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VALUING COMPANION ANIMALS: ALTERNATIVES TO MARKET VALUE

JESSICA DELLOW[†]

This article explores how the lives of companion animals – pets by another name – are valued in negligence actions when they are wrongfully killed, and the justifications underlying the current approach of market value. Because Canadians welcome companion animals into their families for reasons that go beyond economics, this paper argues that a proposition of law that values them based only on market value fails accurately to identify and compensate for the loss suffered when a companion animal is wrongfully killed.

Compensating a plaintiff for either mental distress or loss of companionship appears, initially, to be an attractive alternative to the market value approach; however, because of the cautious manner with which psychological injuries have been approached in Canada, and the common law position that loss of companionship is non-compensable, these alternatives are impracticable means by which the present legal position could be modified. While compensation for mental distress can respond to some situations involving the wrongful death of a pet, it cannot provide redress in all such actions.

A solution to the challenges posed by the present legal position lies in valuation by reference to the investment made by animal guardians during the course of a companion animal's lifetime. This method would allow for a companion animal's value to be accurately measured, thereby permitting compensation that adequately reflects the entirety of the loss suffered. Legislative change, creating a statutory cause of action for the attendant non-pecuniary loss, would be the most effective way of achieving this proposed change.

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I. INTRODUCTION

Canadians live in a society where companion animals are increasingly elevated to the status of family members. Animal guardians willingly expend large sums of money feeding and caring for their companion animals; some even consider providing luxury items to be part of the responsibility of owning a companion animal.¹ It is perhaps not surprising, then, that animal guardians are now initiating lawsuits when their companion animals are wrongfully killed. However, legally, animals are chattels. This status as personal property means that, under the law of damages, an owner suing for the wrongful death of his companion animal is usually limited to recovering its market value.²

The question, then, is whether a claim for damages for the loss of a companion animal in excess of its market value should ever succeed and, if so, on what basis.³ This paper aims to demonstrate the insufficiency of the current approach. It aims further to identify alternative methods of valuation which more accurately reflect the social reality that, of all the things that the law classifies as chattels, companion animals alone uniquely develop a bond with their guardian and are valued primarily, if not solely,

¹ See for example Lisan Jutras, "Have we all gone doggone crazy?" *The Globe and Mail* (October 23, 2007) L2, an article which discusses Canadian society's tendency to treat its pets like family members, purchasing clothing for them, taking them to dog "spaws" and in some cases referring to a pet dog as one's "baby"; see also Rebecca Dube, "'Owners Desperately Seeking Fido: Call in Sherlock Bones'" *The Globe and Mail* (February 21, 2008) L1, where it is noted that a Toronto businessman offered a \$15,000 reward for the return of his lost chocolate lab.

² Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law Inc., 2000) at 75. Where a chattel is destroyed, the default measure of damages is cost of replacement. Where a chattel is damaged, as opposed to destroyed, the default measure of damages is usually the reasonable cost of repair which could, conceivably, far exceed market value of the companion animal if, for example, surgery was required to "repair" the companion animal.

³ As will be discussed below, the majority of Canadian actions brought for damages for the loss of a companion animal have arisen out of alleged negligent conduct on the part of the defendant and this paper primarily addresses damages in that context. The cause of action could also, however, be an intentional tort (which would bring with it an increased opportunity to succeed in a claim for either aggravated or compensatory damages) or for breach of contract.

on non-economic grounds.⁴ The merits and shortcomings of compensation for mental distress and for loss of companionship are examined, as are the pros and cons of legislative change and using loss of investment to value companion animals' lives. Reference to loss of investment will be shown to be the preferable guide to valuation of claims, while legislative change appears to be the most effective potential means of carrying out this paper's proposed changes to valuing companion animals.

II. ANIMALS ARE PROPERTY, PETS ARE FAMILY?

(a) The Common Law View: Animals are Chattels

A succinct and accurate statement of the traditional view the common law takes of animals can be found in the reasons of Justice Wallace in *Diversified Holdings v. British Columbia* where he observed that,

In the beginning, Genesis said mankind should 'have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over every creeping thing that creepeth upon the earth'. However, as society became more sophisticated and man brought certain animals into a state of subjection, under English law at least it was considered appropriate to distinguish between those animals which under normal circumstances are usually

⁴ Many academic commentators writing on the issue of valuation of companion animals have focused on the bond which develops between companion animal and animal guardian as highlighting the inadequacy of the current common law approach (albeit in the context of the American common law). See for example Stephen 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" (1998) 4 Animal L. 33; Debra Squires-Lee, "In Defense of Floyd: Appropriately Valuing Companion Animals in Tort" (1995) 70 N.Y.U.L. Rev. 1059; and Elaine T. Byszewski, "Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship" (2003) 9 Animal L. 215.

found at liberty, animals *ferae naturae*, and those animals which are generally tame, living in association with man, animals *mansuetae* or *domitae naturae*. Domestic animals are the subject of absolute ownership, with all the rights, duties, privileges and obligations that relationship entails.⁵

Canadian jurisprudence is rife with similar references to the status of animals as chattels. For example, the dissenting judgment in *Harvard College v. Canada (Commissioner of Patents)* dismissed an argument put forward by animal rights activists simply by referring to animals' status as property. Justice Binnie writes, "[o]f course, whatever position is adopted under patent law, animals have been and will continue to be used in laboratories for scientific research. Pets are property."⁶ A judgment from British Columbia, in a decision involving an action brought in relation to a dog, held that animals must be viewed by the law as "just another consumer product."⁷ Furthermore, the provisions prohibiting cruelty against animals in the *Criminal Code*, are located in part XI, under the section entitled "Wilful and Forbidden Acts in Respect of Certain Property."⁸

These examples illustrate that the status of animals as property is enshrined deeply within Canada's common law and statutory legal framework. Clearly, then, any change to the status of animals as chattels brings with it the possibility for change in a variety of legal contexts. However, if such a change is limited in scope to companion animals alone, these concerns diminish.

⁵ *Diversified Holdings v. British Columbia* (1982), 133 D.L.R. (3d) 712, 3 W.W.R. 516, (B.C.S.C.) at para. 16 [*Diversified Holdings* cited to D.L.R.].

⁶ 2002 SCC 76, 219 D.L.R. (4th) 577, at para. 100.

⁷ *Pezzente v. McClain*, [2005] 2005 BCPC 352, B.C.J. No. 1800, (Prov. Ct.) (eC) at para. 15 [Pezzente].

⁸ *Criminal Code*, R.S.C. 1985, c. C-46, s. 446.

(b) Recovery for Destruction of Chattels is Usually Fair Market Value (Cost of Replacement)

When a chattel is destroyed, the position at common law is generally that the appropriate measure of damages is that amount which represents the replacement cost of the destroyed good.⁹ For inanimate chattels for which there is a current market, this principle makes eminent sense; its application permits a plaintiff to replace her destroyed good with a like good, while holding the defendant responsible only for the actual economic loss he caused.¹⁰ When this principle is applied to companion animals, however, it makes less sense: an award for the market value of the companion animal is not capable of restoring what has been lost.

Although the law currently takes the view that a companion animal is a chattel, in reality what is lost when a companion animal dies is a relationship, rather than a good available for trade in an open market. Recovery for market value therefore fails to return the plaintiff to the position he was in before he sustained the loss, the ultimate goal underlying recovery in tort.¹¹ The illogical result of the current approach to valuation of companion animals has been described as being that, “[i]t awards damages for a loss that the owner of a companion animal *does not actually suffer* (economic value) and refuses to compensate an owner for the damages that an owner actually *does suffer* (emotional distress and loss of society).”¹²

⁹ Harvey McGregor, *McGregor on Damages*, 17th ed. (London: Sweet & Maxwell Ltd., 2003) at 1059 [*McGregor On Damages*]. See for example *Tremear v. Park Town Motor Hotels Ltd.*, [1982] 4 W.W.R. 444 (Sask. Q.B.) as reproduced in *McGregor on Damages* at 1059.

