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# Em“BARK”ing on the Journey to Expand Recovery of Damages for the Loss of a Companion Animal

Jade McKenzie\*

## INTRODUCTION

When Tootsie, a two-year-old Maltese dog, was diagnosed with a respiratory disorder requiring corrective surgery, her owner desperately feared for the safety and well-being of her beloved pet.<sup>1</sup> The veterinarian advised the dog’s owner of the risks associated with such a procedure and the importance of withholding all food and water for twenty-four hours following surgery.<sup>2</sup> Contrary to her own instructions, the veterinarian proceeded to feed Tootsie a food mixture merely two hours after the surgery, causing Tootsie to aspirate the mixture into her lungs, and ultimately resulting in her premature death.<sup>3</sup> When Tootsie’s owner was informed of this tragedy, the veterinarian attempted to conceal the fact that it was her own negligence that caused Tootsie’s death.<sup>4</sup> Due to the current state of the law in California, the court refused to award any type of emotional distress damages to sufficiently compensate Tootsie’s owner for the negligent killing of her precious dog, leaving her with nothing but heartache.<sup>5</sup>

Tootsie’s owner is only one of many individuals who are forced to endure the loss of man’s best friend without any compensation to acknowledge the emotional impact of such a tragic event. In *Carbasha v. Musulin*, a West Virginia Supreme Court decision, a woman who witnessed the death of her pet dog was only permitted to recover the dog’s fair market value after he

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\* J.D., Chapman University Dale E. Fowler School of Law, May 2016; B.A., California Polytechnic State University, San Luis Obispo, 2013. I would like to thank Professor Kenneth Stahl for his thoughtful guidance throughout the development of this Comment; the Editors of the *Chapman Law Review* for their hard work in the publication process; and my mother, Liddy, and father, Ken, for their unconditional love and support.

1 *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 558 (Ct. App. 2009).

2 *Id.*

3 *Id.* at 558–59.

4 *Id.* at 559.

5 *Id.* at 564.

was struck and killed by a negligently driven vehicle while the two of them were taking a walk.<sup>6</sup> It is the unfortunate reality that the vast majority of individuals who suffer the loss of a pet must undergo severe pain and suffering without receiving compensation for their emotional distress. In fact, the majority of courts refuse to allow plaintiffs to recover non-economic emotional distress damages arising from the injury to or death of a companion animal; rather, the judiciary is stuck in an antiquated mode of viewing animals as if they were any other form of inanimate personal property, limiting recovery to their fair market value.<sup>7</sup>

Although the role that companion animals play in American society has been gradually transitioning away from mere property and is becoming more akin to that of a family member, the judiciary has failed to keep pace with this change.<sup>8</sup>

Today, 63% of all American households have one pet, 45% have more than one. In fact, there are more pets in America than there are citizens (360 million pets, 290 million people). Americans will spend upwards of \$36 billion pampering those pets this year, an amount nearly equal to the amount Americans spend on toys and candy *combined*. . . . Beyond question, many Americans love their cats, their dogs, their birds, as well as they love their children. But like the children of the pre-industrial revolution, the [judiciary] chooses to categorize those pets as nothing more than chattel.<sup>9</sup>

What were once treated as items of personal property, used solely for economic purposes, are now providing societal benefits to humans, such as companionship, affection, and emotional fulfillment. Despite judicial recognition of such a significant change, courts continue to label companion animals as personal property, thereby prohibiting plaintiffs from recovering emotional distress damages when they are forced to grieve the loss of a pet.<sup>10</sup> The unconditional love and companionship that pet owners derive from their furry friends creates an emotional dependence that persists even after the animal's death, just as it would upon the death of a family member, and this relationship

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<sup>6</sup> *Carbasha v. Musulin*, 618 S.E.2d 368, 371 (W. Va. 2005) (“[D]ogs are personal property and damages for sentimental value, mental suffering, and emotional distress are not recoverable for the negligently inflicted death of a dog.”).

<sup>7</sup> Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 50 (1998).

<sup>8</sup> Sabrina DeFabritiis, *Barking up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary's Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 245 (2012).

<sup>9</sup> *Carbasha*, 618 S.E.2d at 372 (Starcher, J., dissenting) (internal citations omitted).

<sup>10</sup> *Id.*

should be afforded better recognition by the law.<sup>11</sup> One of the most crucial roles of the judiciary is to adapt to society's changing attitudes and to formulate remedies that account for such changes. Nevertheless, while courts have acknowledged the emotional bond that often exists in the relationships between people and their pets, the current state of the law fails to adequately address this change, leaving many aggrieved plaintiffs without a legal remedy.<sup>12</sup>

While courts have historically refused to recognize the recovery of emotional distress damages associated with the injury to or death of a companion animal, some states have recently begun to recognize a plaintiff's ability to recover non-economic damages as a result of the intentional injury to a companion animal.<sup>13</sup> Among these states is California, which recently held in *Plotnik v. Meihaus* that "a person's intentional injuring or killing a pet will support recovery of damages for intentional infliction of emotional distress," reasoning that the strong emotional connection that exists between a human and a companion animal indicates that recovery for emotional distress damages is warranted in particular situations.<sup>14</sup> Although courts are certainly taking steps in the right direction, limiting the potential recovery of emotional distress damages to cases involving intentional conduct leaves countless plaintiffs, such as Tootsie's aggrieved owner, without a sufficient remedy. This Comment will address the need for expanding California's recognition of non-economic emotional distress damages to include recovery for the loss of a companion animal due to the *negligent* conduct of another.

Although California has allowed for the recovery of emotional distress damages when a pet has been intentionally injured or killed, this rule should similarly apply to the negligent injuring or killing of a companion animal. A plaintiff may recover under a theory of negligent infliction of emotional distress in

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<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *Hendrickson v. Tender Care Animal Hosp. Corp.*, 312 P.3d 52, 54–55 (Wash. Ct. App. 2013) (recognizing human-animal bond, but refusing to award emotional distress damages for the negligent death or injury to a pet).

<sup>13</sup> See *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (stating that the court is willing to recognize a cause of action for intentional infliction of emotional distress for the intentional killing of a pet); *Gill v. Brown*, 695 P.2d 1276, 1278 (Idaho Ct. App. 1985) (holding that plaintiffs are entitled to recover emotional distress damages for the intentional killing of their pet donkey); *Burgess v. Taylor*, 44 S.W.3d 806, 809–12 (Ky. Ct. App. 2001) (recognizing the court's ability to award emotional distress damages when defendant sold plaintiff's pet horses to a slaughterhouse without her knowledge).

