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

Victor E. Schwartz[*] & Emily J. Laird[**]

[*] Victor E. Schwartz is Chairman of the Public Policy Group in the Washington, D.C. office of the law firm of Shook, Hardy & Bacon L.L.P. He co-authors the most widely used torts casebook in the United States, PROSSER, WADE AND SCHWARTZ'S TORTS (10th ed. 2000). He has served on the Advisory Committees of the American Law Institute's RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY, APPORTIONMENT OF LIABILITY, and GENERAL PRINCIPLES projects. Mr. Schwartz received his B.A. *summa cum laude* from Boston University and his J.D. *magna cum laude* from Columbia University. Mr. Schwartz once owned two cats, Chat and Spinach. He believes that if Chat had lived the length of years of a human, Chat would have been admitted to a reasonably good law school. Spinach, on the other hand, would have been gainfully employed at a fast food chain, eating some of the profits.

[**] B.A. (2000), *summa cum laude*, Oklahoma Baptist University; J.D. (2003), *Order of the Coif*, University of Missouri. Emily was a member of the *Missouri Law Review* and an editor for the *Journal of Dispute Resolution*. She is an associate in the Public Policy Group at Shook, Hardy & Bacon L.L.P. in Washington, D.C. She is the proud owner of a mixed breed dog of the Heinz 57 variety named Charlie that she rescued from an animal shelter. Admittedly, little Charlie has no fair market value, but is priceless to Emily.

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.[1] 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.[2] 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,[3] 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.[4] 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

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.[5] 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.[6] 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.[7]

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."[8] The umbrella of compensatory damages includes economic and non-economic damages. Economic damages compensate plaintiffs for tangible injuries and are subject to objective measurement.[9] Examples of economic damages include lost earnings and medical expenses.[10] Non-economic damages compensate plaintiffs for intangible injuries such as pain and suffering, loss of companionship, and emotional distress.[11] In some jurisdictions, non-economic damages may also encompass injuries such as the loss of enjoyment of life and other unquantifiable injuries.[12] However categorized, the goal and purpose of these damages is to compensate plaintiffs—not to punish defendants.[13]

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.[14] 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.[15] As punitive damage awards have increased in size in recent years, there has been a movement to tighten the legal controls that govern them.[16]

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.[17] It is important to recognize this current trend when considering the actions of various courts in pet law cases.

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.[18] 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."[19]

As a general rule, non-economic damages are not allowed in cases where a plaintiff claims injury to personal property due to negligence.[20] 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."[21] 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."[22]

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

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.[23]

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.[24] The early law required distinguishing between wild and domesticated animals.[25] 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.[26] 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."[27]

The majority of American jurisdictions adopted the English common law's imposition of strict liability with regard to wild animals.[28] 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.[29] 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.[30] In that situation, the plaintiff has to prove that the owner was negligent in order to recover.[31]

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.[32] These statutes usually cap the amount of damages that can be recovered under this theory.[33]

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,[34] courts "have treated pets as simple personal property."[35] In fact, one court has noted that courts holding otherwise would be "aberrations flying in the face of overwhelming authority to the contrary."[36]

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."[37]

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.[38] 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*.[39]

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."[40]

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

> 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."[41] 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,[42] California,[43] Connecticut,[44] Florida,[45] Georgia,[46] Idaho,[47] Illinois,[48] Indiana,[49] Iowa,[50] Kentucky,[51] Massachusetts,[52] Michigan,[53] Minnesota,[54] Nebraska,[55] New Jersey,[56] New York,[57] 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]ecovery 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,[58] Ohio,[59] Oregon,[60] Pennsylvania,[61] Texas,[62] Virginia,[63] Washington,[64] West Virginia,[65] and Wisconsin.[66] These courts have listed various public policy reasons supporting their decisions.[67] 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 ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.[68]

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.*, Carbasho 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 . . . ."[69] 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.[70]

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."[71] 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."[72] 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."[73]

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.[74] The court reasoned, "[f]irst, under Pennsylvania law, dogs are personal property and are not persons."[75] 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."[76] 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

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."[77] 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."[78]

A New Jersey appellate court likewise determined that pet owners should not recover non-economic damages for injury to their pets.[79] 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."[80] 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."[81] 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.'"[82] 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."[83] 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.[84] The court reasoned that "allowing such claims to go forward

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."[85] 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."[86] 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."[87]

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.[88] 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."[89] 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."[90]

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

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."[91] 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."[92] 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).[93]

Alaska follows this "actual value" approach.[94] In *Mitchell v. Heinrichs*,[95] 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."[96] 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.'"[97] 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.[98]

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.[99] "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.[100] Courts exclude sentimental value or loss of companionship from their value calculations because these factors are inherently subjective, easily inflatable, and potentially astronomical.[101]

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."[102] 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."[103] 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."[104]

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."[105] 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."[106]

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

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*.

incurred during a pet's life, such as obedience training, initial vaccinations, and the price of spaying or neutering the pet. This approach justly allows owners to recover value for pets that have no traditional fair market value, while avoiding the excesses that would accompany the availability of non-economic damages.

IV. THE ASSAULT ON THE RULE OF LAW BY ARGUMENTS SUPPORTING NON-ECONOMIC DAMAGES IN PET CASES AND THE ARGUMENTS FOR CHANGE

In a narrow set of circumstances, some courts and legislatures have allowed non-economic damages in lawsuits involving harm to pets. As we will show, allowing non-economic damages solely for an injury to a pet twists the fundamental purpose of non-economic damages and uses them for punitive, rather than compensatory purposes. Allowing unlimited and unbounded non-economic damages in pet cases ignores lessons learned in the context of wrongful death. Furthermore, it is clear that when courts allow non-economic damages in pet cases, they undertake fundamental changes to the common law that are best left to the legislature.

A. Challenging the Traditional Approach to Pet Lawsuits: The Movement by Some Courts and Legislatures to Allow Non-Economic Damages in Pet Lawsuits

1. Non-Economic Damages in Cases Involving Negligent Injury to a Pet

A few outlier courts have allowed non-economic damages in cases of negligently caused harm to pets.[107] In *Campbell v. Animal Quarantine Station*,[108] the Supreme Court of Hawaii, a court that has been uniquely

107. Courts have been somewhat more willing to allow non-economic damages in cases where defendants intentionally cause harm to pets. *See, e.g.*, Burgess v. Taylor, 44 S.W.3d 806 (Ky. Ct. App. 2001); Gill v. Brown, 695 P.2d 1276 (Idaho Ct. App. 1985). Though these decisions imprudently stretch the bounds of traditional tort law and allow non-economic damages for injuries to property, they have not specifically elevated pets above other types of property in order to do so. Rather, the few courts that have allowed noneconomic damages for negligent harm to a pet have done so under the same criteria they use in awarding damages for negligent harm to other types of property in general.

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

sympathetic to expansion of tort law,[109] recognized that it was the first state to allow recovery "for mental distress suffered as the result of the negligent destruction of property."[110] In the sad facts of that case, a pet dog died due to heat exposure after it sat in a hot transport van awaiting treatment at a veterinary hospital.[111] The owners were allowed to recover for "injured feelings and mental distress" even though they did not see the dog die, they did not see the dog's body after it died, and they sought no psychiatric or medical assistance as the result of the dog's death.[112]

Even though the plaintiffs were "neither eyewitnesses to their dog's death nor located within a reasonable distance of the accident," the court held that it is enough that plaintiffs experience the consequences of the harm.[113] In Hawaii, witnessing an event helps only to "determine the genuineness and degree of mental distress" and a failure to witness the event does not bar recovery.[114] Also, the plaintiffs did not have to present any medical testimony to bolster their emotional distress claims because the court held such evidence is only an "indicator[] of the degree of the mental distress," not a "bar to recovery."[115] At any rate, the court reasoned, "[b]y limiting the total award among five people to $1,000.00, the trial court indicated its awareness of the limited duration and severity of the distress suffered by the plaintiffs."[116] In addition, the Hawaii Supreme Court stated that it did not matter that the owners suffered no physical manifestation of harm due to emotional distress because Hawaii also was "the first jurisdiction to allow recovery [in emotional distress cases] without a showing of physically manifested harm."[117]

The defendants argued that allowing emotional distress damages for negligent damage to personal property "would lead to a plethora of similar cases, many which would stretch the imagination and strain all bounds of credibility."[118] The court rejected the defense's argument, reasoning that "Hawaii has devised a unique approach to the area of recovery for mental

109. Hawaii is one of the few states that holds that foreseeability is not an element of warnings defect claims. *See* In re *Hawaii Fed. Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992) (applying Hawaii law). Similarly, in the emotional distress context, Hawaii "became the first jurisdiction to allow recovery without a showing of physically manifested harm." *Campbell*, 632 P.2d at 1068. Hawaii courts are fairly unique in their continued reliance on the liberal allowance provided in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), to recovery for emotional distress. *See Campbell*, 632 P.2d at 1069; Leong v. Tasaki, 520 P.2d 758, 765 (Haw. 1974).

110. *Campbell*, 632 P.2d at 1071.

111. *Id*. at 1067, 1071.

112. *Id*.

113. *Id.* at 1069.

114. *Id*.

115. *Campbell*, 632 P.2d at 1070.

116. *Id*. at 1071.

117. *Id*. at 1068.

118. *Id*.

distress" in its earlier holding that owners of a negligently-flooded house could recover for emotional distress.[119] Further, the court noted that, since its earlier holding, "there has been no plethora of similar cases" and, as a result, "fears of unlimited liability have not proved true."[120] Thus, the court determined that it could award emotional distress damages for the loss of a pet consistent with Hawaiian case law and public policy.