¹⁰ *McGregor on Damages*, *supra* note 9 at 1072-1073, cites *Hall v. Barclay* [1937] 3 All E.R. 620 (C.A.) at 623, where Greer L.J. explains: “[W]here you are dealing with goods which can be readily bought in the market a man whose rights have been interfered with is never entitled to more than what he would pay to buy a similar article elsewhere.”

¹¹ *McGregor on Damages*, *supra* note 9 at p. 13. The author cites to *Livingstone v. Rawyards Coal Co.* (1880) 5 App.Cas.25 at 39.

¹² Wise, *supra* note 4 at p. 33.

(c) The Social Reality: Companion Animals are Family Members

In the United States, a number of writers have pointed to the bond between companion animal and animal guardian as well as the fact that companion animals are treated as family members, rather than inanimate chattels, to support the argument that market value is an inadequate approach to determine compensation.¹³ The same sentiments, that companion animals are essentially family, appear to be widely held by Canadian citizens.

A recent study of Canadian animal guardians indicates that 83% of Canadian animal guardians view their companion animal as a member of the family.¹⁴ Conversely, a mere 15% of participants in the same survey viewed the love they had for their companion animal as being based on the animal's status as a pet, as opposed to its status as a family member.¹⁵ The study also found that for many pet-owners, a pet was treated in many respects as a child of the family.¹⁶

The amount of money which Canadian citizens are willing to spend in caring for a companion animal also indicates that they are valued in non-economic terms. In 2001, the average Canadian dog-owner spent over \$650 per dog, and the average cat-owner \$380 per cat.¹⁷ These high expenditures support the assertion that guardians value their companion animals primarily on non-economic grounds.¹⁸

¹³ See for example Squires-Lee, *supra* note 4 at 1065, and Wise, *supra* note 3 at 45.

¹⁴ Ipsos-Reid, "Paws and Claws: A Syndicated Study on Canadian Pet Ownership" (June, 2001), online: Ipsos Canada <http://www.ctv.ca/generic/WebSpecials/pdf/Paws_and_Claws.pdf> at p. 4 ["Paws and Claws"].

¹⁵ *Ibid.*

¹⁶ "Paws and Claws", *supra* note 14 at 4-5. The study concluded that 69% of pet owners allow their pets to sleep with them, 60% either carried their pet's photo in their wallet or displayed it with other family photos, and that almost all (98%) pet owners talked to their pets.

¹⁷ *Ibid.* at 9.

¹⁸ Squires-Lee, *supra* note 4 at 1065-1067.

(d) The Bond between Guardian and Companion Animal Provides a Rational Basis upon which Companion Animals can be Distinguished from other Chattels

The relationship which develops between animal guardian and companion animal provides a rational basis upon which Canadian courts could distinguish companion animals from other forms of personal property. Animals used in farming operations or laboratories can properly, if distastefully, be referred to as commodities in the sense that their value lies solely in their ability to generate income, meaning that they have an ascertainable economic value measurable by current market rates.¹⁹ As with non-companion animals, the value of an inanimate chattel such as a stereo is determinable, in almost every case, by reference to what an individual is willing to pay for it on a free and open market.²⁰ The value of a companion animal in the eyes of its animal guardian, on the other hand, has little to do with economics; the value of a companion animal flows instead from the unique relationship between the two.²¹ Distinguishing between companion animals and other forms of personal property is therefore neither arbitrary nor difficult once this fundamental difference is acknowledged.

As obvious as this distinction appears to be to those who advocate for a method of valuation other than market value for companion animals, critics have argued that retreating from the present legal position would not only disturb years of precedent but also cause unintended

¹⁹ Wise, *supra*, note 4 at 70, Wise persuasively argues that, "The distinction between nonhuman animals, whose use is entirely economic, and companion animals...remains obvious today. As far as the producer, the slaughterhouse worker, the processor, the grocer, and the consumer are concerned, one sheep may be the same as another...Market value as a measure of damages only makes sense as compensation for the wrongful deaths of nonhuman animals whose owners consider them fungible..."

²⁰ There are limited exceptions where Canadian courts have allowed recovery in excess of market value in circumstances where the property in issue had special or unique value to the owner. See for example *Wilson v. Sooter Studios Ltd.* (1988), 33 B.C.L.R. (2d) 241 (C.A.), where the British Columbia Court of Appeal upheld the trial judge's award of the cost of the wedding pictures and an additional \$1000, to reflect the intrinsic value of the photos to the plaintiffs, against the defendant photographer who failed to deliver contracted photos.

²¹ Wise, *supra* note 4 at 49.

consequences when valuing other forms of property.²² The argument is that if recovery for non-economic loss in the form of mental distress is permitted in actions for the wrongful death of companion animals (read: destruction of chattels), non-economic damages for destruction to other chattels will, *ipso facto*, become recoverable.²³

Judicial support for this argument was found in the observation of an American court that to allow damages for mental stress in companion animal actions, “would permit recovery for mental stress caused by the malicious or negligent destruction of other personal property.”²⁴ However, this fear appears unfounded in the Canadian context. Canadian courts have on occasion distinguished between “ordinary” chattels, which are to be valued at their market value, and chattels which may need to be valued in a different manner because the destroyed chattel had a “special” or “unique” value to the owner.²⁵

Moreover, some of the lower Canadian courts which have considered the issue of companion animals specifically have recognized that the relationship between animal guardian and companion animal may provide sufficient reason to view it as more than a mere chattel. For example, that the label “chattel” is inadequate is borne out in Canadian jurisprudence where judges have recognized that companion animals are “loved companion[s].”²⁶ One judge has even gone so far as to explicitly criticize the principle that animal companions must be viewed as simply consumer products, observing, “In my view, that characterization as a general proposition, is incorrect in law.”²⁷

²² Victor E. Schwartz & Emily J. Laird, “Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule” (1996) 33 Pepp. L. Rev. 227 at 237-238 and 258-259.

²³ *Ibid.* at 238.

²⁴ *Johnson v. Douglas*, 723 N.Y.S. 2d 627, 628 (NY Sup Ct 2001), reproduced in *Ibid.* at 237 [Johnson].

²⁵ See for example *Chappell v. Barati* (1984), 20 C.C.L.T. 137 (Ont. H.C.), where damages were allowed in the amount of \$7,500 when the defendant negligently caused a fire which destroyed several thousand trees planted by the plaintiff even though the diminution in market value was negligible.

²⁶ *Brown v. Edwards*, [2005] O.J. No. 1800 (Sup. Ct. (Sm. Cl. Div.)), at para. 18 [Brown], reversed by *Brown v. Edwards* [2006] O.J. 3595 (Sup. Ct.) [Brown Sup. Ct.].

