RECOVERY OF COMMON LAW DAMAGES FOR EMOTIONAL DISTRESS, LOSS OF SOCIETY, AND LOSS OF COMPANIONSHIP FOR THE WRONGFUL DEATH OF A COMPANION ANIMAL

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There were two men in one city; the one rich, and the other poor. The rich man had exceedingly many flocks and herds:

But the poor man had nothing, save one little ewe lamb, which he had bought and nourished up: and it grew up together with him, and with his children; it did eat of his own meat, and drank of his own cup, and lay in his bosom, and was unto him like a daughter.[1]

I. INTRODUCTION

It has been suggested that, since owners of companion animals and parents of small children experience the effects of their wrongful deaths in similar manners, the law should compensate them similarly.[2] The grant of that wish would have caused the Ancient Greeks to shrug knowingly. They understood that Zeus punishes us mortals in two ways: by not giving us what we want and by giving us what we want. The human companions of companion animals would gain little here by getting what they wanted.

Most American households have companion animals who are viewed not just as family, but as children. It is therefore helpful to compare the kinds of damages that the common law provides, or should provide, for the wrongful death of a child, with the kinds of damages the common law provides, or should provide, for the wrongful death of a companion animal, and the reasons for any limitations usually placed on the recovery for each. This article argues that plaintiffs whose companion animals are wrongfully killed should at *least* be entitled to the same kind, though not necessarily the same magnitude, of common law damages as are parents of young children wrongfully killed. Furthermore, courts should award noneconomic damages in actions brought for the wrongful death of a companion animal, which seek compensation for the human companion's loss,

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[1] 2 *Samuel* 12:2-3.

[2] Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. Rev. 1059, 1082-83 (1995); Debigail Mazor, Note, *Veterinarians at Fault: Rare Breed of Malpractitioners*, 7 U.C. DAVIS L. REV. 400, 408, 411-12 (1974). As the Book of Samuel shows, "companion animals" are not limited to particular species, though cats and dogs constitute the greatest number of them in the United States. THE 1995 AAHA REPORT: A STUDY OF THE COMPANION ANIMAL VERTERINARY SERVICES MARKET 13 (1995) (hereinafter 1995 AAHA REPORT). The overwhelming, and usually exclusive, value of "companion animals" to their owners is noneconomic. If their economic value is anything other than incidental, they cannot be defined as companion animals. Thus, the "little ewe lamb" from the Book of Samuel is a companion animal to the poor man, while a dog or cat primarily used for breeding purposes is not. The leading text on veterinary ethics states that "the 'human-companion animal bond' means at the very least a continuous, bidirectional relationship between a human and an animal that brings a significant benefit to a central aspect of the lives of each, which is in some sense voluntary, and in which each party treats the other not just as something entitled to respect and benefit in its own right, but also as an object of admiration, trust, devotion, or love." JERROLD TANNENBAUM, VETERINARY ETHICS 125 (1989).

and in actions for intentional or negligent infliction of emotional distress, which seek compensation for injuries caused by observation of the manner in the which a companion animal was killed or, sometimes, of its immediate consequences.[3] It might appear imprudent at first glance for human companions to seek damages for the deaths of companion animals when courts refuse to award similar damages to parents of children wrongfully killed.[4] This article argues, however, that the human companions of companion animals wrongfully killed should *not* be limited to the kinds of damages available to the parents of young children, because those damages have been artificially restricted for reasons that have everything to do with humans and nothing to do with nonhuman animals.

Section II discusses the tension between principle and policy, and betwixt logic and experience that shaped the evolution of claims for both emotional distress and loss of society in the deaths of human beings. Claims for emotional distress and loss of society in the deaths of companion animals cannot properly be understood as *sui generis* in the common law.

Section III reviews the mounting evidence that companion animals generally assume a place in their human companion's family, and not just any place, but the place of a child. Because of this, the death of a companion animal will often strike her human companion in much the same way, if not always to the same degree, as the death of a human family member.

Section IV argues that the principles and policies that determine recovery for bystander emotional distress when humans are the victims should equally apply when companion animals are the victims. The purpose of bystander emotional distress claims is to secure damages not for the emotional distress that a bystander might suffer because the victim, often a close relative, died or was severely injured, but for the separate emotional distress caused by witnessing the traumatic event itself or its immediate consequences.[5]

Section V discusses claims for emotional distress and loss of companionship caused by the enormity of the loss itself. The common law provides substantially greater support for actions seeking damages for emotional distress and loss of companionship for the owners of companion animals wrongfully killed than it does for actions seeking damages for emotional distress and loss of companionship for the wrongful deaths of

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[3] *E.g.*, Miles v. Edward O. Tabor, M.D., Inc., 443 N.E.2d 1302, 1305-06 (Mass. 1982); Cimino v. Milford Keg, Inc., 431 N.E.2d 920, 927 (Mass. 1982).

[4] *See* Altieri v. Nanavati, 573 A.2d 359, 361 (Conn. Super. Ct. 1989) ("There is no reason to believe that malpractice on the family pet will receive higher protection than malpractice on a child or spouse."). *But see* Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 563-64 (La. 1990) (it was long the law in Louisiana that mental anguish could be recovered for injury to property, but not for injury to family members).

[5] *E.g.*, Cohen v. McDonnell Douglas Corp., 450 N.E.2d 581, 590 (Mass. 1983) ("[T]he injury to Nellie Cohen did not result from a sensory perception of the injuries caused to her son or the injury producing event. Thus, the emotional distress which she suffered is more akin to the anguish that any person feels after being informed of death or injury to a loved one than it is to the distress, which we have deemed compensable, that involves first-hand observation of a defendant's negligence or the consequences thereof.").

family members or humans wrongfully killed. Both principle and policy strongly favor the recognition of common law claims for emotional distress and loss of companionship for the wrongful deaths of companion animals, even when it does not permit recovery of these damages for the deaths of human children.

Section VI discusses how, and under what circumstances, the states of Massachusetts, Wisconsin, and New York permit, or should permit, damages for emotional distress and loss of companionship when a companion animal is killed. In particular, it analyzes the noneconomic damages that should stem from witnessing the traumatic death of, or serious injury to, a companion animal, and from the wrongful death itself when either results from veterinary wrongdoing.

Section VII concludes that refusing noneconomic damages to a human companion for the wrongful death of her companion animal is often improper. Whether that death is witnessed or not, denying noneconomic damages arbitrarily abridges the important principle that a victim should be compensated for all foreseeable injuries tortiously caused in the absence of a rational and sufficiently weighty countervailing public policy. Courts should recognize that such damages should be fairly compensated.

II. Principle and Policy Behind the Common Law's Award of Damages for Emotional Distress and Loss of Society

Historically, the common law has been extremely suspicious of emotional distress claims; its attitude towards wrongful death is even worse.[6] In the early decades of the nineteenth century, the common law damages to which a human companion was entitled for the wrongful death of her companion animal were usually confined to pecuniary loss. Small as this was, it was greater than the damages to which a parent was entitled under the common law for the wrongful death of her child, which was nothing. For many more decades, recovery for wrongful death was usually limited to pecuniary loss for both children (by statute) and companion animals (by common law).[7] Only well into the twentieth century did the door crack to admit the recovery of emotional distress damages for the deaths of both companion animals (by common law) and children (by statute and common law). However, the circumstances in which damages were allowed varied dramatically among the many jurisdictions. Recovery for loss

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[6] Squires-Lee, *supra* note 2, at 1065. This poses a significant problem for one who argues that, since the law embraces mental well-being as intrinsically valuable and mental suffering results from the death of one's companion animals, tort law should compensate the mental suffering caused by the death of one's companion animal.

[7] *E.g.*, Buchanan v. Stout, 108 N.Y.S. 38, 39 (App. Div. 1908) ("In the case of the loss of a parent or child, a wife or a husband, through the negligence of another, the mental distress thereby occasioned cannot be a basis for a recovery, but only the pecuniary loss sustained; and we think in this case the plaintiff was limited to the pecuniary loss sustained by the death of her cat . . .").

of society was limited, where it was permitted at all, to claims resulting from the deaths of children and not to companion animals.[8]

Tortfeasors have long avoided liability for loss of society damages connected with nonhuman animals. Courts have placed several policy obstacles in the way of complete recovery for loss of society in cases of wrongful death and infliction of emotional distress. Only in recent decades have many judges belatedly recognized that most, if not all, of these obstacles are unacceptably arbitrary.

Among the "many considerations" of policy affecting tort liability in general, Prosser and Keeton have singled out six "for special mention." They are (1) a recognized need for compensation, (2) historical development, (3) moral aspect of defendant's conduct, (4) convenience of administration, (5) capacity to bear or distribute loss, and (6) prevention and punishment.[9] The first four play significant roles in helping to determine whether a plaintiff should be compensated for the emotional distress or loss of society suffered when her companion animal is wrongfully killed.[10] Two of the four considerations, however, stand out—historical development and convenience of administration.[11]

Historical development is a primary counterweight to the argument that an owner should be compensated for the loss of society she suffers when her companion animal is wrongfully killed, because a fundamental principle of tort law demands that a tortfeasor be held liable for all damages proximately caused by his wrongful conduct. "To a truly astounding degree law is rooted in the past," and the past has not compensated owners for the losses they suffer upon the deaths of companion animals.[12] Prosser and Keeton note that "[t]hroughout [their] book, in section after section, you will find references to origins of modern rules. Behind the history recorded in judicial opinions lie the historical influences of the social, economic and political forces of the time."[13] Because "law - good, mediocre, and bad - tends to survive, its widespread borrowing means that the private law of a society frequently derives from a vastly different time,

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[8] *Cf.*, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974). For the purposes of this article, "loss of companionship" will be subsumed within the broader term "loss of society."

[9] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 20-26 (5th ed. 1984). Tort comes from the Latin, "tortus" which means "twisted." "The metaphor is apparent: a tort is conduct which is twisted, or crooked, not straight." *Id.*, § 1, at 2. In the opinion of the authors, "[s]o far as there is one central idea, it would seem that it is that liability must be based upon conduct which is socially unreasonable" *Id.*, § 1, at 6.

[10] Capacity to bear or distribute loss is most often involved in the decision to extend liability without fault. *Id.* § 1, at 24-25. Prevention and punishment are rarely mentioned in the context of the award of compensatory, as opposed to punitive, damages. *Id.* § 1, at 26.

[11] A recognized need for compensation and the moral aspect of the defendant's conduct probably play minor roles.

[12] ALAN WATSON, LEGAL TRANSPLANTS - AN APPROACH TO COMPARATIVE LAW 95 (2nd ed. 1993).

[13] KEETON ET AL., *supra* note 9, at 20-21.

place, and culture, even from a different cosmology."[14] Holmes strongly concurred:

> The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is part of the rational study, because it is the first step towards an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules . . . . It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it has been laid down have vanished long since, and the rule simply persists from blind imitation of the past.[15]

The roots of law never clutch more deeply than in the common law. Unlike mathematics, and physics, or even statutory law, the common law values the past simply for having been. Even in this "age of statutes,"[16] tort continues to develop primarily through the common law.

The intersection of the law of nonhuman animals, damages for loss of society, and damages for wrongful death—three complex and controversial common law disciplines—is weighted with anachronistic legal notions. As I have discussed at length elsewhere, few areas of the law are as securely anchored in vanished worlds and archaic cosmologies than is the law of nonhuman animals in general.[17] Gaius, the second century Roman author of the *Institutes*, would recognize it at a glance.[18] As discussed in this article, the common law long resisted the idea that peace of mind was entitled to independent protections and grudgingly gave ground only in recent decades.[19] And it continues stoutly to resist many claims for compensation for loss of society and almost universally rejects any damages at all for the death of a human being.

If anything, convenience of administration has played an even greater role in the common law's resistance to compensation for mental injuries. It has been suggested that human companions should be entitled to recover emotional distress damages for the deaths of their companion ani-

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[14] Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471, 474 (1996) [hereinafter Wise 1].

[15] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). As I have noted elsewhere, the evolutionary biologist, Ernst Mayer, made the same point about science. "'An analysis of almost any scientific problem leads automatically to a study of its history . . . . To understand the history of a scientific problem, however, one must appreciate not only the state of factual knowledge, but also the *Zeitgeist* of the time.' ERNST MAYR, ONE LONG ARGUMENT: CHARLES DARWIN AND THE GENESIS OF MODERN EVOLUTIONARY THOUGHT vii (1991)," Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15, 15 (1995) [hereinafter Wise 2]. The neuroscientist and evolutionary anthropologist, Terrence W. Deacon, begins his arguments about the origins and nature of language with the observation that "(k)nowing how something originated often is the best clue to how it works." TERRENCE W. DEACON, THE SYMBOLIC SPECIES - THE CO-EVOLUTION OF LANGUAGE AND THE HUMAN BRAIN 23 (1997).

[16] *See generally*, Guido Calabresi, A Common Law for the Age of Statutes (1982).

[17] *See generally*, Wise 2, *supra* note 15 (arguing that the rationales for denying legal rights to nonhuman animals are no longer valid in modern society).

[18] Wise 1, *supra* note 14, at 499.

[19] KEETON ET AL., *supra* note 9, § 12, at 54-55.

mals along the lines of the following syllogism: an overarching principle of tort law is that victims should be compensated for all damages proximately caused by a tortfeasor's wrongful conduct; human companions suffer proximately caused emotional distress and loss of society when their companion animals are wrongfully killed; therefore, owners should be compensated for this emotional distress and loss of society.[20] But a similar syllogism has not led to the common law allowing compensation to human beings for noneconomic damages for the deaths of their spouses and children.

Common law courts have occasionally employed just such a formal legal reasoning in awarding emotional distress damages for the wrongful killing of nonhuman animals.[21] Unsurpassed for sixty years is the case of *Rasmussen v. Benson*, in which the Nebraska Supreme Court held the negligent seller of a sack of poisoned bran liable for all damages caused to a farmer who bought the tainted feedstock. The farmer fed it to his dairy cows, hogs, and chickens, which caused the farmer to lose his business and suffer such great emotional distress that he sickened with a decompensated heart and died.[22] This syllogism may not be reason alone for awarding noneconomic damages to human companions. But linked with appropriate substantive, or policy, considerations, sufficient reason exists.

A century ago, Holmes, while a Harvard Law School professor, took aim at the highly formal reasoning by syllogism or deduction that then dominated common law reasoning.[23] "The life of the law," he said,

> has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[24]

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[20] Squires-Lee, *supra* note 2, at 1082; Peter Barton & Frances Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 N.Y.L. Sch. L. Rev. 411, 411-416 (1989). *See* Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 562 (Mass. 1973) (tracing the history of the spousal consortium claim).

[21] *See infra* notes 40-41 and accompanying text. *E.g.*, Bond v. A.H. Bolo Corp., 602 S.W.2d 105, 109 (Tex. Ct. App. 1980) (referring to birth certificates, newspaper clippings, and photographs, the court said that when the "greater value [of personal property] is in sentiment... the most fundamental rule of damages that every wrongful injury or loss to persons or property should be adequately and reasonably compensated requires the allowance of damages in compensation for the reasonable special value of such articles to their owner taking into consideration the feelings of the owner for such property").

[22] 275 N.W. 674, 678 (Neb. 1937), *aff'd on reh'g*, 80 N.W. 890 (Neb. 1938). In 1973, the Eighth Circuit Court of Appeals noted that the trial court found that *Rasmussen* had never been cited by the Nebraska courts, Owens v. Childrens Memorial Hosp., 480 F.2d 465, 466 (8th Cir. 1973). Prosser and Keeton said that "[i]t may even be suggested that the decision is just and right; but even the Nebraska Supreme Court recoils from the idea of any general rule permitting recovery for mental suffering at the loss of property." Keeton et al., *supra* note 9, at 17 n.11.

[23] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 15-19 (1990).

[24] OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed. 1963). *E.g.*, Bowen v. Lumbermans Mut. Cas. Co., 517 N.W.2d 432, 439-44 (Wis. 1994) (Public policy considerations may preclude tort liability that would otherwise be imposed); Tobin v. Gross-

Science historian Thomas Kuhn has persuasively argued that, because "a nonrational incommensurability" exists between competing paradigms, a choice between them can never be compelled solely by logic.[25] "Just *because* it is a transition between incommensurables, the transition between competing paradigms cannot be made a step at a time, forced by logic and neutral experience. Like the gestalt shift, it must occur all at once (though not necessarily in an instant) or not at all."[26]

> Judges recognize that the choices they must make among competing principles are inevitably influenced by that which is unconscious and semi-conscious. Nearly one hundred years ago, Holmes cautioned that judicial decisions "depend on a judgment or intuition more subtle than any articulate major premise," are most generally "the unconscious result of instinctive preferences and inarticulate convictions," and often "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth." More recently, Justice Brennan recognized that "emotional and intuitive responses . . . often speed into our consciousness far ahead of the lumbering syllogism of reason" and concluded that the "internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality." This is why Judith Kaye, Chief Justice of the New York Court of Appeals, has written that "(t)he value judgments of appellate judges can hardly be alien to the development of the common law; they are essential to it." Scientific experiments suggest that a decision-maker's prior emotional experiences may trigger "covert biases" that precede conscious reasoning influence decisions without the decision-maker knowing it and that belief in the truth of what is being comprehended necessarily accompanies the act of comprehension suggests the wisdom of these judges.[27]

The field of compensation for emotional distress roils in almost unparalleled confusion. Prosser and Keeton point out how, not so long ago, the courts refused to allow any inquiry whatsoever into the human state of

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man, 249 N.E.2d 419, 421 (N.Y. 1969) ("the common law is not circumscribed by syllogisms"). "Every important principle that was developed in the common law, Holmes believed, 'is in fact and at bottom the result of more or less definitely understood views of public policy.'" G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 139 (1993) (quoting Oliver Wendell Holmes).

[25] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 4, 66-91, 110, 148-50, 185-86 (2nd ed. 1962).

[26] *Id.* at 150 (emphasis added). *See* Thomas S. Kuhn, *Second Thoughts on Paradigms, in* The Essential Tension —Selected Studies in Scientific Tradition and Change 313-18 (1977).

[27] Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 21 Vt. L. Rev. *40, *41 (forthcoming 1998) [hereinafter Wise 3] (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)); Gregory v. Ashcroft, 501 U.S. 452, 466 (1991) (quoting OLIVER WENDELL HOLMES, THE COMMON LAW (1881)); Chicago, Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907) (Holmes, J.); William J. Brennan, Jr., *Reason, Passion, and the 'Progress of the Law', in* 42 REC. ASS'N BAR CITY N.Y. 948, 951, 958 (1987) (forty-second annual Benjamin N. Cardozo Lecture); Judith Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1009 (1988); Antoine Bechara et al., *Deciding Advantageously Before Knowing the Advantageous Strategy*, 275 SCIENCE 1293, 1294 (1997).

mind, as it "cannot be known,"[28] was too intangible, personal, peculiar, incapable of measurement, speculative, and unforeseeable, and would throw open the courtroom to fictitious and fraudulent claims.[29] Nearly to the present, judges denied recovery for emotional distress, unless it was accompanied by a physical impact (e.g. the physical impact rule), because they feared a flood of baseless litigation.[30] A leading early American authority for this proposition was the decision by Holmes for the Massachusetts Supreme Judicial Court in *Spade v. Lynn and Boston Railroad Co,* decided in 1897.[31] Two years later, Holmes made no apologies for the fact that this rule of law was "not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles upon purely practical grounds."[32] Unabashed, he later referred to the *Spade* rule as "an arbitrary exception" to the general principles of tort liability "[b]ased upon a notion of what is practicable."[33] In 1961, a dissenter on the New York Court of Appeals invoked Holmes' argument in protesting the overturning of the physical impact rule stating, "[i]llogical as the legal theoreticians acknowledge this rule to be, it was Justice Holmes who said that the life of the law has not been logic, but experience."[34] Eight years later, the New York Court of Appeals severely circumscribed recovery noting that "[w]hile 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 its ramifying consequences, like the ripplings of waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree."[35] In 1988, Holmes' former court acknowledged that elements of its reasoning on liability for negligent infliction of emotional distress continued to be "based more on the pragmatic need to limit the scope of potential liability, than on grounds of fairness or other imperatives of corrective justice."[36]

The perpetual tension between law as logic and law as experience can never be resolved. An excess of either form or substance may trespass upon common law and sometimes even constitutional demands, such as that of equality for equality.[37] Legal reasoning that is excessively formal,

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[28] KEETON ET AL., *supra* note 9, § 4, at 23 & n. 32 (quoting Basely v. Clarkson, 83 Eng. Rep. 565 (1681)).

[29] *Id.*

[30] KEETON ET AL., *supra* note 9, § 4, at 23-24, § 12, at 54-56.

[31] 47 N.E. 88 (Mass. 1897).

[32] Smith v. Postal Tel. & Cable Co., 55 N.E. 380, 380 (Mass. 1899).

[33] Homans v. Boston Elevated Ry. Co., 62 N.E. 737, 737 (Mass. 1902).

[34] Battalla v. State, 219 N.Y.S.2d 34, 38 (1961) (Van Voorhis, J., dissenting).

[35] *See* Tobin v. Grossman, 249 N.E.2d 424 (N.Y. 1969) (the court refused to allow emotional distress damages to a mother who saw her child suffer serious injuries in an automobile accident).

[36] Migliori v. Airborne Freight Corp., 690 N.E.2d 413, 416 (Mass. 1998).

