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# PEPPERDINE LAW REVIEW

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**Non-Economic Damages in Pet  
Litigation: The Serious Need  
To Preserve a Rational Rule**

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# Non-Economic Damages in Pet Litigation: The Serious Need To Preserve a Rational Rule

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#### I. INTRODUCTION

For more than two hundred years, the traditional rule in pet law has been to limit damages to the market value of the animal that has been injured or killed.<sup>1</sup> This system has worked well, resulting in low and predictable costs of veterinary services. Yet, some have regarded the system as overly harsh because of the very strong emotions pet owners may feel when a pet is injured or dies because of another's negligence.<sup>2</sup> As a result, advocates of change to the traditional damage rules in animal cases encourage courts and legislatures to award non-economic damages in pet cases.

This article will describe these potential changes and the public policy implications of changing the rules of damages in animal law. After briefly describing the traditional rules of damages in tort law,<sup>3</sup> an important predicate to understanding the current unsound impetus to change, this article will set forth the established law of damages with respect to pets and other animals.<sup>4</sup> It will show how the movement to allow non-economic damages in pet cases assaults fundamental principles of animal law. It will also demonstrate several reasons why allowing non-economic damages in

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1. See *infra* notes 16-17 and accompanying text.  
2. See discussion *infra* Part III.  
3. See *infra* Part II.  
4. See *infra* Part III.

pet cases is unsound public policy.<sup>5</sup> Next, this article will explain how allowing non-economic damages in pet cases, particularly in those involving mere negligence, harms veterinarians, manufacturers of pet medications, pet owners, and even pets themselves.<sup>6</sup> Finally, it will then show that capping non-economic damages in pet suits is not a helpful compromise, but a dangerous misstep that is to be avoided.<sup>7</sup>

## II. THE BASICS OF TORT LAW DAMAGES

Before addressing the question of whether non-economic damages should be allowed in pet litigation, it is vitally important to understand the traditional purpose of the basic types of damages available in the torts system. This background will assist in understanding the public policy arguments that follow.

### A. Types of Damages Awarded in Tort Law

Under foundational tenets of tort law, there are two overarching types of damages: compensatory damages and punitive damages. Compensatory damages "are intended to represent the closest possible financial equivalent of the loss or harm suffered by the plaintiff, to make the plaintiff whole again, [and] to restore the plaintiff to the position the plaintiff was in before the tort occurred."<sup>8</sup> The umbrella of compensatory damages includes economic and non-economic damages. Economic damages compensate plaintiffs for tangible injuries and are subject to objective measurement.<sup>9</sup> Examples of economic damages include lost earnings and medical expenses.<sup>10</sup> Non-economic damages compensate plaintiffs for intangible injuries such as pain and suffering, loss of companionship, and emotional distress.<sup>11</sup> In some jurisdictions, non-economic damages may also encompass injuries such as the loss of enjoyment of life and other unquantifiable injuries.<sup>12</sup> However categorized, the goal and purpose of these damages is to compensate plaintiffs—not to punish defendants.<sup>13</sup>

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5. See *infra* Part IV.

6. See *infra* Part V.

7. See *infra* Part VI.

8. See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 519 (10th ed. 2000) [hereinafter PROSSER, WADE AND SCHWARTZ'S TORTS].

9. *Id.* at 530.

10. *Id.*

11. See *id.* at 530, 534-35.

12. See *id.* at 535-36.

13. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. REV. 47, 59 (2002) [hereinafter *Twisting the Purpose of Pain and Suffering Awards*].

Unlike compensatory damages, punitive damages consist of a sum above and beyond compensating the plaintiff for the harm suffered.<sup>14</sup> The goals of punitive damages are to punish a defendant for his or her conduct, deter a defendant from repeating his or her wrongful act, and prevent others from engaging in similar conduct.<sup>15</sup> As punitive damage awards have increased in size in recent years, there has been a movement to tighten the legal controls that govern them.<sup>16</sup>

Despite the clear and distinct goals of compensatory and punitive damages, there has been a growing trend for plaintiffs' attorneys to use a defendant's alleged bad acts to augment non-economic damages. In such instances the fundamental purpose of non-economic damage awards to compensate the plaintiff is upended. The defendant is punished, yet the award is not subject to the extensive legal controls imposed to help assure real punitive damages do not cross the constitutional line. This current trend to twist the purposes of punitive and compensatory damages is unsound and is incongruent with the clearly delineated function of compensatory and punitive damages.<sup>17</sup> It is important to recognize this current trend when considering the actions of various courts in pet law cases.