²⁷ *Ferguson v. Birchmount Boarding Kennels* (2006), 79 O.R. (3d) 681 (Div. Ct.), at para. 20

While relying upon the status of (companion) animals as chattels at common law may provide an uncomplicated justification to deny recovery in excess of market value, it does not reflect current views. Canadian social values are no longer, if they ever were, in alignment with a proposition of law which views companion animals as being solely chattels. Giving effect to this social value, and allowing awards in excess of market value, could well be within the scope of the judiciary's authority to effect "incremental change" to the common law in order to "bring it into step with a changing society."²⁸

III. DAMAGES: THE APPROACHES TAKEN IN CANADIAN COMPANION ANIMAL ACTIONS

The early Canadian jurisprudence, which considered the possibility of recovery in excess of market value, relied heavily upon companion animals' status as chattels to deny such an award. More recent decisions, however, suggest that a shift in mentality may be occurring. While the decisions discussed below (in which damages in excess of market value were awarded) cannot be said to be binding authority for the proposition that companion animals should be valued by something other than market value, they do indicate at the very least a new-found willingness on the part of the judiciary to make such awards.

(a) Perspective One: Status as Chattels is of Primary Importance

Emphasis upon the legal classification of companion animals as property was relied upon most strongly in cases where sales legislation intersected

[*Ferguson*].

²⁸ *R. v. Salituro*, [1991] 3 S.C.R. 654 at para. 29 per Iacobucci J.: "In keeping with these developments, this court has signaled its willingness to adapt and develop common law rules to reflect changing circumstances in society at large... The common theme of these cases is that, while complex changes to the law with uncertain ramifications should be left to the legislature, the courts can and should make incremental changes to the common law to bring legal rules into step with a changing society."

with the action. In cases in which the judge's initial determination that a companion animal was a chattel attracted by operation of law provincial sales legislation, the legal status of the companion animal as a chattel effectively foreclosed the judge from considering awards in excess of market value.

In *Pezzente* the claimant brought an action against a dog breeder in relation to a dog (purchased from the breeder), which turned out to suffer from numerous health problems, despite the warranties given by the breeder at the time of sale. The judge determined that although he was not "dealing with the usual 'chattel', but with an animal who...is a well loved member of [the plaintiff's family]...the law is coldly unemotional and I really must view Bear as just another consumer product."²⁹ The relevant provincial sales legislation therefore applied and damages were limited to those which were the direct and natural result of the breach of warranty.³⁰

On the issue of what was reasonable in determining damages, the judge held that it had to be made on the basis of what was reasonable economically and not emotionally. The decision to have the surgery performed on the dog was, in the judge's opinion, an emotional one and not an economic one.³¹ The submission of defence counsel, likening Bear to a \$350 stereo, was adopted by the judge, who concluded that, "You don't spend \$10,000 to repair a \$350 stereo."³² Damages were awarded for only the market value of the dog.³³

The provision the trial judge relied upon to limit the recovery of damages was s. 56(2) of the British Columbia *Sale of Goods Act* which provided at the time that "[t]he measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."³⁴ However, this statutory language

²⁹ *Pezzente*, *supra* note 7 at paras. 3-4.

³⁰ *Ibid.* at para. 10.

³¹ *Ibid.* at para. 11.

³² *Ibid.*

³³ *Ibid.* at para. 16.

³⁴ *Sale of Goods Act*, R.S.B.C. 1996, c. 410, s. 56.

is simply a codification of the principle at common law that the only loss which is to be compensated for is that which is foreseeable, as was established in *Hadley v. Baxendale*.³⁵ Arguably, Justice Auxier erred in concluding that this language required him to limit the amount of damages that were recoverable by the plaintiff to economic harm.

*Gandy v. Robinson*³⁶ was a decision of the New Brunswick Court of Queen's Bench considering a fact situation similar to that in *Pezzente*. In this case, some time after the plaintiff purchased a dog from the defendant for \$350, it became apparent that the dog suffered from a defective hip; the plaintiff spent \$1400 to repair the dog's hip and sought to recover those costs or a refund of the purchase price of the dog from the defendant.³⁷ The judge hearing the matter determined that the *Consumer Product Warranty and Liability Act* governed the situation and rejected the claim.³⁸ As in *Pezzante*, companion animals were viewed as ordinary chattels which were to be accorded the same treatment under the law as any other chattel:

The defendants as sellers of the consumer product under warranty have at all times stood ready to take back the product and refund the purchase price. The law of purchase and sale does not expect sellers of a defective home entertainment system or a defective burglar system to do more than that. I am not convinced that there should be a different rule for a defective dog.³⁹

One curious aspect of these decisions is that, while relying on the status of the dog in question as a chattel to limit recovery, both judges implicitly recognized that a companion animal is not really property comparable in kind to an inanimate chattel. In *Pezzente* the trial judge observed that he would not order the possible alternative remedy available under the *Sale of Goods Act* (requiring the defendant to replace the dog) as he "...would not anticipate the latter alternative being acceptable to the claimant because the very word 'replace'

³⁵ (1854), 9 Exch. 341, 156 E.R. 145.

³⁶ (1990), 108 N.B.R. 436 (Q.B.) [*Gandy*].

³⁷ *Ibid.*, at 437-438.

³⁸ *Ibid.* at 439-440.

³⁹ *Ibid.* at 440.

means she would be required to relinquish Bear to the defendant.”⁴⁰ The trial judge in *Gandy* similarly acknowledged the special relationship which forms between human and companion animal when he referred to a book about dog ownership and, holding that it properly described the relationship between man and dog, quoted the following excerpt with approval:

They have so much to offer us. They are playful companions when we are in the mood for fun; they are loving companions when we are lonely or depressed; they are health-giving companions when they stir us into taking long walks; they are calming companions when we become agitated...⁴¹

(b) Perspective Two: Wrongful Death Actions can Support an Award for Mental Distress

In contrast to the above decisions, there are several cases which suggest that compensatory damages for mental distress are recoverable at common law in wrongful death actions for companion animals. Not surprisingly, these decisions justify such awards by referring to the bond between animal guardian and companion animal, and to the family-like relationship between animal and guardian. Perhaps more significant to the outcomes, though, were the existence of fairly unusual fact situations that permitted the triers of fact to circumvent the traditional legal view that market value was the only available measure of damages.

In the Ontario case of *Somerville v. Malloy*, an elderly male plaintiff successfully sued the defendant after the defendant’s dog attacked and killed the plaintiff’s dog, injuring the plaintiff in the process.⁴² Although the plaintiff in this case was awarded \$20,000 for the emotional trauma and mental distress he suffered as a result of the attack, the unique facts of this case suggest that its precedential value may be limited.⁴³

⁴⁰ *Pezzente*, *supra* note 7 at para. 16.

⁴¹ Desmond Morris, *Dogwatching* (London: J. Cape, 1986) at 1 and 5 as quoted in *Gandy*, *supra*, note 36 at 438.

⁴² (1999), 106 O.T.C. 389, 92 A.C.W.S. (3d) 560 (Ont. S.C.J.) [*Somerville*].

⁴³ *Ibid.*, at para. 19.

For instance, Ontario had legislation in place which held dog owners strictly liable for damages from a bite or attack by their dog on another person or another domestic animal.⁴⁴ The plaintiff also suffered mental distress which was capable of (some) medical verification.⁴⁵ Most importantly, however, the plaintiff himself was physically injured during the incident, suffering a bite to the elbow which had left a small scar.⁴⁶ While it may be tempting to read this decision as being strong authority for awarding damages for the loss of a companion animal in excess of market value, the injury to the plaintiff himself appears to be a necessary hook for an award of this magnitude.

