

Curtiling Companion Compensation: Why Barring Non-Economic Damages Awards for
Companion Animals is Ultimately Best for Pet Welfare

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(Language taken from the AVMA 2014-15 Animal Law Writing Competition)

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INTRODUCTION

From thousands of years ago to present day, animals have been the cherished companions of human beings throughout the world.¹ Because of this bond, when companion animals (“pets”) are injured or killed, their owners suffer both emotional distress and financial hardship when grappling with the physical harm their pet endured.² But, because animals are legally considered property in all 50 states,³ pet owners’ recoverable compensation for these harms is more limited than the recoverable compensation available for harms done to humans.⁴ There is a lack of consensus among scholars over whether liability should be broadened in cases of pet injury or death beyond traditional property damage principles.⁵ Although both proponents and opponents of

¹ SONIA S. WAISMAN ET AL., *ANIMAL LAW* 24 (3d ed. 2006); see, e.g., Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 806–11 (2004) (explaining the roles of pets in today’s society as “playmates, friends, confidants, helpers, and protectors.”).

² See, e.g., *Barking Hound Vill., LLC v. Monyak*, 787 S.E.2d 191, 193 (Ga. 2016) (“[P]laintiffs...sought compensatory damages including over \$67,000 in veterinary and other expenses incurred in treating [their pet dog].”); Livingston, *supra* note 1, at 805–06 (explaining that, because of the relationship between a pet owner and a pet, the owner’s distress when their pet dies is similar to when a human family member dies); Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1069–71 (1995) (comparing the grief pet owners feel when a pet dies naturally to the intensified grief when the pet dies due to tortious conduct). A companion animal is defined as “an animal that you have at home for pleasure, rather than one that is kept for work or food.” *Companion Animal*, OXFORD LEARNER’S DICTIONARY, <https://www.oxfordlearnersdictionaries.com/us/definition/english/companion-animal?q=companion+animal> (last visited Feb. 28, 2018).

³ Zachary Paterick et al., *A Stepping Stone Toward Companion Animal Protection Through Compensation*, 22 *ANIMAL L.* 79, 85 n.40 (2015).

⁴ See Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 *PEPP. L. REV.* 227, 232 (2006) (“[A]s a general rule, non-economic damages are not allowed in cases where a plaintiff claims injury to personal property due to negligence.”). Because animals are legally considered property, they do not have standing and thus cannot sue on their own behalf. PAMELA D. FRASCH ET AL., *ANIMAL LAW IN A NUTSHELL* 263 (2d ed. 2016).

⁵ Compare, e.g., Phil Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Values, and Animal Welfare*, 6 *STAN. J. ANIMAL L. & POL’Y* 30, 72–75 (2013) (arguing that allowing non-economic damages compensation for pet harm will increase veterinary costs and lead to pet care “decisions that may not be in the best interests of the” pet), with Jade McKenzie, Comment, *Em”BARK”ing on the Journey to Expand Recovery of Damages for the Loss of a Companion Animal*, 19 *CHAP. L. REV.* 659, 682 (2016) (arguing that allowing pet owners to recovery emotional distress damages in negligent pet harm cases will “conform[] the law to modern societal values” and “provide pet owners with sufficient compensation.”).

expanding liability care deeply about the importance of pets in society, maintaining the current structure of liability and compensation for pet injury and death is the approach most beneficial to animal welfare.⁶

Part I of this Paper provides an overview of recoverable damages in pet harm cases.⁷ Part II provides an overview of the causes of action that can be pursued when a pet is harmed.⁸ Lastly, Part III argues that any expansion of liability would have a negative impact on animal welfare.⁹

I. AN OVERVIEW OF PET HARM DAMAGES

In pet harm cases, plaintiffs may recover both compensatory damages and punitive damages, depending on the cause of action brought.¹⁰ The types of damages recoverable for each cause of action have been defined by both statutes and the common law.¹¹

A. Compensatory Damages

Economic damages, one type of compensatory damages, compensate plaintiffs for tangible injuries and may therefore be measured objectively.¹² Pet owners may recover economic damages

⁶ See, e.g., Goldberg, *supra* note 5, at 45 (“[E]ven though pets have long been characterized as property for litigation purposes, these legal tenets do not undermine the value of pets and are accounted for in animal cruelty and animal welfare laws.”); Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 52 (2002) (“The current legal system has not kept up with the reality of the relationship between companion animals and their human caretakers.”).

⁷ See *infra* Part I.

⁸ See *infra* Part II.

⁹ See *infra* Part III.

¹⁰ Adam P. Karp, *Cause of Action in Intentional Tort for Loss of or Injury to Animal by Human*, in 44 CAUSES OF ACTION 2d 211 § 3, Westlaw (database updated Dec. 2017) [hereinafter Karp, *Intentional Torts*]. Nominal damages are awarded when a plaintiff’s legal rights have been violated without causing any harm, and thus will not be addressed. See generally RESTATEMENT (SECOND) OF TORTS § 907 (AM. LAW INST., 1979) (explaining nominal damages).

¹¹ See Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals’ Property Status*, 60 SMU L. REV. 3, 32 (2007) (explaining that Tennessee, Maryland, and Illinois “have enacted statutes allowing damages beyond market value in at least some circumstances”). See generally Casey Chapman, Comment, *Not Your Coffee Table: An Evaluation of Companion Animals as Personal Property*, 38 CAP. U. L. REV. 187, 210–13 (2009) (discussing state statutes regulating recoverable damages in pet harm cases).