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14. PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 8, at 549.

15. *Id.* at 519.

16. See *Twisting the Purpose of Pain and Suffering Awards*, *supra* note 13, at 52-59. The Supreme Court first imposed controls on punitive damages in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991), where it held "that punitive damages . . . had 'run wild' . . . and should be subject to constitutional due process limitations." *Twisting the Purpose of Pain and Suffering Awards*, *supra* note 13, at 52. Since that time, "the Court has increasingly placed legal controls on both the amount and procedures for [punitive damage] awards while [emphasizing its concern that . . . fundamental constitutional rights] will be infringed by "excessive punitive damages." *Id.* These legal controls include: substantive due process restrictions on the amount of punitive awards in *Haslip*, 499 U.S. at 18-23, and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (indicating that punitive damages awards cannot be "grossly excessive" or they will run afoul of the Due Process Clause); procedural due process requirements for the assessment of punitive damages and for meaningful judicial review in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (undertaking an extensive analysis of the common law role of judicial review in assuring that punitive awards were not arbitrary or excessive and ruling an amendment to the Oregon Constitution prohibiting judicial review of the punitive damages awarded by a jury "unless the court can affirmatively say there is no evidence to support the verdict" violated the Due Process Clause) and in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (ruling that constitutional concerns required federal appeals courts to take a "thorough, independent review" of the constitutionality of a punitive damages award, requiring *de novo* review of exemplary awards rather than a less standard of review); and Commerce Clause limitations on the use of activity outside the jurisdiction as a basis for punitive awards in *BMW of North America v. Gore*, 517 U.S. 559 (1996) (ruling that punitive damages awards should not be based on conduct that is lawful in another state).

17. For a full analysis of this current trend to use compensatory damages to punish defendants, see *Twisting the Purpose of Pain and Suffering Awards*, *supra* note 13.

### B. Damages for Injuries to Property in Tort Law

Under traditional concepts of tort law, damages for physical harm to property are based on the worth of the property.<sup>18</sup> In the vast majority of the cases, this is based upon the market value of the property, which “usually is defined as what the property in question could probably have been sold for on the open market, in the ordinary course of voluntary sale by a leisurely seller to a willing buyer.”<sup>19</sup>

As a general rule, non-economic damages are not allowed in cases where a plaintiff claims injury to personal property due to negligence.<sup>20</sup> In such cases, “the courts in general appear to be extremely reluctant to allow recovery for mental disturbance occasioned by a merely negligent injury to chattels.”<sup>21</sup> Though courts commonly consider emotional distress damages in some real property contexts, such as nuisance cases, “[t]here appears to be somewhat more reluctance to allow recovery where the plaintiff’s mental disturbance is caused solely by his feeling for his property as such, and not by the violence or malice displayed by the defendant in committing the tort.”<sup>22</sup>

Several policy reasons underlie the traditional principle of not allowing the recovery of emotional damages for injury to property in cases of mere negligence. These reasons include:

- (1) [T]he plaintiff’s right to freedom from mental disturbance is not one which the law undertakes to protect, so that one who works a purely mental injury has breached no duty and committed no wrong,
- (2) . . . in most cases, such injuries are so remote from the normal, foreseeable consequences of the wrong involved that they cannot be said to have been proximately caused thereby, and
- (3) . . . such damages are so subjective that they are beyond the capacity of the legal process to investigate and evaluate, so that to entertain claims

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18. PROSSER, WADE AND SCHWARTZ’S TORTS, *supra* note 8, at 547.

19. *Id.*

20. See, e.g., *Kleinke v. Farmers Coop. Supply & Shipping*, 549 N.W.2d 714, 716 (Wis. 1996) (under Wisconsin tort law, “it is unlikely that a plaintiff could ever recover for the emotional distress caused by negligent damage to his or her property.”); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981) (recognizing that Hawaii allows damages for injury to property, but noting that “Hawaii has devised a unique approach to the area of recovery for mental distress.”); Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 502 (2003) (noting that only Hawaii, Alaska, Maryland, and Florida have extended emotional distress claims to property); W.E. Shipley, Annotation, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R. 2d 1070 § 2 (2004).

21. Shipley, *supra* note 20, at § 2.

22. *Id.*

based thereon would open the door to fraud and greatly swell the burden of litigation.<sup>23</sup>

As we will show in this article, non-economic damages have no place in negligence actions brought by owners of animals because animals are traditionally viewed as their owners' property.