[37] *Batalla*, 219 N.Y.S.2d at 38 (permitted emotional distress damages without a physical impact in a cause of action based on negligence); Cohen v. Varig Airlines, 405 N.Y.S.2d 44, 55 (App. Div. 1978) (Sandler, J., dissenting) (dissented against refusal to allow emotional distress damages for the intentional loss of luggage by an airline in light of the fact that "[t]he reality of the distress suffered by these plaintiffs cannot be doubted. Few would contend that the economic value of their lost property represents full or fair compensation for the

or formalistic, may result in legal rules that logically relate both horizontally (across legal disciplines) and vertically (across time), but that stagnate and become increasingly platonic and more detached from the problems of the real world, or become excessively arbitrary.[38] The judicial "animals as property" syllogism (that one may never recover damages for emotional distress and loss of society for the negligent destruction of property, that companion animals are property, and therefore one may never recover damages for emotional distress for the negligent destruction of companion animals) both unthinkingly perpetuates anachronistic and unprincipled legal rules and ignores substantive factors that the common law should consider.[39] On the other hand, courts sometimes insist that "arbitrary distinctions are an inevitable result of the drawing of lines which circumscribe legal duties, and . . . delineations of limits of liability in tort actions are usually determined on the basis of considerations of public policy."[40] However, legal reasoning that is excessively substantive, or substantivistic (in Atiyah's and Summer' parallel forum)[41] may result in an excessive arbitrariness that can equally lead to decisions that stray so far from overarching principles of justice that they undermine fundamental values.[42] Avowedly arbitrary rules are the most unstable of any judicial action. Woven from gossamer, they can undermine the "reasoned judgment" that forms the core of Western judging.[43] Even the declaring courts often find themselves unable to stomach their arbitrary consequences sooner and later. Thus, the arbitrariness of the physical impact rule "led courts to stretch the boundaries of the term 'impact' in order to allow recovery," and finally to abandon it altogether.[44]

Legal rules may be arbitrary in different ways. The kind of arbitrariness most relevant to the problems addressed in this article concerns equality and occurs when formalistic reasoning leads to the imposition of

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injury that was in fact sustained"). Both *Batalla* and *Cohen* supported their arguments with the following: "[i]t is fundamental to our common-law system that one may seek redress for every substantial wrong." *See also* Wise 3, *supra* note 27, at *100 (discussing equality in awarding damages).

38 *See* P.S. Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 28-29 (1987) (labeling excessively formal legal reasoning as "formalistic" and explaining how it occurs).

39 *Id.* at 30-31.

40 Bovsun v. Sanperi, 461 N.E.2d 843, 847 (N.Y. 1984) (citation omitted). *E.g.*, Thing v. La Chusa, 771 P.2d 814, 828 (Cal. 1989) ("[D]rawing arbitrary lines is unavoidable if we are to limit liability and establish meaningful rules for application by litigants and lower courts."). *See* Keeton et al., *supra* note 9, § 3, at 15-16.

41 *See discussion* Atiyah & Summers, *supra* note 38, at 30-31.

42 *See generally* Wise 3, *supra* note 27 (arguing that the automatic denial of even the most fundamental legal rights to every nonhuman animal rests on arbitrary, irrational, unequal, and insufficiently weighty policy considerations that violate overarching principles of common law equality and liberty).

43 Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (joint plurality opinion). *See* Peter Linzer, *The* Carolene Products *Footnote and the Preferred Position of Individual Rights:* Louis Lusky & John Hart Ely v. Harlan Fiske Stone, 12 Const. Commentary 277, 302-03 (1995).

44 Payton v. Abbot Labs, 437 N.E.2d 171, 176 (Mass. 1982).

a legal rule that is improperly and excessively underinclusive or overinclusive with respect to the policy that it is intended to further. Thus, plaintiffs who should be treated alike are treated differently, or plaintiffs who should be treated differently are treated alike.[45] However, as Professor Pearson noted, even an arbitrary rule should not be condemned if the possible alternatives are no less arbitrary.[46] It is true that an overarching legal principle exists that victims should be compensated for all damages caused by a tortfeasor's wrongful conduct. With respect to the issues being discussed, justice can best be served when no rational and sufficiently weighty substantive considerations encroach upon this legal principle, so that human companions should not be automatically barred from being compensated for the noneconomic damages they suffer when their companion animals are killed. And, if some measure of arbitrariness is necessary, then it should be the least arbitrary alternative.[47]

The issue of whether, and to what extent, damages for loss of society for the wrongful deaths of companion animals should be available to an owner is not one *sui generis* within the common law. Thus, it is not that "the refusal to compensate [the owners of companion animals] belittles the relationship and affection between animal and human and reinforces the misconception that reasonable people are not emotionally harmed by the death of a companion animal" or that "[t]ort's refusal to compensate people for their suffering buttresses the notion that grief at the loss of a companion animal is not 'normal.'"[48] Courts easily concede the suffering borne by parents who learn that death was negligently inflicted upon their child or by parents who observed the event itself. Yet these courts may refuse to award emotional distress damages. As for the emotional distress damages inflicted when the wrongful death of one's child is observed,

> the problem can be seen as one instance of the wider question of under what circumstances damages for mental or emotional distress may be recovered when the emotional distress arises not from an act against the plaintiff but from the causing of a physical injury to a third person or the placing of a third person in danger of such injury.[49]

In 1983, the Supreme Judicial Court of Massachusetts refused compensation for negligent infliction of emotional distress when a mother died after learning by telephone in Chicago that her son had been killed in a plane crash seven hours before in Boston.[50] In the court's view, "the deci-

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[45] *See* discussion in Wise 3, *supra* note 27(discussing formalistic reasoning). *See also* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 477-81 (1982).

[46] *Id.* at 485.

[47] *Cf.*, Dzionlonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978) ("Every effort must be made to avoid arbitrary lines which 'unnecessarily produce incongruous and indefensible results.' The focus should be on underlying principles." (citation omitted)).

[48] Squires-Lee, *supra* note 2, at 1083, 1069.

[49] Bruce I. McDaniel, Annotation, *Recovery for Mental or Emotional Distress Resulting from Injury to, or Death of, Members of Plaintiff's Family Arising from Physician's or Hospital's Wrongful Conduct*, 77 A.L.R.3d 447, 453 (1977).

[50] Cohen v. McDonnell Douglas Corp., 450 N.E.2d 581, 590 (Mass. 1983).

sion whether to impose liability should not be made merely by reference to what is logically reasonably foreseeable," but by reference to other factors as well.[51]

> It does not matter in practice whether these factors are regarded as policy considerations imposing limitations on the scope of reasonable foreseeability . . . or as factors bearing on the determination of reasonable foreseeability itself. The fact is that, in cases of this character, such factors are relevant in measuring the limits of liability for emotionally based injuries resulting from a defendant's negligence.[52]

In 1969, the New York Court of Appeals refused to allow emotional distress damages to a mother who saw her child suffer serious injuries in an automobile accident, despite its recognition that "[e]very parent who loses a child or whose child of any age suffers an injury is likely to sustain grievous psychological trauma, with the added risk of consequential psychological harm."[53] In 1935, the Wisconsin Supreme Court, while destroying the physical impact rule, still denied all recovery to a mother who died seventeen days after witnessing her daughter negligently killed by an automobile.[54]

In these cases, and in hundreds of others, the courts denied relief not because they undervalued a close human relationship, but for policy reasons. This is equally applicable to the issue of whether damages for loss of society should be awarded for the deaths of companion animals. It is, therefore, a mistake to characterize decisions that refuse to award emotional distress damages to owners of companion animals as demeaning the relationship between them. They are wrong for other reasons.

III. Companion Animals as Family

More than 110 million companion animals reside in more than sixty percent of American households. More than sixty million of these are cats, while more than fifty million dogs reside with more than one-third of all Americans.[55] More Americans share their lives with companion animals than with children.[56] Human companions commonly consider their companion animals as members of their *families*.[57] Almost one-third of the

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[51] *Id.* at 588.

[52] *Id.* (quoting *Dzionkonski*, 380 N.E.2d at 1302).

[53] Tobin v. Grossman, 249 N.E.2d 423 (N.Y. 1969). The Pennsylvania Supreme Court refused to accept this "callous view." Sinn v. Burd, 404 A.2d 672, 686 (Pa. 1979).

[54] Waube v. Warrington, 258 N.W. 497 (Wis. 1935), *overruled by* Bowen v. Lumbermans Mut. Cas. Co., 517 N.W.2d 432 (Wis. 1994).

[55] Harold B. Weiss et. al., *Incidence of Dog Bite Injuries Treated in Emergency Departments*, 279 J. Am. Med. Ass'n 51, 53 (1998); Elizabeth C. Hirschman, *Consumers and Their Animal Companions*, 20 J. Consumer Res. 616, 626 (1994); J.K. Wise et al., *Dog and Cat Ownership, 1991-1998*, 204 J. Am. Vet. Med. Ass'n 1166 (1994).

[56] Laurel Lagoni et al., The Human-Animal Bond and Grief 3 (1994); Elizabeth McKey & Karen Payne, *APPMA Study: Pet Ownership Soars*, 18 Pet Business 22 (1992).

[57] Alan Beck & Aaron Katcher, Between Pets and People—The Importance of Animal Companionship 40-45 (2d ed. 1996); Mary Elizabeth Thurston, The Lost History of the Canine Race—Our 15,000-Year Love Affair With Dogs 275 (1996); Squires-Lee, *supra* note

respondents in one study of 122 families felt closer to their *dog* than to any other family member.[58]

Companion animals, however, are not considered by their human companions to be "just any member of the family . . . they are *children*."[59] It is common knowledge that many human companions treat their companion animals as children, sometimes even enrolling them in daycare.[60] Companion animals provide "the kind of uncomplicated affection that parents exchange with young children" and draw from us "the loving intimacy that is appropriate to children."[61] The vignette of the two men and the lamb from the Second Book of Samuel, which begins this article, is part of a story related by the prophet Nathan to King David. Nathan told David how a rich man, instead of dressing a lamb from his huge flocks to feed a traveler, had taken and killed the poor man's lamb instead. "And David's anger was greatly kindled against the man: and he said to Nathan, As the Lord liveth, the man that hath done this thing shall surely die: And he shall restore the lamb fourfold, because he did this thing, and because he had no pity."[62] Why was David so angry? Not because a rich man had stolen a poor man's ewe. That was mere theft. What kindled his fury was that the rich man's flocks were just "sheep" to him, while the poor man's ewe had

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2, at 1062, 1065; Betty J. Carmack, *The Effect on Family Members and Functioning After the Death of a Pet*, *in* PETS AND THE FAMILY 149, 150 (Marvin B. Sussman ed. 1985) (citing studies that demonstrate that 70% to 93% of American human companions view their companion animals as family members); V.L. Voith, *Attachment of People to Companion Animals*, 15 VET. CLINIC N. AM. [SMALL ANIMAL PRAC.] 289 (1985) (99% of 500 human companions surveyed consider their cats or dogs to be full-fledged family members); Ann Cain, *A Study of Pets in the Family System*, *in* NEW PERSPECTIVES ON OUR LIVES WITH COMPANION ANIMALS 5 (Alan Beck & Aaron Katcher eds. 1983) (87% of 60 families surveyed considered the pet a family member); Thomas E. Catanzaro, *A Study of the Human-Animal Bond in Military Communities*, *in* THE PET CONNECTION: ITS INFLUENCE ON OUR HEALTH AND QUALITY OF LIFE: PROCEEDINGS OF THE MINNESOTA-CALIFORNIA CONFERENCES ON THE HUMAN ANIMAL BOND 341, 341-47 (R.K. Anderson et al. eds. 1984) (98% of 896 military families surveyed said that their companion animal was a full family member and 30% said that their pet was a close friend); Kenneth M. G. Keddie, *Pathological Mourning After the Death of a Domestic Pet*, 131 BRIT. J. PSYCHIATRY 21, 22 (1977).

58 Sandra B. Barker & Ralph T. Barker, *The Human-Canine Bond—Closer Than Family Ties?*, 10 J. Mental Health Counseling 46 (1988).

59 BECK & KATCHER, *supra* note 57, at 41-43 (emphasis added) (companion animals are treated by families as young children).

60 Kimberly Stevens, *Teacher's Furry Pets*, N.Y. Times, June 28, 1998, at 9-3; *Enrolling Fido in Day Care*, BOSTON GLOBE, Dec. 25, 1990, at A40; Squires-Lee, *supra* note 2, at 1062; Barton & Hill, *supra* note 20, at 415; JAMES SERPELL, IN THE COMPANY OF ANIMALS 63-70 (1986); Mazor, *supra* note 2, at 408, 411-12.

61 BECK & KATCHER, *supra* note 57, at 42-43. An increasing body of research is also revealing the health and psychological benefits that companion animals bestow upon their human companions. *Id.* at 78-95; SERPELL, *supra* note 60, at 73-99; HEALTH BENEFITS OF PETS: SUMMARY OF WORKING GROUP, DEPT. OF HEALTH & HUMAN SERVICES 216 (1988); E. Friedmann et al., *Animal Companions and One Year Survival of Patients Discharged From a Coronary Care Unit*, 8 CAL. VET. 45 (1982).

62 2 *Samuel* 12:5-6.

been "unto him like a daughter." David reacted *as if* the little ewe lamb had been the poor man's daughter.[63]

In 1995, an American Animal Hospital Association (AAHA) study concluded that "[p]et-owner attitudes toward the *value of their pets as members of the family* are quite high."[64] Its "researchers were impressed with the high degree of importance pet owners place upon their pets" and characterized seventy percent of those surveyed in the category as viewing their "[p]ets as [c]hildren."[65] The AAHA's *Practical Guide to Client Grief* reminds small animal veterinarians that "[o]n a daily basis, you treat *valuable members of people's families* [their ill or injured companion animals]".[66]

Small animal veterinarians literally bank on the treatment of companion animals by their human companions as members of their families. Their professional existence depends upon it. Human companions routinely pay hundreds, sometimes thousands, of dollars for veterinary care for their companion animals, almost all of which is uninsured.[67] The strength of the bond between humans and companion animals earns small animal veterinarians large sums of money. According to the American Veterinary Medical Association, the human companions of companion animals spent $11.1 billion on health care for their companion animals in 1996.[68] The average human companion is expected to pay about $11,500 on each companion dog during the span of that dog's life.[69] An estimated forty to fifty percent of those expenditures will go to veterinary care.[70] The 1997 *Veterinary Fee Reference*, published by the American Animal Hospital Association, reveals that nearly three-quarters of all small animal practices in the United States gross $300,000 to $500,000 per year, almost one-quarter gross more than $750,000 per year and more than one-tenth gross more than one million dollars per year.[71] The Chief of Staff at perhaps the leading nonhuman animal hospital in the world, the Angell Memorial Hospital in Boston, recently reported that "[t]he vast majority of

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[63] "In the Bible, capital punishment is reserved for cultic offenses, which included murder. *See Exod.* 21:12-14; *Num.* 35:29-34. Theft of property, as long as it was not cultic or under the ban . . . was not punishable by death. Theft of another human being, however was. *Exodus* 21:16." The Oxford Companion to the Bible 422 (Bruce M. Metzger & Michael D. Coogan eds. 1993).

[64] 1995 AAHA REPORT *supra* note 2, at 5 (emphasis added).

[65] *Id.* at 81, 84.

[66] GARY BISHOP ET AL., PRACTICAL GUIDE TO CLIENT GRIEF: SUPPORT TECHNIQUES FOR 15 COMMON SITUATIONS 7 (1997) (emphasis added).

[67] AMERICAN ANIMAL HOSPITAL ASSOCIATION, THE VETERINARY FEE REFERENCE—A COMPREHENSIVE SURVEY OF SMALL ANIMAL SERVICES AND FEES WITH NATIONAL AND REGIONAL ANALYSIS, K2-K16 (1997) [hereinafter VETERINARY FEE REFERENCE].

[68] Carol Marie Cropper, *Strides in Pet Care Come at Price Owners Will Pay*, N.Y. Times, Apr. 5, 1998, at 1-16.

[69] Leslie Eaton, *Hey Big Spenders*, N.Y. Times, Sept. 11, 1994, at 3-1.

[70] 1995 AAHA REPORT, *supra* note 2, at 20.

[71] VETERINARY FEE REFERENCE, *supra* note 67, at K1.

[human companions] order him to save the animal no matter what the cost."[72]

In his leading text on veterinary ethics, Professor Jerrold Tannenbaum of Tufts University School of Veterinary Medicine observed that:

> [t]he [bond between humans and companion animals] seems to be everywhere—in scholarly publications describing its value to human health, in AVMA policy statements, in practice management discussions touting its value for maximizing revenues, in advertisements appealing to the bond as an incentive for animal owners to buy pet products.[73]

If the economic value of companion animals was important to their human companions, as is normally the case with sofas, chairs, and other inanimate property, small animal veterinarians would close their doors, because human companions would never bring their companion animals for treatment. Instead, they would abandon them. They would throw them out. They would euthenize them upon any pretext rather than incur the high cost of feeding and caring for them. They would obtain newer, younger, and healthier companion animals, who are certainly plentiful and cheap enough. American animal shelters overflow with millions of potential companion animals who can be had for nearly free. One need open any small town newspaper or review the community bulletin board at almost any supermarket to find advertisements for free companion animals. What owner of a worn and broken chair or sofa would not seize the opportunity to replace it with a brand new one for free?[74]

But human companions do not usually throw their companion animals out. They do not usually abandon them. They do not euthenize them merely to obtain newer, younger, or healthier ones. This is because the value of their companion animals to them is not economic. Companion animals are not fungible. They are of a different order.

Professor Tannenbaum has pointed out the hypocrisy of a small animal veterinarian earning his living from the strength of the bond between humans and companion animals, then denying its importance when he kills his patient.

> [T]he organized profession continues to insist that courts hearing veterinary malpractice suits treat pets like other kinds of personal, property, such as sofas and television sets, and deny awards for owner's pain and suffering resulting from loss or injury caused by veterinary malpractice. But one cannot promote the human-companion animal bond as a vital part of client's lives and at the same time tell pet owners that they cannot collect for their pain and suffering because animals are merely articles of personal property.[75]

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[72] Vicki Croke, *Giving Pets a Piece of the Rock*, Boston Globe, Jan. 31, 1998, at F1, F8 (quoting Dr. Paul Gambardella).

[73] TANNENBAUM, *supra* note 2, at 124.

[74] Human companions of companion animals should not be prejudiced by the fact that some humans shamefully mistreat nonhuman animals with whom they live by abusing them or giving them up for adoption any more than should a parent of a killed or injured child be prejudiced by the fact that some parents shamefully mistreat their children or give them up for adoption.

[75] TANNENBAUM, *supra* note 2, at 30.

The veterinary profession's public embrace of the bond between humans and companion animals as a method of enticing clients should alone estop them from trying to prevent claims by the human companions of companion animals whom they have killed. Damages sought for emotional distress and loss of companionship explicitly derive from that bond.[76]

Every modern small animal veterinarian must also be sensitive to the intense grief that the human companion may suffer when her companion animal dies, particularly when that companion animal is negligently killed. It is so commonly encountered by modern small animal veterinarians that The American Animal Hospital Association published *The Practical Guide to Client Grief.*

> It is difficult to ignore the mounting evidence indicating that the grief people feel at the deaths of their pets is real. Recent studies show that the grief pet owners feel when companion animals die is often overwhelming. Pet owners' responses to pet loss are often as emotional as the grief responses accompanying the loss of a human friend or family member. In one study, 75% of pet owners said they experienced disruptions in their lives after their pets died. One third of these pet owners said they experienced difficulties in their relationships with others and/or needed to take time off from work due to their feelings of grief.[77]

Many other authorities concur with this phenomena.[78] Dr. Boris Levinson has written that "[w]hen the animal's death results from natural

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[76] KEETON ET AL., *supra* note 9, § 105, at 733.

[77] BISHOP ET AL., *supra* note 66, at 12.

