HARMING COMPANION ANIMALS
(*Second Edition*)

INTRODUCTION

Too often, especially with the advent of the Internet, information is sought from International Society for Animal Rights (ISAR) from the custodians of companion animals about harm done by veterinarians through, for example, misdiagnosis, prescribing the wrong medicine, operating unnecessarily or not when they should, and committing other kinds of veterinary malpractice.[1] ISAR also receives heartbreaking reports of intentional acts of cruelty perpetrated against companion animals: dogs shot by neighbors, cats stoned by teenagers, horses maimed by sadists, and more.

The media exposure during the last few decades about the harm visited upon companion animals causes nightmares for many of their custodians, who live in fear their animals may be the next victims.

Given what is now known about the emotional aspects of the human-animal bond, and how millions of companion animal caretakers regularly experience that relationship, it's not surprising that when harm is caused the custodian seeks some kind of recourse.

Often a complaint is made to prosecutors, veterinarian licensing authorities, or the Better Business Bureau. Sometimes newspaper announcements are placed, publicizing what the wrongdoer did, or failed to do. Mostly, however, the reaction of choice is a private civil lawsuit. Usually not to recover damages for their own sake, but to expose the wrongdoer's conduct, to prevent him or her from harming any animals in the future, and/or to inflict financial punishment.

Once virtually unheard of, in recent years the number of civil lawsuits arising out of harm to companion animals has soared. Various reasons have been offered for this phenomenon: the Internet and information explosion; a more litigious culture; considerable academic and journalistic writing on the subject; more lawyers practicing animal law and willing to take such cases; development of new theories of liability; greater awareness of the importance of companion animals to their caretakers' quality of life; more sensitive willingness on the part of some

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[1] For a comprehensive study of veterinary malpractice by Professor David Favre of the Animal Legal and Historical Center at the Michigan State University College of Law, see http://www.animallaw.info/articles/arusfavrevetmalpractice.htm .

legislatures and courts to treat seriously intentional and negligent harm done to companion animals.

But to say that "the number of civil lawsuits arising out of harm to companion animals has soared," is not to say that the increased litigation is succeeding. In fact, despite the occasional anecdotal story that makes the newspapers or a sound- bite on local TV news, virtually all litigation against veterinarians is *not* succeeding. Not if success is measured *by imposing a significant financial and/or professional penalty on the wrongdoer* (1) so that his future intentional or negligent conduct is likely to be deterred, and/or (2) so that the injured or deceased animal's custodian is recompensed for his or her emotional pain and suffering.

The lack of success in these kinds of cases—even if liability for intentional or negligent conduct is proved—is because in virtually every state companion animals are considered mere property, inanimate objects like a chair. This results in insignificant damage awards and the lack of deterrence and recompense. In other words, a veterinarian guilty of intentionally or negligently injurious conduct has little to fear from a lawsuit, for two reasons.

The first has already been explained: insignificant award of damages.

The second, related to the first, has to do with insurance.

Most claims for the injury or death of a companion animal will not be for *intentional* conduct, which insurance won't cover, but rather for *negligence*, for which most veterinarians will be covered. This means that in a veterinary malpractice case the insurance company will have to pay not only for the defense, but also any damages awarded. That leaves the veterinarian with only two costs: the deductible and premium. The costs of each are modest. As are the damages to be paid by the insurance company.

Indeed, as Christopher Green, Esq., noted in his seminal article "The Future of Veterinary Malpractice Liability in the Care of Companion Animals":[2]

> The price of liability coverage for veterinarians has not risen once in over a decade and premiums actually dropped in each of the two prior years. This means that veterinarians are now paying *less* for their malpractice coverage than they were 14 years ago. If one further adjusts for inflation, the average price of veterinary liability insurance is now 44% *lower* than in 1989—an effect verified by the country's largest veterinary liability insurer who reports that it collected the same total dollar amount in premiums from the

[2] 10 *Animal Law* 163, 174-175 (2004).

> 42,000 veterinarians it insured in 2001, as from the 26,000 it insured ten years earlier.

As to the cost of that insurance, Green reported that "[i]n 2003, basic liability coverage for a companion animal veterinarian still costs only $147 per year. For a scant $41 more, small animal veterinarians can boost their policy to the highest coverage tier of $1,000,000 per claim and $3,000,000 in total annual claims—a ten-fold increase in protection for a total premium price of only $188 per year."[3]

Here's what a veterinarian callously posted on the Internet: "Most veterinarians carry professional liability insurance. It costs me about $350 a year and I always forget to renew on time, dammit! Which is why right now, my insurance is expired. No biggie. I can 'go bare' occasionally, seeing as I understand the reality of what'll happen if I'm ever sued: not much. It'll be a pain in the butt, but it'll be over with as soon as I hand over a simple settlement consisting of a couple thou on my credit cards to cover the price of the pet in question."

Why is veterinary malpractice insurance so inexpensive? Why are many veterinarians not much concerned about being sued, and thus why are some not as careful as they should be?

As noted above, the answer is because once the veterinarian pays the premium and deductible the insurance company has virtually no serious financial risk. Its legal defense fees will be modest (unlike in a case involving an injured or dead human), and even if liability is found the award against the veterinarian will be minimal. To cover its defense costs and payment of an award, the company has (1) the premium, (2) the deductible and (3) actuarially, premiums paid by the many other veterinarians who don't get sued.

Thus to the extent the threat of personal liability and significant money damages acts as a deterrent to wrongful behavior for any professional conduct—*e.g.* lawyers, physicians and therapists, all of whom deal with *human beings*—veterinarians face no similar danger because *they deal with animals who are under most state laws and legal decisions considered mere property*.

As an example consider a case decided by one of New York's intermediate appeals courts, *Lewis* v. *DiDonna*.[4] The facts are simple, and were undisputed. A pharmacist mislabeled the dosage on a prescription for plaintiff's dog, who died as a result of the negligence.

To demonstrate the dog's custodian's measure of damages—how much he had suffered from his dog's negligent death—the trial judge allowed the plaintiff to introduce proof of "loss of companionship." In other words, how much plaintiff's

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[3] Green at 175.
[4] 743 N.Y.S.2d 186 (2002).

pet had meant to him and how much the custodian had suffered as a result of the pharmacist's negligence (which was undisputed).

On appeal, all five appellate judges ruled that pets "are recognized as personal property . . . and damages for the loss of a pet are limited to the value of the pet at the time it died . . . which are ordinarily proven by establishing the *market value* of the pet, if it has one, or, if there is no market value, by such factors which tend to fairly show its value."[5] In other words, the plaintiff was entitled to recover only the cost of purchasing another dog. The emotional and other value of plaintiff's negligently-killed dog *to him* was legally irrelevant.

Cited by the court in its *Lewis* v. *DiDonna* decision, in support of the long-standing "animals as property" principle upon which the judges relied, was an 1881 case from the highest court in New York (the Court of Appeals).

On appeal, the 1881 decision had upheld the defendant's conviction for stealing "property"—a dog. But while the "animals as property" principle was what allowed the judges in that case to uphold the conviction (dog = chair), the judges in *Lewis* v. *DiDonna* should have read the 1881 case more closely because, despite its conclusion, it had somewhat undercut the "animals-as-property" attitude toward companion animals. According to the 1881 decision,

> The reason generally assigned by common-law writers for this rule as to stealing dogs is the baseness of their nature and the fact that they were kept for the mere whim and pleasure of their owners. When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history . . . and the faithful St. Bernards, which, after a storm has swept over the crests and sides of the Alps, start out in search of lost travelers, the claim that the nature of a dog is essentially base and that he should be left a prey to every vagabond who chooses to steal him *will not now receive ready assent.*[6]

Still, as in 1881, today in most states companion animals are considered personal property—not the sentient and often highly intelligent beings they are, and their custodians know them to be.

There are contemporary animal rights activists who believe the solution to the "animals as property" mindset, and its consequence of attributing a negligible value to companion animals' wellbeing and lives, is through legislation. Indeed, as shown below, a few legislatures have taken a more modern and moral view and enacted statutes enlarging the kinds of claims that can be brought for harm to companion animals, and increasing the measure of damages for their injury or death.

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[5] Italics added.
[6] Italics added.

Other equally well intentioned people believe the solution lies in the courts, by encouraging them to fashion new remedial rules as to the kinds of claims that can be brought and by allowing increased damages if liability is found. As noted, some courts have.

While legislative and judicial reform can result in a demise, or at least amelioration, of the "animals as property" principle and accord companion animals and their custodians the legal protection they deserve and so desperately need, the question is what will bring about that reform.