### III. THE LAW OF DAMAGES WITH RESPECT TO PETS AND OTHER ANIMALS

#### A. *An Introduction to Pet Law Damages: An Historic Look at Animal Lawsuits*

Early animal law focused on injuries to people or land caused by pets.<sup>24</sup> The early law required distinguishing between wild and domesticated animals.<sup>25</sup> Under the common law of England, the owner or possessor of a wild animal was subject to strict liability if the animal caused injuries to anyone.<sup>26</sup> The owners of domestic animals, such as dogs, cats, sheep, or horses, were "subject to strict liability only if [they] knew or had reason to know that the animal had vicious propensities."<sup>27</sup>

The majority of American jurisdictions adopted the English common law's imposition of strict liability with regard to wild animals.<sup>28</sup> For domestic animals, even though "the canard is often repeated that the common law rule is that a domestic animal such as a dog (or cat) is entitled to one bite," case history suggests that American jurisdictions have followed the English rule that owners of domesticated animals are strictly liable for injuries caused by an animal if the owner knows or has reason to know of the animal's vicious tendencies.<sup>29</sup> The majority of American jurisdictions determine that if a plaintiff cannot prove that the owner knew or should have known of an animal's dangerous propensities, strict liability does not apply.<sup>30</sup> In that situation, the plaintiff has to prove that the owner was negligent in order to recover.<sup>31</sup>

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23. *Id.*

24. *See, e.g.*, PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 8.

25. *Id.*

26. *Id.* at 685.

27. *Id.*

28. *Id.*

29. PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 8, at 686.

30. *Id.*

31. *Id.*



Finally, statutes in some states have made domestic pet owners strictly liable for harms caused by their animals.<sup>32</sup> These statutes usually cap the amount of damages that can be recovered under this theory.<sup>33</sup>

## B. Modern Pet Lawsuits: The Traditional Approach

### 1. Pets are Considered Property for Purposes of Tort Law

The law regarding an owner's responsibility for causing harm has remained relatively stable for over two hundred years of American jurisprudence. In recent years, however, there has been some movement to change the law regarding a pet owner's claim for harm to his or her animal. Under the traditional approach to pet lawsuits, which no appellate court has yet to disturb,<sup>34</sup> courts "have treated pets as simple personal property."<sup>35</sup> In fact, one court has noted that courts holding otherwise would be "aberrations flying in the face of overwhelming authority to the contrary."<sup>36</sup>

While pets should be labeled as "property" for tort law purposes, it is important to avoid the stigma associated with labeling pets as "simple" or "mere" property. Characterizing animals as "property" under tort law does not mean that animals are held in the same regard as inanimate objects, such as a chair or a car. As a leading scholar on pet law, Professor Richard L. Cupp has stated, "[e]motionally, the loss of inanimate property such as a bicycle cannot be compared with the loss of a loved family pet."<sup>37</sup>

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32. See OHIO REV. CODE ANN. § 955.28 (West 2004).

33. See, e.g., CAL. FOOD & AGRIC. CODE § 31501 (requiring the owners of dogs who injure or kill any livestock or poultry to pay twice the actual value of the animals killed or damage sustained by the livestock or poultry owners).

34. See, e.g., *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1123 (Ohio Ct. App. 2003); *Bobin v. Sammarco*, No. CIV.A.94-5115, 1995 WL 303632 at \*2 (E.D. Pa. May 18, 1995) (mem.); *Harabes v. The Barkery, Inc.*, 791 A.2d 1142, 1144 (N.J. Super. Ct. Law Div. 2001); *Kennedy v. Byas*, 867 So. 2d 1195, 1198 (Fla. Dist. Ct. App. 2004).

35. Richard L. Cupp, Jr. & Amber E. Dean, *Veterinarians in the Doghouse: Are Pet Suits Economically Viable?*, THE BRIEF, Spring 2002, at 43, 43 [hereinafter *Veterinarians in the Doghouse*].

36. *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (quoting *Snyder v. Bio-Lab, Inc.*, 405 N.Y.S.2d 596 (N.Y. Sup. Ct. 1978) ("[a]s with personal property generally, the measure of damages for injury to, or destruction of, an animal is the amount which will compensate the owner for the loss and thus return him, monetarily, to the status he was in before the loss") and *Stettner v. Graubard*, 368 N.Y.S.2d 683 (N.Y. Town Ct. 1975) ("sentiment will not be considered in assessing market value for purposes of determining measure of damages for destruction of dogs")).