In *Knowles Animal Hospital, Inc. v. Wills*,[121] a Florida appellate court under similar reasoning allowed dog owners to recover $13,000 for physical and mental suffering for the death of their dog due to their veterinarian's negligence.[122] The court allowed the jury to consider the owners' "mental pain and suffering" because the defendant's act was "of a character amounting to a great indifference to the property of the plaintiffs."[123]

The court's leap from earlier cases to its conclusion that emotional distress damages can be recovered for the negligent treatment of a pet is tenuous at best. It cited one case allowing recovery of mental suffering and anguish damages due to the intentional taking a child's body from her parents' home by an undertaker and the later embalming of the body without parental consent.[124] The other case cited involved an award of damages for mental distress due to the intentional malicious destruction of a pet, not negligence.[125] Both cases the court cited for support involved non-economic damages as a result of intentional action, very different factual situations from the negligence case the court had before it.

Finally, in *Peloquin v. Calcasieu Parish Police Jury*, a Louisiana appellate court, without detailed analysis, held that the owner of an animal could recover for mental anguish as the result of injury to the animal.[126] The court appeared to base its decision on the statutory definition of a pet as a "movable thing" and accompanying statutory rights and obligations. This development was not entirely surprising given the fact that the common law system is not an inherent part of Louisiana law and Louisiana courts have, at

119. *Id*. (citing Rodrigues v. State, 472 P.2d 509 (Haw. 1970)). *But see, e.g.*, Kleinke v. Farmers Coop. Supply & Shipping, 549 N.W.2d 714, 716 (Wis. 1996) (stating that 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.").

120. *Campbell*, 632 P.2d at 1071.

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

122. *Id*. at 38.

123. *Id*. (citing Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); La Porte v. Associated Indeps., Inc., 163 So. 2d 267 (Fla. 1964)).

124. *Knowles Animal Hosp.*, 360 So. 2d at 38 (citing *Kirksey*, 45 So. 2d at 189).

125. *Id.* (citing *La Porte*, 163 So. 2d at 268).

126. Peloquin v. Calcasieu Parish Police Jury, 367 So. 2d 1246, 1251 (La. Ct. App. 1979).

times, stretched tort law to its outer limit.[127] In that case, the owners of a cat sued their neighbors who found the cat in their yard and took it to an animal control shelter, where the cat was "put to sleep."[128] The cat's owners did not witness the event.[129]

2. Non-Economic Damages in Cases Involving Intentional Injury to a Pet

Some courts have allowed emotional harm damages for intentional or reckless infliction of emotional distress where the defendant deliberately or maliciously harmed the plaintiff's pet.

Some of these cases allowing non-economic damages for intentionally-caused harms to pets involved defendants who deliberately harmed the pets in order to inflict emotional distress upon the owners. In these cases, courts have reasoned that the tort occurred against the owner of the animal and not the pet, and therefore applied the traditional criteria for intentional infliction of emotional distress.[130] For example, in *Burgess v. Taylor*,[131] the plaintiffs boarded their horses with defendants who later sold the horses for slaughter. A Kentucky appellate court allowed the intentional infliction of emotional distress claim of the owners to continue, refusing to preclude the claim "simply because the facts giving rise to the claim involve an animal."[132] In these cases, the courts consider a pet's unique and sentimental value to be relevant only in assessing whether the defendant's conduct was so

127. For example, Louisiana courts have held that there is a duty to rescue. *See, e.g.,* Marsalis v. La Salle, 94 So. 2d 120 (La. Ct. App. 1957) (cat bite case). The Louisiana Supreme Court has held that absolute liability applies in product cases. *See also* Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986). *Halphen* was an extreme case that created absolute liability for products found to be unreasonably dangerous per se. *See id*. Under the *Halphen* absolute liability standard, manufacturers were potentially liable for risks involving their products that were neither known nor discoverable, and as a result unpreventable at the time of sale. *Id*. Which products, if any, would fall into the "unreasonably dangerous per se" category was essentially unknowable. The specter of absolute liability hunted all products, even those as mundane as escalators and freight elevators. *See also* Brown v. Sears, Roebuck and Co., 514 So. 2d 439 (La. 1987), *reh'g denied*, 516 So. 2d 1154 (1988) (finding that an escalator was unreasonably dangerous as to children); McCoy v. Otis Elevator Co., 546 So. 2d 229 (La. App. 2d Cir.), *writ denied*, 551 So. 2d 636 (La. 1989) (finding that a doorless freight elevator installed in 1923 but maintained by a company other than the manufacturer since 1962 was unreasonably dangerous per se as to electrician injured during renovation in 1982, without evidence of a single prior accident). The Louisiana Products Liability Act ("LPLA"), LA. REV. STAT. ANN. § 9:2800.51-60 (2005), was enacted to bring Louisiana into the "mainstream" of American law, superceding the Louisiana Supreme Court's decision in *Halphen*.

128. *See Peloquin*, 367 So. 2d at 1248 (using the word "destroyed.")

129. *Id.*

130. *See, e.g.*, Miller v. Peraino, 626 A.2d 637 (Pa. Super. Ct. 1993).

131. 44 S.W.3d 806 (Ky. Ct. App. 2001).

132. *See id.* at 813.

outrageous that it meets the criteria for an intentional or reckless infliction of emotional distress claim against the owner.[133]

A small handful of courts have allowed owners to collect emotional harm damages when a defendant's malicious acts were directed solely against an animal. In *La Porte v. Associated Independents, Inc.*,[134] a garbage collector killed a dog by hurling a garbage can at it in the view of its owner. When the owner went up to the dog, the garbage collector "laughed and left."[135] The court determined the defendant was liable for damages due to the plaintiff's emotional harm.[136] In *City of Garland v. White*,[137] police officers entered the private property of pet owners and shot their pet, absent any provocation, resulting in shotgun pellets hitting the house "very near to" where the owners were seated.[138] The court held the officers liable for the owner's emotional harm.[139] Finally, in *Banasczek v. Kowalski*,[140] a court allowed the owners of a "maliciously destroyed pet" to collect emotional harm damages even though they did not see the defendant shoot their two dogs.[141] The court noted that this type of claim "should not be confused with a claim for the sentimental value of a pet, [which is] unrecognized in most jurisdictions."[142]

3. Some Legislatures Have Unwisely Allowed Non-Economic Damages in Pet Cases, but Most Legislative Attempts to Allow These Damages Have Failed

Since the overwhelming majority of courts have determined that non-economic damages cannot be awarded in pet cases, legislatures are increasingly being asked to enact legislation allowing these damages. Tennessee and Illinois are the only states to have enacted such statutes, though both are fairly limited in their application.[143]

133. *Miller*, 626 A.2d at 640 ("intentional infliction of emotional distress cannot legally be founded upon . . . behavior toward an animal.").
134. 163 So. 2d 267 (Fla. 1964).
135. *Id*. at 268.
136. *Id*. at 268-69.
137. 368 S.W.2d 12 (Tex. Ct. App. 1963).
138. *Id.* at 15.
139. *Id*. at 17.
140. No. 9009 of 1978, 1979 WL 489, at *2 (Pa. Com. Pl. Jan. 30, 1979).
141. *Id.*
142. *Id.*
143. *See* 510 ILL. COMP. STAT. 70/16.3 (2002); TENN. CODE ANN. § 44-17-403 (Supp. 2004).

The Tennessee statute is the only pet-specific law that allows for damages where a person or a person's animal negligently or intentionally kills another's animal, though it explicitly excludes actions against veterinarians, shelters and law enforcement officers.[144] In addition, the statute applies only where the harm took place on the owner/caretaker's property or "while under the control and supervision of the deceased pet's owner or caretaker," such as by being on a leash.[145] In these instances, the owner can recover "up to five thousand dollars ($5,000) in non-economic damages."[146] The statute also provides that "[n]oneconomic 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."[147]

The Illinois statute allows recovery only for non-economic damages when the animal is subject to an act of aggravated cruelty or torture or is injured or killed in bad faith when seized or impounded.[148] The owner can seek damages including, but "not limited to, the monetary value of the animal, veterinary expenses incurred on behalf of the animal, any other expenses incurred by the owner in rectifying the effects of the cruelty, pain, and suffering of the animal, and emotional distress suffered by the owner."[149] The statute does not allow for non-economic damages for acts of negligence that harm an animal.

In addition to the enacted legislation in Tennessee and Illinois, proponents of expanded damages in pet lawsuits have introduced legislation to allow non-economic damages in pet cases in the state legislatures of New Jersey,[150] New York,[151] Massachusetts,[152] Rhode Island,[153] California,[154]

144. TENN. CODE ANN. § 44-17-403(e).

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

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

147. TENN. CODE ANN. § 44-17-403(d).

148. 510 ILL. COMP. STAT. § 70/16.3.

149. *Id.*

150. H.D. 2411, 211th Leg., Reg. Sess. (N.J. 2004); H.D. 2012, 211th Leg, Reg. Sess. (N.J. 2004) As introduced, the parallel bills would permit loss of companionship damages of up to $20,000. *Id.* The part of the bill allowing loss of companionship damages was deleted in committee.

151. H.D. 4545, 226th Leg., Reg. Sess. (N.Y. 2003) (permitting recovery of up to $5,000 for non-economic damages for the death or injury of a companion animal); H.D. 6340, 226th Leg., Reg. Sess. (N.Y. 2003) (permitting the pet itself the right to be compensated for pain, suffering, and loss of faculties; would permit the courts to appoint guardians to sue on the pet's behalf for its injuries; would also permit the owner to recover for "the loss of reasonably expected society, companionship, comfort, protection and services of the injured companion animal . . . ."); H.D. 2791, 226th Leg., Reg. Sess. (N.Y. 2003) (same).

