ARTICLES

RECONSIDERING NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS FOR LOSS OR INJURY TO A PET

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INTRODUCTION

On July 12, 2024, the *New York Times* published a piece entitled *A Hit-and-Run Driver Killed My Dog. The Penalty? Maybe a $100 Fine*.[1] The author described her ten-year-old Havanese dog, Chicky, who was killed in a crosswalk by a hit-and-run driver.[2] The author's family was "devastated."[3] The community was teetering on a desire for "raw . . . vigilantism."[4] Yet, as the author recognized, "Legally speaking, pets are classified as property."[5] The hit-and-run was a mere traffic infraction.[6] The author bemoaned the fact that the penal law did not reflect the "body of psychological and medical literature [that] confirms . . . that contact with dogs is good for us in so many ways."[7]

Had the author located and sued the hit-and-run driver, she may have been just as disappointed in the outcome. Her dog would be considered property in the tort context, too.[8] Her recovery would probably exceed $100, the amount of the criminal fine, but only by a few thousand dollars and only because her pet was a purebred.[9] In

[1] Ginia Bellafante, *A Hit-and-Run Driver Killed My Dog. The Penalty? Maybe a $100 Fine,* N.Y. TIMES (July 12, 2024), https://www.nytimes.com/2024/07/12/nyregion/a-hit-and-run-driver-killed-my-dog-the-penalty-maybe-a-100-fine.html [https://perma.cc/Z7WZ-LRQ9].
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *See* Kaufman v. Langhofer, 222 P.3d 272, 275 (Ariz. Ct. App. 2009) ("[T]he majority position classif[ies] animals as personal property."); *see also* Geordie Duckler, *The Animal as an Object of Value*, *in* RECENT DEVELOPMENTS IN ANIMAL LAW 8, 8 (2015). Occasionally, courts suggest pets may be acquiring a new status. *See, e.g.*, Hardy v. Flowers, HHD-CV-20-5065186, 2021 WL 929946, at *3 n.2 (Conn. Super. Ct. Feb. 16, 2021) ("In a number of jurisdictions, there has been a slow evolution towards the 'de-chattelization' of household pets."); *Finn v. Anderson,* 101 N.Y.S.3d 825, 828 (City Ct. 2019).
[9] The plaintiff usually recovers the market or replacement value of the pet. *See infra* text accompanying note 40; *see also* Phil Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Values, and Animal Welfare*, 6 STAN. J. ANIMAL L. & POL'Y 30, 35 (2013) ("Most pets . . . are deeply cherished, but have little or no market value.").

most places,[10] she would not be entitled to compensation for her loss of the "human-pet bond."[11]

My recent companion article, *The Restatement of Torts and Recovery for Loss of the Human-Pet Bond After an Intentional Tort*,[12] explored the history and avenues of recovery for emotional distress when a pet's injury or death qualifies as an intentional tort.[13] This Article picks up where that article left off. Owners[14] whose pets[15] are *negligently* injured or killed have a harder time recovering for loss of the human-pet bond than when the defendant commits an intentional tort.[16] Specifically, this Article examines the hostility to the tort of negligent infliction of emotional distress (NIED) in the pet

[10] Very few states allow recovery in this context. *See infra* text accompanying notes 38–59. Chicky's family, who lives in New York, would not have been helped by a recent New York case that allowed a plaintiff to recover for her mental distress when a driver hit her son's dog while she was walking the dog on a leash. *See* DeBlase v. Hill, No. 522689/2023, 2025 WL 1873243, at *17 (N.Y. Sup. Ct. Kings Cnty. June 17, 2025). At the time of Chicky's accident, a dog walker (not a family member) was walking Chicky. *See* Bellafante, *supra* note 1.

[11] *See* John P. Brown & Jon D. Silverman, *The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States: Executive Summary*, 215 J. AM. VETERINARY MED. ASS'N 161, 172 (1999) (defining the human-pet bond as "encompass[ing] the many forms of people's interactions with animals, including companionship, pleasure, fun, physical security and protection, physical health and service").

[12] Merle H. Weiner, *The Restatement of Torts and Recovery for Loss of the Human-Pet Bond After an Intentional Tort*, 55 UNIV. MEM. L. REV. 525 (2025).

[13] The article detailed how the first two iterations of *Restatement of Torts* restricted the ability of plaintiffs to recover damages for their emotional harm attending loss or injury to their pets. *Id.* at 528–29. The American Law Institute did this both with the law of remedies and the law of liability. *See id.* at 531. Section 21 of the new *Restatement (Third) of Torts: Remedies* clarifies the availability of such recovery in the intentional tort context. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 (A.L.I., Tentative Draft No. 2, 2023). Section 21 says in relevant part that emotional distress damages are recoverable, even if not accompanied by bodily harm, when they "result[] from an intentional tort that is principally directed at property rights or financial interests, committed under circumstances in which emotional harm is especially likely to result." *Id.* § 21(a)(3). The section specifically says it "applies to intentional torts such as trespass to land, trespass to chattels, conversion, fraud, and interference with contract." *Id.* § 21(b). My article argues that section 21 may have little impact in states that are hostile to recovery because it reaffirms the substantive law that hampers recovery in the intentional tort context.

[14] *Owner* is still the most commonly used word for a human companion. *See* Laurel Lagoni, *Family-Present Euthanasia: Protocols for Planning and Preparing Clients for the Death of a Pet*, *in* THE PSYCHOLOGY OF THE HUMAN-ANIMAL BOND 181, 181 (Christopher Blazina, Güler Boyraz & David Shen-Miller eds., 2011).

[15] For purposes of this Article, the term *pet* means companion animals such as cats and dogs. Admittedly, people keep other animals as pets. *See, e.g.*, Buck Hills Falls Co. v. Press, 791 A.2d 392, 398 (Pa. Super. Ct. 2002) (deciding chickens were not "household pets," despite owners' claim to the contrary). However, often "those attachments tend to be more distant and may be actively avoided." *See* James A. Serpell, *The Human-Animal Bond*, *in* THE OXFORD HANDBOOK OF ANIMAL STUDIES 81, 81 (Linda Kalof ed., 2015). Whether the definition should be expanded for purposes of this analysis is beyond the scope of this Article.

[16] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012).

context, focusing particularly on the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (the *Third Restatement*).

This Article argues that the *Third Restatement*'s position on the unavailability of the tort of NIED for pet owners is misguided.[17] The American Law Institute (ALI or Institute) should have recognized the availability of the NIED tort when a veterinarian, or someone with a special relationship to the pet owner, injures a pet through gross negligence and causes the pet owner serious emotional distress that was especially likely. The Article simultaneously defends the inability of Chicky's owner to recover in tort for emotional harm. It explains why the two situations should be treated differently. The Article suggests that judges should adopt a nuanced approach to the topic, and recognize that veterinarians' liability for pet owners' serious emotional harm furthers tort law's objectives in important and unique ways.

Part I of this Article explains why the tort of NIED is important for plaintiffs with companion animals.[18] Part II then lays out the *Third Restatement*'s description of the NIED tort, contextualizing it with the history of the tort more generally.[19] Part II sets forth the surprising position found in the *Third Restatement*: that the tort of NIED is *always* foreclosed when the defendant is a veterinarian who injures a patient.[20] Part III evaluates the arguments against application of the tort when a veterinarian negligently kills or injures a pet.[21] Part IV then offers a proposal for how courts might allow the tort against a veterinarian, but also constrain liability.[22] Part V considers potential arguments against this proposal, including whether it is necessary, whether it is consistent with tort doctrine generally, and whether its benefits outweigh its disadvantages.[23]

I. WHY THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IS IMPORTANT FOR PET OWNERS

The tort of NIED is important for pet owners because harm to the human-pet bond is real harm and tort law does not otherwise compensate for this loss when a defendant is negligent.