¹² See Katherine A. Burke, *Measuring Damages for Tortious Injury to Companion Animals*, COLO. LAW., Feb. 2013, at 21, 22; Schwartz & Laird, *supra* note 4, at 230.

for both intentional and negligent harms to their pets.¹³ The valuation methodologies can roughly be broken out into two separate approaches that adhere to traditional property harm recovery rules.¹⁴

The first approach calculates damages based on the diminished value rule or the cost rule, which is the traditional approach to assessing damages in property harm cases.¹⁵ Because pets have little to no market value, courts concede that this approach rarely results in awarding damages for pet death cases.¹⁶ In response, some courts have adopted a second approach that compensates pet owners by instead measuring their pets' value to their owner.¹⁷ After determining a pet has no market value, courts that adopt this approach assess other objective factors to determine a pet's intrinsic, peculiar, actual or special value to calculate the damage award amount.¹⁸

¹³ Karp, *Intentional Torts*, *supra* note 10, at § 30 (discussing recoverable damages for intentional torts to pets).

¹⁴ See Paterick et al., *supra* note 3, at 90–91 (explaining that some courts award damages “by allowing for recovery of market value” and other courts “have changed their approach and searched for alternative valuation methods”); *cf.* FRASCH ET AL., *supra* note 4, at 169–70 (explaining the inconsistencies among courts in determining pet harm compensatory damages). See generally DAN B. DOBBS ET AL., DOBBS' LAW OF TORTS § 481, Westlaw (database updated June 2017); Schwartz & Laird, *supra* note 4, at 234–43 (explaining damage award calculations in pet harm cases).

¹⁵ See Alison M. Rowe, *Survey of Damages Measures Recognized in Negligence Cases Involving Animals*, 5 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 249, 254 (2013) (explaining that a majority of courts use the diminished value rule). The application of the diminished value rule depends upon the extent of the harm to the property. DOBBS ET AL., *supra* note 14, at § 481. When the property is damaged, the plaintiff recovers the difference between the value of the property immediately before harm was done and the value immediately afterwards. *Id.* When the property is destroyed or converted the plaintiff recovers the value of the property at the time it was destroyed or converted, or, in the case of conversion, at a reasonable time thereafter. *Id.* The cost rule compensates the plaintiff for the cost of repair or replacement of the harmed property. *Id.*

¹⁶ See, e.g., *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 813 (Ohio Ct. App. 2003).

¹⁷ See Rowe, *supra* note 15, at 255–57 (explaining the ‘value to the owner’ approach of measuring damages). This method is the traditional approach to assessing damages in property harm cases when the property is valued by the owner but has little to no market value. See, e.g., *Fairfax v. N.Y. Cent. & Hudson River R.R.*, 73 N.Y. 167, 172 (1878) (holding that damages for lost second-hand clothing should be “the value of the clothing for use by the plaintiff” although it “would sell for but little”); *Heiligmann v. Rose*, 16 S.W. 931, 932 (Tex. 1891) (holding that damages for deceased dogs without a market value should be measured by the special value of the dogs to the owner).

¹⁸ Goldberg, *supra* note 5, at 50; see Schwartz & Laird, *supra* note 4, at 241 (“Courts using this approach may factor in...the original amount paid for the pet, total veterinary bill costs over a pet's life, training costs, and the loss of potential income or special services from the animal (such as breeding fees or guide dog services).”). Courts that assess a pet's value to its owner take nuanced approaches to determine this value. Goldberg, *supra* note 5, at 50. Regardless of the method used, courts do not consider subjective factors, such as sentimental value. *Id.*; see, e.g., *Burgess v. Shampooch Pet Indus., Inc.*, 131 P.3d 1248, 1252 (Kan. Ct. App. 2006) (determining damages for an injured pet with no market value should be measured by “the reasonable and customary cost of necessary veterinary care and treatment”).

Non-economic damages, a second type of compensatory damages, are awarded to “compensate plaintiffs for intangible injuries such as pain and suffering, loss of companionship, and emotional distress.”¹⁹ They are generally recoverable for pet harms only in intentional tort cases.²⁰ Some exceptions to this rule have been made in the courts and in the legislature.²¹ Whether non-economic damages should be recoverable for negligent harm to pets is a hotly debated topic in animal law.²²

B. Punitive Damages

Punitive, or “exemplary”, damages have been described as “quasi-criminal” in nature because, similar to criminal punishments, they are intended to punish tortfeasors and discourage them from engaging in similar conduct in the future.²³ Like non-economic damages, punitive damages are only recoverable in intentional tort cases.²⁴ Depending on the jurisdiction, plaintiffs may recover punitive damages in pet harm cases in which the conduct of the person who caused the harm was “malicious, willful or in reckless disregard of the rights of the” pet and its owner.²⁵

¹⁹ Schwartz & Laird, *supra* note 4, at 230.

²⁰ *Id.* at 235–36.

