NON-ECONOMIC DAMAGES: WHERE DOES IT GET US AND HOW DO WE GET THERE?

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I. INTRODUCTION

One issue in the forefront of animal law in the courts, state legislatures and the media in recent years is the question of whether and under what circumstances a person may be entitled to monetary damages for non-economic harm--such as emotional distress and loss of companionship--for the wrongful injury to or death of a companion animal. This issue is often referred to in shorthand as "non-economic damages," and will be referenced as such in this article. This article will raise some of the fundamental questions that must be addressed in considering this issue and present the reader with some of the hotly debated responses.

First, is there a potential benefit to nonhuman animals overall to allow a particular human to obtain a greater monetary award when one particular nonhuman animal is harmed by the wrongful act of another? In other words, what's in it for the animals? Is this simply another means of dipping into the deep pockets of insurance companies and putting more money into the pockets of greedy plaintiffs? Correspondingly, if animal advocates are to choose their battles, is this one worth fighting or would their time for the animals be better spent addressing other pressing issues?

Second, if we assume the answer to the first question is yes (*i.e.*, there is a potential benefit to nonhuman animals), would it be more productive to focus on legislative efforts to enact statutes expressly allowing compensation for emotional distress and loss of companionship in these circumstances, or is advocates' time better spent trying to advance the issue through the courts? There is no simple answer to these questions. This paper will attempt to summarize the risks and potential advantages of both. In the end, however, careful evaluation and consideration of the big picture may go the furthest in effectuating progress in this area.

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II. WHAT'S IN IT FOR THE ANIMALS?

If you are an attorney who represents plaintiffs in cases of tortious harm to companion animals and you seek recovery of damages for emotional distress and loss of companionship because you believe the human plaintiff should have the right to compensation for this aspect of the loss, then you can skip to the next section. You do not need an answer to the first series of questions. If, on the other hand, your motivation for taking these cases is primarily as a means of advancing the interests of nonhuman animals within the legal system, then the fundamental question that must be considered is whether these cases indeed represent an effective means of achieving, or at least moving toward, that goal.

Some animal advocates will answer with a resounding "yes." One rationale is that these cases prompt the courts to recognize that although animals are "property" under the current legal system, they are sentient "property," far different from inanimate objects. Even where courts have ruled that the plaintiff is not entitled to "non-economic" damages, they often have acknowledged the special relationship between humans and their companion animals. Take, for example, the case of *Rabideau v. Racine*, 627 N.W.2d 795 (Wis. 2001). In that case, plaintiff's dog was fatally shot by a police officer. The primary question posed to the Wisconsin Supreme Court was whether the plaintiff was entitled to emotional distress damages based on claims of negligent and intentional infliction of emotional distress. The court ultimately ruled against her based on its interpretation of Wisconsin precedent (also noting the "slippery slope" concern), but it rejected the trial court's conclusion that the claim was frivolous, and recognized the availability of emotional distress damages in cases where the facts support a claim for intentional infliction of emotional distress. Significantly, the court started the opinion as follows:

> At the outset, we note that we are uncomfortable with the law's cold characterization of a dog, such as Dakota, as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.[2]

[2] Rabideau v. Racine, 627 N.W.2d 795, 798 (Wis. 2001); *see also* Paprocki v. Nolet, No. 01AS02905 (Cal. Super. Ct., Sacramento County Jan. 22, 2003) (Reluctantly following California precedent and dismissing a claim for "non-economic damages" arising from alleged negligence, the trial judge urged the state appellate court to reverse the ruling, stating in the minute order:

> Today many animals are more than pets, they are true companions. . . . [T]his court takes judicial notice of the emotional and physical well being pets often bring to their human companions. . . . To hold that a person does not suffer severe emotional distress or other noneconomic damage or harm when a negligent act takes the life of his/her companion pet, the law ignores reality.);

Ammon v. Welty, 113 S.W.3d 185, 187 (Ky. Ct. App. 2002) ("The affection an owner has for, and receives from, a beloved dog is undeniable. It remains, however, that a dog is property, not a family member.").