[17] *See id.* § 47 cmt. m.
[18] *See* discussion *infra* Part I.
[19] *See* discussion *infra* Part II.
[20] *See infra* notes 187–91 and accompanying text.
[21] *See infra* Part III.
[22] *See infra* Part IV.
[23] *See infra* Part V.

Considerable scientific research and personal testimonials describe the benefit of the human-pet bond and the corresponding harm when it is lost. In a seminal article, *The Human-Animal Bond*, James Serpell details the general physical and psychological health benefits that pet ownership provides beyond the therapeutic benefits that some owners receive.[24] The general benefits include "the capacity . . . to buffer or ameliorate the deleterious health consequences of psychosocial stress."[25] A recent qualitative study, discussing the advantages of a pet's social support, notes the following: "The relationship is characterized by substantial affection and love, perceived as unconditional, and . . . fosters inner strengths that an individual may feel are lacking at times, such as self-esteem and courage."[26] Pets also encourage healthy activity through their care (e.g., walking the dog) and facilitate human-human bonds.[27] The importance of pets to individuals' lives is perhaps best reflected in the following statistic from a 2015 Harris Poll: ninety-five percent of American dog and cat owners consider their pet to be a member of their family.[28] To deny the importance of the human-pet bond produces "a hopelessly inauthentic account of humanity."[29]

Consider, for example, the harm experienced by the plaintiff in the case of *Repin v. State*.[30] *Repin* involved the botched euthanasia of the plaintiff's "beloved Alaskan Malamute, Kaisa."[31] The plaintiff was "a single man, with no children," who lived a solitary life.[32] He adopted

[24] Serpell, *supra* note 15, at 85, 87–88; *see also* Froma Walsh, *Human-Animal Bonds I: The Relational Significance of Companion Animals*, FAMILY PROCESS 462, 466 (2009) (summarizing studies indicating the physical and psychological health benefits of companion animals).

[25] Serpell, *supra* note 15, at 88–89.

[26] Charlie Lea, Yasmin Kirby & Jasmin Tilley, *Dogs as a Gateway to the Good Life: Using Thematic Analysis to Explore the Mechanisms Underpinning Dog Ownership and Human Well-Being*, 22 QUALITATIVE RSCH. IN PSYCH. 15, 27 (2025); *see also HABRI Benchmark Survey of U.S. Pet Owners*, HUM. ANIMAL BOND RSCH. INST., https://habri.org/pet-owners-survey/ [https://perma.cc/C5FY-WV2P] (noting that "87% of pet owners say that they have experienced mental health improvements from pet ownership").

[27] Lea et al., *supra* note 26, at 29–30; *see also HABRI Benchmark Survey of U.S. Pet Owners*, *supra* note 26 (noting that "76% of pet owners report that their personal health has improved as a result of owning a pet").

[28] *More than Ever, Pets Are Members of the Family*, PRNEWSWIRE.COM (July 16, 2015, 1:00 PM ET), https://www.prnewswire.com/news-releases/more-than-ever-pets-are-members-of-the-family-300114501.html [https://perma.cc/D9DU-YPXB]; *see* Nicole Owens & Liz Grauerholz, *Interspecies Parenting: How Pet Parents Construct Their Roles*, 43 HUMAN. & SOC'Y 96, 96 (2018); Natasha Feduik, *Differentiating Between Pet Parents and Pet Owners*, PETMD (Aug. 25, 2017), https://www.petmd.com/news/view/differentiating-between-pet-parents-and-pet-owners-36247 [https://perma.cc/BP4P-62GA].

[29] Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 179 (1992).

[30] Repin v. State, 392 P.3d 1174 (Wash. Ct. App. 2017).

[31] *Id.* at 1176.

[32] *Id.* at 1177.

Kaisa as a puppy, and she became "an indispensable part of Repin's reclusive life."[33] When the dog was diagnosed with metastatic cancer and only had a short time to live, he decided to euthanize the dog.[34] The plaintiff's expert described the euthanasia as "reckless and grossly negligent," and detailed what went wrong:

> In short, one does not euthanize a dog by injecting caustic solution outside the vein, causing her to experience tremendous fear and suffer agonizing pain for an extended duration while she is forcibly, physically restrained by the owner until the veterinarian can leave the room to obtain more euthanasia solution and return to administer it properly. That is not euthanasia. It is torturous to both the animal and her owner.[35]

The owner, who had to restrain his dog as she howled in pain, reported "severe emotional distress resulting from the painful euthanasia . . . . [He] now lacks patience, easily angers, suffers headaches, and drinks alcohol to sleep."[36]

Although a pet owner may suffer from loss of the human-pet bond,[37] a pet owner cannot typically recover for that loss in tort law when the defendant negligently injures or kills the pet.[38] Mr. Repin recovered nothing for his pain and suffering.[39] The law of remedies allows a pet owner to recover the market value or replacement value of the animal.[40] If the injured pet needs veterinary care, the owner is also entitled to the reasonable costs of veterinary care to save or treat the animal.[41] Damages sometimes include the "intrinsic value" or

[33] *Id.*
[34] *Id.*
[35] *Id.* at 1179.
[36] *Id.*
[37] This loss is comprised of both the loss of companionship but also the pain and suffering triggered by the harm to the pet.
[38] *See, e.g.*, *Repin*, 392 P.3d at 1181–82 (quoting Hendrickson v. Tender Care Animal Hosp. Corp., 312 P.3d 52, 57 (Wash. Ct. App. 2013)).
[39] *Repin*, 392 P.3d at 1191.
[40] *See, e.g.*, Carbasho v. Musulin, 618 S.E.2d 368, 371 (W. Va. 2005) (holding that pain and suffering are not recoverable for a negligence claim for the loss of a pet dog); Fackler v. Genetzky, 595 N.W.2d 884, 892 (Neb. 1999) (agreeing with "majority approach" that "animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property"). *See generally* Robin Cheryl Miller, Annotation, *Damages for Killing or Injuring Dog*, 61 A.L.R. 5th 635 (1998).
[41] *See* Barking Hound Vill., LLC. v. Monyak, 787 S.E.2d 191, 196 (Ga. 2016) ("By ensuring that property owners whose animals are negligently injured by another are able to recoup reasonable expenses incurred in attempting to save the animal, this Court's decisions . . . are consistent with the position taken by courts in a majority of states."); *see, e.g.*, Blue Pearl Veterinary Partners v. Anderson, 888 S.E.2d 783, 787 (Va. Ct. App. 2023); Martinez v. Robledo, 147 Cal. Rptr. 3d 921, 922 (Ct. App. 2012); Leith v. Frost, 899 N.E.2d 635, 641 (Ill. Ct. App.

"actual value" of the animal,[42] although this typically does not include "sentimental value."[43] Rather, an intrinsic or actual value measure compensates the plaintiff for special investments in the pet, such as immunizations or special training.[44] It usually does not include the owner's pain and suffering or the loss of the pet's companionship.[45]

The pet owner is also ineligible for "parasitic damages."[46] Parasitic damages compensate the plaintiff for emotional harm and are a standard component of recovery when the plaintiff suffers negligently inflicted physical injury.[47] These damages are seen as critical to make-whole relief and corrective justice.[48] But the law treats injury to property differently. Damages for emotional distress are generally not available when a defendant negligently injures property, even a pet.[49] As one court recently said:

2008); Burgess v. Shampooch Pet Indus. Inc., 131 P.3d 1248, 1253 (Kan. Ct. App. 2006); Zager v. Dimilia, 524 N.Y.S.2d 968, 970 (Vill. Ct. 1988).