²¹ See *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981) (permitting recovery of non-economic damages for negligent death of plaintiff’s dog). Section 663-8.9 of the Hawaii Revised States was later passed barring liability for emotional distress arising out of harm to property. HAW. REV. STAT. ANN. § 663-8.9 (West, Westlaw through 2017 1st Spec. Sess.); Goldberg, *supra* note 5, at 46–47. *Campbell*, in allowing the non-economic damage award, relied on *Knowles Animal Hospital, Inc. v. Wills*, which was a Florida case also permitting recovery of non-economic damages for negligent harm to the plaintiff’s dog. *Knowles Animal Hosp., Inc. v. Wills*, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978); *Campbell*, 632 P.2d at 1071 n.6. *Knowles Animal Hospital, Inc.* had relied on the authority of two tenuously related cases: 1) *Kirksey v. Jernigan*, which allowed recovery of non-economic damages when a woman’s daughter was shot, an undertaker took her body two hours later, refused to return it when the plaintiff asked for it, didn’t return it for 2–3 days, embalmed it, mutilated it, and charged the mother fifty dollars; and 2) *La Porte v. Associated Independents, Inc.*, which involved malicious, rather than negligent, harm to a dog. *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964); *Kirksey v. Jernigan*, 45 So. 2d 188, 189–90 (Fla. 1950); *Knowles Animal Hosp., Inc.*, 360 So. 2d at 38; Schwartz & Laird, *supra* note 4, at 245.

²² Goldberg, *supra* note 5, at 32–34 (explaining the debate).

²³ *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001); RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (AM. LAW INST. 1979).

²⁴ RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (AM. LAW INST. 1979).

²⁵ William C. Root, Note, “*Man’s Best Friend*”: *Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 429 (2002).

II. AN OVERVIEW OF CAUSES OF ACTION FOR PET INJURIES

A. *Intentional Torts*

Pet owners attempt to recover for harm to their pets both under property-based torts (conversion and trespass to chattels) and intentional infliction of emotional distress (IIED).²⁶ Owners rely on the property-based torts as theories of liability in two situations: 1) when an owner temporarily surrenders a pet to a third party and the pet has either been returned harmed or not returned at all or; 2) when the pet has remained in the possession of the owner, but was injured or killed by a third party.²⁷ To establish intent, because pets are legally considered property, the plaintiff must prove that the defendant's conduct toward the pet was intentional and, separately, that the conduct resulted in the harm to the plaintiff.²⁸

By contrast, to establish intent for IIED, a tort which allows recovery for any harm, the plaintiff must prove that the defendant's conduct toward the pet was intended to harm the plaintiff.²⁹ Recovery in IIED cases is challenging in general because satisfying the injury and conduct elements of the tort is difficult.³⁰ But recovery is even more challenging in pet harm cases

²⁶ See generally, Karp, *Intentional Torts*, *supra* note 10 (explaining the intentional tort causes of action pursued in pet harm cases).

²⁷ *Martin v. Sikes*, 229 P.2d 546, 550 (Wash. 1951); RESTATEMENT (SECOND) OF TORTS § 226 cmt. b (AM. LAW INST. 1965); Karp, *Intentional Torts*, *supra* note 10. Trespass to chattels and conversion sit on a spectrum: more substantial harms constitute conversion lesser harms constitute trespass to chattels. Karp, *Intentional Torts*, *supra* note 10 at § 11. Compare *Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 598 (Cal. Ct. App. 2012), (holding that the defendant striking the plaintiff's dog with a bat constituted trespass to chattels), with *Coston v. Reardon*, No. 063892, 2001 WL 1467610, at *1 (Conn. Super. Ct. Oct. 18, 2001) (holding that the defendant shooting and killing plaintiff's dog could support a cause of action for conversion).

²⁸ Karp, *Intentional Torts*, *supra* note 10, at § 4.

²⁹ *Id.* In a non-pet victim IIED case, usually the defendant directs his actions at the plaintiff with the intent to distress the plaintiff. See generally RESTATEMENT (THIRD) OF TORTS § 1 (AM. LAW INST. 2010) (explaining tortious intent); RESTATEMENT (THIRD) OF TORTS § 46 (AM. LAW INST. 2012) (explaining the tort of IIED).

³⁰ Russell Fraker, Note, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 993 (2008). IIED claims are often brought in conjunction with another theory of liability, such as conversion, trespass to chattels, or actions brought under 42 U.S.C. § 1983. See 42 U.S.C. § 1983 (2012); see, e.g., *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 557–58 (Cal. Ct. App. 2009) (bringing claims of IIED and veterinary malpractice); *Criscuolo v. Grant County*, No. 10-CV-0470-TOR, 2014 WL 527218, at *1–2 (E.D. Wash. Feb. 10, 2014) (bringing claims under 42 U.S.C. § 1983, as well as for IIED, malicious injury to a pet, conversion, and trespass to chattels).

because of the additional evidentiary hurdle plaintiffs must overcome to establish the intent element.³¹

B. Negligence

Plaintiffs rely on three theories of negligence liability when pursuing pet harm claims: 1) veterinary malpractice; 2) breach of bailment; and 3) negligent infliction of emotional distress (NIED).³² Veterinary malpractice claims are brought by plaintiffs alleging that a veterinarian “breached a duty of care arising out of the veterinary-client relationship” while treating the plaintiff’s pet.³³ Courts have relied on medical malpractice law when analyzing veterinary malpractice cases.³⁴ Unlike medical malpractice, however, veterinary malpractice liability is limited by animals’ legal status as property.³⁵ Veterinary malpractice claims often overlap with breach of bailment claims.³⁶ Plaintiffs prefer pursuing a breach of bailment claim to a veterinary

³¹ See ADAM P. KARP, UNDERSTANDING ANIMAL LAW 348 (2016) [hereinafter KARP, UNDERSTANDING ANIMAL LAW].