In principle, the answer is that *reform will come from only a philosophical, cultural and social change in thinking about the nature and rights of companion animals, and their importance to the wellbeing of their human custodians.*

In the meantime, International Society for Animal Rights frequently receives reports of veterinary malpractice and intentional harm done to companion animals, and requests for information about what can be done. When these requests had so grown in number, it became no longer efficient for our organization to respond to them individually. Accordingly, Professor Henry Mark Holzer researched and wrote, and ISAR published, the first edition of *Harming Companion Animals: Liability and Damages*. Because since then there have been significant changes in some of the statutes and case law, Professor Holzer and ISAR have prepared this updated edition.

The monograph—aimed at laypersons, not legal professionals—is intended to be, and should be understood as, only *educational* in nature. *It is not intended to constitute, and should not be considered, legal advice generally or to address any individual situation in particular.* When confronted with a legal problem regarding intentional or negligent harm to a companion animal, there is no substitute for face-to-face, fact-specific advice obtained from one's own attorney. Accordingly, ISAR urges anyone with a potential or actual problem of this kind to consult a lawyer.[7]

Moreover, *Harming Companion Animals: Liability and Damages* is not intended to be a comprehensive statement of the law on that subject. Its modest goal is to present merely general statements of the principal legal categories, using examples to illustrate each, and to present additionally useful information in the Footnotes and Bibliography.

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[7] One can begin by entering "animal rights lawyer" into a search engine. However, because there are so many attorneys now purporting to practice in that specialized field of law, care must be taken to ascertain that an individual lawyer is fully qualified. ISAR does not make specific recommendations, although we note that organizationally Animal Legal Defense Fund does superb legal work on behalf of animals.

Specifically, *Harming Companion Animals: Liability and Damages* focuses on the nature and scope of wrongdoers' liability and the damages that may be recoverable from them. The book's methodology is to present brief but thorough explanations of the applicable principles of liability and damages, and then to illustrate them by the use of quotations from actual cases.

Although the monograph has not been written for lawyers, ISAR hopes that the information contained in it should be of considerable value to them, especially our use of actual cases and inclusion of the extensive bibliography. The latter includes:

- Law review articles.
- Law review notes.
- Book reviews.
- Books.
- International resources.
- Journals.
- Magazine articles.
- Miscellaneous resources.
- Newspaper articles.
- Online resources.
- Pending legislation.
- Unsuccessful bills.
- Reported cases.

Harming Companion Animals: Liability and Damages has been written for the benefit of the layperson whose companion animal has been harmed by intentional or negligent or intentional veterinarian conduct (or, rarely, by a breach of contract). Accordingly, the monograph has tried to keep the legal jargon to a minimum and, when possible, it expresses legal concepts mostly in lay terms (except when using quotes from actual court decisions).

The monograph does not deal with criminal conduct. Every state has laws criminalizing certain kinds of illegal behavior toward animals in general, and companion animals in particular. However, because this monograph is intended to provide information to the layperson who must deal with the *civil* consequences of intentional and negligent and intentional acts, it does not cover criminal conduct.

Following this Introduction the monograph consists of four major parts.

Section I deals with "liability" resulting from wrongful conduct. Someone must have done something either intentionally or negligently (or through breach of contract) to cause harm to a companion animal.

If there is liability, the second question, dealt with in Section II, is: what are the "damages"?

Part III presents "legislation": an overview of some state statues dealing with intentional and negligent harm to companion animals.

Part IV provides a sampling of state and federal cases which have confronted the damages and liability aspects of harm to companion animals.

While most of the harm to companion animals results from intentional and negligent conduct by veterinarians, *Harming Companion Animals: Liability and Damages* should not be taken as a criticism (let alone a condemnation) of all veterinarians. On the contrary. Although among the thousands and thousands of veterinarians in the United States there are some bad apples—just as in the medical, legal, and all other professions—*the vast majority of veterinarians and their staffs are caring, dedicated, competent, healers who feel deeply about the animals they treat. For them, all of us who have shared our lives with companion animals should be, and most of us are, eternally grateful.*

PART I. LIABILITY

Intentional Conduct

The word "tort" will frequently be used in this monograph, so it's a good idea to have a simple, workable explanation of what it means.

Human beings are engaged in a countless variety of activities, from driving cars to performing brain surgery. It's probably impossible to list everything that people do in the normal (and sometimes abnormal) course of their lives.

Sometimes things go wrong. A disgruntled employee will smash his computer. An electrician will wire a circuit box backwards. As a result, the employer and the homeowner will suffer financial and other types of losses. Generally speaking, the law of torts is designed to allocate the costs of those losses, sustained by one person as the result of what someone else has done (or failed to do). Intentionally or negligently injuring someone constitutes the commission of a "tort." (Torts and crimes are quite different. A tort is sometimes referred to as a "civil wrong," and defined as "a wrongful act for which damages can be sought by the injured party.")

As noted, there are two kinds of torts, intentional and negligent. (Negligent torts will be discussed below.)

Without getting too technical, "intent" is the mental state of wanting something to happen because of something you're going to do. If Bob Jones points a loaded

gun at Dick Smith's head and pulls the trigger, the law (and a jury!) will infer that Bob intended to kill Dick. If you're Bob, you did it because you intended to kill Dick.

To illustrate the principle of tort in the context of intentional conduct that has harmed and killed companion animals, and to provide the reader with a real-life illustration of the kind of evidence necessary to prove liability, the following is an edited version of a case entitled *Burgess* v. *Taylor*, decided unanimously by three judges in the Kentucky Court of Appeals on March 9, 2001[8]—a heartbreaking case, that is not easy reading.

The owner of two pet horses sued, for intentional infliction of emotional distress suffered by the owner (sometimes in Kentucky called the tort of "outrage") because the woman who was supposed to board them instead sold them for slaughter.

The jury found for plaintiff.

On appeal, one of the first statements the court made was that "the conduct of the *offender* [the defendant] rather than the *subject* of the conduct [the horses] determines whether the conduct was outrageous."[9] In other words—and this is very important—what the *defendant did* was the test of "outrageousness"—*not that the victim of that conduct was an animal*. Said the court:

> Judy Taylor ("Taylor") was the owner of two registered Appaloosa horses, nicknamed Poco and P.J. Taylor had owned Poco for 14 years (since he was a foal) and P.J. for 13 years (since her birth). Taylor loved Poco and P.J. as if they were her "children." Taylor and others testified that the horses were gentle and affectionate, and, having spent their entire lives together, were inseparable. * * *
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> Due to a variety of medical problems . . . it was difficult for Taylor to perform some of the physical tasks necessary to properly care for her horses by herself. Taylor did not want to sell or separate Poco and P.J. Therefore, she decided to try to find someone with a farm who would like to care for both of them in exchange for the

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[8] The case can be found in the West Publishing Co. system of reported judicial opinions at 44 S.W.3d 806. In the remainder of this monograph, three or four periods (dots) signify that at least one word but not a complete sentence has been omitted. Asterisks (*) signify that at least one sentence has been omitted. Bracketed ([]) material has been added by the author. The indented paragraphs are portions of the courts' opinions.

[9] Italics added.

enjoyment of having them-a common arrangement in the horse world sometimes referred to as a "free-lease agreement."

Taylor's brother suggested that his friends, Lisa and Jeff Burgess, who had a small farm with horses of their own, might be interested in such an arrangement. Taylor subsequently spoke to the Burgesses, explained her situation and the arrangement she was looking for. Taylor testified that she explained to Lisa that she never wanted to lose contact with or control of Poco and P.J., that she wanted to be able to visit them, and if the Burgesses ever didn't want to keep them anymore, Taylor would take them back or find another place for them to live.

Lisa agreed, assuring Taylor that she loved and was knowledgeable about horses, that she had a nice pasture for them to live in together, that she liked helping people, and that Taylor could come and visit the horses any time she wanted.

Believing that she had found a good place for her horses, Taylor agreed to let Poco and P.J. go live with the Burgesses. Taylor did not transfer ownership of the horses, nor ever indicate to the Burgesses that she no longer wanted them. On August 31, 1994, the Burgesses came to Taylor's residence to pick up Poco and P.J. Later that evening, Lisa called Taylor to tell her that they had led them around their new pasture and that the horses were doing fine.

Within the next few days, Lisa Burgess called Eugene Jackson, a known slaughter-buyer, to say she had two horses for sale. On September 6, 1994, Jackson purchased Poco and P.J. from the Burgesses for a total of $1,000.00.

Taylor waited a week before planning her first visit in order to give Poco and P.J. time to adjust to their new surroundings. She bought some film and treats for the horses and called Lisa to say that she would like to come and see Poco and P.J. and take some pictures. Lisa told Taylor "they're gone," that she had given them to a man she had met on a trail ride, but she did not know his name. Upset and frightened, Taylor said she needed to know who he was and where her horses were so she would know they were okay and could bring them back to her home. Lisa said she would find out and let Taylor know. The Burgesses then asked their friend, Kenny Randolph, to cover for them by lying and telling Taylor that he had the horses. Randolph never had possession of Poco and P.J. at any time and admitted his role in the events when questioned by a Harrison County, Indiana police detective.