The judge did, however, mention that damages for mental distress are routinely permitted by Canadian courts, emphasizing that it was not the statute itself that created the possibility of recovery for mental distress:

[A]s for recovering damages for emotional trauma or mental distress, our courts regularly compensate victims in this respect without the victim having to establish that he or she experienced nervous shock. One need only look to the many decisions in the field of damages for wrongful dismissal to see that mental distress is a proper head of damage when the circumstances are proven to exist.⁴⁷

The plaintiffs in *Newell et al. v. Canadian Pacific Airlines, Ltd.* were also successful in their action for mental distress damages in the wrongful death of their companion animal.⁴⁸ Unlike all of the other case law in Canada addressing the issue, the cause of action in this case arose following a breach of contract, rather than negligence. Like the plaintiff in *Somerville*, however, these plaintiffs had a fairly unique factual basis supporting their claim.

⁴⁴ *Ibid.* at para. 12; *Municipalities S.O.* 1989 ch. 84 s.20.

⁴⁵ *Somerville*, *supra* note 42 at para.10. The plaintiff at the time of trial required medication to help him sleep.

⁴⁶ *Ibid.* at para. 8.

⁴⁷ *Ibid.* at para. 15.

⁴⁸ (1977), 74 D.L.R. (3d) 574 (Ont. Co. Ct.) [*Newell*].

As a result of the negligence of the defendant passenger airline, one of the plaintiffs' companion animals was killed and the other became severely ill while the plaintiffs and their pets were travelling onboard a flight to Mexico.⁴⁹ The judge in this case relied upon the development of a line of cases in England which held that the reasonably foreseeable damages in a breach of contract case may, at times, include damages for mental distress.⁵⁰ Concluding that the state of the law was the same in Ontario as in England on this point, the judge awarded \$500 for the mental distress suffered by the plaintiffs upon learning that one of their dogs had died while en route to Mexico, and that the other was extremely ill. The mental distress the judge identified was not severe or incapacitating; the judge simply observed that the plaintiffs were "genuinely affected by their unfortunate experience."⁵¹

The most recent actions involving companion animals indicate that courts are less willing to accept the argument that because animals are property at law, recovery must be limited to market value. For example, in *Brown* the claimant animal guardians were successful at the court of first instance in a wrongful death action against their veterinarian.⁵² Making the usual observations that the deceased dog was valued as "not only a chattel but as a loved companion"⁵³ and that "Tina was an important and rewarding member of the family,"⁵⁴ the

⁴⁹ *Ibid.* at 576.

⁵⁰ *Newell, supra*, note 48 at 585-593. The trial judge referred to three decisions of the Court of Appeal of England where damages for "vexation, frustration and distress" were awarded where it met the test of reasonable foreseeability laid down in *Hadley v. Baxendale, supra* note 35. These decisions, frequently referred to as the holiday cases, are: *Jarvis v. Swans Tours Ltd.*, [1973] 1 Q.B. 233 [*Jarvis*]; *Jackson v. Horizon Holidays Ltd.*, [1975] 3 All E.R. 92; *Heywood v. Wellers (a firm)*, [1976] 1 All E.R. 300 [*Heywood*]. The English House of Lords more recently considered the issue of awarding damages for mental distress arising out of breach of contract in *Farley v. Skinner*, [2002] 2 A.C. 2002. These three "holiday cases" were considered in the judgment and the court held that damages for mental distress arising out of breach of contract were possible where the plaintiff could show that one of the goals of the contract was peace of mind, as opposed to being the sole or primary goal of the contract as was the case in each of the holiday cases.

⁵¹ *Newell, supra* note 48 at 586.

⁵² The decision was reversed on appeal in *Brown Sup. Ct.*, *supra* note 26, on other grounds.

⁵³ *Brown, supra* note 26 at para. 18.

⁵⁴ *Supra* note 26 at para. 22.

judge proceeded to award the plaintiffs damages in the amount of \$3,500.⁵⁵

A number of factors were referred to as supporting the award in *Brown*. The judge considered the age of the dog and the likelihood that she would live another four years,⁵⁶ the way in which the plaintiffs treated the dog (as their child),⁵⁷ the time that the plaintiffs spent playing with the dog,⁵⁸ and the distress suffered by the female plaintiff on learning of the dog's death.⁵⁹ Although it is not clear entirely what role mental distress played in the award, it is clear that it played some role, as evidenced by the fact that the female plaintiff was apportioned \$2,000 of the total damages awarded, while her husband received only \$1,500 of the general damages award, on the basis that her mental distress was more severe.⁶⁰

The most recent of the actions involving the wrongful death of a companion animal follows the approach taken in *Brown* by, again, making an award for mental distress. In *Ferguson* the claimant animal guardians were awarded damages for the pain and suffering they suffered as a result of the negligent loss of their dog by the defendant. On appeal, Justice Chapnik held that the award was justifiable, given the facts as found by the trial judge. Those facts were the emotionally distraught and hysterical state of the plaintiff on learning of the dog's loss, the relationship the plaintiffs had had with the dog for 7 1/2 years, and the inability to work, insomnia and nightmares from which the female plaintiff suffered following the dog's death.⁶¹

⁵⁵ *Ibid.* at para. 23.

⁵⁶ *Ibid.* at para. 20.

⁵⁷ *Ibid.* at para. 21.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at para. 22.

⁶⁰ *Ibid.* at paras. 22-23.

⁶¹ *Ferguson*, *supra* note 27 at 686-687.

(c) A Consistent Approach has not yet Been Determined in Canadian Law

Thus, the approach taken by Canadian courts when confronted with companion animal actions has varied. The decisions have ranged from total reliance on legal status as functioning to limit damages to the market value of the companion animal, to outright denial of the suggestion that a companion animal could ever be termed an “ordinary” chattel, akin to any other consumer product available on the market.

Given the minimal amount of Canadian jurisprudence in this area, and the total lack of any appellate court commentary, it is difficult to hypothesize what any court will do in the future when confronted with this issue.

It does, however, appear that if a court is provided with a rational basis upon which to award damages in excess of market value it will do so. This issue of proper valuation of companion animals is likely to be revisited in the near future: class actions have been initiated in at least two provinces against the manufacturers of allegedly tainted pet food.⁶² The issue then, for those advocating such awards, will be to identify just such a rational basis.

IV. DAMAGE AWARDS COMPENSATING FOR MENTAL DISTRESS

(a) The Awards in *Ferguson* and *Brown* Compensate for Grief

The awards in *Ferguson* and *Brown* were, ostensibly, for mental distress suffered by the animal guardians. However, an examination of the facts as found by the trial judges reveals that the mental suffering being compensated for was in reality grief, as neither decision refers to an identifiable mental illness or psychological effect suffered by the relevant plaintiff.

⁶² *Whiting v. Menu Foods Operating Ltd.* [2007] O.J. No. 3996 (Sup. Ct.); *Joel v. Menu Foods GenPar Ltd.* (2007), 2007 BCSC 1482, B.C.J. No. 2159, (S.C.).

While most provinces have, through legislative enactment, allowed for recovery of some non-economic loss upon the death of a closely related third party, few have gone as far as to permit recovery for grief.⁶³ Indeed, it appears that only three provinces currently permit recovery for grief: residents of New Brunswick can claim damages for “companionship and grief”, while Alberta and Saskatchewan have provisions which expressly permit recovery for bereavement (at capped amounts) upon proof of the wrongful death itself.⁶⁴

There is a negative inference that can be drawn from the fact that the majority of Canadian provinces and territories have not yet created a statutory right of recovery for grief, while allowing compensation for other non-pecuniary losses. The inference is that the legislatures do not yet consider grief to be a loss for which the tort system should provide compensation. Indeed, courts have recognized that to award damages for grief, some mention of that possibility would have to be made in the relevant act itself; non-pecuniary losses recoverable by statute:

[P]roperly exclude[s] grief, sorrow and mental anguish suffered by reason of the death as compensable items of damage. Non-pecuniary loss of this kind, unlike guidance, care and companionship, are not provided for in the Act and under its terms remain non-recoverable.⁶⁵

On this basis it is submitted that it is improper for the judiciary to award damages for ‘mental distress’ to circumvent the common law status of companion animals as chattels when, in reality, the judiciary is permitting recovery for grief. By describing the loss suffered as mental distress, the judiciary attempts to permit recovery for an emotional injury that is not compensable at common law.