The *Rabideau* majority expressly clarified saying, "To the extent this opinion uses the term "property" in describing how humans value the dog they live with, it is done only as a means of applying established legal doctrine to the facts of this case."[3]

Beyond the potential benefit of court opinions acknowledging that animals are not simply "property," the publicity that often surrounds these cases (particularly in the more egregious cases of intentional harm to the animal) may evoke heightened sympathy for and compassion towards the specific animal harmed and, in turn, toward animals generally (or certain species of animals, at least). It may also increase public awareness of a problem affecting certain animals in a given community (for example, police shootings of animals, which is much more common across the country than most individuals would think or want to believe).[4] Public outcry or action by a vocal segment of society (which may be initiated by a highly emotional, high profile court case) can be the impetus for change in the legal system; also, court rulings themselves may cause the legislature to clarify or change the law.[5] Further, these cases may prompt the media to increase public awareness of issues relating to animals, which, in turn, could effect some change for the benefit of animals.

Proponents argue that these cases are an important step toward the legal system's recognition of animal interests. The argument is that as more and more courts issue published

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[3] *Rabideau*, 627 N.W. 2d at 798; *see generally In re* Estate of Howard H. Brand, No. 28473 (Vt. Prob. Ct., Chittenden County Mar. 17, 1999) (refusing to enforce a will provision calling for the destruction of testator's horses, the court reasoned:

> Although the discussion regarding the future of Mr. Brand's animals occurs within the realm of property law, the unique type of 'property' involved merits special attention.... The mere fact that this court has received more than fifty letters from citizens across the country concerned about the outcome of this case, and not a single communication addressing Mr. Brand's desired destruction of his perfectly good Cadillac, underscores this point.);

but see DeSanctis v. Pritchard, 803 A.2d 230 (Pa. Super. Ct. 2002) (rejecting divorced husband's attempt to enforce the couple's agreement allowing him visitation rights to see their dog, the court commented that the parties were seeking "an arrangement analogous, in law, to a visitation schedule for a table or a lamp," given that animals are property under Pennsylvania law; it is noteworthy that in voiding the agreement the court commented that during a four year separation period the husband never saw the dog.).

[4] *See, e.g.*, Brown v. Muhlenberg Township, 269 F.3d 205 (3d Cir. 2001) (where plaintiff did not witness police shooting of dog, no recovery for intentional infliction of emotional distress under Pennsylvania law); Copenhaver v. Borough of Bernville, 2003 U.S. Dist. LEXIS 1315 (E.D. Pa. Jan. 9, 2003) (dismissing claim for intentional infliction of emotional distress, with leave to amend to allege facts supporting the claim; allowing punitive damages claim to remain); Amons v. District of Columbia, 231 F. Supp. 2d 109 (D.D.C. 2002) (denying a motion to dismiss claim for intentional infliction of emotional distress where officers entered plaintiff's home without permission or a warrant, searched the home and shot plaintiff's dog); Rabideau v. Racine, 627 N.W.2d 795 (Wis. 2001) (police shooting case discussed above); *and* Fuller v. Vines, 36 F.3d 65 (9th Cir. 1994) (after a series of appeals and remands, in December 1998 the jury rendered a special verdict, finding that in shooting the dog one of the police officers violated the human plaintiffs' constitutional rights--the killing was held to constitute a seizure of "property" under the Fourth Amendment--causing $143,000 in damages, plus $10,000 in punitive damages).

[5] For example, in response to the Wisconsin Supreme Court's denial of a woman's application for admission to practice law the state legislature enacted a statute providing that "no person shall be denied admission or license to practice as an attorney in any court in this state on account of sex." *See* Application of Ms. Goodell, 81 N.W. 551 (Wis. 1879) (on reapplication, the court granted Goodell's motion for admission). Court decisions also can evoke a response that may be detrimental to animals. For example, two years after a Minnesota appellate court voided a provision of a "hunter harassment" statute that prohibited animal activists from interfering with hunting activities in *State v. Miner*, 556 N.W.2d 578 (Minn. Ct. App. 1996), Minnesota enacted a constitutional amendment declaring, "Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall forever be managed by law and regulation for the public good." MINN. CONST. art. XIII, § 2.

