

# ARTICLES

## RECOVERY OF “NON-ECONOMIC” DAMAGES FOR WRONGFUL KILLING OR INJURY OF COMPANION ANIMALS: A JUDICIAL AND LEGISLATIVE TREND

BY  
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*The emotional bond between humans and their animal companions can be as strong as that experienced between two people, and animal companions are often looked upon and treated as members of the family. When they are wrongfully killed or injured, however, the legal system traditionally has not adequately recognized this important relationship. Instead, recovery has been limited to the market value of the animals. It is time for state laws to explicitly acknowledge the significance of the human-animal companion relationship and codify recovery for such non-economic injuries as emotional distress and loss of companionship. This article examines why damages for such non-economic harm are justified and sets forth an explicit legislative proposal to remedy the injuries suffered by humans whose animal companions have been wrongfully harmed.*

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I. INTRODUCTION

The syllogism is as follows: The proper measure of recovery for property damage is the market value of the property at the time it was damaged or destroyed. Animals, including companion animals, are property. Therefore, the measure of damages for the wrongful killing or injury of an animal companion is solely the market value of that animal “property.” Traditionally, this has been the law. The flaw in the syllogism (and in the law) is that, despite their legal classification as “property,” animals are in fact live, sentient beings long recognized (particularly in the case of dogs) as “man’s best friend” and considered by many to be beloved family members, a far cry from items of property like a table or chair.

In 1995, one commentator concluded that three important objectives of tort law—compensation, deterrence, and the reflection of societal values—compelled reevaluation in cases of harm to animal companions, noting that no logical reason existed at that time to deny human companions the right to recover for their non-economic injuries, such as emotional distress and loss of companionship in these cases.<sup>1</sup> Other legal commentators also have recognized the human-animal companion bond, urging courts to reflect this relationship in their decisions.<sup>2</sup> Now it is time for state legislatures to step in and codify as public policy what has long been recognized by some courts, as well as legal commentators, historians, experts, and members of society as a whole—the bond that frequently exists between humans and their animal companions.

<sup>1</sup> Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. Rev. 1059 (1995). For ease of reference, damages recoverable for these non-economic injuries will be referred to simply as “non-economic damages.”

<sup>2</sup> Peter Barton & Frances Hill, *How Much Will You Receive in Damages From the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 N.Y.L. Sch. L. Rev. 411 (1989); 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 (1998).

This article first summarizes the development and current status of human-to-human loss of consortium/companionship claims. It then sets forth the rationale supporting legislation allowing recovery of non-economic damages for harm to animal companions, looking to the well-recognized and documented bond that exists between humans and their animal companions. It considers the public policy reasons for statutorily permitting recovery of such damages (whether couched in terms of emotional distress, loss of companionship, or otherwise), and addresses potential arguments against updating tort liability in this manner. Finally, it discusses recent legislation and provides a proposed approach.

## II. HUMAN LOSS OF CONSORTIUM / LOSS OF COMPANIONSHIP

Before considering the development of these claims, a common point of reference is necessary. “Loss of consortium” originally was limited to a wife’s household services, including “general usefulness, industry, and attention within the home and family.”<sup>3</sup> This concept of consortium was known as the “material” version.<sup>4</sup> The more modern “sentimental” version later developed, focusing on a spouse’s loss of affection, companionship, society,<sup>5</sup> and sexual relations;<sup>6</sup> although some courts have sharply criticized efforts to separate consortium into “material” and “sentimental” aspects and have treated them as indivisible.<sup>7</sup>

In cases involving parent/child, as opposed to spousal, loss of consortium, the term has been similarly defined as “the loss of love, companionship, society [and] affection,” merely omitting the sexual component.<sup>8</sup> As articulated by one court: “Sexual relations are but one element of the spouse’s consortium action. The other elements—love, companionship, affection, society, comfort, services and solace—are

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<sup>3</sup> *Gail v. Clark*, 410 N.W.2d 662, 667 (Iowa 1987).

<sup>4</sup> *Id.* at 668; *Acuff v. Schmitt*, 78 N.W.2d 480, 481-82 (Iowa 1956).

<sup>5</sup> “Society” has been defined simply as “companionship” or “company.” *Webster’s Third New International Unabridged Dictionary of the English Language* 2162 (Philip Babcock Gove ed., 3d ed., Merriam-Webster Publisher 1986).

<sup>6</sup> See e.g. *Gail*, 410 N.W.2d at 668 (“society, comfort, and affection”); *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 320 (Mass. 1976) (noting that underlying purpose of loss of consortium “is to compensate for the loss of the companionship, affection and sexual enjoyment of one’s spouse”); *Brann v. Exeter Clinic, Inc.*, 498 A.2d 334, 338 (N.H. 1985) (citing to its decision *Guevin v. Railroad*, 78 N.H. 289, 300 (1916), defining consortium to include three elements: “service, society and sexual intercourse,” but noting recovery is “not dependent upon proving loss of service”).

<sup>7</sup> See e.g. *Montgomery v. Stephan*, 101 N.W.2d 227, 228 (Mich. 1960) (“[i]t would be a reckless semanticist who would assert that he was able, justifiably, to place each of the various elements of conjugal fellowship in one or the other of the suggested pigeonholes . . .”).

<sup>8</sup> *Reben v. Ely*, 705 P.2d 1360, 1362 (Ariz. App. 1985).

similar in both [spousal and parent-child] relationships and in each are deserving of protection.”<sup>9</sup>

Additionally, statutes permitting recovery for loss of “services” have been construed to encompass “consortium damages,” including loss of companionship and society, but not necessarily “grief, mental anguish or suffering;”<sup>10</sup> although the latter may be included as separate elements of recoverable damages.<sup>11</sup>

At common law, recovery for loss of consortium was allowed only where the spouse, or later the parent, was injured; thus, the claim would lie for the limited period between injury and death.<sup>12</sup> Currently, however, wrongful death statutes in most states take over where the common law leaves off and allow recovery for loss of consortium damages.<sup>13</sup> Some statutes apply to cases of either wrongful injury or

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<sup>9</sup> *Berger v. Weber*, 303 N.W.2d 424, 426 (Mich. 1981); see *Williams v. Hook*, 804 P.2d 1131, 1132 n. 1 (Okla. 1990) (noting that “sexual relations are but one aspect of the bundle of sticks that makes up a claim for consortium” and that those referenced above should be considered in a child’s loss of consortium claim).

<sup>10</sup> *Iowa-Des Moines Nat’l Bank v. Schwerman Trucking Co.*, 288 N.W.2d 198, 204 (Iowa 1980) (quoting William L. Prosser, *Handbook of the Law of Torts* § 127, 908 (4th ed., West 1971); see *Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R. Co.*, 335 N.W.2d 148, 151-52 (Iowa 1983) (quoting *Schwerman Trucking Co.* and holding that “services” under Iowa Code § 613.15 includes parental consortium damages, without regard to whether the parent is injured or killed); *Norvell v. Cuyahoga County Hosp.*, 463 N.E.2d 111 (Ohio App. 1983) (loss of a child’s services includes loss of society, companionship, comfort, love and solace). For an example of broader language, which includes sorrow and mental anguish, see W. Va. Code § 55-7-6 (2000) (in wrongful death actions, “the jury shall include, but may not be limited to, damages for . . . [s]orrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice,” as well as compensation for the reasonably expected loss of “services, protection, care and assistance”).

<sup>11</sup> See e.g. Nev. Rev. Stat. Ann. § 41.085 (LEXIS L. Publg. 2000) (“jury may award each person pecuniary damages for his grief or sorrow, loss of probable support, companionship, society, comfort and consortium . . .”).

<sup>12</sup> *Audubon-Exira Ready Mix*, 335 N.W.2d at 149.

<sup>13</sup> See e.g. Haw. Rev. Stat. § 663-3 (1999) (applies to wrongful death of a “person” and includes recovery for loss of “love and affection, including loss of society, companionship, comfort, consortium or protection”); Kan. Stat. Ann. § 60-1904 (1999) (damages may be recovered for “mental anguish, suffering or bereavement,” and “loss of society, companionship, comfort or protection;” but § 60-1903 caps recovery for such damages at \$250,000); Mich. Stat. Ann. § 27A.2922(6) (LEXIS L. Publg. 2000) (wrongful death of a “person;” includes recovery for loss of “society and companionship”); N.C. Gen. Stat. § 28A-18-2 (2000) (damages include compensation for loss of reasonably expected “services, protection, care and assistance of the decedent, whether voluntary or obligatory,” and reasonably expected “society, companionship, comfort, guidance, kindly offices and advice”); Or. Rev. Stat. § 30.020(2)(d) (1999) (includes recovery in an amount which “[j]ustly, fairly and reasonably compensates the decedent’s spouse, children . . . and parents for pecuniary loss and for loss of the society, companionship and services of the decedent”); R.I. Gen. Laws § 10-7-1.2 (2001) (spouses entitled to damages for “loss of consortium;” children entitled to damages for loss of “parental society and companionship;” and parents entitled to loss of “the minor’s society and companionship”); Wyo. Stat. Ann. § 1-38-102(c) (2000) (includes actions brought on behalf of spouse, parent, child or siblings of decedent and includes recovery for “loss of probable future companionship, society and comfort”).

death.<sup>14</sup> Other states have enacted separate statutes applicable only to tortious injury claims.<sup>15</sup>

### A. Spousal Loss of Consortium

A husband's legal right to his wife's services was first recognized in 1610, when an English court allowed a husband's cause of action for an assault on his wife "*per quod consortium . . . amisit*," which has been translated to "whereby he lost the company of his wife."<sup>16</sup> The legal status of the wife at that time was generally analogous to that of a servant, as chattel or property of her husband.<sup>17</sup>

By the 1970s, a majority of states recognized a wife's cause of action for loss of consortium, thereby permitting either spouse to sue for loss of the other's love, society, affection, and/or sexual relations.<sup>18</sup> By 1983, nearly every state recognized such claims, either by statute or case law.<sup>19</sup>

Countering concerns over expanding tort liability in this manner, courts rejected arguments that recognition of this cause of action would necessarily require the same recognition of other relationships and correspondingly place greater burdens on the courts. Courts committed to "proceed from case to case with discerning caution."<sup>20</sup>

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<sup>14</sup> See e.g. N.D. Cent. Code § 32-03.2-04 (2000) (applies to "wrongful death or injury to [a] person" and allows compensation for noneconomic damages arising from "mental anguish, emotional distress . . . loss of society and companionship, loss of consortium . . . and other nonpecuniary damage").

<sup>15</sup> See e.g. R.I. Gen. Laws § 9-1-41 (2000) (analogous to Rhode Island's wrongful death statute, R.I. Gen. Laws § 10-7-1.2).