⁶³ Ontario, Manitoba, Nova Scotia, and Prince Edward Island permit recovery for loss of care, guidance and companionship when a family member is wrongfully killed: *Family Law Act*, RSO 1990, c. F.3, as am. by SO 1999, c. 6, s. 25(5), s. 61; *Fatal Accident Acts*, CCSM, c. F50, s. 3.1; *Fatal Injuries Act*, RSNS 1989, c. 163, as am. by 2000, c. 29, ss. 9-12, s. 5(2)d; *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5, s. 6(3)(d).

⁶⁴ *Fatal Accidents Act*, R.S.N.B. 1973, c. F-7 s. 3(4)(d), *Fatal Accidents Act*, R.S.A. 2000, c. F-8 s. 8; *Fatal Accidents Act*, R.S.S. 1978, c. F-11, s. 4.

⁶⁵ *Mason v. Peters et al.* (1982), 139 D.L.R. (3d) 104 (Ont. C.A.), at p. 118.

(b) Distress and Employment Law: An Inappropriate Comparison to the Companion Animal Context

Even if one accepts that the plaintiffs in *Brown* and *Ferguson* were being compensated for mental distress, as opposed to grief, the awards remain problematic under the common law. Recovery for mental distress in this context must also be resisted as it leads to the irrational result that recovery in the wrongful death of a companion animal would be possible where the same facts would not give rise to recovery if the wrongfully killed party were a human.⁶⁶

In *Somerville* the judge observed that mental distress awards are commonly made “in this respect without the victim having to establish that he or she experienced nervous shock.”⁶⁷ However, this is not entirely accurate. Justice Sheppard there referred to the area of employment law as an example of an area of law where courts readily make awards for mental distress awards.⁶⁸ Employment law is, however, not an appropriate analogy to wrongful death actions for companion animals for at least two reasons.

An award for mental distress in relation to wrongful dismissal seeks to compensate the plaintiff for harm suffered by him *directly*, as opposed to harm suffered by a third party. Secondly, mental distress awards in the context of wrongful dismissal are typically awards for aggravated damages.⁶⁹ Although aggravated damages are compensatory in nature, they are also related to the conduct of the defendant in that they reflect that the defendant was particularly “callous, high-handed or malicious” in the way in which he acted towards the plaintiff.⁷⁰

⁶⁶ Schwartz & Laird, *supra* note 22 beginning at 256, the authors make the same argument in the American context.

⁶⁷ *Somerville*, *supra* note 42 at para. 15.

⁶⁸ *Ibid.*

⁶⁹ See for example *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711 (H.C.). The plaintiff was awarded \$7,500 in aggravated damages for the mental distress he suffered upon his wrongful dismissal.

⁷⁰ Cassels, *supra* note 2 at 195-196. Aggravated damages were explained in *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.) at 299: “[A]ggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary loss. They are designed to compensate the plaintiff, and they are measured by the plaintiff’s suffering.... It is, of course, not the damages that are aggravated but the injury. The damage award is

Unlike in the employment context, the injury complained of in a companion animal wrongful death action (giving rise to the mental distress suffered by the plaintiff) is inflicted upon a third party (the companion animal), not the claimant. Even more significant, however, is the fact that there has yet to be a case in Canada in which the wrongful death of a companion animal was the result of intentional, rather than negligent, conduct. The negligent behavior in both *Brown* (failure to maintain proper care and attention while walking the dog)⁷¹ and *Ferguson* (failure to inspect a fence for possible escape routes)⁷² are not capable of supporting an aggravated damages award as the conduct that caused the loss cannot be said to be “callous, malicious, or high-handed.”⁷³

(c) Negligent or Intentional Infliction of Mental Suffering

A more appropriate comparator group for plaintiffs in companion animal wrongful death actions, and any attendant mental distress which subsequently arises, lies in cases where courts have considered whether or not to award damages for the intentional or negligent infliction of nervous shock, where that shock arises because of injury or death to a person other than the claimant.⁷⁴ However, in cases of this kind Canadian courts have been relatively cautious. Rather than allowing recovery for any and all mental distress, Canadian courts have followed where the English have led and required that the plaintiff meet fairly strict criteria before qualifying for compensation for mental distress.⁷⁵ A plaintiff seeking compensation

for aggravation of the injury by the Defendant’s high-handed conduct.”

⁷¹ *Brown*, *supra* note 26 at paras. 8-11.

⁷² *Ferguson*, *supra* note 27 at 684-685.

⁷³ Cassels, *supra* note 2 at 202. The author explains that, “Generally, aggravated damages (beyond those available for the “pain and suffering” associated with a personal injury) are awarded only when there is advertent malicious conduct by the plaintiff. Thus, cases involving inadvertence (negligence), while sometimes giving rise to general damages for pain and suffering, will rarely give rise to additional aggravated damages.”

⁷⁴ Schwartz, *supra* note 22 at 251. The authors there make the same argument and refer to the need to consider the law of intentional or negligent infliction of mental suffering when contemplating making awards in excess of market value for companion animals, beginning at.

⁷⁵ The origins of recovery for “nervous shock” lie in the decision of *Wilkinson v. Downton* [1897], 2 Q.B. 57, as cited in Lewis N. Klar, *Tort Law*, 3rd ed. (Scarborough: Thomson Canada Limited, 2003) at 72-73. Klar summarized the holding as follows: “The tort requires (1) an act or statement (2) calculated to produce harm and (3) harm. It clearly

for nervous shock is required to demonstrate that she suffered harm as a result of the defendant's negligent or intentional act, and that the nervous shock suffered was reasonably foreseeable.⁷⁶

The harm suffered is perhaps the easiest aspect of this cause of action to deal with as courts have been fairly consistent in their findings as to what kind of harm is compensable. Courts have held consistently that the claimant must have suffered "some recognizable psychiatric illness."⁷⁷ As it is described in *Devji v. Burnaby (District)*, the threshold is not a low one; it requires that the plaintiff:

[E]xperience something more than the surprise and other emotional responses that naturally follow from learning of the death of a friend or relative...there must be something more that separates actionable responses from the understandable grief, sorrow and loss that ordinarily follow the receipt of this information."⁷⁸

In considering the harm suffered courts have, for example, distinguished between post-traumatic stress disorder and mere bereavement; even where both are the result of the same traumatic event, only the former is compensable.⁷⁹

Canadian courts have not yet come to a definitive conclusion as to whether or not the reasonable foreseeability requirement of this cause of

did not contemplate an action based on negligence." The action does now, however, extend to negligent acts. See for example *Martin v. Mineral Springs Hospital*, [2001] W.W.R. 298 (Alta. Q.B.) [*Martin*].

⁷⁶ Allan M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Canada: LexisNexis Canada Inc., 2006) at 428.

⁷⁷ *Heighington v. Ontario*, [1987] O.J. No. 725, 60 O.R. (2d) 641 (H.C.) as cited in Linden & Feldthusen at 426.

⁷⁸ *Devji v. Burnaby (District)* (1999), [2002] 2 W.W.R. 12 at para. 75 [*Devji*].