³² See generally DOBBS ET AL., *supra* note 14, at § 481; FRASCH, *supra* note 4, at 128–35, 139–49 (explaining NIED claims, veterinary malpractice claims, and breach of bailment claims). Punitive damages are not recoverable for mere negligence. Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1304 (2005). Whether non-economic damages are recoverable is contested in the courts and in the legislature. See generally Schwartz & Laird, *supra* note 4 (explaining non-economic damage recovery in cases and statutes and advocating against non-economic damage awards in negligence actions); Chapman, *supra* note 11, at 210–11, 219 (2009) (explaining non-economic damage recovery in cases and statutes, and advocating for non-economic damage awards in negligence actions).

³³ Colleen K. Sanson, *Cause of Action Against Veterinarian for Veterinary Malpractice*, in 38 CAUSES OF ACTION 2d 173, Westlaw (database updated Dec. 2017). Ordinary negligence claims can also be brought against veterinarians. 90 AM. JUR. 3D *Proof of Facts* § 12, Westlaw (database updated Feb. 2018). Malpractice claims are brought when the veterinarian was using professional skills, such as performing surgery on an animal. *Id.* Negligence claims are brought when the veterinarian was using skills possessed by laypeople, such as making transportation arrangements for an animal. *Id.*

³⁴ Sanson, *supra* note 33, at §§ 5, 18; Cheryl M. Bailey, Annotation, *Veterinarian’s Liability for Malpractice*, 71 A.L.R.4th 811 § 2[b] (database updated weekly).

³⁵ Sanson, *supra* note 33, at § 5 (explaining courts’ reluctance to apply some medical malpractice principles to veterinary malpractice); see, e.g., *Pruitt v. Box*, 984 S.W.2d 709, 711 (Tex. App. 1998) (“We are not convinced that the standard applicable to medical malpractice on human beings should be applied to veterinary malpractice cases in light of Texas law relegating animals to personal property status.”).

³⁶ Livingston, *supra* note 1, at 830 (“In veterinary negligence cases, courts are divided about whether the action should proceed on a theory of bailment, simple negligence, or professional malpractice.”).

malpractice claim “because expert witnesses are not required and the burden of proof is on the defendant to explain what happened to the animal.”³⁷

Finally, pet owners sometimes attempt to bring claims for NIED.³⁸ Most states refuse to recognize an NIED action for harm to property and dismiss the case.³⁹ Even when states are willing to entertain the claim, however, NIED fails on the merits.⁴⁰ Although courts have been fairly uniform in rejecting NIED claims, plaintiffs have still attempted to recover under that theory of liability, even within the past few years.⁴¹

C. Statutes

In addition to bringing claims under common law theories of liability, plaintiffs may also recover under federal and state statutes.⁴² Statutes either impose additional requirements on existing common law causes of action, or create new causes of action altogether.⁴³ For example,

³⁷ 90 AM. JUR. 3D *Proof of Facts*, *supra* note 33, at § 4.

³⁸ *Id.* at § 10.

³⁹ DOBBS ET AL., *supra* note 14, at § 390.

⁴⁰ *See* Goldberg, *supra* note 5, at 38–43 (explaining cases that have refused NIED recovery for pet harms based on the bystander test and the zone of danger test); *see, e.g.*, Rowbotham v. Maher, 658 A.2d 912, 913 (R.I. 1995) (refusing NIED recovery for destruction of the plaintiff’s dog because “a third party may recover if...[they are] a close relative of the victim” and pets are not considered relatives). *But see, e.g.*, Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1071 (Haw. 1981) (permitting NIED recovery for death of plaintiff’s dog).

⁴¹ *See, e.g.*, Repin v. State, 392 P.3d 1174, 1182 (Wash. Ct. App. 2017); Dehlin v. Forget Me Not Animal Shelter, No. 34407–0–III, 2017 WL 4712142, at *3 (Wash. Ct. App. 2017); Sweat v. West Virginia, No. CV 3:16-5252, 2016 WL 7422678, at *7 (S.D. W. Va. Dec. 22, 2016).

⁴² KARP, UNDERSTANDING ANIMAL LAW, *supra* note 31, at 183–84, 343. *See generally*, *Pet Damages: Related Statutes*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/statutes/topic/pet-damages> (last visited Jan. 26, 2018) (listing state statutes relating to pet damages). In terms of federal statutes, pet owners have relied on 42 U.S.C. § 1983 and the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671–2680 (2012); 42 U.S.C. § 1983 (2012); *see, e.g.*, Kaiser v. United States, 761 F. Supp. 150, 150, 156 (D.D.C. 1991) (bringing a claim against a police officer who shot the plaintiff’s dog for IIED and NIED, among other torts, under the FTCA); FRASCH, *supra* note 4, at 48. Every state has also enacted statutes criminalizing animal cruelty, and most make animal abuse a felony offense. Luis E. Chiesa, *Why Is It a Crime to Stomp on a Goldfish – Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 4 (2008). Some states also require veterinarians and other social service providers to report abuse and cruelty. *Abuse Reporting Requirements by State*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/Abuse-Reporting-requirements-by-State.aspx> (last visited Jan. 29, 2018).