[42] Adam P. Karp, *Cause of Action in Intentional Tort for Loss of or Injury to Animal by Human*, 44 CAUSES OF ACTION 2D 211, § 30 (2024). *But see* Liddle v. Clark, 107 N.E.3d 478, 484 (Ind. Ct. App. 2018) (limiting recovery to a pet's fair market value).

[43] Kaufman v. Langhofer, 222 P.3d 272, 277 n.9 (Ariz. Ct. App. 2009).

[44] *See, e.g.*, Strickland v. Medlen, 397 S.W.3d 184, 193 n.58 (Tex. 2013); Mitchell v. Heinrichs, 27 P.3d 309, 314 (Alaska 2001); *McDonald v. Ohio State Univ. Veterinary Hosp.,* 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994).

[45] *See* Alison M. Rowe, *Survey of Damages Measures Recognized in Negligence Cases Involving Animals*, 5 KY. J. EQUINE, AGRIC. & NAT. RES. L. 249, 256–57 (2013) (describing this as the position for "[m]ost jurisdictions"); *see, e.g.*, Shera v. N.C. State Univ. Veterinary Teaching Hosp., 723 S.E.2d 352, 357–58 (N.C. Ct. App. 2012); Sherman v. Kissinger, 195 P.3d 539, 547 (Wash. Ct. App. 2008); *McDonald*, 644 N.E.2d at 752; *Daughen v. Fox,* 539 A.2d 858, 864 (Pa. Super. Ct. 1988); Stettner v. Graubard, 368 N.Y.S.2d 683, 685 (Town Ct. 1975). *But see* Mercurio v. Weber, No. SC1113/03, 2003 WL 21497325, at *2 (N.Y. Dist. Ct. Nassau Cnty. June 20, 2003); Saathoff v. Davis, No. 13-CV-2253, 2015 WL 13307406, at *6 (C.D. Ill. June 29, 2015) (relying on Illinois law).

[46] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012).

[47] *See id.* at ch. 8, Scope Note ("Usually, damages for the emotional consequences of physical harm—a component of the familiar "pain and suffering"—are recoverable when physical harm occurs.").

[48] *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 20 cmt. b (A.L.I, Tentative Draft No. 2, 2023).

[49] Bruce A. Wagman & Jayne M. DeYoung, 90 AM. JUR. 3D *Proof of Facts: Actions Involving Injury to Animals* § 22 (2006) ("[M]ost jurisdictions maintain . . . there can be no recovery of emotional distress damages resulting from an animal's negligent destruction."); *see* W.E. Shipley, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R.2d 1070, § 8 (1953); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (A.L.I. 2012); Repin v. State, 392 P.3d 1174, 1185 (Wash. Ct. App. 2017); Barking Hound Vill., LLC v. Monyak, 787 S.E.2d 191 (Ga. 2016); *Strickland*, 397 S.W.3d at 191–92; Naples v. Miller, No. 08C-01-093, 2009 WL 1163504, at *3 (Del. Super. Ct. Apr. 30, 2009); Kondaurov v. Kerdasha, 629 S.E.2d 181, 187 n.4 (Va. 2006); Pacher v. Invisible Fence of Dayton, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003); Lockett v. Hill, 51 P.3d 5, 7–8 (Or. Ct. App. 2002); Fackler v. Genetzky, 595 N.W.2d 884, 892 (Neb. 1999). *But see* Johnson v. Wander, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (involving a question of gross negligence); Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1071

> Under Wyoming law, dogs are property. While we do not question the Cardenas family's heartache over the deaths of their dogs, [prior precedent] precludes recovery . . . under these facts. . . .
>
> . . . This Court declines the invitation to adopt a rule allowing for the recovery of emotional distress damages for the loss of a pet.[50]

Because a pet owner cannot recover damages for emotional harm either through the calculation of a pet's "intrinsic value" or as parasitic damages, the tort of NIED has special significance.[51] This tort recognizes that in some circumstances a plaintiff is entitled to emotional distress damages even if the plaintiff's claim is for standalone emotional harm. It is most commonly applied in the following three situations: (1) when the plaintiff was frightened from being almost physically injured (i.e., the plaintiff was in the zone of danger); (2) when the plaintiff witnessed an accident that injured a close family member (i.e., the plaintiff was a bystander); or (3) when the plaintiff and defendant had a relationship that required the defendant, when acting, to be mindful of the plaintiff's emotional wellbeing (i.e., the plaintiff had a special relationship with the defendant).[52]

Despite the differences between these categories, courts often foreclose the NIED claim in the pet context by simply saying pets are property.[53] When the tort is available, recovery is closely

(Haw. 1981); Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (affirming a jury instruction to allow consideration of owners' mental pain and suffering from their dog's injury caused by the defendant's gross negligence); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 327 (Or. 1982) (dicta).

[50] Cardenas v. Swanson, 531 P.3d 917, 921, 923 (Wyo. 2023) (citations omitted).

[51] Typically, mere negligence is not considered "outrageous" conduct that qualifies one for the tort of intentional infliction of emotional distress. *See* Wagman & DeYoung, *supra* note 49, § 11.

[52] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 47–48 (A.L.I. 2012).

[53] *See Cardenas*, 531 P.3d at 922 (rejecting a negligent infliction of emotional distress claim because dogs are considered property); Steller v. Bischoff, No. 07-CV-24, 2007 WL 9710251, at *12 (D. Wyo. June 25, 2007) (rejecting negligent infliction of emotional distress claim because horses are considered property); Mulvaney v. Rodriguez, No. CV206061430S, 2021 WL 2014819, at *1–2 (Conn. Super. Ct. Apr. 26, 2021) (striking four claims for negligent infliction of emotional distress that were not predicated on bystander recovery because a dog is classified as property); Kennedy v. Byas, 867 So. 2d 1195, 1197 (Fla. Dist. Ct. App. 2004) (holding that the "impact rule" precludes recovery for emotional distress damages in veterinary malpractice cases); Strawser v. Wright, 610 N.E.2d 610, 612 (Ohio Ct. App. 1992) (holding plaintiffs could not use the tort of negligent infliction of emotional distress to recover emotional damages because "Ohio law simply does not permit recovery for serious emotional distress which is caused when one witnesses the negligent injury or destruction of one's property"); *Roman v. Carroll,* 621 P.2d 307, 308 (Ariz. Ct. App. 1980) (rejecting a claim for negligent infliction of emotional distress when another dog mauled the plaintiff's poodle, stating, "Damages are not

circumscribed with a variety of requirements,[54] and plaintiffs seldom prevail. For example, courts find that the owner was not in the "zone of danger,"[55] did not witness the animal's injury,[56] did not suffer a physical manifestation of the emotional distress,[57] was not the injured pet's "family,"[58] or lacked the required relationship with the defendant.[59]

Options exist for reforming the law that currently limits pet owners' recovery in the negligence context. Courts could include sentimental value in the intrinsic value measure of damages, make available parasitic damages for negligent injury to property, and/or expand the availability of the tort of NIED. It is beyond the scope of this Article to tackle the first two topics. The law in those areas is so firmly entrenched that reform efforts would probably be pointless. Moreover, my companion article explains why compensatory damages should exclude a pet's sentimental value and why parasitic damages should not be available in a typical negligence case.[60]

The tort of NIED, however, is worth tackling. Not only is this newer tort less steeped in history and more amenable to change than the other law, but it is also much more amenable to careful calibration in its application. Judges have a lot of control over the precise application of the NIED tort because of its constituent elements.[61] Consequently, reform efforts may have more success than efforts to make loss of sentimental value compensable or parasitic damages available for negligent harm to pets. In fact, this Article only advocates for recovery of emotional distress damages in a subset of pet cases, argues that the tort of NIED can easily accommodate these cases, and criticizes the *Third Restatement* for foreclosing this option.

recoverable for negligent infliction of emotional distress from witnessing injury to property"). *But see* Vaneck v. Cosenza-Drew, No. MMX-CV-08-5003942, 2009 WL 1333918, at *5 (Conn. Super. Ct. Apr. 20, 2009) (recognizing the viability of bystander recovery).