⁷⁹ *Martin*, *supra*, note 75. The plaintiff husband was denied damages for mental distress when he witnessed the still-born delivery of his first child. Although the doctor's negligence caused the still-birth and the plaintiff suffered "tremendous grief and sorrow" he did not suffer from a recognizable medical illness and was denied recovery on that basis.

action must include a consideration of certain “control mechanisms” to limit liability.⁸⁰ Three control mechanisms have, however, been applied at different times by various courts in Canada: the absence of temporal, locational or relational proximity has been relied upon to deny recovery.⁸¹

The aspect of temporal proximity is most easily satisfied when the plaintiff witnesses the event itself, or arrives upon the scene shortly after it occurs without being advised by an intermediary that the accident occurred.⁸² As temporal proximity is concerned with the plaintiff’s direct perception of the accident, attendance at a hospital very shortly after the accident may also satisfy this requirement. However, plaintiffs have been denied recovery when they were advised by telephone of the fatal injury suffered by a family member and then arrived at the hospital already fully aware of the death.⁸³ There the Court denied recovery because it was not reasonably foreseeable that nervous shock would be caused, reasoning that as people “view the bodies of deceased persons for a number of reasons on many occasions and psychological injury is not what one expects or would reasonably foresee from such an experience.”⁸⁴ Similarly, locational proximity will frequently be satisfied wherever temporal proximity is satisfied, as it is concerned with whether or not the plaintiff was present at the accident or its immediate aftermath.

⁸⁰ The United Kingdom has accepted that there must be a distinction between primary and secondary victim cases where psychological illness is caused. In cases where the claimant is a secondary victim he must establish, in addition to reasonable foreseeability of psychiatric injury in a person of normal fortitude, that certain indicators of proximity existed between the plaintiff and the defendant: *White v. Chief Constable of South Yorkshire Police* (1998), [1999] 2 A.C. 455 (U.K. H.L.)

⁸¹ Whether these three control mechanisms are necessary for the proper application of the two-part test for liability adopted in *Nielsen v. Kamloops (City)* (1984), [1984] 5 W.W.R. 1 was recently questioned in *Mustapha v. Culligan of Canada Ltd.* (2006), 43 C.C.L.T. (3d) 27, 275 D.L.R. (4th) 473 (Ont. C.A.), leave to appeal to S.C.C. granted [2007] S.C.C.A. No. 109.

⁸² *Abou-Marie (Litigation Guardian of) v. Baskey*, [2001] O.J. No. 4842, [2001] O.T.C. 876 (Sup. Ct.). Mother entitled to damages for negligent infliction of nervous shock when she arrived home and saw her daughter’s body on the lawn after it had been hit by car.

⁸³ *Devji*, *supra* note 78.

⁸⁴ *Ibid.* at para. 63.

The relational aspect of proximity requires that there be a close, although not necessarily familial, relationship between the person injured and the plaintiff seeking relief.⁸⁵ Although initially only familial relationships were considered to be adequate, more recent decisions seem to indicate that other relationships could satisfy the requirement.⁸⁶

(i) Negligent or Intentional Infliction of Mental Suffering and the Companion Animal Jurisprudence

While it may be comforting that two Canadian judges have recognized that the value of a relationship with a companion animal may exceed its market value, the facts in *Brown* and *Ferguson* fail to bring the plaintiffs within the requirements for recovery for psychiatric harm. The plaintiffs in both cases were advised of the loss of their companion animal over the telephone, and, moreover, neither party appeared to come remotely close to suffering from a recognizable psychiatric illness.

Allowing damages for mental distress suffered as a result of a companion animal's death where the requirements of proximity to the accident and a recognizable physical or psychological illness are not also satisfied would permit recovery when a companion animal is wrongfully killed where it would be impossible if the third-party were human. Not only is this an absurd result, but it would also provide a basis for future litigants in human wrongful death actions to argue that the law in relation to mental distress has been relaxed in terms of the evidentiary requirements necessary to establish this cause of action.⁸⁷

However, where the requirements of proximity and mental illness are satisfied in the context of a wrongful death action relating to a companion animal, recovery should be allowed. A court in those circumstances would not be compensating for grief or ignoring the common law as it has developed in relation to nervous shock; rather, it would be compensating for a real injury suffered by the plaintiff. Although to date recovery for

⁸⁵ Linden & Feldthusen, *supra* note 76 at 432.

⁸⁶ See for example *Devji*, *supra* note 78.

⁸⁷ Schwartz & Laird, *supra* note 22 at p. 251.

mental distress as a result of an injury to a third party has been limited to humans, there does not appear to be any reason to prevent animal guardians from accessing the remedy offered where the other evidentiary requirements are also satisfied.

In *Marshall v. Lionel Enterprises*, Justice Haines discussed in obiter the very possibility that the cause of action is capable of expansion in terms of claimants:

Close relatives will no doubt pose little problem but what of sweethearts, fiancés, or perhaps even close friends?...I can do little better than to quote the statement of Lord Wright in *Hay or Bourhill v. Young*, [1943] A.C. 92 at p. 110:

The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury of the Judge decides.

The “good sense” of the Judge or jury must of course take into account the knowledge of the time.⁸⁸

Arguably, the companion animal context provides an example of a situation where “the knowledge of the time” might provide justification for the expansion of the cause of action to the deaths of non-humans. Indeed, it appears to be simply good sense and the knowledge of the time that permitted the judges in *Somerville*, *Ferguson* and *Brown* to recognize the unreasonableness of limiting the award of damages to market value, given the obvious love of the animal guardian for his or her lost companion animal.

⁸⁸ [1971] 25 D.L.R. (3d) 141 (Ont. H.C.) at 151.

(ii) Mental Distress and Breach of Contract

The plaintiffs in *Newell* succeeded because their contract with the defendant airline was capable of being classified as one for peace of mind; their case therefore fell into an exception to the general rule that contract law does not compensate for mental distress.

In *Fidler v. Sun Life Assurance Co. of Canada*, the Supreme Court of Canada recently reconsidered the issue of when one can recover for mental distress flowing from a breach of contract and held that mental distress should be compensable where one (not necessarily the sole or primary) purpose of the contract is to secure a psychological benefit, provided the degree of mental distress caused by the breach warrants compensation.⁸⁹ Thus, the exception for non-commercial (or peace of mind) contracts is no longer relevant; the applicable principle, rather, is that “as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable.”⁹⁰

It has been pointed out that the pre-*Fidler* rule was based upon a number of assumptions, the most important being that contracts are usually to secure a commercial benefit and so mental distress flowing from breach of the contract could not be said to be reasonably foreseeable.⁹¹ However, as courts have now recognized that liability for breach of contract causing mental distress is to be determined by asking whether a psychological benefit was an object of the contract, animal guardians could argue that many of the contracts entered into with various service-providers in relation to their pets are precisely to secure such a psychological benefit.

Consider, for example, the scenario where a kennel is hired to board a companion animal while his guardian is on vacation (as in *Ferguson*). The primary object of such a contract is, without a doubt, the psychological

⁸⁹ [2006] 271 D.L.R. (4th) 1, [2006] 2 S.C.R. 3 [*Fidler*].

⁹⁰ *Ibid.* at para. 48.

⁹¹ Shannon Kathleen O’Byrne, *Damages for Mental Distress and Other Intangible Loss in a Breach of Contract Action*, (2005) 28 Dal. L. J. 311 at 344.

benefit which accrues to the animal guardian from knowing that his companion animal is being appropriately and safely cared for while he is away. If the contract were breached any resulting mental distress would be reasonably foreseeable and, arguably, compensable under the rule in *Fidler* provided it was significant enough to justify compensation.