opinions acknowledging that companion animals are different than inanimate property, this fact will start to be recognized more broadly within the legal system and society as a whole.[6] As such, the argument goes, common sense would seem to dictate that they cannot be treated in the same manner as inanimate property. Longstanding anti-cruelty laws are a testament to this, but in the minds of many such laws are far from enough. The "non-economic damages" cases, proponents assert, could be a catalyst for the legal system to include animals within a category of quasi-property, *sui generis* and entitled to greater legal recognition.[7] As courts gradually begin to acknowledge that animals are considered by many to be family members, it should necessarily follow (so the argument goes) that their interests are entitled to greater weight within the legal system--regardless of whether or not they remain classified as "property." These cases (opponents of animal advocacy fear) could also represent a stepping stone toward a time where a nonhuman animal, through a guardian or other representative, could be a plaintiff in her own right, to seek redress for the injuries she herself has suffered.[8]

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[6] Given that the basis for plaintiffs' claims in these cases is the bond that exists between the plaintiff and his or her companion animal (such that interference with that bond warrants payment of damages for the ensuing emotional distress and loss of companionship), the animals harmed are generally "companion" animals as opposed to those animals suffering in laboratories or on factory farms. Proponents of these cases generally agree that the same theories should be applied to all sentient beings. Although a minority of proponents may view companion animals as being in a distinct category, there would appear to be no rational basis for recognizing the interests of some sentient beings and not others. *See, e.g.,* Rabideau v. Racine, 627 N.W.2d 795, 799 (Wis. 2001) ("Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion.") Unfortunately, human society necessarily tends to rely on the false sense of security of an outdated *status quo* in an effort to rationalize delaying progress, enlightenment and the recognition of the interests of others. It is only with 20/20 hindsight long after the laws and society as a whole have evolved that the absurdity and offensiveness of the position becomes apparent. *See, e.g.*, Mitchell v. Wells, 37 Miss. 235, 252-53 (1859) (Mississippi's "climate, soil, and productions, and the pursuits of her people . . . require slave labor. It was declared in the convention that framed the Federal Constitution, by some delegates, that Georgia and South Carolina would become barren wastes without slave labor. . ."); People v. Hall, 4 Cal. 399 (1854) (ruling testimony of Chinese witness was inadmissible to convict Caucasian man, court looked to "public policy" and referred to "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . between whom and ourselves nature has placed an impassable difference"); Bradwell v. State, 83 U.S. 130, 132-33 (1872) (quoting from the Illinois Supreme Court and affirming its denial of a woman's application for admission to the bar:

> That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarding as an almost axiomatic truth. In view of these facts, we are certainly warranted in saying that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.).

[7] *See, e.g.*, Bueckner v. Hamel, 886 S.W.2d 368, 376-78 (Tex. Ct. App. 1994) (Andell, J., concurring) (where plaintiff sued a hunter for killing his dogs, the court awarded actual and punitive damages; one justice concurred with the majority but would have expanded the award to encompass the "special value" of the dog to the plaintiff "[b]ecause of the characteristics of animals in general and of domestic pets in particular, I consider them to belong to a unique category of 'property' that neither statutory law nor case law has yet recognized.").

[8] *See, e.g.,* Palila v. Hawaii Dept. of Land and Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1988)

> ("As an endangered species under the Endangered Species Act, . . .the bird (Loxioides bailleui), a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court as a plaintiff in its own right . . . represented by attorneys for the Sierra Club, the Audobon Society, and other environmental parties.");

see also Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988); *but see* Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. 1993) (dismissing a claim brought by Kama, a dolphin, as a named plaintiff, for lack of standing, concluding that the Marine Mammal

Whether or not opponents' fears ultimately will be realized (an issue beyond the scope of this paper), are "non-economic damages" cases an effective means of getting there? Some animal advocates believe they are not. The focus of these cases is on the human plaintiff--the animals as companions or family members to *humans*; the loss suffered by the *human*, even though it is the nonhuman animal herself who has been injured or killed; and monetary compensation to the *human* plaintiff. As such, they offer no direct benefit to anyone other than the human plaintiff in the case.

One counter-argument is that nonhumans can benefit where the impetus for greater protections for the nonhuman was the *human* interest. The prime example is the environment. One often cited rationale for protecting the environment is to preserve it for future generations of *humans*; or to preserve it as a habitat for endangered species of animals so they will be there for "our [*human*] children."[9] Thus, there is arguably a sound basis for the position that even though a particular human plaintiff may obtain monetary compensation in these cases, this does not foreclose the possibility that nonhuman animals ultimately will benefit in some manner.