[78] *See, e.g.*, Lagoni et al., *supra* note 56, at 29 ("The death of a companion animal may be one of the most significant losses we experience throughout our lives."); John Archer & Gillian Winchester, *Bereavement Following the Death of a Pet*, 85 BRIT. J. PSYCHIATRY 259 (1994) (the grief occasioned by the death of a companion animal is closely related to the grief occasioned by the death of a human family member); Carmack, *supra* note 57, at 160 (citing studies that demonstrate the bond between American human companions and their companion animals, and the sense of loss felt when companion animals die); Joel Savishinsky, *Pets and Family Relationships Among Nursing Home Residents*, *in* PETS AND THE FAMILY 109, 120-22 (Marvin B. Sussman ed. 1985) (the loss of companion animals and of family members are seen as interrelated experiences); James E. Quackenbush, *The Death of a Pet: How It Can Affect Owners*, 15 VET. CLINICS N. AM.: SMALL ANIMAL PRAC. 395, 396 (1985) ("[I]n effect, the impact of the death of a pet on an owner is fundamentally no different than the impact of any other family member; the behavior of the survivor after the death of a human being and the behavior of an owner after the death of a pet are virtually indistinguishable."); Kathleen V. Cowles, *The Death of a Pet: Human Responses to the Breaking of the Bond*, *in* PETS AND THE FAMILY 135, 146 (Marvin B. Sussman ed. 1985) ("For many complex reasons, the emotional attachment which many humans develop for their pets not only equals but indeed frequently transcends the emotional attachments which they form with humans. When this bond is broken, the grief responses by owners can be profound." (citing A. DeGroot, *Preparing the Veterinarian for Dealing with the Emotions of Pet Loss*, *in* THE PET CONNECTION: ITS INFLUENCE ON OUR HEALTH AND QUALITY OF LIFE: PROCEEDINGS OF THE MINNESOTA-CALIFORNIA CONFERENCES ON THE HUMAN ANIMAL BOND 283, 283 (R.K. Anderson et al. eds. 1984))); James Harris, *A Study of Client Grief Responses to Death or Loss in a Companion Animal Veterinary Practice*, *in* NEW PERSPECTIVES ON OUR LIVES WITH COMPANION ANIMALS 370, 376 (Aaron Katcher & Alan Beck eds. 1983) ("The grief process can be severe and long-lasting . . ."); Steven E. Crow et al., *Pet owner Grief in a University Hospi-*

causes or from an accident, the same kinds of reaction are experienced as when a beloved human being dies, namely shock, protest, guilt, anger, idealization of the lost love object, and awareness of one's own mortality."[79] This grief has been found to vary with such factors as the degree of strength of the bond between the human and the companion animal and whether the dead companion animal was the human companion's sole companion animal.[80] Grief over the death of a companion animal has been found to last from six months to a year with an acute phase of one or two months.[81]

Judges have begun to recognize the bond between humans and companion animals. In 1997, the Vermont Supreme Court acknowledged that "[l]ike most pets, [the worth of a mixed breed dog] is not primarily financial but emotional; its value derives from the animal's relationship with its human companions."[82] The Supreme Court of Florida has "hasten[ed] to say that the anguish resulting from the mishandling of the body of a child cannot be equated to the grief from the loss of a dog, but that does not imply that mental suffering from the loss of a pet dog . . . is nothing."[83] A Florida District Court of Appeal acknowledged that "anyone who has enjoyed the companionship and affection of a pet will often spend far in excess of any possible market value to maintain or prolong its life."[84] The Minnesota Court of Appeals observed that "[w]hen a pet is lost, its owner frequently cares least about the amount of money it will cost to replace the pet."[85] Judge Andell, concurring on a Texas Court of Appeals case, urged courts not to "hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for

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tal, in 9 ARCHIVES OF THE FOUNDATION OF THANATOLOGY—VETERINARY MEDICAL PRACTICE: PET LOSS AND HUMAN EMOTION 23 (1981); James E. Quackenbush & Lawrence Glickman, *Social Services for Bereaved Pet Owners: A Retrospective Case Study in a Veterinary Teaching Hospital, in* NEW PERSPECTIVES ON OUR LIVES WITH COMPANION ANIMALS 377, 384-85 (Aaron Katcher & Alan Beck eds. 1983); Boris M. Levinson, *Human Grief on the Loss of an Animal Companion, in* 9 ARCHIVES OF THE FOUNDATION OF THANATOLOGY—VETERINARY MEDICAL PRACTICE: PET LOSS AND HUMAN EMOTION 5 (1981) ("When the animal's death results from natural causes or from an accident, the same kinds of reactions are experienced as when a beloved human being dies, namely shock, protest, guilt, anger, idealization of the lost love object, and awareness of one's own mortality.").

79 Levinson, *supra* note 78, at 5; Crow et al., *supra* note 78, at 23.

80 Quackenbush & Glickman, *supra* note 78, at 384-85; Harris, *supra* note 78, at 370-71.

81 Carmack, *supra* note 57, at 149. Aaron Katcher & M.A. Rosenberg, *Euthenasia and the Management of the Client's Grief*, 1 Compendium on Continuing Education 887 (1979) (grief lasted an average of ten months). BISHOP ET AL., *supra* note 66, at 18 ("It is NOT helpful to . . . suggest grievers replace the one they've lost. People who have experienced a major loss are often urged to get on with life and remarry, have another child, or adopt a new pet as soon as possible. Most grievers view this advice as insensitive and are deeply offended by the implication that anyone else could take the place of the unique loved one who died.") (emphasis in the original).

82 Morgan v. Kroupa, 702 A.2d 630, 633 (Vt. 1997).

83 LaPorte v. Associated Independents, Inc., 163 So. 2d 267, 269 (Fla. 1964).

84 Paul v. Osceola County, 388 So. 2d 40, 40 (Fla. Dist. Ct. App. 1980).

85 Soucek v. Banham, 524 N.W.2d 478, 481 (Minn. Ct. App. 1995).

many people, pets are the *only* family members they have."[86] As a result, he concluded that "[t]he law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live."[87]

IV. Liability to Bystanders for Intentional and Negligent Infliction of Emotional Distress for Acts Affecting Children and Companion Animals

"The common law has historically distrusted emotion."[88] Because of that distrust, until nearly the mid-point of the twentieth century, common law courts reflexively, and nearly unanimously, turned back plaintiffs' independent claims for damages for emotional distress. Sometimes they refused to allow claims for emotional distress under any circumstances.[89] Courts generally allowed recovery only for emotional distress that was "parasitic" to a contemporaneous physical or bodily injury,[90] the so-called "impact doctrine."[91] They believed so fervently in the physical impact rule that it "crystallized into a rigid rule of law lasting into the Twentieth Century as unyielding as the law of the Medes and Persians."[92] The courts' reasons usually were that (1) emotional distress was difficult to prove, evaluate, and measure, and (2) emotional distress was so variable and peculiar to each individual that it was unforeseeable and thus could not fairly be said to have been proximately caused by anything done by the defendant.[93] Perhaps of greatest concern was the fear that opening the door to any emotional distress claims would allow in trivial or fictitious claims.[94]

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86 Bueckner v. Hamel, 886 S.W.2d 368, 378 (Tex. Ct. App. 1994) (Andell, J., concurring) (emphasis in the original).

87 *Id.*

88 Bowen v. Lumbermans Mut. Cas. Co., 517 N.W.2d 432, 437 (Wis. 1994).

89 *See* Nancy Levit, *Ethereal Torts*, 61 Geo. Wash. L. Rev. 136, 141 (1992) ("Decisions in the late nineteenth and early twentieth centuries categorically denied recovery for infliction of emotional distress alone."); Stuart M. Speiser et al., 4 The American Law of Torts § 16.1, at 936 (1987) [hereinafter Speiser 1] ("There was a considerable reluctance—indeed, a deep and abiding negatism [sic.] - among the Nineteenth Century courts to allow recompense for mental injuries, suffering, disturbance or distress."); Keeton et al., *supra* note 9, § 12, at 54-55. *See also* Dillon v. Legg, 441 P.2d 912, 924 (Cal. 1968); Johnson v. Wells Fargo & Co., 6 Nev. 543, 558 (1887).

90 Speiser 1, *supra* note 89, § 16.1, at 943-44.

91 *Id.* § 16.2, at 953.

92 *Id.* § 16.7, at 991. *See* Douglas Bryan Marlowe, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 782-94 (1988) (providing a useful overview of the evolution of various approaches to claims for mental distress); James G. Curenton, *The Twilight Zone of Danger: Negligent Infliction of Emotional Distress as an Actionable Tort*, 15 Cumb. L. Rev. 519, 520-23 (1985) (listing 39 jurisdictions that abrogated the physical impact rule by 1983).

93 Speiser 1, *supra* note 89, § 16.1, at 937, § 16.2, at 991; Keeton et al., *supra* note 9, § 12, at 55-56.

94 Speiser 1, *supra* note 89, § 16.1, at 937, § 16.2, at 991; Keeton et al., *supra* note 9, § 12, at 56.

The response to each of these reasons is convincing.[95] First, emotional distress is no harder to prove than is the well-recognized physical pain and suffering, and courts have uniformly permitted emotional distress damages to be awarded that result from the most trivial of physical impacts.[96] Medical science now recognizes that mental and physical injuries cannot clearly be distinguished and that, in many situations, a plethora of mental damages, including fright, shock, grief, and anxiety, are foreseeable.[97] Second, when states finally opened the door to independent emotional distress claims, the feared tide of litigation never materialized.[98] Moreover, as Prosser argued, it is the normal business of courts to separate the meritorious from the frivolous, and the substantial from the trivial, and that it is nothing less "than a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."[99] Finally, it was demonstrated that the physical impact rule was severely underinclusive, because obvious and severe emotional distress unaccompanied by a physical impact went uncompensated, despite the fact that it was deemed worthy of compensation. The rule was also overinclusive because emotional distress damages continued almost universally to be awarded when emotional distress was linked to the slightest impact.[100]

> Prosser and Keeton have, however, identified three current principle concerns that continue to foster judicial caution and doctrinal limitations on recovery for emotional distress: (1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act.[101]

Courts have continued to search for a satisfactory method for assuring the genuineness of claims for purely emotional distress and for preventing unlimited liability for a tortfeasor. Intentionally inflicted severe emotional distress that involves behavior unacceptable in a civilized society came to be recognized as an independent tort, because "[g]reater proof

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95 Speiser refers to the doctrine as an "atavistic primitivism." *Id.* § 16.7, at 992.

96 *Id.* § 16.1, at 938-43, § 16.7, at 996; Keeton et al., *supra* note 9, § 12, at 55. SPEISER 1, *supra* note 89, § 16.8, at 996 (Speiser notes that by 1959, a clear majority of American jurisdictions had rejected the impact doctrine); Curenton, *supra* note 92, at 522 n.23 (noting that by 1983, 39 jurisdictions had rejected the impact rule).

97 KEETON ET AL., *supra* note 9, § 12, at 55.

98 *E.g.*, Bowen v. Lumbermans Mut. Cas. Co., 517 N.W.2d 432, 443 (Wis. 1994) (possibly fearing such litigation, the court stated that public policy considerations may preclude tort liability that would otherwise be imposed); Ramirez v. Armstrong, 673 P.2d 822, 826 (N.M. 1983) (limiting the cause of action for negligent infliction of emotional distress to bystanders who are close relatives); Corso v. Merrill, 406 A.2d 300, 306 (N.H. 1979).

99 KEETON ET AL., *supra* note 9, § 12, at 56. *E.g.*, Battalla v. State of New York, 219 N.Y.S.2d 34, 38 (1961) (overturning the physical impact rule, the New York Court of Appeals said that "even if a flood of litigation were realized . . . it is the duty of the courts to willingly accept the opportunity to settle these disputes").

100 Marlowe, *supra* note 92, at 790-91; Pearson, *supra* note 45, at 488.

101 KEETON ET AL., *supra* note 9, at 360-61; Pearson, *supra* note 45, at 488 n.66.

that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom."[102] Today, while "[m]ost jurisdictions do not recognize a general duty not to negligently inflict emotional distress,"[103] most allow emotional distress damages once filtered through a set of often strict, confusing, and inconsistent policy considerations.

Emotional injury to a bystander is the most intractable and controversial area of emotional distress damages. Which of the theoretically large number of those affected by a wrongful death or serious injury should have the right to make a claim? The requirement that a plaintiff demonstrate that, if she was not the victim of a direct physical impact, she was at least within the "zone of danger" of such a physical impact has replaced the physical impact rule in many jurisdictions.[104] No relief for a bystander outside the "zone of danger" who suffered severe emotional distress, and possibly consequent physical injury, was permitted by an American appellate court until 1968.[105] Then, the California Supreme Court, in *Dillon v. Legg*,[106] applied the general negligence requirement of foreseeability, but attached policy considerations that moderated it, and allowed a bystander to recover under certain circumstances.[107]

Since *Dillon*, the jurisdictions have splintered. If the law of negligent infliction of emotional distress is foggy, bystander liability sits, as did Dickens' Lord High Chancellor, "at the very heart of the fog."[108]

> Probably there is no topic in present day American law in which the law is in more ferment than in the general area of negligent infliction of mental or emotional distress or harm for injury to *another* - a "third person." Particularly in the "bystander" or "witnessing" cases concerning physical injury, etc., to third persons, notably family members, can case authority be found for virtually

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[102] Agis v. Howard Johnson Co., 355 N.E.2d 315, 318 (Mass. 1976) (quoting State Rubbish Collectors Assoc. v. Siliznoff, 240 P.2d 282, 286 (Cal. 1952)); *Bowen*, 517 N.W.2d at 437. The position of the Restatement of Torts reversed between 1934 and 1948; *compare* Restatement of Torts § 46 (1934) (no liability) *with* RESTATEMENT OF TORTS § 46 (supp. 1948) (liability) and RESTATEMENT (SECOND) OF TORTS § 46 (1963) (liability). *See* KEETON ET AL., *supra* note 9, § 12, at 56-64. In 1993, when Texas became the forty-seventh state to recognize the tort of intentional infliction of emotional distress, its Supreme Court noted that forty-three states had adopted the formulation found in the Restatement and three states had adopted an equivalent of outrageous conduct. Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993).

[103] Boyles v. Kerr, 855 S.W.2d 593, 598 (Tex. 1993).

[104] Marlowe, *supra* note 92, at 794-801; Curenton, *supra* note 92, at 523-25.

[105] At least when the issue was raised. *See* Cohn v. Ausonia Realty Co., 148 N.Y.S. 41 (App. Div. 1914); Spearman v. McCary, 58 So. 927 (1912), *cert. denied*, 58 So. 1038 (Ala. 1912) (zone of danger issue not discussed though court upheld award for emotional distress for fright resulting from concern for safety of another).

[106] 441 P.2d 912 (Cal. 1968).

[107] Thus the observation of the New York Court of Appeals that "(u)ntil 1968 no upper court in this country had held that a mother could recover for her own injuries due to shock and fear for her child as a result of an accident occurring in her view." Tobin v. Grossman, 249 N.E.2d 420 (N.Y. 1969). *See* Speiser 1, *supra* note 89, § 16.25, at 1119-20 for a discussion of cases from jurisdictions that continue to adhere to the "zone of danger" rule. *See also Dillon*, 441 P.2d at 924-25 (summarizing the evolution in the law of emotional distress over the last century and a half).

[108] CHARLES DICKENS, BLEAK HOUSE 2 (Dodd, Mead & Co., Inc. 1952) (1853).

every position; and minute distinctions or subtleties are the rule—not the exception.[109]

Perhaps the most that can accurately be said is that a majority of jurisdictions employ something akin to the *Dillon* analysis, and that some basic exception-riddled rules have been adopted by most states.[110] A bystander may generally recover damages for emotional distress and any physical harm caused by that emotional distress if (1) she is located near the accident scene in which another person has been seriously injured or killed (or, less frequently, if she arrives very soon thereafter at the scene or sometimes even at the hospital), (2) the bystander's emotional distress results from a contemporaneous or near-contemporaneous sensory experience of the incident (or, less frequently, from witnessing its effects on the victim who was injured or killed), as opposed to learning of what occurred from others, and (3) the bystander and victim have a close, usually familial, relationship.[111]

This article focuses on the recovery of damages when a companion animal is the victim of a wrongful act. The judicial confusion, arbitrariness, irrationality, "minute distinctions" and "subtleties" that characterize much of the area of damages for both intentional and negligent infliction of emotional distress when there is injury to a human being often worsen when the victim is a companion animal. At one extreme, no bystander recovery should be expected for the death of a companion animal intentionally inflicted in a jurisdiction that does not permit even immediate human family members to recover under the same circumstances. Similarly, no recovery should be expected for emotional distress damages negligently inflicted that result from an injury to another, human or nonhuman, in jurisdictions that continue to adhere to the "physical impact" rule.[112] At the other extreme, recovery may be allowed for emotional distress caused by the negligent killing of a companion animal, even in the absence of a physical impact or a contemporaneous or near-contempora-

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[109] SPEISER 1, *supra* note 89, § 16.23, at 1106 (emphasis in original). Keck v. Jackson, 593 P.2d 668, 669 (Ariz. 1979) (en banc) ("The case law in this field . . . is in a state of confusion and no general agreement has yet been reached."); Annotation, *Right to Recover for Emotional Disturbance, or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2D 100, 103 (1959) ("The case law in the field here treated is in an almost unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed perplexity.").

[110] SPEISER 1, *supra* note 89, § 16.26, at 1121-28; Marlowe, *supra* note 92, at 803-17; Curenton, *supra* note 92, at 526-30.

[111] SPEISER 1, *supra* note 89, § 16.24, at 1114-19. Professor Pearson has argued that the *Dillon* rule is even more arbitrary than the "zone of danger" rule because it has less internal consistency. Pearson, *supra* note 45, at 500-01, 516.

[112] *E.g.*, Carroll v. Rock, 469 S.E.2d 391, 393 (Ga. Ct. App. 1996) (rejected claim for damages for negligent infliction of emotional distress when a veterinary clinic lost the plaintiff's cat, as no impact to the plaintiff occurred that resulted in her physical injury). *See* Marlowe, *supra* note 92, at 792-93 & n.59 (jurisdictions adhering to the impact rule as of 1988 were Arkansas, District of Columbia, Georgia, Indiana (Eakin v. Kumiega, 567 N.E.2d 150, 152 (Ind. Ct. App. 1991); *but cf.* Campins v. Capels, 461 N.E.2d 712, 721 (Ind. Ct. App. 1984) (endorsing consideration of sentimental value of items in assessing damages for conversion of stolen jewelry)), Kentucky and Oregon).

neous observation of the acts that led to her death, if such damages are permitted for the destruction of personal property in general.[113]

Aside from those jurisdictions that forbid third-party recovery even for intentional infliction of emotional distress, the decisive issue will often be whether the relationship between the owner and her companion animal is characterized as sufficiently close to warrant recovery. Comment 1 of Section 45(2) of the *Restatement (Second) of Torts* notes that, in most cases intentional infliction of emotional distress damages have been limited to plaintiffs who were near relatives, or at least close associates, of the person against whom the outrageous conduct was directed. However, "there appears to be no essential reason" why even a stranger, under the appropriate circumstances, should not be able to recover. Despite this caveat and Prosser and Keeton's characterization of any limitation to family members as an "arbitrary limitation [that] does not appear to be called for,"[114] some courts have limited recovery for intentional infliction of emotional distress to members of the plaintiff's immediate family.[115]

Even jurisdictions that permit recovery for damages for negligent infliction of emotional distress when a plaintiff is outside the zone of danger demand foreseeability. Most limit liability to those classes of persons most likely to suffer severe emotional distress if they witness a serious injury to another. But several jurisdictions refuse to define foreseeability in terms of the closeness of the relationship between the plaintiff and the victim at all.[116] The original vague *Dillon* guideline was "[w]hether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."[117] Thus, a closely-related plaintiff was eligible, while a distantly-related plaintiff was not. Speiser summarizes the present rule as it had developed over the past thirty years:

> [T]he plaintiff must fulfill the requirement that there exist a close, but not necessarily a blood, relationship between the plaintiff and the victim since the more closely related the victim and the witness are the more likely, and hence

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[113] *E.g.*, Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981) (awarding damages for the death of a dog); Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970) (permitting recovery for emotional distress that arises from property damage, the court said that liability will be imposed by the application of general tort principles when serious mental distress is a reasonably foreseeable consequence of a defendant's act). By H.R.S. 663-8.9, the Legislature in 1986 forbid recovery for the negligent infliction of emotional distress arising solely from damage to property unless the emotional distress suffered was serious and results in physical injury or mental illness.

[114] KEETON ET AL., *supra* note 9, at 66.

[115] *E.g.*, Wiehe v. Kukal, 592 P.2d 860, 863 (Kan. 1979).

[116] *See* Paugh v. Hanks, 451 N.E.2d 759, 766-67 (Ohio 1983) ("A strict blood relationship between the accident victim and the plaintiff-bystander is not necessarily required . . . the more closely the plaintiff and the victim are related, the more likely it is that the emotional injury was reasonably foreseeable."). *See also* Leong v. Takasaki, 520 P.2d 758 (Haw. 1974). Arthur Goodhart, *The Shock Cases and Area of Risk*, 16 Mod. L. Rev. 14, 25 (1953) ("[I]t is a gloomy view of human nature which suggests that the sight of the death or injury of someone [other than a close family member] cannot create such a shock.").

[117] Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968).

> foreseeable, it is that the witness will suffer mental anguish and resulting physical injuries upon observing the injury to the victim.[118]

It is unclear whether the word "related" in *Dillon* refers to the sense of being "connected by reason of an established or discoverable relation," which could encompass the human companion/companion animal relation, or whether it was meant in its sense of being "connected by common ancestry or sometimes by marriage," which would not encompass the relationship between humans and companion animals.[119] The handful of courts that have discussed this relationship for the purposes of compensation for either negligent or intentional infliction of emotional distress have not agreed.

