil tort law, where higher courts continue to rely on the property classification for companion animals.⁵⁵

A. *Legal Classification of Companion Animals*

Under this legal categorization of property, animals are technically not more than inanimate objects. Legal status determines the extent of recovery, and for companion animals, their legal status falls short.⁵⁶

50. Nicole R. Pallotta, *Chattel or Child: The Liminal Status of Companion Animals in Society and Law*, 158 SOC. SCIS. 1, 12-13 (2019) (stating that "[a]lthough courts sometimes express remorse and empathy for animals and their owners," they often decline recovery for emotional injuries).

51. *Myers v. City of Hartford*, 853 A.2d 621, 623 (Conn. App. Ct. 2004).

52. *Id.* at 626 (citations omitted).

53. *See* Pallotta, *supra* note 50, at 2.

54. *Id.* at 5.

55. *Id.* at 4.

56. Angie Vega, *Detailed Discussion of Damages for Death or Injury of Companion Animals*, ANIMAL LEGAL & HIST. CTR. (2022), <https://www.animallaw.info/article/detailed-discussion-damages-death-or-injury-companion-animals> [<https://perma.cc/7RKG-82GW>].

The governing rule in the United States allows plaintiffs whose property has been damaged or destroyed to recover an amount that would enable them to restore their economic interest to what it was before the alteration or destruction occurred.⁵⁷ In other words, they can only recover their economic losses.⁵⁸ This same principle applies in the case of injury or death of companion animals based on the notion that as property, animals belong to their owners.⁵⁹ Therefore, they are entitled to recover the economic value of the animal as compensation.⁶⁰ This means that in assessing the amount of damages suffered by the owner of a companion animal that has been harmed, the law does not consider damages that do not have an economic connotation.⁶¹ To add to this, companion animals typically have little or no economic value as property.⁶² Therefore, emotional injuries such as mental anguish, emotional distress, and loss of companionship are not part of the equation. It is important to note that there is a minority view where some states allow recovery of noneconomic damages for trespass to chattels in general.⁶³ Examples of these states include Tennessee⁶⁴ and Illinois,⁶⁵ which have expanded recovery in companion animal cases by enacting new legislation.

Undeniably, there is a “disconnect between the public perception of the value of companion animals and the recovery allowed by state supreme courts.”⁶⁶ New legal classification of animals is needed, especially in the case of companion animals since they fall in a unique position somewhere in between property and a family member. This puts courts in a difficult situation when they acknowledge the importance of the relationship between humans and their family companions, but they refuse to change the common law precedent that has historically classified all animals as property.⁶⁷ Regardless of whether the legal classification of

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.*

63. *See, e.g.,* Gonzales v. Pers. Storage, Inc., 65 Cal. Rptr. 2d 473, 475 (Cal. Ct. App. 1997) (damages for emotional distress growing out of a defendant’s conversion of personal property are recoverable).

64. TENN. CODE ANN. § 44-17-403 (2021).

65. 510 ILL. COMP. STAT. 70/16.3 (2022).

66. *See* Favre & Dickinson, *supra* note 27, at 896.

67. *See* Christopher D. Seps, Note, *Animal Law Evolution: Treating Pets as Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339, 1344 (2010).

companion animals changes in the near future, companion animal owners should be compensated for their actual losses.

B. Valuation of Companion Animals

When a person suffers an injury due to the tortious conduct of another, that person can seek recovery for their harm in the form of compensatory damages. Compensatory damages can be economic and noneconomic in nature. Additionally, in limited circumstances, punitive damages are available as well. This is because the primary purpose of tort law is to compensate plaintiffs rather than to punish defendants. Although it depends on the jurisdiction, economic damages are generally the remedy available for the damage or destruction of personal property, more specifically, fair market value. The policy behind this principle is that personal property can generally be replaced with an item that has similar characteristics. This same principle applies to companion animals as well.

Interestingly, some states have recognized that companion animals are more highly valued than other types of property and have expanded recovery beyond fair market value, allowing more flexible approaches. A small number of courts allow recovery of veterinary expenses even if they exceed the commercial value of the animal, and others have even recognized what they have called actual value to the owner or intrinsic value.⁶⁸ However, these approaches are limited to economic damages and are always within the principles of property law. Only six states have allowed recovery of emotional distress damages,⁶⁹ either for the destruction of all personal property,⁷⁰ or in the very old Florida case, a

68. See, e.g., *Mitchell v. Heinrichs*, 27 P.3d 309, 314 (Alaska 2001) (holding that the actual value of the pet to the owner, rather than the fair market value, is sometimes the proper measure of the pet's value); *Barking Hound Vill., LLC v. Monyak*, 787 S.E.2d 191, 197 (Ga. 2016) (“[T]he actual value of the animal could be demonstrated by reasonable veterinary and other expenses incurred by its owners in treating its injuries, as well as by other economic factors. . . . [E]vidence of noneconomic factors demonstrating the dog's intrinsic value to its owners would not be admissible. . . . [T]he proper measure of damages for the loss of a pet dog is the actual value of the dog to its owners rather than the dog's fair market value.”); *Leith v. Frost*, 899 N.E.2d 635, 641 (Ill. App. Ct. 2008) (holding that under Illinois law, the pet's actual value is used to determine compensatory damages).

69. See *Burgess v. Taylor*, 44 S.W.3d 806 (Ky. 2001); *Rabideau v. City of Racine*, 627 N.W.2d 795 (Wis. 2001); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454 (Alaska 1985); *Gill v. Morris Brown*, 695 P.2d 1276 (Idaho Ct. App. 1985), *LaPorte v. Associated Indeps., Inc.*, 163 So. 2d 266 (Fla. 1964); *Womack v. Von Rardon*, 135 P.3d 542 (Wash. 2006).

70. *Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 603 (Cal. Ct. App. 2012) (holding that a pet owner could recover for emotional distress under the trespass to personal property cause of action

kind of legal aberration where the Supreme Court awarded \$2,000 to the plaintiff for the defendant's malicious destruction of the plaintiff's pet.⁷¹

The issue with allowing recovery of solely economic damages is that courts are ignoring a real and ascertainable injury, which is the mental anguish of the owner. Therefore, companion animal owners are left with no legal remedy to compensate them when their companion animals are killed or injured. Evidently, the value of companion animals is emotional rather than economic. Veterinary care is expensive and often outweighs the economic value of beloved companion animals. Indeed, if humans only cared about the economic value of their companion animals, small animal veterinarians would not have a job.⁷²

According to the 2021-2022 American Pet Products Association (APPA) survey, 90.5 million households in the United States own a pet. Seventy-five percent of owned cats are mixed breed, and fifty-four percent of owned dogs are mixed breed.⁷³ This shows that most owners do not own companion animals that hold significant market value. Therefore, unless a pet that is not a pure breed has some special training or quality, their market value is most likely zero.⁷⁴ In addition, companion animals are usually adopted and of mixed breed, so their replacement value is usually low.⁷⁵ With fair market value, it may not even be worth pursuing legal action, as the amount that could be recovered is likely not enough to even cover litigation costs.

1. Fair Market Value

Fair market value is the majority rule. As previously noted:

The calculation of damages when personal property is destroyed is the fair market value of the item at the time of destruction or, in other words, the cost to replace it. When property is merely damaged, damages are

because "in a proper case a person's intentional injuring or killing [of] a pet will support recovery of damages for intentional infliction of emotional distress").

71. *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 266, 267, 269 (Fla. 1964).

72. For instance, the average adoption fee for cats and kittens is \$68-317. Compare that with the cost of initial veterinary care of around \$300. This means a new average pet owner can potentially spend far more money on the initial vet visit than what they spent buying or adopting a cat and even more if their animal is sick or suffers an injury. *Adoption Fees*, ANIMAL HUMANE SOC'Y, <https://www.animalhumanesociety.org/resource/adoption-fees> [https://perma.cc/V9PE-R45P] (last visited Feb. 5, 2024).

73. Humane Soc'y U.S., *Pets by the Numbers*, HUMANEPRO, <https://humanepro.org/page/pets-by-the-numbers> [https://perma.cc/3ZKE-V2H2] (last visited Mar. 25, 2024).

74. *See Vega, supra* note 56, at 7.

75. *Id.*

measured by the cost of repair. This calculation also applies in the case of companion animals. When a companion animal is injured, veterinary expenses would be equivalent to the cost of repair. . . . [Under this approach,] when the cost of veterinary care (repair costs) exceeds the value of the injured pet, in some states the “plaintiff’s damages are measured by the fair market value of the injured pet immediately before the loss.”⁷⁶

Regardless, the damages may not exceed the market value before the loss.⁷⁷

Courts like this approach because economic damages are readily ascertainable. To prove these damages, the plaintiff can present evidence of how much was paid to purchase or adopt their animal, or the plaintiff can provide documentation showing proof of pedigree, any special training, health certificates, or any other evidence that helps to prove the value of the animal immediately before the death or injury. For instance, the Georgia Supreme Court held in 2016 that the value of a dog, as with any other property, may be proven by evidence that the dog was of a “particular breed, and had certain qualities, and by witnesses who knew the market value of such animal, if any market value [is] shown.”⁷⁸

There is nothing fair about the fair market value approach in companion animal cases. States that follow the fair market value are failing to compensate pet owners adequately and therefore, are not fulfilling the most fundamental purpose of tort law. This has left companion animal owners in a compromised position where their injury is clearly significant, but there is no real remedy that can appropriately compensate them for their injuries.

2. Actual Value

Market value may provide some recovery when an animal has significant economic value, like in the case of purebred animals, or when they have some special training or are used for shows or in breeding programs. A problem arises when the companion animal that suffers harm is just a regular animal without any commercial value. What about a domestic cat or a seven-year-old dog that is missing a limb? If a companion animal with these characteristics is tortiously injured or killed, the owner will most likely not be entitled to any compensation under the

76. *Id.* (quoting *Warren v. Heartland Auto. Servs.*, 144 P.3d 73, 76 (Kan. Ct. App. 2006); see also *Sherman v. Kissinger*, 195 P.3d 539, 547 (Wash. Ct. App. 2008) (determining the “market value” is its reasonable price at a fair and consensual sale).

77. See *Warren* 144 P.3d at 76-77.

78. *Barking Hound Vill., LLC v. Monyak*, 787 S.E.2d 191, 197 (Ga. 2016).

fair market value approach. To provide a more flexible remedy to companion animal owners whose animals do not hold any commercial value, a minority view considers the “actual cost” or “actual value” of the animal to the owner.⁷⁹

The actual value to the owner is the approach allowed when the commercial value of a particular companion animal is not ascertainable or cannot be calculated.⁸⁰ This valuation does not allow for recovery of damages for emotional loss or loss of the relationship that might otherwise be allowed if the companion animal was not considered mere personal property. Under this approach, courts still value the animals as property but are more sympathetic to the fact that pets may possess some value to the owner even though they lack any market value.⁸¹ While a step in the right direction, the actual value approach still does not allow pet owners to recover noneconomic damages. The Texas case *Strickland v. Medlen* demonstrates how courts assess actual value:

The “true rule” in Texas remains this: Where a dog’s market value is unascertainable, the correct damages measure is the dog’s “special or pecuniary value” (that is, its actual value)—the economic value derived from its “usefulness and services,” not value drawn from companionship or other non-commercial considerations. . . . While actual value cannot include the owner’s “feelings,” . . . it *can* include a range of other factors: purchase price, reasonable replacement costs (including investments such as immunizations, neutering, training), breeding potential (if any), special training, any particular economic utility, veterinary expenses related to the negligent injury, and so on.⁸²

The issue with fair market value and actual value is that these approaches disregard the potential sentimental value that a companion animal represents. It also neglects those “special values” pets provide their owners in terms of reciprocal emotional bonds. Noneconomic damages focus on the emotional injury that owners suffer, which is ultimately what drives plaintiffs to seek recovery in court. It is about more than money with companion animal owners. Unfortunately, virtually all state supreme courts have rejected this approach and continue to limit recovery to the fair market value or the actual value of the companion animal.

79. See Seps, *supra* note 67; Waisman & Newell, *supra* note 15.

80. See Schwartz & Laird, *supra* note 19, at 241-42.

81. *Id.*; see also Mitchell v. Heinrichs, 27 P.3d 309, 313-14 (Alaska 2001); Leith v. Frost, 899 N.E.2d 635, 640-41 (Ill. App. Ct. 2008); Sherman v. Kissinger, 195 P.3d 539, 547-48 (Wash. Ct. App. 2008); Strickland v. Medlen, 397 S.W.3d 184, 192 (Tex. 2013).