This approach may also avoid the difficulties associated with proving the existence of a “psychological illness”, as is currently the case with intentional or negligent infliction of mental suffering. In *Fidler*, Justice McLachlin referred repeatedly to the “anxiety”, “distress” and “discomfort” experienced by the plaintiff, as opposed to a “recognizable psychological illness”.⁹² Similarly, in *Newell* the judge referred to mental distress as being equivalent to frustration, annoyance or disappointment.⁹³ This, apparently more forgiving, threshold of proof may increase the likelihood of recovery in certain actions involving companion animals.

V. DAMAGE AWARDS FOR LOSS OF COMPANIONSHIP

(a) Third Party Damages for Non-Pecuniary Losses Involving the Wrongful Death of a Human

Although companionship played a tangential role in the award in *Ferguson*, the phrase “loss of companionship” is largely absent from the Canadian jurisprudence dealing with the wrongful deaths of companion animals.⁹⁴ Nonetheless, loss of companionship has also been a proposed head of recovery in wrongful death actions for companion animals. However, as was originally the case with mental distress, loss of companionship is not compensable at common law in the context of humans.⁹⁵

⁹² *Fidler*, *supra* note 89 at paras. 57-60.

⁹³ *Newell*, *supra* note 48.

⁹⁴ Part of the reason underlying the award of damages in *Ferguson* was the relationship the plaintiffs had with the dog over the 7 years they had owned it.

⁹⁵ *Baker v. Bolton* (1808), 170 E.R. 1033, 1 Camp. 493 (Eng. Nisi Prius).

The position at common law was first modified in England by the 1846 passing of *Lord Campbell's Act*, which permitted plaintiffs to bring an action for losses suffered as a result of the death of certain classes of family members.⁹⁶ Canadian provinces enacted comparable legislation.⁹⁷ However, the interpretation given to these legislative enactments was that losses recoverable under them were only those which could be said to have a pecuniary nature or aspect.⁹⁸

This pecuniary interpretation did permit a child to claim for the loss of companionship of a parent, as it can be viewed as a pecuniary loss “for unpaid but economically valuable services that were previously provided by the deceased.”⁹⁹ Thus, in *St. Lawrence & Ottawa Railway v. Lett* the husband and children of a deceased woman were entitled to damages for loss of companionship:

I think the term injury in the statute means substantial injury as opposed to mere sentimental...I am free to admit that the injury must not be sentimental or the damages a mere solatium, but must be capable of a pecuniary estimate; but I cannot think it must necessarily be a loss of so many dollars and cents capable of calculation. The injury must be substantial; the loss, a loss of a substantial pecuniary benefit, and the damages are not to be given to soothe the feelings of the husband or child, but are to be given for the substantial injury.”¹⁰⁰

The loss suffered by the children was deemed compensable on the ground that they had lost “education in religion, morals and virtue which...can be imparted to the children by a mother alone.”¹⁰¹

⁹⁶ S.M. Waddams, *The Law of Damages*, loose leaf (Toronto: The Cartwright Group, 2007) at para. 6.10.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* at para. 6.20.

⁹⁹ Cassels, *supra* note 2 at 180.

¹⁰⁰ [1885] 11 S.C.R. 422 at p. 433 [*St. Lawrence*].

¹⁰¹ *Ibid.*, at 436.

Some legislatures have responded to this development of the law by modifying the relevant statute to expressly permit recovery for loss of companionship. Manitoba, for example, permits recovery of \$30,000 for the loss of companionship for a limited class of family members of the deceased; this award does not require that there be evidence of harm.¹⁰² Similarly, Nova Scotia's *Fatal Injuries Act* makes express that recovery in a wrongful death action can be for either pecuniary or non-pecuniary losses.¹⁰³

However, not all provinces have modified the common law approach by legislative enactment. British Columbia, Newfoundland and Labrador, the Yukon, Nunavut and the North West Territories do not yet permit recovery for non-pecuniary loss.¹⁰⁴ As a result, in these jurisdictions, recovery for the loss of companionship of a child is rare.¹⁰⁵ This is illustrated by a recent decision of the British Columbia Court of Appeal where it was held that, despite his suffering, a father could not recover for the loss of companionship of his son. The underlying basis for such damages under the relevant British Columbia Act was "the loss of the 'services' of the deceased rather than the loss of the deceased himself."¹⁰⁶ Thus, the situation in Canada remains that, absent a provincial statute providing otherwise, the common law limits recovery for loss of companionship to pecuniary losses.

¹⁰² *Fatal Accident Act*, R.S.M. 1987, c.F50, s. 3.1.

¹⁰³ *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, s. 5(2).

¹⁰⁴ The legislation pertaining to fatal accidents in British Columbia, Newfoundland and Labrador, the Yukon, Nunavut and the North West Territories do not yet provide recovery for non-pecuniary loss of companionship, guidance or care.

¹⁰⁵ One frequently noted exception is the case of *Lian v. Money*, [1996] 4 W.W.R. 263 as cited in Waddams, *supra* note 96 at para. 6.340. However, the award was based on the special services the child provided to his parents and is in this way consistent with the common law permitting compensation for companionship which had a pecuniary component.

¹⁰⁶ *Loyie v. Erickson Estate* (1994), 2000 BCSC 374, [2000] 94 B.C.L.R. (2d) 33 as cited in *Bianco Estate v. Fromow* [1998] 161 D.L.R. (4th) 765. The decision in *Bianco Estate* that a parent could not in ordinary circumstances claim recovery for the loss of companionship of a child has been distinguished in *Zapata Estate v. Grunder*, 2000 BCSC 374, [2000] 95 A.C.W.S. (3d) 297 on the ground that the holding is limited to the context of a parent losing a child and is not applicable to the context of a child losing a parent.

(b) Third Party Damages for Non-Pecuniary Losses Associated with the Wrongful Death of a Companion Animal

The way in which courts have dealt with the matter of children in wrongful death actions is relevant to the issue of companion animals, as the relationship between owner and companion animal appears to be the most analogous to the familial relationship between parent and child (as opposed to, for example, that existing between spouses). As the position in several of our provinces and territories remains that this loss is not compensable, allowing recovery in the context of companion animals would again lead to the irrational result that an animal guardian could recover where a human could not for the loss of a child at common law. Because loss of companionship awards have largely been created by statute, it seems unlikely that a court will, or even should, allow recovery under this head for companion animals.

VI. THERE ARE VALID POLICY REASONS FOR NOT PERMITTING RECOVERY IN NEGLIGENCE ACTIONS ON THE BASIS OF LOSS OF COMPANIONSHIP OR MENTAL DISTRESS

(a) Permitting Recovery On The Facts As Found In *Brown And Ferguson* Ignores The Policy Reasons For Which Canadian Courts Have Limited Recovery For Mental Distress

It has been argued that the rules prohibiting recovery for emotional distress and loss of companionship derived from a period of time where the common law was “unreasonably suspicious of, and hostile, to claims of emotional distress, even for humans, and while it was entirely deaf to claims of damages for human wrongful deaths.”¹⁰⁷ While it is true that these arguments originate in the human context, and the author has relied upon the same arguments to illustrate the problems associated with recovery

¹⁰⁷ Wise, *supra* note 4 at p. 69.

under either of these heads, the fact remains that Canadian courts continue to limit claims for damages for mental distress for loss of human life. Adherence to precedent is not the only justification for such limitation: there are valid policy objectives that the courts are advertent to in limiting access to recovery for mental distress to narrowly defined circumstances.