Not hearing from Lisa, and after learning about the dangers of the

> slaughter market at a humane event over the weekend, Taylor called back and begged Lisa to tell her where Poco and P.J. were. At first, Lisa refused to tell her. Eventually, she lied and said that they were with a Kenny Randolph in the Corydon area of Indiana. Taylor called Randolph and told him she wanted to see her horses. Randolph, lying, told Taylor that he had them, but was not going to let her see them or tell her where they were. Taylor pleaded with him to tell her, and he eventually gave her vague directions to a fictitious location in the Frenchtown, Indiana area where he said they were in a pasture. He refused to give her specific directions or the name of the "gravel road" the pasture was supposedly on. Frantic, Taylor drove to the area and tried to find the gravel road Randolph spoke of. Taylor tried every road she found, stopping and asking people along the way if they had seen the horses, but was, of course, unsuccessful. Finally, it became dark, and a distraught Taylor had to return home.
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> With the aid of Victoria Coomber, a humane investigator, and Sharon Mayes, president of a local humane organization, in early October 1994, Taylor learned that Poco and P.J. had been purchased from the Burgesses by Eugene Jackson, a known slaughter-buyer, and then sold to Jason Ryan of the Ryan Horse Company, a business which supplies horses to slaughterhouses. Ryan Horse Company sold them to the Beltex Corporation in Texas where they were slaughtered in late September.
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> On August 23, 1995, Taylor filed an action in Jefferson Circuit Court
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> . . . . The jury returned a verdict against the Burgesses, finding that they had breached their agreement with Taylor and that they had intentionally inflicted emotional distress on Judy Taylor.

In 1984, seventeen years before the Burgess decision, the Kentucky Supreme Court had for the first time recognized the tort of intentional infliction of emotional distress ("outrage") for conduct affecting *humans*, adopting a formulation shared by virtually all other states that have recognized the tort:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Thus, in order to recover in Kentucky and in other states where the tort has been recognized, the plaintiff must prove four elements:

> 1) The wrongdoer's conduct must be intentional or reckless[10];
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> 2) The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
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> 3) There must be a causal connection between the wrongdoer's conduct and the emotional distress; and
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> 4) The emotional distress must be severe.

Needless to say, these four requirements are difficult to satisfy.

Said the Kentucky court:

> First, it is clear that the Burgesses' conduct was reckless in that they intended their specific conduct and either knew or should have known that emotional distress would result. Lisa Burgess admitted that she never had any intentions of keeping Poco and P.J. She sold P.J. and Poco to Eugene Jackson, a known-slaughter buyer, shortly after she acquired them. Further, the jury heard testimony from Kenny Randolph that the Burgesses told him that they had sold the horses to Eugene Jackson to go to slaughter, and that the Burgesses had asked him to lie for them so Taylor would not find out what they had done. There was significant evidence that the Burgesses were aware of Taylor's feelings for Poco and P.J., and hence, knew or should have known that emotional distress would result from their selling them to a slaughter-buyer.
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> Second, the Burgesses' conduct clearly rises to the level of being outrageous and intolerable in that it offends generally accepted standards of decency and morality, certainly a situation "in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'."
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> The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental

[10] Reckless conduct lies between intentional and negligent conduct. It is often explained as perceiving a known risk but engaging in the conduct anyhow. An example would be deliberately driving the wrong way on a one-way street. If the driver didn't know it was a one way street, but should have, his conduct would be negligence. If he did know, and wanted to show off, his conduct would constitute the intentional tort of battery.

> condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. * * * Compelling evidence was presented at trial establishing Taylor's love for her horses and concern that they were in a good place. Recognizing that love, Lisa Burgess called Judy Taylor the evening she picked up the horses to tell her that she led them around their new pasture and the horses were doing fine. The jury heard evidence of subsequent phone calls by a distraught and frightened Taylor to Lisa Burgess and Kenny Randolph, *begging* to know where her horses were. * * * The Burgesses knew that Poco and P.J. were heading to slaughter, and that Taylor was, in reality, pleading for their lives. Yet, in the face of Taylor's pleas for the horses she loved like children, the Burgesses continued to lie and refuse to tell her where they were. This Court cannot characterize this emotional torment inflicted by the Burgesses upon Taylor as anything other than "heartless, flagrant, and outrageous."
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> Third, the sale of Poco and P.J. by the Burgesses to a known slaughter-buyer satisfies the requirement of a causal connection between the Burgesses' conduct and the emotional distress. Further, the Burgesses' subsequent lies precluded Taylor from locating and saving her horses before they were slaughtered. Additionally, contrary to the Burgesses' assertions, we conclude sufficient evidence was presented from which the jury could properly infer that Poco and P.J. were, in fact, slaughtered.
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> Finally, the evidence indicates that Taylor suffered severe emotional distress. Taylor testified that when she learned what had happened to Poco and P.J., she broke down, knowing that "my babies were dead." Since then she has suffered from many panic attacks, and has had major problems with high blood pressure for which she must receive medical care. She suffers from anxiety and depression, for which she takes medication, and has had many thoughts of suicide. She described overwhelming feelings of loss and failure. She testified she has trouble sleeping and has recurring nightmares in which she hears Poco's scream in her head. Taylor testified that she has sought help from her doctor and social workers but cannot get over what happened.

Having found that the plaintiff satisfied all four criteria for an intentional infliction of emotional distress claim, the appeals court upheld the jury's verdict.

In those criteria, and the facts the plaintiff produced to satisfy them, there exists for others who would bring similar claims for intentional infliction of emotional distress, a veritable "how to do it" checklist.

As in the *Burgess* case, proof that the alleged wrongdoer acted intentionally can be shown by the existence of a plan, or through the wrongdoer's own understanding of the likely consequences of his conduct. For example, stealing a poodle wearing ID tags from a parked car.

As in the *Burgess* case, proof that the wrongdoer acted in a manner that offends generally accepted standards of decency and morality will arise from the facts of the case itself, as, for example, where teenagers put a kitten into a clothes dryer or bury a puppy alive. Or do something outrageously similar to what Burgess did to the plaintiff's pet horses.

As in the *Burgess* case, proof of a causal connection between the wrongdoer's conduct and the emotional distress will usually be easy to establish—for why would the aggrieved custodian of a harmed companion animal sue unless the defendant had somehow directly caused the injury or death? This causality is usually found, for example, where a dog who is allowed to run free is poisoned by a neighbor. Poisoned meat + hungry dog = death.

As in the *Burgess* case, proof that the emotional distress is severe is perhaps the easiest element to prove, as that case painfully makes apparent. In the hundreds of cases ISAR has seen, the emotional distress suffered by the custodian of a companion animal who has been intentionally harmed is almost always considerably more than merely "severe"—an emotional state most jurors can relate to because of their own relationships, directly, or even indirectly, with companion animals.

However, it must be emphasized that *a claim for intentional infliction of emotional distress for harm to a companion animal can only succeed* (1) *in a state that recognizes the existence of that tort and*, (2) *like the Kentucky courts, is willing to apply it to distress caused by harm to a companion animal.* A state whose courts (or legislature) understands that it is "the conduct of the *offender* [the defendant] rather than the *subject* [the companion animal] of the conduct that determines whether the conduct was outrageous." In other words, that what the defendant *did* is the test of "outrageousness"—*not that the victim of that conduct was an animal.*

Most states, however, do not recognize that the tort of intentional infliction of emotional distress can apply to harming a companion animal.

For example, take the Connecticut case of *Pantelopoulos v. Pantelopoulos*.[11] The former husband alleged that his ex-wife intentionally allowed his pet dog to starve to death when she moved out of her house, leaving the dog in the garage without food or water. "While the court is sympathetic to the loss experienced by the plaintiff in losing a beloved pet," said the judge, "Connecticut [does not

[11] 869 A.2d 280 (Conn. Super., 2005).

recognize a claim] . . . for intentional infliction of emotional distress in connection with the loss of a pet."

In states like Connecticut there are two solutions to this callous and primitive notion that a human can't be emotionally damaged by the intentional harm to a companion animal with whom he has bonded.

One solution is to get legislation enacted that provides otherwise. Another is to keep hammering the courts until they rule otherwise, using the *Burgess* case as a model. Until then, in the states that either don't recognize the tort of intentional infliction of emotional distress or, if they do, don't apply it to the injury or death of a companion animal, their custodians will have to put up with the kind of judicial decision represented by *Pantelopoulos v. Pantelopoulos*.

Negligent Conduct

As the Introduction notes, "human beings are engaged in a countless variety of activities, from driving cars to performing brain surgery. It's probably impossible to list everything that people do in the normal (and sometimes abnormal) course of their lives."

Sometimes things go wrong. A driver runs a red light, hitting someone. A surgeon leaves a sponge in someone's abdomen. As a result, the injured pedestrian and the harmed patient will suffer financial and other types of losses.