<sup>14</sup> *Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 600–03 (Ct. App. 2012).

certain situations involving the death or injury of a family member;<sup>15</sup> however, California has refused to find a defendant liable for this cause of action when the case involves negligent conduct towards an animal. While it is concededly true that the loss of a family member is likely to result in greater hardship than the loss of a companion animal, it is virtually undisputed that the death of a pet is considered to be a traumatic event that will also lead to significant emotional devastation. Due to the analogous nature of these relationships based upon the grief that accompanies either loss, such protection should be granted in the latter situation as well as the former. The state's failure to adapt to modern views regarding companion animals leaves numerous plaintiffs without an adequate remedy when they suffer the loss of their beloved pet. Courts have repeatedly acknowledged the special relationship that often exists between humans and companion animals, yet there have been no efforts to alter the law to provide a sufficient remedy when this relationship has been destroyed in situations involving negligence. Moreover, emotional distress damages are compensatory in nature, and thus serve to make the plaintiff whole in cases where a person has been the victim of another's wrongful conduct. As such, whether a person's conduct is intentional or negligent should be irrelevant when awarding emotional distress damages. In making this determination, the focus should be on the plaintiff's recovery rather than the defendant's actions.

In this Comment, Part I will address the history of the classification of nonhuman animals as property, and will discuss the enactment of statutes and judicial interpretations concerning the recovery of damages for the loss or destruction of personal property. Part II will discuss the current state of the law pertaining to the availability of emotional distress damages, particularly in California, and how states have applied these damage awards to cases involving the negligent harm to a companion animal. Finally, Part III will identify the issues associated with the lack of recognition of such damages and will propose a solution by suggesting that California allow a plaintiff to recover emotional distress damages for the negligent, as well as the intentional, injury to or death of a companion animal.

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<sup>15</sup> See, e.g., *Stump v. Ashland, Inc.*, 499 S.E.2d 41, 52 (W. Va. 1997) (allowing claim of negligent infliction of emotional distress after truck crashed into house resulting in homeowners' deaths).

## I. ANIMALS AS PROPERTY AND AVAILABLE DAMAGES

Historically, and still to this day, all animals have been considered the personal property of humans.<sup>16</sup> As a result, when a person suffered the loss of a companion animal, the available damages were initially limited to the fair market value of the animal.<sup>17</sup> Due to the tragic nature of such an event and the emotional suffering that often accompanies the loss, courts began to recognize that this limited remedial scheme was vastly insufficient. In an effort to adequately compensate these individuals, many courts now allow additional damages to be recovered, including medical expenses and, in some cases, emotional distress damages.<sup>18</sup> While California has recently expanded the availability of emotional distress damages for the loss of a companion animal, many plaintiffs are still left without a sufficient remedy, resulting in the need for further expansion.<sup>19</sup>

### A. Animals as Personal Property

The emerging debate between scholars and animal rights advocates over the proper classification of animals has led to many changes in the way both society and the legal system view companion animals. Ranging from civil liability to criminal prosecution, the law's treatment of injury to or death of a companion animal has been drastically altered in recent years, and continues to change. While animal rights have significantly increased over the past few centuries, the continuing classification of animals as personal property has left countless animals and their human counterparts without a proper avenue for relief.

There currently exist three basic categories of property recognized in the American legal system—real property, personal property, and intellectual property.<sup>20</sup> Personal property is “physical, moveable, and has a limited physical existence,” and as such, animals have historically fallen under this broad classification.<sup>21</sup> Some scholars believe that the justification for

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<sup>16</sup> David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1026 (2010).

<sup>17</sup> William C. Root, “Man’s Best Friend”: Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury, 47 VILL. L. REV. 423, 423–24 (2002).

<sup>18</sup> See *Leith v. Frost*, 899 N.E.2d 635, 641 (Ill. App. Ct. 2008) (modifying trial court judgment to award damages in the amount that plaintiffs paid in veterinarian bills, rather than fair market value); see also *Gill*, 695 P.2d at 1278 (awarding emotional distress damages for intentional killing of pet).

<sup>19</sup> *Plotnik*, 146 Cal. Rptr. 3d at 603–04.

<sup>20</sup> Favre, *supra* note 16, at 1025.

<sup>21</sup> *Id.* at 1026.

the legal status of animals as property is based both in theology, and on the inferior status of nonhuman animals.<sup>22</sup> This type of classification has resulted in both procedural and substantive hurdles for animals and their advocates, such as the inability of an animal to sue on its own behalf, the denial of rights and privileges that are afforded to humans, and of course, a plaintiff's inability to recover damages for the wrongful death or injury of a pet.<sup>23</sup> These concerns have prompted a series of arguments urging for a change in the legal classification of animals as property. While some scholars argue that a fourth category of property should be created to accommodate for the unique characteristics possessed by animals, others advocate for a change in their property status altogether, arguing that animals should be afforded the status of "legal personhood."<sup>24</sup>

In his article entitled *The Legal Thinghood of Nonhuman Animals*, Steven Wise, President of the Center for the Expansion of Fundamental Rights in Boston, argues that although the "legal thinghood" of animals is derived primarily from ancient law and primitive legal systems, when legal rules no longer reflect current values, such rules must be reconsidered.<sup>25</sup> He addresses the fact that the earliest examples of law clearly demonstrate legal ownership of nonhuman animals, but that these theories of law were founded upon notions of "divine power" as opposed to justice.<sup>26</sup> Modern legal theory, he argues, has essentially replaced this method of law, and requires a consideration of normative principles and scientific discoveries that have since been

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22 Derek W. St. Pierre, *The Transition from Property to People: The Road to the Recognition of Rights for Non-human Animals*, 9 HASTINGS WOMEN'S L.J. 255, 261 (1998) ("The first has a theological basis, established in the Bible. In Genesis, man is given 'dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the earth, and over every creeping thing that creeps upon the earth.' A second justification rests in the 'inferior' status of non-human animals. Historically, non-human animals were viewed as lacking a 'soul,' a 'mind,' a 'will,' or whatever attribute it was thought makes humans uniquely human.").

23 BRUCE A. WAGMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 51 (4th ed. 2010).

24 Steven Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 472 (1996); see also CAROL B. MATLACK, WE'VE GOT FEELINGS TOO!: PRESENTING THE SENTIENT PROPERTY SOLUTION *passim* (Barbara K. Lawing & April Turner eds., 2006) (arguing for a new category of property referred to as "sentient property"); Favre, *supra* note 16, at 1021-22 (arguing for a new category of property referred to as "living property"); Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314, 379 (2007) (arguing for a new category of property referred to as "companion animal property").

25 Wise, *supra* note 24, at 473-74. "As every legal rule has its unique history, an understanding of this history is instrumental in the reconsideration to which every legal rule eventually becomes subjected." *Id.* at 474.