37. *Veterinarians in the Doghouse*, *supra* note 35, at 47. Professor Cupp has also stated, I certainly do not think of my dog as property; comparing my reaction to his destruction with my reactions to the destruction of a lamp, a bicycle or clothing would be odious.

Several courts determining that pets are property for purposes of tort law recovery have emphasized this point.<sup>38</sup> The Wisconsin Supreme Court, in determining that a dog owner could not seek non-economic damages for the loss of her dog compassionately stated:

At the outset, we note that we are uncomfortable with the law's cold characterization of a dog . . . as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.

Nevertheless, the law categorizes the dog as personal property despite the long relationship between dogs and humans. *To the extent this opinion uses the term "property" in describing how humans value the dog they live with, it is done only as a means of applying established legal doctrine to the facts of this case.*<sup>39</sup>

Another court has similarly emphasized the importance of not dismissing animals as "mere property," stating, "[w]ithout in any way discounting the bonds between humans and animals, we must continue to reject recovery for non-economic damages for loss or injury to animals."<sup>40</sup>

## 2. As Personal Property, Non-Economic Damages Are Not Available for Harm to Pets

Because non-economic damages cannot be recovered for harm to property, "the law is clear that pet owners cannot recover for emotional

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But . . . [f]or both pragmatic and moral reasons, we must resist the temptation to provide emotional distress damages to pet owners suffering the deep and legitimate pain of losing a pet to negligently inflicted harm."

Richard L. Cupp, Jr., *Barking Up the Wrong Tree: Justice: Awarding Emotional Distress Damages to Pet Owners Whose Animals are Harmed is a Dog of an Idea*, L.A. TIMES, June 22, 1998, at B5 [hereinafter *Barking Up the Wrong Tree*].

38. See, e.g., *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001).

39. *Id.* (emphasis added). See also *Harabes v. The Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. Ct. App. Div. 2001) (quoting *Rabideau*, 627 N.W.2d at 798).

40. *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003).

distress based upon an alleged negligent or malicious destruction of a dog, which is deemed to be personal property."<sup>41</sup> This fundamental principle applies whether a plaintiff seeks to include emotional harms in calculating damages or sues under a cause of action for negligent infliction of emotional distress. Courts that have reinforced this approach over the past twenty years include those in Arizona,<sup>42</sup> California,<sup>43</sup> Connecticut,<sup>44</sup> Florida,<sup>45</sup> Georgia,<sup>46</sup> Idaho,<sup>47</sup> Illinois,<sup>48</sup> Indiana,<sup>49</sup> Iowa,<sup>50</sup> Kentucky,<sup>51</sup> Massachusetts,<sup>52</sup> Michigan,<sup>53</sup> Minnesota,<sup>54</sup> Nebraska,<sup>55</sup> New Jersey,<sup>56</sup> New York,<sup>57</sup> North

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

42. *See Roman v. Carroll*, 621 P.2d 307, 308 (Ariz. Ct. App. 1980) ("A dog, however, is personal property. Damages are not recoverable for negligent infliction of emotional distress from witnessing injury to property.") (citation omitted).

43. *See Harasymiv v. Veterinary Surgical Assocs.*, No. C-01-02588, 2003 WL 22183946 (Cal. Ct. App. Sept. 23, 2003), at \*3 ("Defendants' conduct outside of plaintiff's presence, and directed to his pet cannot serve as a basis for any claim by plaintiff for emotional distress.")

44. *See, e.g., Altieri v. Nanavati*, 573 A.2d 359, 361 (Conn. Super. Ct. 1989) ("[T]he Supreme Court recently held that there can be no bystander emotional disturbance claims arising from medical malpractice on another person. There is no reason to believe that malpractice on the family pet will receive higher protection than malpractice on a child or spouse.")

45. *See Kennedy v. Byas*, 867 So. 2d 1195, 1197-98 (Fla. Dist. Ct. App. 2004) (declining to carve out an exception for veterinary malpractice to the rule that to recover negligent infliction of emotional distress, the plaintiff must have experienced some "physical impact").

46. *See, e.g., Carrol v. Rock*, 469 S.E.2d 391, 393 (Ga. Ct. App. 1996) (holding that, where cat escaped from veterinarian's care, "[r]ecover for negligent infliction of emotional distress is allowed only where there has been some impact on the plaintiff that results in a physical injury.")