[54] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 47–48 (A.L.I. 2012).

[55] Naples v. Miller, No. 08C-01-093, 2009 WL 1163504, at *3 (Del. Super. Ct. Apr. 30, 2009).

[56] Krasnecky v. Meffen, 777 N.E.2d 1286, 1289 (Mass. App. Ct. 2002).

[57] Sekcienski v. Manley, No. K23C-01-041, 2024 WL 1756966, at *4 (Del. Super. Ct. Apr. 22, 2024).

[58] *See* Miller v. Nye Cnty., 488 F. Supp. 3d 973, 981–82 (D. Nev. 2020); McDougall v. Lamm, 48 A.3d 312, 314 (N.J. 2012).

[59] *See* Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554, 562 (Tex. App. 2004).

[60] *See* Weiner, *supra* note 12, at 616–18 (arguing for the availability of parasitic damages when the defendant commits a conversion or trespass to chattels).

[61] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. g (A.L.I. 2012); *see also id.* § 48 cmt. h.

II. A BRIEF HISTORY OF THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN THE PET CONTEXT

Before turning to the *Third Restatement*'s problematic approach to the tort of NIED in the pet context, it is useful to set forth the prior two *Restatement*s' approaches to the topic. This brief history will demonstrate the following: pet owners were not categorically excluded from recovery for standalone emotional harm that was negligently caused, judges had considerable control over the availability of these damages, and principles of tort law existed that should have produced a different result from that found in the *Third Restatement*.

A. The Initial Restatement

In 1934, the first of four volumes of the first iteration of the *Restatement of Torts* was published (hereafter the *Restatement (First) of Torts* or the *First Restatement*). The project had over nine hundred sections at completion.[62]

Emotional tranquility was not an interest generally protected in the *First Restatement*,[63] except in the narrow instance when the harm was caused by servants of common carriers who insulted passengers.[64] The *First Restatement* bluntly stated: "freedom from mental and emotional disturbances is not, as a thing in itself, . . . of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance."[65] It did not matter if the defendant intended to inflict such emotional distress, so long as that was the only outcome.[66]

However, recovery for emotional harm was possible when the defendant, acting intentionally, caused bodily harm *or* invaded "any legally protected interest."[67] Animals, including pets, were clearly classified as property and were a legally protected interest.[68] The

[62] *See* RESTATEMENT (FIRST) OF TORTS (A.L.I. 1934) (showing more than 900 sections in its table of contents). The final volume was published in 1939. *Id.* (indicating in its updated introduction the publication year of each volume).
[63] *See id.* § 1.
[64] *See id.* § 48.
[65] *Id.* § 46 cmt. c.
[66] *See id.* §§ 46 cmt. c, 47(a) cmt. a.
[67] *Id.* § 47(b) ("[I]f the actor has by his tortious conduct become liable for an invasion of any legally protected interest of another, emotional distress caused by the invasion or by the tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other."). *See generally id.* § 312.
[68] *See id.* § 217 cmt. b.

First Restatement's substantive provisions on trespass to chattels gave numerous examples of harm to animals including "beat[ing] another's horse or dog" and "deliberately driv[ing] or frighten[ing a herd of sheep] down a declivity."[69] For this type of tort, a plaintiff could recover damages for mental distress.[70]

But for cases of negligence, recovery of damages for emotional distress was more limited. The *First Restatement*'s organizational structure was heavily influenced by the old forms of action.[71] As such, the project differentiated between the availability of parasitic damages for intentional and negligent harm to property. In the context of negligence, the *First Restatement* recognized recovery for emotional distress damages, but only when the plaintiff suffered illness or other bodily harm from the emotional disturbance.[72] Section 313, "Emotional Distress Unintended," addressed situations where the defendant did not intend the emotional distress, but was negligent in causing that result and had facts that would have led a reasonable person to know of the likely physical repercussions.[73] When the harm was unintentional, a defendant did not need to anticipate a plaintiff's super-sensitivities, although knowledge of them could make the defendant's action negligent.[74]

The Reporter for the *First Restatement*, Francis Bohlen, promoted section 313 because he wanted to reverse the outcome in the famous case of *Mitchell v. Rochester Railroad*.[75] *Mitchell* involved a team of horses that almost collided with the plaintiff. The plaintiff's fright

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[69] *Id.*

[70] *See id.* § 47(b).

[71] Arthur L. Goodhart, *Restatement of the Law of Torts, II*, 83 U. PA. L. REV. 968, 974 (1935); Kenneth S. Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 MD. L. REV. 293, 341 (2021). That organizational framework persists today. Abraham & White, *supra*, at 332.

[72] *Compare* RESTATEMENT (FIRST) OF TORTS § 313 (A.L.I. 1934) ("Emotional Distress Unintended"), *with id.* § 312 ("Emotional Distress Intended").

[73] *Id.* § 313; *see also id.* § 436 (allowing recovery if the emotional harm negligently caused by the defendant's acts, like fright, caused the physical harm). Section 312, titled "Emotional Distress Intended," is not relevant here. It required that the actor *intentionally* and unreasonably subject the plaintiff to the emotional distress and should have recognized the likely physical repercussions. Section 312 typically required willfully wrongful and often unlawful acts. *See, e.g.*, Aetna Life Ins. v. Burton, 12 N.E.2d 360, 362 (Ind. Ct. App. 1938). Section 312 could apply when a domestic violence perpetrator intentionally injures a victim's pet in order to subject her to emotional distress, a common phenomenon, at least today. Michelle Newberry, *Pets in Danger: Exploring the Link Between Domestic Violence and Animal Abuse*, 34 AGGRESSION & VIOLENT BEHAV. 273, 273 (2017); Caroline Forell, *Using a Jury of Her Peers to Teach About the Connection Between Domestic Violence and Animal Abuse*, 15 ANIMAL L. 53, 55 (2008).

[74] RESTATEMENT (FIRST) OF TORTS § 313 cmt. b (A.L.I. 1934).

[75] *See* Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93, 95–96 (2007); Mitchell v. Rochester R.R., 45 N.E. 354 (N.Y. 1896).

from the near miss produced a miscarriage.[76] Professor Bohlen thought a defendant should be liable when the defendant risks physical harm to the plaintiff, causes emotional harm, and the emotional harm results in physical injury.[77]

While the *First Restatement*'s novel provision applied in cases of a physical risk to the plaintiff, it could also apply when the defendant invaded the plaintiff's legally protected interest in property and caused emotional harm that resulted in physical injury.[78] Although section 313 did not say that expressly, that was the implication of section 456, "Physical Harm Brought About by Emotional Disturbance Resulting from an Actionable Injury or the Conduct Which Caused It."[79] Comment a stated:

> The rule stated in this Section applies irrespective of whether the harm which makes the actor's conduct actionable is a physical harm *or is harm to an interest of the other in land or things*, if the circumstances under which such an interest is invaded are such as to make the manner of invasion a substantial cause of the mental disturbance which results in the other's illness or other bodily harm.[80]

It takes little imagination to see this provision's potential applicability to the pet context. After all, injury to a pet can result in the owner's serious emotional distress with consequential bodily harm or illness.[81] Therefore, section 313 could apply, for example, if the plaintiff suffered such an outcome when a veterinarian negligently harmed the plaintiff's pet, so long as the veterinarian witnessed the owner's strong attachment to the pet or knew of the owner's super-sensitivities. Evidence of the owner's strong attachment might include an owner's generous spending for

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[76] *Mitchell*, 45 N.E. at 354.