26 *Id.* at 543.

founded.<sup>27</sup> Due to the fact that the foundations of ancient laws are no longer applicable and have been fundamentally destroyed, the application of these laws “violates modern notions of fundamental principles of justice.”<sup>28</sup> Wise argues that “scientific discovery has created new views of life and of nature and decisively undermined the hierarchical cosmologies that once underpinned the transcendence of human over nonhuman animals,” and as such, “legal values, principles, and rights are not inherently limited to human beings, but entitle at least some nonhuman animals to transcend their historical legal thinghood and to draw equally upon these sources for legal personhood . . . .”<sup>29</sup>

Notwithstanding the numerous scholars who are in support of this view,<sup>30</sup> the harsh reality is that animals continue to be classified as personal property and are treated as such with respect to the law. Nevertheless, while these animals are considered to be the personal property of humans in all fifty states,<sup>31</sup> many changes have taken place to accommodate for the previously mentioned hardships that this classification places on animals. In 1867, Henry Bergh founded the first American Society for the Prevention of Cruelty to Animals (“ASPCA”) in New York, which was aimed at promoting the interests of animals in being free from unnecessary pain and suffering.<sup>32</sup> Since that time, hundreds of local humane societies have been established across the country in an attempt to advocate for an increase in animal rights.<sup>33</sup> Additionally, every state has adopted its own anti-cruelty laws designed to prevent the mistreatment of animals, and as of 2009, forty-six states and the District of Columbia had at least one felony anti-cruelty law.<sup>34</sup> Specifically, California has enacted more than 100 statutes pertaining to the treatment of animals.<sup>35</sup> Among these is California Penal Code section 597, enacted in 1872 and aimed at preventing cruelty to

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<sup>27</sup> *Id.* at 543–44.

<sup>28</sup> *Id.* at 475.

<sup>29</sup> *Id.* at 545–46.

<sup>30</sup> See generally Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369 (2007); Carter Dillard, *Empathy with Animals: A Litmus Test for Legal Personhood?* 19 ANIMAL L. 1 (2012); Christopher D. Seps, Note, *Animal Law Evolution: Treating Pets as Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339.

<sup>31</sup> WAGMAN ET AL., *supra* note 23, at 74.

<sup>32</sup> Favre, *supra* note 16, at 1028.

<sup>33</sup> *Frequently Asked Questions*, ASPCA, <http://www.aspc.org/about-us/faq/how-many-aspcas-are-there> [<http://perma.cc/6BHZ-KZ36>].

<sup>34</sup> WAGMAN ET AL., *supra* note 23, at 91–92.

<sup>35</sup> *Animal Legal & Historical Center*, MICH. ST. U., <https://www.animallaw.info/statutes/us/california?page=2> [<http://perma.cc/7UH9-P2BW>].



animals, which states that “every person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of a crime,”<sup>36</sup> and defines an animal as “every dumb creature.”<sup>37</sup>

Furthermore, in 2012, the Oregon Court of Appeals issued a ruling in *State v. Nix* that classified nonhuman animals as “victims” for the purpose of prosecuting under Oregon anti-cruelty statutes, essentially expanding the recognition of animal rights in the state.<sup>38</sup> In *Nix*, the defendant was found to be in possession of dozens of emaciated horses and goats and was ultimately convicted of twenty counts of second-degree animal abuse.<sup>39</sup> The court held that even though the animals were still considered to be the personal property of the defendant, each of the twenty neglected farm animals was a separate victim.<sup>40</sup> In reaching this conclusion, the court reasoned that “none of the provisions upon which defendant relies . . . expressly or implicitly provides that the victim of a violation of the animal neglect statutes is a person” and that “even though animals usually are the property of persons, there is a broader public interest in their health, care, and well-being that requires vindication when they are neglected.”<sup>41</sup> However, on March 5, 2015, the Supreme Court of Oregon vacated this landmark decision for lack of jurisdiction, holding that the State did not have authority to appeal the misdemeanor judgment and, as a result, both the court of appeals and the supreme court lacked judicial power to issue opinions.<sup>42</sup> Although the decision has been vacated, the court’s rationale in issuing such a ruling indicates its willingness to expand animal rights and potentially recognize that animals should be classified as more than mere property.

While there has been a significant increase in the recognition of animal rights and interests on both the statutory and institutional level, there still exists a large concern associated with the ability of plaintiffs to recover emotional distress damages for the loss of their pet. These concerns are primarily due to a companion animal’s continued legal status as property. Although courts have recognized that the distinct nature of an

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<sup>36</sup> CAL. PENAL CODE § 597 (West 2016).

<sup>37</sup> *People v. Baniqued*, 101 Cal. Rptr. 2d 835, 840–41 (Ct. App. 2000).

<sup>38</sup> *State v. Nix*, 283 P.3d 442, 449 (Or. Ct. App. 2012), *vacated*, 345 P.3d 416 (Or. 2015) (“[T]he individual animal identified in each count of second-degree animal neglect for which defendant was found guilty qualified as a separate victim . . .”).

<sup>39</sup> *Id.* at 443.

<sup>40</sup> *Id.* at 449.

<sup>41</sup> *Id.* at 446–48.

<sup>42</sup> *State v. Nix*, 345 P.3d 416, 424 (Or. 2015).

animal necessitates the creation of rules to acknowledge its unique status,<sup>43</sup> the ability to recover non-economic damages in situations where an animal has been intentionally or negligently killed or injured is still severely lacking.

## B. Recovery for Damage to Personal Property

While an individual who suffers the loss of a companion animal may generally recover the fair market value of the animal, this nominal value is clearly insufficient when considering the overall purpose of civil recovery. Legal remedies are designed to compensate a plaintiff for the defendant's wrongful conduct; in determining the type of compensation that should be awarded, it is crucial to look at the nature of the injury and provide compensation that will make the plaintiff whole. In many cases involving injury to a companion animal, however, a plaintiff is not made whole absent an award of emotional distress damages.

In a lawsuit involving tortious conduct, there are two general types of damages that a plaintiff may be able to recover: punitive damages and compensatory damages. The United States Supreme Court has defined punitive damages as "private fines intended to punish the defendant and deter future wrongdoing," whereas compensatory damages "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."<sup>44</sup> In other words, compensatory damages are generally thought of as those that serve to make the plaintiff whole, and include both economic and non-economic damages. While economic damages "compensate plaintiffs for tangible injuries" and often refer to measurable amounts such as lost earnings or medical expenses, non-economic damages "compensate plaintiffs for intangible injuries such as pain and suffering, loss of companionship, and emotional distress."<sup>45</sup>

In lawsuits arising from the loss or destruction of personal property, California has generally limited the measure of damages to the fair market value of the property at the time of the loss or destruction,<sup>46</sup> refusing to allow the recovery of

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<sup>43</sup> See *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997) ("[M]odern courts have recognized that pets generally do not fit neatly within traditional property law principles. . . . Instead, courts must fashion and apply rules that recognize their unique status.").

<sup>44</sup> *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 424 (2001).

<sup>45</sup> Victor E. Schwartz & Emily J. Laird, *Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 230 (2006).