⁴³ *See generally* Karp, *Intentional Torts*, *supra* note 10, at § 3 (listing statutes that provide recourse for pet harms).

some state statutes provide requirements of satisfying the duty of care element in a veterinary malpractice claim.⁴⁴

By contrast, wrongful death statutes create their own civil cause of action.⁴⁵ Although intended to provide recovery for the wrongful death of a human, owners have used these statutes to argue that they should be permitted to recover non-economic damages for the wrongful death of their pet.⁴⁶ Courts reject these arguments for two reasons: First, given the limited scope of these statutes for traditional plaintiffs, permitting recovery for harm to pets would be inappropriate.⁴⁷ Second, when a pet dies, pet owners have not suffered a compensable wrongful death because pets are property and are thus not entitled to recovery.⁴⁸

III. THE HARM OF EMOTIONAL DAMAGE RECOVERY

At first glance, pet harm cases appear to concern a pet owner likening their pet to a family member while the law responds by likening their pet to a coffee table.⁴⁹ The disconnect between how pet owners feel about their pets and how the law classifies their pets has led to a rallying cry

⁴⁴ See generally Donald M. Zupanec, Annotation, *Validity, Construction, and Effect of Statutes or Regulations Governing Practice of Veterinary Medicine*, 8 A.L.R.4th 223 (database updated weekly) (discussing state statutes that regulate veterinary medicine practice).

⁴⁵ See generally RESTATEMENT (SECOND) OF TORTS § 925 (AM. LAW INST. 1979) (discussing wrongful death statutes).

⁴⁶ See Kelly Wilson, Note, *Catching the Unique Rabbit: Why Pets Should Be Reclassified as Inimitable Property Under the Law*, 57 CLEV. ST. L. REV. 167, 178 n.64 (2009) (“Wrongful death statutes vary from state to state, but in a majority of jurisdictions, are only reserved for relatives related by blood or marriage”); see, e.g., *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269, 1273 (Vt. 2009) (rejecting the plaintiffs argument that awarding non-economic damages for the death of their pet cats “merely does for the wrongful death of companion animals what the [Vermont wrongful death statute] does for the death of immediate relatives due to the fault of others”).

⁴⁷ See, e.g., *Kaufman v. Langhofer*, 222 P.3d 272, 279 (Ariz. Ct. App. 2009) (refusing to allow non-economic damage recovery for plaintiff’s pet’s death “when such damages cannot be recovered for the injury to or loss of close human friends, siblings, and nonnuclear family members such as grandparents, grandchildren, nieces, nephews, aunts, and uncles”); *McDougall v. Lamm*, 48 A.3d 312, 326 (N.J. 2012) (stating that permitting a pet owner to recover non-economic damages for the death of her pet would give pet owners “rights in excess of those the Legislature has granted to family members suffering the loss of another human”).

⁴⁸ See, e.g., *Philip v. Norwich Veterinary Hosp.*, No. CV126012219, 2012 WL 3641646, at *2 (Conn. Super. Ct. July 25, 2012) (reasoning that dogs are legally considered property and thus, when the dog dies, the pet owner “cannot be deemed to have suffered a wrongful death”).

⁴⁹ Compare *Anzalone v. Kragness*, 826 N.E.2d 472, 474 (Ill. App. Ct. 2005) (“[P]laintiff considered [her cat] to be a member of her family.”), with *Anzalone*, 826 N.E.2d at 476 (“[I]n the eyes of common law, a pet ‘is an item of personal property’”) (quoting *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1086 (Ill. App. Ct. 1987)).

for changes to the law to more accurately reflect a pet's importance in its owner's life.⁵⁰ But, looking past the loaded labels of 'family member' and 'property', and seeing how they are applied in the courts, reveals that expanding liability for pet injury and death provides short-term satisfaction and long-term harm.⁵¹

A. *The Human-Pet Relationship is Already Properly Reflected in Law*

A suggestion commonly offered by proponents of expanding liability ("proponents") is to change the legal status of pets from property to a property-person hybrid that accurately reflects the modern relationship between pet owners and their pets.⁵² The change in legal status would allow an expansion of liability in pet harm cases by providing special rules, claims, and recovery mechanisms often categorically barred from property injuries.⁵³ The law, as it currently stands, however, is both properly reflective of the relationship between humans and their pets, and flexible enough to adapt to the evolution of that relationship.⁵⁴

First, animals may be property in legal status, but they are not in legal practice.⁵⁵ Nearly every case, treatise, and article repeats the same phrase: animals are considered property under the

⁵⁰ See, e.g., Sabrina DeFabritiis, *Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary's Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 266 (2012) ("Allowing human companions to recover for their emotional suffering will more accurately reflect society's current view of companion animals.").

⁵¹ See *Strickland v. Medlen*, 397 S.W.3d 184, 197–98 (Tex. 2013) ("[A] family dog—'in life the firmest friend'—is a treasured companion. But it is also personal property, and...[t]he majority rule...leavens warm-heartedness with sober-mindedness, applying a rational rule rather than an emotional one."). See generally, Goldberg, *supra* note 5, at 72–78 (explaining the long-term negative impact on pet welfare if liability is expanded.).

⁵² See, e.g., Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314, 314 (2007) (arguing for the creation of a "companion animal property" category) (2007); Lauren M. Sirois, Comment, *Recovering for the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages*, 163 U. PA. L. REV. 1199, 1225–39 (2015) (arguing for the creation of a "semi-property" category); Wilson, *supra* note 46, at 170–71 (arguing for the creation of an "inimitable property" category).