Just as in cases of intentional torts, the law requires an allocation of the cost of those negligently-caused losses.

Again without getting too technical, "negligence" is conduct below a standard of care that the law considers adequate to protect someone from the unreasonable risk of harm. To win a negligence case, the plaintiff must prove that a duty of care was owed and breached, that the negligent conduct was foreseeable, and that it was the proximate cause of the injury. (Also, that there were damages.)

To illustrate the principle of tort in the context of negligent conduct that has harmed (actually killed) companion animals, and to provide the reader with a real-life illustration of the kind of evidence necessary to prove *liability* (not *damages*), the following is an edited version of *Kenny v. Lesser*, an appellate court case from New York.[12]

A New York State jury awarded a horse owner $100,000 because of the defendant's veterinary malpractice. On appeal, the court ruled that there was enough evidence to support the verdict. Here are the facts of the case, and the court's malpractice (i.e. negligence) analysis:

[12] 281 A.D.2d 853, 722 N.Y.S.2d 302 (2001).

On October 11, 1993, plaintiff's three-year-old thoroughbred race horse underwent arthroscopic surgery for removal of a chip fracture in his right front fetlock. . . . * * * During the course of the procedure, the horse was anesthetized with a combination of drugs, the bone chip was successfully removed and the horse was transported to a recovery stall. While in recovery, the horse went into cardiac and respiratory arrest and died.

Claiming that the horse was over anesthetized and improperly monitored during the surgery, plaintiff commenced this veterinary malpractice action against the clinic . . . . * * *

There was no dispute at trial that plaintiff's horse succumbed to the effects of the anesthesia administered during surgery. The debate was over whether this horse was among the small percentage of equine patients that simply do not survive anesthesia through no fault of the surgeon and/or anesthesiologist, as defendants contended, or whether any act or omission on the part of defendants . . . caused his death, as plaintiff contended. On this disputed point, plaintiff presented the testimony of one expert, Nicholas Dodman. * * *

It was established during Dodman's testimony that he is a veterinarian, board certified in veterinary anesthesiology. He is also a professor at Tufts University School of Veterinary Medicine in Boston, Massachusetts. During his career—which spanned nearly 30 years . . .—he lectured all over the country on veterinary anesthesia and anesthetic drugs and authored hundreds of articles on the subject of veterinary anesthesia. Dodman himself has anesthetized some 2000 horses undergoing surgery.

Defendants contend that Dodman was unqualified to give an expert opinion on the standard of care because he practiced in a "university" setting, as opposed to this Albany County clinical setting. We disagree. Dodman's testimony, detailing impressive credentials in the very specific area of veterinary anesthesiology, sufficiently established his qualifications as an expert in this case, as well as his familiarity with the standard of care applicable to veterinarians administering anesthesia during surgery. The fact that Dodman did not practice in a clinical setting did not render his testimony inadmissible . . . . * * *

We also disagree with defendants' contention that the verdict is against the weight of the evidence . . . . * * * Dodman testified that the care and treatment rendered by [the anesthetist and surgeon] included departures from accepted standards of veterinary practice

which caused the horse's death. Specifically, he opined that the dosage of one particular drug administered to the horse . . . over a short period of time, particularly in conjunction with the administration of a large dosage of another drug . . . and an inordinately high level of a gaseous volatile anesthetic . . . constituted a departure from accepted standards of veterinary care. These dosages, according to Dodman, caused the horse to become respiratorily and cardiovascularly depressed, a condition which went undetected . . . . When disconnected from pure oxygen after surgery, Dodman's testimony continued, the horse could not sustain himself on room air only.
Dodman also opined that the monitoring procedures employed . . . during surgery—taking a peripheral pulse and making visual observations of the horse—were substandard. According to Dodman, various devices were available to monitor the horse's vital signs during and after surgery, including an aneroid gauge to measure blood pressure (blood pressure being the single most important determinate of the depth of anesthesia in a horse), blood gas monitoring equipment and/or an electrocardiogram monitor. He specifically opined that standard practice required that a patient be monitored by these devices when Halothane is being administered. Dodman further noted that no contemporaneous notes were recorded by [one of the veterinarians] during surgery, which might have enabled him to document the developing trend in the respiratory and cardiac depression that ensued while the horse was under anesthesia. Dodman opined that where, as here, an orthopaedic patient is anesthetized with gaseous Halothane, it is a departure from standard practice not to keep such notes.

In his defense [one of the veterinarians] denied over-anesthetizing the horse and further opined that he properly monitored the horse's vital signs during the surgery by making visual and auditory observations and by taking his pulse every five minutes. Of note, plaintiff, who was present in the operating room, contradicted [the veterinarian] on this latter point, testifying that [the veterinarian] sat two feet away from the horse during surgery and never touched him throughout it. The jury also learned through [the veterinarian's] testimony that he considered aborting the surgery because the horse was not properly responding to the anesthesia. It was further established at trial that *after* the horse died, [the veterinarian] created a chart of the entire procedure. This postoperative record attempts to document, in time and dosage, the various drugs administered during surgery, as well as the horse's vital signs at particular time intervals. The jury further learned that, after creating this chart, [the veterinarian] then made additional changes to it. * * *

To establish a checklist for people who want to sue for veterinary malpractice, let's go back to the requisite elements of a negligence claim.

It's a fact that Kenny's horse *died*.

It's a fact that as a result Kenny suffered a *loss*.

It's a fact that the law requires an *allocation* of the cost of that loss if there was negligence.

We know that negligence is conduct below a *standard of care* that the law considers adequate to protect someone from the *unreasonable risk of harm*.

It's a fact that to win a negligence case, the plaintiff must prove that the negligent conduct was *foreseeable*, and the *proximate cause* of the injury. (There were damages, a subject to be discussed later).

In the *Kenny v. Lesser* decision there was conduct below the acceptable standard of care because of the way the anesthesia was handled and monitored, foreseeable injury or death if it was not handled and monitored correctly, and not having done so correctly having been the proximate cause of the horse's death.

This will be the typical liability analysis in a case where a companion animal has been injured or killed as the result of a veterinarian's negligence.

Every state recognizes claims for negligence for the injury or death of a companion animal, which means that it will be the most frequently brought claim, as compared with a lawsuit for breach of contract, which is usually not very useful.

Breach of Contract

Ordinarily, the injury or death of a companion animal is not associated with a claim for breach of contract. Instead the focus is on a tort lawsuit for either intentional or negligent harm.

But sometimes a breach of contract claim will succeed in establishing the offending veterinarian's *liability*, though the problem of *damages* is a serious one. Here is one example, from the case of *Austin v. State of Illinois*[13]:

> The owner's dog was diagnosed with malignant lymphoma. The owner took his dog for chemotherapy treatment at the State's university veterinarian hospital. The dog responded positively to the first protocol of treatment. When the dog returned for the second protocol, there was no evidence that the dog was treated.

[13] 54 Ill. Ct. Cl. 375 (2000).

> The chemotherapy flow sheet was not initialed by a clinician or administrator. The State called no witnesses to testify that they administered the appropriate chemotherapy drugs to the dog. There were no authorization forms or estimates prepared. The dog was not lethargic as he had been after the first treatment. The dog suffered a relapse. The owner paid to have the oncologist remove a sample of the cancer and to send it to a lab. The test was never done, and the owner was never refunded. The owner established two instances of breach of contract. The owner showed that the dog never received the second treatment. It was presumed that treatment was not provided since there was no documentary evidence of the treatment and no testimony that the treatment was provided. Also, the test for which the owner paid was never performed, and the owner was never refunded.

Because the owner's claim was not for intentional or negligent tort, but only breach of contract, the damages were almost nothing. Even the judge who wrote the opinion realized that contract damages were inadequate:

> This is a sad and difficult case. No monetary award can bring back Dirty Red to Claimant. No amount of money could satisfy Claimant's loss. There is also no question that Dr. Kitchell is a caring, veterinary oncologist. However, she was not present on April 16, 1997, when the Claimant's dog was not treated properly. It is the Court's desire that this Opinion will cause the Respondent to do a better job of charting and that a constructive end will come from this case.

Nice sentiments, but because the damages are so small in a breach of contract case, there is little or no incentive for wrongdoers to change their ways.[14]

PART II. DAMAGES

Generally

Essentially, there are two kinds of damages for the commission of a tort, "compensatory" and "punitive."

Again without getting too technical, compensatory damages, as the name suggests, are those which make the injured party whole for the loss he has

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[14] Increasingly, other theories of liability are being tried. Among them are bailment, breach of fiduciary duty, deceptive or fraudulent trade practices, common law fraud and misrepresentation, unfair trade practices, conversion, breach of warranty, strict liability. But they are rarely successful even on a trial level, let alone on appeal.

suffered. If your brand new Jaguar is totaled in your driveway by a drunk driver, you're entitled to a brand new Jaguar. If it happened while you were driving and you were hurt, you're entitled to medical expenses, loss of income, etc.—and you're also entitled to damages for what's called "pain and suffering," which can be awarded by a jury in almost any amount.