152. H.D. 932, 183rd Leg., Reg. Sess. (Mass. 2003) (permitting owner to recover for "the loss of reasonably expected society, companionship, comfort, protection and services of the injured animal . . . ;" pets themselves to recover for "pain, suffering, and loss of faculties;" the courts to appoint a guardian ad litem or a next friend to sue on the pet's behalf for its injures).

Colorado,[155] Mississippi,[156] and Michigan.[157] Fortunately, these attempts have largely been unsuccessful. In Colorado, for example, the backlash against the bill was so severe that the state lawmaker who introduced the legislation ultimately killed his own bill.[158] As the *Denver Post* editorialized, allowing pet owners to recover non-economic damages would have "unintended consequences—and actually may work against getting the medical care our dogs and cats need."[159] Specifically, it would lead to defensive pet medicine, "put ordinary veterinary care beyond the reach of poorer households," and keep some people from spaying or neutering their pets.[160]

The vast number of states in which such legislative attempts have been made indicates that proponents of this type of legislation most likely will continue their efforts to enact legislation in other states.

B. The Movement to Allow Non-Economic Damages in Pet Cases Is Unsound Public Policy

1. Allowing Non-Economic Damages in Pet Cases Often Twists the Fundamental Purpose of Non-Economic Damages

Advocates of allowing non-economic damages in pet cases often improperly twist the fundamental compensatory purpose of non-economic damages into a punitive focus. For instance, one commentator advocating non-economic damages in pet cases writes "'the tort system strives to

153. H.D. 2593, 2003-2004 Leg., Reg. Sess., (R.I. 2004) (permitting recovery of up to $10,000 for non-economic damages for the death or injury of a companion animal).

154. H.D. 225, 2003-2004 Leg., Reg. Sess., (Cal. 2003) (permitting recovery of up to $4,000 for non-economic damages for the death or injury of a companion animal).

155. H.R. 1260, 64th Gen. Assem.,, Reg. Sess., (Colo. 2003) (permitting recovery of up to $100,000 for non-economic damages for the death or injury of a companion animal).

156. H.R. 109, 2004 Leg., Reg. Sess., (Miss. 2004) (permitting recovery of up to $5,000 for "the owner's loss of companionship and affection of the pet" in non-economic damages for the death or injury of a companion animal).

157. H.D. 1379, 91st Leg., Reg. Sess., (Mich. 2001) (permitting recovery of up to $250,000 in non-economic damages for the death or injury of a companion animal).

158. *See* Julia C. Martinez, *Pet Bill Killed by House Sponsor Move Outrages Senate Backer*, DENVER POST, Feb. 16, 2003, at B1.

159. Editorial, *Pet Law Barks Up Wrong Tree*, DENVER POST, Feb. 12, 2003, at B6.

160. *Id.* After observing that such a bill also would put pets above children in terms of the parents' ability to recover, the Post stated that a "better title [for the bill] would be 'the Tort Lawyers' Income Relief Act of 2003.'" *Id.*

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.'"[161] Another, referring to the use of non-economic damages in lawsuits against veterinarians, suggests that "[t]he economic impact of permitting non-economic damages supports the tort goal of deterring future bad acts."[162] Yet another contends that "[v]aluing companion animals at fair market value, however, poorly serves tort goals of efficient compensation for loss and deterrence of future harm."[163]

As stated earlier in this article,[164] the clearly delineated goals of compensatory and punitive damages have become increasingly blurred in recent years. Punitive damages are intended to punish a defendant's wrongful conduct and deter that individual and others from engaging in similar misconduct in the future.[165] Compensatory damages, including non-economic damages, compensate tort victims for personal injuries and economic losses with the goal of "making the plaintiff whole."[166] Despite these fundamental distinctions, it is clear that many advocates of non-economic damages in pet law cases highlight the potential of these damages to deter behavior that harms animals.

A great danger lies in these attempts to twist the purpose of non-economic damages into the goal of deterrence. Very likely, these improperly-awarded damages will not be reconsidered on appeal. Since non-economic damage awards are inherently subjective, generally, courts will not second-guess the jury's decision-making. This "hands off" approach creates the opportunity for plaintiffs' lawyers to manipulate the system by using the defendant's alleged "bad acts" to augment non-economic damages. Without proper oversight by trial courts, plaintiff's counsel can direct the jury away from the needs of their clients and toward

161. Sonia S. Waisman & Barbara R. Newell, *Recovery of "Non-Economic" Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 65 (2001) (quoting Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1080-81 (1995)).

162. Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 530-31 (2004).

163. Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 240 (2003).

164. *See supra* note 17 and accompanying text.

165. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury . . . [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); W. PAGE KEETON et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 2, at 9 (5th ed. 1984) [hereinafter PROSSER & KEETON] (explaining that punitive damages are awarded to punish defendant, teach defendant not to "do it again," and deter others from similar behavior).

166. *See Twisting the Purpose of Pain and Suffering Awards*, *supra* note 13, at 50.

the wrongdoing of defendants, improperly mixing the fundamental compensatory purpose of non-economic and punitive damages. The defendant is then "punished" by an award not subject to the extensive legal controls that help assure that real punitive awards do not cross the constitutional line. Any trend to use non-economic damages in pet cases to "punish" should be halted in its tracks.

Furthermore, even if the deterrence of improper veterinary conduct were a proper focus of economic damages in pet cases, there is no real or perceived need to deter current veterinary behavior. The public holds veterinarians in high regard, considering veterinarians to hold one of America's most well-respected professions.[167] In fact, a Gallup poll surveying 1,000 adults showed that veterinarians placed in the top three professions in terms of honesty and ethics, following only nurses and doctors.[168] Furthermore, state and professional boards of veterinary medicine provide avenues for citizens to file complaints alleging negligence and malpractice.[169] These boards regulate veterinary behavior by professionally disciplining vets who violate board standards.[170]

2. Allowing Unlimited and Unbounded Non-Economic Damages in Pet Cases Ignores the *Dillon v. Legg* Experience

a. Dillon v. Legg *and* Thing v. La Chusa

The California Supreme Court's line of emotional distress cases for those who witness the death of a close relative is germane to the issue of non economic damages for the loss of a pet. In *Dillon v. Legg*,[171] the California Supreme Court allowed a mother and sister who witnessed the death of a

167. The Gallup Organization, *Public Rates Nursing as Most Honest and Ethical Profession: Image of the Clergy Recovers to Late 1990s Level, Is Still Lower than in 2000 and 2001*, Dec. 1, 2003, *at* http://www.gallup.com/poll/content/login.aspx?ci=9823 [hereinafter Gallup Organization] (last visited Dec. 14, 2004); Joseph Carroll, *Public Rates Nursing as Most Honest and Ethical Profession: Image of the Clergy Recovers to Late 1990s Level, Is Still Lower than in 2000 and 2001*, GALLUP ORG. POLL ANALYSES, Dec. 1, 2003, *at* http://www.mycoolcareer.com/news/news_121203.html (last visited Dec. 14, 2004).

168. *See* Gallup Organization *supra* note 167.

169. *See, e.g.*, Cal. Veterinary Med. Bd., Filing a Complaint, *at* http://www.vmb.ca.gov/comp-inf.htm (last visited Apr. 13, 2005).

170. *See, e.g.*, Maine Dep't of Prof'l & Fin. Regulation, Disciplinary Actions, *at* http://www.state.me.us/pfr/olr/avda02.htm#40 (last visited Apr. 13, 2005) (enumerating disciplinary actions taken in the year 2002).

171. 441 P.2d at 912, 912-13 (Cal. 1968).

child hit by a car to recover non-economic damages for emotional distress. Both were allowed to recover even though the mother was not "within the zone of danger" of the car that hit the victim and the sister was only arguably "within the zone of danger" of the accident.[172]

The court determined that both the mother and the sister could recover because the defendant should have reasonably foreseen that hitting and killing the girl would result in emotional distress to her mother and sister.[173] The court embraced this "reasonable foreseeability" test, rejecting the more predictable zone-of-danger rule and impact rule.[174] The court stated that courts using its foreseeability test should take into account such factors as the following:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[175]

The court held that since its test "is inherently intertwined with foreseeability[,] such duty or obligation must necessarily be adjudicated only upon a case-by-case basis."[176]

Two decades later, in *Thing v. La Chusa*,[177] the California Supreme Court retreated from its holding in *Dillon*. In *Thing*, the court determined that a mother who did not witness an automobile striking and injuring her child could not recover for the emotional distress she suffered when she arrived at the accident scene.[178] The court held that the foreseeability test articulated in *Dillon* and its factors had been relaxed in post-*Dillon* cases where "[l]ittle consideration ha[d] been given . . . to the importance of avoiding the limitless exposure to liability that the pure foreseeability test of 'duty' would create and towards which these decisions have moved."[179] The court rejected *Dillon*'s foreseeability test, recognizing *Dillon*'s test "is

172. *Id.* at 915.
173. *Id*. at 921.
174. *Id*. at 915 (noting "[t]he zone-of-danger concept must, then, inevitably collapse because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of *impact*.") (emphasis in original).
175. *Id*. at 920.
176. *Id*.
177. Thing v. La Chusa, 771 P.2d 814 (Cal. 1989) (en banc).
178. *Id*. at 815.
179. *Id*. at 821.

endless because foreseeability, like light, travels indefinitely in a vacuum."[180]

In *Thing*, the court abandoned *Dillon*'s case-by-case foreseeability analysis in favor of a "clear rule under which liability may be determined."[181] The court noted that "drawing arbitrary lines is unavoidable if we are to limit liability and establish meaningful rules for application by litigants and lower courts."[182] The court held that, rather than a potentially infinite foreseeability test, "a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if" the plaintiff:[183]

> (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.[184]

The court explained that the victim must be closely related to the plaintiff claiming emotional distress because "in common experience, it is more likely that [persons closely related by blood or marriage] will suffer a greater degree of emotional distress than a disinterested witness to negligently caused pain and suffering or death."[185] Even though "[s]uch limitations are indisputably arbitrary since it is foreseeable that in some cases unrelated persons have a relationship to the victim or are so affected by the traumatic event that they suffer equivalent emotional distress," "[n]o

180. *Id*. at 823 (quoting Newton v. Kaiser Founds. Hosps., 228 Cal. Rptr. 890, 893 (Cal. Ct. App. 1986).