<sup>46</sup> 23 CAL. JURISPRUDENCE 3D DAMAGES § 69 (2015).

non-economic damages in such cases. Due to an animal's property classification, courts have historically extended this limitation to situations where an animal has been the victim of intentional or negligent injury or death.<sup>47</sup> However, several states, including California, now recognize that "[p]ets are no longer exclusively treated as property with regard to damages" and have consequently expanded the available recovery in such lawsuits.<sup>48</sup> Indeed, California's state legislature has acknowledged the availability of additional damages in animal-related lawsuits by codifying this change in California Civil Code section 3340, which states that: "[f]or wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity, exemplary damages may be given."<sup>49</sup> Although this type of allowance has commonly referred to the recovery of punitive damages in cases involving intentional injury,<sup>50</sup> or an award of economic damages, such as reasonable medical expenses relating to the injury or death of the animal, very recently courts have begun awarding non-economic damages, such as damages for emotional distress.<sup>51</sup> In doing so, courts have focused on the property's actual and intrinsic value and the injury to the plaintiff, stating that "harm may be caused to a person's emotional well-being by malicious injury to that person's pet as personal property," but continuing to acknowledge that damages for sentimental value are not recoverable.<sup>52</sup> As a result, many states have started to take a step in the right direction by allowing the recovery of additional damages when a person's pet has been injured or killed.

## II. CURRENT STATE OF THE LAW

Every state has recognized that nonhuman animals possess sentient traits and qualities that inherently distinguish them

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<sup>47</sup> See, e.g., *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (App. Div. 2001) (dismissing plaintiff's claim for emotional distress damages based upon negligent or malicious killing of dog because of its property classification); *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269, 1274 (Vt. 2009) (holding that the measure of damages for death of pet cats was fair market value prior to death less fair market value after death).

<sup>48</sup> JUDICIAL COUNCIL OF CAL., CIVIL JURY INSTRUCTION, CACI No. 3903O (2016).

<sup>49</sup> CAL. CIV. CODE § 3340 (West 2016).

<sup>50</sup> *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. Ct. App. 2001) (finding that the trial court did not abuse its discretion in awarding \$75,000 in punitive damages).

<sup>51</sup> See *Martinez v. Robledo*, 147 Cal. Rptr. 3d 921, 927 (Ct. App. 2012) (stating that an injured pet owner's recovery of costs incurred in treatment and care is an appropriate measure of damages); *Kimes v. Grosser*, 126 Cal. Rptr. 3d 581, 586 (Ct. App. 2011) (allowing plaintiff to present bills incurred to save pet cat in recovering reasonable and necessary costs); see also *Womack v. Von Rardon*, 135 P.3d 542, 546 (Wash. Ct. App. 2006) (holding that malicious injury to a pet can support a claim for emotional distress damages).

<sup>52</sup> *Womack*, 135 P.3d at 546.

from other forms of property. As a result, courts are now changing their approach when confronted with cases involving an injury to an animal, and often will treat companion animals as more than mere property by allowing their owners to receive additional forms of compensation. Some states, including Washington,<sup>53</sup> Kentucky,<sup>54</sup> Alaska,<sup>55</sup> Idaho,<sup>56</sup> Florida,<sup>57</sup> Louisiana,<sup>58</sup> and Connecticut,<sup>59</sup> have already acknowledged the availability of emotional distress damages based on the intentional injury to a companion animal. Until 2012, California had refused to make such a determination, limiting the available remedies in cases involving the injury to or death of an animal to economic damages.<sup>60</sup> In a landmark decision, however, the California Court of Appeal for the Fourth District changed the state's view and held that a person who intentionally kills or injures an animal may be liable for emotional distress damages.<sup>61</sup>

#### A. *Plotnik v. Meihaus*: A Landmark Change in California Law

In 2003, plaintiffs David and Joyce Plotnik moved into a home with their two children and their miniature pinscher dog, Romeo, next door to the Meihaus family.<sup>62</sup> In the six years following their move, the plaintiffs and the defendant, John Meihaus, Jr., developed a hostile relationship consisting of countless adverse encounters between the two families.<sup>63</sup> This relationship came to an end on April 9, 2009, when Romeo ran into the Meihaus' backyard after hearing a loud banging noise coming from their property.<sup>64</sup> After his dog began barking, David Plotnik heard a loud squeal and subsequently saw Romeo rolling down the slope of the yard.<sup>65</sup> When Mr. Plotnik entered the Meihaus' yard, Mr. Meihaus was holding a bat, shouting at Mr. Plotnik "to be more courteous and get [his] dogs to stop

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<sup>53</sup> *See id.*

<sup>54</sup> *See Burgess*, 44 S.W.3d at 812.

<sup>55</sup> *See Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985).

<sup>56</sup> *See Gill v. Brown*, 695 P.2d 1276, 1278 (Idaho Ct. App. 1985).

<sup>57</sup> *See La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964).

<sup>58</sup> *See Brown v. Crocker*, 139 So. 2d 779, 781 (La. Ct. App. 1962).

<sup>59</sup> *See Liotta v. Segur*, No. CV020347756S, 2004 WL 728829, at \*1 (Conn. Super. Ct. Mar. 15, 2004).

<sup>60</sup> *See Kimes v. Grosser*, 126 Cal. Rptr. 3d 581, 586 (Ct. App. 2011) (limiting damages to fair market value when defendant shot and killed pet cat); *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 565 (Ct. App. 2009) (refusing to award emotional distress damages when veterinarian negligently killed pet dog).

<sup>61</sup> *Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 603 (Ct. App. 2012).

<sup>62</sup> *Id.* at 591–92.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 592.

<sup>65</sup> *Id.*

barking.”<sup>66</sup> Meihaus’ striking of Romeo caused the dog to have difficulty walking, and ultimately required Romeo to undergo surgery to repair his right rear leg.<sup>67</sup>

The court acknowledged the availability of an award for emotional distress damages as a result of the defendant’s conduct, holding that “California law allows a pet owner to recover for mental suffering caused by another’s intentional act that injures or kills his or her animal.”<sup>68</sup> In doing so, the court recognized that other states have acknowledged a pet owner’s ability to “recover for mental suffering caused by another’s wrongful acts resulting in the pet’s injury or death” and focused on the strong attachment that may exist between a person and a pet.<sup>69</sup> The court quoted the 1889 California Supreme Court case *Johnson v. McConnell*, noting that “there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt.”<sup>70</sup> In determining the award of damages, the court individually addressed the plaintiffs’ separate causes of actions for trespass to personal property, negligent infliction of emotional distress, and intentional infliction of emotional distress. Basing its decision on the property status of the animal, the court found that the defendant was liable for emotional distress damages under the plaintiffs’ trespass claim.<sup>71</sup> Consequently, the court refused to allow additional emotional distress damages based on the claim for intentional infliction of emotional distress, simply stating that “[a]llowing recovery for the same conduct here would amount to double recovery.”<sup>72</sup>

In denying the plaintiffs’ request for emotional distress damages based on their negligence claim, the court adopted its previous holding in *McMahon v. Craig*, which held that “a pet owner could not recover damages for emotional distress or loss of companionship based on a veterinarian’s negligent treatment that resulted in a dog’s death.”<sup>73</sup> However, *Plotnik* is easily distinguishable from *McMahon* because the claim in *McMahon* involved negligence in the veterinarian context, whereas the injury in *Plotnik* involved the conduct of a neighbor. The court in *McMahon* addressed the difficulty in creating a rule that imposes

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<sup>66</sup> *Id.* at 593.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 591.