47. *See Gill v. Brown*, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985) (holding that negligent infliction of emotional distress is not available where defendant shot and killed plaintiff's donkey, but plaintiff suffered no physical injury as a result).

48. *See Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987) (holding, where dog died from anesthesia in veterinarian's care, that a cause of action for emotional harm or loss of companionship does not exist when harm is solely to property, including animals).

49. *See Little v. Williamson*, 441 N.E.2d 974, 975 (Ind. Ct. App. 1982) (ruling, in a case where a boy witnessed a Great Dane kill his puppy and injure his sister as she tried to protect the puppy, that "our cases consistently hold negligent infliction of emotional distress, absent contemporaneous physical injury, is not compensable.")

50. *See Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996) ("[A]lthough we are mindful of the suffering an owner endures upon the death or injury of a beloved pet, we resolve to follow the majority of jurisdictions that do not allow recovery of damages for such mental distress.")

51. *See Ammon v. Welty*, 113 S.W.3d 185, 187-89 (Ky. Ct. App. 2003) (ruling that family and dog relationship was not the type that supported a claim for loss of consortium).

52. *See Krasnecky v. Meffen*, 777 N.E.2d 1286, 1287-90 (Mass. App. Ct. 2002) (holding that sheep owners had no cognizable claim for loss of companionship and society because wrongful death statutes only apply to death of persons).

53. *See Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (stating that "plaintiff requests that we create for pet owners an independent cause of action for loss of companionship when a pet is negligently injured by a veterinarian. Although this Court is sympathetic to plaintiff's position, we defer to the Legislature to create such a remedy.")

54. *See Soucek v. Banham*, 503 N.W.2d 153, 164 (Minn. Ct. App. 1993) (stating that the law does "not find sufficient threshold evidence to sustain a cause of action for negligent infliction of emotional distress" in animal litigation).

Dakota,<sup>58</sup> Ohio,<sup>59</sup> Oregon,<sup>60</sup> Pennsylvania,<sup>61</sup> Texas,<sup>62</sup> Virginia,<sup>63</sup> Washington,<sup>64</sup> West Virginia,<sup>65</sup> and Wisconsin.<sup>66</sup> These courts have listed various public policy reasons supporting their decisions.<sup>67</sup> For instance, a New York state court, in forbidding recovery of non-economic damages for the loss of a pet, emphasized the realities of a legal system that cannot allow unbounded recovery for every harm in people's lives:

While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.<sup>68</sup>

55. See *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999) ("This court has clearly held that animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property.")

56. See, e.g., *Harabes v. The Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. Ct. App. Div. 2001) ("[T]here is no authority in this state for allowing plaintiffs to recover non-economic damages resulting from defendants' alleged negligence.")

57. See, e.g., *Schrage v. Hatzlacha Cab Corp.*, 788 N.Y.S.2d 4, 5 (N.Y. App. Div. 2004) ("[P]ets are treated under New York law as personal property, and the loss of a dog by reason of negligence will not support claims by the animal's owners to recover for their resulting emotional injury.")

58. See *Kautzman v. McDonald*, 621 N.W.2d 871, 876-77 (N.D. 2001) (applying traditional tort law to cases involving injury to animals).

59. See, e.g., *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 814 (Ohio Ct. App. 2003) ("Whether or not one agrees with the view that pets are more than personal property, it is clear that Ohio does not recognize noneconomic damages for injury to companion animals.")

60. *Lockett v. Hill*, 51 P.3d 5, 7-8 (Or. Ct. App. 2002) (holding that witnessing the death of her cat did not entitle the plaintiff to recover for negligent infliction of emotional distress).

61. See, e.g., *Daughen v. Fox*, 539 A.2d 858, 865 (Pa. Super. Ct. 1988) ("Under no circumstances . . . may there be recovery for loss of companionship due to the death of an animal.")

62. See *Zeid v. Pearce*, 953 S.W.2d 368, 369 (Tex. App. 1997) ("[O]ne may not recover damages for pain and suffering or mental anguish for the loss of a pet.")

63. See *Kondaurov v. Kerdasha*, No. 042077, 2005 WL 2240986, at \*5-6 (Va. Sept. 16, 2005) (holding that "[T]he law in Virginia, as in most states that have decided the question, regards animals, however beloved, as personal property" and that damages for negligence resulting in harm to property do not include non-economic damages.)