181. *Thing*, 771 P.2d at 827.

182. *Id*. at 828.

183. *Id.* at 829. A few state courts have recognized a bystander exception, but only for witnessing a brutal accident involving a spouse, child or sibling. If the spouse, child or sibling is injured or killed elsewhere, such as in most medical malpractice cases, the plaintiff may not recover under negligent infliction of emotional distress. *See, e.g.*, *Roman v. Carroll*, 621 P.2d 307 (Ariz. Ct. App. 1980). Courts addressing these issues in animal cases have rejected bystander emotional distress claims as well as claims for veterinary malpractice. *See, e.g.*, *id.*; *Coston v. Reardon*, No. 063892, 2001 WL 1467610 (Conn. Super. Ct. Oct. 18, 2001); *Holbrook v. Stansell*, 562 S.E.2d 731 (Ga. Ct. App. 2002).

184. *Thing*, 771 P.2d at 829-30.

185. *Id*. at 828.

policy supports extension of the right to recover . . . to a larger class of plaintiffs."[186]

The court noted that if it continued allowing recovery for all who could foreseeably be affected by the death of a loved one, liability could be limitless because emotional distress occurs unavoidably when one's loved one suffers, "regardless of the cause of the loved one's illness, injury, or death."[187] Therefore, "[e]ven if it is 'foreseeable' that persons other than closely related percipient witnesses may suffer emotional distress, this fact does not justify the imposition of what threatens to become unlimited liability for emotional distress on a defendant whose conduct is simply negligent."[188]

The court also explained the purpose of its requirement that plaintiffs claiming emotional distress must be present at the scene of the injury.[189] This factor helps "distinguish[] the plaintiff's resultant emotional distress from the emotion felt when one learns of the injury or death of a loved one from another, or observes pain and suffering but not the traumatic cause of the injury."[190] This limitation "to plaintiffs who personally and contemporaneously perceive the injury-producing event and its traumatic consequences" provides "[g]reater certainty and a more reasonable limit on the exposure to liability for negligent conduct."[191]

b. Dillon *and* Thing *and the Rejection of Bystander Claims in Pet Cases*

The court's reasons for restricting emotional distress claims are all relevant to the issue of whether these damages should be awarded in pet cases. In fact, courts refusing to allow non-economic damages in pet cases have recognized that bystander emotional distress cases are instructive in animal lawsuits.[192] These cases cite as reasons for barring recovery the fact that the owners did not witness the injury-causing event or the fact that the owners are not closely related to the pet.[193] Cases also cite difficulties with determining the class of animal for which owners would be able to recover

186. *Id*.
187. *Id*. at 829.
188. *Id*.
189. *Id.* at 828.
190. *Id*.
191. *Id*.
192. *See* Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691 (Iowa 1996); Harabes v. The Barkery, Inc., 791 A.2d 1142, 1145 (N.J. Super. Ct. App. Div. 2001); Pacher v. Invisible Fence of Dayton, 798 N.E.2d 1121, 1126 (Ohio Ct. App. 2003).
193. *See, e.g.*, *Nichols*, 555 N.W.2d at 691.

for emotional distress and with defining the class of individuals who could recover for injuries to pets.[194]

In *Rabideau v. City of Racine*,[195] the Wisconsin Supreme Court determined that since emotional distress cases are limited to a closed set of close family members, pets cannot fit into that category. The court held that allowing emotional distress claims by a pet's "human companion" "enter[s] a field that has no sensible or just stopping point."[196] It determined that:

> First, it is difficult to define with precision the limit of the class of individuals who fit into the human companion category. Is the particular human companion every family member? the owner of record or primary caretaker? a roommate? Second, it would be difficult to cogently identify the class of companion animals because the human capacity to form an emotional bond extends to an enormous array of living creatures.[197]

As a result, the court held that "in this case the public policy concerns relating to identifying genuine claims of emotional distress, as well as charging tortfeasors with financial burdens that are fair, compel the conclusion" that allowing emotional distress claims by the "human companion" of an animal "will not definitively meet public policy concerns."[198]

The court recognized that, like emotional distress claims by humans who are not close relatives of the victim, cutting off the class short of allowing recovery for pets is inherently arbitrary:

> We agree, as we must, that humans form important emotional connections that fall outside the class of spouse, parent, child, grandparent, grandchild or sibling. We recognize[] . . . that emotional distress may arise as a result of witnessing the death or injury of a victim who falls outside the categories established in tort law. However, the relationships between a victim and a spouse, parent, child, grandparent, grandchild or sibling are deeply embedded in the organization of our law and society. The emotional loss experienced by a bystander who witnessed the

194. *See Harabes*, 791 A.2d at 1145; *Pacher*, 798 N.E.2d at 1126.
195. 627 N.W.2d at 802.
196. *Id.*
197. *Id.*
198. *Id.*

> negligent death or injury of one of these categories of individuals is more readily addressed because it is less likely to be fraudulent and is a loss that can be fairly charged to the tortfeasor.[199]

Due to these public policy considerations, the court "conclude[d] that [the pet owner] cannot maintain a claim for the emotional distress caused by negligent damage to her property."[200]

c. Courts Awarding Non-Economic Damages in Pet Cases Allow Recovery in Instances Where Humans Could Not Recover Under Thing v. La Chusa

Courts and legislatures that have allowed non-economic damages in pet cases have allowed owners to recover for pets and other property in situations in which even close family members could not recover under the *Thing v. La Chusa* standard.[201] The Hawaii Supreme Court in *Campbell* specifically refused to apply even *Dillon*'s guidelines—guidelines much more liberal than those in *Thing*[202]—noting that the factors "should be utilized to determine the genuineness and degree of mental distress, rather than to bar recovery."[203] Furthermore, in all three state court cases allowing non-economic damages for injuries to pets and other property, the owners were not present to witness the injury to the pet.[204]

Likewise, the statutes that have been enacted to allow non-economic damages do not meet the *Thing v. La Chusa* standard of ensuring genuine emotional distress. The Illinois statute contains no requirement that the owner be present at the scene of the injury to the animal or simultaneously aware of the injuries.[205] Further, it contains no requirement that owners must prove that they suffered serious emotional distress.[206] The Tennessee statute provides that the injury must occur "on the property of the deceased pet's owner or care-taker, or while under the control and supervision of the deceased pet's owner or caretaker."[207] Yet these requirements do not

199. *Id.* at 801.

200. *Id.* at 802.

201. *See* Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1069 (Haw. 1981).

202. *See* discussion *supra* Part IV.B.2.a.

203. *Campbell*, 632 P.2d at 1069.

204. *Campbell*, 632 P.2d at 1067 ("None of the plaintiffs saw the dog die, nor did any of them see the deceased body of [the dog.]"); Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (explaining in the brief opinion that the pet died in the hospital, after being there almost two days, and making no mention of the presence of the owners); Peloquin v. Calcasieu Parish Police Jury, 367 So. 2d 1246, 1248 (La. Ct. App. 1979) (explaining that the owners did not witness harm to the pet).

205. *See* 510 ILL. COMP. STAT. § 70/16.3.

206. *Id.*

207. TENN. CODE ANN. § 44-17-403 .

necessarily require that the injury occur in the owner's presence and with the owner's awareness. The Tennessee statute is also ambiguous as to the class of people who can recover, enumerating only the "pet's owner or caretaker," when "caretaker" could refer to the great number of people who may assist in the care-taking of a pet at any period of time.[208]

The courts and legislatures permitting non-economic damages in pet cases have allowed these damages absent boundaries to reasonably "limit liability and establish meaningful rules for application by litigants and lower courts."[209] Their sanctioning of open-ended recoveries hearkens back to the *Dillon v. Legg* days when California allowed the "limitless exposure to liability that the pure foreseeability test" provided.[210]

3. When Courts Allow Non-Economic Damages in Pet Cases, They Step Outside of the Institutional Bounds of the Judiciary and Undertake Changes That Should Be Left to the Legislature

In its decision to bar non-economic damages in a negligence claim against a veterinarian and animal hospital, a Michigan appellate court[211] recognized that legislatures are the place where changes to the availability of damages in pet cases must be made:

> There are several factors that must be considered before expanding or creating tort liability, including, but not limited to, legislative and judicial policies. In this case, there is no statutory, judicial, or other persuasive authority that compels or permits this Court to take the drastic action proposed by plaintiff. Case law on this issue from sister states is not consistent, persuasive, or sufficient precedent. We refuse to create a remedy where there is no legal structure in which to give it support. However, plaintiff and others are free to urge the Legislature to visit this issue in light of public policy considerations . . . .[212]