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[118] SPEISER 1, *supra* note 89, § 16.27, at 1129-30; Marlowe, *supra* note 92, at 809 & n. 149. *See, e.g.*, Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 570 (La. 1990) (noting that a plausible argument can be made that "the test [for recovery] should not be blood or marriage, but whether [the factfinder] is convinced from all the facts that there existed such a rapport between the victim and the one suffering shock as to make the causal connection between the defendant's conduct and the shock understandable" (quoting 12 F. STONE, LOUISIANA CIVIL LAW TREATISE TORT DOCTRINE § 170 (1977))); Kriventsov v. San Rafael Taxicabs Inc., 229 Cal. Rptr. 768 (Ct. App. 1986) (uncle and nephew were sufficiently close); James v. Lieb, 375 N.W.2d 109, 115 (Neb. 1985) (requiring a "marital or intimate familial relationship between the plaintiff and the victim . . . would not eliminate aunts, uncles, and grandparents from the class of potential plaintiffs, but it would place upon them a heavier burden of proving significant attachment"); Goncalvez v. Patuto, 458 A.2d 146, 151 (N.J. Super. Ct. App. Div. 1983) (in light of the Book of Samuel's story of the poor man and the ewe lamb, the court's statement that the "strength, interdependence, and unique emotional commitments of [the sibling] relationship have been recognized at least as far back as the Book of Genesis," is interesting); Portee v. Jaffee, 417 A.2d 521, 528 (N.J. Super. Ct. App. Div. 1980) (requiring "a marital or intimate, familial relationship between plaintiff and the injured person"); Keck v. Jackson, 593 P.2d 668, 670 (Ariz. 1979) ("[T]he emotional distress must result from witnessing an injury to a person with whom the plaintiff has a close personal relationship, either by consanguinity or otherwise."); Dzionkonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978) (same); Mobaldi v. Regents of the Univ. of Cal., 127 Cal. Rptr. 720, 726 (App. Ct. 1976) (in holding that a foster mother could recover when the victim was a foster child, the court said that "the emotional attachments of the familial relationship and not the legal status" are determinative); D'Ambra v. United States, 338 A.2d 524, 531 (R.I. 1975) ("Personal relationship may link people together more tightly, if less tangibly, than any mere physical and chronological proximity."); Hunsley v. Giard, 553 P.2d 1096, 1103 (Wash. 1976) ("We decline to draw an absolute boundary around the class of persons whose peril may stimulate mental distress."); Leong v. Takasaki, 520 P.2d 758, 766 (Haw. 1974) (plaintiff can recover for emotional distress resulting from witnessing the death of his step-grandmother with whom he had a close relationship). *But see, e.g.*, Idemudia v. Consolidated Rail Corp., 895 F. Supp. 162, 165 (E.D. Mich. 1995) (aunt was not the "immediate family member" required for negligent infliction of emotional distress); Reynolds v. State Farm Mut. Auto Ins. Co., 611 So. 2d 1294 (Fla. Dist. Ct. App. 1992), *rev. denied*, 623 So. 2d 494 (1992) (denied recover to fiancee as no close familial relationship existed with an especially close emotional attachment); Clomon v. Monroe City Sch. Bd., 572 So. 2d 571 (La. 1990) (driver of car who killed a boy she did not know could not collect against negligent school bus driver for emotional distress under the "bystander rule"); Devereux v. Allstate Ins. Co., 557 So. 2d 1091, 1098 (La. 1990) (driver who killed a negligent pedestrian who was "practically a stranger" to him could not recover for negligent infliction of emotional distress against the insurer of the pedestrian); Trapp v. Schuyler Constr., 197 Cal. Rptr. 411, 412 (Ct. App. 1983) (recovery denied when first cousins involved).

[119] *Compare* Webster's Ninth New Collegiate Dictionary 994, definitions 1 and 2.

The Supreme Court of Alaska and the Idaho Court of Appeals have held that the relationship between a companion animal and her human companion is sufficiently close to permit recovery of damages for intentional infliction of emotional distress.[120] The Supreme Court of Tennessee has held that the threat by a veterinarian to kill a dog because of unpaid fees suffices for intentional infliction of emotional distress.[121] The Supreme Court of Hawaii has permitted the recovery of negligently inflicted emotional distress damages for injury to a companion animal.[122] On the other hand, several courts have prohibited a human companion from recovering for negligent infliction of emotional distress on the ground that the emotional distress was not suffered as a result of the death or injury of a human family member within the required degree of consanguinity[123] or because the companion animal was property.[124] The critical issue, however, should not be whether companion animals are technically "family." Family members should certainly be eligible to recover noneconomic damages when they see another family member killed. But "family" is not an end in itself, but merely a means to assure foreseeability and reasonable limitation of the liability of a negligent tortfeasor. As previously shown in Section III, companion animals are sufficiently "family" so as to ensure forseeability and reasonable limitations on liability.

V. Liability for Emotional Distress and Loss of Society for the Deaths of Children and Companion Animals

A. Wrongful Deaths of Children

In 1808 Lord Ellenborough declared that, insofar as the common law was concerned, "the death of a human being could not be complained of."[125] Speiser scoffed at this "off-hand remark[ ]" claiming that it was based neither "on precedent or logic."[126] Lord Ellenborough was branded by Holdsworth as "the victim of . . . confusion of ideas,"[127] by Prosser, in the fourth edition of his classic *Law of Torts*, as a judge "whose forte was

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120 Croft by Croft v. Wicker, 737 P.2d 789, 792 (Alaska 1987); Richardson v. Fairbanks North Star Borough, 705 P.2d 454, 456 (Alaska 1985); Gill v. Brown, 695 P.2d 1276, 1277-78 (Idaho Ct. App. 1985).

121 Lawrence v. Stanford, 655 S.W.2d 927 (Tenn. 1983).

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

123 Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691 (Iowa 1996) (Iowa law requires that the plaintiff and victim be related to the second degree of consanguinity).

124 Fowler v. Ticonderoga, 516 N.Y.S.2d 368, 370 (App. Div. 1987) ("Although plaintiff may have observed the killing of his dog . . . the alleged tort involved personal property, not a family member."); Roman v. Carroll, 621 P.2d 307, 308 (Ariz. Ct App. 1980) (no claim because the dog was property).

125 Baker v. Bolton, 170 Eng. Rep. 1033 (1808). In contrast, the civil law routinely permits emotional distress damages for wrongful death. Stuart M. Speiser et. al., 1 Recovery For Wrongful Death and Injury, § 3.54 , at 251-56 (3d ed. 1992) [hereinafter Speiser 2] .

126 Speiser 2, *supra* note 125, § 1.1, at 1-4, 1-14.

127 William Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. Rev. 431, 435 (1916).

never common sense,"[128] and by Pollack as the originator of "one of the least rational parts of our law."[129] But the confusion or irrationality in the common law was not Lord Ellenborough's. The prominent Near-Eastern scholar, Jacob J. Finkelstein, persuasively argued that Ellenborough "was in fact stating nothing which was not already the established law in England for hundreds of years."[130] Educated by Finkelstein, Prosser's fifth edition omitted the insult to Ellenborough's common sense and conceded that he had ruled "perhaps in line with the understanding of his time."[131]

What lay at the core of Lord Ellenborough's holding was the centuries-old belief, derived from the Old Testament, that sacred human life transcended any other value. It was therefore deemed impossible to equate human life with anything that human society could provide, including money.[132] In 1868, the Michigan Supreme Court reiterated this biblical view by upholding the common law's denial of recovery for wrongful death.

> [T]he reason for the rule is to be found in that natural and almost universal repugnance among enlightened nations to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard, a repugnance which seems to have been strong and prevalent among nations in proportion as they have been or become more enlightened and refined, and especially so where the Christian religion has exercised its most beneficent influence, and where human life has been held most sacred . . . [t]o the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting.[133]

This, Finkelstein recognized was "at once a 'fleshing-out' of the skeletal frame of Lord Ellenborough's terse statement, and an engagingly artless—and non-legalistic—profession of the Western or 'Judeo-Christian' position on the subject of human life."[134]

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128 WILLIAM P. PROSSER, PROSSER ON THE LAW OF TORTS § 127, at 901 (4th ed. 1971).

129 FREDERICK POLLACK, TORTS 62, 63 (13th ed. 1939).

130 Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notions of Sovereignty*, 46 Temp. L. Q. 169, 178-79, 196-97 (noting that "[f]rom the time that wrongful death became a Crown Plea hundreds of years earlier, i.e., after Western or 'Judeo-Christian' moral categories and their legal implications had displaced the earlier Roman and Anglo-Saxon traditions respecting homicide . . . no possibility existed for the private recovery of damages in such instances"). *See, e.g.*, Percy H. Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239, 253 (1929) ("We should be inclined to regard Lord Ellenborough's dictum . . . as an accurate statement of English law as he knew it."); Admiralty Commissioners v. S. S. Amerika, 1917 App. Cas. 38, 52 (P.C. 1916) (appeal taken from C.A.) (The House of Lords in 1916 held that although the felony-merger doctrine was no longer part of the law, the rule against recovery for wrongful death should continue except as modified by statute). *See also*, Wise 1, *supra* note 14, at 476-88.

131 KEETON ET AL., *supra* note 9, § 127, at 945 (quoting Jacob Finkelstein).

132 Finkelstein, *supra* note 130, at 173, 196, 253.

133 Hyatt v. Adams, 16 Mich. 180, 191-92 (1868).

134 Finkelstein, *supra* note 130, at 179. *E.g.*, King v. Henkie, 80 Ala. 505 (1886); Connecticut Mut. Life Ins. Co. v. New York & New Haven R.R., 25 Conn. 265 (1856); Worley v. Cincinnati, H & D. R.R., 1 Handy 481 (Ohio 1855).

Ellenborough's holding "became a magical incantation recited by rote, without any critical examination, by hundreds of decisions in the various courts throughout the length and breadth of the United States."[135] The United States Supreme Court, however, could find no "clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies."[136] Unable to discern a reason to adopt it other than it "had the blessing of age," and the Court refused to incorporate it into General Maritime Law.[137]

When courts declared this principle impossible to uproot, the legislatures of England and the American states were forced to act.[138] In 1846, the English Parliament enacted Lord Campbell's Act, which granted wrongful death damages to survivors of the victims of wrongful death.[139] Because damages for such noneconomic damages as emotional distress and loss of society were highly disfavored in the absence of physical impact to the plaintiff, it should come as no surprise to learn that English judges, "alarmed at the difficulty of evaluating the impalpable injuries to sentiments and affections because of death," permitted recovery only for a survivor's pecuniary damages.[140] Lord Campbell's Act, it was said, had been enacted for the purpose of compensating families, "not for solacing their wounded feelings."[141]

Most American states modeled their wrongful death statutes after Lord Campbell's Act and either explicitly limited recovery to pecuniary damages or their statutes were so interpreted by their courts.[142] A small number of states included the value of the decedent's loss of society within the meaning of pecuniary.[143] But few statutes enacted in common law jurisdictions have permitted the recovery of damages for grief, bereavement, or emotional distress, though many now allow damages for

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135 SPEISER 2, *supra* note 125, § 1.1, at 1-4. *See also* KEETON ET AL., *supra* note 9, § 127, at 945. Massachusetts, Hawaii, and General Maritime Law are the only American jurisdictions in which wrongful death has been held to be nonstatutory. Gaudette v. Webb, 284 N.E.2d 222 (Mass. 1972) (the right underlying the cause of action was of common law origin, though the wrongful death statute specified the procedure for recovery and the damages that could be recovered); Kake v. Horton, 2 Hawaii 209 (1860); Moragne v. State Marine Lines, Inc., 398 U.S. 375 (1970).

136 *Moragne*, 398 U.S. at 381.

137 *Id.* at 386.

138 *E.g.*, Grosso v. Delaware, L.&W. R.R. Co., 13 A. 233, 236 (N.J. 1888) ("[T]he rule has become so solidified that whatever its original reason was, and however such reason may have ceased to exist, it cannot be judicially disregarded or annulled, but, if injurious, its further modification must be sought from legislative action."); Green v. Hudson River R.R., 28 Barb. 9, 15 (N.Y. 1858) ("But I suppose the question has been too long settled, both in England and in this country, to be disturbed . . .").

139 Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93 (Eng.).

140 KEETON ET AL., *supra* note 9, § 127, at 951. *See* Blake v. Midland R.R., 118 Eng. Rep. 35 (1852); Gillard v. Lancashire & Y.R.R., 12 LT 356 (1848).

141 *Blake*, 118 Eng. Rep. at 43.

142 SPEISER 2, *supra* note 125, § 3.1, at 5-12, § 3.49, at 308-13, 318-19; KEETON ET AL., *supra* note 9, § 127, at 951 ("it is the general rule that only pecuniary loss is to be considered").

143 SPEISER 2, *supra* note 125, § 3.1, at 15.

loss of society.[144] This is because they continue to characterize human death as an inestimable loss.[145] Speiser cogently criticizes the frequent limitation of wrongful death damages to pecuniary losses in terms which are useful when arguing in favor of wrongful death damages for companion animals.[146] "It is obvious," he says," that in most death cases, the emotional impact of the loss of the beloved person is at least equal to, if not greater than, the 'pecuniary' loss involved."[147]

In short, with sporadic exceptions, the common law provides no remedy whatsoever for the wrongful death of a child. Grieving parents are left with inadequate statutory remedies, usually modeled upon Lord Campbell's Act, which were enacted at a time when damages for emotional distress and loss of society were highly disfavored. Therefore these statutes rarely permit the recovery of damages for emotional distress, though many now allow damages for loss of society.

B. Wrongful Deaths of Companion Animals

1. Introduction

The common law regards companion animals as it regards nonhuman animals in general: they are personal property, legal things.[148] Courts have usually denied damages for emotional distress to plaintiffs whose property has been destroyed for some of the same reasons they traditionally denied nonpecuniary damages to plaintiffs who suffered emotional distress in the absence of a physical bodily impact.[149] Here we routinely encounter formalistic (as opposed to formal) legal reasoning by which judges ritualistically intone the "animals as property" syllogism.

Unsurprisingly, formalistic reasoning often results in excessively arbitrary decisions utterly detached from the reality of the relationships be-

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144 SPEISER 2, *supra* note 125, § 3.52, at 243-44; KEETON ET AL., *supra* note 9, § 127, at 951. *See also* MacCuish v. Volkswagenwerk A.G., 494 N.E.2d 390, 398 (Mass. App. Ct. 1986). In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, *reh'g den.* 415 U.S. 986 (1974), the United States Supreme Court consciously fashioned the General Maritime Law rule for recovery of wrongful death damages after the damages provided by the majority of the states and allowed the award of damages for loss of society, but not for emotional distress. This decision was later criticized by scholars:

> In what may be the least convincing footnote (No. 17) in the history of our jurisprudence, Justice Brennan cautioned that "Loss of society must not be confused with mental anguish or grief, which are not compensable under the maritime wrongful death remedy. The former entails the loss of positive benefits, while the latter represents an emotional response to the wrongful death." The reason for this curious distinction taken in the footnote may have been that several Circuit Courts of Appeal, in post-*Moragne* cases, had concluded that damages for what was most often called 'survivor's grief' were not recoverable in *Moragne* death actions.

GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 372 (2d ed. 1975).

145 SPEISER 2, *supra* note 125, § 3.52.

146 *See infra* Section V.

147 SPEISER 2, *supra* note 125, § 3.55.

148 *See generally* Wise 1, *supra* note 14, for a detailed examination of how nonhuman animals "attained" legal thinghood.

149 4 Marilyn Minzer et al., Damages in Tort Actions § 37.30, at 37-112 (1997).

tween humans and companion animals. Since Roman times, law has partitioned the material world into things and persons.[150] It has never divided them according to the degree to which humans were emotionally attached to them. At one time, women, children, human slaves, and nonhuman animals were all "things" under Roman law.[151] In nineteenth century America, a slave owner was entitled only to the market value of a lost slave, because a slave, though human, generally had only economic value to the slave owner.[152] On the other hand, modern courts often recognize that human fetuses may be the objects of emotional attachments sufficiently intense to sustain claims for noneconomic damages when the fetuses are killed.[153]

We must therefore determine whether nonarbitrary, rational, and sufficiently weighty policy considerations exist that justify encroachment upon the overarching principle that the owner of a companion animal wrongfully killed should not be fully compensated for her injury. And if every alternative is arbitrary, we must choose the least arbitrary.

At the outset this article notes that property and emotional distress came together long ago. "The loss of marital rights is a species of mental distress."[154] Property rights beat at the heart of the long-established common law causes of action of a husband (though not his wife) for loss of consortium, criminal conversation, and for alienation of affections. Loss of consortium existed because a wife was considered her husband's servant, and both servants and wife were his chattels.[155] "He was allowed damages for injury to her in much the same manner that he would have been allowed damages for the loss or injury to one of his domestic animals."[156] Interference with his property interest in the wife could also support an action for trespass.[157] One reason that the tort of alienation of affections

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150 THOMAS C. SANDARS, THE INSTITUTES OF JUSTINIAN 26 (1984).

151 *Id.* at 50.

152 *See, e.g.*, Ellis v. Welch, 4 Rich. 468 (S.C. 1851).

153 *See* Carey v. Lovett, 622 A.2d 1279, 1287 (N.J. 1993) ("The unique relationship between a pregnant woman and her baby mitigates the need for the additional requirements for an 'indirect claim' for emotional distress . . . .The maternal-fetal relationship bespeaks the genuineness of an otherwise-valid claim for emotional distress."); Johnson v. Ruark Obstetrics & Gynecology Assoc., 395 S.E.2d 85, 98 (N.C. 1990) (both parents of the fetus could sue for negligent infliction of emotional distress); Sesma v. Cueto, 181 Cal. Rptr. 12, 15 (Ct. App. 1982) ("whether a fetus is a person for wrongful death purposes is not determinative . . . of whether the prospective mother can have a relationship with the fetus which would sustain a . . . cause of action for emotional distress when a parent witnesses the tortious death of a child"); Johnson v. Superior Court of Los Angeles County, 177 Cal. Rptr. 63, 65 (Ct. App. 1981) ("Whether or not a fetus is a person for wrongful death purposes is not determinative of whether a prospective parent can have a relationship with the fetus which would sustain" an action for negligent infliction of emotional distress.).

154 KEETON ET AL., *supra* note 9, § 124, at 923.

155 Jacob Lipman, *The Breakdown of Consortium*, 30 Colum. L. Rev. 651, 653 (1930). Moreover, "(t)here was an early writ of 'ravishment' which listed the wife with the husband's chattels." KEETON ET AL., *supra* note 9, § 124, at 917.

156 Kronbitter v. Washburn Wire Co., 151 N.E.2d 898, 899 (N.Y. 1958), *overruled by* Millington v. Southeastern Elevator Co., 239 N.E.2d 897 (N.Y. 1968).

157 Lipman, *supra* note 155, at 653, 656.

was abolished was because it was "rooted in ideas . . . involving wives as property"[158] and because it was seen as "compelling what appears to be a forced sale of the spouse's affections."[159] Similarly, a property right justified the common law right of a father to receive damages for emotional distress and loss of society for the abduction and seduction of his child, though jurisdictions split on whether emotional distress damages were available for tortious infliction of injury upon a child.[160]

Other examples exist. Family members can usually recover damages for emotional distress against one who wrongfully interferes with the dead body of a relative.[161] According to comment (a) of section 868 of the *Restatement (Second) of Torts*, "[t]he technical basis of the cause of action is the interference with the exclusive right of control of the body, which frequently has been called by the courts a 'property' or a 'quasi-property' right."[162]

Separate from claims for emotional distress is the independent common law tort of loss of companionship.[163] Loss of companionship is intimately related to traditional claims for loss of consortium derived from the marriage relationship (anchored in property rights, as explained above).[164] It has occasionally been extended to cover such unmarrieds as those living in stable and significant relationships,[165] parents deprived of the normal full companionship and society of a child,[166] and children deprived of the companionship and society of their parents.[167]

The common law's refusal to permit compensation for the deaths of human beings, therefore, has no relevance to whether human companions

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158 Fundermann v. Mickelson, 304 N.W.2d 790, 791 (Iowa 1981). *See, e.g.*, Price v. Price, 60 N.W. 202, 203 (Iowa 1894) (the court noted that "under the common law the title to the personal property of the wife was vested in the husband; that he was entitled to her labor, or the proceeds of it; and that an injury to her was, in contemplation of the law, an injury to him alone"); Duffies v. Duffies, 45 N.W. 522 (Wis. 1890) (the court noting that in common law, "The wife was not only inferior to the husband, but she had no personal identity separate from her husband"); Foot v. Card, 18 A. 1027, 1028 (Conn. 1889) ("So far forth as the husband is concerned, from time immemorial the law has regarded his right to the conjugal affection and society of his wife as a valuable property.").

159 Wyman v. Wallace, 615 P.2d 452, 455 (Wash. 1980).

160 Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 693-95 (Mass. 1980).

161 SPEISER 1, *supra* note 89, § 16.31, at 1150-51.

162 RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (1979).

163 Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E.2d 1084, 1086 (Ill. App. Ct. 1987). Loss of companionship, and in fewer cases, emotional distress, may be separate elements of damages in statutory wrongful death claims. Keeton et al., *supra* note 9, § 127, at 951-52. *See also* Frank v. Superior Court, 722 P.2d 955 (Ariz. 1986) (loss of companionship and society are recognized as the primary components of a wrongful death action); Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 556 (Mass. 1973) (tracing the history of the spousal consortium claim).

164 KEETON ET AL., *supra* note 9, § 125, at 932. In those states that restrict claims for loss of companionship to married couples, the chances of obtaining such damages for the loss of one's companion animals are low indeed. *Id.*

165 Butcher v. Superior Court, 188 Cal. Rptr. 503 (Ct. App. 1983).

166 Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975); Keeton et al., *supra* note 9, § 125, at 934.

167 Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 693-5 (Mass. 1980); Keeton et al., *supra* note 9, § 125, at 936.

should be compensated for the deaths of their companion animals. This is because the common law bar to human wrongful death action was firmly rooted in the perceived radical incommensurability between humans and anything else in the universe.[168] In contrast, there has never been a common law bar to prosecuting companion animals wrongful death cases. No incommensurability between nonhuman animal life and money has ever been claimed. Legislatures have never enacted restrictive nonhuman animal wrongful death statutes.

While the very pervasiveness of wrongful death statutes enacted since Lord Campbell's Act strongly signals that human lives are no longer deemed incommensurable with money, the long common law prohibition has led nearly every American court to defer to whatever compensation schemes the legislatures generated.[169] This is true even though many wrongful death statutes remain modeled on initial restrictive interpretations of Lord Campbell's Act. Legislative limitations on human wrongful death recovery, restrictive and unfair as they may sometimes seem, therefore present no obstacles to damage awards for emotional distress and loss of society for the wrongful deaths of companion animals. They were enacted in abrogation of a common law that does not concern companion animals.[170] Common law judges remain free to re-examine the fairness and justice of denying damages for emotional distress and loss of society for the wrongful death of companion animals in light of the evolution of modern attitudes towards companion animals, noneconomic damages, and the fundamental principles of tort.