82. *Strickland*, 397 S.W.3d at 192, 193 n.58 (citations omitted) (emphasis in original).

a. Noneconomic Value

No clear path to the recovery of noneconomic damages exists in the United States for injury or death to companion animals. In fact, it is almost non-existent. The holdings in the cases that have entertained such damages tend to reflect egregious fact patterns or narrow holdings.⁸³ Noneconomic damages are exactly what they sound like. They are damages awarded to compensate for nonpecuniary losses⁸⁴ such as pain, mental suffering, emotional distress, loss of companionship and society, and loss of consortium.⁸⁵

David Favre and Thomas Dickenson note that “[t]he extent of recovery for harm to a companion animal will depend first upon the cause of action utilized, and second, upon the scope of damages allowed under that cause of action.”⁸⁶ Owners alleging injuries due to the harm inflicted upon a companion animal often request to add “sentimental value” or “loss of companionship” to the calculation of their damages award.⁸⁷

Despite plaintiffs asking courts to recognize and compensate their emotional losses for over a century,⁸⁸ courts are still unwilling to award damages for the owner’s mental suffering because they “decline to extend such claims [for the harm] of something that the law considers to be property.”⁸⁹

Despite the general rule, some legislatures and some narrow holdings have allowed non-economic damages. The first instance was in

83. For instance, states that have allowed recovery under this approach have done so either by allowing emotional distress damages for damage or destruction of property or under intentional or negligent infliction of emotional distress and veterinary malpractice. *See, e.g.*, *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 268-89 (Fla. 1964); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067-69 (Haw. 1981); *Burgess v. Taylor*, 44 S.W.3d 806, 812-13 (Ky. Ct. App. 2001); *Womack v. Von Rardon*, 135 P.3d 542, 543-44, 546 (Wash. Ct. App. 2006). More recently, courts have allowed expanded recovery under violation of constitutional rights claims when the government or a government agent unreasonably seizes or kills a companion animal. These cases were tied to a federal civil rights law with completely different determinations for damages. *See Moreno v. Hughes*, 157 F. Supp. 3d 687, 690-91 (E.D. Mich. 2016); *Brooks v. Jenkins*, 104 A.3d 899, 912-14 (Md. Ct. Spec. App. 2014).

84. *In re Nalle Plastics Fam. Ltd. P’ship*, 406 S.W.3d 168, 174 (Tex. 2013).

85. *See, e.g.*, OR. REV. STAT. § 31.705 (2023) (defining noneconomic damages).

86. *See Favre & Dickinson, supra note 27*, at 895.

87. *See Pallotta, supra note 50*, at 12-14.

88. *See, e.g.*, *Allen v. Camp*, 70 So. 290, 290 (Ala. Ct. App. 1915) (The plaintiff sought \$5,000 against the defendant as damages for wrongfully shooting his dog. Among other things, plaintiff alleged that his wife had suffered mental pain and suffering, resulting in loss of consortium and large medical bills.).

89. *See Susan J. Hankin, Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL’Y 314, 332 (2007).

1964. In the stalwart Florida case, *La Porte v. Associated Independents* (which, oddly enough, still stands), the Supreme Court of Florida held that the plaintiff was entitled to recover damages for mental distress suffered from the malicious destruction of her dog by the respondent's employee. *La Porte* has been distinguished in its application in future animal law cases and has not been overturned in almost six decades. Here, the court stated:

The affection of a [dog owner] for [their] dog is a very real thing and that the malicious destruction of the pet provides an element of damages for which the owner should recover, irrespective of the value of the animal because of its special training, such as a Seeing Eye dog or sheep dog.⁹⁰

It is important to note that in 1978, a Florida court of appeals used *La Porte* as persuasive authority to allow the plaintiff to recover noneconomic damages arising from the defendant veterinarian's negligent conduct, which resulted in the burn injury suffered by the plaintiff's dog.⁹¹

It took more than forty years for the next case, and it involved uniquely egregious facts. In the case *Womack v. Von Rardon*, a Washington court of appeals held that the "malicious injury to a pet can support a claim for, and be considered a factor in measuring a person's emotional distress damages."⁹² Here, the plaintiff sought emotional distress damages arising from the malicious burning of her cat, "Max," by the neighbors' minor children.⁹³ The court in this case awarded \$5,000 based on the plaintiff's emotional distress.⁹⁴

Within recent decades, a few states have explored new approaches. For example, in the California case *Plotnik v. Meihaus*, the plaintiff's dog sustained injuries from being hit with a baseball by the plaintiff's neighbor. A court of appeals held that a pet owner might recover for emotional distress under trespass to personal property.⁹⁵

In the more recent Louisiana case *Barrios v. Safeway Insurance Co.*, the court of appeal allowed both owners of a dog to recover damages in the total amount of \$10,000. The plaintiffs sued the motorist for mental anguish and property damage for hitting and killing their dog with his car. Here, the appellate court acknowledged the existence of an emotional

90. *La Porte v. Assoc. Indeps., Inc.*, 163 So. 2d 266, 269 (Fla. 1964).

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

92. *See Womack v. Von Rardon* 135 P.3d 542, 546 (Wash. Ct. App. 2006).

93. *Id.* at 543-44.

94. *Id.* at 544, 547.

95. *See Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 599, 601 (Cal. Ct. App. 2012).

bond between the plaintiffs and their dog and stated: “[a]lthough a pet is considered corporeal movable property in Louisiana, clearly, pets are not inanimate objects. This Court takes judicial notice of the emotional bond that exists between some pets and their owners, and the “family” status awarded to some pets by their owners.”⁹⁶

It is important to note that although *Barrios* is still valid, it is an anomaly and an exception to the majority rule. This court of appeal recognized the importance of the relationship of humans with their dogs, regardless of the dog’s property status, and allowed recovery of damages based on the mental anguish alleged by the plaintiffs.⁹⁷ In addition, the court allowed recovery of damages arising from negligent conduct (a car accident), which most jurisdictions unequivocally still refuse to allow.⁹⁸

Finally, Hawaii had a unique approach. The Supreme Court of Hawaii in *Campbell v. Animal Quarantine Station* affirmed the trial court’s decision in a case where the plaintiffs’ dog died after being left in a hot van during transport from the Hawaii Quarantine Station to the veterinarian’s office. In this case, the court held that serious mental harm could be inflicted when someone endures negligently inflicted property damage.⁹⁹ Furthermore, the court held that the plaintiff did not need to witness the dog’s death to recover for serious mental distress and that medical testimony was not necessary to substantiate plaintiff’s claim of emotional distress.¹⁰⁰ Unfortunately, this innovative approach was invalidated five years later by HRS § 663-8.9, which abolished serious emotional distress arising from all property damage.¹⁰¹ However, it continues to be cited by scholars who advocate for the expansion of noneconomic damages in companion animal cases.

96. *Barrios v. Safeway Ins. Co.*, 2011-1028, pp. 5-7 (La. App. 4 Cir. 3/21/12), 97 So. 3d 1019, 1023-24. *But see* *Repin v. State*, 392 P.3d 1174, 1176 (Wash. Ct. App. 2017) (refusing to allow *Barrios v. Safeway Insurance Co.* as valid authority because Louisiana’s Napoleonic code allows recovery of damages in breach of contract for nonpecuniary losses).

97. *Barrios*, 2011-1028 at pp. 6-7; 97 So. 3d at 1024.

98. *Id.*

99. *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981).

100. *Id.* at 1069, 1071.

101. HAW. REV. STAT. § 663-8.9 (2023).

Serious emotional distress arising from property damage; cause of action abolished; exception for physical injury.(a) No party shall be liable for the negligent infliction of serious emotional distress or disturbance if the distress or disturbance arises solely out of damage to property or material objects.

(b) This section shall not apply if the serious emotional distress or disturbance results in physical injury to or mental illness of the person who experiences the emotional distress or disturbance. *Id.*

Courts started allowing noneconomic damages back in 1964 with the *La Porte* case. But, sadly, after almost six decades, only four oddball states allow noneconomic damages arising from harm inflicted on companion animals.

Most jurisdictions will allow recovery for intentional infliction of emotional distress if the elements of the claim are met. However, this narrow cause of action is allowed only if the defendant harmed the animal with the intention to inflict emotional distress on the plaintiff and if the conduct is outrageous.¹⁰² So, even if a defendant intended to injure or kill a companion animal, recovery under this cause of action will not be available if they did not intend to cause emotional distress.¹⁰³ This means that unless the state allows recovery of emotional injuries for damage or destruction of property, companion animal owners will most likely not have a legal remedy that redresses their emotional injuries.¹⁰⁴

While judges refuse to change precedent to adjust common law and court opinions continue to be circular, humans that suffer the loss of a companion animal they love and consider family continues to be uncompensated. As Judge Hotten stated in his dissenting opinion in the 2021 case *Anne Arundel County v. Reeves*: “[g]iven prevailing societal values, attitudes, and norms, it no longer appears tenable to deny emotional damages for a cherished family dog . . . in the same way that the common law precludes emotional damages for an inanimate object that was accidentally broken.”¹⁰⁵

Although the overwhelming majority of courts have repeatedly held that noneconomic damages cannot be awarded in companion animal cases,¹⁰⁶ six states have expanded damage recovery beyond fair market value through the enactment of legislation. Of those six states, only three

102. *Burgess v. Taylor*, 44 S.W.3d 806, 811 (Ky. Ct. App. 2001).

103. *See id.*

104. *Id.* at 815 (the court upheld the trial court’s award of actual value, along with compensation and punitive damages, in a case involving the conversion and sale of pet horses to a slaughter buyer).

105. *Anne Arundel Cnty. v. Reeves*, 252 A.3d 921, 943 (Md. 2021) (Hotten, J., dissenting).

106. *See, e.g., Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 814 (Ohio Ct. App. 2003) (“Whether or not one agrees with the view that pets are more than personal property, it is clear that Ohio does not recognize noneconomic damages for injury to companion animals.”); *Kaufman v. Langhofer*, 222 P.3d 272, 279 (Ariz. Ct. App. 2009) (holding that it would not be appropriate to expand Arizona common law to allow a pet owner to recover emotional distress or loss of companionship damages because that would allow broader compensation for the loss of a pet than for the loss of a person); *Scheele v. Dustin*, 998 A.2d 697, 698 (Vt. 2010) (holding that plaintiffs cannot recover noneconomic damages arising from the intentional killing of a dog).

have statutes that allow recovery for noneconomic injuries. Tennessee allows noneconomic damages up to \$5,000 for the intentional or negligent killing of a pet but requires that the incident must have occurred either on the owner or pet caretaker's property or while in the control and supervision of the caretaker.¹⁰⁷ Under this statute, noneconomic damages cover "reasonably expected society, companionship, love and affection of the pet."¹⁰⁸ Illinois allows recovery of emotional distress damages for the intentional killing of an animal for up to \$25,000 for each act of cruelty.¹⁰⁹ Oregon allows the owner of a search and rescue animal or a therapy animal to recover noneconomic damages against any person who steals or, without provocation, attacks the search and rescue animal or therapy animal.¹¹⁰ Note that Tennessee is the only state that allows this type of damages recovery in negligent actions but requires that the incident occurs on the owner's property or while the dog or cat was under the owner's supervision or control.¹¹¹ This demonstrates how out of sync society and the law are in this area.

3. Legal Distinction of Companion Animals from Other Types of Property: Pet Trusts, Animal Cruelty Laws, Custody Battles, Hot Car Laws

As Sande Buhai has recently observed: "Americans are deeply connected to their companion animals, regardless of what remedies the law affords animals. Because the law follows culture, recent legislative and judicial developments [in key legal areas other than tort law] have begun to reflect the bonds formed between humans and nonhuman animals."¹¹²

Companion animals are cherished family members, and we naturally want to provide for them after we die. However, companion animals cannot inherit via a will because they are considered property. Consider the development of pet trusts in the United States. As of 2022, all fifty states and the District of Columbia have enacted pet trust laws.¹¹³ Thanks

107. TENN. CODE ANN. § 44-17-403(a)(1) (2021).

108. *Id.* § 44-17-403(d).

109. 510 ILL. COMP. STAT. § 70/16.3 (2022).

110. OR. REV. STAT § 30.822 (2023).

111. *See* TENN. CODE ANN. § 44-17-403(a)(1).

112. Sande L. Buhai, *Pets as Property: Signs of Change in the Law of Judgment Collections*, 26 ANIMAL L. 171, 171 (2020).

113. *Map of States with Companion Animal (Pet) Trust Laws*, ANIMAL LEGAL & HIST. CTR. (2022), <https://www.animallaw.info/content/map-states-companion-animal-pet-trust-laws#:~:text=>

to these laws, companion animals can be beneficiaries of trusts created by their owners with the purpose of securing their well-being. Through the creation of an animal trust, the owner can also include specific directions regarding the care of the animal.

Another area of law that has changed relatively recently is divorce and family law. Some “courts have begun to take into account the best interests of the family as a whole (including those of the animal) rather than looking solely at market value and formal indicia of ownership.”¹¹⁴ In this area, courts are approaching pet custody issues similar to custody issues concerning children.¹¹⁵ In addition, some courts have acknowledged that the special relationship humans have with their companion animals differs from humans’ relationship with ordinary property.¹¹⁶ It is important to note that the application of the best interest standard approach is discretionary.¹¹⁷

There is also a legislative trend empowering courts to take the well-being of animals into account in divorce proceedings.¹¹⁸ Furthermore, “[t]hese new laws are accelerating the shift already underway, . . . challenging the strict property paradigm as applied to animals in custody cases.”¹¹⁹ For instance, Alaska signed HB 147 into law in 2016—the first law allowing judges to take the “well-being of the animal” into account in pet custody disputes.¹²⁰ As of 2021, California,¹²¹ Illinois,¹²² New

=Details,-Hover%20over%20state&text=Summary%3A%20As%20of%202022%2C%20all,pet%20trust%20law%20in%202016.

114. See Buhai, *supra* note 112, at 173 (citing L. Morgan Eason, *A Bone to Pick: Applying a Best Interest of the Family Standard in Pet Custody Disputes*, 62 S.D. L. REV. 79, 80, 85 (2017)).