As the Michigan court appreciated, courts are institutions suited to adjudicate rights of the individual parties. They are not equipped to make

208. *See id*.
209. Thing v. La Chusa, 771 P.2d 814, 828 (Cal. 1989) (en banc).
210. *Id*. at 821.
211. Koester v. VCA Animal Hosp., 624 N.W.2d 209 (Mich. Ct. App. 2000), *appeal denied*, 631 N.W.2d 339 (Mich. 2001).
212. *Id.* at 211.

sweeping changes to traditional tort law principles, to provide prospective notice to defendants of any changes to the law, or to create detailed statutory holdings that can adequately constrain or limit damages in the pet law context.[213] Unlike the legislature, they are not in a position to hold hearings on the subject. They are confined to arguments before the court. The question of whether to allow non-economic damages in pet cases affects veterinarians, pet owners, insurers, manufacturers of veterinary medicines, and others. The interests of this group need to be heard, weighed, and balanced in a legislative forum. For these reasons, the sweeping change of allowing non-economic damages in pet cases, if allowed at all, should be instituted by state legislatures, not the courts.

a. Allowing Non-Economic Damages in Pet Cases Constitutes a Sweeping Change to Two Hundred Years of Tort Law That Warrants Legislative Consideration

For much of this nation's history, courts have developed tort law in a slow, incremental fashion. In recent years, however, a few courts have abandoned this incremental approach. This has resulted in "potentially large adverse consequences to the nation's civil justice system and to those who must abide by its rules."[214]

For more than two hundred years, a fundamental principle of tort law has been that pets are property in the eyes of the law.[215] As this article has shown, this characterization is not designed to denigrate pets, but is a legal classification based on public policy. Since non-economic damages traditionally cannot be recovered for injuries to property, they have not been available in pet cases.[216] The reason for this basic rule in pet law is simple: in a world where injuries happen quite frequently and have "ramifying consequences, like the ripplings of the waters, without end," the law serves to "limit the legal consequences of wrongs to a controllable degree."[217] One court rejecting non-economic damages in pet law cases has warned, "[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."[218]

213. *See id.* (indicating that the court would "defer to the Legislature" to create such remedies). *See also* Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1072-77 (1999) [hereinafter *Medical Monitoring*]

214. *Medical Monitoring*, *supra* note 213, at 1073.

215. *Veterinarians in the Doghouse*, *supra* note 35, at 43.

216. *See* discussion *infra* Part II.

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

218. *Id.*

Changing the tort law to allow plaintiffs to recover non-economic damage for the loss of their property is an abrupt change from a fundamental principle of tort law. Likewise, changing the tort law to remove pets from the legal category of property, opening the door to more expanded damages, is also a vast departure from traditional tort law. Either of these sweeping changes warrant legislative consideration.

b. Sweeping Changes to Tort Law, Such as Allowing Non-Economic Damages in Pet Cases, Warrants the Prospective Notice That Only a Legislature Can Provide to Potential Defendants

Any change to long-standing principles of tort law ought to be left to the legislature because the courts' retroactive focus, although possibly appropriate when implementing minor adjustments to common law principles, is not appropriate when the "adjustments" precipitate a broad, fundamental change in an available tort remedy.[219] If the tort system adopts the novel remedy of allowing non-economic damages in pet cases, thereby denoting a sweeping change to the rights and responsibilities of the public, the change should be done prospectively to provide "fair notice" to those potentially affected.

c. Courts Cannot Create Detailed Statutory Holdings That Can Adequately Constrain or Limit Damages in the Pet Law Context

Should courts allow non-economic damages for the negligent injury to a pet, they will have to detail the criteria for when recovery is allowed, since open-ended recovery could deluge the courts with claims. Thus far, courts have not demonstrated an ability to articulate consistent eligibility requirements.[220] They have not identified in their holdings the class of animals for which owners will be able to recover non-economic damages or the class of individuals who are eligible to recover for injuries to pets. Unless clear criteria for these claims are established, a flood of new lawsuits is likely to come. Without properly defining the class of individuals entitled to recover, fundamental issues are unclear: Are claims restricted to actual owners? How is ownership defined? For example, suppose an individual is caring for a pet that is "owned" by a friend or relative, and the animal is

219. *See supra* note 213 and accompanying text.

220. *See, e.g.*, Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1071 (Haw. 1981); Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38-39 (Fla. Dist. Ct. App. 1978); Peloquin v. Calcasieu Parish Police Jury, 367 So. 2d 1246, 1251 (La. Ct. App. 1979).

injured while the pet is in the individual's custody. Courts may also face claims by owners of exotic animals, not typically considered to be pets. As a result, courts are likely to become clogged with speculative non-economic damage claims. Plaintiffs' lawyers will be encouraged to push the outer envelope of uncertain law.

The criteria, or lack thereof, for non-economic damages in pet cases will lead to inconsistent decisions among jurisdictions, causing disparate treatment of similarly situated plaintiffs and costly litigation as parties attempt to clarify their rights and duties.[221] The legislature, rather than the courts, is better equipped to determine a standard for allowing non-economic damages in pet cases.[222]

V. THE ADVERSE PUBLIC POLICY CONSEQUENCES OF ALLOWING NON-ECONOMIC DAMAGES IN PET CASES

The public policy ramifications of allowing non-economic damages in pet cases are great. Permitting non-economic damages in pet cases will likely cause harm to veterinarians, manufacturers of pet medicines, pet owners, and even pets themselves.

A. Non-Economic Damages in Pet Suits Will Harm Veterinarians and Other Animal Health Providers

Veterinarians are being sued with increasing frequency in recent years.[223] As Professor Cupp has noted regarding pet lawsuits, "[t]he most inviting targets for such lawsuits typically are veterinarians. As with human doctors, negligence by vets frequently causes injury or death, and statistics indicate that owners are increasingly likely to sue over such negligence."[224] In fact, Professor Cupp has stated, "[n]ot long ago the American Veterinary Medical Association (AMVA) Professional Liability Insurance Trust responded to approximately 1,200 veterinary malpractice claims each year; by 1999 that number had risen to approximately 2,000 claims—a 66 percent increase."[225]

221. A lack of consistency and specificity in judicially-created eligibility standards has proved disastrous in asbestos litigation. *Cf.* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1852-59 (1992) (discussing the different treatment accorded pleural plaque claims in different jurisdictions). Trials essentially have become "games of chance" because of the lack of clearly delineated standards for recovery. *Id.* Even when similarly situated plaintiffs have tried their cases in the same jurisdiction, awards have been inconsistent. *Id*

222. *See supra* note 213 and accompanying text.

223. *See* Huss, supra note 162, at 492.

224. *Veterinarians in the Doghouse*, *supra* note 35, at 43.

225. *Id.* (footnote omitted)

As a result of the increasing exposure of veterinarians to liability, the costs of veterinary insurance are likely to rise. Insurers for veterinarians have already expressed concern about the potential effects of pet lawsuits.[226] Typically, for insurers, when damages that are being recovered in lawsuits are limited to economic damages, they are reasonable and predictable. When wild-card non-economic damages are added to the equation, however, actuaries cannot accurately predict the likely costs of lawsuits.[227] As this occurs more frequently, veterinary liability costs, formerly predictable, will have no objective predictive measure. As a result, insurers must substantially increase reserves for potential claims. This process will likely result in an increase in premiums and deductibles. There may even be exits from the veterinary insurance field, creating less competition. This process could drive up costs of insurance even higher, causing vets to bear the brunt of the increased costs.[228]

In the medical malpractice context, parallel increases in non-economic damages and accompanying high insurance rates spawned a medical malpractice liability crisis that still ravages parts of the country.[229] A PriceWaterhouseCoopers study concluded that litigation accounted for 7% of the increase in rising costs of health insurance premiums.[230] In 2002, the Department of Heath and Human Services reported that "[t]he cost of the

226. Richard Marosi, *Every Dog Has His Day in Court*, L.A. TIMES, May 24, 2000, at A1.

> Some insurers for veterinarians . . . worry that the success of animal law will leave them overwhelmed with litigation, pushing up the costs of animal health care. 'Someday there is going to be a precedent that says animals are more than chattel. It's something we're afraid is definitely going to happen,' said Jay O'Brien, executive vice president of ABD Insurance Services, a leading veterinary insurance company. 'The problem is that it leaves it wide open for lawyers to ask for what they want.'

Id.

227. *See* Huss, *supra* note 162, at 532 ("Uncertainty alone, especially in jurisdictions where there have been higher than expected judgments or settlements, could also lead to increased [insurance] rates.").

228. *See* Greg A. Scoggins, *Legislation Without Representation: How Veterinary Medicine Has Slipped Through the Cracks of Tort Reform*, 1990 U. ILL. L. REV. 953, 965 (1990) ("Because of . . . economic constraints on owners, . . . veterinarians will likely bear a great deal of this [insurance price] increase.").

229. AM. TORT REFORM FOUND, JUDICIAL HELLHOLES 2004 12, 19, 28, 30 & 35 (2004), *at* http://www.atra.org/reports/hellholes/ (last visited Dec. 9, 2004) [hereinafter JUDICIAL HELLHOLES] (noting that the medical malpractice crisis is still raging in Philadelphia, Pennsylvania; Madison County, Illinois; St. Clair County, Illinois; the state of Florida; and the District of Columbia).