[77] *See* Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 AM. L. REG. 141, 171–73 (1902) (arguing there should have been recovery in *Mitchell*).

[78] *See* RESTATEMENT (FIRST) OF TORTS § 456 & cmt. a (A.L.I. 1934).

[79] *Id.* Section 456 reads: "If the actor's negligent conduct has so brought about any injury to another as to create a right of action in the other against the actor, the actor is also liable for physical harm resulting to the other from fright or shock or other similar and immediate emotional disturbance which either the harm or the actor's negligent conduct which causes it is a substantial factor in bringing about." *Id.*

[80] *Id.* § 456 cmt. a (emphasis added).

[81] *See, e.g.*, Liotta v. Segur, Case No. CV020347756S, 2004 WL 728829, at *1 (Conn. Super. Ct. Mar. 15, 2004) ("[Plaintiff experienced] physical manifestations of an anxiety attack for which she was taken to the emergency room"); Kaiser v. United States, 761 F. Supp. 150, 154 (D.D.C. 1991) (claiming post-traumatic stress disorder).

veterinary services,[82] as well as the owner's behavior toward the pet in front of the veterinarian,[83] such as comforting the pet like a child or expressing love for the pet.[84]

Yet section 313 appears to have had little effect on the case law. No reported case cites section 313 as a pathway to recovery for emotional harm following injury to a pet.[85] In fact, plaintiffs' lawyers probably gave section 313 little thought at the time. The *First Restatement* allocated to the judge—as part of the duty analysis—the decision of whether emotional distress was recoverable at all, a position largely consistent with then-Judge Cardozo's decision in *Palsgraf v. Long Island Railroad*.[86] To recover for a particular category of harm, the harm had to be the type that is normally associated with the risky conduct.[87] Judges at the time would have been unlikely to find that requirement satisfied for three reasons.

First, judges probably would have found that the plaintiffs had "exceptional physical sensitiveness" that was unknown to defendants.[88] After all, judges frequently found that female plaintiffs were abnormally sensitive when they experienced fright-induced physical injuries from physical risks.[89] An injury stemming from a plaintiff's emotional attachment to a pet, even one with physical repercussions, would certainly have seemed equally, if not more, exceptional.

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[82] *See* AM. VETERINARY MED. ASS'N, PET OWNERSHIP AND DEMOGRAPHICS SOURCEBOOK 7 (2022) (indicating that average spending per household ranges from approximately $250 for cats to $370 for dogs per year).

[83] *See, e.g.*, Quesada v. Compassion First Pet Hosps., No. A-1226-19, 2021 WL 1235136, at *6 (N.J. Super. Ct. App. Div. Apr. 1, 2021) ("It was foreseeable that plaintiff would have a serious mental reaction . . . . After the veterinarian euthanized Amor, . . . plaintiff [was saying] goodbye, where he was 'loudly crying and exclaiming to staff how Amor had saved his family when [his] sister died.' Plaintiff also held Amor's body, 'spoke to him[ ] and sang to him,' . . . [and] wanted to view the cat's body prior to cremation." (second and third alterations in original)).

[84] *See, e.g.*, McMahon v. Craig, 97 Cal. Rptr. 3d 555, 558 (Ct. App. 2009) (describing how an owner wrote a veterinarian a letter describing plaintiff's and dog's "special bond," and that plaintiff "would be emotionally devastated if Tootsie died").

[85] A Lexis search for the following resulted in no cases: "section 313 restatement pet injury," "section 313 pet emotional distress," "section 313 animal emotional distress," "section 313 emotional harm pet*s," and "section 313 emotional harm animal*s." Of course, courts may have been influenced by the section without citing it. *Cf.* Rasmussen v. Benson, 280 N.W. 890, 891–92 (Neb. 1938) (allowing in a negligence case the award of emotional distress damages after the negligent poisoning of plaintiff's dairy cows resulted in the subsequent loss of plaintiff's dairy business, his fear of telling his customers about the poisoning, and ultimately plaintiff's death by "decompensation of the heart caused by mental shock and emotional upset").

[86] *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 101 (1928).

[87] *See* RESTATEMENT (FIRST) OF TORTS § 281 cmts. e, g (A.L.I. 1934).

[88] *See id.* § 313 cmt. b.

[89] *See generally* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 832 (1990).

Second, as a duty question, the inquiry involved policy considerations, even if the defendant's negligent conduct was a factual and legal cause of the harm. At the time, there was a widespread fear of trivial and spurious claims.[90] Such fear would have made it unlikely that judges would have found the emotional distress recoverable.

Third, a caveat to section 313 said the Institute took no position on whether observing negligently inflicted harm to a child or spouse would qualify the plaintiff for emotional distress damages.[91] How, then, could negligently inflicted harm to a pet support such a claim? This caveat would have encouraged judges to either strike the claim for such relief, instruct the jury not to award emotional distress damages, and/or make categorical statements about the unavailability of emotional distress damages for harm to property.[92]

Although the *First Restatement*'s provision on standalone emotional distress was never important for pet owners, it reflected an acknowledgment that negligent conduct in some cases could justify recovery for emotional distress that did not flow from physical harm. It also represented an allocation of power between the judge and the jury that would allow a judge to reject liability for such damages except in the most deserving cases.

B. The Second Restatement and Its Aftermath

The *Restatement (Second) of Torts* was partially published in 1965 and completed in 1977.[93] It continued to treat animals as property.[94] The absence of a pet illustration, or any property illustration, in the

[90] *See* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939) ("The most valid objection to the protection of 'mental' interests lies in the 'wide door' which might be opened, not only to fictitious and fraudulent claims, but to litigation in the field of trivialities and mere bad manners. . . . But this is a poor reason for denying recovery for any genuine, serious mental injury."); Shipley, *supra* note 49, § 2. There were obvious concerns about fraud, often gendered. *See* Chamallas & Kerber, *supra* note 89, at 820.

[91] *See* RESTATEMENT (FIRST) OF TORTS § 313 caveat.

[92] *See, e.g.*, Valley Dev. Co. v. Weeks, 364 P.2d 730, 733 (Colo. 1961) (en banc) ("Under ordinary circumstances there can be no recovery in tort for mental anguish suffered by a plaintiff in connection with an injury to his property, either real or personal.").

[93] Harvey S. Perlman & Gary T. Schwartz, *General Principles*, 10 KAN. J.L. & PUB. POL'Y 8, 8 (2000).

[94] *See* RESTATEMENT (SECOND) OF TORTS § 217 cmt. e (A.L.I. 1965) (discussing as an example of Ways of Committing Trespass to Chattel, "beat[ing] another's horse or dog" and deliberately driving or frightening a "herd of sheep . . . down a declivity"); *id.* § 226 cmt. d., illus. 4 (discussing as an example of Conversion by Destruction or Alteration "intentionally shoot[ing] and kill[ing] the horse which the plaintiff is riding"); *id.* § 226 cmt. b (using as an example of conversion when "a horse is permanently lamed"); *id.* § 226 cmt. d ("A intentionally feeds poisonous weeds to B's horse.").

section discussing unintended emotional distress raised questions about the availability of such recovery.[95] So too did the section on compensatory damages for trespass to chattels; it did not mention recovery for emotional distress.[96] However, the *Second Restatement*'s inclusion and modification of section 313 as well as notable cases decided in the years following its publication set up doctrinal pathways for recovery using the tort of NIED, although many courts appeared resistant.