64. See *Pickford v. Masion*, 98 P.3d 1232, 1233-35 (Wash. Ct. App. 2004) (holding that no case has allowed for "emotional distress suffered because of injury or threatened injury to a pet").

65. See, e.g., *Carbasha v. Musulin*, No. 32288, 2005 WL 1545279, at \*1 (W. Va. July 1, 2005) (holding that "dogs are personal property and damages for sentimental value, mental suffering, and emotional distress are not recoverable for the negligently inflicted death of a dog.")

66. See *Rabideau v. City of Racine*, 627 N.W.2d 795, 798-99 (Wis. 2001) (barring a claim for negligent infliction of emotional distress for pets).

67. See, e.g., *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. Ct. 2001).

68. *Id.* at 628 (quoting *Bovsun v. Sanperi*, 461 N.E.2d 843, 851 (N.Y. 1984) (Kaye, J., dissenting)).

Furthermore, the court reasoned that if emotional distress could be recovered for the loss of pets, it “would permit recovery for mental stress caused by the malicious or negligent destruction of other personal property . . . .”<sup>69</sup> The court concluded:

Although we live in a particularly litigious society, the court is not about to recognize a tortious cause of action to recover for emotional distress due to the death of a family pet. *Such an expansion of the law would place an unnecessary burden on the ever burgeoning caseloads of the court in resolving serious tort claims for injuries to individuals.*<sup>70</sup>

Similarly, an Ohio appellate court held that pet owners cannot recover for emotional distress for the loss of a pet because “Ohio does not recognize a cause of action for serious emotional distress caused by injury to property.”<sup>71</sup> The court held, “this is the position that the vast majority of jurisdictions take . . . [and] is also the view our legislature and courts have taken, by choosing to classify dogs as personal property.”<sup>72</sup> The court detailed several factors supporting its holding, including “the difficulty in defining classes of persons entitled to recover, and classes of animals for which recovery should be allowed . . . [and] concern[s] about quantifying the emotional value of a pet and about increasing potential burdens on the court system.”<sup>73</sup>

Additionally, the United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, determined that Pennsylvania did not allow recovery for non-economic damages, such as emotional distress, due to injury to a pet.<sup>74</sup> The court reasoned, “[f]irst, under Pennsylvania law, dogs are personal property and are not persons.”<sup>75</sup> Further, it found no “controlling authority” to support the idea that “Pennsylvania would recognize the relationship between a pet and her owner as the functional equivalent of an intimate familial relationship for purposes of determining liability for negligent infliction of emotional distress.”<sup>76</sup> Finally, the court stated, “Pennsylvania does not regard a cherished and beloved pet as a unique form of personal property entitling the owner to more than the pet’s

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69. *Id.*

70. *Id.* (emphasis added).

71. *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003).

72. *Id.* at 1125-26 (citations omitted).

73. *Id.* at 1126 (citations omitted).

74. *Bobin v. Sammarco*, No. CIV.A.94-5115, 1995 WL 303632 at \*2 (E.D. Pa. May 18, 1995) (mem.).

75. *Id.*

76. *Id.*

actual value.”<sup>77</sup> As a result, claims for non-economic damages as a result of injury to a pet would involve a “sweeping redefinition of personhood, family, and personal property”—a drastic move that “Pennsylvania law has not accepted.”<sup>78</sup>

A New Jersey appellate court likewise determined that pet owners should not recover non-economic damages for injury to their pets.<sup>79</sup> The court stated that “there are practical reasons and public policy considerations that weigh against such claims,” including problems with “defin[ing] who may be entitled to recover” and “identify[ing] the class of animals for which a pet owner may recover.”<sup>80</sup> Another policy consideration the New Jersey appellate court enumerated for not allowing non-economic damages for the loss of a pet “is the need to ensure fairness of the financial burden placed upon a negligent defendant.”<sup>81</sup> The court cited testimony in one pet death case regarding the value of the pet with estimates of the pet’s worth ranging from \$100-\$200 to “as high as the national debt.”<sup>82</sup> According to the court, “[s]uch testimony illustrates the difficulty in quantifying the emotional value of a companion pet and the risk that a negligent tortfeasor will be exposed to extraordinary and unrealistic damage claims.”<sup>83</sup> An additional public policy concern the court noted is the burden the availability of non-economic damages could place on the already overburdened torts system.<sup>84</sup> The court reasoned that “allowing such claims to go forward

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77. *Id.*

78. *Id.*

79. *Harabes v. The Barkery, Inc.*, 791 A.2d 1142, 1142 (N.J. Super. Ct. App. Div. 2001).