230. AM. MED. ASS'N, MEDICAL LIABILITY REFORM—NOW!, 8-9 (2005), *at* http://www.ama-assn.org/ama1/pub/upload/mm/-1/mlrnowjune142005.pdf (last visited Dec. 16, 2004) [hereinafter MEDICAL LIABILITY REFORM—NOW!] (citing PRICEWATERHOUSECOOPERS, AM. ASS'N OF HEALTH PLANS, THE FACTORS FUELING RISING HEALTHCARE COSTS, 3 (2002), *at* http://www/aahp.org/InternalLinks/PwCFinalReport.pdf) (last visited Feb. 12, 2004)).

excesses of the litigation system are reflected in the rapid increases in the cost of liability insurance coverage. Premiums are spiking across all specialties in 2002."[231]

The availability of non-economic damages specifically contributed to the insurance problems in the medical malpractice crisis. A 2003 study of the states with the greatest medical malpractice crises by Blue Cross/Blue Shield uncovered the idea that "inappropriately large jury verdicts are the primary factor contributing to increasing medical liability premiums."[232] The United States Department of Health and Human Services issued a report concluding that premium increases were disproportionately higher in states with unbounded availability of non-economic damages:

> 2001 premium increases in states without litigation reform ranged from 30%-75%. In 2002, the situation has deteriorated. States without reasonable limits on non-economic damages have experienced the largest increases by far, with increases of between 36%-113% in 2002. States with reasonable limits on non-economic damages have not experienced the same rate spiking.[233]

Further, the Department of Health and Human Services reported that the costs of non-economic damages were so high that imposing "reasonable limits" on these damages "would reduce the amount of taxpayers' money the federal government spends by up to $50.6 billion per year."[234]

The situation of veterinarians may become similar to medical doctors who have faced this same phenomenon.[235] Increased "financial pressure could cause veterinarians to leave the practice and could decrease interest in this field."[236] Since veterinarians make well under half the average salary of medical doctors, any rate increase is likely to hit them even more harshly than the medical community.[237]

---

231. MEDICAL LIABILITY REFORM—NOW!, *supra* note 230, at 6 (citing OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., UPDATE ON MEDICAL LIABILITY CRISIS: NOT THE RESULT OF THE "INSURANCE CYCLE" (2002)).

232. MEDICAL LIABILITY REFORM—NOW!, *supra* note 230, at 4.

233. *Id*. at 9 (citing OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., SPECIAL UPDATE ON MEDICAL LIABILITY CRISIS (2002), *at* http://aspe.hhs.gov/daltcp/reports/mlupd1.htm (last visited Feb. 3, 2004)).

234. *Id*. at 9 (citing OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADDRESSING THE NEW HEALTH CARE CRISIS: REFORMING THE MEDICAL LITIGATION SYSTEM TO IMPROVE THE QUALITY OF HEALTH CARE 11 (2003)).

235. *See* Scoggins, *supra* note 228, at 954-59 ("The veterinary profession now faces many of the same problems that the human medical profession confronted in the mid-1970s and 1980s—higher premiums, higher damage awards, and higher claim numbers."); MEDICAL LIABILITY REFORM—NOW!, *supra* note 230, at 3-4; JUDICIAL HELLHOLES, *supra* note 229, at 12, 19, 28, 30 & 35.

236. Huss, *supra* note 162, at 531.

237. *Id.* at 491. "Certainly the compensation for the average veterinarian is far less than for a medical doctor. Nationwide, the average salary for veterinarians is $60,910 compared with dentist

Compounding these problems, allowing claims for non-economic damages will create new incentives to pursue baseless claims that simply seek a modest "settlement." Nevertheless, these baseless claims may harm the reputations of veterinarians, accelerating a rise in their insurance premiums. In general, an increase in insurance rates could lead to a potential exodus of good veterinarians from the field, leaving those remaining disproportionately burdened.

B. Non-Economic Damages in Pet Suits Will Harm Manufacturers of Medicines for Animals

In considering the strategy of filing a lawsuit against a veterinarian who has no or little insurance who negligently prescribes veterinary medicine to a pet, plaintiffs' attorneys will be tempted to target the veterinary medicine manufacturer. Even though the manufacturer played little or no role in harming the animal, joint and several liability may allow the potential of large damages against the manufacturer if the veterinarian is judgment-proof or has little or no insurance.[238] The increased availability of non-economic damages in pet cases will likely make these suits very appealing to trial attorneys.

The benefits of holding a manufacturer who played little or no role in harming a pet responsible are far outweighed by the fact that these suits would impact the production, research, and development of new and current medicines. Liability against pharmaceutical manufacturers has a history of reducing the number of beneficial products available to American

and doctor mean incomes (in 1999) of $125,358 and $163,000, respectively." *Id.* (citing Lisa Heyamoto, *Vets Love the Work and the Pets*, TALLAHASSEE DEMOCRAT, Aug. 21, at 3; Steve Dale, *Clients, Vets Speak Out on Billing Practices*, SAN DIEGO UNION-TRIB., Feb. 21, 2002, at E3); *See also* Scoggins, *supra* note 228, at 954, 965 (noting the disparity in doctor and vet incomes and also commenting that "[t]he veterinary profession provides an interesting example of a group ill-equipped to absorb a liability crisis.").

238. The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. *See* Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 2004 (Ill. 1983). The principle underlying joint liability is that each defendant's wrongful conduct is substantial enough to pay for the plaintiff's injury, so the plaintiff should be fully compensated and should not suffer if one defendant is absent from the jurisdiction or insolvent. Over the past two decades, the shortcomings of joint liability rules have become increasingly apparent. In many of its operations, it means that a defendant only minimally at fault bears a disproportionate burden. Though a substantial majority of states have abolished or modified the traditional doctrine, a distinct minority of sixteen jurisdictions have yet to abolish or modify their joint liability rules. *See* RESTATEMENT (THIRD) OF TORTS § 17 cmt. a (2000) (surveying state joint liability laws).

consumers. A Conference Board survey of more than 2,000 chief executive officers found that thirty-six percent of the companies had discontinued product lines as a result of actual liability experience and that eleven percent of the companies had done so based on anticipated liability problems.[239]

In some cases, consumers have lost the use of a unique product altogether. For example, due to unwarranted products liability litigation, Merrell Dow Pharmaceuticals withdrew its anti-nausea morning sickness drug, Bendectin, from the market in 1983.[240] Although the drug had been approved by the U.S. Food and Drug Administration and was widely acclaimed by health care professionals, Merrell Dow's legal defense costs were far in excess of the amount received in annual sales of Bendectin.[241] For similar reasons, G.D. Searle & Co., a subsidiary of Monsanto, withdrew the Copper-7 intrauterine device from the market in 1986, even though the product had been approved by the FDA and used for many years.[242] Furthermore, two of the three companies manufacturing the DPT vaccine stopped producing it in 1984 in light of rising product liability costs.[243] As a result, the Center for Disease Control asked doctors to stop vaccinating children over age one to conserve the limited supply of the vaccine.[244]

Fears of liability also discourage the research and innovation of new treatments. The Conference Board, a well-known organization that performs business research, surveyed 500 chief executive officers of large U.S. corporations about the impact of the tort system on their companies.[245] The study reported "that roughly one-third of all firms surveyed, and nearly half of those claiming 'major impacts,' had decided against introducing new products because of liability fears."[246] An American Medical Association study on the development of new medical technologies revealed that:

> Innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence

239. COMM. ON COMMERCE, SCIENCE, AND TRANSP., PRODUCT LIABILITY REFORM ACT OF 1997, S. REP. NO. 105-32, at 8 (1997) [hereinafter PRODUCT LIABILITY REFORM ACT] (citing MCQUIRE, CONFERENCE BOARD, RESEARCH REPORT NO. 908, 19 THE IMPACT OF PRODUCT LIABILITY TABLE 28 (1998)).

240. *Id.* at 7.

241. *See id.*

242. *See* Betsy Morris, *Monsanto Unit Stops Marketing Its IUDs in U.S.*, WALL ST. J., Feb. 3, 1986.

243. *See* PRODUCT LIABILITY REFORM ACT, *supra* note 239, at 10.

244. *See id.*

245. *See* PETER W. HUBER & ROBERT LITAN, Overview, *in* THE LIABILITY MAZE (Peter W. Huber & Robert Litan eds., The Brookings Institution 1991).

246. *Id.* at 6.

> indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks.[247]

Regarding the impact of increased liability on pharmaceutical research, the American Medical Association noted that from the early 1970s to 1988, the number of pharmaceutical companies actively pursuing research on contraceptives and fertility declined from thirteen companies to only one company.[248] The report concluded, "[u]nless the liability laws are drastically altered, it is very unlikely that pharmaceutical companies will aggressively pursue research in this area."[249]

In contrast, experience in the AIDS research area demonstrates that pharmaceutical research and development revives when liability is brought back within reasonable, predictable limits. For instance, a leading "California biotechnology company . . . scuttle[d] its promising AIDS vaccine program" when liability concerns grew high in the state.[250] But the company revived the program "when the state's legal climate changed" to alleviate some liability concerns.[251] Furthermore, one company with a promising vaccine for HIV-infected pregnant women totally left Tennessee, where it had planned to conduct research at Vanderbilt University, because Tennessee's laws did not provide "much protection against liability."[252] The company decided to hold the drug trials in Connecticut instead once a new Connecticut law offered legal protection to companies testing AIDS vaccines in pregnant women.[253]

If non-economic damages are increasingly allowed in pet cases, plaintiffs' attorneys will undoubtedly seek to hold deep-pocket animal pharmaceutical manufacturers jointly and severally responsible for the harm. History foretells that any increased exposure and liability of the manufacturers will discourage the development of new drugs with the potential of saving the lives and curing diseases of animals in the future. As a result, manufactures may have decreased desires to participate in animal health research and development, harming pets themselves.