⁵³ See, e.g., Hankin, *supra* note 52, at 386–87 ("[C]ompanion animal property...will create additional legal effects in...tort law....Courts would no longer need to be constrained by the 'mere property' label in awarding damages that recognize the bond between people and their companion animals.").

⁵⁴ See Goldberg, *supra* note 5, at 63–67 (explaining that we do not uniquely value companion animals in the present day in comparison to periods throughout history).

⁵⁵ *Id.* at 35 ("Unlike in traditional property cases, courts have ruled that these other costs are in addition to and can exceed the economic value of the pet.").

law.⁵⁶ Despite this constant refrain, dogs have been distinguished from other forms of property going back to the old common law rule.⁵⁷ The old rule prohibited dogs from being the subject of larceny because they had no value beyond the love and companionship they gave to their owner, which was not compensable.⁵⁸ Today, there are many more protections in place for animals than there are for ‘mere property’, including the numerous criminal and civil statutes protecting pets and compensating owners.⁵⁹ Proponents argue that these newer protections for pets indicate that states have acknowledged that pets transcend legal property status, and thus non-economic damages should be awarded to provide complete compensation.⁶⁰ But the enactment of these newer protections itself already properly reflects the importance of pets in society and thus providing even greater compensation is unnecessary.⁶¹

Second, property law and tort law are flexible enough to accommodate the special considerations required for pet harm compensation.⁶² Property harm causes of action in pet cases have permitted broad damage recovery in general.⁶³ The common law has also recognized that

⁵⁶ See, e.g., Sonia S. Waisman & Barbara R. Newell, *Recovery of "Non-Economic" Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 46 (2001) (“Animals, including companion animals, are property.”).

⁵⁷ Annotation, *Dogs as Subject of Larceny*, 92 A.L.R. 212 (database updated weekly).

⁵⁸ *Id.*

⁵⁹ See generally, *Abuse Reporting Requirements by State*, *supra* note 42 (compiling animal abuse state reporting requirements); *Animal Protection Laws of the United States of America and Canada*, ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/resources/advocating-for-animals/animal-protection-laws-of-the-united-states-of-america-and-canada/> (last visited Jan. 29, 2018) (compiling state animal protection laws); *Pet Damages: Related Statutes*, *supra* note 42 (compiling statutes that discuss pet harm damages).

⁶⁰ Waisman & Newell, *supra* note 56, at 65 (“If the criminal justice system is one pillar of our society's defense against wrongful injury, the crucial second pillar is access to private, civil measures which deter wrongful acts and compensate the victims.”).

⁶¹ Goldberg, *supra* note 5, at 66 (“[P]ublic interest in humane treatment of animals has probably never been stronger. Animal welfare issues ‘are part of the public domain like never before.’ The proliferation of animal cruelty statutes in the past twenty years supports this observation.”).

⁶² *Strickland v. Medlen*, 397 S.W.3d 184, 198 (Tex. 2013) (“[T]he law draws sensible, policy-based distinctions between types of property.”); Goldberg, *supra* note 5, at 33, 50–55 (explaining how traditional property principles have been “repackaged” to apply to pet harm claims).

⁶³ See, e.g., *Martinez v. Robledo*, 147 Cal. Rptr. 3d 921, 922 (Cal. Ct. App. 2012) (“[A] pet owner is not limited to the market value of the pet and may recover the reasonable and necessary costs incurred for the treatment and care of the pet attributable to the injury.”); *Burgess v. Shampooch Pet Indus., Inc.*, 131 P.3d 1248, 1252 (Kan. Ct. App. 2006)

some property's market value doesn't correspond to its value to its owner.⁶⁴ Pets, unlike couches and chairs, are not fungible, and the courts recognize this.⁶⁵ Historically, when plaintiffs seek recovery for property with no value other than its meaning to them, courts have permitted damages to be measured by assessing the property's 'actual value to the owner.'⁶⁶ Because pets are property, often with no market value, this measurement standard has also been applied to them.⁶⁷ Courts consider factors such as pedigree, training, breeding income, the recommendation of the treating veterinarian, and circumstances of the injury, when determining the damage award.⁶⁸

Lastly, permitting pet valuation to exceed its current limitations would lead to illogical outcomes by compensating pet deaths more substantially than human deaths.⁶⁹ Proponents argue that non-economic damages should be available when pets are negligently killed because of the deep emotional bond owners have with their pets.⁷⁰ This would effectively create a wrongful death cause of action for a pet owner.⁷¹ Wrongful death statutes, however, provide limited damage

(permitting recovery of "the reasonable and customary cost of necessary veterinary care and treatment," even though the dog harmed had no market value).

⁶⁴ See generally, 3 AM. JUR. 3D *Proof of Facts* §§ 1–23, Westlaw (database updated Feb. 2018) (compiling cases discussing awarding damages despite the harmed property having little to no market value").

⁶⁵ *Hyland v. Borrás*, 719 A.2d 662, 664 (N.J. Super. Ct. App. Div. 1998) ("[A] household pet is not like other fungible or disposable property, intended solely to be used and replaced after it has outlived its usefulness."); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001) ("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.").