2. *Companion Animals as Property, Family, and Self*

a. *Five Theories of Recovery for the Wrongful Deaths of Companion Animals*

The most cursory examination of the modern cases on the recovery of damages for companion animal wrongful death reveals an important commonality. Judges fail to mention any *present* policy reason for continuing the ancient, but now anachronistic, rule. Typically, courts invoke the "animals as property" syllogism in reliance upon cases decided long ago when the common law frequently rejected damages for emotional distress and loss of society even for human beings. However, an owner of a com-

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[168] It would make no difference if, as has sometimes been claimed, the bar on human wrongful death actions was actually the consequence of the English felony-merger doctrine, by which an act that constituted both a tort and a felony was pre-empted by the punishment of death of the felon and the forfeiture of his property to the Crown, leaving no property to obtain through a civil action. Moragne v. State Marine Lines, Inc., 398 U.S. 375, 383 (1970). It is ironic that the killing of a companion animal was not a felony under English law. *See infra* note 213 and accompanying text.

[169] SPEISER 2, *supra* note 125, § 3.1, at 5-12, § 3.49, at 308-13, 318-19; KEETON ET AL., *supra* note 9, § 127, at 951 (noting that "it is the general rule that only pecuniary loss is to be considered").

[170] *See* Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 563-64 (La. 1990) (it was long the law in Louisiana that mental anguish could be recovered for injury to property, but not for injury to family members).

panion animal wrongfully killed might recover damages under at least five theories of recovery.

First, it has been generally, but not universally, recognized that where a defendant commits a willful tort—and especially when the tort is committed with malice or ill-will and it might reasonably be expected to lead to considerable mental disturbance of the plaintiff—compensatory damages for that mental disturbance and its physical consequences may be awarded. This is true even when, aside from the property damage, no independent cause of action would have arisen.[171] The intentional character of the tortfeasor's conduct alone is said to assure the genuineness of any claimed emotional distress.[172]

Accordingly, the malicious or intentional destruction of a companion animal has often justified the award of emotional distress damages.[173] In a pair of veterinary malpractice cases in which veterinarians were both times alleged to have inflicted severe burns upon the plaintiffs' dogs through their gross negligence by leaving them on a heating pad for a long period of time, a Florida Court of Appeals permitted the recovery of emotional distress, both when one dog died from the burns and when one did not.[174] Several states have held that a human companion of a companion animal, or at least one entitled to possession, may recover damages for the emotional distress that results from the conversion of her companion animal.[175]

In a connected matter, it has been suggested that the award of punitive damages against a defendant who intentionally harms a nonhuman animal may actually act as a *substitute* for the award of otherwise forbidden emotional distress damages.[176] However, this suggestion is probably mistaken. First, the purposes of punitive and compensatory damages are not the same, as illustrated by the fact that Florida courts have permitted

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171 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, 1077, 1089-90 (1953).

172 *See, e.g.*, Bowen v. Lumbermans Mut. Cas. Co., 517 N.W.2d 432, 440 (Wis. 1994) (discussing the tort of intentional infliction of emotional distress, the court noted that the "outrageous conduct itself could serve to authenticate the plaintiff's emotional distress").

173 *See, e.g.*, La Porte v. Associated Independents, Inc., 163 So. 2d 267, 269 (Fla. 1964) (killing of dog by hurling garbage can was malicious and demonstrated extreme indifference to plaintiff's rights).

174 *See* Johnson v. Wander, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (dog did not die); Knowles Animal Hosp. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1979), *cert. denied*, 368 So. 2d 1369 (Fla. 1979) (dog died). *But see* Fowler v. Ticonderoga, 516 N.Y.S.2d 368, 370 (App. Div. 1987) (emotional distress damages not available for malicious killing, as dog is personal property).

175 *See* Peloquin v. Calcasieu Parish Police Jury, 367 So. 2d 1246, 1251 (La. Ct. App. 1979) (cat); Linceum v. Smith, 287 So. 2d 625, 629 (La. Ct. App. 1973), *writ denied*, 290 So. 2d 904 (La. 1974) (dog); Brown v. Crocker, 139 So. 2d 779, 781 (La. Ct. App. 1962) (mare); Fredeen v. Stride, 525 P.2d 166, 168 (Or. 1974) (when veterinarian gave plaintiff's dog away after being paid to euthenize him, the court ruled that awarding emotional distress damages is proper if mental suffering is the direct and natural result of the conversion).

176 1 Dan B. Dobbs, DOBBS LAW OF REMEDIES § 5.15(1), at 899-900 (2d ed. 1993).

the award both of emotional distress and punitive damages.[177] Second, the only reported case in which this substitute concept was invoked was ostensibly overruled because the same state supreme court declined to follow its previous holding.[178]

The second through fifth theories of recovery concern damages due to emotional distress and/or loss of society for the wrongful death of a companion animal caused unintentionally. The second is the most common theory of common law recovery: the fair market value at the time of the wrongful death. It depends upon the now-familiar "animals as property" syllogism.[179] Similarly, in one of the only cases to discuss whether the tort of loss of companionship could be invoked for the death of a companion animal, the Illinois Court of Appeals said it could not.[180] The court observed that loss of companionship was an element of damages for the wrongful death of a human being, pursuant to the Illinois Wrongful Death Act.[181] However, the court distinguished cases involving the wrongful deaths of human beings from a claim for the wrongful death of a companion animal by invoking the "animals as property" syllogism.[182]

Courts that still reject common law claims for noneconomic damages for the unintentionally caused deaths of companion animals rely not upon modern scientific knowledge, public policy, or legal reasoning, but upon decisions that derive from scientific knowledge, public policy, and legal reasoning of the nineteenth century or earlier. Then, the common law was unremittingly hostile to claims for emotional distress and loss of companionship generally in the absence of a physical impact to the plaintiff. In a paradigm of formalistic reasoning, these courts perversely authorize the award of damages for an economic loss that human companions of com-

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177 *See Johnson*, 592 So. 2d at 1225 (allowing for both types of damages); *Knowles Animal Hosp.*, 360 So. 2d at 38-39 (recognizing both emotional distress and punitive damages).

178 Wilson v. City of Eagan, 297 N.W.2d 146, 150-51 (Minn. 1980) (the Minnesota Supreme Court allowed the owner of a cat to recover punitive damages from a municipal animal warden who had the cat killed). *But see* Independent Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728, 732 (Minn. 1994) (here the Court held that punitive damages cannot be recovered when the plaintiff only suffered property damage). *See also* Soucek v. Banham, 524 N.W.2d 478, 479-80 (Minn. Ct. App. 1995) (the state appellate court held that a dog owner could not seek punitive damages against the city and the police officers that shot his dog).

179 *E.g.*, Richardson v. Fairbanks North Star Borough, 705 P.2d 454, 456 (Alaska 1985) (dog); Paul v. Osceola County, 388 So. 2d 40, 40-41 (Fla. Dist. Ct. App. 1980) (cat); Gill v. Brown, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985) (donkey); Nichols v. Sukaro Kennels, 555 N.W.2d 689, 692 (Iowa 1996) (dog); *Soucek*, 524 N.W.2d at 481 (dog); Stettner v. Graubard, 368 N.Y.S.2d 683, 684 (Town Ct. 1975) (dog); Green v. Leckington, 236 P.2d 335, 337 (Or. 1951) (dog); Daughen v. Fox, 539 A.2d 859, 864 (Pa. Super. Ct. 1988) (dog); Julian v. DeVincent, 184 S.E.2d 535, 536 (W.Va. 1971) (dog). *See* Dobbs, *supra* note 176, § 5.13(1), at 835, 837, § 5.15(3), at 898; Barton & Hill, *supra* note 20, at 433. *See also* MINZER, *supra* note 149, § 37.22[5], at 37-67; Annotation, *Measure and Elements of Damages for Killing or Injuring Dog*, 1 A.L.R. 3D 997 (1965).

180 Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E.2d 1084, 1086 (Ill. App. Ct. 1987).

181 *Id.* at 1085-86.

182 *Id.* at 1086 (wrongful death cases "involve human beings, not dogs. In the eyes of the law, a dog is an item of personal property. The ordinary measure of damages for personal property is the fair market value at the time of the loss" (citations omitted)).

panion animals wrongfully killed do *not* suffer and fail to compensate human companions for the emotional distress and loss of society that they *do*.

Some courts and the *Restatement (Second) of Torts* deny that fair market value is the proper measure of damages when destroyed property has no market value, or where the value of the destroyed property to the owner is greater than the market value, and instead use a third theory of recovery.[183] They permit an award of damages equal to the actual value of the companion animal to the owner or equal to the companion animal's intrinsic value.[184] The *Restatement (Second) of Torts* states that "[t]he phrase 'value to the owner' denotes the existence of factors *apart* from those entering into exchange value that causes the article to be more desirable to the owner than to others."[185] However, this measure of damages remains based upon the actual monetary loss to the owner and usually does not include sentimental value or emotional distress.[186] In recognition of the fact that each companion animal is unique in the way that a photograph or heirloom may be unique, a few courts have included sentiment or loss of society in the calculus, so long as it is not mawkish.[187] The law of these jurisdictions is not *as* unfair as the law that restricts recovery to fair market value. But it remains anchored in the erroneous notion that the value of a companion animal and her human companion is substantially economic. It therefore remains perverse, if less so, in the same way that the law that completely restricts damages to market value is perverse.

Both the market value and value to the owner theories of damages arbitrarily and unfairly undermine the fundamental common law principle of tort recovery to which every common law jurisdiction generally adheres.[188] In harmony with it, some jurisdictions apply a fourth theory of recovery and permit sentimental value to be directly considered when the

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183 Landers v. Municipality of Anchorage, 915 P.2d 614, 618 (Alaska 1996).

184 *Cf. Daughen*, 539 A.2d at 864 (dog not a unique chattel).

185 RESTATEMENT (SECOND) TORTS § 911 cmt. e (1979) (emphasis added).

186 *Landers*, 915 P.2d at 618.

187 *See Jankoski*, 510 N.E.2d at 1086 (dog); Green v. Boston & Lowell R.R., 128 Mass. 221, 226-27 (1880) (oil portrait of dead parent); Zager v. Dimilia, 524 N.Y.S.2d 968 (Vill. Ct. 1988) (should consider value of emotional bond between dog and family members, without taking sentiment into account); Brousseau v. Rosenthal, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980) (loss of a dog's companionship); Brown v. Frontier Theatres, Inc., 369 S.W.2d 299 (Tex. 1963) (heirloom); Mieske v. Bartell Drug Co., 593 P.2d 1308, 1311 (Wash. 1979) (developed movie film); Harvey v. Wheeler Transfer & Storage Co., 277 N.W.2d 627, 629 (Wis. 1938) (keepsakes). *See also* Dobbs, *supra* note 176, § 5.13(1), at 838-39, § 5.15(3), at 899-900; Barton & Hill, *supra* note 20, at 416-21. *Cf.* Pearson, *supra* note 45, at 502-03 (in the circumstance of bystander negligent infliction of emotional distress, "[w]hat makes Mrs. Dillon's fear [in Dillon v. Legg. 441 P.2d 912 (Cal. 1968)] for her daughter's safety such an intense emotional experience is her daughter's irreplaceability").

188 In Wisconsin this common principle is expressed as "when the negligent act of the defendant culminates in damage to person or property, a cause of action is created in the plaintiff, and he may, as an incident to his recovery, have all the damages which proximately flow from the violation of his right." Borde v. Hake, 170 N.W.2d 768, 771 (Wis. Ct. App. 1969), *overruled on other grounds by* Heifetz v. Johnson, 211 N.W.2d 834 (Wis. 1973) (quoting Booth v. Frankenstein, 245 N.W. 191, 193 (Wis. Ct. App. 1932)).

value of even inanimate personal property derives primarily from sentiment, as opposed to economics or uniqueness.[189] The Indiana Court of Appeals has said that "[t]he underlying principle of universal application is that the fair and just compensation for the loss or damage sustained . . . . Where subordinate rules for the measure of damages (fair market value for personal property) run counter to the paramount rule of fair and just compensation, the former must yield to the principle underlying all such rules."[190] The Court was "referring to the feelings generated by items of almost purely sentimental value . . . . What we are referring to are those items generally capable of generating sentimental feelings, not just emotions peculiar to the owner. In other words, any owner [of the property] would have similar feelings."[191] Similarly, in *Brown v. Frontier Theatres, Inc.*,[192] the Supreme Court of Texas said that the usual rule denying recovery for sentimental value for the loss of personal property

> is not the rule to be applied in a suit to recover for the loss or destruction of items which have their primary value in sentiment.
>
> It is a matter of common knowledge that items such as these generally have no market value which would adequately compensate their owner for their loss or destruction. Such property (heirlooms) is not susceptible of supply and reproduction in kind, and their greater value is in sentiment and not in the market place. In such cases the most fundamental rule of damages that every wrongful injury or loss to persons or property should be adequately and reasonably compensated requires the allowance of damages in compensation for the reasonable special value of such articles to their owner taking into consideration the feelings of the owner for the property.[193]

American jurisdictions influenced by the corresponding civil law principle agree. In the civil law, "one who causes harm to another accepts the corresponding obligation to repair the damage fully."[194] In *Infante v. Leith*,[195] the Puerto Rico Supreme Court permitted the recovery of emotional distress damages suffered by the human companion of a dog who was seriously injured after being attacked by another dog.[196] And while lower Louisiana appellate courts have split on whether emotional distress

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189 *Landers*, 915 P.2d at 619.

190 Campins v. Capels, 461 N.E.2d 712, 720 (Ind. Ct. App. 1984) (quoting Aufderheide v. Fulk, 112 N.E. 399, 400 (Ind. Ct. App. 1916)).

191 *Id.* at 721 (national championship rings and a free-form wedding band).

192 369 S.W.2d 299 (Tex. 1963).

193 *Id.* at 305. *E.g.*, Bond v. A.H. Bolo Corp., 602 S.W.2d 105, 109 (Tex. Ct. App. 1980) (when the "greater value [of personal property] is in sentiment . . . the most fundamental rule of damages that every wrongful injury or loss to persons or property should be adequately and reasonably compensated requires the allowance of damages in compensation for the reasonable special value of such articles to their owner taking into consideration the feelings of the owner for such property").

194 Silvia Rita Cooks, *Mental Anguish from Property Damage*, 3 S.U. L. Rev. 17, 17, 20 (1976-77) (citing Graham v. Western Union Tel. Co., 34 So. 91, 92 (1903)) (noting that article 1382 of the French Civil Code and article 2315 of the Louisiana Civil Code expressly require that all wrongs be compensated).

195 85 P.R.R. 24 (1962).

196 *Id.* at 34-37.

is compensable when caused by negligence towards property, the Louisiana Supreme Court has steadfastly ruled that it is compensable.[197]

The fifth theory of recovery may double as support for the fourth theory. Companion animals have no economic value; they are family, even quasi-children. But, they may also be metaphorical extensions of their owners. Professor Margaret Jane Radin has argued that what may be fungible to one human might be constitutive to another.[198] For example, a wedding ring may be fungible to the jeweler, but constitutive to a wife.[199]

> Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world . . . . One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder.[200]

Radin explains it in another valuable way: constitutive property

> is bound up with one's personhood, and is distinguishable from property that is held merely instrumentally or for investment and exchange and is therefore purely commercial or "fungible." One way to look at this distinction is to say that fungible property is fully commodified, or represents the ideal of the commodity form, whereas [constitutive] property is at least partially noncommodified.
>
> [Constitutive] property describes specific categories in the external world in which holders can become justifiably self-invested, so that their individuality and selfhood become intertwined with a particular object. The object then cannot be replaced without pain by money or another similar object of equivalent market value; the particular object takes on unique value for the individual. Only a few special objects or categories of objects are [constitutive] property. Other property items, which can be replaced by their equivalents or money at no pain to the holder, are merely fungible, that is not bound up with personhood.[201]

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197 *See generally* Cooks, *supra* note 194; Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 563-64 (La. 1990).

198 MARGARET JANE RADIN, REINTERPRETING PROPERTY 2 (1993). Radin originally contrasted "personal property" with "fungible property." Later, she confessed that she probably should have used the word "constitutive," instead of "personal," as personal property had other common meanings. *Id.* This article will adopt her later term of "constitutive property."

199 *Id.* at 16, 54.

200 *Id.* at 36-37, 44-53. Radin is careful to distinguish property that is appropriately constitutive from that which is the object of an inappropriate fetish. *Id.* at 38-44. She gives the example of the family home as properly constitutive, but not fetishistic. *Id.* at 54, 57, 60, 71, 154.

201 *Id.* at 81. "The distinction between fungible and [constitutive] property is intended to distinguish between, on the one hand, things that are really 'objects' in the sense of being 'outside' the person, indifferent to personal constitution and continuity, and on the other hand, things that have become at least partly 'inside' the person, involved with one's continuing personhood." Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849, 1880 n.117 (1987).

"The question whether something is [constitutive] has a *normative* aspect: whether identifying oneself with something—constituting oneself in connection with the thing—is justifiable . . . . There is no algorithm or abstract formula to tell us which items are (justifiably) [constitutive]. A moral judgment is required in each case."[202] Whether personal property is considered constitutive "depends upon whether our cultural commitments surrounding property and personhood make it justifiable for persons and a particular category of thing to be treated as connected."[203] Courts should not decide on an individual basis whether certain property is constitutive or fungible, but whether a class of property is one or the other.[204] This may not always be easy, as in Radin's view, "it makes more sense to think of a continuum that ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money."[205] Constitutive property "deserves, and in our system often receives, a higher level of respect and protection than property that is not."[206] Treating constitutive property as if it were fungible "is threatening to personhood, and alienates the person who is treated not as a whole person but as the holder of a fungible commodity."[207]

Companion animals are the kind of property that lies at the edge of the constitutive end of the fungible/constitutive continuum. The wrongful killing of one's companion animal may therefore threaten the way in which an owner constitutes herself: in losing her companion animal, she loses a vital part of herself. This metaphor of companion animals as constitutive of their owner's person may have legal consequences. To the degree that the wrongful death of a companion animal is understood as inflicting injury directly on the human companion herself, her claim against a tortfeasor for damages for the wrongful death of her companion animal could be understood as the claim of a person for damages to herself. It would therefore lie squarely within the centuries-old tort tradition of eligibility for damages for emotional distress and loss of companionship for injuries directly inflicted.[208]

b. The Inadequacy of the Reasons Given for Denying Damages for Emotional Distress and Loss of Society for the Wrongful Deaths of Companion Animals

For more than a century no American appellate court has re-examined the policy reasons behind refusals to adequately and reasonably

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202 Radin, *supra* note 201, at 1908 (emphasis added).

203 RADIN, *supra* note 198, at 18.

204 *Id.*

205 *Id.* at 53. "Self-investment in external objects seems to be a matter of degree, not either/or." *Id.* at 82.

206 *Id.* at 104.

207 *Id.* at 201. *See also* Radin, *supra* note 201, at 1881 (discussing what types of things should and should not be traded on the market).

208 *See* I. de S. et ux v. W. de S., Y.B. 22 Edw. 3, f. 99, pl. 60 (1348) (the court recognized the right to mental anguish damages when damages were awarded to the wife of a tavern keeper who avoided a hatchet thrown by a dissatisfied customer).

compensate people for the wrongful deaths of companion animals. What compelling and nonarbitrary policy reasons could today militate in its favor? As discussed, they would most likely fall into the two broad categories of historical development and convenience of administration.

Historically, owners of companion animals were denied common law damages for emotional distress and loss of society for the wrongful deaths of their companion animals, especially if they were negligently caused. Yet this rule of law developed when the common law was unreasonably suspicious of, and hostile to, claims of emotional distress, even for humans, and while it was entirely deaf to claims of damages for human wrongful deaths. But the refusal to award human wrongful death damages originated in a quality believed inherent just to human beings. Their lives were incommensurable with anything else, including money. Though the pervasiveness of wrongful death statutes enacted in the United States since Lord Campbell's Act has strongly signaled that human lives are no longer incommensurable with money, the long common law prohibition has led nearly every American court to fetter itself and to defer to whatever scheme the legislatures generated. The courts continue to do so even though many wrongful death statutes remain modeled on initial restrictive interpretations of Lord Campbell's Act.

The reasons advanced for denying damages for wrongful death and loss of society for the deaths of companion animals have been rare and unimpressive. It has been claimed that the reluctance to award damages for the destruction of property in general stems from the same reasons that courts have been reluctant to award damages for emotional distress for injury to human beings and why they imposed physical impact or physical manifestation requirements. Minzer states that courts have justified this on the grounds that:

> 1) Injuries to one's feelings cannot be anticipated and are not a proximate consequence of defendant's negligence; 2) such injuries are too vague and elusive to be left to the discretion of the jury; and 3) mental distress is too easily simulated and allowance of such claims would open the floodgates to fictitious claims and to litigation of trivialities based on hurt feelings and bad manners.[209]

These reasons are inadequate as applied to the wrongful death of companion animals. Only Minzer's first reason carries any force as it sounds in foreseeability. But courts that refuse claims for emotional distress for the destruction of property often concede that an owner's emotional distress may be foreseeable.[210] This is not true for the great majority of personal property. Pencils, paper, paperclips, juice glasses, flatware, and numerous other items can be destroyed without the owner caring about anything but the cost of replacement. This may even be true

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[209] MINZER ET AL., *supra* note 149, § 37.30, at 37-112.

[210] *E.g.*, Kleinke v. Farmers Coop Supply & Shipping, 549 N.W.2d 714, 716-17 (Wis. 1996) (noting that "such types of distress are not 'compensated because [they are] life experience[s] that all [unfortunately] may expect to endure'") (quoting Bowen v. Lumberman's Mut. Cas. Co., 517 NW.2d 432, 445 (Wis. 1994)).

for farm animals and other nonhuman animals that are considered by their owners as fungible and whose value to their human owners is merely economic.