Punitive damages (sometimes called "exemplary damages") are those over and above compensatory damages, where the tort committed was malicious, violent, or oppressive. The idea behind punitive damages is to punish the wrongdoer and send a message of deterrence to others who might be inclined to the same behavior.

To illustrate both kinds of damages, we can take another look at the case of *Burgess v. Taylor*, which arose in the context of an intentional tort.

Intentional Conduct

Because of what the defendant had done to the plaintiff's pet horses, the manner in which it was done, and the consequences to the plaintiff and her horses, the jury awarded Taylor $51,000 in compensatory damages and $75,000 in punitive damages, for a total of $126,000.

Burgess had claimed that under Kentucky law, "the proper award of damages for the loss or damage to an animal is the value of that animal, not emotional damages for that loss." The court disagreed, saying that "there are no cases in Kentucky holding that a finding of intentional infliction of emotional distress or punitive damages is precluded simply because the facts giving rise to the claim involve an animal. * * * "

Then Burgess argued that the $51,000 in compensatory damages and $75,000 of punitive damages for emotional distress was "excessive."

The appeals court noted that the trial judge had considered that issue "and found that when viewed in relation to all of the evidence submitted to the jury, the jury's award was not excessive" because that evidence had painted an horrendous picture of Burgess's callous conduct and its emotionally devastating impact on Taylor.

Lastly, Burgess argued that the award of punitive damages for intentional infliction of emotional distress resulted in double recovery for Taylor.

The appeals court disagreed with this, too. Said the court:

> The $50,000.00 award for compensatory damages for the tort of outrageous conduct is calculated to make whole, or compensate, Judy Taylor for her actual . . . loss. * * * This includes damages for emotional distress for intentional acts regardless of whether

> accompanied by physical injury. * * * Punitive or exemplary damages, on the other hand, are not intended to compensate a victim for his or her loss, but are designed to punish or deter a person, and others, from committing such acts in the future. * * * Therefore, a victim of outrageous conduct can recover both compensatory and punitive damages.

Under the facts of that case, the appellate court believed that a total damage award of $126,000 was appropriate. But remember, the tort was the *intentional* infliction of emotional distress.

Negligent Conduct

Recall the dead horse case, *Kenny v. Lesser*. The jury found that the fair market value of the horse killed by veterinary malpractice was $100,000. The appeals court found that

> this figure is fully supported by competent and credible evidence. In addition to his own testimony that the horse showed a tremendous amount of talent, had a "fantastic" disposition with an ability to learn quickly and had made significant racing accomplishments in a relatively short period of time with minimal training, plaintiff also presented evidence that a licensed horse trainer familiar with the horse was ready and willing to purchase him for $75,000 in August 1993 and that this offer remained viable even after the trainer learned about the . . . bone chip. A licensed thoroughbred trainer and horse breeder, who was also very familiar with this specific horse having ridden him on numerous occasions and who had experience buying, selling and evaluating horses, described the horse as "very nice", "very well balanced", "very fast and sound" and healthy. This expert opined that the horse was worth $125,000 in October 1993.
>
> Touting their expert on damages to be the only competent and qualified witness on this issue, defendants urge that the horse's value was considerably less than the $100,000 figure arrived at by the jury, namely, $20,000. The jury heard from this expert and obviously chose to either totally disregard his opinions or simply factor same into its ultimate conclusion on fair market value. This Court finds no reason to interfere with this discretionary, fact-finding function on its part . . . .

Because *Kenny v. Lesser* involved a horse instead of a dog or a cat, there was no claim made for pain and suffering, or what are called "non-economic" losses. An

example of the latter in the context of a negligence case concerning a companion animal is *McAdams v. Faulk*, in the State of Arkansas.[15]

Mr. McAdams' dog died as the result of the defendant's negligence. He sued, and the trial court dismissed his complaint. On appeal, the defendant argued the dismissal was correct because McAdams had failed to allege the market value of his dog, which was important because "Arkansas law is clear that dogs are personal property and the measure of damages is the market value of the dog at the time of its death."

The appeals court disagreed, because

> [d]amages on a negligence claim are not limited to economic loss damages, and include compensation for mental anguish. * * * An award for mental anguish may cover not only the mental suffering prior to trial, but also the suffering which is reasonably probable to occur in the future. * * * The allegations include reference to [McAdams'] mental suffering from which he will never recover. We also note that punitive damages are recoverable on a malpractice claim.
>
> Second, [the defendants] assert that the complaint fails to allege any facts that would support an award of $50,000 or any such greater amount as may be determined to be necessary to deter Dr. Faulk and others" . . . . * * *

Unfortunately, states and cases are rare that recognize the right to recover more than "market value" for the negligent injury of death of a companion animal.

Breach of Contract

An 1854 English case, *Hadley v. Baxendale*, established the measure of damages recoverable for breach of contract, a precedent that continues to be applied in American courts even today: damages within the contemplation of the parties at the time the contract was made.

This rule was at work in the case of *Austin v. State of Illinois*, where

> [t]he owner paid to have the oncologist remove a sample of the cancer and to send it to a lab. The test was never done, and the owner was never refunded. The owner established two instances of breach of contract. The owner showed that the dog never received the second treatment. It was presumed that treatment was not provided since there was no documentary evidence of the treatment and no testimony that the treatment was provided. Also, the test for

[15] 2002 WL 700956.

which the owner paid was never performed, and the owner was never refunded.

What was Dirty Red's custodian's recovery? The grand sum of $2,212.

The defendant walked away with no judgment against it for the custodian's emotional distress, his pain and suffering, his mental anguish, and for the loss of his companion. Let alone a judgment against the defendant for punitive damages.

PART III: LEGISLATION

Existing legislation

As the reader will note, the few states that have enacted legislation regarding harm to companion animals do not approach the problem in the same way. For example, some states extend the reach of malpractice statutes' principles of liability and damages to veterinarians. In other statutes punitive damages are provided. Here are some examples.

Arkansas: Ark. Code. Ann. §16-114-201(2) & §16-114-208(2) (1987). Section 201 includes veterinarians in the list of health care practitioners subject to the medical malpractice statutes. Section 208 provides for non-economic damages, pain and suffering.

California: Cal. Civ. Code § 3340 allows punitive damages for wrongful injury to animals for willful or gross negligence.

Connecticut: Conn. Pub. Act No. 22-351 & 22-351a (2004). Section 351 creates a civil cause of action for stealing, confining, concealing or unlawfully injuring or killing a companion animal. Section 351a allows punitive damages.

Illinois: 510 Ill. C.S. 70/1 et seq. (Ill. 2002), the Humane Care for Animals Act allows emotional distress damages to a guardian whose pet is intentionally injured and provides for punitive damages and attorney's fees.

Montana: Mont. Code Ann. § 27-1- 222 (2001) allows punitive damages for injuring an animal intentionally, or by gross negligence.

Rhode Island: Section 4-1-50 allows non-economic damages for the loss of the reasonably expected society, companionship, love, and affection of the pet. Veterinarians, however, for the present, are exempt.

Tennessee: Tenn. Code. Ann., Section 44-17-403 (2000) allows non-economic damages for negligently or intentionally causing fatal injuries or death of a pet.

For other and pending legislation, see for example www.animallawcoalition.com.

PART IV: CASE LAW

It is beyond the scope of this monograph to identify every state and federal case dealing with the liability and damages aspects of harm to companion damages. Especially the many cases that simply reiterate one version or another of the proposition that since animals are property there can be only modest damages for harming them intentionally or negligently—even if there is liability in tort or any other theory. Instead, the monograph seeks to present only representative cases where courts have found no liability and/or damages—and examples of the few cases where courts have reached beyond the "animals as property" philosophy.[16]

Examples, alphabetically[17]

Alvarez v. Clasen, 06-304, p. 3 (La. App. 5 Cir. 10/31/06), 946 So.2d 181. (The court ruled that there was no claim for conversion when the defendant neighbor trapped plaintiff's cat and turned it over to animal control, which later euthanized the cat.*

Ammon v. Welty, 113 S.W.3d 185, 186-88 (Ky. App. 2002). (The court ruled that the relationship between a family and its dog, which was shot and killed by the dog warden, was not one that supported loss of consortium claim, since the dog was personal property, and loss of love and affection resulting from destruction of personal property was not compensable by the law).