1. The Physical Manifestation Requirement

The *Second Restatement* made only a few subtle changes to section 313 and to related sections 306[97] and 312[98] of the *First Restatement*, but these changes increased the possibility that pet owners would be able to recover for their pain and suffering after a defendant negligently injured their pets. Section 312, titled "Emotional Distress Intended," added a new illustration that involved killing a dog.[99] So too did section 46, entitled "Intentional Infliction of Emotional Distress,"[100] which was a more rigorous alternative to section 312.[101]

[95] *See id.* § 313.

[96] *Compare id.* § 928 (omitting emotional distress as a potential ground for compensation in a harm to chattels case), *with id.* § 927 cmt. m (mentioning the availability of damages for harm to feelings in the context of conversion).

[97] *See id.* § 306 ("An act may be negligent, as creating an unreasonable risk of bodily harm to another, if the actor intends to subject, or realizes or should realize that his act involves an unreasonable risk of subjecting, the other to an emotional disturbance of such a character as to be likely to result in illness or other bodily harm.").

[98] *See id.* § 312. Section 312, titled "Emotional Distress Intended," required that the actor intentionally and unreasonably subject the plaintiff to the emotional distress and should have recognized the likely physical repercussions. *Id.*

[99] *Id.* § 312 cmt. b, illus. 1 ("A intentionally shoots a dog which is in close proximity to a child. A knows that B, the child's mother, is watching, and that B is pregnant. A also knows that his act is certain to startle B, and to alarm her for the safety of the child, and A should recognize that there is an unreasonable risk that such emotional disturbance may result in bodily harm. B is emotionally disturbed, and suffers a miscarriage. Even if A's conduct is not found to amount to extreme outrage, A is subject to liability to B.").

[100] *See id.* § 46 cmt. f, illus. 11. ("A, who knows that B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage. A is subject to liability to B for the distress and for the miscarriage.").

[101] The Reporter touted section 312 as a less rigorous alternative to section 46 (as it did not require extreme and outrageous conduct). The comments made clear that there was "a considerable degree of duplication" with section 46, but section 312 allowed recovery absent an outrageous act. *Id.* § 312 cmt. b. It allowed a claim where "the conduct, although intended to inflict emotional distress, amounts to something less than extreme outrage, but nevertheless involves an unreasonable risk, which the actor should recognize, that bodily harm will result." *Id.* In addition, the comments to section 312 note that "[a]s stated in [section] 313, there may be a similar liability where the emotional disturbance is not inflicted intentionally, but negligently." *Id.*

These illustrations captured the fact that people could suffer severe emotional distress from harm to their pets.[102]

Section 313, "Emotional Distress Unintended," also contained a change that signified its potential applicability to the pet context.[103] Like the *First Restatement*, it allowed for emotional distress recovery that was negligently caused if the emotional distress resulted in illness or bodily harm and the actor, "from facts known to him[,] should have realized that the distress, if it were caused, might result in illness or bodily harm."[104] However, now section 313's commentary expressly said it applied when the defendant invaded the plaintiff's "own interests" apart from the plaintiff's physical safety.[105] "Own interests" presumably included the plaintiff's property interests, especially when the emotional distress was the reasonably foreseeable consequence of the defendant's tortious act.[106] This change was important in light of the new subsection (2), which clarified that a plaintiff had to face an unreasonable risk of bodily harm if the claim was based on observing harm or peril to a third person (i.e., the plaintiff had to be in the zone of danger).[107] Simply, when the plaintiff's own interests were invaded, the plaintiff need not fear for his or her own safety or be in the zone of danger to recover

[102] *See id.* § 312 cmt. b, illus. 1 ("A intentionally shoots a dog which is in close proximity to a child. A knows that B, the child's mother, is watching, and that B is pregnant. A also knows that his act is certain to startle B, and to alarm her for the safety of the child, and A should recognize that there is an unreasonable risk that such emotional disturbance may result in bodily harm. B is emotionally disturbed, and suffers a miscarriage. Even if A's conduct is not found to amount to extreme outrage, A is subject to liability to B."). This illustration was based on Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316 (1916). RESTATEMENT (SECOND) OF TORTS § 312 Reporter's Notes. Notably, B's recovery was not predicated on B being in the zone of danger. She was not; only her child was.

[103] *See* RESTATEMENT (SECOND) OF TORTS § 313 cmt. d (A.L.I. 1965).

[104] *Id.* § 313(1)(b) ("(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm. (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.").

[105] *See id.* § 313 cmts. a, d (there is "no liability where the actor's negligent conduct inflicts only emotional distress, without resulting bodily harm or any other invasion of the other's interests"); *id.* § 436A (suggesting legal cause would not exist for emotional harm if there were not "bodily harm or other compensable damage").

[106] *See id.* § 313 cmt. d. A court could say that there is no proximate cause if it appeared "highly extraordinary" that the defendant's negligent conduct would have brought about the harm. *Id.* § 435(2).

[107] The zone-of-danger test replaced the caveat in section 313 of the *First Restatement* that said the Institute took no position on whether watching injury to a spouse or child could qualify. *Id.* § 313(2).

(as was necessary when the emotional distress arose from peril or harm to a third person), although the plaintiff still had to suffer bodily harm or illness from the emotional distress.[108]

Despite the possibility that section 313 might support a plaintiff's claim for emotional distress damages for negligent injury to a pet, the *Second Restatement* never made that possibility explicit.[109] In fact, the Reporters for the *Third Restatement* concluded that it was doubtful that the drafter of the *Second Restatement* contemplated recovery for emotional distress accompanying negligent injury to property, and by extension, a pet.[110] The Reporters' conclusion was based on sections 436 and 436A and "their broad restriction on recovery for negligently inflicted emotional harm."[111]

Yet the Reporters' conclusion about the *Second Restatement* is debatable. Section 436A, "Negligence Resulting in Emotional Disturbance Alone," was irrelevant. It limited recovery completely, but only when there was not "bodily harm *or other compensable damage*."[112] Section 436, "Physical Harm Resulting from Emotional Disturbance," was relevant, but merely said that proximate cause could exist if the plaintiff's physical harm results from the plaintiff's emotional distress, as in a section 313 situation.[113] Moreover, the subtle changes from the *First Restatement*, particularly the discussion of "own interests" in the commentary to section 313, throw additional doubt on the Reporters' conclusion.[114] So too do the cases that allowed emotional distress damages after negligent injury to property and cited section 313.[115]

Regardless, plaintiffs whose pets were injured obtained very little help from section 313 in the years following publication of the *Second Restatement*, even in jurisdictions that seemed to recognize the general principle behind it.[116] While pet owners occasionally

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[108] *Id.* § 313 cmt. d.

[109] *See id.* § 313.

[110] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012).

[111] *Id.*

[112] RESTATEMENT (SECOND) OF TORTS § 436A (A.L.I. 1965) (emphasis added).

[113] *Id.* § 436 cmt. a.

[114] *See id.* § 313 cmt. d.

[115] *See, e.g.*, Daley v. LaCroix, 179 N.W.2d 390, 395 (Mich. 1970); *cf.* Lagraize v. State, 306 So. 2d 816, 821 (La. Ct. App. 1975) (denying emotional distress damages for injury to plaintiff's property because plaintiff did not suffer physical manifestations of the "mental anguish").