But, as Nathan's story to David illustrates, humans do not create the same *kinds* of relationships with all their property, not even with all their nonhuman animals. The distinction between nonhuman animals, whose use is entirely economic, and companion animals, so obvious to King David three thousand years ago, remains obvious today. As far as the producer, the slaughterhouse worker, the processor, the grocer, and the consumer are concerned, one sheep may be the same as another. But this is not true for the human companion of a companion animal of any species.

Market value as a measure of damages only makes sense as compensation for the wrongful deaths of nonhuman animals whose owners consider them fungible, because that is the animals' value to them. But the failure to differentiate the death of a companion animal, whose value is noneconomic, and the death of a nonhuman animal, whose value is economic, not only repeats the error of Nathan's rich man, but ignores the understanding of hundreds of years of common law. Perhaps the most helpful distinction occurred in discussions that differentiated amongst tamed wild animals. Sometimes companion animals were seen as having great value (in the context of civil law) and sometimes of little value (when their theft would have required a thief's execution), but they were always differentiated from nonhuman animals kept for economic reasons. Responding to an argument made in 1521 that no property could exist in tamed animals, the only use of which was to give pleasure to their owners, Justice Brooks answered that he might "have a singing bird, *though it be not pecuniarily profitable, yet it refreshes my spirits and gives me good health, which is a greater treasure than great riches.* So if anyone takes it from me he does me much damage for which I shall have an action."[211] Two hundred years later, Matthew Hale said that:

> [l]arceny cannot be committed in some things, whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, gray-hounds, bloodhounds, or of some things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, etc., or their whelps or calves, because, tho reclaimed, *they serve not for food but pleasure*, and so differ from pheasants, swans, etc. made tame which, tho wild by nature, serve for food.[212]

Blackstone, too, noted that it was a common law felony to steal tame or confined animals *ferae naturae* who are fit for human food or service, but the case is different with respect to those which are "*only kept for pleasure*, curiosity, or whim, as dogs, bears, cats, parrots, and singing

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[211] SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 489 (1926) (quoting Y.B. 12 Hen. 8, Trin. pl. 3, at 4 (1521)) (emphasis added); 1 HALSBURY'S LAWS OF ENGLAND 537 (1931). Sir Edward Coke wrote that many nonhuman animals were of a such a base nature that they were not the subject of larceny. 3 COKE INST. 109-10 (1644).

[212] I MATTHEW HALE, HISTORIA PLACITORIUM CORONAE 512 (1736) (emphasis added).

birds; because their value is not intrinsic, but depending only on the caprice of the owner."[213]

In an age when damages for emotional distress and pain and suffering are routinely determined by juries, Minzer's second reason for courts' reluctance to award such damages cannot be seriously considered. Similarly, most modern courts agree that modern psychological and medical tools can detect feigned claims for emotional distress and that the floodgates have not in fact been opened to claims for emotional distress. Moreover, in light of the familial, quasi-child, relationship that exists between an owner and her companion animal, a claim for her companion animal's wrongful death cannot realistically be considered litigation based merely on hurt feelings or trivialities.

On the other hand, Dobbs has argued that:

> When the defendant damages or destroys property by negligent rather than intentional misconduct, most cases deny any recovery for the owner's mental anguish or emotional harm based solely on the injury to or destruction or loss of the property . . . . [T]he rule against mental anguish recoveries for property damages seems to be independent of the special requirements of physical impact or physical symptoms imposed in the more personal cases. Even if courts granted mental distress freely in cases of personal danger to the plaintiff most property damage claims would probably continue to be measured by the value of the property rather than by the subjective happiness the owner claims to derive from it. In the property cases, the rule against mental anguish recovery is merely that objective market value of the property usually marks the limits of recovery and that subjective elements are usually denied.[214]

But this is a tautology. Why, "[w]hen the defendant damages or destroys property by negligent rather than intentional misconduct, [do] most cases deny any recovery for the owner's mental anguish or emotional harm based solely on the injury to or destruction or loss of the property?"[215] Because "objective market value of the property usually marks the limits of recovery and [ ] subjective elements are usually denied."[216]

Nearly unique is the brief 1982 discussion by the Oregon Court of Appeals concerning a claim for emotional distress resulting from damage to real property alleged to have been caused by the negligent installation of insulation.

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213 II WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 393 (1765) (emphasis added). To be the subject of larceny, nonhuman animals "ought not to be [t]hings of a base [n]ature, as [d]ogs, [c]ats, [b]ears, [f]oxes, [f]errets, and the [l]ike, which, however they may be valued by the [o]wner, shall never be so highly regarded by the law, that for their sakes a [m]an shall die." WILLIAM HAWKINS, PLEAS OF THE CROWN 93 (1716); Dunlap v. Snyder, 17 Barb. 561, 565 (N.Y. App. Div. 1854) (the court held that "[a] dog may be highly valued by the owner for various reasons that would have no influence with others, and often without reference to the actual usefulness of the animal, or to any profit desired from him. *Most of them are probably not profitable in a pecuniary view and have really very little pecuniary value* . . ." (emphasis added)).

214 DOBBS, *supra* note 176, § 5.15(3), at 895-96.

215 *Id.* at 895.

216 *Id.*

> It is difficult to imagine a circumstance in which damage to any property does not directly, naturally and predictably result in some emotional upset . . . . Rather, it is the kind of interest invaded that, as a policy matter, is believed to be of sufficient importance to merit protection from emotional impact . . . .
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> . . . It is entirely common and predictable, for example, that a person will be disturbed and upset when someone negligently breaks the headlight of his or her cherished automobile or causes a softball to crash through a picture window. We do not *yet* live . . . in an "eggshell society" in which every harm to property interests gives rise to a right of action for mental distress.[217]

Of course, the court exaggerates. It is not difficult at all to imagine numerous circumstances in which damage to property does not directly, naturally and predictably result in some emotional upset. As previously mentioned, pencils, paper, paperclips, juice glasses, and flatware, if not most items of fungible personal property, may be destroyed without inflicting any emotional distress. But the Oregon court is on to something. Professor Radin's earlier quoted comment about the normative aspect of determining whether property was constitutive or fungible is instructive.[218] Whether "the *kind* of interest invaded that, as a policy matter, is believed to be of sufficient importance to merit protection from emotional impact" os important.[219] In analyzing whether the bond between humans and companion animals is sufficiently important, judges must choose between the anachronistic paradigm of the relationship between humans and companion animals as akin to the "relationship" between an owner and pencils, paper, paperclips, juice glasses, and flatware and the modern paradigm that the relationship between humans and companion animals is more akin to a familial relationship.

The logical arguments in favor of changing paradigms are compelling. The entire value of companion animals, by definition, by common custom and knowledge, and by legal history resides not in their economic value, but in the mutual love, companionship, and sentiment that exists between human companion and companion animal. This is not present in any other species of property. After all, what purpose *is* there to having a companion animal if not for love, companionship, and sentiment?

The "animals as property" syllogism is unacceptably arbitrary, perverse, and unfair because it ignores the commonly understood reality that the relationship between the human companion and companion animal is no more based upon economic value than is the modern parent-child relationship. It awards damages for a loss that the owner of a companion animal *does not actually suffer* (economic value) and refuses to compensate an owner for the damages that an owner actually *does suffer* (emotional distress and loss of society).

Logical arguments will take a judge a long way towards allowing noneconomic damages for the wrongful killing of a companion animal, but

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217 Meyer v. 4-D Insulation Co., 652 P.2d 852, 854, 857 (Or. Ct. App. 1982).

218 *See supra* notes 200-01 and accompanying text.

219 *Meyer*, 652 P.2d at 854.

not necessarily the entire way. Logic alone cannot resolve a clash of competing values. For example, judges often weigh a powerful policy against an overarching principle of tort recovery in determining the proper balance among the competing values that bear on the extent to which a plaintiff might recover damages for the negligent infliction of emotion distress. On the one hand,

> [i]t would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends.[220]

On the other, plaintiffs should be compensated for their injuries, wrongfully caused, and it "must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim."[221] Holmes knew that one cannot be argued into "liking a glass of beer."[222] One judge might simply value the right of an innocent injured plaintiff to recover damages for her injuries more than she values the duty of a negligent defendant to compensate those persons whom he has wrongfully injured. Another judge might value the reverse. One judge may be unable to imagine what it is like to love a ewe lamb as a daughter or even to imagine what it is like to love a *daughter*. Another judge might instinctively understand each. Either a judge's experiences, values, and imagination will finally convince her that the relationship between humans and companion animals *is* of the kind that should merit protection, or they will not. And if they do not, nothing will.

VI. Recovery of Damages for the Wrongful Deaths of Companion Animals Caused by Veterinary Wrongdoing in Massachusetts, Wisconsin, and New York

Both the arguments for the recovery of damages for the emotional distress and loss of companionship that caused a companion animal's wrongful death and the emotional distress triggered by witnessing the manner in which a companion animal is wrongfully killed depend, in part, upon the law and legal history of the jurisdiction in which the claims are presented. This section will compare the arguments for both kinds of dam-

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220 Keeton et al., *supra* note 9, § 54, at 366.

221 *Id.* at 361. *Compare* Millington v. Southeastern Elevator Co., 239 N.E.2d 897, 899 (N.Y. 1969), in which the court overruled a denial of loss of consortium to either spouse. In doing so, the court commented:

> [d]isparagingly described as "sentimental" or "parasitic" damages, the mental and emotional anguish caused by seeing a healthy, loving companionable mate turned into a shell of a person is real enough. To describe the loss as "indirect" is only to evade the issue. The loss of companionship, emotional support, love, felicity and sexual relations are real injuries .... Thus to describe these damages as "merely parasitic" is inaccurate and cruel.

Id.

222 Oliver Wendell Holmes, Jr., *Natural Law*, 33 Harv. L. Rev. 40, 41 (1918-19).

ages using the example of veterinary wrongdoing in three jurisdictions: New York, Wisconsin, and Massachusetts.

A. Liability to Owners for Damages for Emotional Distress and Loss of Society for the Deaths of Companion Animals that Result from Veterinary Wrongdoing

1. Massachusetts

Massachusetts applies the first of the five theories of recovery. In 1868, the Supreme Judicial Court established the rule that emotional distress damages could be awarded when they stemmed from willful or grossly negligent conduct.[223]

> He who is guilty of a willful trespass, or one characterized by gross carelessness and want of ordinary attention to the rights of another, is bound to make full compensation. Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort. Acts of gross carelessness, as well as those of willful mischief, often inflict a serious wound upon the feelings, when the injury done to property is comparatively trifling. We know of no rule of law which requires the mental suffering of the plaintiff, or the misconduct of the defendant, to be disregarded. The damages in this case are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness.[224]

If a veterinarian's wrongful act was willful or reckless, the owner of a companion animal who was killed should be able to sue for all damages proximately caused by the wrongful act, including emotional distress and loss of society.[225]

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[223] Meagher v. Driscoll, 99 Mass. 281, 285 (1868). The court trimmed away the cause of action for grossly negligent conduct in Smith v. Postal Tel. & Cable Co., 55 N.E. 380 (Mass. 1899). *See supra* note 32 and accompanying text.

[224] *Meagher*, 99 Mass. at 285. The Supreme Judicial Court has often reiterated this rule. Massachusetts Comm. Against Discrimination v. Franzaroli, 256 N.E.2d 311, 313 (Mass. 1970); Currier v. Essex Co., 189 N.E. 835, 837-38 (Mass. 1934); Stiles v. Morse, 123 N.E. 615, 617 (Mass. 1919) (noting that "[t]he rule is well settled . . . that if the natural consequence of the wrongful act, done willfully or with gross negligence, is mental suffering to the plaintiff, then that element may be considered in assessing damages"); Burns v. Jones, 98 N.E. 29, 29 (Mass. 1912); Lopes v. Connolly, 97 N.E. 80, 81-82 (Mass. 1912); Spade v. Lynn & Boston R.R., 47 N.E. 88, 89 (Mass. 1897) ("[I]t is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown."); Lombard v. Lennox, 28 N.E. 1125, 1125 (Mass. 1891) ("If the ordinary and natural consequences of the acts set out in the declaration and proved in an action of tort cause an injury to the feelings of the plaintiff, and if the acts are done . . . with gross carelessness of the rights of the plaintiff, damages may be recovered for mental suffering."); Fillebrown v. Hoar, 124 Mass. 580, 585 (1878) ("[I]f the defendant entered on the premises unlawfully, and expelled the family of the plaintiff, he did it willfully, or with such gross carelessness of the rights of the plaintiff that he is bound to make full compensation. Such compensation would include . . . the wound inflicted on the feelings of the plaintiff").

[225] Most courts do not permit recovery of damages for loss of society for the injury, as opposed to the death, of a child, though some statutes permit it. Speiser 1, *supra* note 89, § 8.23, at 596-99 (asking what distinguishes this loss from other compensable intangible losses). However, "[g]enerally, the courts do not discuss the basis for their holding, being

The Supreme Judicial Court has also stated, without citation or discussion, that "[w]hen an animal is killed through the fault of the defendant, the damage which the owner may recover is the value of the animal at the time of the injury."[226] When destroyed property has little or no market value, or when market value clearly will not compensate the owner for the loss, the measure of damages "is the actual value of the property to its owner."[227] But every such case concerned a nonhuman animal whose value to the plaintiff was wholly economic, and those cases were all decided when the law generally disfavored awards for emotional distress. The Massachusetts appellate courts have never discussed the measure of damages for the wrongful death of a companion animal.[228] It is therefore unclear whether Massachusetts, given the opportunity, would apply the third, fourth, or fifth theories of recovery.

Before the physical impact rule was laid to rest in 1978, it was unlikely that Massachusetts would have considered permitting the award of intangible damages to the owner of a wrongfully killed companion animal. That Massachusetts recognizes both the common law torts of intentional and negligent infliction of emotional distress suggests a policy shift in favor of recognizing intangible damages, at least when their genuineness can reasonably be assured and a defendant is not exposed to nearly unlimited liability.[229] That the Supreme Judicial Court has allowed a claim for negligent infliction of emotional distress for witnessing the destruction of a house strongly supports the inference that it now recognizes that humans can become sufficiently connected emotionally to their personal property as to warrant noneconomic damages for its destruction.[230] Therefore, only lack of foreseeability would probably suffice to justify the

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content to cite precedent denying recovery." Allan E. Korpella, Annotation, *Parent's Loss of Child's Society and Companionship as Elements of Damages for Injury to Child*, 69 A.L.R. 3D 553, 555 (1976).

226 Atwood v. Boston Forwarding & Transfer Co., 71 N.E. 72, 72 (Mass. 1904). Other cases apply a market value standard in determining the damages for injuries to, and death of, horses and cows. Hendrick v. Boston & A.R. Co., 48 N.E. 835 (Mass. 1897) (cows); Miner v. Connecticut River R.R., 26 N.E. 994 (Mass. 1891) (horse); Leonard v. Fitchburg R.R., 9 N.E. 667, 668 (Mass. 1887) (cows); Johnson v. Inhabitants of Holyoke, 105 Mass. 80 (Mass. 1870) (horse); Gillett v. Western R.R., 8 Allen 560 (Mass. 1864) (horses).

227 Sarkesian v. Cedric Chase Photographic Lab., Inc., 87 N.E.2d 745, 746 (Mass. 1949) (lost roll of film). *See* Weston v. Boston and Maine R.R., 76 N.E. 1050, 1051 (Mass. 1906) ("where the property . . . has no market value but has a special damage to the plaintiff he can recover that value"); Wall v. Platt, 48 N.E. 270, 273 (Mass. 1897) ("[M]arket value does not in all cases afford a correct measure of damages, and is not, therefore, a 'universal test.'"); Beale v. City of Boston, 43 N.E. 1029, 1030 (Mass. 1896) ("[M]arket value is not a universal test, and cases often arise where some other mode of ascertaining value must be resorted to."); Green v. Boston & Lowell R.R., 128 Mass. 221, 226-227 (1880) (oil portrait of dead parent); Stickney v. Allen, 76 Mass (10 Gray) 352 (1858) (stereotype plates).

228 The legislature understands that the value of companion animals is primarily emotional and sentimental, and not economic. For example, Massachusetts permits reimbursement for damages inflicted upon livestock or fowls, not to exceed their "fair cash market value," but denies reimbursement for damages inflicted upon "dogs, cats, and other pets." Mass. Gen. Laws ch. 140, § 161A (1997).

229 *See infra* Part VI(B)(1).

230 *Id.*

denial of damages for emotional distress and loss of companionship for the owners of companion animals negligently killed by Massachusetts veterinarians. As was discussed, foreseeability is not lacking in veterinary wrongdoing. Not only do human companions treat their companion animals as family, usually children, but veterinarians rely upon this strong bond between humans and companion animals for their livelihood.[231]

As is discussed in the context of Wisconsin law, appropriate policy considerations against fully compensating the human companions of negligently killed companion animals for their emotional distress and loss of society are generally lacking.[232] In summary, there is nothing in Massachusetts' principle, policy, or precedent that justifies contradicting the overarching principle of full compensation, including noneconomic damages, when Massachusetts veterinarians wrongfully kill companion animals.

2. Wisconsin

Employing the negligence analysis that had existed in Wisconsin since 1956, the Wisconsin Supreme Court in 1996 instituted a framework that merged important aspects of the manner in which courts were to determine the validity of claims both for negligent infliction of emotional distress and negligence. The following year, in *Kleinki v. Farmers Coop Supply & Shipping*,[233] the Supreme Court stated that courts should apply the same public policy criteria when determining whether to award damages for negligent infliction of emotional distress that derives from "the loss of a close family member" as "to the alleged emotional distress caused by the negligent damage of property."[234]

However, even negligence and negligent infliction of emotional distress claims that meet the three traditional elements of liability may be dismissed for lack of legal causation because they trespass against public policy.[235] "The [Supreme] [C]ourt has stated these public policy considerations that may preclude liability in capsule form as follows: When it would shock the conscience of society to impose liability the courts may hold as a matter of law that there is no liability."[236] The commonly cited public policy criteria are:

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231 VETERINARY FEE REFERENCE, *supra* note 67, at K1. The data from the New England Region, which includes Massachusetts, Maine, Vermont, New Hampshire, Rhode Island, and Connecticut, reveals that over two-thirds of the small animal practices gross at least $300,000 to $500,000 per year, almost one-third gross more than $750,000 per year and about one-twentieth gross more than one million dollars per year. *Id.* at A1.

232 *See supra* note 54 and accompanying text; discussion *infra* Part V(A)(2).

233 549 N.W.2d 714 (Wis. 1996).

234 *Id.* at 716. *See also* Babich v. Waukesha Mem'l Hosp., Inc., 556 N.W.2d 144 (Wis. Ct. App. 1996) (applying the *Bowen* framework to a claim for negligence). A viable complaint for either negligence or negligent infliction of emotional distress must "set forth the traditional elements of a negligence case: negligent conduct, causation, and injury (severe emotional distress)." *Kleinke*, 549 N.W.2d at 716 (restating Bowen v. Lumbermans Mut. Cas. Co., 517 N.W.2d 432, 442 (Wis. 1994)).

235 *Id.*

236 *Bowen*, 517 N.W.2d at 444, paraphrasing Pfeifer v. Standard Gateway Theater, 55 N.W.2d 29, 40 (1952) (citation omitted). "[I]n cases so extreme that it would shock the con-

> (1) Whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether in retrospect it appears extraordinary that the negligence should have brought about the harm; (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; or (6) whether allowance of recovery would enter a field that had no sensible or just stopping point.[237]

In *Kleinke*, the Supreme Court considered whether plaintiffs who alleged that the defendant had poured three hundred gallons of oil into their basement and forced them to abandon their home could recover for emotional distress due to negligent damage to their property.[238] Relying upon four of the six *Bowen* public policy considerations, the Court concluded that it was "unlikely that a plaintiff could ever recover for the emotional distress caused by negligent damage to his or her property."[239] But *Kleinke* rightly did not bolt the door to claims for emotional distress to every kind of property under every circumstance. While it might have seemed "unlikely" that plaintiffs should be compensated for emotional distress for property damage, emotional distress damages for a veterinarian's negligent killing of a companion animal should not be precluded. As has been demonstrated, a companion animal is a unique species of property that can both form intense relationships with plaintiffs and be killed. The six *Bowen* public policy criteria will be addressed *seriatim*.

The first and third *Bowen* public policy criteria, "whether the injury is too remote from the negligence" and "whether in retrospect it appears extraordinary that the negligence should have brought about the harm" have no relevance to the issues at hand.

The second *Bowen* public policy criterion is "whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor." The injury sustained from the killing of a companion animal is not out of proportion to the culpability of a negligent veterinarian. In *Babic v. Waukesha Mem'l Hosp., Inc.*,[240] the severe emotional distress that afflicted a plaintiff who feared contamination with HIV after being stuck by a syringe left in clean hospital linens was out of proportion to the defendant's culpability when the chance of having contracted the virus under that circumstance was extremely minimal.[241] And in the case of the wrongful deaths of such nonhuman animals as livestock and mink raised for pelts, the value of which to their owners is wholly economic, *Bowen*'s disproportionality criterion would undoubtedly apply. "[E]motional distress based on property damage is the type of injury that will *usually* be wholly out of proportion

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science of society to impose liability the courts may step in and hold as a matter of law that there is no liability." *Id.*

237 *Id.*

238 *Kleinke*, 549 N.W.2d at 715.

239 *Id.* at 716.

240 556 N.W.2d 144 (Wis. Ct. App. 1996).