<sup>16</sup> *Guy v. Livesey*, 79 Eng. Rep. 428 (K.B. 1618); *Black's Law Dictionary* 1162 (Bryan A. Garner ed., 7th ed., West 1999); see F. Warren Hughes, Student Author, *Loss of Consortium in North Carolina: Back Into the Mainstream of American Legal Thought*, 12 N.C.C. L.J. 488 (1981).

<sup>17</sup> *Montgomery v. Stephan*, 101 N.W.2d 227, 230 (Mich. 1960) (noting that historically a woman's "legal nonexistence" and her "degraded position" was as "a combination vessel, chattel, and household drudge"); *Lynch v. Knight*, 11 Eng. Rep. 854, 863 (K.B. 1861) (loss of consortium sustained by the husband was the deprivation of the "assistance of the wife in the conduct of the household and in the education of his children"); *Theama ex rel. Bichler v. City of Kenosha*, 344 N.W.2d 513, 515 (Wis. 1984) (noting "archaic common law doctrine that upon marriage, the woman assumed the status of a chattel and was legally nonexistent"); see generally Margaret Thornton, *Loss of Consortium: Inequality Before the Law*, 10 Sydney L. Rev. 259 (1984).

<sup>18</sup> Nancy C. Osborne, Student Author, *Loss of Consortium: Paradise Lost, Paradise Regained*, 15 Cumb. L. Rev. 179, 179 (1985); Kevin Lindsey, Student Author, *A More Equitable Approach to Loss of Spousal Consortium*, 75 Iowa L. Rev. 713, 714 (1990).

<sup>19</sup> Martin S. Amick, Student Author, *Who Should Recover For Loss of Consortium?*, 35 Me. L. Rev. 295, 295-96 & n. 4 (1983); see *Am. Export Lines, Inc. v. Alvez*, 446 U.S. 274, 284-85 n. 11 (1980) (listing the forty-two jurisdictions which at that time permitted the claim of spousal loss of consortium).

<sup>20</sup> *Diaz v. Eli Lilly & Co.*, 302 N.E.2d 555, 563 (Mass. 1973).

### B. A Child's Recovery for Parental Injury or Death

Before 1977, no jurisdiction in the United States recognized common law loss of parental consortium as a viable claim or element of recoverable damages.<sup>21</sup> By the early 1980s, numerous legal commentators supported recognition of an independent cause of action for loss of parental consortium.<sup>22</sup> Advocates maintained that recognition of such an action was "mandated by logic, compassion, and modern sensitivity to the independent identity of the child, the importance of family relationships, and the fairness of compensating persons injured by another's negligent conduct."<sup>23</sup> Gradually, a small but growing number of courts allowed recovery.<sup>24</sup> As noted by the Oklahoma Supreme Court, even those jurisdictions declining to recognize the cause of action had acknowledged that "the child suffers a real and serious loss when a parent is injured, and that because of the erosion of the traditional concept of a child as a chattel, lack of precedents may be a poor excuse to refuse to acknowledge the cause of action."<sup>25</sup> By early 1997, a total of sixteen state courts had recognized a child's claim for loss of parental consortium.<sup>26</sup>

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<sup>21</sup> Lauren E. Handler, *Parental Consortium Loss Becoming a Viable Claim*, 135 N.J.L.J. 541, Supp. 21 (Oct. 4, 1993).

<sup>22</sup> See e.g. *Rosen ex rel. Rosen v. Zorzos*, 449 S.2d 359, 363 n. 8 (Fla. Dist. App. 1984) (citing to numerous law review articles in support); *Theama ex rel. Bichler*, 344 N.W.2d at 514. In light of conflict among several Florida appellate courts at that time, the appellate court in *Rosen ex rel. Rosen v. Zorzos* certified the question to the Florida Supreme Court, wherein the majority deferred to the legislature on this issue. *Zorzos v. Rosen ex rel. Rosen*, 467 S.2d 305 (Fla. 1985).

<sup>23</sup> *Berger v. Weber*, 303 N.W.2d 424, 429 (Mich. 1981).

<sup>24</sup> See e.g. *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991 (Alaska 1987) (child's claim for injury to, rather than death of, parent); *Villareal v. State*, 774 P.2d 213 (Ariz. 1989) (child's claim for injury to, rather than death of, parent); *Dearborn Fabricating & Engr. Corp. v. Wickham*, 532 N.E.2d 16 (Ind. App. 1988) (child's claim for injury to, rather than death of, parent); *Audubon-Exira Ready Mix*, 335 N.W.2d 148 (in a wrongful death case, where one statute permitted suits by parents for "actual loss of services, companionship and society resulting from injury to or death of a minor child" and another allowed a child's claim where the parent was merely injured, the court concluded the legislature did not intend to withhold such a claim where the parent was killed); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980) (first case recognizing child's loss of consortium claim for nonfatal injuries to parent); *Berger*, 303 N.W.2d 424; *Hay v. Med. Ctr. Hosp. of Vt.*, 496 A.2d 939 (Vt. 1985) (minor child's claim where parent was allegedly permanently comatose); *Williams v. Hook*, 804 P.2d 1131 (Okla. 1990) (injury); *Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990) (where parent is injured, child may recover "such non-pecuniary damages as loss of the parent's love, affection, protection, emotional support, services, companionship, care, and society"); *Ueland v. Reynolds Metals Co.*, 691 P.2d 190 (Wash. 1984) (damages or recovery expressly not limited to minor children; injury to, rather than death of, parent); *Belcher v. Goins*, 400 S.E.2d 830 (W. Va. 1990) (injury); and *Theama ex rel. Bichler*, 344 N.W.2d 513 (minor children; injury to parent).

<sup>25</sup> *Williams*, 804 P.2d at 1134-35 (citations omitted).

<sup>26</sup> See *Giuliani v. Guiler*, 951 S.W.2d 318, 319-20 (Ky. 1997) (noting this claim is the reciprocal of a parent's claim for loss of a child's consortium, which had been recognized by the state legislature; and expressly noting it arises from common law rather than

The Arizona Supreme Court did not hesitate to fill the void. “When we find that the common law or ‘judge-made law’ is unjust or out of step with the times, we have no reluctance to change it.”<sup>27</sup>

“The common law of today is not a frozen mold of ancient ideas, but such law i[s] active and dynamic and thus changes with the times and growth of society to meet its needs. In *Troue v. Marker* [253 Ind. 284, 290, 252 N.E.2d 800, 804 (1969)], Judge Arterburn further admonished that the ‘common law must keep pace with changes in our society.’ Where the reasoning advanced for retention of a common law doctrine is judicially unsound, and where there are no legislative barriers, this Court will abrogate common law doctrine.”<sup>28</sup>

On the other hand, some courts have declined to allow the claim, looking instead to the legislature.<sup>29</sup>

In addition to judicial precedents in tortious injury or death cases, wrongful death statutes in most states permit recovery of some form of non-economic damages in cases of parental death.<sup>30</sup>

### C. A Parent’s Claim For Loss of a Child’s Consortium

The same dynamic can be seen in the development of loss of companionship cases wherein parents have sought recovery for a child’s injury or death. In an early, seminal case, the Wisconsin Supreme Court noted the historical father-child relationship, and concluded that “today’s relationship between parents and children is, or should be, more than that between master and servant,”<sup>31</sup> such that a parent’s claim for loss of a child’s “aid, comfort, society and companionship” may be maintained where the minor child has been injured.<sup>32</sup> By 1988, a growing number of states were recognizing this claim.<sup>33</sup>

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statute); *Pence v. Fox*, 813 P.2d 429 (Mont. 1991); *Romero v. Byers*, 872 P.2d 840 (N.M. 1994); *Hibpshman*, 734 P.2d 991; *Villareal*, 774 P.2d 213; *Dearborn Fabricating & Engr. Corp.*, 532 N.E.2d 16; *Audubon-Exira Ready Mix*, 335 N.W.2d 148; *Ferriter*, 413 N.E.2d 690; *Berger*, 303 N.W.2d 424; *Hay*, 496 A.2d 939; *Williams*, 804 P.2d 1131; *Reagan*, 804 S.W.2d 463; *Ueland*, 691 P.2d 190; *Belcher*, 400 S.E.2d 830; and *Theama ex rel. Bichler*, 344 N.W.2d 513.

<sup>27</sup> *Villareal*, 774 P.2d at 216 (quoting from *City of Glendale v. Bradshaw*, 503 P.2d 803, 805 (Ariz. 1972) allowing loss of consortium for injury to parent).

<sup>28</sup> *Dearborn Fabricating & Engr. Corp.* 532 N.E.2d at 17-18 (recognizing child’s loss of consortium claim where parent was negligently injured) (citations omitted).

<sup>29</sup> See e.g. *Lee v. Colo. Dept. of Health*, 718 P.2d 221, 234 n. 11 (Colo. 1986); *Durepo v. Fishman*, 533 A.2d 264, 265 (Me. 1987); *Zorzos*, 467 S.2d 305.

<sup>30</sup> See e.g. Fla. Stat. Ann. § 768.21(3) (West 1999) (includes damages for “lost parental companionship, instruction, and guidance and for mental pain and suffering”); Haw. Rev. Stat. § 663-3; Kan. Stat. Ann. § 60-1904; Mich. Stat. Ann. § 27A.2922(6); N.C. Gen. Stat. § 28A-18-2; Or. Rev. Stat. § 30.020(2)(d); R.I. Gen. Laws § 10-7-1.2 (2001); Wyo. Stat. Ann. § 1-38-102(c); N.D. Cent. Code § 32-03.2-04.

<sup>31</sup> *Shockley v. Prier*, 225 N.W.2d 495, 500 (Wis. 1975).

<sup>32</sup> *Id.* at 501.