Advocates who question the value of these cases for the animals may also question whether there is any potential detriment to nonhuman animals if recovery of damages for emotional distress and loss of companionship becomes the accepted norm in these cases. There are several levels of debate in this regard. In no particular order, the first is the debate between animal advocates and opponents. Some opponents who claim to care about animals argue that awards for emotional distress or loss of companionship in veterinary malpractice cases will cause malpractice insurance premiums to increase, resulting in higher fees for veterinary services. They argue that many persons already refuse costly treatment and that higher prices simply will result in more animals being abandoned or euthanized when their guardians are unwilling or unable to pay for life-saving treatment.

Protection Act "does not authorize suits brought by animals." The court distinguished *Palila* and *Northern Spotted Owl* as cases where defendants had not challenged the propriety of naming an animal as a plaintiff.). Of course, it is already a given that nonhuman entities, such as corporations, are parties to lawsuits; in fact, it would be thought absurd if they could not be. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting)

> ("Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. [Fn. omitted.] The corporation – a creature of ecclesiastical law – is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.").

[9] For example, certain state constitutions and/or statutes specifically refer to the obligation to preserve the environment for "future generations" [of humans, presumably]. *See, e.g.*, HAW. CONST. art. XI, 1 ("For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources. . ."); MONT. CONST. art. XI, 1 (1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."); N.Y. Envtl. Conserv. Law § 8-0103 (Consol. 2004) ("It is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.").

The primary response to this argument would seem to be a reality check. Even where such awards have long been permitted in cases of negligent harm to animals,[10] to this author's knowledge, there has been no reported impact on the price veterinary services or on the volume of animal euthanasia in the jurisdiction; nor has there been any onslaught of litigation.[11] Moreover, even if such awards become permissible in every state, there is no reason to believe that the frequency or dollar value of the awards would warrant any significant change in veterinary fees.[12] In any event, just as in the legal field, *pro bono* free or low cost veterinary services generally are available for low income guardians who seek treatment for their companion animals. On the other side of the coin, studies indicate that an ever-growing percentage of animal guardians are ready to do whatever it takes for their animals and that veterinary practices have been expanding as a result.[13] Nonetheless, this debate raises at least an issue for consideration by advocates who take these cases with the ultimate goal of benefiting nonhuman animals.

The second debate is among animal advocates. Some raise concerns that these cases evoke the perception of greedy plaintiffs and plaintiff attorneys. If the cases are publicized as frivolous and over-reaching, it could work against the animal advocacy movement as a whole and, in turn, against animals. As anyone who has ever been a plaintiff or litigated on behalf of a plaintiff in these cases can attest, however, such cases often are pursued with a strong belief in the righteousness of the cause; and the monetary award of any settlement or judgment generally is a far cry from what plaintiffs and their counsel may receive in a civil action arising out of nearly any other form of alleged tortious conduct. In any event, if there is any media attention, it is important that the plaintiffs and the issues be presented in a favorable light. It is up to the attorneys handling these cases to be fully prepared for any media attention that may arise.

Generally speaking, animal advocates have relatively limited resources available to them--particularly when compared to the strong political power and seemingly endless financial and personnel resources of government agencies and mega-conglomerates that often oppose advocates' efforts to effectuate change. Given this fact, could time, energy and money be better spent toward a more direct, immediate or broader benefit for nonhuman animals? It is beyond

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[10] *See, e.g.*, Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981); *see also* McAdams v. Faulk, 2002 Ark. App. LEXIS 258, *13 (Unpub. Apr. 22, 2002) ("Damages on a negligence claim are not limited to economic loss damages, and include compensation for mental anguish.").

[11] For a thorough analysis of this and related issues, *see generally* Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163-250 (2004). For this issue in particular, see Section III of the article, "The Quantitative Question: Is the Sky Currently Falling Due to Increased Veterinary Malpractice Litigation and Greater Damage Awards?" (174-77).

[12] *See, e.g.*, TENN. CODE ANN. § 4-17-403 (2004) (T-Bo Act) (limiting awards for "compensation for the loss of reasonably expected society, companionship, love and affection of the pet" to $4,000).