115. *Id.* (citing Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals When Their Owners Get Divorced*, 2 J. ANIMAL L. & ETHICS 231, 245-46 (2007)); see, e.g., Baggett v. Baggett, 422 S.W.3d 537, 550 (Tenn. Ct. App. 2013) (holding that the trial court properly considered the needs of the parties’ dogs and the ability of the parties to care for them when the husband appealed the division of property).

116. See Pallotta, *supra* note 50, at 10.

117. *Id.*

118. *Id.* at 11.

119. *Id.*

120. See Nicole Pallotta, *Alaska Legislature Becomes First to Require Consideration of Animals’ Interests in Custody Cases*, ANIMAL LEGAL DEF. FUND (Jan. 20, 2017), <https://aldf.org/article/alaska-legislature-becomes-first-to-require-consideration-of-animals-interests-in-custody-cases/>; see also ALASKA STAT. § 25.24.160 (2022).

121. CAL. FAM. CODE § 2605 (West 2022) (amends California’s Family Code. The court is allowed to take into consideration “the care of the pet animal.”).

122. 750 ILL. COMP. STAT 5/452, 5/501-503 (2022) (amendment to several provisions under Act 5, the Illinois Marriage and Dissolution of Marriage Act. Under this law, “the court shall take into consideration the well-being of the companion animal”).

Hampshire,¹²³ Maine,¹²⁴ and New York¹²⁵ have passed “pet custody” laws similar to Alaska’s.¹²⁶

The law of judicial liens has also shown a shift in how the law treats animals. Eight states currently provide debtors with specific exemptions for companion animals; twenty-six others permit debtors to include companion animals in a broader exemption that incorporates other types of property up to some limited aggregate fair market value.¹²⁷ To date, only sixteen states still allow creditors to seize or threaten to seize companion animals to satisfy their debts.¹²⁸

Within the negligence arena, more than half of the states have enacted “hot car” laws,¹²⁹ where they either prohibit leaving an animal in a vehicle confined under dangerous conditions or provide civil immunity (protection from being sued) to a person who rescues a distressed animal from a vehicle.¹³⁰

Lastly, in criminal law, animal anti-cruelty statutes have been enacted in all fifty states, with the first being passed in 1829.¹³¹ Now all states have a felony animal cruelty law on the books.¹³² These state laws penalize intentional acts to hurt an animal and failure to act or animal neglect. Scholar Nicole Pallotta could not have illustrated it better: “You will not be punished for kicking your coffee table or trashing your bicycle.

123. N.H. REV. STAT. ANN. § 458:16-a (2022) (stating that “the property settlement shall address the care and ownership of the parties’ animals, taking into consideration the animals’ wellbeing”).

124. ME. STAT. tit. 19-A, § 953 (2022) (allowing the judge to consider the well-being of the companion animal and all relevant factors upon dissolution of marriage).

125. N.Y. DOM. REL. LAW § 236 (McKinney 2022) (requiring the best interest of a companion animal to be considered when awarding possession in a divorce).

126. See Pallotta, *supra* note 50, at 11.

127. See Buhai, *supra* note 112, at 186-87.

128. *Id.*

129. *Exposing the Danger of Dogs in Hot Cars*, 41 THE ANIMALS’ ADVOCATE, Summer 2022, at 3-4.

130. Rebecca F. Wisch, *Table of State Laws that Protect Animals Left in Parked Vehicles*, ANIMAL LEGAL & HIST. CTR. (2023), <https://www.animallaw.info/topic/table-state-laws-protect-animals-left-parked-vehicles>.

131. N.Y. REV. STAT. of 1829pt. IV, ch. 1, tit. 6, § 26 (“Every person who shall maliciously kill, maim, or wound any horse, ox or other cattle, or any sheep, belonging to another, or shall maliciously and cruelly beat or torture any such animal, whether belonging to himself or another, shall, upon conviction, be adjudged guilty of a misdemeanor.”).

132. *Laws that Protect Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/laws-that-protect-animals/> [<https://perma.cc/MS5J-QT57>] (last visited Feb. 6, 2024).

However, if you abuse your dog or cat, you . . . could be prosecuted for animal cruelty.”¹³³

Clearly, the perception that companion animals as unique members of a family is starting to permeate other areas of the law. Some areas, such as trusts and criminal law, are evolving more rapidly than others. Unfortunately, the law has remained rather stagnant when it comes to damages compensation. Companion animals are indeed becoming more like children than replaceable objects in many areas of law. These laws and court decisions may have a rippling effect in the area of damages as well. Undeniably compelling public policy considerations push us to redefine how tort law compensates those who are emotionally injured when their companion animals are tortiously harmed.

4. Public Policy Considerations Denying Expansion of Damages in Companion Animal Cases

For decades, courts have acknowledged the existence of an emotional bond between humans and their animal companions,¹³⁴ yet they routinely declare they are bound by common law.¹³⁵ Courts often rely on several public policy concerns that are unpersuasive and not attuned to modern views of companion animals.¹³⁶ This legal trend ignores evolving public policy considerations and deprives owners of fairness in their claims by overlooking the reality of the existing bond between humans

133. Palotta, *supra* note 50, at 4.

134. *See, e.g.,* *McDougall v. Lamm*, 48 A.3d 312, 314 (N.J. 2012) (holding that while the Court recognized that many individuals develop close, familial bonds with their pets, expanding a cause of action for emotional distress due to the loss of a pet would create “an ill-defined and amorphous cause of action that would elevate the loss of pets to a status that exceeds the loss of all but a few human beings”); *Rabideau v. City of Racine*, 627 N.W.2d 795, 801 (Wis. 2001) (holding that while the court recognized the bond between owner and pet, public policy prevented such recovery. However, under the proper circumstances, a person could recover for intentional infliction of emotional distress for the loss of a pet); *Lachenman v. Stice*, 838 N.E.2d 451, 461 (Ind. Ct. App. 2005) (noting “that although many pets are beloved by their owners, they remain property”).

135. *See* Palotta, *supra* note 50, at 13. *See also* *McDougall*, 48 A.3d at 327-28 (where the New Jersey Supreme Court decided to keep the narrow and specific purposes for the recovery of negligent infliction of emotional distress that allows only certain individuals to be compensated for the traumatic loss of close family members. The court found “no basis in law or public policy to depart from that meaning of the doctrine or to expand it in the manner that plaintiff requests.”); *Scheele v. Dustin*, 998 A.2d 697, 703 (Vt. 2010) (holding that “plaintiffs fail to demonstrate a compelling reason why, as a matter of public policy, the law should offer broader compensation for the loss of a pet than would be available for the loss of a friend, relative, work animal, heirloom or memento”) (quoting *Goodby v. Vetpharm*, 974 A.2d 1269, 1274 (Vt. 2009)).

136. *Wise, supra* note 15, at 37.

and their nonhuman family members.¹³⁷ Furthermore, in denying the expansion of compensation, the legal system has implicitly allowed tortfeasors to avoid liability for injuries caused to companion animal owners.

a. Companion Animals are Categorized as Property

The property classification is one of the main arguments that courts use in refusing to include noneconomic injuries in the computation of damages. “For more than two hundred years, a fundamental principle of tort law has been that pets are property in the eyes of the law.”¹³⁸ Victor E. Schwartz and Emily J. Laird explain that the reason noneconomic damages are not allowed in “pet” cases is that “injuries happen quite frequently and have ‘ramifying consequences, like the rippling of the waters, without end.’”¹³⁹ The law serves to “limit the legal consequences of wrongs to a controllable degree.”¹⁴⁰ These authors continue to explain that “[c]hanging the tort law to allow plaintiffs to recover non-economic damage for the loss of their property is an abrupt change from a fundamental principle of tort law.”¹⁴¹

Unlike what these authors argue, expanding damages to include noneconomic injuries would not be an “abrupt change.” Plaintiffs have asked courts across the states for over half a century to expand the recovery of damages in companion animal cases and to include their emotional injuries in the damages calculation.¹⁴² They have unsuccessfully argued over and over the nature of the relationship with their companion animals and why their damages should also include their economic losses. The property classification is no longer a sound public policy reason. In fact, it is dated and out of touch with the reality that today’s families are multispecies. This change has slowly started to be reflected in some states. Notably, a court of appeals in Ohio recognized in

137. *Id.* at 37-38.

138. *See* Schwartz & Laird, *supra* note 19, at 258-59.

139. *Id.* (quoting *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001)).

140. *Id.* (quoting *Johnson*, 723 N.Y.S.2d at 628).

141. *Id.* at 259.

142. Companion animal owners have alleged emotional injuries for decades. *See, e.g.*, *La Porte v. Associated Indeps., Inc.*, 63 So. 2d 267, 268 (Fla. 1964) (where the plaintiff brought a claim for mental pain against a corporation alleging that its employee had maliciously thrown a garbage can at the plaintiff’s dog, causing the dog’s death); *Johnson v. Wander*, 592 So. 2d. 1225, 1226 (Fla. Dist. Ct. App. 1992) (pet owner sued veterinarian for damages on the basis of gross negligence, damage to property, and emotional distress resulting from serious burns sustained by plaintiff’s dog while under the control of the veterinarian who left the dog heating pads).

2016 the terms “semi-property” or “companion property” regarding companion animals,¹⁴³ and the Judicial Council of California Civil Jury Instructions has a model jury instruction where they state that “[p]ets are no longer exclusively treated as property with regard to damages.”¹⁴⁴

This switch in tort law, in the words of Victor E. Schwartz and Emily J. Laird,¹⁴⁵ has happened in a “slow, incremental fashion,” and it can and has been recognized in a small number of jurisdictions.¹⁴⁶ Perhaps, the best path would be to enact changes through cohesive legislation that establishes consistent, persuasive, or sufficient precedent.¹⁴⁷ Furthermore, just because something has always been the same way is not an argument for it not to change. The development of loss of consortium serves as an example. This cause of action was initially available only to husbands who sought recompense after tortious injury to their wife (who was considered her husband’s chattel).¹⁴⁸ The focus of recovery was the economic value of the wife’s services.¹⁴⁹ Today, loss of consortium has expanded to include the loss of love, society, and companionship of tortiously injured or killed parents, children, siblings, and adult children.¹⁵⁰

b. Opening the Floodgates of Litigation to Fraudulent Claims

Unsurprisingly, the primary argument against the expansion of pet damages is one found with the expansion of any tort: floodgates. There are two main components to the “floodgates” argument. First, critics suggest the courts might be overwhelmed with claims if recovery is expanded to companion animals. Second, there is a concern about the legitimacy of the claim itself. In other words, does the plaintiff have an established relationship that makes the claim genuine? Courts have argued that by allowing noneconomic damages in companion animal cases, virtually every person with an injured animal will file lawsuits seeking astronomical and baseless sums of money, increasing the

143. *Rego v. Madalinski*, 63 N.E.3d 190, 192 (Ohio Ct. App. 2016).

144. JUD. COUNCIL CAL., JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS 858 (2024) (CACI No. 3903O), https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf [<https://perma.cc/C7SB-PFBA>].

145. Note that Laird argues against the expansion of damages in companion animal cases.

146. *See* Schwartz & Laird, *supra* note 19, at 258.

147. *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000).

148. *See* Favre & Dickinson, *supra* note 27, at 903.

149. *Id.*

150. *Id.* at 905.

caseloads of the already hampered judicial system.¹⁵¹ The enactments of laws and the judicial recognition of noneconomic damages in a small number of states have proven the floodgates argument to be a fallacious reason for denying adequate remedy to companion animal owners. Florida¹⁵² and Hawaii¹⁵³ have demonstrated this argument to be untrue. Despite the novelty and uniqueness of these Supreme Court decisions for their time and their longevity (1964 and 1981, respectively), the Hawaii case was not utilized to change precedent during the six years that it was valid, while the Florida case has only been cited in one published case as persuasive authority.¹⁵⁴ Even after all these decades, these cases continue to be outliers that are rarely used by other plaintiffs in court.

Additionally, courts and critics of the expansion of noneconomic damages frequently raise concerns that these types of damages will also open the door for pet owners to file fraudulent claims.¹⁵⁵ This is why the legal system has historically been unwilling to award noneconomic damages in general. Due to the nature of noneconomic injuries, these types of damages are only available to close relatives and/or in very limited circumstances to lessen the likelihood that a claim is fraudulent.

151. See e.g., *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001) (holding that “[s]uch an expansion of the law would place an unnecessary burden on the ever burgeoning caseloads of the court in resolving serious tort claims for injuries to individuals” (quoting *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001)); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125-26 (Ohio Ct. App. 2003) (noting “the difficulty in defining classes of persons entitled to recover, and classes of animals for which recovery should be allowed” supported rejecting the cause of action); *McDougall v. Lamm*, 48 A.3d 312, 322 (N.J. 2012) (“our ‘enormous capacity to form bonds with dogs, cats, birds and an infinite number of other beings that are non-human’ would make it impossible to define the boundaries of the cause of action.”) (quoting *Rabideau v. City of Racine*, 627 N.W.2d 795, 799 (Wis. 2001)).

152. *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964) (holding that “the malicious destruction of [a] pet provides an element of damage for which the owner should recover, irrespective of the value of the animal because of its special training”). Under this case, a plaintiff can recover under IIED for the malicious killing of their pet.