Andrews v. City of West Branch, 454 F.3d 914 (8th Cir. 2006). (A police officer was not entitled to shoot and kill an allegedly dangerous dog because it was not "at large" but rather in an enclosed fence at plaintiff's home).*

Anzalone v. Kragness, 356 Ill.App.3d 365, 826 N.E.2d 472, 2005 WL 525432 (Ill. App. Ct. 1st Dist. 2005). (It is not necessary for the maintenance of an action for killing a pet that it should be shown to be of any pecuniary value; it is for the jury to be the judge of the value. Claims were made for bailment, negligence, breach of fiduciary duty and intentional infliction of emotional distress).

Austin v. State, 54 Ill. Ct. Cl. 375 (2002 Ill. Ct. Cl.). (A dog owner filed a claim against the State of Illinois alleging veterinary malpractice and breach of contract and seeking damages of $ 15,869. The owner established two instances of breach

[16] With the name of a case and its Westlaw citation lawyers can easily find all other cases in any jurisdiction bearing on the subject.

[17] In preparation for this updated edition, between 300 and 350 possibly relevant new cases were reviewed. Of those, approximately 30 were culled; they can be identified by the asterisk at the end of each citation.

of contract and was awarded $2,212).

Barrios v. Safeway Ins. Co., 2012 WL 1000864 (La. Ct. App. Mar. 21, 2012). (A $10,000 award allowed for death of a dog killed by a motorist, because the motorist was negligent, owners were near the scene and arrived immediately afterward, dog had a "family-like" relationship to owners and owners suffered trauma as a result of death. The 4th Circuit ruling in this case differs from the 3rd circuit reasoning in the *Smith* case, below.*

Brinton v. Codoni, 148 Wash. App. 1032, 2009 WL 297006 (Div. 1 2009). (Damages were limited to the fair market value of plaintiff's dog, who was killed in her yard by a dog belonging to the defendant—despite plaintiff's claim of damages for intrinsic value and emotional distress). See also the *Sherman* case, below, which is more limited in its holding.*

Brown v. Muhlenberg Tp., 269 F.3d 205 (3d Cir. 2001). Pennsylvania courts would recognize claim for intentional infliction of emotional distress based upon the killing of a pet).

Burgess v. Shampooch Pet Industries, 131 P.3d 1248 (Kan. App. 2006). (Market value of damages may include, but is not limited to, the reasonable and customary cost of necessary veterinary care. A dog owner was allowed to recover the full value of veterinary repair cost required to return to its previous condition a 13-year-old dog whose hip was dislocated by roomers. The court compared market value vs. value to owner for valuing damages.)*

Burgess v. Taylor, 44 S.W.3d 806, 91 A.L.R.5th 749 (Ky. Ct. App. 2001) (Recovery was allowable for intentional infliction of emotional distress).

Camp v. Anderson, 295 Wis. 2d 714, 721 N.W. 2d 146 (2006). (Negligent infliction of emotional distress is an acceptable cause of action in Wisconsin).*

Carbasho v. Musulin, 2005 W. Va. LEXIS 78. (Dogs are personal property and damages for sentimental value, mental suffering, and emotional distress are not recoverable for the negligently inflicted death of a dog).

Cuozzo v. Loccisano, 832 N.Y.S.2d 744 (App. Term, 9th & 10th Jud. Dists. 2007). (Rather than killing pit bulls, appropriate recourse was to have them neutered, micro-chipped and restrained because while they had previously attacked dogs, there had been no attacks on humans).*

DeJoy v. Niagara Mohawk Power Corp., 13 A.D.3d 1108, 786 N.Y.S.2d 873 (N.Y.A.D. 4 Dept., 2004). (An animal owner may not recover damages for loss of companionship, which can be viewed as legally equivalent to emotional distress, resulting from the death of the animal).

Downing v. Gully, P.C., 915 S.W.2d 181 (1996 Tex. App.). (Plaintiff dog owner brought a negligence and Texas Deceptive Trade Practices Act (DTPA) claim against defendant veterinarian. The veterinarian provided affidavits that were sufficiently specific—describing experience, qualifications, and a detailed account of the treatment—so as to negate Plaintiff's burden to prove breach of the standard of care. Also, the Deceptive Trade Practice Act claims did not apply to state licensed veterinarians).

Fabrikant v. French, No. 10-3288-cv, 2012 WL 3518527 (2d Cir. Aug. 16, 2012). (Owner of seized dogs and cats brought §1983 federal civil rights action against an animal rescue group, but the claim was defeated because the agency was a state actor and possessed immunity).*

Feger v. Warwick Animal Shelter, 29 A.D.3d 515, 814 N.Y.S.2d 700 (2d Dept. 2006). (Cat that allegedly belonged to plaintiff was given up for adoption by defendant, who claimed the cat in question was a different cat. Plaintiff's claim for emotional distress damages were not allowed because the cat was considered personal property).*

Gabriel v. Lovewell, 2005 Tex. App. LEXIS 4060 (2005 Tex. App.). (Horse owners brought a successful claim based on allegations of negligence and breach of implied warranty in connection with the death of their filly. The jury awarded damages of $ 10,075.00 plus prejudgment interest of $ 4,372.27, court costs of $4,446.22, and attorney's fees of $ 40,000.00, totaling $ 58,893.49 plus post judgment interest. Although plaintiff also alleged conversion and use of false, misleading, or deceptive trade practices, the jury limited his recovery to the allegations of negligence and breach of implied warranty).

George v. Leopold, 1996 Conn. Super. LEXIS 2859 (1996 Conn. Super.). The complaint was for veterinary malpractice, intentional infliction of emotional distress, and a violation of the Connecticut Unfair Trade and Practice Act (CUPTA). The court held: (1) bystander emotional distress resulting from veterinarian malpractice was not a cause of action under Connecticut law; (2) the pet owner-pet relationship was not as close as the parent-child or husband-wife relationship; (3) the cat owner failed to allege that she had suffered a severe and debilitating injury; (4) the cat owner's argument about the veterinarian's reckless regard for her emotional wellbeing was just another way of stating a bystander emotional distress claim, and there was no showing of recklessness; and (5) the cat owner did not allege facts sufficient to support her contention of immoral practices by the veterinarian to support a claim under CUPTA).

Gilreath v. Ohio State Univ. Veterinary Hosp., 2002 WL 31953788 (Ohio Ct.Cl., 2002). (Plaintiff unsuccessfully brought claims for medical malpractice, breach of warranty, fraud).

Goodby v. Vetpharm, Inc., 974 A.2d 1269 (Vt. 2009). (Measure of damages for cats killed by antibiotic in suit against veterinarian and manufacturer of

antibiotic was equal to the market value of the cats prior to death minus the market value after their death).*

Harabes v. Barkery, Inc., 348 N.J. Super. 366, 791 A.2d 1142 (Law Div. 2001). (Public policy considerations prevented dog owners from recovering for negligent infliction of emotional distress and loss of companionship damages in connection with the loss of their dog, who allegedly died of medical complications after she was negligently subjected to extreme heat for an extended period of time at a dog grooming business. Emotional distress and loss of companionship damages, which were unavailable for the loss of a child or spouse, should not be recoverable for the loss of a pet dog).

Johnson v. Douglas, 723 N.Y.S.2d 627 (Sup 2001). (Pet owners could not recover for emotional distress based upon an alleged negligent or malicious destruction of a dog, which was deemed to be personal property; the "zone of danger" rule is only applicable to the observance of the death or serious injury of an immediate family member, who is a human being.).

Kaufman v. Langhofer, 222 P.3d 272 (Ariz. Ct. App. 2009). (Scarlet macaw owner's claim for damages for emotional distress and loss of companionship was rejected, but a negligence claim was allowed when the macaw died after a second operation to cure a cloacal prolapse. The standard was re-affirmed that pets are personal property, so harm to macaw did not affect a personal right of the owner. Damages and fault were split between the owner and veterinarian, 30% attributable to veterinarian. The court explored the "value to owner" theory of damages, but rejected it for fear of lack of a limiting principle and concern over awarding more damages for loss of a pet bird than might be recoverable for loss of a non-nuclear family member).*

Kenny v. Lesser, 281 A.D.2d 853, 722 N.Y.S.2d 302, 2001 N.Y. Slip Op. 2570, 2001 WL 279237. (Defendants had departed from reasonable standards of veterinary care regarding their treatment of plaintiff's horse; this departure proximately caused his death and his fair market value in October 1993 was $100,000).

Kennedy v. Byas, 867 So. 2d 1195 (Fla. Dist. Ct. App. 1st Dist. 2004). (The impact rule precluded a dog owner from recovering damages for emotional distress arising out of alleged veterinary malpractice in the treatment of a dog; animals were personal property, not family members).

Kimes v. Grosser, 195 Cal.App.4th 1556 (2011) – Court of Appeal, 1st District, Division 1. (Owner of cat that was shot and injured by neighbor could recover damages necessary for the cat's care, as well as punitive damages if proven that the shooting was willful, even if these damages exceeded the market value of the cat).*

Koester v. VCA Animal Hosp., 244 Mich. App. 173, 624 N.W.2d 209 (2000). (Owner could not properly plead and recover for emotional injuries allegedly suffered as consequence of dog being killed, in light of characterization of dog as personal property).