<sup>33</sup> See *Reben v. Ely*, 705 P.2d 1360 (Ariz. App. 1985) (minor child injured); *Yordon v. Savage*, 279 S.2d 844 (Fla. 1973) (minor child injured); *Bullard v. Barnes*, 468 N.E.2d 1228 (Ill. 1984) (death of minor child); *Ballweg v. City of Springfield*, 499 N.E.2d 1373 (Ill. 1986) (death of adult daughter); *Dymek v. Nyquist*, 469 N.E.2d 659 (Ill. App. 1984)

On the other hand, several courts, including the Michigan and California Supreme Courts, deferred to the state legislature.<sup>34</sup> In 1977, California declined to recognize the cause of action in *Baxter v. Superior Court*,<sup>35</sup> relying upon its holding earlier that year that a child had no cause of action for the negligently caused loss of his parent's affection and society.<sup>36</sup> Commentators and courts in other jurisdictions have questioned the viability of *Baxter* and *Borer* in light of judicial and legislative developments across the country since 1977.<sup>37</sup> Yet, although the California Supreme Court has not recently addressed this issue, it has cited approvingly to its rationale in *Borer* in declining to expand tort liability in other contexts, thus leaving these issues to the legislature.<sup>38</sup> Significantly, parental loss of companionship claims are allowed by statute in most states, particularly in cases of wrongful death.<sup>39</sup>

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(psychiatric treatment allegedly "brainwashing" minor child); *First Trust Co. of N.D. v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 11 (N.D. 1988) (personal injury action; noting North Dakota's wrongful death statute allowed recovery for "mental anguish, emotional distress' . . . 'loss of society and companionship' . . . 'and other nonpecuniary damage'"); *Norvell*, 463 N.E.2d 111 (based on Ohio's wrongful death statute, court allowed same recovery for tortious injury); *Shockley v. Prier*, 225 N.W.2d at 501 ("a parent may maintain an action for loss of aid, comfort, society and companionship of an injured minor child against a negligent tort-feasor . . .").

<sup>34</sup> See e.g. *Sizemore v. Bruce K. Smock & Peter Alumbaugh, Inc.*, 422 N.W.2d 666 (Mich. 1988) (personal injury action).

<sup>35</sup> 563 P.2d 871 (Cal. 1977).

<sup>36</sup> *Borer v. Am. Airlines, Inc.*, 563 P.2d 858 (Cal. 1977).

<sup>37</sup> See e.g. *Hibpshman*, 734 P.2d at 992 (noting that *Borer* "rests in part on grounds which are no longer valid," since that court described the issue as "a wholly new cause of action, unsupported by statute or precedent." The dissenting judge in *Borer* pointed out that *Borer* rested "in its entirety on policy arguments which the [same] court had previously . . . rejected in establishing a wife's right to sue for loss of spousal consortium" (citations omitted); *Reben v. Ely*, 705 P.2d 1360, 1364 (Ariz. App. 1985) (noting that California had not dealt with the issue since 1977, the Arizona court presumed California had not subsequently been presented with the question; the court would not speculate as to what the California Supreme Court would do if again presented with the issue); *Giuliani v. Guiler*, 951 S.W.2d 318, 319-20 (Ky. 1997) (noting that rationale for 1977 Kentucky case no longer existed in light of case law and statutory developments since that time, including six jurisdictions that, in recognizing the cause of action, had reversed previous decisions to the contrary).

<sup>38</sup> See e.g. *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (no recovery of emotional distress damages where mother was not present at scene of son's accident; analogizing parent/child loss of consortium cases to negligent infliction of emotional distress, court cited approvingly to the rationale of *Borer*); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) (plaintiffs sought recovery of emotional distress damages for fear of cancer from exposure to toxic substances; court cited to and agreed with *Borer* and *Thing* regarding concerns over "societal cost" in allowing emotional distress compensation).

<sup>39</sup> See e.g. Idaho Code § 5-310 (1999) (applicable to action for injury to unmarried minor child; interpreted in *Hayward v. Yost*, 242 P.2d 971, 977 (Idaho 1952), to include loss of protection, comfort, society, and companionship); Ind. Code Ann. § 34-23-2-1 (1999) (damages recoverable for loss of child's services, love, and companionship); Iowa R. Civ. P. 8 (1999) (parents may sue for "actual loss of services, companionship and society resulting from injury to or death of a minor child"); Ky. Rev. Stat. Ann. § 411.135

As is evident from the foregoing, development of tort liability with respect to loss of human companionship claims has been a gradual process. Along the way, detractors have raised concerns about opening the “floodgates of litigation” and thereby straining judicial resources and other economic sectors. As with other advancements in the law, such fears have not been realized. Despite the concern of spawning “litigation almost without end,”<sup>40</sup> some courts have been willing to modify existing common law to reflect progressing societal views, while others have stepped back and deferred to the legislature regarding such public policy issues. In any event, there is no dispute that the legislature can and must step in where society’s values at a given time are not reflected in existing laws.

### III. RATIONALE SUPPORTING LEGISLATION ALLOWING RECOVERY OF NON-ECONOMIC DAMAGES FOR HARM TO ANIMAL COMPANIONS

This section provides the reasons why state legislatures, in tort liability statutes, should provide for the recovery of non-economic damages for harm to companion animals. This is accomplished by first examining the strong bond between humans and their animal companions as recognized by the courts, society at large, and the medical profession. The second part of this section explains how authorizing damages for this area of human suffering supports the public policies of compensating victims, affirming the values of society, and deterring wrongful conduct.

#### A. *The Bond Between Human and Animal Companions Can Be as Strong as Any Bond Between Humans*

##### 1. *Courts Have Recognized The Bond That Can Exist Between Humans and Their Animal Companions*

Beyond dispute, human beings have long enjoyed an abiding and cherished association with their household animals.<sup>41</sup>

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(LEXIS L. Publg. 2000) (applies to death of minor child and includes “loss of affection and companionship”); Utah Code Ann. § 78-11-6 (1999) (in wrongful death actions for the death of a child, recoverable damages include “loss for intangible injuries such as loss of society, love, companionship, protection, and affection”); Wash. Rev. Code Ann. § 4.24.010 (2000) (in actions for wrongful injury or death of minor child, recoverable damages include compensation for “loss of love and companionship of the child” and for injury to or destruction of the parent-child relationship); Haw. Rev. Stat. § 663-3; Kan. Stat. Ann. § 60-1904; Mich. Stat. Ann. § 27A.2922(6); N.C. Gen. Stat. § 28A-18-2; Or. Rev. Stat. § 30.020(2)(d); R.I. Gen. Laws § 10-7-1.2; Wyo. Stat. Ann. § 1-38-102(c); N.D. Cent. Code § 32-03.2-04.

<sup>40</sup> *Salin v. Kloempken*, 322 N.W.2d 736, 739 (Minn. 1982) (quoting approvingly from *Eschenbach v. Benjamin*, 263 N.W. 154, 155-56 (Minn. 1935)).

<sup>41</sup> *Nahrstedt v. Lakeside Village Condo. Assn.*, 878 P.2d 1275, 1292 (Cal. 1994) (Arabian, J., dissenting). Although the majority in *Nahrstedt* disagreed with Justice Arabian on the narrow issue ultimately decided, *i.e.* the enforceability of a condominium association’s restrictive covenants concerning pets, it made statements on the subject of animal companionship similar to and summarizing those quoted here. *Id.* at 1278.

...

In addition to these historical and cultural references, the value of pets in daily life is a matter of common knowledge and understanding as well as extensive documentation. People of all ages, but particularly the elderly and the young, enjoy their companionship. Those who suffer from serious disease or injury and are confined to their home or bed experience a therapeutic, even spiritual, benefit from their presence. Animals provide comfort at the death of a family member or dear friend, and for the lonely can offer a reason for living when life seems to have lost its meaning. In recognition of these benefits, both Congress and the state Legislature have expressly guaranteed that elderly and handicapped persons living in public-assistance housing cannot be deprived of their pets. (12 U.S.C. § 1701r-1; Health & Saf. Code, § 19901.) Not only have children and animals always been natural companions, children learn responsibility and discipline from pet ownership while developing an important sense of kindness and protection for animals. Single adults may find certain pets can afford a feeling of security. Families benefit from the experience of sharing that having a pet encourages. While pet ownership may not be a fundamental right as such, unquestionably it is an integral aspect of our daily existence, which cannot be lightly dismissed and should not suffer unwarranted intrusion into its circle of privacy.<sup>42</sup>

In *Brousseau v. Rosenthal*,<sup>43</sup> the court considered the fair measure of damages where the negligence of a veterinarian's boarding kennel caused the death of the plaintiff's dog.

Although the courts have been reluctant to award damages for the emotional value of an injured animal, the court must assess the dog's actual value to the owner in order to make the owner whole. The court finds that plaintiff has suffered a grievous loss. The dog was given to her when it was a puppy in August, 1970 shortly after plaintiff lost her husband. To this retired woman who lived alone, this pet was her sole and constant companion. Plaintiff testified that she experienced precisely the kind of psychological trauma associated with the loss of a pet that has received increased recent public attention. As loss of companionship is a long-recognized element of damages in this State the court must consider this as an element of the dog's actual value to this owner.

...

Resisting the temptation to romanticize the virtues of a "human's best friend," it would be wrong not to acknowledge the companionship and protection that Ms. Brousseau lost with the death of her canine companion of eight years. The 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.<sup>44</sup>

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<sup>42</sup> *Id.* at 1295 (footnotes omitted).

<sup>43</sup> 443 N.Y.S.2d 285 (N.Y.C. Civ. Ct. N.Y. County 1980).

<sup>44</sup> *Id.* at 286-87 (citations omitted); see *Skaggs v. Wal-Mart Stores East, Inc.*, No. 98C12954, slip op. at 2 (Ky. Cir. Ct., Div. 5, Jefferson County Apr. 19, 2000) ("the fair market value standard falls far short of fair compensation for the loss of a companion animal") (citations omitted).

Although animals may be “property” under the law, members of the judiciary have recognized there necessarily is and must be a distinction between inanimate objects such as furniture, cars, or articles of clothing, and sentient beings such as companion animals. In *Bueckner v. Hamel*,<sup>45</sup> the court examined a case in which a cherished family dog had been shot to death.

As I have observed above, *Porras* did not involve domestic pets, but real property. Real property, although highly prized, does not have characteristics that can make it a widely recognized member of the family. It is common knowledge among pet owners that the death of a beloved dog or cat (or other domestic animal) can be a great loss. This is true even if that loss is the result of a prolonged illness or of an automobile accident rather than an intentional shooting as in the present case.

...

Scientific research has provided a wealth of understanding to us that we cannot rightly ignore. We now know that mammals share with us a great many emotive and cognitive characteristics, and that the higher primates are very similar to humans neurologically and genetically. It is not simplistic, ill-informed sentiment that has led our society to observe with compassion the occasionally televised plight of stranded whales and dolphins. It is, on the contrary, a recognition of a kinship that reaches across species boundaries.

The law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of resolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, *mere* property. The law should reflect society’s recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live. In doing so, courts should not hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the *only* family members they have.

Losing a beloved pet is not the same as losing an inanimate object, however cherished it may be. Even an heirloom of great sentimental value, if lost, does not constitute a loss comparable to that of a living being. This distinction applies even though the deceased living being is a nonhuman.

...