153. *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1069-71 (Haw. 1981) (holding that a plaintiff can recover damages arising from mental distress caused by the negligently inflicted property damage. It is not necessary for plaintiffs to witness the dog’s death to recover for serious mental distress and medical testimony is not necessary to substantiate plaintiffs’ claims of emotional distress.).

154. Note that the Florida case has been narrowly construed. See *Knowles Animal Hosp. v. Wills*, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (finding the *La Porte* court’s opinion to be narrow, yet persuasive). The Hawaii case was invalidated a few years later by statute that barred recovery of emotional distress arising from property damage in Hawaii. See HAW. REV. STAT. § 663-8.9 (2023).

155. See *Harabes*, 791 A.2d at 1145; *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798-99 (Wis. 2001).

Claims allowing recovery of noneconomic damages are narrow because close relatives such as spouses, children, and parents are more likely than not to suffer emotional distress and bring genuine issues of material fact before the court. Therefore, these claims are not available for noneconomic injuries arising from harm inflicted on a best friend, a fiancé, or a companion animal, which is considered personal property.¹⁵⁶

The court opinion in the *Rabideau v. City of Racine* case sums up the argument of courts that by allowing recovery of noneconomic damages only to close relatives, they close the door to fraudulent claims.¹⁵⁷ The court in this case did not consider the relationship between the animal victim and their owner to be “deeply embedded in the organization of our law and society” to guarantee the genuineness of the case.¹⁵⁸ However, this argument has been proven untrue.¹⁵⁹ Decades of social and scientific studies have shown the existence and implications of the relationship between humans and their animal companions.¹⁶⁰ By establishing the genuineness of the relationship, a plaintiff should be allowed to recover for the emotional injuries suffered when their companion animal is injured or killed, as the contemporary American family regards companion animals as full family members.¹⁶¹

Reflect, for example, on the expansion of damages for humans in the family. Fifty years ago, a stepchild was not allowed to recover damages for the wrongful death of their stepparent. This expansion of the definition of close family member first happened in 1968 in *Moon Distributors, Inc. v. White*,¹⁶² “the Arkansas Supreme Court expanded the damages recoverable by stepchildren in wrongful death actions to include

156. See *Rabideau*, 627 N.W.2d at 799, 801 (stating that “the relationships between a victim and a spouse, parent, child, grandparent, grandchild or sibling are deeply embedded in the organization of our law and society. The emotional loss experienced by a bystander who witnessed the negligent death or injury of one of these categories of individuals is more readily addressed because it is less likely to be fraudulent and is a loss that can be fairly charged to the tortfeasor. The emotional harm occurring from witnessing the death or injury of an individual who falls into one of these relationships is serious, compelling, and warrants special recognition”).

157. *Id.*

158. *Id.*

159. See discussion *supra* Part III.4.b. Opening the Floodgates of Litigation to Fraudulent Claims.

160. *Id.*

161. See e.g., *Barrios v. Safeway Ins. Co.*, 2011-1028 (La. App. 4 Cir. 3/21/12), 97 So. 3d 1019 (affirming the trial court award of \$5,000 to each of the plaintiffs, finding that they had a close family-like relationship with their deceased dog; that the dog was a part of their lives for approximately twelve years and that his loss caused them psychic trauma).

162. *Moon Distribs. Inc. v. White*, 434 S.W.2d 56, 59 (Ark. 1968).

pecuniary damages not explicitly allowed to stepchildren in the wrongful death statute.”¹⁶³ The Alaska Supreme Court in *Greer Tank & Welding, Inc. v. Boettger*,¹⁶⁴ expanded the classes of persons entitled to recover to include stepchildren.¹⁶⁵ This recognition of changing family definitions did not open courts up to unending litigants because the relationship must first be established. Similarly, this will be the same test with companion animals.

Relationships are complex and constantly evolving. The deconstruction of the meaning of families has taken society to a point where families are not just comprised of a mom, a dad, and children, but has broadened the definition of families to single-parent households, parents of the same sex, children adopted from different countries or born from surrogates, stepchildren, and companion animals with sitters, daycare, health insurance, and human caretakers going to great lengths to ensure the happiness and health of their nonhuman family members. Today’s modern family is indeed a multispecies family.¹⁶⁶ The concern over floodgates litigation is unfounded by opening the door to companion animal damages. Familial relationships have evolved, and the legal system has adapted. Not everyone will be entitled to file for noneconomic damages for the loss of a companion animal, just like not everyone could with human damages. Proving a closely held relationship with an animal will not increase the number of litigants or open any floodgates.

Admittedly, not all companion animals share a mutual emotional bond with their humans. However, today, the relationship with our companion animals is more likely to be genuine and significant enough to guarantee that our emotional injuries are compensated by the legal system. Narrow and clear criteria allowing legal remedy for those more likely to suffer in these cases would be more efficient and would decrease the chance of unlimited litigation and fraudulent claims.

c. Difficulty Measuring Noneconomic Damages and Unfairly Burdening Tortfeasors

Courts frequently refuse to fill the gap of damages compensation in companion animal cases based on the argument that emotional damages

163. Robyn L. Meadows, *Recovery by Stepchildren in Wrongful Death Actions*, 40 KAN. L. REV. 777, 798-99 (1992).

164. *Greer Tank & Welding, Inc. v. Boettger*, 609 P.2d 548, 551 (Alaska 1980); Meadows, *supra* note 163.

165. *See* Meadows, *supra* note 163.

166. *See* LAURENT-SIMPSON, *supra* note 5, at 47.

are difficult to quantify¹⁶⁷ because they are “too intangible, personal, peculiar, incapable of measurement, speculative, and unforeseeable.”¹⁶⁸ This argument has been brought up not just in companion animal cases but also in those about wrongful death and personal injury. In the beginning, courts denied any type of recovery for noneconomic damages under wrongful death cases.¹⁶⁹ This meant that claims for the death of a spouse, a parent, or a child was measured by the pecuniary loss to the dependents.¹⁷⁰

Undeniably, it is difficult to put a dollar figure on emotional feelings. The evolution of damages compensation in child cases helps illustrate how the legal system adapts to shifting societal changes.¹⁷¹ In the case of children, this was because of the “[t]wo realities of childhood . . . in the mid-and late-nineteenth century—high mortality rates and the likely prospect of child labor for any child lucky enough to survive.”¹⁷² Parents and society, in general, were apathetic to child death.¹⁷³ The loss of a child was the loss of a paycheck, but one that another child could replace.¹⁷⁴ Thus, parents valued their children economically.¹⁷⁵

By the early twentieth century, medicine advanced, mortality rates decreased, and parents stopped having as many children.¹⁷⁶ After 1910, child labor declined dramatically.¹⁷⁷ “[T]he death of all children—rich and poor—” was no longer considered a common occurrence and “emerged

167. See *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001) (asserting that the difficulty in quantifying the emotional value of a companion pet and the risk that a negligent tortfeasor will be exposed to extraordinary and unrealistic damage claims).

168. See *Wise*, *supra* note 15.

169. Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. REV. 437, 444-45 (2020) (explaining that “U.S. state legislatures first began creating wrongful death claims in the mid-1850s—finally allowing a tort claim for the wrongful death of another, including giving parents a claim for the tortious death of their children. State legislatures created the claim but then limited the recovery to only pecuniary damages.”).

170. *Id.* at 445-46.

171. *Id.* at 445 (also presenting an argument that the pecuniary measure of damages, in the beginning, matched the nineteenth-century conception of children, where a child was one that parents expected could die and that they valued economically. Further explaining that “parents were appropriately compensated for the death of their child with pecuniary damages”).

172. *Id.* at 450.

173. *Id.* at 461.

174. *Id.*

175. *Id.*

176. *Id.* at 458-59.

177. *Id.* at 462.

as an intolerable social loss.”¹⁷⁸ The end of child labor became problematic for the pecuniary measure of damages for wrongful death.¹⁷⁹ Children did not contribute to the house economically if they did not work.¹⁸⁰ The economic valuation of children shifted even further negatively decades later.¹⁸¹ Raising a child became a financial liability to the parents.¹⁸² Because of this shift, “courts and legislatures had to deal with the question of whether noneconomic damages should also be recoverable” in these types of claims.¹⁸³ Indeed, the economic measure of damages was appropriate when children were viewed as an economic asset to their parents that could be easily replaced.¹⁸⁴

Today, the modern trend is to allow damages for loss of consortium, and the umbrella of the classes of persons permitted to recover has also expanded. For instance, some states have allowed grandparents to recover for the loss of their grandchildren.¹⁸⁵ Economist Lawrence Olson attests to the nonmonetary benefits they expect to derive from their progeny” because “[i]n purely monetary terms, couples would be better off putting their money in a bank as a way of saving for their old age.”¹⁸⁶

The value of companion animals to their families has had a similar evolution. Initially, dogs and cats were easily replaceable domestic animals that oftentimes were allowed to free range and were kept for utilitarian purposes. They were likely to be attacked by other animals and die from parasites and infectious diseases. As the development of an emotional bond was improbable, the fair market value approach seemed appropriate for those times. The advancement of veterinary medicine, together with a shift in the lifestyle of modern families, was the perfect recipe that welcomed companion animals into the home. Companion animals became more popular as families moved to the city and became

178. *Id.* at 457 (quoting VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 43 (1994)).

179. *Id.* at 462.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 447.

184. *See id.* at 461, 464.

185. Nick Rummell, *Awarding Grandma Damages, Top NY Court Cites Ever-Evolving Modern Families*, COURTHOUSE NEWS SERV. (Feb. 18, 2021), <https://www.courthousenews.com/awarding-grandma-damages-top-ny-court-cites-ever-evolving-modern-families/> [<https://perma.cc/74GR-7EPW>].

186. *See* Wieber Lens, *supra* note 169, at 462 (alteration in original) (quoting ZELIZER, *supra* note 178, at 4).

busier and smaller. The development of dewormers, vaccines, diets, and veterinary care made this transition easier as well. Today, diseases once considered highly deadly such as colds, bacterial and fungal infections, distemper, parvovirus, etc. are treatable.¹⁸⁷ This has prolonged the lifespan of companion animals¹⁸⁸ and allowed families to develop deep emotional attachments to them. Indeed, the main contribution of a companion animal to their family is companionship and love. Therefore, noneconomic damages are the appropriate measure when they are harmed.

There is no scale or measuring system to determine noneconomic damages. Yet, it is a common consensus that the wrongdoer should nevertheless compensate for those emotional injuries that do not have a monetary connotation. This is not with the goal of punishing the defendant but to fully compensate the tort victim and deter future tortious conduct. Society desires redressability of emotional injuries.¹⁸⁹

The reality is that even though noneconomic damages are not as straightforward as economic damages, they should be awarded, nonetheless. It certainly is more convenient for the jury and less burdensome for defendants to set aside intangible injuries in the determination of damages. In limiting the scope of liability for fear of unfairly burdening wrongdoers, courts have allowed tortfeasors to get away without paying for the harm they have caused while leaving plaintiffs uncompensated. Indeed, no amount of money will make the

187. See, e.g., Mary Walrath-Holdridge, *Treatment for Parvo in Dogs Nears USDA Approval*, USA TODAY (Sept. 23, 2023, 5:15 AM), <https://www.usatoday.com/story/news/nation/2023/09/23/treatment-for-parvo-in-dogs-nears-usda-approval/70922537007/> [<https://perma.cc/7G2D-ZS95>].

188. *Dogs and Cats Are Living Longer: The Study*, ALMO NATURE, <https://blog.almonature.com/en-gb/dogs-and-cats-are-living-longer-the-study> [<https://perma.cc/ZH65-3LHU>] (last visited Feb. 6, 2024).

189. An increasing number of judges recognize the existence of an emotional bond. See, e.g., *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. Ct. App. 1994) (Andell, J., concurring) (“[T]estimony that an animal is a beloved companion should generally be considered sufficient to justify a finding of damages well beyond the market value of the animal”); see *Carbasha v. Musulin*, 618 S.E.2d 368, 372-73 (W. Va. 2005) (Starcher, J., dissenting) (“This opinion is simply medieval. . . . Beyond question, many Americans love their cats, their dogs, their birds, as well as they love their children. But like the children of the pre-industrial revolution, the majority opinion chooses to categorize those pets as nothing more than chattel. . . . I’m sorry, however, that Ms. Carbasha has no remedy for her grief and emotional distress in our common law.”); *Anne Arundel Cnty. v. Reeves*, 252 A.3d 921, 943 (Md. 2021) (Hotten, J., dissenting) (“Given prevailing societal values, attitudes, and norms, it no longer appears tenable to deny emotional damages for a cherished family dog, killed with gross negligence, in the same way that the common law precludes emotional damages for an inanimate object that was accidentally broken.”).

plaintiff whole again. Compensation for noneconomic injuries “is the only reasonable mechanism that society has by which to acknowledge the importance of the bond that has been severed.”¹⁹⁰ It is a “substitute for actual restoration of psychic tranquility.”¹⁹¹

Another point worthy of analysis is the expansion of damages in negligence cases. Scholars advocating against the recovery of noneconomic damages in negligent cases have argued that although it seems fair to require a negligent defendant to pay for the plaintiff’s injuries and losses, it does not seem fair to have them pay an amount higher than that.¹⁹² Contrary to this argument, emotional injuries, when present, are very real and may have consequences for one’s mental health as well as serious physical injuries. The foreseeability issue should be analyzed on a case-by-case basis rather than barring recovery for all negligent acts.¹⁹³

Expanding recovery does not mean allowing unlimited liability. Indeed, legal controls are necessary to prevent recovery from becoming excessive and arbitrary. The questions of whether a human-companion animal relationship exists and whether it is significant enough to assure recovery of compensatory damages should not be automatically barred; it is a fact intensive analysis and case that should be individually assessed based on preestablished guidelines to assure uniformity and fairness for both parties.¹⁹⁴

Ultimately, in shielding themselves under the argument of dated precedent that states noneconomic damages are not available for the destruction of property, courts have ignored the social construct that companion animals are viewed more as nonhuman family members. The foundation of recovery for damage or destruction of personal property is no longer applicable to harm to companion animals. Therefore, it violates fundamental principles of justice. As Jade Mckenzie suggests, “when

190. Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 835 (2004).