<sup>69</sup> *Id.* at 600.

<sup>70</sup> *Id.* (quoting *Johnson v. McConnell*, 22 P. 219, 220 (Cal. 1889)).

<sup>71</sup> *Id.* at 599–601.

<sup>72</sup> *Id.* at 605.

<sup>73</sup> *Id.* at 598 (citing *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 564 (Ct. App. 2009)).

liability on veterinarians who have negligently injured or killed a person's pet as a result of medical treatment or care, stating that such a rule would raise serious policy concerns pertaining to increased insurance rates or decreased availability of veterinarian care.<sup>74</sup> Allowing the recovery for the negligent injury to a pet outside of the context of veterinary care does not implicate the same policy considerations and, therefore, should have been afforded greater weight in the court's analysis in *Plotnik*. Nevertheless, the court's decision to award the plaintiffs emotional distress damages based on the defendant's intentional conduct demonstrates the affirmative steps that the judiciary is taking to find a proper balance between an animal's property status and its emotional connection with humans in determining the availability of damages in similar situations.

### B. The Lack of Recovery in Cases Involving Negligence

While many states, such as California, have unequivocally determined that a plaintiff may recover emotional distress damages for the intentional injuring or killing of a companion animal, the recovery for cases involving a defendant's negligent conduct is still severely lacking. Based primarily on the level of culpability in cases involving negligence and the absence of any maliciousness or ill-will that often accompanies intentional acts, courts have unanimously concluded that an individual may not recover emotional distress damages for the injury to or death of a pet. Nevertheless, California has recognized that a plaintiff may recover emotional distress damages for cases involving negligence in other contexts, and such recognition should be expanded to include cases involving harm to companion animals.

The claim of negligent infliction of emotional distress is a controversial cause of action that has been interpreted in a variety of ways among the various states. The California Supreme Court has analyzed this claim by reference to two theories of recovery—the bystander theory and the direct victim theory.<sup>75</sup> Under the bystander theory, damages for emotional distress are recoverable when the plaintiff:

- (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.<sup>76</sup>

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<sup>74</sup> See *McMahon*, 97 Cal. Rptr. 3d at 564.

<sup>75</sup> *Gu v. BMW of N. Am., LLC*, 33 Cal. Rptr. 3d 617, 622 (Ct. App. 2005).

<sup>76</sup> *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989).

The California Supreme Court has further elaborated on this theory by stating that “[a]bsent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim.”<sup>77</sup> Due to the fact that a companion animal is generally not considered to be a family member of a household, California courts have never found negligent infliction of emotional distress under the bystander theory in situations involving companion animals. Under the direct victim theory, the California Supreme Court has emphasized that a finding of negligent infliction of emotional distress is fundamentally the same as the claim of negligence, which requires the essential elements of duty, breach, causation, and damages.<sup>78</sup> Additionally, as was seen in the *Plotnik* decision, courts may award emotional distress damages based on any other tort claim, such as trespass to chattels, but have rarely done so.<sup>79</sup>

Although no state currently allows an award of emotional distress damages based on the negligent injury or death of an animal, some states have acknowledged that this possibility may in fact exist. In the 1981 case of *Campbell v. Animal Quarantine Station*, the Supreme Court of Hawaii awarded emotional distress damages when a plaintiff’s pet dog was negligently killed during her transportation to a nearby hospital.<sup>80</sup> The court stated that “[w]here a claim for serious mental distress is made, and the mental distress is inflicted when a person endures negligently inflicted property damage, there is no requirement that plaintiffs must actually witness the tortious event in order to recover,” and awarded the plaintiffs \$1000 in emotional distress damages.<sup>81</sup> However, five years later, Hawaii’s legislature enacted a statute which barred recovery for emotional distress arising from any type of property damage, effectively rendering the court’s holding in *Campbell* invalid.<sup>82</sup> The statute was enacted as part of a tort reform effort triggered by a local hurricane, when numerous plaintiffs sought emotional distress damages arising from damage to their homes and belongings.<sup>83</sup> Although Hawaii no longer permits such recovery, the court’s analysis in *Campbell* provides useful insight into the possibility of allowing emotional distress damages in future negligence cases

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<sup>77</sup> *Id.* at 829 n.10.

<sup>78</sup> *Gu*, 33 Cal. Rptr. 3d at 623.

<sup>79</sup> *See supra* Section II.A.

<sup>80</sup> *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067 (Haw. 1981).

<sup>81</sup> *Id.* at 1066.

<sup>82</sup> HAW. REV. STAT § 663-8.9 (West 2016).

<sup>83</sup> WAGMAN ET AL., *supra* note 23, at 201.

involving damage to personal property. In reaching its holding, the court relied on its previous ruling in *Rodrigues v. State*, in which it permitted recovery for mental distress due to the negligent destruction of the plaintiff's home.<sup>84</sup> By drawing this comparison between a pet and a home, the court suggests that these distinct types of personal property should be treated the same. Of course, such an analysis would necessitate the concession that animals are in fact property, but the benefits of allowing an award of emotional distress damages based on this logic would likely outweigh any negative implications attached to an animal's already established property classification.

Hawaii is not the only state that has acknowledged the possibility of awarding emotional distress damages in negligence cases involving injury to an animal. In *McAdams v. Faulk*, the Arkansas Court of Appeals held that “[d]amages on a negligence claim are not limited to economic loss damages, and include compensation for mental anguish” and reversed the dismissal of a case involving veterinary malpractice where the plaintiff's dog suffered a neck injury after the veterinarian's office inappropriately used a choke holder to quiet him.<sup>85</sup> Additionally, in *Knowles Animal Hospital, Inc. v. Willis*, the Florida Third District Court of Appeal held that “the [lower] court did not commit err by including for consideration of the jury the element of the mental pain and suffering of the plaintiff-owners of the dog” when a dog was negligently left on a heating pad following its operation at a hospital, resulting in a severe burn and disfigurement, and ultimately, his death.<sup>86</sup> Moreover, in determining whether the bystander theory of negligent infliction of emotional distress applied in a case where the plaintiff's dog was shot and killed by a police officer, the Supreme Court of Wisconsin recognized that “humans form important emotional connections that fall outside the class of spouse, parent, child, grandparent, grandchild or sibling. . . . The emotional harm occurring from witnessing the death or injury of an individual who falls into one of these relationships is serious, compelling, and warrants special recognition.”<sup>87</sup> Nevertheless, the court refused to award emotional distress damages in such a case because allowing recovery would “enter a field that has no sensible or just stopping point.”<sup>88</sup> Courts have repeatedly acknowledged

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<sup>84</sup> *Campbell*, 632 P.2d at 1068.

<sup>85</sup> *McAdams v. Faulk*, No. CA 01-1350, 2002 WL 700956, at \*5 (Ark. Ct. App. Apr. 24, 2002).

<sup>86</sup> *Knowles Animal Hosp., Inc. v. Willis*, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978).