Justice McEachern in *Devji*, explains that claims for negligent infliction of nervous shock present two concerns:

...I am not confident that the administration of justice is usually able to identify unmeritorious claims successfully. Fraudulent claims are sometimes uncovered but many claims are advanced by persons who genuinely believe they have suffered psychiatric injury when their real condition is grief or sorrow, and such claims are difficult to disprove. Recent experience shows it is naïve not to believe that an expansion of any area of liability will not produce a volume if not a flood of both valid and invalid claims. This is particularly so when the line between grief and nervous shock is so difficult to ascertain...¹⁰⁸

Thus, both the possibility of a substantial increase in the volume of litigation proceeding through the courts and the difficulties associated with distinguishing between grief and mental illness form a part of the rationale underlying the limits the judiciary has placed upon recovery for nervous shock. These concerns are not lessened simply because the deceased party is a companion animal.

Moreover, it is difficult to conceive of a principled basis upon which courts could justify awarding damages for mental distress on a lower threshold in wrongful death suits involving animals while maintaining the existing standards for humans. Thus, the concern about overburdening the judiciary is a very real one when one considers that recovery in this context would necessarily widen the grounds upon which an individual could

¹⁰⁸ *Devji*, *supra* note 78 at para. 47.

recover when the injury or death, giving rise to the mental distress in the claimant, was suffered by a human.

(b) It Is Impossible To Appropriately Quantify The Loss When The Damage Award Is Compensating For Loss Of Companionship Or Mental Distress

In claims for either mental distress or loss of companionship appropriately quantifying the loss is also problematic. If a companion animal is truly irreplaceable to its owner, how can the judiciary possibly be expected to identify an appropriate sum of money to repair the wrong done? Repairing the injury necessarily involves identifying an amount which “makes the plaintiff whole” but compensating for grief or loss of companionship provides no logical basis upon which the value of the lost animal can be determined. The awards in *Ferguson*, *Brown*, *Newell* and *Somerville* are all illustrative of this difficulty as the awards appear to be plucked, for the most part, from thin air with little effort made to justify the quantum of the award in relation to the injury.

VII. A RATIONAL APPROACH TO THE PROBLEM OF VALUING ANIMAL COMPANIONS IN WRONGFUL DEATH ACTIONS

(a) Value to Owner as Determined by Reference to Lost Investment

Valuing companion animals by reference to the lost investment cost to the owner during the lifetime of the companion animal is an appropriate alternative to the market value approach.¹⁰⁹ This approach provides the judiciary with a method by which it could reasonably assess the value of

¹⁰⁹ Byszewski, *supra* note 4 at 233. The author of this article identified the first use of this theory of recovery in an American case valuing the life of a child in a wrongful death action and argued that this could be the germ of a rational theory of recovery in the context of companion animal wrongful death actions.

the companion animal, while not disrupting other established common law principles. Moreover, such an approach is consistent with the flexibility Canadian courts have occasionally demonstrated when valuing unique forms of property.

Loss of investment takes into account expenditures made by the animal guardian in caring and providing for the companion animal. Costs such as immunizations, neutering, training and food would be calculated to arrive at a number which more accurately reflects the value of the companion animal to the guardian. If actual data are not available, a court could rely upon average expenditures to calculate the investment loss. Thus, based on the Ipsos-Reid data referred to above, if the companion animal at the centre of the wrongful death action were a dog, the figure of \$650 would be multiplied by the number of years the dog lived to arrive at an amount reflective of his value.

Allowing recovery for investment to date of death has several benefits. Firstly, it is reasonably capable of an accurate assessment, either by reference to statistics which indicate average annual expenditures for maintaining a companion animal or to documented expenditures made by the owner. Valuing animals in this way also lessens fears of lawsuits for extraordinary sums being initiated whenever a companion animal is wrongfully killed. By recognizing the bond between guardian and companion animal, and viewing the companion animal as an investment, courts would not be constrained by the classification of companion animals as property.

The suggestion that the investment approach should be extended to cover the entire life the companion animal would have lived, absent the tortious act which led to its death, possibly goes too far.¹¹⁰ The compensation for

¹¹⁰ *Ibid.* at 239. The author goes further, however, than simply investment to date of death and suggests that the recovery should be based upon investment to date of death plus the annual estimated investment multiplied by the number of years the companion animal could reasonably have been expected to live beyond its wrongful death date. In the author's opinion this figure would reflect the "minimum amount that courts should equate with entire pecuniary loss, including loss of companionship."

the years beyond which the companion animal lived are proposed on the basis that the investment cost only to the date of death fails to account for loss of companionship.¹¹¹ However, as discussed above, Canadian courts are resolute that non-pecuniary loss of companionship is not compensable. Allowing recovery for what would have been the rest of the animal's natural life may be inconsistent with the approach taken to "companionship" losses at common law.

(b) Legislative Action as the Preferable Means of Altering the Law

As this brief paper has tried to demonstrate, the difficulties associated with recovery under the existing common law are fairly wide-ranging, and transcend simply the legal classification of animals as chattels. Of any possible solution to the problem of more appropriately valuing companion animals, carefully considered statutory change is perhaps the most attractive as well as the most viable. However, any legislative instrument addressing the problem would benefit from a consideration of the loss of investment approach to arrive at numbers which link compensation amounts to the value to guardian.

Legislative enactment would remove any uncertainty as to who has an action following the death of a companion animal, as well as the types of animals for which damages ought to be recoverable. It would also do away with the current limitations imposed by the common law, thereby relieving the judiciary of the difficulty of formulating an appropriate and workable theory of recovery. In the United States, where individuals and courts have also struggled with the concepts of property, nervous shock, and the effect of *Lord Campbell's Act*, the legislature is increasingly being identified as the more appropriate governmental branch to modify the law as it stands in relation to companion animals.¹¹² Some progress has been made, as two

¹¹¹ *Ibid.*

¹¹² Both academics and judges have commented that the legislature should step in and modify the common law if changes are to be effected. In Byszewski, *supra* note 4 at 224, the author cites *Rabideau v. City of Racine*, 627 N.W.2d 795 (Wis. 2001), where it was observed at 807 that legislative change is preferable as it "allows the legislature to make a considered policy judgment regarding the societal value of pets as companions and to specify the nature of the damages to be awarded in a lawsuit."

States have enacted legislation to allow recovery of non-economic damages in limited circumstances. An examination of these instruments could provide Canadian legislators and animal rights advocates with insight into resolving the difficulties associated with the present state of the law.¹¹³

CONCLUSION

It has been said that denying recovery in excess of market value when a companion animal is wrongfully killed effectively “belittles the relationship and affection between animal and human, and reinforces the misconception that reasonable people are not emotionally harmed by the death of a companion animal.”¹¹⁴ While this is powerful rhetoric, it ignores the very real difficulties and complexities currently associated with recovery at common law. Canadian courts have not been intentionally belittling the role companion animals play in the daily lives of Canadians; they have, for the most part acknowledged the relationship that can and does exist between a pet and his guardian, but have struggled to discover an alternative and logical method of valuation to replace market value.

The loss of investment approach sidesteps the current challenges to recovery posed by the common law. It provides the judiciary with a model that responds to the high value Canadian society places on our relationships with companion animals, as well as to concerns that such a change would either substantially increase the volume of litigation in Canadian courts or result in inflated claims. Statutory change, in addition to a common law right of action, would also more closely align the law with the social values held by Canadians today. Together, these two changes are capable of effectively responding to the shortcomings of the present approach.

¹¹³ Tennessee and Illinois have legislation in place: Tenn. Code Ann. §44-17-403 (2000); *Humane Care for Animals Act* IL ST CH 510 §70/1.

¹¹⁴ Squires-Lee, *supra* note 4 at 1083