191. *Id.* at 842-43.

192. Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 455 (2011).

193. See *McDougall v. Lamm*, 48 A.3d 312, 325-26 (N.J. 2012) (foreseeability requires a consideration of whether the plaintiff’s injury is within the range of harm that emanates from a tortfeasor’s negligence. One can reasonably foresee that people who enjoy an intimate familial relationship with one another will be especially vulnerable to emotional injury resulting from a tragedy befalling one of them).

194. See Vega, *supra* note 56.

legal rules no longer reflect current values, such rules must be reconsidered.”¹⁹⁵

5. Proposing a Statutory Model for Just Compensation in Cases Involving Harm to Pets

It is evident that society and even the legal system have evolved in their view of companion animals. Noticeably, there are impediments to transitioning from the old paradigm of companion animals-as-property. As a practical matter, then, how do courts allow for suitable recovery while protecting tortfeasors from unrestrained damages?

To fill the gap in damages compensation in companion animal cases, this Article proposes a legal framework to strike a balance between the compelling interests of companion animal owners and tortfeasors to ensure fairness for the parties involved. It is tailored to the unique status of companion animals and their relationship with their multispecies families. It expands recovery in cases where companion animals are intentionally or negligently killed or injured to allow recovery of noneconomic damages suffered by the owners who can establish the existence of a meaningful relationship with their companion animals.¹⁹⁶

a. Proposed Cause of Action

This Article proposes a new cause of action that focuses on the injury arising from the emotional bond between humans and companion animals and the unique situation companion animals have,¹⁹⁷ rather than focusing on their property status and their economic value. This proposed cause of action is “tortious harm to a companion animal.”¹⁹⁸ It is crafted to provide an adequate legal remedy to companion animal owners that suffered emotional injuries while setting legal mechanisms in place to ensure that

195. See Jade McKenzie, Comment, *Em “BARK”ing on the Journey to Expand Recovery of Damages for the Loss of a Companion Animal*, 19 CHAP. L. REV. 659, 664 (2016).

196. Courts have manifested concern on this issue before. See *Liddle v. Clark*, 107 N.E.3d 478, 483 (Ind. Ct. App., 2018), (holding that even if they decided to not follow existing precedent on “whether sentimental damages should be recoverable for the death of a pet due to negligence, it would be difficult to determine where to draw the line. Would all types of pets be included? Which individuals would be entitled to recover such damages for the loss of a pet?”).

197. Companion animals are considered property by the law and family members by society.

198. MODEL STATUTE FOR RECOVERY OF DAMAGES FOR HARM TO COMPANION ANIMALS § 7 (Vega 2024) [hereinafter MODEL STATUTE] (see *infra* Part V. Appendix: Model Statute for Recovery of Damages for Harm to Companion animals).

courts are not flooded with disingenuous claims and defendants are not burdened with unfair and arbitrary damage awards.

Under this cause of action, noneconomic damages are compensated regardless of whether the defendant's conduct is intentional or negligent. As society has evolved and moral values have changed concerning companion animals, there is a social presumption that companion animal owners are likely emotionally attached to their companion animals and will suffer emotional injuries when their companion animals are harmed.¹⁹⁹ This relationship has gained so much relevance that it guarantees that emotional distress based on the death or injury of a companion animal will be genuine.

Tortious harm to a companion animal encompasses death and injury arising from intentional or negligent conduct. It also inserts a caveat that it allows compensation for noneconomic injuries arising from the emotional impact suffered as a response to the harm inflicted upon the companion animal and/or the prematurely severed relationship with them.

It recognizes that when a companion animal is killed, a relationship on the same level as a familial one is abruptly destroyed, resulting in a loss of the love, companionship, and safety that the human felt when their companion animal was alive. The destruction of this relationship deserves recognition and compensation.

This cause of action has different elements depending on whether the defendant's action is intentional or negligent. For example, when the death or injury of a companion animal is the result of the defendant's intentional conduct, the focus is on the intention to inflict death upon the companion animal. This approach is new. The existing cause of action that allows recovery of noneconomic damages for intentional infliction of emotional distress focuses on the intention of the defendant to cause severe emotional distress on the plaintiff rather than the intention to inflict harm on the companion animal.²⁰⁰

Death or injury arising from negligent conduct can be compensated so long as the plaintiff proves all the elements of negligence. Expanding recovery to noneconomic injuries in negligence cases is key in fulfilling the goals of tort law of adequate compensation and deterrence of wrongful

199. See discussion *supra* Part II. Companion Animals in Society and the Legal System (discussing companion animals in society and the legal system).

200. See *Rabideau v. City of Racine*, 627 N.W.2d 795, 803 (Wis. 2001) (stating that "[t]here must be something more than a showing that the defendant intentionally engaged in the conduct that gave rise to emotional distress in the plaintiff; the plaintiff must show that the conduct was engaged in for the purpose of causing emotional distress.").

conduct because it “encourage[s] businesses and others to invest in the appropriate precautions.”²⁰¹ In addition, by expanding the scope of damage recovery, potential defendants are encouraged to act more carefully to avoid liability.

To be able to establish a prima facie case for negligent death or injury of a companion animal, the plaintiff must establish all the elements of this cause of action:

1. Defendant has a duty to avoid harming the companion animal of another
2. Defendant breached that duty
3. Defendant’s act or omission that caused injury or death upon the companion animal is the actual and proximate cause of the plaintiff’s injury
4. Plaintiff suffers an injury: Companion animal is killed, and Plaintiff suffers emotional impact as a result (emotional distress and/or loss of companionship)²⁰²

The duty of care defined in this Article flows from the general rule explained below and states as follows: “‘Duty of care’ means the duty to avoid harming the companion animal of another. When a companion animal suffers harm arising from the negligence of a tortfeasor, emotional injuries on the owner are a foreseeable consequence of such harm.”²⁰³

This novel application of the duty of care derives from the general rule of negligence. McKenzie further elaborates that:

“every person has a duty to refrain from acting in a manner that causes foreseeable injury to another.” Therefore, any situation in which a person is not acting as a reasonably prudent person otherwise would act, such as negligently operating a vehicle and striking a dog in the road, would subject that person to liability for negligence.²⁰⁴

Foreseeability is a crucial element in establishing whether a defendant owes a duty to the plaintiff in negligence cases. It determines whether the tortious conduct proximately caused the harm. As the court observed in *McDougall*:

201. See John L. Diamond, *Rethinking Compensation for Mental Distress: A Critique of the Restatement (Third) §§ 45-47*, 16 VA. J. SOC. POL’Y & L. 141, 155 (2008).

202. See MODEL STATUTE, *infra* Part V.Appendix: Model Statute for Recovery of Damages for Harm to Companion animals, at § 7.

203. MODEL STATUTE, *infra* Part V.Appendix: Model Statute for Recovery of Damages for Harm to Companion animals, at § 2(k).

204. McKenzie, *supra* note 195, at 678 (quoting *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 95 (Cal. 1997)).

Foreseeability requires a consideration of whether the plaintiff's injury is within the range of harm that emanates from a tortfeasor's negligence. . . . "[O]ne can reasonably foresee that people who enjoy an intimate familial relationship with one another will be especially vulnerable to emotional injury resulting from a tragedy befalling one of them."²⁰⁵

This foreseeability arises from current societal views. Today, society values animals more highly than ever, and it is reasonable to assume that companion animals have significant emotional value to their owners. Therefore, it is foreseeable that by acting outside of the reasonably prudent person standard, the tortfeasor's conduct could not just result in harming the companion animal of another but also that there is a foreseeable risk that the owner of that companion animal will suffer and be emotionally impacted.

Of course, foreseeability will depend on the circumstances surrounding the event. The jury, not the judge, is entitled to decide the degree of foreseeability in the determination of liability.²⁰⁶ To illustrate the issue, consider the following examples:

Compare the case of a dog being walked on a leash by their owner.²⁰⁷ If a motorcycle hit the dog due to being distracted and losing control of the vehicle, is the foreseeability of emotional damages present? How about the owner that walks a dog without a muzzle despite knowing that the dog goes into hunting mode when he sees other animals? Or the owner that does not take reasonable safety measures to ensure their dog does not escape the property and harm others? These are examples of circumstances where the jury must assess damages on a case-by-case basis. If the animal has an owner, it should be presumed that it is loved. Therefore, there are different scenarios in which noneconomic damages are a foreseeable consequence of negligently harming a companion animal.

It is important to note that the mere fact that an animal is killed or injured would not give rise to these actions. To recover noneconomic damages, the companion animal owner must present evidence of the existence of a meaningful bond with their companion animal and the

205. *McDougall v. Lamm*, 48 A.3d 312, 325 (N.J. 2012) (citations omitted) (quoting *Dunphy v. Gregor*, 642 A.2d 372, 377 (N.J. 1994)).

206. See Benjamin C. Zipursky, *Foreseeability in Breach, Duty and Proximate Cause*, 1247 WAKE FOREST L. REV. 1247, 1259 (2009).

207. In cases involving unleashed dogs, the defendant might have a defense based on the comparative negligence per se doctrine arising under state dog leash laws. See *Baehr v. Com. Ex rel. Lower Merion Twp.*, 414 A.2d 415, 417 (Pa. Commw. Ct. 1980).

suffering of emotional injuries due to the defendant's tortious act on the companion animal. Additionally, the owner's burden of proof to establish this relationship is heightened to clear and convincing evidence to ensure damages awards are based on a substantial belief that such relationships and injuries exist.²⁰⁸ The award of damages will be decided by the jury on a case-by-case basis and will be capped to avoid excessive recovery.

b. What Type of Damages Can Be Recovered?

This model legal framework is a proposal to provide adequate compensation to those owners who suffer from the tortious death or injury of their beloved companion animals. Adequate compensation means full compensation that provides adequate relief. Thus, adequate compensation should include fair market or replacement value, the actual value to the human²⁰⁹ (when the latter cannot be ascertained), and compensation for emotional injuries, including emotional distress and loss of companionship. By allowing these types of damages, when a tortfeasor intentionally or negligently harms a companion animal, the legal system will provide a remedy that will adequately compensate companion animal owners and adequately deter tortfeasors and others from acting similarly.

Emotional distress and loss of companionship are two different types of emotional injuries that can overlap. Therefore, under this proposed statute, companion animal owners are allowed to recover damages for both types of emotional injuries when the plaintiff establishes the existence of a meaningful relationship with their companion animals.

Under the proposed cause of action, expert witness testimony is not mandatory, as it is ultimately the plaintiff's decision whether to have experts such as a psychologist, psychiatrist, or social worker to explain to the trier of fact the existence and extent of emotional injuries and how they have affected the plaintiff's life, or to introduce other evidence that is enough to meet the burden of proof required.²¹⁰

208. See discussion *infra* Part III.6.c.Higher Burden of Proof: Moving from Preponderance of the Evidence to Clear and Convincing Evidence

209. See discussion *supra* Part III.2.a.Noneconomic Value (defining the actual value to the human as the approach allowed when the commercial value of a particular companion animal is not ascertainable or cannot be calculated).

210. This issue has been addressed before. See, e.g., *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981) (holding that in a claim for mental distress, medical proof can be offered to prove "the degree of the mental distress. . ." and "to assist in proving the 'seriousness' of the claim and the extent of recovery, but should not be a requirement allowing or barring the cause of action[;]" this is because they are "indicators of the degree of the mental distress, not as a bar to recovery.").

In addition, the award of noneconomic damages may be increased if a companion animal owner witnesses the death or injury to their animal and suffers emotional distress from it. This is because emotional injuries suffered by the owner may be exacerbated when an injury is witnessed.

i. Emotional Distress

Emotional distress is “the pain and suffering of a plaintiff at the moment he suffers an injury and usually fades away as time passes.”²¹¹ It is the response caused by the knowledge of an event that may give rise to symptoms such as anxiety, depression, panic attacks, becoming withdrawn, etc.²¹² These symptoms are likely present in a human when they learn their companion animal suffered harm.