⁶⁶ *Fairfax v. N.Y. Cent. & Hudson River R.R.*, 73 N.Y. 167, 172 (1878) (holding that damages for lost second-hand clothing should be "the value of the clothing for use by the plaintiff" although it "would sell for little").

⁶⁷ *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286 (N.Y. Civ. Ct. 1980) ("[Plaintiff]'s dog...had no ascertainable market value...[Therefore,] the court must assess the dog's actual value to the owner in order to make the owner whole.").

⁶⁸ *Rego v. Madalinski*, 63 N.E.3d 190, 192 (Ohio Ct. App. 2016).

⁶⁹ See *Kaufman v. Langhofer*, 222 P.3d 272, 279 (Ariz. Ct. App. 2009) ("[T]o allow a pet owner to recover emotional distress or loss of companionship damages would be inappropriate as it would offer broader compensation for the loss of a pet than is currently available in this state for the loss of a person"); *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269, 1273 (Vt. 2009) ("[P]laintiffs request a judicial expansion of law to recover for loss of a pet what the law does not allow for loss of a broad variety of critically loved human beings.").

⁷⁰ *Kaufman*, 222 P.3d at 277–78 ("[Plaintiffs] argue this court should 'expand' Arizona common law to allow recovery of emotional distress...damages when a pet is negligently injured or killed. [Plaintiff] points out pets occupy a special place in the lives of many people and are frequently viewed as family members.").

⁷¹ *Strickland v. Medlen*, 397 S.W.3d 184, 185 (Tex. 2013) ("If a cherished dog is negligently killed,...may a bereaved dog owner recover emotion-based damages for the loss?...[A] court of appeals said yes, effectively creating a novel—and expansive—tort claim: loss of companionship for the wrongful death of a pet."); *Goodby*, 974 A.2d at 68 (rejecting

recovery.⁷² Permitting this claim to be brought would mean that people would be able to recover for the emotional harm of losing their pet, but not of losing their best friend, fiancée, or grandparent.⁷³ It would also mean that pet owners may illogically be allowed broader damage recovery than those people recovering for deaths of humans.⁷⁴ The damages available for recovery for pet injury and death is consistent with their historical relationship to humans and their historical treatment under the law, and should not be changed.⁷⁵

B. Maintaining the Scope of Pet Harm Liability Keeps Pet Care Costs Manageable

Because the bonds pet owners and their pets are so strong, the argument for expanding non-economic damage compensation is understandable on a sentimental level – it ‘feels’ like the right thing to do.⁷⁶ Despite this feeling, however, the fallout of allowing greater damage awards would be laden with harmful consequences.⁷⁷

plaintiff’s argument that awarding non-economic damages for the death of their pet cats “merely does for the wrongful death of companion animals what the [Vermont wrongful death statute] does for the death of immediate relatives due to the fault of others.”).

⁷² Sonya Harrell Hoener, *Extending Wrongful Death Damages to Kinship-Care Relationships*, 43 U. TOL. L. REV. 77, 93 (2011) (“[R]ecover of damages is confined to those with ‘appropriately close blood relationships’ in light of the limited assets of wrongful death defendants.”).

⁷³ *Kaufman*, 222 P.3d at 279 (refusing to allow non-economic damage recovery for plaintiff’s pet’s death “when such damages cannot be recovered for the injury to or loss of close human friends, siblings, and nonnuclear family members such as grandparents, grandchildren, nieces, nephews, aunts, and uncles”); *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 568 (Cal. Ct. App. 2009) (“[G]iven California law does not allow parents to recover for the loss of companionship of their children, we are constrained not to allow a pet owner to recover for loss of the companionship of a pet.”); *McDougall v. Lamm*, 48 A.3d 312, 326 (N.J. 2012) (stating that permitting a pet owner to recover non-economic damages for the death of her pet would give pet owners “rights in excess of those the Legislature has granted to family members suffering the loss of another human.”).

⁷⁴ *See Krasnecky v. Meffen*, 777 N.E.2d 1286, 1289 (Mass. App. Ct. 2002) (“It would be illogical...to accord the plaintiffs greater rights than would be recognized in the case of a person who suffers emotional distress as a result of the tortiously caused death of a member of his immediate family.”).

⁷⁵ *See Goldberg*, *supra* note 5, at 63–67 (explaining that we do not uniquely value companion animals in the present day in comparison to periods throughout history).

⁷⁶ *See Squires-Lee*, *supra* note 2, at 1082–83 (“As long as tort law compensates for emotional losses stemming from other relationships, it should compensate for emotional losses stemming from the death of companion animals.”).

⁷⁷ *See Goldberg*, *supra* note 5, at 72 (discussing expanding non-economic pet harm damage awards, “those who have taken the time to peel the onion layers on its implications have understood the broad, negative consequences these damages will have, particularly for pets themselves”).

Proponents have offered many alternative approaches to expanding liability, including incorporating a damage cap to ensure uniform awards and prevent excessive recovery.⁷⁸ Practically, damage caps are not a viable solution because they have a history of being declared unconstitutional.⁷⁹ These damage caps would presumably be placed on awards for non-economic damages, but the caps declared unconstitutional were those placed on non-economic damages, particularly in medical malpractice cases.⁸⁰ Conflictingly, proponents also argue that permitting broader compensation for pet harms would fulfill the tort law goal of compensating harms, but damage caps, described as “the most egregious” offspring of the tort reform movement, by their very nature deny plaintiffs full compensation for their harms that have been deemed compensable by the courts.⁸¹

Finally, enacting these proposals for broader pet harm damage compensation would impose numerous costs that ultimately harm the pet.⁸² Expanding liability could lead to cost increases for veterinary services due to the added costs of litigation, increased malpractice claims, and rising insurance premiums.⁸³ Veterinary malpractice has its roots in medical malpractice, a field in which the explosion of claims during the 1970s and 1980s led to two tort system crises, which in turn led to the tort reform movement, which in turn led to reformative laws enacted in nearly every

⁷⁸ Sirois, *supra* note 52, at 1233.