[13] *See, e.g.*, Sonia S. Waisman and Barbara R. Newell, *Recovery of 'Non-Economic' Damages For Wrongful Killing Or Injury Of Companion Animals: A Judicial And Legislative Trend*, 7 ANIMAL L. 45, 61-62 (2001)

> ("According to an American Veterinary Medical Association study reported in 1998, $11.1 billion was spent on health care for companion dogs, cats, and birds in 1996, an increase of 61% from expenditures in 1991. As of 1998, there were twenty board-certified veterinary specialties, ranging from anesthesiology to toxicology. . . . In a 1996 survey by the American Animal Hospital Association, 38% of respondents stated they would spend any amount of money to save the life of their animal companion.")

(Footnotes and citations omitted.)

the scope of this paper to opine as to specific alternatives, but it is a question that every animal advocate should consider before automatically assuming that these cases are "for the animals."

Whether the conclusion is that these cases ultimately will benefit nonhuman animals, or whether it is that they simply are meritorious in their own right because human plaintiffs should be entitled to compensation for non-economic harm suffered in these instances, the next question is whether it may be more productive to focus on legislative efforts to enact statutes expressly allowing compensation for emotional distress and loss of companionship in these circumstances, or whether advocates' time and resources are better spent trying to effectuate progress through the judicial system.

III. LEGISLATE OR LITIGATE?

When it comes to collaborative or collective efforts to effectuate change on behalf of any segment of society (human or nonhuman), it seems that nothing moves forward without debate and differences of opinion (regarding the means to achieve that goal) among individuals all working toward the same ultimate goal.[14] Given that any effort to change a societal *status quo* faces obstacles in every direction, this is not at all surprising. On the issue at hand, there is staunch debate and strongly held opinions by animal advocates on both sides of the issue of whether to legislate or litigate for change.

In an ideal world, creating a statutory right for recovery of "non-economic damages" when a companion animal is harmed would be a simple and logical solution. Unfortunately for both humans and nonhumans, however, we do not live in an ideal world. The realities of the political process factor heavily into this debate.

The T-Bo Act (attached as Appendix A), enacted in 2001, was the first statute in the United States expressly permitting recovery of "non-economic damages."[15] The Illinois "Humane Care for Animals Act" (attached as Appendix B) became effective January 1, 2002.[16] A model statute prepared by the Animal Legal Defense Fund is attached as Appendix C. The chart on the following page summarizes the wide range in scope among the two statutes and the model proposal.

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[14] *See generally* JONATHAN S. HOLLOWAY, CONFRONTING THE VEIL (2002) (providing a history of the civil rights movement from 1919 through 1941 through the life and work of Abram Harris, E. Franklin Frazier and Ralph Bunch). The author is a professor at Yale University, serving as Fellow, Stanford Humanities Center, for the 2004-05 academic year.

[15] TENN. CODE ANN. § 44-17-403 (2004).

[16] 510 ILL. COMP. STAT. ANN. 70/16.3 (2004).

KEY PROVISIONS	TENNESSEE T-BO ACT	ILLINOIS HUMAN CARE FOR ANIMALS ACT	MODEL STATUTE
Animals Encompassed by the Act	"[D]omesticated dog or cat normally maintained in or near the household of its owner"	Any "owned" animal	"[A] dog; a cat; or any warm-blooded, domesticated nonhuman animal dependent on one or more human persons for food, shelter, veterinary care, or companionship." [Subject to exceptions.]
Type of Damages Permitted for Non-Economic Loss	"[C]ompensation for the loss of reasonably expected society, companionship, love and affection of the pet"	Includes, but is not limited to, damages for "emotional distress suffered by the owner"[17]	Includes "compensation for the loss of the reasonably expected society, companionship, comfort, protection and services" of the animal
Caps on Damages	$4,000	None on damages for emotional distress; $25,000 for punitive damages	None
Types of Claims Encompassed	Harm caused by "unlawful and intentional, or negligent, act of another"	Harm caused by acts of "aggravated cruelty" or acts of "bad faith"	Harm caused by any "willful, wanton, reckless or negligent act or omission"
Other Notable Restrictions	Expressly does NOT authorize a "non-economic damages" award in cases of "professional negligence against a veterinarian" --- *See* Appendix A [§ 44-17-403(a), (e) and (f)] for additional limitations	N/A	N/A
Other Notable Benefits	N/A	Expressly allows court to enter "any injunctive orders reasonably necessary to protect animals. . . ."	Where an animal is injured but not killed, allows compensation for "pain, suffering and loss of faculties sustained by the animal" --- Expressly allows court to issue restraining orders or injunctive relief "as appropriate"

[17] It is noteworthy that the Illinois statute also permits an award of damages for "expenses incurred by the owner in rectifying the effects of cruelty, pain, and suffering of the animal."