To illustrate this type of emotional injury, imagine the stress and anxiety a person would suffer as a result of their companion animal being severely burnt while under the care of a veterinarian.²¹³ A human will likely suffer greatly even if the companion animal does not die. This is particularly true when treatment is long and painful, and the person witnesses his companion animal suffering. These feelings tend to dissipate as time passes, even when the companion animal dies. However, the negative effects on the owner’s mental health are independent from the pain from which the animal has recovered.

ii. Loss of Companionship

Loss of companionship is another emotional injury that “focuses on the long-term loss of the relationship with the animal that existed before the harm occurred.”²¹⁴ Humans become emotionally attached to companion animals because as Margit Livingston explains, they

appreciate their companionship—their loyalty, their physical proximity, and even their dependence upon us. Just as people value the society of their spouses, children, and other intimates, they rely upon the society of their pets. When a pet dies prematurely because of another’s wrongful act, we experience the loss of that society as a genuine injury.²¹⁵

211. See Vega, *supra* note 56.

212. See Wise, *supra* note 15, at 51.

213. See *Johnson v. Wander*, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (where the plaintiff pet owner alleged emotional distress resulting from learning her dog had sustained serious burns after being left on heating pads for a long period by defendant veterinarian).

214. See Vega, *supra* note 56.

215. Livingston, *supra* note 190, at 819.

Research has shown that humans become stressed when a companion animal is sick, and they may grieve animal loss as much, if not more, than human companion loss.²¹⁶ For most people, the loss of a dog is, in almost every way, comparable to the loss of a human loved one.²¹⁷ Sadly, courts virtually always reject compensation of these types of damages and do not allow it as a separate cause of action, alleging either that “[l]oss of companionship is a component of loss of consortium—a form of personal-injury damage, not property damage,” or that these types of claims are reserved to human relationships.²¹⁸ Grief is an indirect measure of the strength of attachment. As Archer explains, “[t]he process of grief involves the emotional distress, thoughts, and feelings that accompany the slow process of mentally letting go of an established relationship.”²¹⁹

Even when the human acquires another animal, it does not fill the emotional void that the deceased nonhuman family member leaves. For this reason, the “defendant should be required to compensate an animal’s owner for the owner’s lost opportunity to enjoy the remaining years of the animal’s life.”²²⁰ And in the words of the *Brousseau v. Rosenthal* court, “[t]he difficulty of pecuniarily measuring this loss does not absolve [the] defendant of his obligation to compensate [a] plaintiff for that loss, at least to the meager extent that money can make her whole.”²²¹

There is an implicit expectation that that companion animal will be with us for a given period of time depending on their species, breed, age, and health condition. Recovery for the loss of companionship of a companion animal is based on that expectation. Additionally, the model statute proposes that such expectation is considered together with the relationship’s longevity. For instance, the emotional impact of losing a new puppy is not the same as the impact suffered for the loss of a young adult dog or cat with whom humans have built a long relationship for years because in the owner’s mind, the relationship grows stronger as the animal ages.

216. Frank T. McAndrew, *Why Losing a Dog Can Be Harder than Losing a Relative or Friend*, CONVERSATION (Mar. 9, 2017, 11:19 PM), <https://theconversation.com/why-losing-a-dog-can-be-harder-than-losing-a-relative-or-friend-68207> [<https://perma.cc/K6WG-MQ7G>]; Grohol, *supra* note 9; *see also* John Archer, *Why Do People Love Their Pets?*, 18 EVOL. & HUM. BEHAV. 237, 239 (1997).

217. *Id.*

218. *See Strickland v. Medlen*, 397 S.W.3.d 184, 195 (Tex. 2013).

219. *See Archer, supra* note 217, at 239.

220. Gay, *supra* note 19, at 95.

221. *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 287 (N.Y. Civ. Ct. 1980).

Conversely, such an impact will also be different, comparing the relationship with a young adult dog to a relationship with an older one whose owner knows does not have many years ahead. It is a task for the jury to find a reasonable balance of these interests based on the evidence provided by the plaintiff in trying to establish the existence of a meaningful bond and the extent of their emotional injuries. The life expectancy of a companion animal is also an important factor in determining which animal species are covered under the new cause of action. For example, the emotional pain of losing a cat that can live up to eighteen years is not the same as losing a hamster, for instance, whose lifespan is two to three years.

Indeed, no one knows how long a human can experience the loss of the relationship with their deceased family companion. The feelings of loss and sadness are unique to each person and relationship, so the suffering of the loss of a companion animal may look different from one human to another.²²² The damages component of the model statute is designed to accommodate this variability.²²³

Under the model statute, the owner of an animal that is killed by the intentional or negligent conduct of another is entitled to emotional distress and loss of companionship damages so long as they can establish a meaningful relationship with that animal that justifies the existence of such emotional injuries.

6. Limiting Recovery of Noneconomic Damages: Crafting a Legal Scheme to Provide Adequate Compensation

As mentioned, public policy arguments against expansion of recovery for companion animal damages have focused on the hypothetical fear of unrestrained recovery and misuse of the courts. Because of this, companion animal owners are still denied appropriate legal remedy and tortious conduct continues to be undeterred. Fortunately, there are several ways the model statute can address these fears by placing limits on who can recover damages and how they can be recovered.

222. See Grohol, *supra* note 9 (presenting a small study of eighty-two people who had lost their pet. The results showed that “25% took between 3 and 12 months to accept the loss of their pet, 50% between 12 and 19 months, and 25% took between 2 and 6 years, to recover.” (internal citations omitted)).

223. See discussion *infra* Part III.6. Limiting Recovery of Noneconomic Damages: Crafting a Legal Scheme to Provide Adequate Compensation

a. What Classes of Persons Should Be Entitled to Recover Under the Proposed Statute

Arguably, whether someone owns a companion animal is often difficult to determine. For example, a person may purchase or adopt a companion animal and gift it to another person within or outside the family. Or someone may acquire the animal, and someone else may undertake their care or develop a meaningful relationship with them. The core of the proposed legal framework is the existence of such a relationship. For this reason, ownership is one indicator but not the determining factor in the determination of damages. Of course, concerns arise when recovery is not based solely on ownership, such as those based on how to limit the class of persons entitled to recovery.

This concern is addressed by keeping those persons entitled to bring a lawsuit against a wrongful tortfeasor limited to those within a family unit. This includes human family members of the companion animal who suffer emotional distress and/or loss of companionship. In addition, the family member seeking compensation must live together with the companion animal in the same household. By imposing this limitation, the group of individuals that can potentially sue a tortfeasor becomes narrower. Furthermore, this ensures foreseeability and genuineness of such actions since it is more likely that a family member with whom a companion animal lives will suffer emotional distress than other members of society, such as a neighbor, a sitter, or an extended family member.

Companion animals are often part of multi-member families composed of parents, children, and sometimes other members like grandparents. As family members, it is natural that they build different levels of emotional attachments with other members. For instance, a dog may be closer to a teenager who feeds him and plays with him rather than a parent who only feeds him. At the same time, the dog may have a different level of closeness to an adult that works all day but cuddles with him at night. This proposal steps away from the concept of ownership as a requisite to damage recovery and focuses on the existence of the emotional bond.

While critics may argue that this would result in multiple awards for family members, this can be alleviated by a consolidated “household” claim. Allowing multiple family members to sue separately would result in substantial damages awards for noneconomic injuries that would be “larger than any defendant could be expected to satisfy or would ever be

awarded in a human wrongful death case.”²²⁴ There would be a balance between the compensation for the harm inflicted and the burden imposed on the defendant to deter future conduct. To ensure that recovery stays within boundaries of fairness for both plaintiffs and defendants and to avoid overdeterrence when more than one family member in the same household claims emotional damages, this Article proposes that only one lump sum per family is awarded.

In cases when more than one member in the family unit claims emotional injuries, the jury will award one amount per family. The jury would allocate such an amount to each plaintiff in the family according to the evidence presented to establish the individual relationship with the injured or deceased companion animal. These limitations will satisfy the purposes of tort law but will also serve as a hindrance to the policy arguments against the expansion of damages.

b. Which Animals Are Considered Companions for Recovery Purposes

Of course, the elephant in the room is whether the elephant in the room would be covered. Courts and critics against expanding damage recovery are also skeptical as they believe it would allow liability for harm to any animal a plaintiff claims to have an emotional bond with.²²⁵ As the *Rabideau* court stated, humans have indeed “an enormous capacity to form bonds with dogs, cats, birds and an infinite number of other beings that are non-human.”²²⁶ Even though this Article proposes that the definition of companion animals is not limited by a list of specific species, it does limit recovery to mammals and birds. The most common companion animals that display a high level of intelligence and the ability to emotionally bond with humans are in these groups.

Since the model statute requires the existence of an emotional bond with reciprocating affection, this eliminates possible concerns about the “infinite number of other beings” expressed by *Rabideau* and other courts.²²⁷ In addition, the model statute proposes two further limitations in determining what types of animals a plaintiff can seek recovery for.

224. Logan Martin, Comment, *Dog Damages: The Case for Expanding the Available Remedies for the Owners of Wrongfully Killed Pets in Colorado*, 82 U. COLO. L. REV. 921, 946 (2011).

225. See Schwartz & Laird, *supra* note 80, at 238-40.

226. *Rabideau v. City of Racine*, 627 N.W.2d 795, 799 (Wis. 2001).

227. See, e.g., *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1126 (Ohio Ct. App. 2003); *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001); *Smith v.*

For recovery to be allowed, the animal with whom a human claims to have a relationship must live in the household as well and be capable of building an emotional bond with humans. In this way, the likelihood that the human and companion animals nurture and care for each other is higher, and the probability that such a relationship will strengthen with time will be high as well because “[t]he bond that exists between a human and their companion animal is enhanced through experiences with each other.”²²⁸

Undoubtedly, the most common companion animals are dogs and cats;²²⁹ however, there are other domestic animals with whom humans can build meaningful relationships, particularly those with a long lifespan. The emotional injuries are likely to arise from the death of a cat, a bird, or a dog who are expected to live from ten to twenty years in the case of dogs and cats. Certain species of parrots, with whom we share our personal space, can live up to sixty years, and the emotional injuries will be significantly more substantial than the emotional distress caused by the harm inflicted on a small rodent, for instance, whose lifespan is around three years and spends their life in a cage. Additionally, the emotional suffering for the death of a cat kept outdoors for rodent population control is not comparable with the suffering for serious injuries inflicted on a dog that sleeps with its owners and with whom there is a mutual dependency. This will be within the jury’s determination based on the statute.

Under the proposed legal framework, the definition of a companion animal is broader because “humans can form companion relationships with animals besides dogs and cats.”²³⁰ For purposes of the model statute, a companion animal is a domestic animal of a mammal or bird species that lives in the plaintiff’s home and has a sufficiently long lifespan to create a reasonable expectation of the possibility of establishing a long-lasting and meaningful relationship with humans. This measure takes care of the courts’ fear of burdening the judicial system with greater caseloads

Wis. Mut. Ins. Co., 880 N.W.2d 183, 183 (Wis. Ct. App. 2016); *McDougall v. Lamm*, 48 A.3d 312, 314 (N.J. 2012).

228. See Lindsey Rutter, *People Who Are Attached to Their Companion Animals See Emotions in Animals* (Feb. 28, 2022) (B.S. thesis, Oregon State University), <https://ir.library.oregonstate.edu/downloads/m900p273m>.

229. See Malinda Larkin, *Pet Population Still on the Rise, with Fewer Pets per Household: Survey on Pet Ownership also Indicates that Pet Owners Value Veterinarians’ Expertise*, JAVMA NEWS (Nov. 17, 2021), <https://www.avma.org/javma-news/2021-12-01/pet-population-still-rise-fewer-pets-household> (according to the AVMA, in 2020, forty-five percent of households owned dogs and twenty-six percent of households owned cats).

230. Root, *supra* note 16, at 448.

due to “the difficulty in defining [the] classes of persons entitled to recover, and classes of animals for which recovery should be allowed.”²³¹

Plaintiffs will be able to recover noneconomic damages arising from the harm suffered by a particular companion animal if such an animal meets these criteria.

c. Higher Burden of Proof: Moving from Preponderance of the Evidence to Clear and Convincing Evidence

Not only does the statute require proof of the emotional bond, but it must be evaluated under the second highest burden of proof: clear and convincing. This elevated standard—proving that there is a substantial likelihood a fact is true—guards against the inherent concerns that an owner might overstate the emotional bond of their animal. Under this standard, the evidence must lead the court to conclude that there is a substantial likelihood that the fact is true.²³² Courts consider the value of animals to their owners to determine the ultimate award of damages.²³³

Preponderance of the evidence requires the plaintiff to show the elements of a claim by the greater weight of evidence. Under this standard, plaintiffs must convince the jury that they are more likely right than wrong. Opponents to the expansion of damages awards in companion animal cases claim that by allowing noneconomic damages, everyone would feel entitled to file claims alleging emotional injuries stemming from harm inflicted upon any animal that would ultimately burden defendants with arbitrary and excessive damage awards. These concerns are valid. However, fear of an increase in litigation is not a good argument to deny the owners of companion animals adequate remedy. Instead of denying recovery, this Article seeks to address such concerns. Like the California Supreme Court stated in *Dillon v. Legg* holding that recovery of mental and physical pain and suffering would not expose the courts to false claims or a flood of litigation: “Legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion.”²³⁴

231. *Pacher*, 798 N.E.2d at 1126.

232. *Clear and Convincing Evidence*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/clear_and_convincing_evidence (July 2022) [<https://perma.cc/8PSN-UWEB>].

233. See Livingston, *supra* note 190, at 820.

234. See *Dillon v. Legg*, 441 P.2d 912, 925 (Cal. 1968) (allowing the plaintiff, a mother, who was a bystander but not in the zone of danger to recover under negligent infliction of emotional distress arising from witnessing a car negligently strike her daughter).