241 *Id.* at 147.

to the culpability of the negligent party."[242] Moreover, usually "[h]aving one's property damaged is not nearly as devastating as witnessing or being involved in the loss of a close relative."[243] But, as the cited studies demonstrate, a veterinarian's negligent killing of a companion animal does not cause the "usual[ ]" kind of damage.[244] The damages it causes are unique.

More than twenty years ago, the Supreme Court of Wisconsin, in allowing an action by parents for loss of society against a tortfeasor who negligently injured their child, confronted a roughly analogous situation. It said that

> Honest application of a pecuniary standard does not, in today's world, allow adequate recovery for child-death. The cost-accounting technique for measuring damages—value of services less cost of support—is archaic in a society which is not structured on child labor and the family chore framework of an agricultural community.
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> Tort law seeks to compensate injuries as those injuries are understood in light of changing social and economic conditions . . .
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> . . . both court and legislature have recognized that today the injury sustained by a parent on the death of his child is not primarily economic. The law recognizes an interest in emotional and mental well-being. If this is the primary interest that is invaded when a parent loses his minor child, tort law should look to that injury, and fashion an appropriate remedy.[245]

In that case,[246] the Supreme Court rejected the anachronistic reasoning put forth by the Rhode Island Supreme Court in *McGarr v. National & Providence Worsted Mills*,[247] that, as between a parent and child, "[i]t is therefore practically a business and commercial question only, and the elements of affection and sentiment have no place therein."[248] At the same time, the Court embraced the recent statement of the Washington Supreme Court in *Lockhart v. Besel*,[249] that, to limit a parent's damages to "the pecuniary value of the loss of a minor child's services," was "a pure fiction."[250]

The analogy between a companion animal and a child need not be exact to be persuasive. The cited studies demonstrate that the relationship between a human companion and his companion animal contains no more of the elements of a "business and commercial" relationship than does the relationship between parent and child. To reduce it to a "business and commercial" relationship would be no less "a pure fiction," no less arbitrary, and no less unfair. Unlike the relationship between humans and in-

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242 *Kleinke*, 549 N.W.2d at 716 (emphasis added).

243 *Id.*

244 *See supra* notes 57-66 and accompanying text.

245 Shockley v. Prior, 225 N.W.2d 495, 498 (1975) (quoting Note, *Wrongful Death of a Minor Child: The Changing Parental Injury*, 43 Wash. L. Rev. 654, 655, 656, 668 (1968).

246 *Id.* at 499-500 (quoting McGarr v. National Providence Worsted Mills, 53 A. 320, 326 (R.I. 1902)).

247 53 A. at 326.

248 *Id.*

249 426 P.2d 605 (1967).

250 *Id.* at 609.

animate objects they own, or even such animate property as livestock or mink raised for pelts, both the parent/child relationship and the relationship between humans and companion animals are "bi-directional." They "bring a significant benefit to a central aspect of the lives of each, which is in some sense voluntary," while "each party treat[s] the other as something entitled to respect and benefit in its own right, but also as an object of admiration, trust, devotion, or love."[251]

The cited studies also demonstrate that the relationship between humans and companion animals is so analogous to that of a human family relationship, especially of parent and child, that the judicial award of compensation for its destruction from veterinary negligence would not shock the conscience of society. Quite the contrary. Society would more likely expect that the relationship between humans and companion animals would not be exempted from the fundamental tort principle that mandates fair compensation for all damages that proximately flow from the violation of one's right. The emotional distress that a human companion suffers from the negligently caused death of her companion animal is no more a "life experience that all may be expected to endure," than would be the negligently caused death or serious injury of any family member.[252]

The fourth *Bowen* public policy criterion is "whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor." When a small animal veterinarian negligently kills his patient, allowance of recovery for noneconomic damages by that patient's human companion would not place an unreasonable burden upon the guilty veterinarian. In *Kleinke*, the Supreme Court said that ordinarily

> defendants are already liable for the cost of the damage to the property. It would be unfair to also hold them liable for the emotional distress caused the owners. This is particularly true when the property has some sentimental value. In such cases the value of the property itself could be quite small, while the distress could be significant. Allowing recovery for emotional distress in such cases would be a windfall to the plaintiff and unfair to the defendant.[253]

As in Massachusetts, Wisconsin small animal veterinarians gross large sums when the human companions of their companion animal patients bring them for veterinary treatment.[254] The data from the Great Lakes Region, which includes Wisconsin, Illinois, Michigan, Indiana, and Ohio, reveals that nearly three-quarters of small animal practices in this region gross $300,000 to $500,000 per year, almost one-fifth gross more than $750,000 per year and about one-twentieth gross more than one million dollars per year. It would not unfairly burden veterinarians who kill their patients to require them to compensate the human companions of those patients for the "real value" of their companion animals to them.[255] This is especially true because the emotional distress and loss of society that

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251 TANNENBAUM, *supra* note 2, at 125.

252 *Kleinke*, 549 N.W.2d at 717; *Bowen*, 517 N.W.2d at 445.

253 *Kleinke*, 549 N.W.2d at 717.

254 VETERINARY FEE REFERENCE, *supra* note 67, at E1.

255 Peacock v. Wisconsin Zinc Co., 177 Wis. 510, 513-4 (1922).

human companions suffer when veterinarians negligently kill their companion animals deprive them of the very emotional attachment that caused them to bring their companion animals to the veterinarians in the first place.[256] Moreover, since the veterinarians killed their client's companion animals while treating them professionally, they probably purchased—and certainly had the opportunity to purchase—malpractice insurance that would relieve them of any onerous burden to which their liability for such noneconomic damages as emotional distress and loss of society might subject them. In these circumstances, the characterization of a human companion's recovery for emotional distress and loss of society for the death of a companion animal as a "windfall" is so jarring as to make its inappropriateness self-evident.

The fifth *Bowen* public policy criterion is "whether allowance of recovery would be too likely to open the way to fraudulent claims." In *Kleinke*, the Supreme Court stated that "[t]he greater a plaintiff's attachment or sentimental feeling toward the property in question, the greater his or her claim for damages could be. To determine when such an attachment is real and when it is false, and to determine how significant the attachment is, would be difficult, if not impossible. Every plaintiff in a negligent property damage case would be encouraged to claim an extreme emotional attachment to the damaged property."[257]

This public policy criterion has little applicability to the issue of whether the human companion of a companion animal killed through veterinary negligence should be able to recover noneconomic damages. A court will have no more difficulty in determining whether an attachment between humans and companion animals is genuine than it will have in determining whether any other family attachment is genuine. Companion animals normally participate in a living bi-directional relationship with their human companions. Their value to their human companions resides wholly in this relationship. Companion animals killed by veterinarians were being treated by those veterinarians precisely because their human companions cared more about their welfare than about the cost of treating them or of obtaining a free replacement. The chances of a human companion fraudulently claiming a strong emotional attachment under these circumstances is therefore low.

The sixth *Bowen* public policy criterion is "whether allowance of recovery would enter a field that had no sensible or just stopping point." In *Kleinke*, the Court said that "[e]ach and every plaintiff in any property damage claim could assert an emotional distress claim based not on the effect of the incident itself but on how their lives have changed since the underlying incident. Such an allowance could open the way to recovery for stress incurred by any amount of damage to any type of property."[258]

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256 Babich v. Waukesha Mem'l Hosp., Inc., 556 N.W.2d 144, 147-48 (Wis. Ct. App. 1996) (because there was "little actual risk" of contracting HIV thorough a needle stick, the extra precautions taken by hospitals to avoid it would waste precious health care resources without efficiently improving patient safety).

257 *Kleinke*, 549 N.W.2d at 717.

258 *Id.*

But, unlike a claim for emotional stress for the loss of "any type of property," at least two logical stopping places for liability exist.

The first logical stopping place would be to limit liability to the human companion of a companion animal killed through veterinary malpractice. A second, probably fairer, logical stopping place would be to limit liability to the human companion of a companion animal who is killed.[259]

In summary, as with Massachusetts, there is nothing in Wisconsin principle, policy, or precedent that justifies contradicting the overarching tort principle of full compensation, including noneconomic damages, when Wisconsin veterinarians negligently kill companion animals.

3. New York

Unlike Massachusetts and Wisconsin, New York reports over a dozen cases that concern the measure of damages for the wrongful death of a companion animal. They show that New York employs the second and third theories of recovery for the wrongful death of a companion animal—market value and, in the proper circumstances, value to the owner. One would assume that within some of these cases, one would find nonarbitrary (or least arbitrary), rational, and sufficiently weighty countervailing policy considerations that would justify contradicting the overarching principle of full compensation for wrongfully caused injuries. But they are not to be found. Nearly every decision merely restates the "animals as property" syllogism.[260] They lack all analysis or discussion and merely cite to earlier cases that proclaimed the same syllogism, cases that were decided at a time when the common law was nearly universally hostile to claims for intangible damages. A modern re-evaluation is required especially in light of the 1968 decision of the Court of Appeals that established the right of both husband and wife to compensation for loss of consortium, including sentimental damages, noting that the abolition of the right for both husband and wife was "not in accord with the growing recognition that the law of torts must recognize the interest of persons in the protection of essentially emotional interests. . . ."[261]

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[259] *Cf.* Garrett, By Kravit v. City of New Berlin, 122 Wis. 2d 223, 238 (1985) (the court refused to extend the holding of Shockley v. Prier, 225 N.W.2d 495 (1975), to a step-father *in loco parentis* because, unlike natural or adoptive parenthood, the status of being *in loco parentis* is necessarily temporary. This is not true for the human companion of a companion animal); *Babich*, 556 N.W.2d at 148 (allowing recovery in the hospital setting would allow claims by plaintiffs stuck by needles in every other setting).

[260] In 1980, the Court of Appeals refused to recognize either a common law right of action for loss of society (part of the damages there referred to as a permanent loss of consortium) or to include damages for loss of society and grief within those "pecuniary damages" allowed by the New York wrongful death statute. Liff v. Schidkrout, 404 N.E.2d 1288 (N.Y. 1980). The *Liff* decision, however, concerned the exclusive place of the legislature in human wrongful death claims and not companion animals wrongful death claims. *See supra* Section V(A).

[261] Millington v. Southeastern Elevator Co., 239 N.E.2d 897 (N.Y. 1969), *overruling* Kronbitter v. Washburn Wire Co., 151 N.E.2d 898 (N.Y. 1958).

The rule that the owner of a companion animal was merely entitled to market value in a case of wrongful death already existed in a nineteenth century trio of cases. In them, the New York Supreme Court stated that, if no evidence of the value of a dog could be produced that related to some standard and not upon the owner's subjective evaluation, the owner of a dog who was wrongfully killed was entitled to nothing whatsoever.[262] In 1915, the Appellate Division, in *Rimbaud v. Beiermeister*,[263] merely assumed that market value was the proper measure of damages for the death of a dog, but without citation or discussion of policy.[264] Six years later, in 1925, the Appellate Division, in *Blauvet v. Cleveland*,[265] cited the trio of nineteenth century cases and permitted recovery of damages upon proof of the value of a dog who had been shot and killed.[266] A decade later, the Municipal Court, in *Smith v. Palace Transportation Co. Inc.*,[267] again without citation or discussion of policy, said that "[a] live dog is personal property. Its value is governed by the type and traits and pedigree of the dog. While one's feelings for a dog constitute a sentiment which we are inclined to value, it is not recognized as an element of damage."[268]

Nearly forty years later, in *Melton v. South-Shore U-Drive, Inc.*,[269] the Appellate Division, still without discussion of policy and after citing a single New York case, *Rimbaud* (which had cited to nothing at all), concluded in a single sentence that "[t]he jury's award for the full market value of the dog fully compensates plaintiffs." Six years after that, in *Stettner v. Graubard*,[270] a Town Court stated, as usual, without explanation and with a solitary citation to *Melton*, that "[i]t is the law of this state . . . that market value is the correct measure of damages for the destruction of a dog" and that "[s]entiment . . . may not be considered since that often is as much a measure of the owner's heart as it is of the dog's worth."[271] Three years after that, the Appellate Division, in *Cohen v. Varig Airlines*,[272] found that, although an airline had engaged in willful misconduct in failing to deliver the plaintiffs' luggage:

> [t]he law has been traditionally reluctant to extend its protection against the infliction of mental distress, even for intentionally inflicted wrongs. This has been equally true in New York . . . Although courts are, at long last, moving in

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262 Dunlap v. Snyder, 17 Barb. 561, 565 (N.Y. App. Div. 1854); Brown v. Hoburger, 52 Barb. 15, 24-25 (N.Y. App. Div. 1868) ("opinions in regard to the value of dogs which have no standard or marketable value are necessarily fanciful . . . and are not competent"); Smith v. Griswold, 15 Hun. 273 (N.Y. 1878).

263 154 N.Y.S. 333 (App. Div. 1915).

264 *Id.* at 336 (App. Div. 1915).

265 190 N.Y.S. 881 (App. Div. 1921).

266 *Id.* at 863.

267 253 N.Y.S. 87 (Mun. Ct. 1931), *overruled by* Corso v. Crawford Dog & Cat Hosp., 415 N.Y.S.2d 182 (Civ. Ct. 1979).

268 *Id.* at 88.

269 303 N.Y.S.2d 751, 752 (App. Div. 1969).

270 368 N.Y.S.2d 683, 684 (Town Ct. 1975).

271 *Stettner*, 368 N.Y.S.2d at 684.

272 405 N.Y.S.2d 44, 55 (App. Div. 1978).

> the direction of recognizing one's interest to mental and emotional tranquillity as an area entitled to legal protection, we know of no authority which sanctions a recovery against a carrier for mental distress . . . where the gravamen of the wrongdoing is either the loss or the mishandling of luggage . . . In our view, plaintiffs are adequately compensated for their loss to the extent the law allows for the recovery of the actual value of the lost luggage and its contents.[273]

Later that year, in the case of *Snyder v. Bio-Lab, Inc.*,[274] which concerned damages for the deaths of dairy cows, the Supreme Court, still without citation or discussion of policy, stated that

> As 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 return him monetarily to the status he was before the loss. Where the animal has a market value, the market value at the time of the loss . . . will generally be the measure applied.[275]

Two years later, the Appellate Division in *Young v. Delta Airlines, Inc.*,[276] disposed of the claim for emotional distress damages for the death of the plaintiff's dog in one sentence fragment: ". . . New York law does not permit recovery for mental suffering and emotional disturbance as an element of damages for loss of a passenger's property."[277] This ruling relied upon *Cohen*,[278] which, as we have seen, was itself grounded on that court's reluctance to award emotional distress damages for the loss of luggage. Seven years later, the Appellate Division, in *Fowler v. Town of Ticonderoga*,[279] devoted a single sentence to the plaintiff's claim for "psychic trauma."[280] Simply citing to *Smith*,[281] the court stated that "a dog is personal property and damages may not be recovered for mental distress caused by its malicious or negligent destruction."[282]

Without discussing the policy reasons for the rule, the United States District Court in *Gluckman v. American Airlines, Inc.*,[283] refused a cause of action for loss of companionship to an owner whose dog had died while being transported by air. Citing *Brousseau*,[284] *Stettner*,[285] *Zager*,[286] and

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273 *Id.* at 55.

274 405 N.Y.S.2d 596 (App. Div. 1978).

275 *Id.* at 597.

276 432 N.Y.S.2d 390 (App. Div. 1980).

277 *Id.* at 391.

278 *Cohen*, 405 N.Y.S.2d at 55.

279 516 N.Y.S.2d 368 (App. Div. 1987).

280 *Id.* at 370.

281 Smith v. Palace Transp. Co., 253 N.Y.S. 87, 88 (Mun. Ct. 1931).

282 *Fowler*, 516 N.Y.S.2d at 370 (comparing Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182 (Civ. Ct. 1979)).

283 Gluckman v. American Airlines, Inc., 844 F. Supp. 151, 158 (S.D.N.Y. 1994). The court rejected the suggestion made in *Corso*, 415 N.Y.S.2d at 182, that a companion animal was more than property. *Id.* The Vermont Supreme Court adopted *Corso*'s suggestion that companion animals are more than property in 1997. Morgan v. Kroupa, 702 A.2d 630, 633 (Vt. 1997).

284 Brousseau v. Rosenthal, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980).

285 Stettner v. Graubara, 368 N.Y.S.2d 683, 684 (Town Ct. 1975).

286 Zager v. Dimilia, 524 N.Y.S.2d 968 (Vill. Ct. 1988).

Snyder,[287] the court stated that New York cases do not recognize such a cause of action and that an owner is entitled only to the intrinsic value for lost property, including companion animals, when the market value cannot be determined.[288]

Citing *Young*,[289] *Fowler*,[290] and *Gluckman*,[291] the Civil Court in *Erwin v. The Animal Medical Center*[292] dismissed allegations seeking damages for mental distress when the plaintiff's dog allegedly died after undergoing surgery that the plaintiff had refused. Without discussion, the trial court stated that "a pet is considered to be personal property under New York case law, which precludes recovery for mental suffering for loss of personal property."[293] A count for loss of companionship was dismissed, without discussion, on authority of *Gluckman*.[294] Citing *Stettner*,[295] *Brousseau*, [296] and *Corso*,[297] *Erwin* rejected the argument that recovery was limited to market value and allowed recovery for the intrinsic or actual value of the dog.[298] Finally, in *Jason v. Parks*,[299] the Appellate Division, citing *Gluckman*,[300] *Fowler*,[301] *Young*,[302] *Stettner*,[303] *Zager*,[304] and *Smith*,[305] in a one sentence decision held that "[i]t is well-established that a pet owner in New York cannot recover damages for emotional distress caused by the negligent destruction of a dog."

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287 Snyder v. Bio-Lab, Inc., 405 N.Y.S.2d 596, 597 (App. Div. 1978).

288 *Gluckman*, 844 F. Supp. at 157. The court also dismissed a count for negligent infliction of emotional distress on authority of Young v. Delta Air Lines, Inc., 432 N.Y.S.2d 390, which stated that "New York law does not permit recovery for mental suffering and emotional disturbance as an element of damages for loss of a passenger's property," and dismissed a count for intentional infliction of emotional distress on the ground that New York does not permit bystander recovery. *Id.* at 158.

289 432 N.Y.S.2d at 390.

290 Fowler v. Ticonderoga, 516 N.Y.S.2d 368, 370 (App. Div. 1987).

291 *Gluckman*, 844 F. Supp. at 151.

292 N.Y.L.J., Aug. 29, 1996, at 24, col. 4 (N.Y. Civ. Ct. 1996). *Erwin* also cited Stanley v. Smith, 584 N.Y.S.2d 60, 61 (App. Div. 1992), which involved damages for the illegal towing of an automobile, and stated without discussion or citation to any case but *Fowler* that "[d]amages may not be recovered for mental distress caused by malicious or negligent destruction of personal property." *Id.*

293 *Id.*

294 *Id.* ("there being no other contrary case law").

295 Stettner v. Graubara, 368 N.Y.S.2d 683 (Town Ct. 1975).

296 Brousseau v. Rosenthal, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980).

297 Corso v. Crawford Dog and Cat Hospital, Inc., 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979).

298 Erwin v. The Animal Medical Center, N.Y.L.J., Aug. 29, 1996, at 24, col. 4 (N.Y. Civ. Ct. 1996).

299 638 N.Y.S.2d 170, 171 (App. Div. 1996).

300 Gluckman v. American Airlines, Inc., 844 F. Supp. 151 (S.D.N.Y. 1994).

301 Fowler v. Ticonderoga, 516 N.Y.S.2d 368, 370 (App. Div. 1987).

302 Young v. Delta Air Lines, Inc., 432 N.Y.S.2d 390 (App. Div. 1980).

303 Stettner v. Graubara, 368 N.Y.S.2d 683 (Town Ct. 1975).

304 Zager v. Dimilia, 524 N.Y.S.2d 968 (Vill. Ct. 1988). *Zager*, however, involved not the destruction of a dog, but an injury, though it cited to Smith v. Palace Transp. Co., 253 N.Y.S. 87 (Mun. Ct. 1931), and *Stettner*, 368 N.Y.S.2d at 683, for the proposition that New York law precludes sentiment from consideration as damages. *Id.*

305 *Smith*, 253 N.Y.S. at 87.

In only two cases did a court attempt any discussion of the policy considerations connected with an award of damages for the wrongful death of a companion animal. In 1979, the Civil Court in *Corso*[306] purported to overrule *Smith*[307] and said :

> [T]hat a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property .... A pet is not an inanimate thing that just receives affection; it also returns it .... This decision is not to be construed to include an award for the loss of a family heirloom which would also cause great mental anguish. An heirloom while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response. Losing the right to memorialize a pet rock, or a pet tree or losing a family picture album is not actionable. But a dog—that is something else. To say it is a piece of personal property and no more is a repudiation of our humaneness.[308]

This entitled the owner of the dog whose remains had been wrongfully disposed of "to damages beyond the market value."[309] However, the *Corso* analysis is entirely dicta. Ironically, it is the single case with absolutely nothing to do with the tortious death or injury of a companion animal. It concerned the mishandling of the body of a dead dog. When a human body is mishandled, the cause of action that arises has little or nothing to do with the legal personhood of the human being whose remains have been mishandled. While courts have struggled over that issue, the cause of action that arises is based on the fact that the body is the property or quasi-property of the survivors.[310]

The second case followed a year later. In 1980, referring to the loss of the plaintiff's dog, the Civil Court in *Brousseau* stated, without discussion, that "the general rules and principles measure damages by assessing the property's market value .... Although the courts have been reluctant to award damages for the emotional value of an injured animal, the court

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306 Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182 (Civ. Ct. 1979). *See* Animal Hosp. of Elmont, Inc. v. Gianfrancisco, 418 N.Y.S.2d 992, 994-95 (Dist. Ct. 1979) (citing no cases and providing no discussion of policy, the court concluded in one sentence that "[w]hile the ... puppy has a value that can be enumerated in dollars, there are many factors which in the appropriate case may be taken into consideration in an effort to establish the extent of that value; not the least of these would be age of the animal, the purchase price, pedigree, training, show quality, and last, but not least, the length of time the puppy had been living with the [owner]").