If the model statute is the starting point and the T-Bo Act is considered as a possible endpoint in the legislative process, the children's game of "telephone" (where a whispered phrase or story gradually transforms into something very different as it is passed along from person to person) comes to mind. This author was not privy to the legislative process in Tennessee, but has been involved in the process in California--where, on several occasions in recent years, bills have been proposed and then withdrawn as they morphed during the legislative process.

For example, a bill may start out encompassing negligent acts or omissions. Along the way (assuming lobbying by veterinary and insurance industry groups, for example, as is common), revisions could change it to delete negligence altogether or to delete claims of professional negligence against veterinarians. Many animal advocates strongly believe that to enact a statute with these limitations would be more detrimental than to have no statute at all. The reason is that, if and to the extent courts over time would otherwise become more inclined to allow "non-economic damages" claims to reach the jury in negligence cases (veterinary malpractice or otherwise), a statute limited in this manner is likely to dissuade the courts from doing so--effectively slamming the door on recovery for the tangible, but non-monetary component of the loss which may be suffered by the plaintiff regardless of whether the harm was inflicted through an intentional, reckless or negligent act.

In addition, lobbying groups and other opponents to such legislation often urge that monetary caps in line with the T-Bo Act should be imposed. Attorneys who routinely litigate these cases on behalf of plaintiffs differ in their views as to whether settlement values in particular (but judgments as well) are increasing to the point where a five-figure statutory cap would be detrimental to progress in the courts. There appears to be general agreement, though, that while the T-Bo Act will remain noteworthy as the first statute of its kind, a four-figure cap is unacceptable and, indeed, would have a negative impact on litigation (from the plaintiffs' perspective).[18]

One way to face these concerns head on may be to work with the state's veterinary association, if and to the extent possible, to try to draft the statute in such a way that is favorable for the animals (or, more directly, their human companions) yet still take into account the concerns of veterinary associations. Where this is possible, it will alleviate the risk of radical changes to the draft language as it weaves through the legislative process. Where this is not possible, animal advocates seeking to initiate legislation in their jurisdiction should fully research the political climate, including the strength and position of potential opponents. While it cannot be known with certainty what a final bill will look like if or when it is signed into law, knowledge of the issues and the players at the outset allows for a well-reasoned and calculated decision as to whether to go forward in a given jurisdiction at a particular point in time. It goes without saying that the intent to "do something good for the animals" is a worthy goal, but if the means to achieve that goal are not well-researched and planned, the risks of a detrimental effect may far outweigh the potential benefits.

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[18] A limitation as to the animals encompassed by the statute could be another factor of concern (e.g., T-Bo Act's limitation to dogs and cats), given that many people form close bonds with other animals (e.g., horses, ferrets, and pot-bellied pigs). However, since the vast majority of cases raising the "non-economic damages" issue involve dogs or cats, and since future statutes are likely to be broader in scope than the T-Bo Act, this is relatively unlikely to become a major point of contention as to whether a proposed statute would benefit animals and/or their human companions.

This holds true with respect to efforts not only on the legislative front, but in the courts as well. For example, when a claim for emotional distress or loss of companionship is dismissed at the pleadings stage, or at any stage for that matter, an attorney must evaluate whether to appeal. Obviously, an attorney has an ethical obligation to the client. We will assume for present purposes that the plaintiff client wants to do whatever is in the best interest of the animals on a broad scale. In considering whether to appeal, it is a given that any time a theory that may be viewed as "pushing the envelope" is put forth, there is a risk of making "bad law." This risk is an inherent part of the process. However, careful and thorough analysis may at least minimize that risk. Relevant factors include: 1) information about each of the appellate judges and their respective past decisions; 2) the results of thorough research of case precedent in the jurisdiction, including any analogous cases that would be helpful or detrimental to the claim; and 3) whether the facts of the case and the particular parties involved are optimal for a "test case," bearing in mind the well known saying that "bad facts make bad law."