<sup>87</sup> *Rabideau v. City of Racine*, 627 N.W.2d 795, 801 (Wis. 2001).

<sup>88</sup> *Id.* at 802.



the existence of an emotional connection between companion animals and their owners and have conceded that special recognition should be afforded to such relationships, yet the law has failed to provide for this recognition in cases involving the negligent injury to or death of a pet. Due to the courts' acknowledgement of such a bond, the next logical step towards the expansion of civil recovery is the allowance of non-economic damages in cases involving the negligent conduct of an individual.

### III. ALLOWING NON-ECONOMIC DAMAGES IN CLAIMS INVOLVING NEGLIGENT CONDUCT

There are many situations where an individual's pet may be negligently injured or killed, such as cases involving veterinary malpractice<sup>89</sup> and negligence in driving a vehicle<sup>90</sup> or allowing a potentially dangerous dog to roam freely and harm other animals.<sup>91</sup> In each of these scenarios, the plaintiff loses a pet due to the negligent actions of another, and is forced to suffer the loss without just compensation. Although some states, including California, have allowed the recovery of emotional distress damages based on the intentional injuring or killing of a companion animal, this recovery should similarly apply in cases involving negligent conduct. The bystander and direct victim theories that have been uniformly applied in analyzing claims for negligent infliction of emotional distress should apply to cases involving animals with equal force as with any other type of negligent injury claim. Furthermore, the purpose of awarding compensatory damages is to make the plaintiff whole, and emotional distress damages should therefore be awarded in any case where compensatory damages are required in order to accomplish this purpose, regardless of whether the defendant's conduct was intentional or negligent.

#### A. Bystander and Direct Victim Theory as Applied to Cases Involving Companion Animals

The bystander theory of liability and direct victim theory of liability can both be applied to cases involving the negligent injury to or death of a companion animal. Due to the close familial relationship that many people develop with their pets, plaintiffs should be entitled to emotional distress damages when

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<sup>89</sup> See *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 564 (Ct. App. 2009).

<sup>90</sup> See *Carbasha v. Musulin*, 618 S.E.2d 368, 369 (W. Va. 2005).

<sup>91</sup> See *Marshall v. Ranne*, 511 S.W.2d 255, 256 (Tex. 1974).

they witness the death of or injury to their pet. Additionally, there are countless situations where persons have a legal duty to behave in a certain way and have breached that duty in causing injury to an animal, subjecting them to liability for emotional distress. Such duties include the duty to control an animal and prevent it from harming another, the duty to act reasonably, and the legal duty of veterinarians to their patients.

### 1. Bystander Theory

In order to recover for negligent infliction of emotional distress based on the bystander theory, California has consistently held that a plaintiff must establish a direct relationship with the victim, and that “no justification exists for permitting recovery for [negligent infliction of emotional distress] by persons who are only distantly related to the injury victim.”<sup>92</sup> More and more frequently, courts are beginning to acknowledge the significant relationship that develops between people and their pets.<sup>93</sup> As such, situations that provide for a remedy when a plaintiff witnesses the negligent injury or death of a family member should likewise apply to the witnessing of the negligent injury or death of a companion animal. In *Rabideau v. City of Racine*, which involved a police officer’s shooting of the plaintiff’s pet dogs, the Supreme Court of Wisconsin refused to recognize recovery for negligent infliction of emotional distress because of its inapplicability in the context of a “best friend who is human.”<sup>94</sup> The court held that “[f]or purposes of recovery for negligent infliction of emotional distress, this court treats the death of a dog the same as it treats injury to or death of a best friend, a roommate, or a nonmarital partner: It allows no recovery.”<sup>95</sup> This rationale is without merit because a person’s best friend or roommate has a separate family that could recover for witnessing their death or injury. The animal’s only “family” in such a situation would be the owner, and disallowing the owner to recover for emotional distress would essentially render the entire doctrine of bystander liability moot in such a situation. If the pet’s owner is not permitted to recover damages after witnessing a traumatic accident, the owner’s rights will not be vindicated.

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<sup>92</sup> *Thing v. La Chusa*, 771 P.2d 814, 829 n.10 (Cal. 1989).

<sup>93</sup> *See, e.g., 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.”).

<sup>94</sup> *Rabideau v. City of Racine*, 627 N.W.2d 795, 801 (Wis. 2001).

<sup>95</sup> *Id.* at 807.

When people adopt a companion animal and welcome the pet into their home, they are manifesting a concrete addition to their family and establishing a relationship that is vastly different than a simple human-to-human friendship. In fact, many believe that a dog's relationship not only rises to the level of human connection, it greatly surpasses that of a human. As Justice Andell of the Texas Court of Appeals for the First District so eloquently stated in his concurring opinion in *Bueckner v. Hamel*, which involved the intentional shooting and killing of the plaintiff's pet Dalmatian and Australian Shepherd, dogs "represent some of the best of human traits, including loyalty, trust, courage, playfulness, and love. This cannot be said of inanimate property. At the same time, dogs typically lack the worst human traits, including avarice, apathy, pettiness, and hatred."<sup>96</sup> Why else are they so often referred to as "man's best friend"?

In determining the availability of civil damages, family members have been afforded similar remedies in the context of other legal claims, such as actions involving wrongful death of a child or spouse. In these cases, like cases involving the death of a pet, a plaintiff may not recover emotional distress damages involving sentimental values such as grief or sorrow.<sup>97</sup> However, in these types of wrongful death actions, courts may award pecuniary damages for the loss of love, companionship, comfort, care assistance, protection, and affection.<sup>98</sup> Due to the fact that California has recognized that dogs have comparable pecuniary value that may be ascertained by reference to the dog's usefulness or other qualities,<sup>99</sup> these pecuniary damages should likewise be available in cases involving the death of an animal. This comparison between the death of a family member and that of a companion animal reflects California's understanding that these beings share many similar qualities and their loss is often accompanied by analogous emotional devastation, thereby indicating that an individual who suffers the loss of a pet should

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<sup>96</sup> *Bueckner v. Hamel*, 886 S.W.2d 368, 377 (Tex. Ct. App. 1994) (Andell, J., concurring).

<sup>97</sup> See *Quiroz v. Seventh Ave. Ctr.*, 45 Cal. Rptr. 3d 222, 226–27 (Cal. Ct. App. 2006) ("A plaintiff in a wrongful death action . . . may *not* recover for such things as grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss.").

<sup>98</sup> JUDICIAL COUNCIL OF CAL., CIVIL JURY INSTRUCTIONS, CACI No. 3921 (2016); see also *Parsons v. Easton*, 195 P. 419, 422 (Cal. 1921) (stating that there may be a pecuniary loss to a parent from the death of a child arising from the deprivation of the comfort and protection of the child).

<sup>99</sup> *Roos v. Loeser*, 183 P. 204, 205 (Cal. Ct. App. 1919).

be afforded similar remedies as a person who suffers the loss of a family member.