⁷⁹ Schwartz & Laird, *supra* note 4, at 227, 268–69 (2006); *see, e.g.*, Bayer CropScience LP v. Schafer, 385 S.W.3d 822, 831 (Ark. 2011) (declaring punitive damage cap on recovery for injuries resulting in death or for injuries to persons or property unconstitutional).

⁸⁰ *See, e.g.*, Livingston, *supra* note 1, at 826–27 (proposing a statute with a damage cap that would expand non-economic damage recovery in pet harm cases). Montana, New Hampshire, Ohio, Oregon, and Wisconsin have all declared caps on non-economic damages in medical malpractice unconstitutional. *See* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012); Carson v. Maurer, 424 A.2d 825, 838 (N.H. 1980); Morris v. Savoy, 576 N.E.2d 765, 768 (Ohio 1991); Klutschkowski v. PeaceHealth, 311 P.3d 461, 476 (Or. 2013); Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 491 (Wis. 2005).

⁸¹ *See, e.g.*, Livingston, *supra* note 1, at 816 (“Emotional distress damages for pet loss advance the [tort] goal[] of compensation...”); *see also* ROBERT S. PECK & NED MILTENBERG, LITIGATING TORT CASES § 29:20, Westlaw (database updated June 2017).

⁸² *See generally* Goldberg, *supra* note 5, at 72–78 (discussing the economic and social costs of expanding liability in pet harm cases).

⁸³ *Id.* at 73, 75.

jurisdiction.⁸⁴ Damage caps, the “most ubiquitous” type of tort reform law, were placed on medical malpractice claims and many have since been declared unconstitutional.⁸⁵ Given veterinary malpractice’s close ties to medical malpractice, concern about a similar potential crisis is not unfounded.⁸⁶ To prevent a veterinary malpractice crisis, scholars have recommended not awarding non-economic damages in the first place.⁸⁷

Permitting non-economic damage recovery for negligent property harms would incur a social cost as well.⁸⁸ Expanding liability not only affects possible damage awards, but also possible defendants.⁸⁹ Anyone who has contact with a pet could be potentially liable: groomers, trainers, kennels, pet sitters, and other pet owners.⁹⁰ Proponents argue that this expansion of liability carries out the tort law goal of compensation for all harms.⁹¹ Which it does.⁹² The Restatement (Third) of Torts drafters recognized the “real and serious emotional harm” that pet owners experience when their pets are injured or killed.⁹³ Despite this recognition, they ultimately concluded that a line – perhaps arbitrary – should be drawn at negligent emotional harm recovery in the greater interest of pets overall.⁹⁴

⁸⁴ See Gregg A. Scoggins, *Legislation Without Representation: How Veterinary Medicine Has Slipped Through the Cracks of Tort Reform*, 1990 U. ILL. L. REV. 953, 957 (1990) (explaining the two malpractice crises); Roland Christensen, Student Article, *Behind the Curtain of Tort Reform*, 2016 BYU L. REV. 261, 273 (2016) (explaining the influence of tort reform); Bailey, *supra* note 34, at § 2[b] (explaining the commonalities between medical and veterinary malpractice).

⁸⁵ PECK & MILTENBERG, *supra* note 84, at § 29:20; see *supra* note 82 and accompanying text (discussing medical malpractice caps being declared unconstitutional).

⁸⁶ See Scoggins, *supra* note 87, at 964 (“[T]he greatest risk for veterinarians now concerns new theories for recovery that may emerge and create the potential for a liability crisis similar to that of the human medical profession.”).

⁸⁷ *Id.* at 985.

⁸⁸ See Goldberg, *supra* note 5, at 75 (2013) (discussing the effects increased liability would have on non-veterinary pet services).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Squires-Lee, *supra* note 2, at 1080–83.

⁹² STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 1:3, Westlaw (database updated March 2018) (“[T]orts... serve five distinct purposes... (4) to compensate for harm (the most important function of tort actions)...”).

⁹³ RESTATEMENT (THIRD) OF TORTS § 47 cmt. m (AM. LAW INST. 2012).

⁹⁴ *Id.*

CONCLUSION

From ancient times to present day, humans have cherished pets for their companionship. When those pets are harmed, their owners understandably feel deep emotional distress. Some balk at their pet's legal status as property and argue for a change, but the relationship between pet owners and pets is properly reflected in the law through the nuanced treatment of pets from the old common law to today, the flexibility of property and tort law, and the already restricted compensation for humans in similar circumstances. Expanding liability to permit compensation for that distress in negligent harm cases would harm pets by increasing both the economic and social costs of pet care. Pet injury and pet death is devastating, and the current compensation system does not fully compensate pet owners for their distress. Expanding it, however, would create greater harmful consequences than maintaining it. Therefore, the liability structure should be sustained as it is in the best interests of both pets and their owners.