From a big picture perspective, lawyers or advocacy organizations may wish to consider using the toxic tort cases as a model and utilizing some form of national coordinating counsel. The role of national coordinating counsel is to oversee (to the extent possible in this context) much or all of the litigation nationwide, to assure consistent handling and availability of resources, and to assist in strategizing as to which cases may best serve as test cases to make good law on the issue. Moreover, national coordinating counsel can provide expertise to local attorneys who may not handle these cases on a regular basis.

Whether the legislative process or litigation is the path to take in a particular jurisdiction will depend on the various factors noted in this section. Anyone looking to effectuate change for nonhuman animals (or to benefit human plaintiffs for that matter) through the development of "non-economic damages" will be doing a disservice to the humans or nonhumans they seek to benefit if they move forward on either path without thorough research and a calculated decision-making process.[19]

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[19] As a practical matter, though, it is noteworthy that various courts and the few legislatures that have addressed this issue appear to be somewhat consistent in generally allowing emotional distress damages for intentional torts but not in cases of negligence. *See, e.g.*, Pickford v. Mansion, 98 P.3d 1232 (Wa. 2004) (distinguishing cases involving malicious conduct and declining to allow recovery of damages for emotional distress where defendant/neighbor's two large dogs wandered into plaintiffs' yard and attacked their small dog); Kennedy v. Byas, 867 So. 2d 1195, 1198 (Fla. Ct. App. 2004) (declining to allow recovery of emotional distress damages, the court distinguished this from the earlier Florida case *LaPorte v. Associated Independents, Inc.*, 163 So.2d 267 (Fla. 1964) (The court stated, in *LaPorte* "the defendant's behavior was malicious -- the defendant threw a garbage can at the plaintiff's pet; in the instant case we are dealing with an allegation of simple negligent behavior by a veterinarian who was trying to provide treatment.")); Petco v. Schuster, 144 S.W.3d 554 (Tex. Ct. App. 2004) (where plaintiff's dog escaped from a groomer and was killed in traffic, the court distinguished from an earlier Texas case involving the intentional, premeditated, fatal shooting of a dog); TENN. STAT. ANN. § 44-17-403 (2004) (allowing up to only $4,000 in negligence cases, in limited circumstances); 510 ILL. COMP. STAT. ANN. 70/16.3 (2004) (not applicable in negligence cases); *see also* Ammon v. Welty, 113 S.W.3d 185, 187 (Ky. Ct. App. 2002) (where a dog warden fatally shot a dog but the facts did not establish intentional infliction of emotional distress, no recovery for loss of consortium or emotional distress); *and* Burgess v. Taylor, 44 S.W.3d 806 (Ky. Ct. App. 2001) (upholding $75,000 award of "punitive damages for emotional distress" where defendant sold plaintiff's beloved horses for slaughter). *But see* Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981); *and* McAdams v. Faulk, 2002 Ark. App. LEXIS 258, *13 (Unpub. Apr. 22, 2002) (cases allowing "non-economic damages" in negligence cases).

Often, this is in line with the case law in a given jurisdiction, which may limit recovery for negligent infliction of emotional distress to a relatively narrow set of factual circumstances. *See, e.g.*, Rabideau v. Racine, 627 N.W.2d 795, 801 (Wis. 2001) ("We note that this rule of nonrecovery applies with equal force to a plaintiff who witnesses as a bystander the negligent injury of a best friend who is human as it does to a plaintiff whose best friend is a dog.").

IV. CONCLUSION

In sum, this paper raises a number of questions to be considered when evaluating whether to pursue the "non-economic damages" issue and in what manner to do so. There are rarely any easy answers when trying to effectuate the evolution of the legal system to include more fully nonhuman animals. This difficulty, however, should not keep the conscientious advocate from thoughtfully evaluating the tough questions before charging forward.

APPENDIX A

TENNESSEE CODE ANNOTATED
"T-BO ACT"

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

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

(c) Limits for non-economic damages set out in subsection (a) shall not apply to causes of action for intentional infliction of emotional distress or any other civil action other than the direct and sole loss of a pet.