247. *Id*. at 7.
248. *Id*.
249. *Id*.
250. Jon Cohen, *Is Liability Slowing the AIDS Vaccines?*, SCIENCE, Apr. 10, 1992, at 168, *available at* 1992 WLNR 2621168.
251. *Id.* at 170.
252. *Id*.
253. *Id*.

C. Non-Economic Damages in Pet Suits Will Harm Pet Owners

As one commentator notes, "[a]n important public policy is to provide an atmosphere where veterinarians can provide services at reasonable prices to as large a number of animals as possible while supporting the general tort goals of compensation, deterrence, and affirmance of societal values."[254] This goal of "reasonable prices" for veterinary costs is jeopardized with increased liability in pet cases. As Professor Cupp has suggested regarding allowing emotional distress damages in pet cases, "[a]n increase in available damages, and the increased litigation that results, might raise the price of veterinary services. Veterinarians would be required to purchase more insurance, and they would pass on as much of the cost as possible to consumers."[255]

Fears of increased liability may in turn "cause veterinarians to change their practices and to begin performing more defensive medicine," further fueling the cost increase that will accompany greater risk of liability.[256] As a result, "veterinarians will order more expensive tests" at unnecessary and high costs to pet owners.[257] Ultimately, this "higher cost of veterinary care could price this treatment beyond some people's ability to pay . . . ."[258] Increased veterinary costs will create very challenging choices for pet owners and unfortunate results for pets.

D. Non-Economic Damages in Pet Suits Will Harm Pets

While many proponents of non-economic damages in pet cases earnestly believe these damages will provide better treatment for animals, they have overlooked an unintended consequence of their pursuit: allowing non-economic damage in pet cases could actually have the effect of causing more suffering for pets.[259] As Professor Cupp notes,

> The demand for veterinary medicine for pets is much more elastic than the demand for human medicine. Although consumers will spend a lot of money for life-saving human medical procedures, many pet owners have a limit—often a few hundred dollars or less—on how much they will spend on veterinary services. With

254. Huss, *supra* note 162, at 532-33.

255. *Veterinarians in the Doghouse*, *supra* note 35, at 48.

256. Huss, *supra* note 162, at 531.

257. *Id*.

258. *Id*.

259. *Barking Up the Wrong Tree*, *supra* note 37, at B5; *Veterinarians in the Doghouse*, *supra* note 35, at 48; Marosi, *supra* note 226, at A1 ("Veterinarians believe animal health care costs would skyrocket under an avalanche of litigation. Ironically, they say, animals would suffer because owners would not be able to afford treatment.").

> higher prices, fewer pet owners could (or would) pay for needed veterinary medicine; in turn, more animals would suffer. In effect, pet owners would be compensated at the cost of their pets' health and lives.[260]

Increased veterinary prices will leave fewer owners willing or able to pay for veterinary care. As a result, "more pets would suffer with untreated ailments."[261] Also, many more pets would likely be "put to sleep" because costs of treatment are too high.[262]

Besides deterring owners from seeking veterinary treatment, there are other ways that the threat of increased veterinarian liability harms pets. First, the practice of defensive medicine by veterinarians who fear liability may put animals through unnecessary treatments that may cause pets discomfort or even death. Second, increased insurance costs and the added pressure to see more patients to make up for lost profits will combine to prevent veterinarians from having the time to engage in pro bono activities that benefit animals, such as free spaying and neutering services, vaccination clinics, and discounts to poor families with sick pets. Third, increased fears of liability may stop veterinarians from trying to save extremely ill or traumatically injured animals that may require risky treatment as their only chance at survival. Veterinarians may not risk the potential liability that may accompany risky procedures that veterinarians would not have hesitated undertaking in the past.

Unfortunately, the pursuit of non-economic damages by well-intentioned animal advocates may end up harming exactly those the advocates seek to help: defenseless animals. Lucrative non-economic damages in pet cases may end up thickening plaintiffs' attorneys' wallets with contingency fees at the expense of pets. These damages will benefit only the small number of owners who ever receive them at the grave and great cost to all pets.

260. *Veterinarians in the Doghouse*, *supra* note 35, at 48. A 1999 study reveals that pet owners would pay $688 for treatment for their pets if there is a 75% chance of recovery and only about $356 if there is a 10% chance of recovery. John P. Brown & Jon D. Silverman, *The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States*, 215:2 J. AM. VETERINARY MED. ASS'N 161, 167 (1999).

261. *Barking Up the Wrong Tree*, *supra* note 37, at B5.

262. *See* Huss, *supra* note 162, at 531. "The higher cost of veterinary care . . . may increase the rate of euthanization of animals." *Id.* (citing Kathleen Burge, *Appeals Court Weighs the Value of Family Pets*, BOSTON GLOBE, Nov. 25, 2001, at B1).

VI. LEGISLATIVE CAPS ON NON-ECONOMIC DAMAGES IN PET SUITS ARE NOT A HELPFUL COMPROMISE

Some proponents and opponents of non-economic damages in pet law cases believe that a reasonable compromise to end their debate about the appropriateness of these damages is to allow non-economic damages by statute with damage caps.[263] The Tennessee statute allowing non-economic damages in pet cases presents one such "compromise" and caps the maximum non-economic damages that pet owners can recover at $5,000.[264] Indeed, history and practice illustrate that caps do not result in a compromise limiting damages.[265] Instead, caps mean an eventual surrender that will allow unbounded damages.

A. A Page in History Illuminates the Danger of "Compromise" in the Form of Non-Economic Damage Caps

The history of damage caps in wrongful death statutes is instructive to veterinarians and others who may be warming to a "modest cap" on non-economic damages in pet cases. In the 1800s and earlier, no causes of action were allowed for wrongful death.[266] Courts expressed concern that damages would be uncertain and potentially explosive in size.[267] In the late 1800s, the British Parliament enacted "Lord Campbell's Act," which allowed claims for wrongful death under strict controls, including curbing damages to pure out-of-pocket costs.[268] In the early 1900s, states began to enact wrongful death statutes modeled on Lord Campbell's Act.[269] A majority of these

263. *See* discussion *supra* Part IV.A.3.

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

265. *See* discussion *infra* Part VI.A.

266. In *Baker v. Bolton* (1808) 170 Eng. Rep. 1033, Lord Ellenborough declared that "[i]n a civil Court, the death of a human being could not be complained of as an injury." This case is credited with originating the English common law rule that a person had no cause of action against a tortfeasor for causing the death of another. *See, e.g.*, PROSSER & KEETON, *supra* note 165, at § 127, at 945.

267. *See* PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 8, at 575 n.1, 577 n.9.

268. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 389 (1970) ("[A]brogating the rule was Lord Campbell's Act."); PROSSER & KEETON, *supra* note 165, § 127, at 945. This statute allowed the personal representative of a victim to recover for the benefit of close relatives for their pecuniary loss, so long as the victim would have had a cause of action had he or she survived. *See* RESTATEMENT (SECOND) OF TORTS § 925 (1977).

269. *See* PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 8, at 570 n.3. New York adopted the first "wrongful death act" in 1847. *See* McDavid v. United States, 584 S.E.2d 226 (W. Va. 2003) (discussing the history of wrongful death acts and ruling that, under West Virginia's expansive law, a court may award pain and suffering endured between the time of injury and the time of death, even when the decedent did not institute an action for personal injury prior to his or her death, so long as there is evidence of conscious pain and suffering of the decedent prior to death).

statutes strictly limited damages to actual out-of-pocket losses.[270] About half of the states enacting wrongful death statutes contained restrictions on the amounts that could be awarded, capping damages at rather modest figures ranging from $5,000 to $20,000.[271] These states capped damages for the same reason the common law rejected actions for wrongful death: there was the potential for damages to become "out of sight" because of emotions about loss of a loved one.[272]

But these wrongful death damage caps disappeared over time.[273] Some caps were held unconstitutional under state constitutions as violative of equal protection or the right to jury trial.[274] The history of wrongful death damages—first extremely constricted, then expanded but capped, and finally unbounded by any cap in some states—foretells that capped non-economic damage provisions will simply provide a foot in the door to wider recognition of the damages in the future.

B. Damage Caps Will Encourage Litigation

Allowing non-economic damages, albeit with caps, solidifies their legitimacy. Once plaintiffs' lawyers can attain non-economic damages, they will have a great incentive to push the envelope and have these laws held unconstitutional. A study of short-lived non-economic damage caps in the medical malpractice context illustrates that caps do not last for long.

As discussed earlier in this article,[275] non-economic damages in medical malpractice cases spawned a medical malpractice liability crisis that still ravages parts of the country. During the 1980s, state legislators sought to provide some predictability in the amount of non-economic damage awards

270. *McDavid*, 584 S.E.2d at 231.

271. *See* PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 8, at 577 n.9.

272. PROSSER & KEETON, *supra* note 165, at 951 (citing Blake v. Midland R. Co. (1852) 118 Eng. Rep. 42 (Q.B.)); PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 8, at 575 n.1, 577 n.9.

273. PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 8, at 577 n.9 ("No modern American jurisdiction limits recovery for pecuniary losses, although some do limit recovery for non-pecuniary losses.").

274. *See, e.g.*, Trovato v. DeVeau, 736 A.2d 1212 (N.H. 1999) (finding that a statute limiting damages in wrongful death cases to $50,000 where the decedent was not survived by a family member violated equal protection provision of New Hampshire Constitution); Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999) (finding that a $500,000 limit on non-economic damages in personal injury and wrongful death actions arising out of common law violated right to jury trial provision of Oregon Constitution).