Kondaurov v. Kerdasha, 629 S.E. 2d 181 (Va. 2006). (No recovery for emotional anguish was allowed when Plaintiff's dog was injured while riding in Plaintiff's car and struck by defendant's vehicle.*

Krasnecky v. Meffen, 56 Mass. App. Ct. 418 (2002 Mass. App.). (Plaintiff sheep owners sued defendant dog owners, whose dogs killed plaintiff's sheep, seeking damages for emotional distress and loss of companionship and society, as well as strict liability, trespass to real estate, and negligence/recklessness. The Superior Court Department, Hampshire (Massachusetts), found for the sheep owners on the claim of emotional distress, in the amount of one dollar, and for the dog owners on all remaining claims).

Kyprianides v. Warwick Valley Humane Society, 59 A.D.3d 600 (N.Y. 2d Dept. 2009). (Following the authorized seizure by a humane society of plaintiff's dogs, cats, pigeons and an iguana, the humane society was authorized to euthanize some of the animals and the killing did not support a claim of emotional distress).*

Lachenman v. Stice, 838 N.E.2d 451 (Ind. App. 2005). (Dog owner's witnessing the death of his dog, which was fatally attacked by neighbor's dog, was not sufficient direct involvement to allow a claim of negligent infliction of emotional distress under the bystander rule. The loss of a pet dog is only an economic loss which does not support a claim of negligent infliction of emotional distress).

LaPlace v. Briere, 962 A.2d 1139 (N.J. App. Div. 2009). (Plaintiff's horse died after an unauthorized third party exercised it while at defendant's stable. Despite the horse sometimes being removed from the stable, there existed a bailment because the stable owner provided shelter, food, water, grooming, training and medical care).*

Lawrence v. Big Creek Veterinary Hosp., L.L.C., 2007 WL 2579436 (Ohio. Ct. App. 11th Dist. Geauga County 2007). (A claim for veterinary malpractice requires plaintiff to show the injury was caused by the doing of something a veterinarian exhibiting ordinary skill, care and diligence would not have done in similar circumstances, or, the failure of the veterinarian to do something a veterinarian exhibiting ordinary skill, care and diligence would have done in similar circumstances.)*

Lewis v. Di Donna, 294 A.D.2d 799, 743 N.Y.S.2d 186 (3d Dep't 2002). (Pets are recognized as personal property and damages for the loss of a pet are limited to the value of the pet at the time it died, which are ordinarily proven by establishing the market value of the pet, if it has one, or, if there is no market

value, by such factors which tend to fairly show its value. Loss of companionship of pet is not a cognizable cause of action. A dog owner would not be allowed the opportunity to present proof of loss of companionship of her dog at the time of trial with respect to the issue of damages).

Lewis v. Hendrickson, 2003 Ohio 3756 (2003 Ohio App.). (A veterinary malpractice claim where veterinarian misdiagnosed a tumor. The case was in a small claims court).

Liotta v. Segur, 2004 Conn. Super. LEXIS 737 (2004 Conn. Super.). (No recovery for negligent infliction of emotional distress, but the court left open the possibility of recovery for intentional infliction of emotional distress in the wrongful death/injury of a pet).

Lockett v. Hill, 182 Or.App. 377, 51 P.3d 5 (Or.App., 2002). (Plaintiffs, owners of a cat mauled by defendant's pit bulls, successfully brought claim of negligence, but were barred from recovery of emotional distress damages and damages for the loss of a pet's companionship).

Mathew v. Klinger, D.V.M., P.C., 179 Misc. 2d 609 (1998 N.Y. Misc.).(Plaintiff dog owner filed an action against defendant veterinarian after her dog died from complications of a perforated esophagus caused by a chicken bone. The veterinarian's failure to take steps to see if the dog had swallowed something was a departure from accepted veterinary practices; no expert was necessary to explain that an x-ray should have been taken. The lower court awarded plaintiff the sum paid for the veterinary treatment as well as the sum for the necropsy to determine the dog's cause of death. Upon appeal, the court determined that the dog was not healthy, as it already was in a life-threatening situation when brought to defendant. As such, plaintiff was not entitled to recover the cost of the necropsy and the damages award was modified accordingly).

McAdams v. Faulk, 2002 WL 700956. (Plaintiff's complaint of negligence and malpractice was improperly dismissed for failure to state a claim. Plaintiff need not make an allegation regarding the market value of the dog. Damages on a negligence claim are not limited to economic loss damages, and include compensation for mental anguish. An award for mental anguish may cover not only the mental suffering prior to trial, but also the suffering which is reasonably probable to occur in the future. Punitive damages are recoverable on a malpractice claim).

McDougall v. Lamm, 2012 WL 2079207 (N.J. 2012). (A negligent infliction of emotional distress claim is not allowed when defendant neighbor's dog shook plaintiff's dog to death. The court reasoned that recovery for witnessing loss of a pet would be inconsistent with existing statutes such as the Wrongful Death Act, and might permit greater recovery for emotional distress resulting from loss of an animal than a human).*

McGee v. Smith, 107 S.W. 3d 725. (Tex. App. 2003). (Veterinarian's failure to provide food and water to a foal and mare over a hot Texas, three-day weekend—who both then died as a result—was not ordinary negligence but a matter of professional care that required expert testimony. The appellate court subsequently overturned a $45,000 lower court judgment obtained by the plaintiff. In a sharp dissent, one judge protested that this was the equivalent of turning every civil action involving a physician-defendant into a medical malpractice case.)

McMahon v. Craig, 176 Cal.App.4th 1502 (2009) – Court of Appeal, 4th District, Division 3. (A bystander emotional distress claim was not allowed where the owner was not present at the scene of a veterinarian's alleged malpractice. Owner was not deemed to be a "direct victim" of alleged malpractice. Veterinarians did not undertake a duty to protect owner's mental and emotional tranquility).*

Medlen v. Strickland, 2011 WL 5247375 (Tex. App. – Fort Worth, No. 02-11-00105-CV, Nov. 3, 2011). (Damages were recoverable based on the sentimental value of a dog that had to be euthanized after alleged negligence of animal shelter employee).*

Mercurio v. Weber et al, 2003 WL 21497325. (A dog owner was entitled to damages of $2,095.46 from a negligent dog groomer. Recoverable damages consisted of veterinary costs and compensation for loss of companionship of a dog that died, as measured by cost of replacing him. The plaintiff was not entitled to damages for emotional distress).

Mireles v. Morman, 2010 WL 3059241 (Tex. App. – Austin, Aug. 6, 2010) (After the trial court awarded a dog owner market value damages plus lost profits from breeding and show opportunities when defendant refused to return the dog, the appellate court reversed—citing lack of concrete evidence to establish proof of lost profits).*

Mitchell v. Heinrichs, 27 P.3d 309 (Alaska 2001). (Plaintiff sought recovery for a shot dog on the theories of conversion, intentional infliction of emotional distress, and punitive damages. The court recognized a cause of action for intentional infliction of emotional distress for the intentional or reckless killing of a pet animal. The trial court must "make a threshold determination whether the severity of the emotional distress and the conduct of the offending party warrant a claim of intentional infliction of emotional distress." The challenged conduct must have been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. A pet's actual value to the owner may exceed its fair market value and include the original cost to the owner or full reasonable replacement costs).

Naples v. Miller, 992 A.2d 1237 (Del. 2010). (Affirming a judgment that dogs are personal property, so veterinary expenses cannot be recovered in an analogous

fashion to medical expenses in a personal injury case. Thus the court rejected the claim of plaintiff for past and future veterinary expenses).*

Oberschlake v. Veterinary Assoc. Animal Hosp., 151 Ohio App. 3d 741, 2003 - Ohio- 917, 785 N.E.2d 811 (2d Dist. Greene County 2003). (A dog owner could not recover damages emotional distress and loss of companionship arising from a veterinarian's improper attempt to spay already-spayed dog. The dog was personal property for which non-economic damages were not available. A dog owner cannot recover for emotional distress).

Pacher v. Invisible Fence of Dayton, 154 Ohio App. 3d 744, 2003 -Ohio- 5333, 798 N.E.2d 1121 (2d Dist. Montgomery County 2003). (A family could not recover for negligent infliction of emotional distress they suffered when its dog was injured by an invisible fence The family members were not bystanders to the injury, their dog was personal property, and Ohio did not recognize a claim for emotional distress caused by injury to property. The family's reaction was not the type of serious emotional distress for which recovery was permitted. The family dog itself did not have a direct claim for emotional distress; the dog's legal status as personal property deprived him of the legal capacity to sue. Burn injuries to the dog would not have occurred if ordinary care had been exercised by the defendant invisible fence company, and thus the trial court appropriately found the company liable in negligence in amount of $187.05, which constituted the amount family paid to treat its dog's injuries).