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

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

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

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

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APPENDIX B

CHAPTER 510. ANIMALS
HUMANE CARE FOR ANIMALS ACT
510 ILL. COMP. STAT. ANN. 70/16.3 (2004)

Civil Actions

Sec. 16.3. Civil actions. Any person who has a right of ownership in an animal that is subjected to an act of aggravated cruelty under Section 3.02 or torture under Section 3.03 in violation of this Act [510 ILCS 70/3.02 or 510 ILCS 70/3.03] or in an animal that is injured or killed as a result of actions taken by a person who acts in bad faith under subsection (b) of Section 3.06 or under Section 12 of this Act [510 ILCS 70/3.06 or 510 ILCS70/12] may bring a civil action to recover the damages sustained by that owner. Damages may include, but are not limited to, the monetary value of the animal, veterinary expenses incurred on behalf of the animal, any other expenses incurred by the owner in rectifying the effects of the cruelty, pain, and suffering of the animal, and emotional distress suffered by the owner. In addition to damages that may be proven, the owner is also entitled to punitive or exemplary damages of not less than $ 500 but not more than $ 25,000 for each act of abuse or neglect to which the animal was subjected. In addition, the court must award reasonable attorney's fees and costs actually incurred by the owner in the prosecution of any action under this Section or exemplary damages of not less than $ 500 but not more than $ 25,000 for each act of abuse or neglect to which the animal was subjected. In addition, the court must award reasonable attorney's fees and costs actually incurred by the owner in the prosecution of any action under this Section.

The remedies provided in this Section are in addition to any other remedies allowed by law.

In an action under this Section, the court may enter any injunctive orders reasonably necessary to protect animals from any further acts of abuse, neglect, or harassment by a defendant.

The statute of limitations for cruelty to animals is 2 years.

APPENDIX C

PROPOSED LEGISLATION TO ADDRESS THE WRONGFUL INJURY OR KILLING OF ANIMAL-COMPANION

(1) "Animal-Companion" defined

For purposes of this section, "animal-companion" means a dog; a cat; or any warm-blooded, domesticated nonhuman animal dependent on one or more human persons for food, shelter, veterinary care, or companionship. It does not include animals that are the subjects of legal, humane farming practices; of legal, humane biomedical research practices; or of activities regulated by the federal Animal Welfare Act.

(2) Wrongful Killing of Animal-Companion

A person who by willful, wanton, reckless or negligent act or omission kills, or causes or procures the death of, an animal-companion shall be liable in damages for the fair monetary value of the deceased animal to his or her human companion(s), including compensation for the loss of the reasonably expected society, companionship, comfort, protection and services of the deceased animal to his or her human companion(s); for reasonable burial expenses of the deceased animal; for court costs and attorney's fees; and other reasonable damages resulting from the willful, wanton, reckless or negligent act or omission.

(3) Wrongful Injury of Animal-Companion

A person who by willful, wanton, reckless or negligent act or omission injures, or causes or procures to be injured, an animal-companion shall be liable in damages for the expenses of veterinary and other special care required; the loss of reasonably expected society, companionship, comfort, protection and services of the injured animal to his or her human companion(s); pain, suffering, emotional distress and consequential damages sustained by the animal's human companion(s); pain, suffering and loss of faculties sustained by the animal; court costs and attorney's fees; and other reasonable damages resulting from the willful, wanton, reckless or negligent act or omission.

(4) Punitive Damages for Willful, Wanton, or Reckless Act

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

(5) Action; Limitations of Actions; Disposition of Damages

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

or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty.

(b) Damages under this section for injuries sustained by an animal shall be recovered in an action of tort by a guardian ad litem or next friend, commenced within three years from the date of injury or from the date when the guardian ad litem or next friend knew, or in the exercise of reasonable diligence should have known, of the factual basis for a cause of action; or within such time thereafter as is provided by section four, four B, or nine of chapter two hundred and sixty. Damages so recovered shall be payable into a trust for the care of the animal, which trust shall be enforceable for the life of the animal by a person appointed by the court. Any remainder of trust funds existing at the death of the animal shall be distributed to a non-profit organization dedicated to the protection of animals.

(6) Injunctive Relief

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