[116] *Compare* Koester v. VCA Animal Hosp., 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (Michigan case barring recovery for emotional distress arising from negligence toward plaintiff's dog), *and* Smith v. Univ. Animal Clinic, 30 So. 3d 1154, 1156 (La. Ct. App. 2010) (Louisiana case reversing the trial court's grant of emotional distress damages for negligence toward plaintiff's dog pursuant to state statute), *with Daley*, 179 N.W.2d at 395 (Michigan case

recovered for emotional distress as part of a general negligence case,[117] they mostly lost, with courts obliquely referencing section 313's requirements.[118] Recovery was foreclosed if the emotional distress did not result in illness or bodily harm, or if the defendant did not know the pet owner (so that the defendant lacked knowledge of the facts necessary for liability, i.e., that the distress might cause illness or other bodily harm).

Both problems were evident, for example, in *Soucek v. Banham*.[119] There, three police officers shot and killed the plaintiff's German shepherd mix named Mack, an "obedience-trained family pet" that was "known in the neighborhood to be gentle."[120] Mack got loose and two people called the police, saying they thought they saw a "wolf."[121] Within four minutes of spotting Mack, three officers shot the dog between seven and fifteen times.[122] Soucek discovered the dog's death the next day at the pound.[123] He "cried as he held the dead animal."[124] Although the dog was wearing a collar, the officers said they did not see the collar and thought the dog was a wolf.[125] The animal warden disputed the officers' account; she saw the police celebrating, "laughing and saying, 'We got the dog, we got the dog.'"[126] She reported, "[i]t was clear they knew it wasn't a wolf."[127]

The plaintiff alleged negligence as well as intentional and negligent infliction of emotional distress.[128] The appellate court remanded for a trial on the officers' official function and discretionary

allowing for plaintiff's recovery of damages for emotional harm even when the plaintiff experienced no physical impact, and citing section 313), *and Lagraize*, 306 So. 2d at 821 (Louisiana case noting that Louisiana law disallows recovery for emotional stress unaccompanied by physical injury in the case of negligence, "unless the emotional disturbance causes illness or bodily harm," and citing section 313).

[117] *See, e.g.*, Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1071 (Haw. 1981); Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (allowing for recovery of emotional distress when defendant was grossly negligent); Johnson v. Wander, 592 So. 2d 1225, 1225 (Fla. Dist. Ct. App. 1992) (reversing a grant of partial summary judgment for defendant on the issue of emotional distress damages when defendant was grossly negligent).

[118] *See, e.g.*, Daskalea v. Wash. Humane Soc'y, 480 F. Supp. 2d 16, 39 (D.D.C. 2007); Kaiser v. United States, 761 F. Supp. 150, 156 (D.D.C. 1991); Gill v. Brown, 695 P.2d 1276, 1277–78 (Idaho Ct. App. 1985); Fowler v. Town of Ticonderoga, 516 N.Y.S.2d 368, 370 (App. Div. 1987).

[119] Soucek v. Banham, 503 N.W.2d 153 (Minn. Ct. App. 1993).

[120] *Id.* at 156.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 157.

[126] *Id.*

[127] *Id.* The warden also testified, *inter alia*, that the police "took turns posing over the dog as if they were bounty hunters. . . . One officer with dark hair and a mustache came up to me with a big grin and said, 'Nice looking "wolf", huh?'" *Id.*

[128] *Id.* at 156.

immunity defenses (because the evidence conflicted regarding whether the officers acted willfully and maliciously), but it also held that neither emotional distress claim would be heard on remand.[129] Although the court recognized an exception to the "zone of danger" rule if the plaintiff could show "a direct invasion of [the plaintiff's] rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct,"[130] the NIED claim was legally insufficient for two reasons. First, citing section 436A of the *Second Restatement*,[131] it found that an accompanying physical injury was required and absent.[132] Second, the appellate court held "there was no direct invasion of *his* rights."[133] The court continued: "[T]he officers did not know respondent was the owner of the dog. As willful or malicious as a jury might find appellants' conduct to be, it was directed at the animal and not at its owner. We have found no law supporting respondent's derivative claim."[134]

Many courts rejected the NIED claim outright in the pet context,[135] aided by the *Second Restatement*'s provision that allowed judges to strike a request for damages for harm that was not legally compensable in a negligence suit.[136] One court even suggested that section 313 "implies" emotional distress damages are *not* available for injury to property, buttressing that conclusion with the language from comment e to section 911, that "[c]ompensatory damages are not given for emotional distress caused merely by the loss of [] things."[137] Yet the court's reference to section 911 was inapt because section 313 required illness or bodily harm and was not triggered by the "mere[] loss of [] things."

Courts' rejection of the NIED claim was indirectly supported by the fact that section 313 now expressly disallowed emotional distress

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[129] *Id.* at 163–64. The plaintiffs had abandoned the claim for IIED on appeal. *Id.* at 163.

[130] *Id.* at 163. The court found the plaintiff was not within the "zone of danger," nor reasonably feared for his safety. *See id.* at 163–64.

[131] *Id.* at 164; RESTATEMENT (SECOND) OF TORTS § 436A (A.L.I. 1965).

[132] *Soucek*, 503 N.W.2d at 164.

[133] *Id.* at 163 (quoting Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 907 (Minn. Ct. App. 1987)).

[134] *Soucek*, 503 N.W.2d at 164.

[135] *See, e.g.*, McDougall v. Lamm, 48 A.3d 312, 314 (N.J. 2012); Kennedy v. Byas, 867 So. 2d 1195, 1196 (Fla. Dist. Ct. App. 2004); Nichols v. Sukaro Kennels, 555 N.W.2d 689, 691 (Iowa 1996); Zeid v. Pearce, 953 S.W.2d 368, 369 (Tex. App. 1997); Strawser v. Wright, 610 N.E.2d 610, 612 (Ohio Ct. App. 1992); Daughen v. Fox, 539 A.2d 858, 864 (Pa. Super. Ct. 1988), *appeal denied*, 553 A.2d 967 (Pa. 1988); Fowler v. Town of Ticonderoga, 516 N.Y.S.2d 368, 370 (App. Div. 1987); Fackler v. Genetzky, 595 N.W.2d 884, 892 (Neb. 1999).

[136] *See* RESTATEMENT (SECOND) OF TORTS § 328B(f) (A.L.I. 1965) ("In an action for negligence the court determines . . . (f) whether the harm claimed to be suffered by the plaintiff is legally compensable.").

[137] Price v. High Pointe Oil Co., 828 N.W.2d 660, 666 (Mich. 2013).

damages for witnessing harm to a third person, including the death of one's child, unless the plaintiff was in the zone of danger and feared for his or her own safety.[138] Judges voiced concern about the apparent inconsistency if a plaintiff could recover emotional distress damages for negligent injury to a pet, but not for a child.[139] This new psychological barrier to allowing the claim—i.e., the apparent inconsistency between the recovery of emotional distress damages for witnessing harm to pets but not children—should have vanished after the California Supreme Court's decision in *Dillon v. Legg*,[140] described immediately below. However, the outcomes in pet cases alleging negligence remained fairly constant.

2. The Bystander Recovery Framework

The California case of *Dillon v. Legg* was decided shortly after the first part of the *Second Restatement* was published.[141] It allowed a parent to recover emotional distress damages after witnessing a negligently inflicted injury to his or her child, even when the parent was outside the zone of danger.[142] The thrust of *Dillon* was widely followed by other state courts in its aftermath, although not uniformly.[143] Despite courts' general acceptance of *Dillon*, they were still unwilling to allow pet owners to recover for their emotional distress as bystanders to their pets' injuries.