275. *See* discussion *supra* Part VI.A.

as a way of lending stability to dropping insurance markets.[276] Excessive losses during that decade had resulted in insurance companies raising premiums and canceling or refusing to issue policies for certain high-risk activities.[277] This made it difficult for health care professionals engaged in risky activities, such as obstetric medicine, to obtain liability insurance.[278] Policymakers believed that limits on non-economic damages would render damages awards more predictable and help stabilize the insurance industry.[279] As a result, lawmakers in a number of states enacted statutory limits either directly on non-economic damages[280] or on total damages.[281]

These statutes quickly came under fire. In fact, "[p]laintiffs' lawyers in key litigation states such as Alabama, Florida and Texas challenged statutory caps on non-economic damages as unconstitutional."[282] They were most successful in invalidating these statutes when they used provisions of state constitutions, rather than the United States Constitution.[283] State

276. *See, e.g.*, Randall R. Bovbjerg, et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 NW. U. L. REV. 908, 908-09 (1989).

277. *See id.* at. 909.

278. *Id.* at. 925.

279. *Id.* at 909, 912, 928; State of Maryland, Report of the Governor's Task Force to Study Liability Insurance 10 (Dec. 1985) (concluding that a $250,000 cap would "help contain awards within realistic limits").

280. *See, e.g.*, ALASKA STAT. § 09.17.010 (2004) ($400,000 limit on non-economic damages); CAL. CIV. CODE § 3333.2 (1997) ($250,000 limit on non-economic damages); COLO. REV. STAT. § 13-64-302 (2003) ($250,000 limit on non-economic damages unless the court finds justification through good cause, thereby increasing the limit; FLA. STAT. §§ 766.207, 766.209 (2005) ($250,000 limit on non-economic damages); HAW. REV. STAT. § 663-10.9(2) (2004) ($375,000 limit on damages for pain and suffering with certain classes of torts excepted); IDAHO CODE ANN. § 6-1603 (2004) ($250,000 cap on non-economic damages); KAN. STAT. ANN. §§ 60-1902, 60-1903 (2001) ($250,000 limit on noneconomic damages); ME. REV. STAT. ANN. tit. 24-A § 4313 (2001) ($250,000 limit on non-economic damages); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (2002) ($500,000 limit on non-punitive non-economic damages); MASS. GEN. LAWS ANN. ch. 231, § 60H (2001) ($500,000 limit on total damages and $500,000 limit on non-economic damages with exceptions allowed for special circumstances); MICH. COMP. LAWS § 600.1483 (2003) ($280,000 limit on non-economic damages with exceptions); MO. ANN. STAT. § 538.210 (2001) ($350,000 cap on non-economic damages); MONT. CODE ANN. § 25-9-411 (2003) ($250,000 limit on non-economic damages); N.D. CENT. CODE § 32-42-02 (1999); N.D. CENT. CODE § 32-03.2-08, 32-42-02 (2001) ($500,000 limit on non-economic damages); UTAH CODE ANN. § 78-14-7.1 (2002) ($400,000 limit on non-punitive, non-economic damages); W. VA. CODE ANN. § 55-7B-8 (2001 & Supp. 2003) ($250,000 limit on non-economic damages); WIS. STAT. ANN. §§ 893.55, 895.04 (2001) ($350,000 cap on non-economic damages).

281. *See, e.g.*, IND. CODE ANN. § 34-18-14-3 (2001) ($1,250,000 limit on total damages); LA. REV. STAT. ANN. § 40:1299.42 (2001) ($500,000 limit on total damages); N.M. STAT. ANN. § 41-5-6 (2001 & Supp. 2004) ($600,000 limit on total damages except for punitive damages and medical expenses); S.D. CODIFIED LAWS § 21-3-11 (2000) ($500,000 cap on total damages); TEX. CIV. PRAC. & REM. CODE ANN. § 74.303 (2005) (articulating the total damages in wrongful death actions); VA. CODE ANN. § 8.01-581.15 (2001) ($1,500,000 cap on total damages).

282. *Twisting the Purpose of Pain and Suffering Awards supra* note 13, at 61.

283. Often "open courts" provisions in state constitutions are used to attack limits on non-economic damages. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 84-87, 93 (1978) (holding that the Price-Anderson Act, which preempted state tort law in order to

constitutions often have broadly worded provisions that have not received much, if any, judicial attention.[284] This use of state constitutional provisions makes it easy for plaintiffs' lawyers to preclude appeal to the United States Supreme Court.[285] Limits on non-economic damages were struck down in Alabama, Florida, New Hampshire, North Dakota, Ohio, Texas, Utah and Washington state.[286] While these cases involved caps placed on existing lines of liability, part of their reasoning could apply to a "cap" on a newly-created right of damages.[287] These decisions voiced the view that only courts, not legislatures, could place limits on tort damages.[288]

promote the nuclear power industry, does not violate the Due Process or Equal Protection Clauses of the United States Constitution); *see also* Victor E. Schwartz, Mark A. Behrens & Leavy Mathews III, *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269 (1999) (discussing a century of congressional enactments changing state liability law and the numerous decisions consistently holding those statutes constitutional). As a practical matter, these provisions are intended to provide citizens of a state with justice and reasonable access to the courts. Open court provisions, however, can be stretched to suggest that any time a legislature in any way limits any person's rights to sue, it is violative of the "open courts" provision. *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 932 & n.28 (2001) [hereinafter *Judicial Nullification*] (collecting cases).

284. *See Judicial Nullification*, *supra* note 283; *see* also *infra* note 285 and accompanying text.

285. For a more thorough discussion of this issue, see *Judicial Nullification*, *supra* note 283; Victor E. Schwartz, Mark A. Behrens & Monica G. Parham, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1, 5 (2000); Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do To Stop It*, Briefly (National Legal Center for the Public Interest 1999).

Unlike some state supreme courts, the United States Supreme Court has historically been reluctant to overturn economic legislation that does not violate fundamental rights. *See supra* note 283 and accompanying text.

286. *See, e.g.*, Wright v. Central Du Page Hosp. Ass'n., 347 N.E.2d 736, 744 (Ill. 1976) ($500,000 limitation on recovery in medical malpractice actions violated equal protection guarantee); Brannigan v. Usitalo, 587 A.2d 1232, 1236-37 (N.H. 1991) (statute imposing $875,000 limitation on non-economic damages recoverable in actions for personal injury violated state constitution's equal protection guarantee); Carson v. Maurer, 424 A.2d 825, 836-38 (N.H. 1980) (statute imposing $250,000 limitation on non-economic damages recoverable in medical malpractice actions violated state constitution's equal protection guarantee); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978) (statute imposing $300,000 limit on damages recoverable in medical malpractice action violated state and federal equal protection guarantees); Morris v. Savoy, 576 N.E.2d 765, 772-73 (Ohio 1991) (statute imposing $200,000 limit on "general" damages recoverable in medical malpractice action violated state due process guarantee); Condemarin v. Univ. Hosp., 775 P.2d 348, 364 (Utah 1989) (statute limiting medical malpractice liability of state hospital to $100,000 violated provisions of state constitution).

287. *See supra* note 285 and accompanying text.

288. *See id.*

The history of damage caps in the wrongful death and medical liability contexts indicates that capped damages are not a real, practical compromise. Once caps are established, the "burgeoning herd"[289] of animal law attorneys can quickly seek to challenge the caps under state constitutional principles. Since these caps are abolished by state court decisions citing state constitutional provisions,[290] there is very little chance that the Supreme Court of the United States will ever overturn the courts' decisions. Thus, for opponents of non-economic damages in the pet law arena, the "compromise" of allowing capped damages equals a surrender paving the way to full recognition of unlimited non-economic damages in pet cases.

C. Damage Caps Will Still Harm Animals

Allowing non-economic damages, albeit with caps, will still harm animals by raising the costs of veterinary visits. Research has shown that even small changes in the costs of veterinary visits deter owners from seeking treatment for their pets.[291] Indeed, a recent study reveals the direct correlation between veterinary prices and treatment for animals, showing that an increase of veterinary service prices of 10% will result in a 4.3% decrease in the demand for such services.[292] Any increase in the cost of veterinary care, however small, inevitably will harm pets, something the law should not condone.

VII. CONCLUSION

Two traditional principles of tort law—that pets are property and that damages to property are limited to its fair market value—have for two hundred years supported the proposition that non-economic damages cannot be awarded in pet lawsuits. The public policy reasons for this rule are clear. Non-economic damages in pet law are unsound public policy and can lead to harm to many who are concerned for the welfare of animals: veterinarians whose professional goal is to help animals, manufacturers who engage in the discovery of new medicines to help animals, the owners who love their pets, and pets themselves. Capping non-economic damages is not a helpful

289. Marosi, *supra* note 226, at A1. Also reporting that:

> In the last two years, the number of attorneys registered as members with the Animal Legal Defense Fund has mushroomed from 450 to 600. And across the country, eager law students crowd classrooms for lessons on such topics as 'Capital Punishment of Animals.' A total of twelve law schools offer such courses, up from five just five years ago.

Id.

290. *See supra* note 285 and accompanying text.

291. *See* Brown & Silverman, *supra* note 260, at 168.

292. *Id.*

"compromise," for history has shown that damage caps are easily assailed and ultimately overturned. It is crucial that courts and legislatures resist the urge to listen to well-intentioned animal rights advocates who ask for non-economic damages in pet cases. Instead, courts should recognize that allowing non-economic damages in pet cases will usher in a host of harmful public policy consequences and an abrupt departure from established and effective tort law.