80. *Id.* at 1145. The court quoted the Wisconsin Supreme Court’s rationale in similarly holding that pet owners cannot recover for non-economic damages due to harm to their pets:

We are particularly concerned that were such a claim to go forward, the law would proceed upon a course that had no *just* stopping point. Humans have an enormous capacity to form bonds with dogs, cats, birds and an infinite number of other beings that are non-human. Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion.

*Id.* (quoting *Rabideau v. City of Racine*, 627 N.W.2d 795, 798-99 (Wis. 2001)). The court also noted, “what is a pet to one person can seem as a menace to another.” *Id.* (quoting Jay M. Zitter, Annotation, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5th 545 (2001)).

81. *Harabes*, 791 A.2d at 1145.

82. *Id.* (quoting *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 690 (Iowa 1996)).

83. *Id.*

84. *Id.* at 1146; *see also Kennedy v. Byas*, 867 So. 2d 1195, 1198 (Fla. Dist. Ct. App. 2004) (In rejecting a claim for emotional distress damages in a veterinary malpractice case the court held that “while pet owners may consider pets as part of the family, allowing recovery for these types of cases

would open the floodgates to future litigation.”<sup>85</sup> Indeed, “[s]uch an expansion of the law would place an unnecessary burden on the ever burgeoning caseloads of the court in resolving serious tort claims for injuries to individuals.”<sup>86</sup> Finally, the court found that since New Jersey does not allow emotional distress claims under its Wrongful Death Act, “there is no reason to believe that emotional distress and loss of companionship damages, which are unavailable for the loss of a child or spouse, should be recoverable for the loss of a pet dog.”<sup>87</sup>

### 3. The Value of a Pet is Based on Fair Market Value or Actual Value

Since traditional tort recovery for injury to property is the fair market value of the property and pets are considered to be property, in a majority of jurisdictions, when a pet is negligently injured or killed, its owner generally recovers only its market value.<sup>88</sup> Under this approach, “[t]he measure of damages for injury to, or destruction of, an animal is the amount which will compensate the owner for the loss and thus return the owner, monetarily, to the status he or she was in before the loss.”<sup>89</sup> Factors courts may consider in determining an animal’s market value include “the purchase price of the animal, cost to replace the animal, age and normal life span, its breed, degree and type of training, usefulness and desirable character traits, breeding potential and/or unborn young, and (in livestock cases) loss of the animal’s produce.”<sup>90</sup>

Since, often, mixed breed pets have little or no market value, “[c]ommentators suggest that the standard calculation . . . , typically fair

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would place an unnecessary burden on the ever burgeoning caseload of courts in resolving serious tort claims for individuals.”)

85. *Harabes*, 791 A.2d at 1145.

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

87. *Id.* at 1146.

88. *Veterinarians in the Doghouse*, *supra* note 35, at 43. See also *Daughen v. Fox*, 539 A.2d 858, 864 (Pa. Super. Ct. 1988) (valuing a dog at its market value); *Mitchell v. Heinrichs*, 27 P.3d 309, 313 (Alaska 2001) (noting that the majority approach is to “generally limit the damage award in cases in which a dog has been wrongfully killed to the animal’s market value at the time of death.”).

89. *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691-92 (Iowa 1996) (quoting 4 AM. JUR. 2d *Animals*, § 162 (1964) [hereinafter *Animals*]). See also *Daughen*, 539 A.2d at 864.

Under Pennsylvania law, a dog is personal property. The fundamental purpose of damages for an injury to or destruction of property by [the] tortious conduct of another is to compensate the injured party for actual loss suffered. As in this case, where the property has been destroyed, the measure of damages would be the value of the property prior to its destruction.

*Id.*

90. *Veterinarians in the Doghouse*, *supra* note 35, at 43. See also *Nichols*, 555 N.W.2d at 692 (“In determining the measure of damages for injuries to a dog, factors include its market value, which may be based on purchase price, relatively long life of breed, its training, usefulness and desirable traits.”) (quoting *Animals*, *supra* note 89, at § 165).

market value, may not adequately compensate the pet owner for the loss."<sup>91</sup> In situations "[w]hen the market value cannot be calculated, some courts allow a plaintiff to collect the 'actual value' (sometimes called the 'intrinsic value') of the animal to the owner."<sup>92</sup> Courts using this approach may factor into a pet's value the money an owner originally paid for the pet, money the owner spent on veterinary bills during the pet's life, costs incurred in training the animal, and the loss of potential income or special services from the animal (such as breeding fees or guide dog services).<sup>93</sup>

