

Seeking More Than 'Market Value' **New causes of action pursued to compensate owners for killing of pets**

Stacy N. Lilly

Shadow was killed by a pellet gun.

The 5-year-old shepherd-mix and his family were on vacation in Vermont, stopped at a church parking lot to take a break, according to a lawsuit filed by Shadow's owners. Lewis Dustin, sitting on his porch nearby, shot the dog, severing Shadow's aorta, when he wandered into Dustin's yard.

Shadow died in his family's arms as they rushed him to the hospital.

With more than 60 percent of all U.S. households having at least one dog or cat, the country's culture is increasingly recognizing the special relationship between animals and human caregivers. As a result, companion animals are affectionately regarded as family members.

Perhaps, the most notable example of this bond is the extreme measures Hurricane Katrina victims took to care for and save their family pets — some people risked their own lives.

The post-Katrina search and rescue efforts conducted by animal rescue groups were unprecedented, and the aftermath compelled Congress to consider companion animals in its post-Katrina legislation.

The Pets Evacuation and Transportation Act of 2006 requires FEMA to ensure that state and local emergency preparedness operational plans, including evacuation plans, take into account the needs of individuals with household pets and service animals prior to, during and following a major disaster or emergency.

In addition, the post-Katrina Emergency Management Reform Act of 2006 authorized the search, rescue, care and shelter of pets and service animals as a type of essential assistance to be provided after a major disaster declaration.

Despite the popularity of companion animals and despite society's growing acceptance of the unique relationship between these animals and their human caregivers, the majority of U.S. jurisdictions continue to limit recovery for a pet's killing or injury to the animal's net worth, treating the animal only as personal property. Therefore, liability for injury or death of a family pet has traditionally been limited to the cost of treatment or replacement value of the pet.

However, attempts to change this precedent are increasing.

The first step in abolishing the rule that pets are mere property is convincing courts that companion animals are intrinsically worth more than other forms of personal property.

A growing number of courts are, in fact, acknowledging this.

Some have taken the next step, reshaping common law principles to recognize greater recovery for emotional distress when a pet is killed or injured by willful, intentional or outrageous conduct. With that, two notable causes of action are emerging: intentional infliction of emotional distress caused by the intentional killing of, or injury, to a pet and a new tort, called malicious injury to a pet.

Emotional Distress

Although pets are legally treated as personal property in the United States and no cause of action lies for emotional distress due to their negligent destruction or injury, the number of cases permitting recovery for non-economic or emotional distress damages following the intentional killing of a family pet is on the rise.

Such claims emphasize that the emotional impact an owner sustains by the intentional killing of a companion animal is substantially greater than the out-of-pocket costs associated with replacing the pet. Further, these claims underscore the notion that the human owner should be entitled to damages for the intentional death of or injury to a family pet.

Claims for intentional infliction of emotional distress typically require extreme and outrageous conduct with an intent to cause the resulting emotional distress. Not surprisingly, the success of such claims, and the ability to survive summary judgment, depends largely on the jurisdiction and the facts surrounding the animal's harm.

Some jurisdictions, for example, require a blood or marriage relationship in order to recover damages for intentional infliction of emotional distress. Companion animals can never reach that level of closeness.

Other courts, however, have been open to extending the common law to afford companion animal owners damages for emotional distress when that family pet is killed by an intentional tortious act. The outrageousness of the defendant's conduct is the key in those cases, and clearly some courts take more conservative positions on what is, or is not, outrageous.

Although Pennsylvania currently follows the majority of jurisdictions and limits damages resulting from a negligent killing to fair market value, recovery for emotional distress damages following an intentional killing is possible.

The issue has not recently been addressed by state appellate courts, but pet owners can advance the argument based upon a 1979 Luzerne County Common Pleas Court opinion, *Banasczek v. Kowalski*, that expressly recognized the right of dog owners to recover for mental suffering caused by the destruction of the owner's dog, even if the killing occurred outside the owner's presence.

More recently, the 3rd U.S. Circuit Court of Appeals followed *Banasczek* in its 2001 decision *Brown v. Muhlenberg Twp.* and held the killing of a pet could indeed be recognized in Pennsylvania as extreme and outrageous, thus entitling the human owner to emotional distress damages.

Moreover, *Brown* predicted that Pennsylvania courts would permit a jury to decide if a pet owner suffered an intentional infliction of emotional distress where the malicious behavior was directed to the owner as well as the pet. It is especially notable that the *Brown* court's rationale gave credit to the strength of community sentiment against at least extreme forms of animal abuse and the substantial emotional investment that pet owners frequently make in their pets.

In tandem, these decisions provide the opportunity for practitioners to advance intentional infliction of emotional distress claims on behalf of Pennsylvania pet owners who have lost a companion animal due to an intentional act.

Malicious Injury to a Pet

One state appellate court has recognized a new common law cause of action and remedy for those pet owners whose companion animals have been maliciously injured or killed.

In the 2006 Court of Appeals of Washington case *Womack v. Von Rardon*, the plaintiffs recovered not only the fair market value for their cat, who had to be euthanized after he was intentionally covered with gasoline and set on fire, but also an award of \$5,000 for emotional distress.

The court held that malicious injury to a pet can support a claim for emotional distress and be considered a factor in measuring damages, regardless of whether the defendant knew of the pet owner's existence and regardless of whether the defendant intended to cause the resulting emotional distress.

This is the first court to hold a defendant civilly liable for the malicious injury of a pet without regard to any intent to harm the pet's guardian.

Pursuant to *Womack*, depending on the particular facts of the case, harm may be caused to a person's emotional well-being by the malicious injury to that person's pet as personal property, and an award for emotional distress damages — akin to a general award for pain and suffering — can be recovered.

This new tort has yet to be considered by Pennsylvania courts.

Lewis Dustin pleaded guilty to a misdemeanor charge of animal cruelty for shooting Shadow, the Associated Press reported. His sentence of 11 to 12 months in jail was suspended and he was ordered to undergo a year of professional counseling and perform 520 hours of community service. In addition, Dustin was prohibited from possessing a pellet gun or having a dog in his home for one year and was ordered to pay restitution for Shadow's emergency care and burial costs.

Claims for intentional infliction of emotional distress and malicious injury to a pet were also pursued by Shadow's owners. The issues were ultimately decided by the Supreme Court of Vermont in *Scheele v. Dustin*.

Although the court recognized that Shadow's owners had a strong emotional bond with their dog, it ultimately applied the traditional view that Shadow was personal property, thus denying the claims for emotional damages.

Shadow's story underscores the need for change. The time is ripe for the legal system to legitimize the emotional connection between humans and the companion animals who share our lives, arouse our deepest affections, and have a value well beyond anything the "market" could assign. •