As stated above, I concur in the analysis and disposition of the majority opinion. I hasten to add, however, that testimony 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 and its yet-unborn progeny.<sup>46</sup>

In *Corso v. Crawford Dog and Cat Hospital, Inc.*,<sup>47</sup> the defendant, after euthanizing the plaintiff’s dog, was to deliver the dog’s remains in a casket for a funeral the plaintiff had planned. Instead, the defendant improperly disposed of the dog and delivered the casket with the

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<sup>45</sup> 886 S.W.2d 368, 376-78 (Tex. App. 1994) (Andell, J., concurring).

<sup>46</sup> *Id.* (citations omitted).

<sup>47</sup> 415 N.Y.S.2d 182 (N.Y.C. Civ. Ct. Queens County 1979).

body of a dead cat inside, which the plaintiff discovered at the funeral home. The court concluded that an actionable tort had been committed and that the plaintiff was entitled to damages beyond the dog's market value.

In ruling that a pet such as a dog is not just a thing I believe the plaintiff is entitled to damages beyond the market value of the dog. A pet is not an inanimate thing that just receives affection; it also returns it. I find that plaintiff Ms. Corso did suffer shock, mental anguish and despondency due to the wrongful destruction and loss of the dog's body.

She had an elaborate funeral scheduled and planned to visit the grave in the years to come. She was deprived of this right.

This decision is not to be construed to include an award for the loss of a family heirloom which would also cause great mental anguish. An heirloom while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response. Losing the right to memorialize a pet rock, or a pet tree or losing a family picture album is not actionable. But a dog – that is something else. To say it is a piece of personal property and no more is a repudiation of our humaneness. This I cannot accept.<sup>48</sup>

In *In re Estate of Howard H. Brand*,<sup>49</sup> the decedent's will directed that his horses and his Cadillac be destroyed upon his death. The public responded to the horses' impending deaths with outrage, and the court refused to enforce that part of the provision.

Courts in other jurisdictions have also recognized the distinction between companion animals and other forms of personal property in landlord tenant cases, tort actions, and even divorce decrees. The mere fact that this court has received more than fifty letters from citizens across the nation concerned about the outcome of this case, and not a single communication addressing Mr. Brand's desired destruction of his perfectly good Cadillac, underscores the point.<sup>50</sup>

Other courts have taken the same approach. In *Smith v. Avanzino*,<sup>51</sup> a will provided for the destruction of the testator's dog, Sido. The state legislature stepped in to assure that no harm would come to the

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<sup>48</sup> *Id.* at 183; see generally *Animal Hosp. of Elmont, Inc. v. Gianfrancisco*, 418 N.Y.S.2d 992, 992-93 (Dist. Ct., 2d Dist., Nassau County 1979) (characterizing an animal companion as a "four-legged member of the family"); *O'Brien v. Exotic Pet Warehouse, Inc.*, N.Y.L.J. 25 (Westchester County City Ct. of Yonkers Torts Oct. 5, 1999); *Brock v. Rowe* (Or Cir. Ct., Wash. County Feb. 8, 2001); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981); *Knowles Animal Hosp., Inc. v. Wills*, 360 S.2d 37 (Fla. Ct. App. 1978).

<sup>49</sup> No. 28473 (Vt. Prob. Ct., Chittenden County Mar. 17, 1999).

<sup>50</sup> *Id.* (footnotes omitted).

<sup>51</sup> No. 225-698 (Cal. Super. Ct., S.F. City & County June 17, 1980) (commonly known as the "*Sido*" case).

animal.<sup>52</sup> During court proceedings, the judge was notified the issue had become moot, but he nonetheless resolved the matter on the record, voiding the will provision so as to act “in the best interests of the dog.”<sup>53</sup>

Courts are also giving serious consideration to legal disputes over the custody of animal companions, with some ordering visitation for a non-custodial former guardian.<sup>54</sup> In one of these cases, in 1999, a New York appellate court, “[c]ognizant of the cherished status accorded to pets in our society,” concluded it was “best for all concerned” that a ten-year-old cat remain where he had “lived, prospered, loved and been loved” for the preceding four years.<sup>55</sup>

The foregoing case excerpts reflect the judiciary’s growing recognition of what the next section of this article will confirm is an irrefutable bond between humans and their animal companions.

## 2. *Society’s Recognition of the Bond is Both Longstanding, and Increasingly Deep and Pervasive*

Remains at human burial sites previously have led researchers to estimate that dogs were domesticated about 14,000 years ago, long before the domestication of goats, cattle, and sheep.<sup>56</sup> Recent studies of dogs’ mitochondrial DNA at the University of California at Los Angeles, however, estimated that domestication occurred as early as around 135,000 years ago.<sup>57</sup> According to an article in the *New Scientist*, “If this is right, domestication started at around the time that our own species evolved, and perhaps not long after our ancestors acquired language. [Human-animal companionship] could well predate such cultural mainstays as art and the practice of burying the dead.”<sup>58</sup>

Cats were known to be household companions in Egypt 5000 years ago and were often mummified and entombed with their human companions.<sup>59</sup> When a dog died, the members of the Egyptian household shaved their entire bodies and heads and the dog was buried in sacred tombs within the city.<sup>60</sup> Archeologists in Israel have unearthed the 1200 year old skeleton of a woman with her hand resting on the body of

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<sup>52</sup> *Id.* (noting that California Senate Bill 2059, which included a provision to save Sido specifically, had been unanimously passed and signed into law before the close of court proceedings).

<sup>53</sup> *Id.*

<sup>54</sup> See e.g. *Assal v. Kidwell*, Civ. No. 164421 (Md. Cir. Ct., Montgomery County Dec. 3, 1999); *Raymond v. Lachmann*, No. 107990/97 (N.Y. Sup. Ct., N.Y. County May 30, 1997); *Arrington v. Arrington*, 613 S.W.2d 565 (Tex. Civ. Ct. App. 1981); see generally Barbara Newell, *Animal Custody Disputes: A Growing Crack in the “Legal Thinghood” of Nonhuman Animals*, 6 *Animal L.* 179 (2000).

<sup>55</sup> *Raymond v. Lachmann*, 264 A.D.2d 340, 341 (N.Y. App. Div. 1999).

<sup>56</sup> Kate Douglas, *Mind of a Dog*, 165 *New Scientist* 22, 24 (Mar. 4, 2000).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Nahrstedt*, 878 P.2d at 1294 n. 5 (Arabian, J., dissenting) (citation omitted).

<sup>60</sup> *State v. Wallace*, 271 S.E.2d 760, 761 (N.C. App. 1980) (referring to Herodotus in *An Account of Egypt* (5th Century) (dogs regarded as sacred)).

her dog.<sup>61</sup> More recent examples of the human-animal bond are the gravestone inscriptions found at Denver Pet Cemetery:

“A beloved family member, a true and gentle friend . . . . The pain and emptiness in our hearts today can only be comforted when we are reunited with you.”

. . .

“[T]he love of my life.”

. . .

“I loved you more than life itself . . . . I’ll miss you dearly, my sweet boy.”<sup>62</sup>

By the 1980s, counseling for loss of animal companions was being increasingly recognized as an important human service.<sup>63</sup> In fact, at that time, large veterinary medical centers such as The Animal Medical Center in New York City and the Veterinary Hospital of the University of Pennsylvania employed full-time professionals to assist persons coping with the death of an animal companion.<sup>64</sup> In a recent interview, one clinical social worker who ran bereavement meetings at New York’s Animal Medical Center discounted the notion that those who become incapacitated after the loss of a pet are eccentric loners and misfits, commenting that he sees “‘extreme reactions from people with supportive families, no psychological problems and stable lives . . . [wh]o pound the floor screaming and talking about wanting to die.’”<sup>65</sup>

A Los Angeles psychiatrist who once hospitalized a man on the brink of suicide after his dog was killed in a motorcycle accident stated that “animal bereavement needs to be treated seriously” and that for some “it’s like losing a person, or worse.”<sup>66</sup> Other professionals have echoed this conclusion.<sup>67</sup> According to a veterinarian spokeswoman for the Denver Area Veterinarian Medical Society, for “[m]any of us, our

<sup>61</sup> *Nahrstedt*, 878 P.2d at 1294 n. 5 (Arabian, J., dissenting) (citation omitted).

<sup>62</sup> Cate Terwilliger, *Saying Goodbye: Special Friends Take Leave With Dignity in Pet Cemetery*, *The Denver Post* G-01 (2d ed. Jan. 15, 1998).

<sup>63</sup> Sandra B. Barker & Randolph T. Barker, *The Human-Canine Bond: Closer Than Family Ties?*, 10 *J. Mental Health Counseling* 46, 54 (Jan. 1988).

<sup>64</sup> *Id.*

<sup>65</sup> Sheila Moran, *When a Pet Dies: New Resources for Living With the Loss*, U.S.A. Today 4D (Mar. 15, 1999) (quoting social worker Paul Weinberg).

<sup>66</sup> *Id.* (quoting psychiatrist Judith Orloff).

<sup>67</sup> See e.g. Vera Lawlor, *Easing the Pain: The Loss Can Be Devastating, But Answers, And Respect, Can Help Owners Weather the Grief*, *The Record* (Bergen County, N.J.) H01 (May 21, 1998); Lisa Cooke, *Getting Over the Death of a Companion Animal*, *Copley News Service* (June 22, 1998) (available in LEXIS, News Library, CURNWS File) (according to Susan Brace, a psychologist specializing in issues of loss, “[t]he death of an animal companion is a tremendous loss . . . . Depending on the individual, losing a pet can be even more traumatic than losing a family member.”); Pam McKeown, *Pets Have Great Impact on Our Lives When They Die*, *The Daily Oklahoman*, Section IV at 3 (Aug. 19, 1998) (quoting Kenneth Curl, Chairman and Professor of Funeral Science at the University of Central Oklahoma “[l]osing a pet is just like losing a significant other or anyone else with whom you’ve had a special bond.”); Barker, *supra* n. 63, at 54 (“[t]he bereavement process of pet owners has been found to closely approximate the grief process experienced as a result of human deaths.”).

bonds to our animals are every bit as strong if not stronger than the bonds we would have to a family member' . . . 'When that relationship is lost and that bond is broken, there is a severe grieving process.'"<sup>68</sup> Similarly, a New Jersey veterinarian has been quoted as saying, "to-day pets are members of the family, and any time you lose a loved one, you grieve."<sup>69</sup>

Recognizing this reality and the need to address it, by 1998, nine veterinary schools across the United States offered pet-loss support hotlines;<sup>70</sup> similar services exist outside the United States as well.<sup>71</sup> According to the founder of such a program at a Japanese university, with more people living alone, they are becoming more emotionally dependent upon their animal companions and are "much more likely to see them as members of the family."<sup>72</sup>

The bond with animal companions also was evidenced in a 1995 report by the American Animal Hospital Association, in which 70% of surveyed individuals who formerly or then-currently shared their lives with animal companions responded that they thought of their animals as children.<sup>73</sup> When asked to identify the one companion they would want on a deserted island, 53% listed a dog or cat.<sup>74</sup> Similarly, ten years earlier, 99% of 1500 survey respondents considered their animal companions to be a family member.<sup>75</sup> A researcher who is a psychiatric nurse, educator and clinician has confirmed<sup>76</sup> that animal companions, as one senior citizen has put it, "aren't like family—they are family."<sup>77</sup>

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<sup>68</sup> Terwilliger, *supra* n. 62 (quoting veterinarian Donna Harris).