Emotional injuries may be easy to allege. By raising the burden of proof, plaintiffs who do not share the type of relationship required will most likely not meet this burden, as the standard required is more rigorous than the preponderance of the evidence standard.²³⁵ On the other hand, when a human and a companion animal share an intimate and profound connection, the companion animal owner should not struggle to prove the relationship and emotional injuries under this burden of proof.²³⁶ This is true, particularly when companion animals take place in daily routines and important events more frequently, and technology is widely available to help prove the existence of a profound connection.

So, what would such evidence look like? It could be something as simple as testimony on where the dog sleeps to more complex data showing the number of photos and text messages about the pet. Examples of the willingness of companion animal owners to use technology when interacting with their pets are starting to be analyzed. For instance, a survey conducted by Google Surveys among 1,500 U.S. adult dog owners in April 2017 showed that twenty-nine percent of dog owners share more pictures online of their dog than of friends and family,²³⁷ while sixty-five percent of people studied admitted that they also took more photos of their pet than their significant other.²³⁸ Other examples include having access to portals to be able to print records, receipts, text messages, etc.

By raising the burden of proof to clear and convincing evidence, the plaintiff is compelled to introduce evidence showing that it is highly probable that they shared a meaningful emotional bond with their companion animal and that because of that existing relationship, they suffered emotional injuries resulting from the tortious harm inflicted upon their companion animal. After assessing the evidence presented and determining the level of the alleged emotional bond, the jury must have a firm belief based on the facts presented that the companion animal was

235. See *Karch v. Karch*, 885 A.2d 535, 537 (Pa. Super. Ct. 2005) (defining preponderance of the evidence).

236. See Ursula Aragunde-Kohl, José Gómez-Galán, Christian Lázaro-Peréz & José Ángel Martínez-López, *Interaction and Emotional Connection with Pets: A Descriptive Analysis from Puerto Rico*, 10 ANIMALS 1, 10 (2020), <https://doi.org/10.3390/ani10112136> [<https://perma.cc/A683-NYYE>].

236. Press Release, Rover Press Room, Rover.com Reveals New Research on “Dog People” (May 10, 2017), <https://www.rover.com/blog/press-release/rover-com-reveals-new-research-dog-people/> [<https://perma.cc/NMK6-2NX8>].

237. *Id.*

238. Ana Luisa Suarez, *Dog Owners Take More Pictures of Their Pet than Their Significant Other*, APARTMENT THERAPY (Dec. 29, 2018), <https://www.apartmenttherapy.com/dog-owners-take-more-photos-of-pet-265725>.

more like a family member than just a simple pet. And that as a result of the harm inflicted upon the animal, the plaintiff suffers significant emotional injuries that deserve to be monetarily compensated. Ultimately, this limitation, together with statutory caps²³⁹ and other measures proposed in this statute, will minimize the risk of frivolous and disingenuous claims and the risk that defendants are burdened with arbitrary and excessive damage awards.²⁴⁰ If the plaintiff can meet this burden in proving the value of their companion animal to them, then compensation for their loss would be fair, and the existence of such injuries would be more likely be genuine than not.

d. Factors for the Jury

There are currently no objective standards when determining the existence and extent of emotional injuries.²⁴¹ As Mark Geistfeld notes, “jury instructions are currently so open-ended that jurors are likely to use a number of different methods to determine awards.”²⁴² This inconsistency adds an element of subjectivity that makes courts uncomfortable, the application of the law becomes difficult, and the line between fair compensation and excessive recovery becomes blurred.

Emotional injuries vary in each case. They are not easily ascertainable; therefore, there is a higher risk that juries may award damages out of sympathy rather than an objective analysis of the plaintiff’s emotional harm. To avoid this issue, this Article proposes a list of factors for the jury that serves as a baseline for objectively determining whether noneconomic injuries exist and whether they are significant enough to allow monetary compensation. When the plaintiff alleges emotional injuries, they must describe the relationship with the companion animal in the complaint and introduce evidence of such relationship and the extent of the injury. Based on that evidence, the jury

239. See discussion *infra* Part III.6.e. Statutory Caps

240. This measure addresses in part the policy concerns against damages expansion raised by courts. See e.g. *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001) (expressing the need to ensure fairness of the financial burden placed upon a negligent defendant).

241. *Merlo v. Standard Life & Accident Ins. Co.*, 130 Cal. Rptr. 416, 424 (Cal. Ct. App. 1976) (holding that “there is no fixed or absolute standard by which to compute the monetary value of emotional distress. . . .”); *Tan Jay Int’l, Ltd. v. Canadian Indem. Co.* 243 Cal. Rptr. 907, 913 (Cal. Ct. App. 1988) (holding that “[d]eterminations concerning emotional distress—its existence and the appropriate compensation for it—are left to the finder of fact . . . based on an entire evidentiary record, including the reasonable inferences which can be drawn from it. . . .”).

242. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 779 (2005).

will be able to assess the factors and assign a monetary value to the harm.²⁴³

The non-exhaustive list of factors seeks to provide some uniformity between juries in the determination of noneconomic damages and to minimize the risk of burdening defendants unduly by avoiding excessive awards based on sympathy. This list has been crafted to provide juries with an objective tool to determine whether the plaintiff suffered emotional distress and/or loss of companionship based on the emotional bond with their companion animal and the extent of such injuries. Courts have implied the necessity of establishing standards for the determination of noneconomic damages before. For instance, in the *McDougall v. Lamm* case, the court stated:

this critical determination [of the existence of a relationship to a degree of intimacy required] must be guided as much as possible by a standard that focuses on those factors that identify and define the intimacy and familial nature of such a relationship. That standard must take into account the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and . . . “whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life’s mundane requirements.”²⁴⁴

These same factors have been suggested by courts to allow the award of noneconomic damages in different relationship contexts. For example, the New Hampshire Supreme Court allowed recovery under negligent infliction of emotional distress for unmarried cohabitants.²⁴⁵ In addition, parents and siblings can recover under loss of consortium if they can prove a close relationship based on the same factors.²⁴⁶

The legal system recognizes that certain relationships between family members can be so significant that they deserve pecuniary compensation when such relationships are prematurely broken due to the

243. See *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 287 (N.Y. Civ. Ct. 1980) (holding that “[t]he difficulty of pecuniarily measuring this loss does not absolve defendant of his obligation to compensate plaintiff for that loss, at least to the meager extent that money can make her whole. The dog’s age is not a depreciation factor in the court’s calculations, for ‘manifestly, a good dog’s value increases rather than falls with age and training.’” (quoting *Stettner v. Graubard*, 368 N.Y.S.2d 683, 685 (Town Ct. of Harrison, Westchester Cnty. 1975))).

244. See *McDougall v. Lamm*, 48 A.3d 312, 320 (N.J. 2012) (quoting *Dunphy v. Gregor*, 642 A.2d 372, 378 (N.J. 1994)).

245. See *Graves v. Estabrook*, 818 A.2d 1255, 1262 (N.H. 2003).

246. See *Fitzjerrell v. City of Gallup*, 79 P.3d 836, 841 (N.M. Ct App. 2003).

conduct of a third person. Therefore, compensation of noneconomic damages is not awarded based on consanguinity or on the fact that someone is related. Instead, it is based on the significance of the relationship between the plaintiff and the victim. These factors are important because the evidence presented by plaintiffs will be juxtaposed with the same set of objective factors.

Courts have suggested identifying and defining the intimacy and familial nature of a given relationship.²⁴⁷ To determine whether a plaintiff has a sufficiently close and intimate relationship with a companion animal, this legal framework proposes the following non-exclusive factors for the jury to consider:

Human-companion animal relationship factors:

Duration of the relationship

For purposes of determining emotional value, the age of the companion animal is not a depreciating factor. In assessing loss of companionship damages, this factor shall be considered together with the breed, health condition, and life expectancy of the companion animal.

Whether the companion animal was included in family routines and events.

Whether the animal is a recognized emotional support animal or a service dog.

Examples of how the companion animal contributed to the well-being of the caretaker or family.

Examples of mutual dependency.

Frequency and average duration of time spent with the companion animal.

Who feeds the companion animal, and how often?

Who financially provides for the ongoing needs of the companion animal?

Who keeps records concerning the companion animal, such as medical expenditures, etc.?

Whether the companion animal is the sole companion to the owner?

Whether the owner has attended support groups and/or received grief counseling.

247. See *McDougall*, 48 A.3d at 320.

Whether the plaintiff(s) suffered physical impact as a result of the emotional distress or loss of companionship.

Whether the injury or loss of the companion animal has significantly impacted family dynamics.²⁴⁸

There is a caveat to the first requirement concerning the length of the relationship between a person and a companion animal. Relationships grow stronger and deeper as time passes; this also applies to the relationship humans form with their companion animals. Like in human relationships, it takes time for humans and their animal companions to get to know each other fully and to care about each other at a deeper level.²⁴⁹ That deep attachment does not form automatically when a companion animal joins a family. Instead, it builds as meaningful interactions take place across time. Therefore, the duration of the relationship is an important factor in determining noneconomic damages. Experiencing the injury or death of a puppy will likely not produce the same impact as experiencing the injury or death of an adult dog with whom the human has shared many years of his or her life and experiences.

For this reason, the age of the companion animal should not be considered a depreciating factor in assigning a monetary value to the emotional injury, as it may add to the quality of the relationship. Though, it should be counterbalanced with factors such as the breed of the animal, age, and health condition. In other words, age and lifespan expectations should be looked at together in determining monetary value.

Factors 2, 3, and 4 assist the jury in assessing the role of the companion animal within the family and help establish the deepness of the relationship based on mutual dependence, meaningful interactions, and commitment based on the evidence provided by the plaintiff.

The remaining factors will help the jury assess noneconomic damages in those situations that enhance existing relationships,²⁵⁰ with careful consideration not to prejudice those classes of persons that do not have economic means or that otherwise have healthy animals and do not

248. MODEL STATUTE, *infra* Part V.Appendix: Model Statute for Recovery of Damages for Harm to Companion animals, at § 7.

249. Iris Smolkovic, Mateja Fajfar & Vesna Mlinaric, *Attachment to Pets and Interpersonal Relationships*, 3 J. EUR. PSYCH. STUDENTS 15, 20 (2012) (explaining how their study showed that the “[l]ength of ownership also had an important influence on pet attachment. Owners who had owned their pet for more than three years reported stronger attachment to their pets”).

250. Lauren M. Sirois, Comment, *Recovering for the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages*, 163 U. PA. L. REV. 1199, 1232-33 (2015).

need constant veterinary visits. These factors provide a preliminary understanding of the relationship of the companion animal with an individual, and they are also relevant when more than one family member is claiming noneconomic damages. They will assist the jury in allocating monetary awards to more than one member of the family unit based on the different degrees of attachment. This will be relevant when deciding how to divide the judgment among family members.

Other factors may be relevant in certain situations when the plaintiff has financial means. However, even though they may be helpful, they are weighed less heavily. This is because some plaintiffs, such as owners in underserved communities that do not have access to veterinary care, spay/neuter providers, etc.,²⁵¹ and owners of healthy companion animals that do not need constant veterinary care would be punished. These factors include investment costs (food, medical care, recreation, training), costly high-tech care, and consistent luxury expenses (daycare services, grooming, toys, food, sitting, and health insurance).

e. Statutory Caps

Statutory caps limit the monetary value of a loss (in this case, of emotional distress and loss of companionship) that may be awarded to the injured party. Statutory caps are an appropriate mechanism to limit liability as there is no precise formula to translate emotional injuries into precise monetary terms. In the United States, only five states have established caps via statute for injury or death of companion animals.²⁵² Caps are particularly important in companion animal cases due to the element of the variability of these damages. They would make monetary awards more predictable, guarantee more uniform awards, and prevent exorbitantly high payouts by the jury based on sympathy.²⁵³ Furthermore, they would keep down the cost of veterinary services,²⁵⁴ match recovery

251. See *Humane Soc'y U.S.*, *supra* note 73.

252. These statutory caps are inconsistent and cover different damages in different circumstances. The Tennessee T-Bo Act, for example, caps noneconomic damages at \$5,000, whereas Illinois caps punitively set a range between \$500-\$25,000 for each act of cruelty. Compare Connecticut (CONN. GEN. STAT. § 22-351a (2022)), Illinois (510 ILL. COMP. STAT. § 70/16.3 (2022)), Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (West 2022)), Nevada (NEV. REV. STAT. § 41.740 (2022)), and Tennessee's T-Bo Act (TENN. CODE ANN. § 44-17-403 (2021)).

253. As recovery is going to be interpreted by the jury as the amount that they think would compensate the plaintiff for their emotional losses. Keeping the scope of liability contained would result in less disproportionate and unfair settlements or verdicts.