Alaska follows this "actual value" approach.<sup>94</sup> In *Mitchell v. Heinrichs*,<sup>95</sup> the Alaska Supreme Court held "[w]e agree with those courts that recognize that the actual value of the pet to the owner, rather than the fair market value, is sometimes the proper measure of the pet's value."<sup>96</sup> The court explained that where "there may not be any fair market value for an adult dog, the 'value to the owner may be based on such things as the cost of replacement, original cost, and cost to reproduce.'"<sup>97</sup> The court detailed that:

[A]n owner may seek reasonable replacement costs—including such items as the cost of purchasing a puppy of the same breed, the cost of immunization, the cost of neutering the pet, and the cost of comparable training. Or an owner may seek to recover the original cost of the dog, including the purchase price and, again, such investments as immunization, neutering, and training.<sup>98</sup>

In courts using the "actual value" of the pet approach, some plaintiffs, such as the owner in *Mitchell*, ask that the court consider the pet's "sentimental value" in calculating its actual value.<sup>99</sup> "The vast majority of courts" that calculate the "actual value" of a pet have declined such requests and do not permit the court to consider the pet's sentimental value or the

91. *Mitchell*, 27 P.3d at 313.

92. *Veterinarians in the Doghouse*, *supra* note 35, at 47. Other courts refer to this type of valuation as the "special or pecuniary value" of the pet to the owner. *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 561 (Tex. Ct. App., 2004) (quoting *Heiligmann v. Rose*, 16 S.W. 931, 932 (Tex. 1891)).

93. See generally, *Mitchell*, 27 P.3d at 313. See also *Veterinarians in the Doghouse*, *supra* note 35, at 47.

94. *Mitchell*, 27 P.3d at 313.

95. *Id.*

96. *Id.*

97. *Id.* at 313-14 (quoting *Landers v. Anchorage*, 915 P.2d 614, 618 (Alaska 1996)).

98. *Id.* at 314.

99. *Id.*



owner's loss of companionship.<sup>100</sup> Courts exclude sentimental value or loss of companionship from their value calculations because these factors are inherently subjective, easily inflatable, and potentially astronomical.<sup>101</sup>

Between simple fair market value and "actual value," the "actual value" approach may be the most prudent and just approach, as well as one consistent with sound principles of tort law. Occasionally, certain types of property—such as family photographs or heirlooms—"have no market value, simply because they are not salable."<sup>102</sup> Many times, in these situations, market value would not be adequate compensation to the owner, so that "[i]n these cases, there may be recovery of the value to the owner, as distinguished from value to others."<sup>103</sup> Thus, "the 'personal value' so awarded is determined by consideration of whatever factors may be relevant, such as original cost of the property, the use made of it, and its condition at the time of the wrong."<sup>104</sup>

In animal cases, fair market value should be used for animals possessing a marketable pedigree like show dogs or horses. But, this preference for using market value should be "a standard not a shackle."<sup>105</sup> For the large number of pets that have no fair market value, the "more elastic standard" of actual value to the owner should be utilized in "recognition that property may have value to the owner in exceptional circumstances which is the basis of a better standard than what the article would bring in the open market."<sup>106</sup>

When determining an animal's "actual value," it is vital that courts do not allow claimants to inflate the "actual value" of their pets by including sentimental value or loss of companionship in the pet's actual value. Allowing plaintiff's lawyers to seek vastly subjective and easily inflatable loss of companionship and sentimental value damages creates the same effect of awarding unbounded non-economic damages in these cases. Providing the carrot of potentially astronomic damages may encourage aggressive plaintiffs' lawyers to file flimsy claims that could add to already overburdened dockets. Instead, courts should limit their consideration of "actual damages" to ascertainable, direct, and real replacement costs

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100. *Veterinarians in the Doghouse*, *supra* note 35, at 46-47. But, a minority of courts factor in sentimental value or loss of companionship as factors included in a pet's "actual value." *See, e.g.*, *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987); *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980) ("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.") (citations omitted).

101. *See supra* text accompanying notes 82-83.

102. PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 8, at 548.

103. *Id.*

104. *Id.* at 548-49.

105. *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994) (quoting *Bishop v. E. Ohio Gas. Co.*, 143 Ohio St. 541 (1944)).

106. *Id.*