<sup>69</sup> Lawlor, *supra* n. 67 (quoting veterinarian Dr. Susan Cropper). See Barker, *supra* n. 63, at 54 (one counseling professional noted the grief was "as intense and emotionally and cognitively debilitating as is found in crises that result when a family member dies").

<sup>70</sup> Barker, *supra* n. 63, at 54.

<sup>71</sup> Cooke, *supra* n. 67. Internet on-line pet support and memorial services are also available. See e.g. <<http://www.in-memory-of-pets.com>> (accessed Mar. 6, 2001).

<sup>72</sup> Cooke, *supra* n. 67 (quoting Washizu Tsukimi of Nippon Veterinary and Animal Science University).

<sup>73</sup> Carol Marie Cropper, *Strides in Pet Care Come at Price Owners Will Pay*, N.Y. Times A16 (Apr. 5, 1998).

<sup>74</sup> *Id.*

<sup>75</sup> Victoria L. Voith, *Attachment of People to Companion Animals*, 15 *Veterinary Clinics of N. Am.* 289, 290 (1985); see Ann Ottney Cain, *A Study of Pets in the Family System*, in *New Perspectives On Our Lives With Companion Animals* 72, 81 (Aaron Katcher & Alan Beck eds., U. of Pa. Press 1983) (majority of survey participants considered their animal companions to be family members and described the animal's role in the family as "very important").

<sup>76</sup> Cain, *supra* n. 75, at 81; see generally Roberta Erickson, *Companion Animals and the Elderly*, *Geriatric Nursing* 92, 92 (Mar./Apr. 1985) (animal companion is an "important 'significant other' that often goes unrecognized in professional circles").

<sup>77</sup> Dru Wilson, *Human-Pet Bond Can Be Therapeutic*, *Omaha World-Herald*, Living Section at 53 (Apr. 15, 1999) (quoting Dorothy Pezoldt, 84-year-old resident of Colorado Springs retirement center, who shares her life with her small terrier she adopted from a local non-profit center, Animal Companions for the Elderly).

These findings are thoroughly consistent with the results of a number of studies examining the nature of relationships between humans and companion animals, which are regularly reported in the nation's most-widely circulated newspaper, *USA Today*. To take some recent examples, on March 1, 2000 *USA Today* reported, under the headline *Pets Are Part of the Family*, results of a study showing percentages of survey respondents who do "special things" for their animal companions.<sup>78</sup> These percentages ranged from the 52% who cook special foods for their animals, up to the 84% who refer to themselves as their animal companions' "mom" or "dad."<sup>79</sup> In the previous month, *USA Today* reported the results of a Chicago cat clinic's survey of 295 "cat lovers," in which 78% of the women stated they would end their relationships with men who did not like their cat.<sup>80</sup> In perhaps the most dramatic statement about the bond between humans and companion animals, an article entitled *Risking It All for Fido* reported that 50% of survey respondents said they would be "very likely" to risk their own lives to rescue their animal companion, and an additional 33% said they would be "somewhat likely" to do so.<sup>81</sup>

In 1998, it was reported that the Episcopal Church of the Holy Trinity on Manhattan's Upper East Side regularly permitted parishioners to bring their dogs to Sunday morning services.<sup>82</sup> The dogs even accompanied their human companions to the altar during communion.<sup>83</sup> As stated by one parishioner, "it's like being with a family member."<sup>84</sup> Two years later, this practice continues and has become a "natural part" of church functions.<sup>85</sup>

The importance of the human-animal companion bond certainly has not been lost on the nation's business community. In the human resources department, a growing number of companies—from high-tech companies<sup>86</sup> to such bastions of tradition as the law firm of Steptoe & Johnson<sup>87</sup>—allow companion animals to accompany their humans to work. Companies doing so have noted that this policy is a

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<sup>78</sup> Cindy Hall & Elizabeth Wing, *Pets Are Part of the Family*, *USA Today* D9 (Mar. 1, 2000).

<sup>79</sup> *Id.*

<sup>80</sup> Dan Vergano, *A Better Life: Love Me, Love My Cat*, *USA Today* D6 (Feb. 14, 2000).

<sup>81</sup> Cindy Hall & Bob Laird, *Risking It All for Fido*, *USA Today* D1 (June 24, 1999).

<sup>82</sup> *Newsweek* (Periscope Section) 8 (Apr. 27, 1998).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Telephone Interview by Sonia Waisman with the Reverend Herbert Draesel of the Church of the Holy Trinity in Manhattan, N.Y. (May 20, 2000).

<sup>86</sup> Candee Wilde, *IT Shops Let Pets Come to Work* <<http://www.cnn.com/TECH/computing/9812/23/petsit.idg/index.html>> (Dec. 23, 1998). Some of the companies include Netscape Communications Corp., Excite Inc., and Auto Desk, Inc. *Id.*

<sup>87</sup> Phil McCombs, *Steptoe & Johnson, Attorneys-at-Paw*, *Wash. Post* C1 (Feb. 9, 2000).

benefit important enough to some employees to help the companies attract and retain professionals in heavy demand.<sup>88</sup>

The bond is at least as evident, if not more so, in the products and services marketplace. In 1998, there were approximately a dozen “doggie day-care” centers in New York City.<sup>89</sup> The owner of one such center (a canine “nursery school” offering story hour, snack time, nap time and crafts) commented that admission can be very competitive, “[l]ike the way parents are frenzied about what exclusive nursery school their child will get into, it’s the same for us.”<sup>90</sup> Another noted that “[d]ogs have become our surrogate children.”<sup>91</sup> As of August 1999, the Best Friends Pet Care company alone had three vacation resorts for companion animals in the Washington, D.C. area and another thirty-two across the country, and other similar businesses had been established in Northern Virginia, Maryland, Vermont, and Nevada.<sup>92</sup> In 1999, the International Association of Pet Cemeteries claimed 650 members, including the Hartsdale Pet Cemetery in Westchester County, New York, which was founded in 1896.<sup>93</sup> At least three greeting card companies, including Hallmark, offer sympathy cards for the loss of animal companions.<sup>94</sup>

A marketing specialist at Coopers & Lybrand, who has studied the “pet supply” industry, has acknowledged that animal companions “are treated as family and nothing is too good for them.”<sup>95</sup> Six years ago, “pet supply” superstores were already the trend with venture capitalists and executives from other kinds of superstores, ready to tap into an “attractive market” in the then-53 million households with animal companions.<sup>96</sup> In December 1999, *USA Today* reported consumers planned to spend an average of \$95 on gifts for their animal companions that year.<sup>97</sup>

Further evidence is found in the increasing advancement and complexity of veterinary medical care for companion animals. According to an American Veterinarian Medical Association study reported in 1998, \$11.1 billion was spent on health care for companion dogs, cats,

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<sup>88</sup> Wilde, *supra* n. 86; see Edward Iwata, *Staff-Hungry Tech Firms Cast Exotic Lures*, *USA Today* B1 (Feb. 1, 2000) (high-tech companies offering veterinary insurance as employee benefit).

<sup>89</sup> Kimberly Stevens, *Teacher’s Furry Pets*, *N.Y. Times* 9:3 (June 28, 1998).

<sup>90</sup> *Id.* (quoting Larry Roth, owner of Doggy Do and Pussycats, Too, in Manhattan, New York).

<sup>91</sup> Steve Dale, *Dog Lovers Campaign for Canines at Work*, *The Ariz. Republic* AH20 (May 1, 1999) (quoting Patti Moran, president and founder of the nonprofit organization Pet Sitters International in North Carolina).

<sup>92</sup> Jacqueline L. Salmon, *While Owners are Away, Resorts, Salons Pamper Their Pets*, *The Wash. Post*, B1, B4 (Aug. 2, 1999).

<sup>93</sup> Moran, *supra* n. 65.

<sup>94</sup> Cooke, *supra* n. 67.

<sup>95</sup> Leslie Eaton, *Hey, Big Spenders*, *N.Y. Times* Section 3 at 1 (Sept. 11, 1994).

<sup>96</sup> *Id.*

<sup>97</sup> Anne R. Carey & Marcy E. Mullins, *Surfing For Man’s Best Friend*, *USA Today* B1 (Dec. 16, 1999).

and birds in 1996, an increase of 61% from expenditures in 1991.<sup>98</sup> As of 1998, there were twenty board-certified veterinary specialties, ranging from anesthesiology to toxicology.<sup>99</sup> People travel with their ailing animal companions across the country for access to specialists known for kidney transplants, open heart surgery, and bone cancer treatment, for example.<sup>100</sup> In a 1996 survey by the American Animal Hospital Association, 38% of respondents stated they would spend any amount of money to save the life of their animal companion.<sup>101</sup>

In March 2000, when an angry motorist threw a dog named Leo to his death in heavy San Jose traffic, the *Washington Post* ran a front-page story with color photograph,<sup>102</sup> and donations from across the nation to help find and prosecute the perpetrator reached \$120,000.<sup>103</sup> In November 1998, a New Jersey political activist beat his four-month old Jack Russell Terrier to death. In an interview, he commented that many people acted as if he had killed a child.<sup>104</sup>

As all of the foregoing reaffirms, it is simply inescapable reality that a significant portion of our society both personally and professionally considers animal companions to be part of the American family.

### 3. *The Significance of the Bond Has Been Further Documented in Recent Health Studies*

Studies indicate that beyond loss of companionship and pure emotional distress, certain plaintiffs may be able to demonstrate entitlement to damages for bodily injury as well when an animal companion is wrongfully killed or injured. By the mid-1980s, there was considerable evidence indicating animal companions had the capacity to reduce the frequency of serious disease and to prolong life.<sup>105</sup> One study of

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<sup>98</sup> Cropper, *supra* n. 73.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* The veterinary teaching hospital at the University of California at Davis is a pioneer in feline kidney transplants; Michigan State University's Veterinarian Teaching Hospital is known for open-heart surgery; and Colorado State University's Veterinarian Teaching Hospital is recognized for bone cancer treatments. *Id.* In fact, a procedure for treating osteosarcoma perfected by the Colorado Veterinary Hospital was later adapted for humans. *Id.*

<sup>101</sup> Deborah Stoudt, *Long Live Cats and Dogs, Owners Say*, Baltimore Sun N1 (Jan. 23, 2000).