307 253 N.Y.S. at 87.

308 *Corso*, 415 N.Y.S.2d at 183.

309 *Id.*

310 *See supra* note 161 and accompanying text. *E.g.*, Gostkowski v. Roman Catholic Church, 186 N.E. 798, 799-800 (N.Y.1933) (where surviving spouse exercised right to sue for damages for interference with body of deceased spouse, son of deceased had no cause of action for interference with dead body of deceased). *See generally*, Speiser 1, *supra* note 89, § 16.31-32, at 1106 (noting that family members can usually recover damages for emotional distress against one who wrongfully interferes with the dead body of a relative).

must assess the dog's actual value to the owner in order to make the owner whole."[311] *Brousseau*, however, went one step further:

> Although loss of companionship has been excluded both as an element of damages in wrongful death cases and as an independent common law action that holding was based upon the statutory preemption and upon the statutory language [of the wrongful death statute]. Because there is no analogous wrongful death statute that governs damages for the loss of an animal, the policies behind the loss of consortium cases impact upon the court's consideration in the instant case.[312]

Brousseau then allowed loss of companionship to be considered as an element of the dog's actual value to the owner.

Reading case after case citing to case after case, with no court providing a reason for its holding, causes one to experience the puzzlement that Justice Harlan expressed in *Moragne*. Why did the common law forbid recovery for human wrongful death? One would expect some "clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies."[313] New York uses the second and third theories of market value and value to the owner as the measure of damages for the wrongful deaths of companion animals because those rules have "the blessing of age" and nothing more.[314] Policy considerations against fully compensating the owners of negligently killed companion animals for their emotional distress and loss of society are generally lacking.[315] As was true with Massachusetts and Wisconsin, nothing specific in New York principle, policy, or precedent justifies contradicting the overarching principle of full compensation for wrongfully caused injuries. There are only judges saying it again and again.

B. Liability to Owners for Intentional and Negligent Infliction of Emotional Distress that Results from Veterinary Wrongdoing

1. Massachusetts

Massachusetts adopted the tort of intentional infliction of emotional distress in 1971,[316] at least when physical harm resulted, and expanded it

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311 Brousseau v. Rosenthal, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980) (citing to *Stettner*, 368 N.Y.S.2d at 683; *Smith*, 253 N.Y.S. at 87; Blauvet v. Cleveland, 190 N.Y.S. 881, 863 (App. Div. 1921).

312 *Id.* at 286 n.1 (citing to Liff v. Schidkrout, 404 N.E.2d 1288 (N.Y.1980); Millington v. Southeastern Elevator Co., 239 N.E.2d 897 (N.Y. 1969)). *See also* Gluckman v. American Airlines, Inc., 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (loss of companionship in New York is a "means for assessing the 'intrinsic' value of the lost pet when the market value cannot be determined," but is not an independent cause of action).

313 Moragne v. State Marine Lines, Inc., 398 U.S. 375, 381 (1970).

314 *Id.* at 386.

315 *See supra* notes 47-54 and accompanying text.

316 George v. Jordan Marsh Co., 268 N.E.2d 915 (Mass. 1971) (finding a cause of action where plaintiff suffered two heart attacks following harassment by a collection agency).

to include purely emotional distress injuries five years later.[317] The wrongful conduct needed to satisfy the elements of the tort probably need not be directed towards the plaintiff. The Supreme Judicial Court refused a claim by a plaintiff that the sexual abuse of her daughter had inflicted emotional distress upon her, not because the acts had not been directed towards the mother, but because the mother had neither suffered severe emotional distress nor had substantially contemporaneous knowledge of the sexual abuse.[318] If those elements had been met, determining any effect of the defendant's abuse of the daughter upon family members would have been a question of fact.[319]

The holding of the Supreme Judicial Court in *Spade v. Lynn B.R. Co.*,[320] a leading American case in favor of imposing the physical impact rule in cases of negligent infliction of emotional distress, was abandoned only in 1978 in favor of a rule that commenced with foreseeability, then required the weighing of such policy considerations as "where, when, and how the injury to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person."[321] It required a plaintiff to witness the accident or come upon an accident scene while the injured was still present.[322] This was liberalized when the Supreme Judicial Court allowed a claim to proceed, though the plaintiff had observed the injured person not at the scene, but at the hospital.[323] The court later shaped the contours of the contemporaneous observation element more sharply when it refused recovery both: (1) to the estate of a mother who died after being informed of her son's death in an airline accident a thousand miles away,[324] and (2) to a mother who did not learn of the accident that claimed the life of her son until four hours later and did not see his body for twenty-four hours.[325]

Concern about the difficulty in discriminating between real and feigned or imagined emotional distress caused the court to require proof of physical harm caused by any negligently inflicted emotional distress until 1993. Then it abandoned the argument that "where the defendant's conduct has been merely negligent, without any element of intent to harm,

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317 Agis v. Howard Johnson Co., 355 N.E.2d 315, 318 (Mass. 1976) (employer started terminating waitresses in alphabetical order to force them to disclose information on employee theft).

318 Nancy P. v. D'Amato, 517 N.E.2d 824, 828 (Mass. 1988).

319 *Id.* at 827.

320 47 N.E. 88 (Mass. 1897).

321 Dzionkonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978).

322 *Id.*

323 Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 691 (Mass. 1980) *superseded by statute as stated in* Lijoi v. Mass. Bay Transp. Authority, 548 N.E.2d 893, 895 (Mass. App. Ct. 1990). "A plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead to the hospital. So long as the shock follows closely on the heels of the accident, the two types of injury are equally foreseeable." *Id.* at 697.

324 Cohen v. McDonnell Douglas Corp., 450 N.E.2d 581 (Mass. 1983).

325 Stockdale v. Bird & Son, Inc., 503 N.E.2d 951, 953 (Mass. 1987).

his fault is not so great that he should be required to make good a purely mental disturbance"[326] in favor of a requirement that the alleged emotional distress just be objectively corroborated.[327] This was because

> [t]he courts that have applied the physical harm rule to particular symptoms have confronted serious definitional difficulties. Physicians themselves often cannot distinguish between the mental and the physical aspects of an emotional disturbance. Modern medicine shows that all emotional disorders have physical ramifications, while all physical illnesses have emotional aspects. Judges, then, cannot sit as "super doctors" and cannot classify ailments along physical versus mental lines while the progress in medical sciences inextricably links these two realms of human physiology.[328]

The court's continuing concern over appropriate limits on the scope of liability recently led it to reaffirm *Dzionkonski*'s limitation of a close familial or other relationship between the plaintiff and a person whose severe injuries or death she witnesses. The court noted that "[a] parent of or other person closely related to a third person directly injured by the tortfeasor's conduct is more likely to suffer and suffer more severe emotional injuries than others who witness the accident or come upon the third person's impaired condition," and they "comprise a discrete and well-defined class, membership in which is determined by preexisting relationships."[329]

But this may be confined to differentiating degrees of human relationships. Massachusetts appellate courts appear receptive to claims for negligent infliction of emotional distress that result from the destruction of important kinds of property. In harmony with *Nancy P.*,[330] the Supreme Judicial Court approved a claim for negligent infliction of emotional distress that arose from the witnessed negligent destruction of a family home from a gas explosion.[331] The court found sufficient corroboration of the genuineness of the alleged emotional distress in such symptoms as headaches, sleeplessness, and trouble concentrating. This was reinforced by the fact that the destruction of one's home is recognized as a common cause of, and the alleged symptoms corresponded to common manifestations of, the claimed post-traumatic stress syndrome.[332] In a subsequent case the court did turn back claims for both intentional and negligent infliction of emotional distress by an artist against a church that had destroyed a mural he had painted on church property.[333] But the claims were defeated, not because the emotional distress derived from the destruction

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326 Payton v. Abbott Labs, 437 N.E.2d 171, 179 (Mass. 1981).

327 *See, e.g.*, Migliori v. Airborne Freight Corp., 690 N.E.2d 413 (Mass. 1998); Sullivan v. Boston Gas Co., 605 N.E.2d 805, 807 (Mass. 1993).

328 *Sullivan*, 605 N.E.2d at 808 (citation omitted). The court acknowledged that the complexity of the medical understanding of even tension headaches "would preclude us from concluding on appeal that they are purely physical or mental." *Id.*

329 *Migliori*, 690 N.E.2d at 415, 418.

330 Nancy P. v. D'Amato, 517 N.E.2d 824 (Mass. 1988).

331 *Sullivan*, 605 N.E.2d at 811.

332 *Id.*

333 Moakley v. Eastwick, 666 N.E.2d 505 (Mass. 1996).

of property, but because the church had the right to renovate and remove structures or objects on the property. The artist's alleged physical manifestations of the emotional distress were also insufficient to establish the tort of negligent infliction of emotional distress.[334]

In summary, the owner of a companion animal in Massachusetts killed through veterinary wrongdoing will probably not be disqualified from entitlement to damages sustained from witnessing the death of a companion animal on the ground that the wrongful acts were not directed towards the plaintiff. However, the courts probably will require at least a near-contemporaneous observation of the injuries inflicted in order to prevail on a claim for negligent infliction of emotional distress. This may be a difficult hurdle to surmount for veterinary wrongdoing, though not for many other wrongful acts that kill companion animals, because veterinary wrongdoing will often occur out of the immediate sight of a human companion. Nor must the owner suffer anything more than severe emotional distress as a result of the wrongful conduct. Finally, owners will probably be able to recover for veterinary wrongdoing if companion animals are characterized by the courts as property that is at least as important to a plaintiff as was the house in *Sullivan*, which they appear to be.

2. *Wisconsin*

"Historically, the tort of negligent infliction of emotional distress has raised two concerns: (1) establishing authenticity of the claim and (2) ensuring fairness of the financial burden placed upon a defendant whose conduct was negligent."[335] In *Bowen*,[336] the Supreme Court stated that:

> Claimants and courts need a framework for evaluating bystander's claims of negligent infliction of emotional distress. The framework should be free of artificial, vague and inconsistent rules, yet should allow plaintiff to recover for negligently inflicted severe emotional distress while protecting tortfeasors from spurious claims, from claims concerning minor psychic and emotional shocks, and from liability disproportionate to culpability.[337]

The Supreme Court's adoption of the usual three negligence criteria, with legal causation to be determined by recourse to enumerated public policy criteria, has already been discussed in the context of a claim for negligence. However, two issues that are unique to the tort of negligent infliction of emotional distress remain.

The first concerns the contemporaneity of the plaintiff's observation of the triggering event. "[T]he required contemporaneous sensual perception has been recognized as arbitrary even by the courts which have incorporated it . . . [and] no other aspect of the tort . . . has resulted in more

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334 *Id.* at 511. It appears that the plaintiff, who was an artist suing because the defendants had partially destroyed his artwork, did not actually witness the destruction, but was told about it later. *Id.* at 507-08.

335 Bowen v. Lumbermans Mut. Cas. Co., 517 N.W.2d 432, 443 (Wis. 1994).

336 *Id.*

337 *Id.* at 442.

attention and litigation."[338] In each case, the court must determine whether a human companion's emotional distress was caused by the shock of witnessing the incident, or its effects, at some reasonable point after it occurs.

The *Bowen* Court observed that "[t]he requirement that the plaintiff observe the incident is construed permissively by some courts and not by others."[339] Then it said that

> [t]he distinction between on the one hand witnessing the incident or the gruesome aftermath of a serious accident minutes after it occurs and on the other hand the experience of learning of the family member's death through indirect means is an appropriate place to draw the line between recoverable and nonrecoverable claim.[340]

The second issue is whether a human companion is within a class likely to suffer severe emotional distress upon witnessing a serious injury to another. The original guideline set forth in *Dillon v. Legg*,[341] was "[w]hether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."[342] Speiser summarized the present rule as follows:

> [T]he plaintiff must fulfill the requirement that there exists a close, but not necessarily a blood, relationship between the plaintiff and the victim since the more closely related the victim and the witness are the more likely, and hence foreseeable, it is that the witness will suffer mental anguish and resulting physical injuries upon observing the injury to the victim.[343]

In harmony with the Speiser summary, *Bowen* stated that recovery of damages for negligent infliction of emotional distress would be allowed "when the plaintiff can prove that the victim is a loved one, that is, when the plaintiff and the victim have a relationship analogous to one of the relationships specified [spouse, parent, child, grandparent, grandchild or sibling]."[344] The strength of the bond between humans and companion ani-

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338 Polikoff v. Calabro, 506 A.2d 1285, 1288 n.3 (N.J. Super. Ct. App. Div. 1986). *See generally*, Blanche Wilkinson, *Bystander Emotional Distress Claims in Medical Malpractice Cases*, 15 Am. J. Trial Advoc. 605, 616 (1992) (discussing the evolution of bystander recovery and how courts attempt to limit liability); McDaniel, *supra* note 49, at 460-62.

339 *Bowen*, 517 N.W.2d at 444 n.29.

340 *Id.* at 445.

341 441 P.2d 912 (Cal. 1968).

342 *Id.* at 920.

343 SPEISER 1, *supra* note 89, § 16.27, at 1129-30.

344 *Bowen*, 517 N.W.2d at 444 n.28. *See* Paugh v. Hanks, 451 N.E.2d 759, 766-67 (Ohio 1983) ("[A] strict blood relationship between the accident victim and the plaintiff-bystander is not necessarily required . . . [because] the more closely the plaintiff and the victim are related, the more likely it is that the emotional injury was reasonably foreseeable."); Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 570 (La. 1990) (a plausible argument can be made for the argument that "the test (for recovery) should not be blood or marriage, but rather whether [the factfinder] is convinced from all the facts that there existed such a rapport between the victim and the one suffering shock as to make the causal connection between the defendant's conduct and the shock understandable," (quoting 12 F. Stone, Louisiana Civil Law Treatise Tort Doctrine, § 170 (1970)); Kriventsov v. San Rafael Taxicabs, Inc., 229 Cal. Rptr. 768 (Ct. App. 1986) (uncle and nephew were sufficiently close); James v. Lieb, 375

mals, the closeness of the personal relationship between human companion and companion animal, the tangibility of that bond, and the reality that it is analogous to a bond between family members strongly support the argument that Wisconsin should hold that a human companion is part of a class likely to suffer severe emotional distress upon witnessing a serious injury to her companion animal.

3. New York

In 1994, a New York federal court noted that "New York has been traditionally skeptical of emotional distress claims, leading to some apparently harsh results."[345] It then denied recovery to the owner of a companion animal who was euthenized after having suffered brain damage from being left in the 140 degree heat of an unventilated cargo hold of an airplane sitting on the tarmac in Phoenix, Arizona for over an hour.[346] New York law, said *Gluckman*, required that even intentional or reckless conduct be directed towards the human plaintiff.[347]

The case of *Mitchell v. Rochester Railway*[348] had been a landmark that embedded the "physical impact" doctrine in the American law of negligent infliction of emotional distress. As a result, even a pregnant woman was unable to recover for her injuries when she was frightened so badly from nearly being struck by a negligently operated horse-drawn carriage that she fell unconscious and suffered a miscarriage and a consequent illness.[349] Thus, in 1908, the Appellate Division reversed a judgment for emotional distress damages incurred when the plaintiff witnessed her cat

N.W.2d 109, 115 (Neb. 1985) (requiring a "marital or intimate familial relationship between the plaintiff and the victim . . . will not eliminate aunts, uncles, and grandparents from the class of potential plaintiffs, but would place upon them a heavier burden of proving a significant attachment"); Goncalvez v. Patuto, 458 A.2d 146, 151 (N.J. Super. Ct. App. Div. 1983) ("The strength, interdependence and unique emotional commitments of [the father-son] relationship have been recognized at least as far back as the Book of Genesis."); Portee v. Jaffee, 417 A.2d 521, 528 (N.J. 1980) (requiring "a marital or intimate, familial relationship between plaintiff and the injured person"); Keck v. Jackson, 593 P.2d 668, 670 (Ariz. 1979) ("[T]he emotional distress must result from witnessing an injury to a person with whom the plaintiff has a close personal relationship, either by consanguinity or otherwise."); Dziokonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978); Mobaldi v. Board of Regents of the Univ. of Calif., 127 Cal. Rptr. 720, 726 (Ct. App. 1976) (in holding that a foster mother could recover when the victim was foster child, the court said that "the emotional attachments of the family relationship and not legal status" is determinative); D'Ambra v. United States, 338 A.2d 524, 531 (R.I. 1974) ("Personal relationship may link people together more tightly, if less tangibly, than any mere physical and chronological proximity."); Hunsley v. Giard, 553 P.2d 1096, 1103 (Wash. 1976) ("We decline to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress."); Leong v. Takasaki, 520 P.2d 758 (Haw. 1974) (plaintiff can recover for emotional distress resulting from witnessing the death of his step-grandmother with whom he had a close relationship).

345 Gluckman v. American Airlines, Inc., 844 F. Supp. 151, 157 (S.D.N.Y. 1994) (quoting Bravman v. Baxter Healthcare Corp., 794 F. Supp. 96, 100 (S.D.N.Y 1992), *aff'd in part, rev'd in part*, 984 F.2d 71 (2d Cir. 1993)).

346 *Id.* at 158. The judge described the defendant's actions as "deplorable." *Id.*

347 *Id.* at 157-58.

348 45 N.E. 354 (N.Y. 1896).

349 *Id.* at 355.

being killed by a dog, as no physical impact to the plaintiff had occurred.[350]

The physical impact requirement was not overturned until 1961.[351] But, in 1969, the Court of Appeals criticized the zone of danger test and refused to permit a mother to recover for emotional distress damages that resulted when she allegedly watched her two year old child being struck by a car and seriously injured.[352]

> Every parent who loses a child or whose child of any age suffers an injury is likely to sustain grievous psychological trauma, with the added risk of consequential physical harm.
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> . . . .
>
> . . . The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of others. That is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed.[353]

However, in 1984, the Court of Appeals, after noting that "[t]raditionally, courts have been reluctant to recognize any liability for the mental distress which may result from the observation of a third person's peril or harm," adopted the "zone of danger" test, but limited it to "immediate family members," which it did not define.[354] Then, in 1993, the Court of Appeals refused to recognize a cause of action for negligent infliction of emotional distress for "all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond," and excluded the victim's niece from eligibility.[355] It therefore came as little surprise when, in 1994, the *Gluckman* court said that a cause of action for negligent infliction of emotional distress in New York "arises only in unique circumstances."[356] It further stipulated that the only bystander eligible to recover for negligent infliction of emotional distress was a plaintiff who observed the serious injury or death of a family member, and that, as property, the plaintiff's dog did not qualify.[357]

In summary, in contrast to Massachusetts and Wisconsin, it is unlikely that the owner of a companion animal in New York will be entitled to compensation for the infliction of either intentional or negligent infliction of emotional distress for veterinary, or other, wrongdoing. This follows from the severe limitations New York has imposed upon recovery for human beings.

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350 Buchanan v. Stout, 108 N.Y.S. 38, 39 (App. Div. 1908).

351 Battalla v. State, 219 N.Y.S.2d 34 (1961).

352 Tobin v. Grossman, 249 N.E.2d 419 (N.Y. 1969).

353 *Id.* at 423, 424.

354 Bovsun v. Sanperi, 461 N.E.2d 843, 846, 850 n.13 (N.Y. 1984).

355 Trombetta v. Conkling, 626 N.E.2d 653, 655 (N.Y. 1993).

356 Gluckman v. American Airlines, Inc., 844 F. Supp. 151, 157 (S.D.N.Y. 1994).

357 *Id.* (quoting Cucchi v. New York City Off-Track Betting Corp., 818 F. Supp. 647, 656 (S.D.N.Y. 1993)).

VII. CONCLUSION

An overarching principle of tort law is full compensation for all foreseeable injuries in the absence of sufficiently weighty countervailing policy considerations. By definition and common experience, companion animals have no economic value to their owners. This has been known to the common law for hundreds of years. Instead, the value of companion animals to their human companions lies in their bi-directional relationship. If a companion animal is wrongfully killed, through veterinary malpractice or otherwise, her human companion suffers an injury that is of the same kind, if not necessarily of the same degree, that she would suffer from the wrongful killing of any other family member. If a human companion witnesses the wrongful killing of, or severe injury to, a companion animal, the injuries he suffers are also of the same kind.

The "animals as property" syllogism arbitrarily, irrationally, unfairly, and formalistically limits recovery of noneconomic damages for the wrongful deaths of companion animals. It ignores the fact that the relationship between a human and his companion animal is no more based upon economics than is any other family relationship. It perversely permits the award of damages for an economic loss that a human companion does not suffer and refuses to compensate for the emotional distress and loss of society and companionship that he actually does suffer. The failure to recognize the reality of the relationship that exists between human companions and companion animals may also lead to a failure to permit damages for the emotional distress that a human companion suffers upon witnessing the circumstances of a companion animal's wrongful death.

The claims of humans for the emotional distress they suffer after witnessing the wrongful killing of their companion animals and for the emotional distress and loss of companionship they suffer from the loss itself should be evaluated as are any other damages for tortious injury. If human companions of companion animals are not compensated for the injuries they actually suffer, and no rational, fair, and sufficiently weighty policy considerations can justify this refusal, the overarching principle of full compensation for tortious injury will be undermined by an irrationality and arbitrariness that should not be part of the common law.