Pantelopoulos v. Pantelopoulos, 49 Conn.Supp. 209, 869 A.2d 280 (Conn.Super.,2005). (A man who brought an action against his former wife after she moved out of their former marital residence, to which he was prohibited entry by court order. She left his dog in the garage, and the animal died from starvation and dehydration. He failed to state a legally sufficient cause of action for intentional infliction of emotional distress because there was no legal that permitted recovery of non-economic damages in connection with negligent or even intentional acts resulting in death of pet).

Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554, 2004 WL 903930 (Tex. App. Austin 2004). (Dogs are personal property for damages purposes, not persons, extensions of their owners, or any other legal entity whose loss would ordinarily give rise to personal injury damages. Only two elements can be awarded under the "true rule" of damages for loss of a dog: (1) market value, if any, and (2) some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog. Special or pecuniary value of a dog to its owner refers solely to economic value derived from the dog's usefulness and services, not value attributed to companionship or other sentimental considerations. A dog owner was not entitled to recover counseling expenses, nor intrinsic value damages. Intrinsic value damages are recoverable only where the property is shown to have neither market value nor replacement value).

Pickford v. Masion, 124 Wash.App. 257, 98 P.3d 1232 (Wash.App. Div. 2,2004). (A dog owner whose pet was mauled by other dogs could not recover for negligent or malicious infliction of emotional distress against owners of other dogs. The owners of other dogs did not maliciously inflict severe emotional distress, and at most, they were negligent for failing to keep their dogs contained. A cause of action for destruction of the companionship relationship did not extend to the dog owner's loss suffered; damages were recoverable for the actual or intrinsic value of lost property, but not for sentimental value).

Price v. Brown, 545 Pa. 216 (1996 Pa.). (Breach of bailment and professional negligence claims brought against a veterinarian when plaintiff's dog died following surgery).

Rabideau v. City of Racine, 627 N.W.2d 795, 807 (Wis. 2001). (Plaintiff, who observed a city police officer shoot and kill her dog, was not related to the animal as spouse, parent-child, grandparent-grandchild, or sibling, as was required in order to bring a claim for damages based upon the tort of negligent infliction of emotional distress. To maintain a cause of action for the intentional infliction of emotional distress there must be something more than a showing that the defendant intentionally engaged in the conduct that gave rise to emotional distress in the plaintiff; the plaintiff must show that the conduct was engaged in for the purpose of causing emotional distress. The complaint of the dog owner against the city, alleging that city police officer shot and killed the dog, encompassed a claim for damages for property loss).

Rees v. Flaherty, 2003 WL 462868 (Conn. Super. Feb. 6, 2003). (Plaintiff sued defendant boarding facility for negligence for losing her dog (Count 1), breach of contract (Count 2), bailment (Count 3), negligent infliction of emotional distress (Count 4) and violation of the Connecticut Unfair Trade Practices Act (Count 5)).

Roman v. Trs. Of Tufts Univ., 461 Mass. 707 (2012). (A plaintiff asserting a claim of negligence against a veterinarian must prove that the care provided deviated from the reasonable standard of care within the profession and that a resulting harm occurred as a result of the deviation).*

Schrage v. Hatzlacha Cab Corp., 13 A.D.3d 150, 788 N.Y.S.2d 4 (N.Y.A.D. 1 Dept., 2004). (Pets are treated under New York law as personal property, and the loss of a dog by reason of negligence will not support claims by the animal's owners to recover for their resulting emotional injury).

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Schmidt v. Stearman, 2010 Ark. App. 274 (2010). (The owner of dogs failed to produce enough evidence to support the claim of emotional distress so severe

that no reasonable person could be expected to endure it, despite evidence of weight loss, anxiety, loss of sleep and depression following the killing on his property of his five dogs by a neighbor).*

Shera v. N.C. State Univ. Veter. Teach'g Hosp., 723 S.E.2d 352 (N.C. Ct. App. 2012). (Replacement value of dog is used to calculate damages, not the intrinsic value, when there is no evidence the dog performs any unique task for owners. Emotional bond is not compensable under law. NC has not yet recognized the lost investment valuation method).*

Sherman v. Kissinger, 195 P.3d 539 (Wa. 2008) – Court of Appeals of Washington, Division 1. (No cause of action exists for the wrongful death of a dog).*

Skinner v. Chapman, 412 Fed.Appx. 287 (2d Cir. 2010). (Affirming grant of summary judgment to defendant police dog-control officer against plaintiff's fourth amendment unreasonable seizure claim. Defendant had seized plaintiff's unlicensed dog following a complaint from a neighbor that the dog was dangerous and not vaccinated).*

Smith v. University Animal Clinic, 30 So.3d 1154 (La. Ct. App. 2010). (Cat's ID tag was switched while it was boarding at the defendant clinic. After being mistakenly given to a different owner, the cat was subsequently lost and never found. Plaintiff was entitled to damages from the clinic under the contract of deposit, as clinic knew or should have known its failure to perform would result in non-pecuniary loss. $800 in fees the clinic waived covered the extent of damages).*

Snead v. Soc'y for Prevention of Cruelty to Animals of Pa., 985 A.2d 909 (Pa. 2009). (Plaintiff's claims for negligence, conversion and civil rights violations were allowed when defendant seized and euthanized plaintiff's abused dogs. Defendant agency had right to seize, but not put down dogs. Defendant's multiple immunity defenses (that it was either a Commonwealth agency or protected by the Tort Claim Act) were rejected.*

Sokolovic v. Hamilton, 960 N.E.2d 510 (8th Dist. Cuyahoga County 2011). (A dog did not have a unique pedigree, so it was the equivalent of personal property for purposes of a veterinary malpractice claim. Therefore, potential damages were limited to the fair market value of the dog before and immediately after the alleged negligent act).*

Tarpy v. County of San Diego, 1 Cal. Rptr. 3d 607 (Cal. App. 4th 2003). (County was not liable for damages for dog that died after being neutered at county animal facility because dog's owner signed release of liability form).

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emotional distress based on veterinarian's prescription of medication for treatment of cockatiel that proved toxic and resulted in its death).

Williamson v. Prida, 75 Cal. App. 4th 1417 (1999 Cal. App.). (Appellate court overturned a jury award of $600,000 against veterinarians because of a lack of evidence to show that their actions fell below the standard of care as necessary for a veterinary malpractice claim).

Womack v. Von Reardon, 133 Wash.App. 254,135 P.3d 542 (2006). (Damages were allowed for only the actual/intrinsic value of cat set on fire by minors and later euthanized, not sentimental value, on a claim for emotional distress for harm caused to cat. Importantly, malicious injury was held to support a claim for, and considered a factor in, measuring a person's emotional distress damages. Note that Scheele v. Dustin (above) expressly declined to follow this ruling.*

Zeid v. Pearce, 953 S.W.2d 368 (1997 Tex. App.). (Negligence action seeking damages for mental anguish of plaintiff dog-owners was dismissed. In Texas, the recovery for the death of a dog is its market value, if any, or some special or pecuniary value to the owner that may be ascertained by reference to the dog's usefulness or services. The court found this rule to be inconsistent with a claim for pain and suffering and mental anguish. One may not recover damages for bystander recovery for mental anguish in medical malpractice cases; the court applies the same rule to the case involving death due to veterinary malpractice).

Examples, by jurisdiction

State

See cases above from Alaska, Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Vermont, Virginia, Washington, Wisconsin.

Federal

See cases above from the following federal Circuit Courts of Appeal: 2d, 3d, and 8th.

CONCLUSION

This monograph's discussion of the liability and damages aspects of harming companion animals underscores the greatest problem today facing those who care for them: *that through intentionally and negligently wrongful conduct they can be harmed with virtual impunity*. As Christopher Green has said:

> [T]he overwhelming refusal of American civil courts to allow more than market value damages in cases of veterinary malfeasance [or

> in cases of intentional harm] presents two main problems. First, there is the *equity*, or *fairness*, issue: whereby human victims of veterinary negligence are not fully compensated for the emotional and financial investments made in their companion animals. Second, there is the *efficiency* issue: whereby the inability to recover more than nominal damages financially precludes owners actually harmed by veterinary malpractice from even seeking civil redress in the courts. This preclusion in turn prevents any meaningful judicial oversight to ensure that veterinarians are adequately conforming to the level of care expected by pet owners and the rest of American society.[18]

These statutes—the ones already enacted, and the ones now on the table—point the way to what must be done: every state in the Union must, either by legislation or court decision, recognize that the custodians of companion animals can suffer if they are intentionally or negligently harmed, and that to vindicate that anguish and the rights of the injured or killed, the laws have to change. Christopher Green has talked of "fairness" and "efficiency," and justifiably so.

But there is another, more basic, aspect to the proper recompense for the harming of companion animals: morality!

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