<sup>102</sup> Michael D. Shear, *Angry Driver Hurls Woman's Pet Into Traffic*, Wash. Post A1 (Mar. 7, 2000).

<sup>103</sup> *Heart-Wrenching Road Rage: Angry Driver Tosses Dog Into Traffic* <<http://home.digitalcity.com/sanfrancisco/issues/main.dci?page=roadrage>> (accessed Mar. 25, 2001).

<sup>104</sup> Laura Barnhardt & Paul Rogers, *Puppy Killer Must Dig Graves at Pet Cemetery: Sentenced to 300 Hours Service*, The Record (Bergen County, N.J.) L1 (Jan. 14, 2000).

<sup>105</sup> See e.g. Cindy C. Wilson & F.L. Netting, *Companion Animals and the Elderly: A State-of-Art Summary*, 183 J. of the Am. Veterinarian Med. Ass. 1425, 1428 (Dec. 15, 1983); James A. Serpell, *The Personality of the Dog and Its Influence on the Pet-Owner Bond*, in *New Perspectives On Our Lives With Companion Animals* 57, 57 (Aaron Katcher & Alan Beck, eds., U. of Pa. Press 1983) (during and as a consequence of interactions with companion animals, many people experienced beneficial physiological and psychological changes); Barker, *supra* n. 63, at 46 (noting numerous studies docu-

veterans, for example, identified a positive correlation between morale<sup>106</sup> and living with a companion animal,<sup>107</sup> and further supported previous findings that close contact with companion animals is associated with superior health status.<sup>108</sup>

In the late 1980s and early 1990s, a study was conducted to examine prospectively the independent effects of companion animals, social support, disease severity and other psychosocial factors on one-year survival after acute myocardial infarction.<sup>109</sup> The researchers concluded the study provided “strong evidence” that companion animals, and dogs in particular, promote “cardiovascular health independent of social support and the physiological severity of the illness.”<sup>110</sup> The report noted previous findings that companion animals decrease their human companions’ anxiety and sympathetic nervous system arousal in response to stressors.<sup>111</sup> The report also noted that Medicaid recipients with animal companions visited their physicians less frequently than those without animals.<sup>112</sup>

A similar study in the early 1990s compared risk factors for cardiovascular disease in people who shared their lives with animal companions and those who did not.<sup>113</sup> The study demonstrated that those with animal companions had significantly lower systolic blood pressure and plasma triglycerides than those without animals.<sup>114</sup> The researchers suggested further investigation of the positive correlation

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menting the “beneficial effects of pets on the emotional and physical health of the elderly” and the handicapped, for example; and noting studies demonstrating that interaction with companion animals increase the survival rate of coronary-care patients, and reduce blood pressure and anxiety levels).

<sup>106</sup> Morale has been defined as synonymous with depression levels, and has been identified as an important indicator of the quality of life. Susanne S. Robb, *Health Status Correlates of Pet-Human Association in a Health-Impaired Population*, in *New Perspectives On Our Lives With Companion Animals* 318, 326 (Aaron Katcher & Alan Beck, eds., U. of Pa. Press 1983).

<sup>107</sup> *Id.* at 318, 325 (study, which compared veterans living with animal companions and those living without them, was undertaken to extend systematic efforts to identify health status correlates of association with animal companions).

<sup>108</sup> *Id.* at 327.

<sup>109</sup> Erika Friedmann & Sue A. Thomas, *Pet Ownership, Social Support, and One-Year Survival After Acute Myocardial Infarction In the Cardiac Arrhythmia Suppression Trial (CAST)*, 76 *Am. J. of Cardiology* 1213 (Dec. 15, 1995).

<sup>110</sup> *Id.* at 1217.

<sup>111</sup> *Id.* (citing C.C. Wilson, *The Pet as an Anxiolytic Intervention*, 179 *J. of Nervous and Mental Disease* 482 (1991); Erica Friedmann, *The Role of Pets in Enhancing Human Wellbeing: Physiological Effects*, in *Waltham Book of Human Animal Interactions* 33, 33-53 (I. Robinson, ed., Pergamon 1995)).

<sup>112</sup> *Id.* (citing J.M. Siegel, *Stressful Life Events and Use of Physician Services Among the Elderly: The Moderating Role of Pet Ownership*, 58 *J. Personality and Soc. Psychol.* 1081 (1990)).

<sup>113</sup> Warwick P. Anderson et al., *Pet Ownership and Risk Factors for Cardiovascular Disease*, 157 *The Med. J. of Australia* 298 (Sept. 7, 1992).

<sup>114</sup> *Id.*

between companion animals and the prevention of cardiovascular disease.<sup>115</sup>

Further evidence of that positive correlation was presented in a recent study of stockbrokers already taking medication for hypertension, wherein researchers found those who adopted an animal companion reduced by half the increase in blood pressure that accompanied stress.<sup>116</sup> Moreover when participants were undergoing stressful verbal and mathematics tests, researchers found that companion animals calmed the participants the most, while the spouse caused the most stress.<sup>117</sup>

In other studies, scientists have demonstrated that petting an animal releases the same endorphins as those which contribute to the so-called "runner's high" experienced by joggers;<sup>118</sup> and that dogs are "powerful social catalysts," who make it easier for people to connect with other people and be healthier as a result.<sup>119</sup>

Ten years ago, one legal commentator had already considered the possibility that research on the effects of companion animals on human physiology may enable plaintiffs to establish that the loss of their animal companion caused physical injury, thereby simplifying the ability to recover on a claim of negligent infliction of emotional distress or similar claims.<sup>120</sup> According to that commentator, studies demonstrating the benefits of animals in the treatment of handicapped children, the mentally impaired, and the elderly, along with studies showing the presence of animals has the effect of lowering blood pressure and heart rates, might encourage courts to be more willing to accept non-economic value as a legitimate component of a damage award.<sup>121</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> *Study: Pets Curb Dangerous Rises in Blood Pressure* <<http://www.cnn.com/HEALTH/heart/9911/07/pets.heart/index.html>> (Nov. 8, 1999); see Tracy Connor, *Pets Can Reduce Blood Pressure*, N.Y. Post O28 (Nov. 8, 1999).

<sup>117</sup> *Id.* (both quoting psychologist Karen Allen, one of the principal researchers in the stockbrokers' study).

<sup>118</sup> Bill Brazell, *Tech Workers Need Dogs On the Job* <<http://www.cnn.com/TECH/computing/9905/03/dogs.idg/>> (May 3, 1999).

<sup>119</sup> Dan Vergano, *A Better Life: Dogs Unleash Sociability*, USA Today D6 (Feb. 14, 2000).

<sup>120</sup> Gregg A. Scoggins, Student Author, *Legislation Without Representation: How Veterinary Medicine Has Slipped Through the Cracks of Tort Reform*, 1990 U. Ill. L. Rev. 953, 973 (1990).

<sup>121</sup> *Id.* (citing to the following: Alan Beck, Louisa Seraydarian & Frederick Hunter, *Use of Animals in the Rehabilitation of Psychiatric Inpatients*, 58 Psychological Rep. 63, 66 (1986); Faith T. Fitzgerald, *The Therapeutic Value of Pets*, 144 J. Med. 103 (1986); Mara M. Baun, Nancy Bergstrom, Nancy F. Langston & Linda Thomas, *Physiological Effects of Human/Companion Animal Bonding*, 33 Nursing Res. 126 (1984); James J. Lynch, G. Frederick Fregin, James B. Mackie & Russell R. Monroe, Jr., *Heart Rate Changes in the Horse to Human Contact*, 11 Psychophysiology 472 (1974); Erika Friedmann, Aaron H. Katcher, Sue A. Thomas, James J. Lynch & Peter R. Messent, *Social Interaction and Blood Pressure: Influence of Companion Animals*, 171 J. Nervous & Mental Disorders 461 (1983)).

*B. Public Policy Dictates Strongly in Favor of This Proposal*

At least two prior commentators have examined and explained in detail how the most important purposes of tort law support making damages available for the suffering of human companions of animals who are harmed.<sup>122</sup> As Squires-Lee concludes, “the tort system strives to compensate victims, affirm societal values, and deter wrongful conduct. The emotional harms wrought by the death of a companion animal must be recognized if these goals of tort law are to be fulfilled.”<sup>123</sup>

The laws of every state already explicitly acknowledge the obvious differences between animal companions and inanimate property in their criminal prohibitions against cruelty to and neglect of animals. If the criminal justice system is one pillar of our society’s defense against wrongful injury, the crucial second pillar is access to private, civil measures which deter wrongful acts and compensate the victims. As with other kinds of injuries, animals’ human companions are not sufficiently protected or made whole through criminal prohibitions alone. From both a logical and a policy standpoint, we must close the gap and authorize tort remedies for the tremendous pain and anguish, including loss of companionship, caused to humans by wrongful harm to their animal companions.

Moreover, at least where the harm to an animal companion is intentional, the existence of tort remedies can deter not only future similar acts against animals, but also wrongful physical injury to other humans. Numerous studies have demonstrated that persons who commit violence against animals very frequently also commit violent acts against humans,<sup>124</sup> and experts believe strong deterrence of the former helps deter the latter.<sup>125</sup>

The arguments against allowing recovery of non-economic damages for death or injury of animal companions parallel in many respects the arguments raised against human loss of companionship

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<sup>122</sup> Squires-Lee, *supra* n. 1, at 1080-88; Wise, *supra* n. 2, at 37, 48.

<sup>123</sup> Squires-Lee, *supra* n. 1, at 1080-81 (“stating that goals of tort are: (a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help,” Restatement (Second) of Torts 901 (1979)); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 772 (1985) (“[t]heoretically the tort process serves to compensate victims, . . . deter wrongdoers and vindicate important societal and personal values“); see 3 Fowler V. Harper et al., *The Law of Torts* 11.5, at 98 (2d ed. 1986) (“asserting that any measure to reduce costs of accidents ‘must on the whole satisfy the ethical or moral sense of the community, its feeling of what is fair and just’”).

<sup>124</sup> See e.g. Alan R. Felthous & Stephen R. Keller, *Violence Against Animals and People: Is Aggression Against Living Creatures Generalized?*, 14 Bull. Am. Acad. Psychiatry Law § 1 (1986); Barbara Star, *Patient Violence/Therapist Safety*, 29 Soc. Work 225, 227 (1984); *Cruelty to Animals and Interpersonal Violence* (Randall Lockwood & Frank R. Ascione, eds., Purdue Univ. Press 1998).