254. By capping noneconomic damages awards insurance companies can predict more easily their expected losses and keep insurance premiums down. Therefore, veterinarians do not

to the real loss at hand, and pay respect to the belief that the loss of a companion animal does not validate awards equivalent to the loss of a spouse, child, or parent.²⁵⁵

There is no clear consensus as to what a cap should be.²⁵⁶ Values for emotional damages are inherently arbitrary, and the “legislature is certainly an appropriate body to make estimates about the emotional value their constituents derive from their companion animals.”²⁵⁷ Keeping the scope of liability to a reasonable cap will limit the jury’s capacity to overburden the defendant, particularly in negligent actions; therefore, jury awards are prevented from becoming excessive. A calibrated estimate that protects the interests of plaintiffs and defendants would be appropriate. This means estimates that are neither too low as not to compensate plaintiffs for their true injuries nor too high as to overcharge defendants.²⁵⁸ A cap with these characteristics would lessen the chances of disproportionate liability.²⁵⁹

To overcome the issue of arbitrariness and excessiveness, statutory caps in this model statute are crafted to limit noneconomic damages awards to reasonable amounts depending on whether the defendant’s conduct was intentional or negligent and on whether the conduct resulted in death or injury of the animal. In addition, the cap is higher for those cases where two or more family members claim emotional damages. This

need to increase their prices. See Leonard J. Nelson, III, Michael A. Morrissey & Meredith L. Kilgore, *Damages Caps in Medical Malpractice Cases*, 85 MILBANK Q. 259, 269 (2007) (concluding that in medical malpractice, “the more rigorous empirical analyses consistently showed that damages caps reduced medical malpractice premiums,” with the exception of one study).

255. Sirois, *supra* note 250, at 1233 n.217 (stating “A cap would [] send a message that although the human-animal bond is worthy of significant compensation . . . the bonds among humans are [still] at the heart of our existence and social organization.”) (alteration in original) (quoting Livingston, *supra* note 190, at 827-28)).

256. *Id.* at 1233.

257. See Elaine T. Byszewski, Comment, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 231-32 (2003).

258. See Madeleine O’Neill, *Maryland Lawmakers Weigh Loosening Cap on Damages in Pet Death Lawsuits*, MD.: DAILY REC. (Mar. 2, 2022), <https://thedailyrecord.com/2022/03/02/md-lawmakers-weigh-loosening-cap-on-damages-in-pet-death-lawsuits/> (reporting that Sen. Susan C. Lee, D-Montgomery, presented a bill that would lift Maryland’s current cap of \$10,000 in compensatory damages when there is a showing of gross negligence, intent, malice, or a constitutional violation on pet damages cases. Sen. Lee stated that current law places “nonsensical limitations” on cases involving a tortious injury or death of a pet).

259. See Livingston, *supra* note 190, at 839.

last measure may raise the recoverable amount but would likely be lower than allowing each family member to sue separately.

Under this model statute, caps are lower in those scenarios where the conduct is negligent to keep juries from becoming overly-sympathetic and in those instances where the animal survives (as emotional distress tends to dissipate with time).²⁶⁰ The proposed statutory caps limit noneconomic damages to \$65,000 for intentional or grossly negligent conduct when the companion animal is killed and \$45,000 for negligent conduct that results in substantial injury to the animal. On the other hand, noneconomic damages awards in cases involving the negligent killing of a companion animal are capped at \$25,000, and the cap is set at \$15,000 for negligent conduct resulting in substantial injuries.

IV. CONCLUSION

The American family structure has shifted to include animal companions.²⁶¹ This cultural change that started decades ago is now reflected in many areas.²⁶² The law is no stranger to this shift and has slowly begun to adapt to protect humans' interest in their companion animals as family members.²⁶³

In tort law, this change started to take place decades ago.²⁶⁴ Yet, to this date, this area of law remains very much unchanged. Most Americans who have companion animals consider them family members. Therefore, the consensus is that owners can recover for the emotional losses suffered when their companion animal is injured or killed. The sad reality is that compensation of noneconomic damages in companion animal cases is not allowed in most states because courts often shield themselves behind the longstanding legal principle that companion animals are considered personal property. As a result, the legal system has provided blanket immunity for tortfeasors who harm companion animals, while companion animal owners are denied the right to recover for their emotional losses. In turn, companion animal owners are left with the possibility of

260. See discussion *supra* Part III.5.b.i. Emotional Distress (defining emotional distress as the response caused by an event that may give rise to symptoms such as anxiety, depression, panic attacks, becoming withdrawn, etc. that has a tendency to go away as time passes).

261. See Laurent-Simpson, *supra* note 5, at 27.

262. See discussion *supra* Part II. Companion Animals in Society and the Legal System

263. See discussion *supra* Part II. Companion Animals in Society and the Legal System

264. See, e.g., *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067 (Haw. 1981); *Burgess v. Taylor*, 44 S.W.3d 806, 812-14 (Ky. Ct. App. 2001); *Womack v. Von Rardon* 135 P.3d 542, 543 (Wash. Ct. App. 2006).

recovering market value, which usually does not even begin to cover expensive litigation costs.

This Article aims to resolve the issue of recovery by proposing a comprehensive legal framework that can be introduced as a statute and used by courts in granting monetary relief to companion animal owners. A statute is more appropriate to move the needle, as it would delineate the circumstances in which recovery should be allowed and the limitations to liability depending on the nature of the conduct and its result (death or injury to the companion animal).

More specifically, this Article proposes a tort reform adapted to the companion animals' legal and societal status and opens the door to recovery of noneconomic damages (emotional distress and loss of companionship) based on the existence of a meaningful relationship between humans and their animal companions. It moves from expanding existing causes of action to include animals (which has been proven ineffective) to creating a new cause of action that is crafted with this unique status in mind instead of trying to compare them to human beings.

Admittedly, there is a judicial concern that by allowing recovery of noneconomic damages, the legal system would open the door to unlimited liability, and plaintiffs would be "inclined to set entirely arbitrary figures on their animals' value."²⁶⁵ To avoid this result, this Article proposes several limitations to prevent the risk of inconsistent and inaccurate damages awards.²⁶⁶ First, recovery would only be available to those who consider their companion animals a member of their family and can establish by clear and convincing evidence the existence of an emotional bond. Establishing an emotional bond will depend on a list of factors proposed that the jury would use to determine the existence of an ex-ante relationship and the extent of the emotional injuries if the jury finds such a relationship to exist. In addition, statutory caps are suggested, depending again on the nature of the conduct and the result obtained. This way, recovery is more predictable, and awards are less likely to be arbitrary and excessive.

As Paul Rubin and Joanna Shepard point out, "[a] well-functioning legal system creates incentives for potential tortfeasors to internalize the costs of the externalities by making injurers liable for damages if a tort actually occurs."²⁶⁷ As it stands now, there is no real deterrence for

265. See Livingston, *supra* note 190, at 820.

266. *Id.*

267. See Paul H. Rubin & Joanna M. Shepherd, *Tort Reform and Accidental Deaths*, 50 J.L. & ECON. 211, 211 (2007) (citations omitted).

defendants to behave in a way that does not harm companion animals. The question is not whether companion animals are economically valued by their families. That question has been answered numerous times by scholars and many courts. The position of companion animals within the family is widely accepted, and an increasing number of courts continue to recognize that. This Article answers the question of whether there is a reasonable and logical pathway to overcome the difficulties that the award of noneconomic damages presents in companion animal cases while restraining the exposure of tortfeasors.

With the multi-approach proposed in this Article, companion animal owners will be able to recover for their emotional losses while courts are given guidance on how to identify the existence and value of the injury. Moreover, the combination of the limitations allows compensation within the boundaries of reasonability and fairness for plaintiffs and defendants. It is a win for the plaintiff and the legal system, which will become more efficient and fairer while encouraging defendants to act in a manner that does not harm companion animals.

Ultimately, the goal is to finally give the diverse, multi-generational, and multi-species families the recognition they deserve in the legal system and grant a small victory to companion animals by giving them the recognition they deserve within the family.

V. APPENDIX: MODEL STATUTE FOR RECOVERY OF DAMAGES FOR HARM TO COMPANION ANIMALS

§ 1 Purpose

The purpose of this model statute is to establish a legal framework for the recovery of damages when a companion animal is harmed, the circumstances, and the extent under which recovery shall be available.

§ 2 Definitions

The following words and phrases, when used in this statute, shall have the meanings given to them in this section:

“Companion animal” means a domestic animal of the mammal or bird species that lives in the plaintiff’s home and has a sufficiently long lifespan to create a reasonable expectation of the possibility of establishing a long-lasting and meaningful relationship with humans.

“Owner, human, family member, or caretaker” means a person or persons who have the primary responsibility for the companion animal, have a close relationship with the companion animal, and who belongs to the same family unit and lives in the same house as the companion animal.

“Family Unit” means the family members that reside together, composed of humans and companion animals.

“Defendant” means who intentionally, deliberately, negligently, or grossly negligently inflicts harm to a companion animal.

“Plaintiff or claimant” means a person or persons seeking recovery of compensatory damages arising from the injury or death inflicted on a companion animal due to the defendant’s conduct.

“Compensatory damages” means economic and noneconomic damages suffered by the plaintiff.

“Noneconomic damages” means emotional distress and loss of companionship damages.

“Emotional distress” means the pain and suffering of an owner as a consequence of the injury or death of their companion animal, and that usually fades away as time passes. It is the response caused by the harm to the companion animal that may give rise to symptoms including but not limited to anxiety, depression, panic attacks, becoming withdrawn, etc.

“Loss of companionship” means the premature severance of a pre-existing relationship between the owner and the companion animal.

“Actual value to the owner” means the economic value derived from the usefulness and services of the companion animal when fair market value is not ascertainable.

“Duty of care” means the duty to avoid causing foreseeable harm to the companion animal of another. When a companion animal suffers harm arising from the negligence of a tortfeasor, emotional injuries on the owner are a foreseeable consequence of such harm.

“Serious injury” means a physical injury inflicted on a companion animal, which involves a risk of death, loss or impairment of bodily function, or disfigurement, including but not limited to broken bones, bleeding wounds, organ injury, and permanent disability.

§ 3 Actions for tortious injury or death of a companion animal

There shall be an action in which a companion animal owner may be entitled to recovery of damages for the intentional or negligent injury or death of a companion animal with whom the owner has a meaningful relationship.

§ 4 Burden of proof

Noneconomic damages shall be awarded only if the plaintiff proves the existence of a meaningful bond with their companion animal by clear and convincing evidence and the suffering of emotional injuries as a consequence of the defendant’s tortious act on the companion animal.

§ 5 Factors for the determination and extent of a meaningful human-companion animal bond

Before awarding noneconomic damages, the trier of fact shall consider the following nonexclusive factors to determine the existence and extent of a human-companion animal bond. These factors shall also assist the jury in determining the existence of individual relationships with the companion animal when more than one family member seeks recovery from noneconomic injuries. Human-companion animal relationship factors:

- (1) Duration of the relationship
- (2) For purposes of determining emotional value, the age of the companion animal is not a depreciating factor. In assessing loss of companionship damages, this factor shall be considered together with the breed, health condition, and life expectancy of the companion animal.
- (3) Whether the companion animal was included in family routines and events.
- (4) Whether the animal is recognized as an emotional support animal or a service dog.

- (5) Examples of how the companion animal contributed to the well-being of the caretaker or family.
- (6) Examples of mutual dependency.
- (7) Frequency and average duration of time spent with the companion animal.
- (8) Who feeds the companion animal, and how often?
- (9) Who financially provides for the ongoing needs of the companion animal?
- (10) Who keeps records concerning the companion animal, such as medical, tax, expenditures, etc.?
- (11) Whether the companion animal is the sole companion to the owner?
- (12) Whether the owner has attended support groups and/or received grief counseling.
- (13) Whether the plaintiff(s) suffered physical impact as a result of the emotional distress or loss of companionship.
- (14) Whether the injury or loss of the companion animal has significantly impacted family dynamics.

§ 6 Compensatory damages award for harm to companion animals

A defendant found liable for intentionally or negligently inflicting serious injury or death to a domestic animal shall be responsible to the plaintiff for:

- (1) The fair market value of the animal,
- (2) The actual value of the companion animal to the owner when market value cannot be determined,
- (3) Veterinary expenses reasonably related to the defendant's conduct,
- (4) Burial or cremation expenses,
- (5) Emotional distress and/or loss of companionship, and
- (6) Punitive damages when the defendant's conduct is intentional or grossly negligent.

§ 7 Tortious harm of a companion animal

A cause of action for compensatory damages shall be available when a companion animal suffers serious injury or death due to intentional, negligent, or grossly negligent conduct.

A person who may be entitled to recovery under this section shall be able to recover noneconomic damages if:

- (1) The claimant suffers emotional distress and/or loss of companionship, and
- (2) The claimant establishes a meaningful relationship with the companion animal

In claims alleging negligent conduct, the plaintiff shall prove all the elements required to establish a prima facie case of negligence.

The damages award may be increased if the plaintiff witnesses the tortious harm and suffers severe emotional distress as a result.

§ 8 Limitations of recovery

In a civil action in which a plaintiff seeks recovery of noneconomic damages, the trier of fact shall determine the amount of noneconomic damages separately from the amount of other damages. Under this cause of action, the plaintiff is not required to witness the harm. However, the damage award may be increased if the plaintiff witnesses the death and suffers severe emotional distress as a result.

The damages award for emotional distress and loss of companionship arising from the death of a companion animal shall not exceed \$65,000 when the conduct of the defendant is intentional or grossly negligent; and \$45,000 when the death is the result of negligent conduct.

The damages award for emotional distress arising from the serious injury of a companion animal shall not exceed \$25,000 when the conduct of the defendant is intentional; and \$15,000 when the serious injury is the result of negligent conduct.

This limitation shall not apply to punitive damages.

§ 9 Statute of Limitations

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Any claim or cause of action arising out of the present statute shall be filed within two years of the date when the harm to the companion animal occurred.