In *Bueckner*, the Texas Court of Appeals for the First District specifically acknowledged this unique relationship by noting some of the special characteristics possessed by companion animals.<sup>100</sup> In his concurring opinion, Justice Andell stated: “Because 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.”<sup>101</sup> He goes on to suggest:

The law should reflect society’s recognition that animals are sentient and emotive beings . . . . In doing so, courts should not hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people pets are the *only* family members they have.<sup>102</sup>

He concludes his opinion with the proposition that “testimony that an animal is a beloved companion should generally be considered sufficient to justify a finding of damages well beyond the market value of the animal . . . .”<sup>103</sup>

On a similar note, in his dissenting opinion in *Carbasha*, a 2005 West Virginia Supreme Court decision involving a plaintiff who witnessed the death of her pet dog when he was struck by a negligently driven vehicle, Justice Starcher suggested that the law should be altered to conform with present ideals and values, stating that “[w]hen the common law of the past is no longer in harmony with the institutions or societal conditions of the present, this Court is constitutionally empowered to adjust the common law to current needs.”<sup>104</sup> He critiqued the majority’s decision by stating that they continue “to maintain the primitive limits of the common law, and refuse[] to adjust to the realities of the modern world, and permit recovery of damages for sentimental value, mental suffering, or emotional distress.”<sup>105</sup> It is imperative that courts recognize their obligation to adjust the law to adapt to modern perspectives and societal outlooks. Such conformity requires a change in the way that courts approach issues regarding companion animals, particularly in situations where a plaintiff is forced to witness the injury to or death of a beloved pet.

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100 *Bueckner*, 886 S.W.2d at 377 (Andell, J., concurring).

101 *Id.*

102 *Id.* at 378.

103 *Id.*

104 *Carbasha v. Musulin*, 618 S.E.2d 368, 372 (W. Va. 2005) (Starcher, J., dissenting).

105 *Id.*

## 2. Direct Victim Theory

In terms of the direct victim theory of liability, although the California Supreme Court has implied that a plaintiff may not be able to recover emotional distress damages for the negligent injury of an animal simply because there is no duty that exists in such a scenario,<sup>106</sup> there are numerous cases where such a duty does exist and is breached when the animal has been injured. For example, in *Marshall v. Ranne*, a case involving a boar owned by the defendant who attacked and injured the plaintiff, the Texas Supreme Court stated that “a possessor of a non-vicious animal may be subjected to liability for his negligent handling of such an animal,” suggesting that a person has a duty to prevent a pet from injuring another person, pet, or property.<sup>107</sup> Moreover, the California Supreme Court has repeatedly held that it is a general rule of negligence that “every person has a duty to refrain from acting in a manner that causes foreseeable injury to another.”<sup>108</sup> Therefore, any situation in which a person is not acting as a reasonably prudent person otherwise would act, such as negligently operating a vehicle and striking a dog in the road, would subject that person to liability for negligence. In these cases, emotional distress damages would be required in order to fully compensate plaintiffs for their losses.

Additionally, there exists a duty in veterinary malpractice cases that could subject a veterinarian to liability for emotional distress damages resulting from negligent conduct. In fact, the vast majority of cases involving negligent injury to a companion animal involve claims of veterinary malpractice.<sup>109</sup> In medical malpractice lawsuits, the duty of care that a physician owes patients has traditionally been defined as the standard of “learning, skill and ability which others similarly situated ordinarily possess.”<sup>110</sup> Courts have further elaborated on this standard by defining “similarly situated” as “a standard of professional competence and care customary in the field of practice among practitioners in similar communities.”<sup>111</sup> While some states are in conflict regarding whether the same standard

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106 *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 807 (Cal. 1993) (“[T]here is no duty to avoid negligently causing emotional distress to another, and . . . damages for emotional distress are recoverable only if the defendant has breached some other duty . . .”).

107 *Marshall v. Ranne*, 511 S.W.2d 255, 259 (Tex. 1974).

108 *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 95 (Cal. 1997).

109 *WAGMAN ET AL.*, *supra* note 23, at 215.

110 *Id.* at 219.

111 *Williams v. Reynolds*, 263 S.E.2d 853, 855 (N.C. Ct. App. 1980).

should be applied to veterinarians,<sup>112</sup> California courts have unanimously found that the medical malpractice standard applies to veterinary malpractice cases.<sup>113</sup> In doing so, courts have looked to California statutes such as the California Business & Professions Code, which categorizes both medical doctors and veterinarians as licensed health care providers, and the California Code of Civil Procedure, which treats both types of cases the same for statute of limitations purposes.<sup>114</sup> Thus, it is clear that a duty exists in veterinary malpractice cases, and when a veterinarian breaches this duty through negligent conduct, he or she should be liable for emotional distress damages to the aggrieved plaintiff under the direct victim theory of liability.

### B. Emotional Distress Damages Serve to Make a Plaintiff Whole

As a form of compensatory damages, emotional distress damages are awarded to compensate plaintiffs for any injury that has wrongfully been inflicted upon them. In determining the amount of damages to be awarded, the court must look at the extent of the injury to the plaintiff as a result of the defendant's conduct. This is distinguishable from punitive damages, where the court must look at the defendant's conduct and determine whether the conduct is so reprehensible as to warrant additional damages for the purpose of punishing or deterring the defendant. Accordingly, in cases where the court has considered emotional distress damages based on the intentional injury to a pet, the court focuses on the effect that the injury or death has had on the plaintiff and the hardship that often accompanies such a loss.<sup>115</sup> Due to the fact that courts place such a strong emphasis on the effect of the action on plaintiffs, there should be no distinction

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<sup>112</sup> Compare *Gillette v. Tucker*, 65 N.E. 865, 869 (Ohio 1902) (adopting a similar malpractice analysis for all doctors, regardless of species), with *Pruitt v. Box*, 984 S.W.2d 709, 711 (Tex. Ct. App. 1998) (holding that the standard applicable to medical malpractice should not be applied to veterinary malpractice cases).

<sup>113</sup> See *Williamson v. Prida*, 89 Cal. Rptr. 2d 868, 872 (Ct. App. 1999) (holding that the medical malpractice standard applies to veterinary malpractice cases).

<sup>114</sup> CAL. BUS. & PROF. CODE § 4800 (West 2016); CAL. CIV. PROC. CODE § 340.5 (West 2016); CIV. PROC. § 597.5; see also *Williamson*, 89 Cal. Rptr. 2d at 872 (relying on the California Business and Professional Code and Civil Procedure Code in holding that veterinarians and physicians are treated the same).

<sup>115</sup> See *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (“[T]he loss of a beloved pet can be especially distressing in egregious situations.”); *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964) (“[T]he affection of a master for his dog is a very real thing and . . . the malicious destruction of the pet provides an element of damage for which the owner should recover.”); *Womack v. Von Rardon*, 135 P.3d 542, 546 (Wash. Ct. App. 2006) (“[H]arm may be caused to a person’s emotional well-being by malicious injury to that person’s pet as personal property.”).

between intentional or negligent conduct by the defendant. In either situation, the plaintiff is forced to endure the loss or injury to a pet, and the way in which this injury has occurred should be irrelevant. Of course, it would make no logical sense to award punitive damages for negligent conduct, but emotional distress damages serve a different purpose. Without emotional distress damages in situations where a plaintiff's pet has been negligently harmed, the plaintiff is not provided an adequate remedy. The focus in these cases must be on the plaintiff's recovery, not the defendant's conduct.