<sup>125</sup> See e.g. Randall Lockwood, *Cruelty to Animals and Human Violence, Training Key #392*, (Intl. Ass’n of Chiefs of Police, Inc.) 3-4 (1988).

claims. Those arguments in human companionship cases generally have been as follows:

- 1) damages will be speculative due to the intangible nature of the loss,
- 2) double recovery may occur through an overlap between the parent's damages and the child's damages,
- 3) recognition will lead to a multiplicity of lawsuits and protracted litigation,
- 4) extending liability will increase insurance premiums, and
- 5) the judiciary should defer to the legislature for consideration of the above-referenced socio-economic factors.<sup>126</sup>

In the context of claims for loss of human companionship, numerous courts have explained fully why these arguments are unpersuasive and without merit.<sup>127</sup> For the reasons set forth below, they are equally unpersuasive and lacking in merit in the context of claims for damages for wrongful harm to an animal companion.

1) With respect to the speculative nature of damages, most if not all states have decided to allow damages for pain and suffering, loss of spousal consortium, and loss of the affection and companionship of a parent or child in human wrongful death or injury cases.<sup>128</sup> Non-economic damages are no more speculative or difficult to assess in this context than in the former contexts. As the California Supreme Court has ruled: "[T]he jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience."<sup>129</sup>

2) Double recovery generally would not be relevant to animal cases, as it involves consideration of lost income and similar factors. Courts rejecting a child's claim for loss of parental consortium have concluded that "[r]eflection of the consequential disadvantages to children of injured parents is frequently found in jury awards to the parents on their own claims under existing laws and practice."<sup>130</sup> This is clearly not the case where an animal companion is injured or killed and the plaintiff is limited to recovering the price paid if the animal was purchased rather than adopted. Interestingly, though, when considering compensation for a child's loss, courts have noted that "[t]he award would accrue directly to the child rather than be lumped in with

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<sup>126</sup> See e.g. *Dearborn Fabricating & Engr.*, 532 N.E.2d at 17.

<sup>127</sup> See e.g. *id.* at 16-18; *Belcher v. Goins*, 400 S.E.2d 830; *Theama ex rel. Bichler*, 344 N.W.2d 513.

<sup>128</sup> *Dearborn Fabricating & Engr.*, 532 N.E.2d at 16-18; see generally *Hibpshman*, 734 P.2d at 996; *Theama ex rel. Bichler*, 344 N.W.2d at 520 ("courts and juries daily assess such uncertainties, with apparent success").

<sup>129</sup> *Molien v. Kaiser Found. Hosp.*, 616 P.2d 813, 821 (Cal. 1980) (in a case which did not involve animals the court abandoned the physical harm requirement for emotional distress claims based on negligence).

<sup>130</sup> *Salin*, 322 N.W.2d at 741, quoting and agreeing with *DeAngelis v. Lutheran Med. Ctr.*, 84 A.D.2d 17, 23 (N.Y. App. Div. 1981).

that of the parent who may or may not spend it for the child's benefit."<sup>131</sup>

3) "Fear of an increase in litigation has been voiced in almost every case where the courts have been asked to recognize a new cause of action."<sup>132</sup> That fear is unwarranted to an even greater extent in the context of this proposal which does not create a new cause of action. Therefore, there should be no issue as to multiplicity of suits and no validity to any "floodgates of litigation" argument. Moreover, any purported "protracted litigation" would likely consist of, at most, several witnesses by both sides to establish or refute the existence of a strong emotional bond between the particular plaintiff and his or her animal companion.

4) Allowing loss of companionship damages should have a minimal impact, if any, on insurance premiums. As a practical point, with hundreds of thousands, if not millions, of dollars at issue in cases of human injury or wrongful death, the amount of damages a trier of fact is likely to award in animal companion cases generally would pale in comparison and be virtually inconsequential in terms of judicial economy, insurance premiums, burdens on the courts, or any other aspect of economic concern. Moreover, any state legislature concerned with this issue or with the potential burden on tortfeasors if excessive amounts are awarded, may include a fair and reasonable cap on the non-economic portion of the damages award, as legislators have done in other contexts.<sup>133</sup>

5) Finally, with respect to deference to the legislature, arguments can be and have been successfully made that it is appropriate for courts to modify the common law to adapt with advancement of societal views.<sup>134</sup> In any event, this proposal certainly does not dispute that the legislature is an appropriate body to act on such issues and relieve the courts of the need to grapple with them.

Legislators seeking to enact this proposal will also have to address arguments relating specifically to animals. As was evident in the debate over Tennessee's "T-Bo Act,"<sup>135</sup> certain legislators and commentators may be apprehensive about legislation perceived to somehow make animals fully equivalent to humans. In response to such fears, it

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<sup>131</sup> *Berger v. Weber*, 303 N.W.2d 424, 427 (Mich. 1981); see generally *Dearborn Fabricating & Engr. Corp.* 532 N.E.2d at 17 (quoting *Berger*). As noted later in this article (*infra* Section IV.A.), and as recognized by commentators and renowned scholars such as Laurence Tribe (*infra* n. 147), an analogous approach can be taken in animal injury cases if the animal's own pain and suffering are deemed compensable, by establishing a trust for the care of the injured animal. This issue, however, is beyond the scope of this article.

<sup>132</sup> *Theama ex rel. Bilcher*, 344 N.W.2d at 521 (citing 56 B.U. L. Rev. at 732).

<sup>133</sup> See e.g. Kan. Stat. Ann. §§ 60-1903, 60-1904 (1999) (setting cap of \$250,000 for such damages as "mental anguish, suffering or bereavement," and "loss of society, companionship, comfort or protection" in wrongful death actions).

<sup>134</sup> See e.g. *Villareal*, 774 P.2d at 216; *Dearborn Fabricating & Engr., Corp.*, 532 N.E.2d at 17-18.

<sup>135</sup> *Infra* Section IV.A.

must be emphasized that the legislation proposed herein will compensate for very real losses suffered *by humans*. It places the same trust in the jury system that exists in every case where a jury or trier of fact must evaluate the claim and set a dollar value to non-economic harm such as pain and suffering, or emotional distress.

It is noteworthy that one legal commentator, writing in opposition to the separate and distinct issue of whether limited rights should be extended to certain animals, nonetheless fully supported recovery of non-economic damages for harm to animal companions.<sup>136</sup> According to Richard A. Epstein, professor of law at the University of Chicago, allowing recovery for loss of companionship in this context “is good law and solid economics, because it recognizes that when these non-monetary elements are included, the actual losses to the [animal’s human companion] exceed the market value.”<sup>137</sup> As noted by Epstein, “whether for human beings or pets, the interests vindicated are those of the party who suffers the emotional loss and loss of companionship.”<sup>138</sup>

#### IV. LEGISLATION

The time clearly has come for legislatures to step in to guide the courts and memorialize by statute what most professionals and companions to animals already know—animals are now clearly and unequivocally members of the family to many individuals who suffer (psychologically and possibly physically as well) at their loss. Where harm to one’s animal companion is the result of the intentional or negligent act of another, the damages must reflect the depth and scope of the loss—as with any other wrongful death or loss of companionship claim.

At this time, Tennessee has passed such a bill,<sup>139</sup> New York Assemblyman Pat Manning has introduced a bill similar to Tennessee’s,<sup>140</sup> and Massachusetts State Senator James P. Jajuga has introduced a bill that addresses the problem more thoroughly in response to appeals from a constituent whose animal companion was wrongfully killed.<sup>141</sup> Legislators in other states have expressed interest in similar provisions.

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<sup>136</sup> Richard A. Epstein, *The Next Rights Revolution?*, Nat. Rev. Vol. LI, No. 21 (Nov. 8, 1999).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> 2000 Tenn. Pub. Acts ch. 762; codified at Tenn. Code Ann. § 44-17-403 (2000).

<sup>140</sup> N.Y. Assembly 7610, 2001-2002 Reg. Sess. (Mar. 27, 2001).

<sup>141</sup> Mass. Sen. 1864, 182d Gen. Ct., 2001 Reg. Sess. (Jan. 30, 2001).

*A. Tennessee's T-Bo Act*

On May 22, 2000, the Tennessee General Assembly passed the "T-Bo" Act,<sup>142</sup> the first such bill in the United States, which provides as follows:

SECTION 1. Tennessee Code Annotated, Title 44, Chapter 17, is amended by adding the following as a new, appropriately designated section:

44-17-403. (a) If a person's pet is killed or sustains injuries which result in death caused by the unlawful and intentional, or negligent, act of another or the animal of another, the trier of fact may find the individual causing the death or the owner of the animal causing the death liable for up to four thousand dollars (\$4,000) in non-economic damages; provided, that if such death is caused by the negligent act of another, the death or fatal injury must occur on the property of the deceased pet's owner or caretaker, or while under the control and supervision of the deceased pet's owner or caretaker.

(b) As used in this section, "pet" means any domesticated dog or cat normally maintained in or near the household of its owner.

(c) Limits for non-economic damages set out in subsection (a) shall not apply to causes of action for intentional infliction of emotional

distress or any other civil action other than the direct and sole loss of a pet.

(d) Non-economic damages awarded pursuant to this section shall be limited to compensation for the loss of the reasonably expected society, companionship, love and affection of the pet.

(e) This section shall not apply to any not-for-profit entity or governmental agency, or its employees, negligently causing the death of a pet while acting on the behalf of public health or animal welfare; to any killing of a dog that has been or was killing or worrying livestock as in § 44-17-203; nor shall this section be construed to authorize any award of noneconomic damages in an action for professional negligence against a licensed veterinarian.

(f) The provisions of this section shall apply only in incorporated areas of any county having a population in excess of seventy-five thousand (75,000) according to the 1990 federal census or any subsequent census.

SECTION 2. This act shall be known and may be cited as the "T-Bo Act."

SECTION 3. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 4. This act shall take effect upon becoming a law, the public welfare requiring it, and shall apply to any fatal injury sustained on or after the effective date of this act.

The T-Bo Act was sponsored by Senator Steve Cohen (D-Memphis) after his Shih Tzu named T-Bo was killed by another dog in August

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<sup>142</sup> *Id.*

1999. Senator Cohen explained: “the only damages you get for your losses are for repairs, as if it were a clock or desk, or replacement, a new dog. If you have a mutt, you collect nothing . . . . It’s a great loss if you’ve lost a pet, and that . . . should be compensated in law.”<sup>143</sup>

While the State of Tennessee certainly is to be commended for being the first to take action in this neglected area of the law, the T-Bo Act is extremely limited in scope, probably due to political exigencies in that particular state. For example, only cats and dogs are deemed eligible for the kind of companionship that warrants compensation when wrongfully destroyed, even though many individuals enjoy similar bonds with other species, such as horses. At the same time, it seems likely that authorizing damages for loss of the companionship of, say, reptiles or insects, may not garner broad popular support. The animal companion should be defined to include a dog, a cat, or any warm-blooded, domesticated nonhuman animal sharing a demonstrable bond of companionship with one or more persons.<sup>144</sup>

With respect to the damages authorized by the T-Bo Act, as a preliminary matter, and in light of today’s litigation costs, damages capped at \$4000 might come closer to a symbolic gesture than full compensation. Also, in addition to the “reasonably expected society, companionship, love and affection” of the animal that have been lost, compensation should be authorized for other reasonable damages such as burial expenses.<sup>145</sup> Moreover, in states where an applicable punitive damages statute does not already exist, punitive damages should be authorized for willful, wanton, or reckless acts or omissions.<sup>146</sup> Attorney’s fees and costs should be recoverable to the same extent as in any wrongful injury or death action in the jurisdiction.

Given that companion animal (usually small animal) veterinarians are in business precisely because human companions do not treat their animal companions like property—they do not routinely throw them out when they become damaged—it seems inappropriate to automatically exclude veterinarians from liability for damages arising from negligent harm to an animal companion.<sup>147</sup> Veterinarians do have to make life and death decisions for companion animals on a daily basis,

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<sup>143</sup> Bonna M. De La Cruz, *Bill May Boost Damage Claims for Owners of Deceased Pets*, *The Tennessean* B5 (Feb. 10, 2000).

<sup>144</sup> *Infra* Section IV.B. and accompanying text.

<sup>145</sup> Burial or funeral expenses are often expressly listed as an element of recoverable damages under wrongful death statutes. *See e.g.* Ind. Code Ann. § 34-23-2-1 (West 1999) (wrongful death of child; damages recoverable for expenses of child’s funeral and burial); N.D. Cent. Code § 32-03.2-04 (2000) (burial costs as component of economic damages); Kan. Stat. Ann. § 60-1904 (1999) (reasonable funeral expenses).

<sup>146</sup> *See infra* n. 154 (examples of statutes expressly authorizing recovery of punitive damages for intentional acts harming animals).

<sup>147</sup> Wise, *supra* n. 2, at 47; *see* Jerrold Tannebaum, *Veterinary Ethics* 130 (Timothy S. Satterfield ed., Williams & Wilkins 1989) (“one cannot promote the human-companion animal bond as a vital part of clients’ lives and at the same time tell pet owners that they cannot collect for their pain and suffering because animals are merely articles of personal property”).

and their ability to perform valuable and needed services should not be unduly burdened. Nonetheless, the same can be said of physicians—who also perform a valuable service, yet are held accountable (for both economic and non-economic damages) when injury results from their negligent acts or omissions.<sup>148</sup> At a bare minimum, veterinarians should be held liable for non-economic damages arising from willful, wanton or reckless conduct.

The Tennessee statute's restricted geographic application, to incorporated areas of counties of 75,000 inhabitants or more, was a necessary response to a rural-urban split in attitudes that could have prevented the Act's passage.<sup>149</sup> For other states facing risks of similar proportion, such a limitation is better than no statute at all; but in the interests of justice and fairness, it should be avoided whenever possible. Likewise, the T-Bo Act applies to injury only where the injury results in the animal's death. As noted earlier in this article, common law loss of consortium claims were applicable only for injury and not for death. For practical purposes, there may be relatively few instances where injury to an animal which did not result in the animal's death would be deemed by a trier of fact to merit the recovery of non-economic damages. This, however, should not foreclose plaintiffs in appropriate cases from pursuing such recovery.

Although beyond the scope of the present article, it should be noted that the animals themselves suffer injuries, such as pain, suffering and loss of major faculties, that should be compensable if they can be proven to have occurred and to have been caused by the wrongful conduct of a legally responsible human.<sup>150</sup>

### B. Proposed Legislation

Based on the foregoing, the following legislation is proposed to remedy the injuries suffered by humans whose animal companions have been wrongfully harmed.

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<sup>148</sup> Many courts have historically held veterinarians and physicians to the same standard of care, and many continue to do so. See *e.g.* *Conkey v. Carpenter*, 63 N.W. 990 (Mich. 1895) (setting forth standard of care for physicians and surgeons, and noting it applied equally to veterinary surgeons); *Gillette v. Tucker*, 65 N.E. 865 (Ohio 1902) (expressly adopting a similar malpractice analysis for all doctors, regardless of the species they treated); *Animal Hosp. of Elmont, Inc. v. Gianfrancisco*, 418 N.Y.S.2d 992, 992-93 (Nassau County 1979) (elaborating on the bond between humans and their companion animals and noting that a veterinarian may be "referred to with love and affection as a 'pet's family pediatrician'").

<sup>149</sup> Telephone Interview by Barbara Newell with Sen. Steve Cohen (May 4, 2000).

<sup>150</sup> The animal's claim would be made by a guardian or guardian *ad litem*, and damages would be placed in a trust for the care of the animal. Laurence H. Tribe, Remark, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Works of Steven Wise*, 7 *Animal L.* 1 (2001); Enger McCartney-Smith, *Can Nonhuman Animals Find Tort Protection in a Human-Centered Common Law?*, 4 *Animal L.* 173, 207 (1998).

1. “Animal-companion” defined.

For purposes of this section, “animal-companion” means a dog, a cat, or any warm-blooded, domesticated nonhuman animal, sharing a demonstrable bond of companionship with one or more persons.

2. *Wrongful killing or injury of animal-companion.*

Where a person’s animal-companion is killed or injured as the result of another person’s willful, wanton, reckless or negligent act or omission, damages shall be recoverable for the human companion’s mental anguish, emotional distress, and other non-economic injuries, including the loss of society, companionship, comfort, protection and services; for veterinary and other special care required; for reasonable burial expenses; for court costs and attorney’s fees; and other reasonable damages resulting from the willful, wanton, reckless or negligent act or omission.<sup>151</sup> The party seeking damages under this section has the burden of establishing such non-economic loss by a preponderance of the evidence.<sup>152</sup>

3. *Punitive damages for willful, wanton, or reckless conduct.*<sup>153</sup>

A person who by willful, wanton, or reckless act or omission kills, injures, or causes or procures the death or injury of an animal-companion shall be liable in punitive damages of not less than \$2,500.

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<sup>151</sup> In determining the amount of non-economic damages to be awarded, it is noteworthy that the findings of at least one study (involving only dogs as the companion species) indicate that the attachment develops “very rapidly.” Barker, *supra* n. 63, at 54. Additionally, the human-canine bond represents a “stronger psychological attachment” for adults than for children. *Id.* at 53. Thus, it should not be presumed that a plaintiff of a certain age or one who spent only a relatively short time with the animal companion could not have suffered non-economic harm from the loss.

<sup>152</sup> This provision addresses concerns of rampant damage awards by requiring the party seeking damages to demonstrate the existence and strength of the bond, not merely the fact that she was a “pet owner.” In this regard, a court in 1925 distinguished between a situation where a dog was “troubled with undue affections from his master,” and where the dog was “a mere ‘critter’ to be made the ‘goat’ for launching this bill in equity” in an attempt to benefit from the dog’s death. *Gerhart v. City of St. Louis*, 270 S.W. 680, 682 (Mo. 1925). The court noted there were “no tears” for the deceased dog in that case. *Id.* However, Senator Vest of Missouri gave a heartfelt eulogy for his companion animal. Joseph Seawell, *Law Tales for Laymen* 123-28 (1925). Any concerns of lawmakers about the potential economic ramification of this proposal should be further allayed by the fact that only those plaintiffs who are able to demonstrate to the trier of fact that they have truly suffered non-economic harm from the loss of companionship—as opposed to merely seeking the optimum financial benefit from the situation—will be compensated in this manner.

<sup>153</sup> Some states have already enacted statutes expressly allowing punitive damages in cases of intentional harm to animals. See e.g. Cal. Civ. Code § 3340 (West 2000) (enacted 1872); Mont. Code Ann. § 27-1-222 (1998) (enacted in 1895); Okla. Stat. tit. 23, § 68 (1998); N.D. Cent. Code § 36-21-13 (1999); and N.D. Cent. Code § 39-08-19 (1999). Even without legislative guidance, some courts have permitted recovery of punitive/exemplary damages for intentional harm to animal companions. See e.g. *LaPorte v. Associated Independents, Inc.*, 163 S.2d 267 (Fla. 1964).

4. *Action; limitation of actions; disposition of damages.*

Damages under this section for injuries sustained by an animal's human companion shall be recoverable in an action of tort, commenced within three years from the date of death or injury or from the date when the human companion knew, or in the exercise of reasonable diligence should have known, of the factual basis for a cause of action.

5. *Injunctive relief.*

Restraining orders and other injunctive relief from wrongful killing or injury of animals may be issued, as appropriate.

## V. CONCLUSION

It is the function of the legislative branch to enact statutes giving form to society's values and beliefs. In this manner, as well as through judicial development of the common law, recovery of damages for such non-economic injuries as loss of companionship, society, affection, love, and service, has developed to reflect society's evolving views about spouses, as well as parents and children. Even though the foregoing loss of consortium claims constituted new causes of action, our courts have not been flooded with the feared tidal waves of litigation. Rather, the balance of equities has weighed and continues to weigh heavily in favor of continuing to allow these claims.

As must always be the case if we are to continue to progress, society's views are still developing. Today it is undeniable that the bond between many persons and their animal companions is as strong, if not stronger, than the bond with other family members. There is medical evidence, not only of the mental, but also of the physiological, health effects emanating from human-animal companionship. The strength and depth of the relationship is reflected in the growing number of counseling centers dedicated solely to the grieving process after the death of animal companions; in the burgeoning "pet supply" industry; and in the increasing number of veterinary specialists and availability of sophisticated technology for the treatment of ill or injured companion animals. The close human-animal companion bond has already been recognized by courts in various contexts, not only in tort cases, but also in marital dissolution and probate cases, for example. In short, this bond is now recognized in all aspects of our society and cannot rationally be denied. When it is severed prematurely due to the wrongful act (be it negligent or intentional) of another, the potentially devastating non-economic loss must be addressed.

Just as courts and legislatures in the past gradually came to recognize that recovery for spousal and parent/child loss of consortium claims were "mandated by logic, compassion and modern sensitiv[ities],"<sup>154</sup> as well as by "the fairness of compensating persons in-

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<sup>154</sup> *Berger v. Weber*, 303 N.W.2d 424, 429 (Mich. 1981).

jured by another's negligenc[e],”<sup>155</sup> it is now time for state legislatures to act, to follow and improve upon Tennessee's lead and statutorily permit recovery of non-economic damages for wrongful injury to or death of animal companions.

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<sup>155</sup> *Id.*