It is generally thought that courts are reluctant to extend compensatory damages to include those for emotional distress for two primary reasons. First, emotional distress damages are inherently difficult to prove or measure, and second, opening the door to these types of emotional distress claims would invite a floodgate of trivial or fictitious litigation.<sup>116</sup> Some scholars have further argued that emotional distress damages are so unique to each individual that such damages are unforeseeable, and as such, the defendant should not be held liable for injuries of this sort.<sup>117</sup> While it is certainly true that measuring emotional distress damages is not a simple task involving a predetermined formula, courts have uniformly permitted plaintiffs to recover emotional distress damages in other contexts.<sup>118</sup> In fact, though limited in its application, the separate cause of action for intentional infliction of emotional distress has been consistently recognized throughout the country. If courts are willing to permit such recovery in these various situations, there should be no reason to prevent recovery in the context involving the negligent treatment of animals. The measure of pain and suffering experienced by the plaintiff is still going to be a subjective test based upon the plaintiff's reaction to the defendant's unlawful conduct, and the underlying context therefore has no relevance. Moreover, advances in medicine and science now allow for a better attempt at measuring emotional distress damages to determine with higher certainty the severity of such damages. For example, expert testimony may be used to prove emotional distress damages, such as long-term emotional trauma related to

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<sup>116</sup> Wise, *supra* note 7, at 50.

<sup>117</sup> *Id.*

<sup>118</sup> See, e.g., *Johnson v. Thigpen*, 788 So. 2d 410, 412 (Fla. Dist. Ct. App. 2001) (allowing emotional distress damages in case involving workplace harassment); *Carey v. Lovett*, 622 A.2d 1279, 1294 (N.J. 1993) (awarding emotional distress damages to parents in medical malpractice claim involving birth of daughter); *Kennedy v. McKesson Co.*, 448 N.E.2d 1332, 1344 (N.Y. 1983) (recognizing availability of emotional distress damages in case involving dental malpractice).

the defendant's conduct.<sup>119</sup> The issue of foreseeability is also moot because medical science now recognizes that "in many situations, a plethora of mental damages, including fright, shock, grief, and anxiety, are foreseeable."<sup>120</sup>

Furthermore, the simple fear that allowing plaintiffs to recover emotional distress damages will result in a "Pandora's box" of litigation is not sufficient to prevent the award of non-economic damages altogether. The current state of the law disallowing emotional distress damages in situations involving intentional or negligent injury to or death of an animal is severely underinclusive and must be better adapted to provide sufficient remedies for plaintiffs in these situations. It is underinclusive in that countless claims involving obvious and severe emotional distress have gone uncompensated and are barred from recovery under this general rule, despite the clear need for an additional remedy in order to make the plaintiff whole.<sup>121</sup> It is one of the general duties of the judiciary to distinguish meritorious claims from frivolous ones, and a law preventing the meritorious claims from being heard is significantly more detrimental than the minimal burden of weeding out those that lack merit.

#### CONCLUSION

The relationship between humans and companion animals has been undergoing tremendous development in recent history. Although animals continue to be characterized as the personal property of humans, the judicial and legislative branches have become increasingly aware of the unique bond that is commonly formed in such a relationship, and as a result, have altered the way they have approached such situations to a limited extent. California in particular has taken significant steps in recognizing the importance of adjusting the way the law treats nonhuman animals and their human counterparts, such as allowing an owner to recover emotional distress damages when a pet has been intentionally injured or killed. This significant decision was a major breakthrough in the California legal system, which has historically limited the available damages in such cases to

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119 JON R. ABELE, EMOTIONAL DISTRESS: PROVING DAMAGES 110 (2003).

120 Wise, *supra* note 7, at 51.

121 *Id.*; see, e.g., Burgess v. Taylor, 44 S.W.3d 806, 812 (Ky. Ct. App. 2001) (finding that plaintiff suffered severe emotional distress but refusing to award emotional distress damages); Daughen v. Fox, 539 A.2d 858, 862 (Pa. Super. Ct. 1988) (denying emotional distress damages award despite plaintiffs' severe emotional distress resulting in the death of one of the plaintiffs).



economic damages. Nevertheless, the judiciary has failed to keep pace with this evolving trend, and it is insufficient to end the transition here, as this remedy does not take into account those plaintiffs who have suffered the loss of a pet as a result of the negligent actions of another. Regardless of whether the pet has been harmed by another’s intentional or negligent actions, the owner nonetheless must bear the loss, and as such, should be afforded similar treatment when seeking a remedy.

Without sufficient compensation for the death or injury to a companion animal in cases involving negligent conduct, plaintiffs are being denied proper compensation and are never truly made whole. It is an unfortunate tragedy that when a plaintiff suffers the loss of a pet, that individual “has no remedy for . . . grief and emotional distress in our common law.”<sup>122</sup> By allowing plaintiffs to recover emotional distress damages in situations where their pet has been negligently killed or injured, California will be one step closer to conforming the law to modern societal values. Whether the allowance of emotional distress damages should be permitted in claims involving damage to personal property, incorporated into the concepts of direct victim liability or bystander liability, or based upon an entirely separate cause of action, this is a change that must take place in order to provide pet owners with sufficient compensation under the law. To illustrate the strong emotional bond that exists between a man and his dog, Justice Starcher concluded his dissenting opinion in *Carbasha* by quoting an old country song entitled “Old Shep.”

When I was a lad  
 And old Shep was a pup  
 Over hills and meadows we’d stray  
 Just a boy and his dog  
 We were both full of fun  
 We grew up together that way.  
 I remember the time at the old swimmin’ hole  
 When I would have drowned beyond doubt  
 But old Shep was right there  
 To the rescue he came  
 He jumped in and then pulled me out.  
 As the years fast did roll  
 Old Shep he grew old  
 His eyes were fast growing dim  
 And one day the doctor looked at me and said  
 I can do no more for him Jim.

With hands that were trembling  
 I picked up my gun  
 And aimed it at Shep’s faithful head  
 I just couldn’t do it  
 I wanted to run  
 I wish they would shoot me instead.  
 He came to my side  
 And looked up at me  
 And laid his old head on my knee  
 I had struck the best friend that man  
 [ever had  
 I cried so I scarcely could see.  
 Old Shep he has gone  
 Where the good doggies go  
 And no more with old Shep will I roam  
 But if dogs have a heaven  
 There’s one thing I know  
 Old Shep has a wonderful home.<sup>123</sup>

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<sup>122</sup> *Carbasha v. Musulin*, 618 S.E.2d 368, 373 (W. Va. 2005) (Starcher, J., dissenting).  
<sup>123</sup> *Id.* at 372–73.