Plaintiffs unsuccessfully argued that they had the right type of relationship for recovery under a *Dillon* type of analysis and/or that they were at physical risk.[144] For example, in *Roman v. Carroll*, the plaintiff sought recovery for her severe emotional shock after

[138] *See* RESTATEMENT (SECOND) OF TORTS §§ 313 cmt. d, 436 caveat & cmt.h (A.L.I. 1965).
[139] *See, e.g.*, Altieri v. Nanavati, 573 A.2d 359, 361 (Conn. Super. Ct. 1989).
[140] *See* Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (en banc).
[141] *Id.*; *see, e.g.*, RESTATEMENT (SECOND) OF TORTS (A.L.I. 1965).
[142] *Dillon*, 441 P.2d at 914–15. *See generally* Clohessy v. Bachelor, 675 A.2d 852, 858 (Conn. 1996) (describing the history of bystander recovery).
[143] *See* Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 806, 819–23 (2004).
[144] *See* Repin v. Washington, 392 P.3d 1174, 1183–84 (Wash. Ct. App. 2017); Carroll v. Rock, 469 S.E.2d 391, 393 (Ga. Ct. App. 1996); *cf.* Cardenas v. Swanson, 531 P.3d 917, 922 (Wyo. 2023) (stating that children's injuries from freeing dogs from an illegal trap would permit emotional distress damages related to their own injuries, but not for the death of their dogs). *But see* Azurdia v. City of New York, 18-CV-4189, 2021WL 4480655, at *11 (E.D.N.Y. Sep. 30, 2021) (denying summary judgment because plaintiff was in the zone of danger); DeBlase v. Hill, No. 522689/2023, 2025 WL 1873243, at *17 (N.Y. Sup. Ct. Kings Cnty. June 17, 2025) (allowing recovery for emotional distress from witnessing death of son's dog when plaintiff was leashed to the dog, was in the zone of danger, feared for her own safety, and defendant was driving an automobile).

witnessing the defendant's Saint Bernard dismember her poodle.[145] She claimed that "her relationship with her pet poodle was a close one," and that she was in the zone of danger.[146] The trial judge entered summary judgment for the defendant.[147] The appellate court rejected her appeal with little discussion.[148] It simply said, "Damages are not recoverable for negligent infliction of emotional distress from witnessing injury to property."[149]

Since *Dillon* was decided, courts have largely restricted bystander recovery to cases involving close relatives.[150] A plaintiff is not allowed recovery for observing negligently inflicted harm to a close friend or a distant relative.[151] Consequently, the psychological barrier to allowing recovery for observing injury to a pet still exists, albeit in a slightly different form. How could a court permit recovery for observing injury to a pet when it disallows recovery for observing injury to a best human friend?[152]

3. The *Burgess* Direct-Victim Framework

After deciding *Dillon v. Legg*, the California Supreme Court decided *Burgess v. Superior Court*,[153] a non-pet case that opened the door to suits against veterinarians for negligent infliction of emotional distress.[154] *Burgess* involved a mother who was anesthetized during a cesarean section.[155] The doctor negligently injured her infant during the delivery.[156] The mother sought damages for her own emotional distress, although she did not qualify as a bystander because she was anesthetized and did not witness the injury to her child.[157] The California Supreme Court held that the

[145] *Roman v. Carroll,* 621 P.2d 307, 308 (Ariz. Ct. App. 1980).
[146] *Id.*
[147] *See id.*
[148] *See id.*
[149] *Id.*
[150] *See Cause of Action by Bystander for Negligent Infliction of Emotional Distress*, 40 CAUSES OF ACTION 2D 115, § 8 (2009) ("Courts have usually interpreted the concept of 'close family relationship' as encompassing immediate family members, as opposed to friends, acquaintances, coworkers, lovers, or strangers.").
[151] *See id.*
[152] *See, e.g.*, Rabideau v. City of Racine, 627 N.W.2d 795, 801 (Wis. 2001); Kaufman v. Langhofer, 222 P.3d 272, 279 (Ariz. Ct. App. 2009); McDougall v. Lamm, 48 A.3d 312, 326 (N.J. 2012). Some courts have classified pets as family and allowed recovery, although those cases are relatively rare. *See infra* note 167 (citing cases).
[153] Burgess v. Superior Ct., 831 P.2d 1197 (Cal. 1992).
[154] *See id.*; *e.g.*, McMahon v. Craig, 97 Cal. Rptr. 3d 555, 561 (Ct. App. 2009).
[155] *Burgess*, 831 P.2d at 1198.
[156] *Id.* at 1199.
[157] *Id.* at 1199, 1204.

mother was nevertheless entitled to emotional distress damages.[158] Although the mother was not a bystander, the mother-doctor relationship required the doctor to protect the mother's emotional wellbeing during childbirth.[159] The court explained: "It is apparent to us, as it must be to an obstetrician, that . . . the mother's emotional well-being and the health of the child are inextricably intertwined."[160]

Burgess's recognition that the mother was a direct victim of the defendant's negligence, predicated on the relationship between the plaintiff and the defendant, prompted pet owners to rely on a similar argument in suits against veterinarians.[161] However, the California Court of Appeal refused to extend *Burgess* to this context in *McMahon v. Craig*, calling *Burgess* "easily distinguishable."[162] The court said, "unlike a mother and child, a pet owners' [sic] emotional well-being is not traditionally 'inextricably intertwined' with the pet's physical well-being."[163] It also noted the limited reach of *Burgess*, as the father in *Burgess* was still treated as a bystander and not a direct victim.[164] It explained that the veterinarian did not undertake a duty to protect the plaintiff's emotional wellbeing without a more explicit agreement to do so.[165]

In sum, by the time the relevant sections of the *Third Restatement* were published in 2012, courts were generally hostile to pet owners' claims of negligent infliction of emotional distress.[166] The exceptions were few.[167]

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158 *Id.* at 1204.

159 *See id.* at 1203.

160 *Id.*

161 *See, e.g.*, McMahon v. Craig, 97 Cal. Rptr. 3d 555, 561 (Ct. App. 2009); *cf.* Kaufman v. Langhofer, 222 P.3d 272, 276 (Ariz. Ct. App. 2009) (refusing to permit the plaintiff to recover emotional distress damages in a suit against a vet because, *inter alia*, the vet's acts did not "directly harm" the plaintiff, but only the pet). The *Third Restatement* suggests that the special relationship analysis should replace reliance on the "direct victim" rubric. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. f (A.L.I. 2012).

162 *McMahon*, 97 Cal. Rptr. at 561–62.

163 *Id.* at 561.

164 *See id.* at 562.

165 *See id.* at 563–64. Increasingly, however, the law is recognizing a doctor's duty to a nonpatient. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS, § 11_0 cmt. d & Reporters' Note cmt. d (A.L.I., Tentative Draft No. 3, 2024) (stating in the context of wrongful pregnancy, "the duty of reasonable care is typically owed to both parents" allowing for "recovery of damages by both parents in a wrongful-pregnancy claim"); *id.* § 11_00 cmt. d & Reporters' Note cmt. d (stating in the context of wrongful birth, "[a]lthough the doctrinal basis for a duty to the other parent in these instances is fuzzy, the vast majority of courts confronting wrongful-birth claims by both parents have affirmed that both may recover for harm suffered.").

166 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012).

167 *See, e.g.*, Vaneck v. Cosenza-Drew, No. MMX-CV-08-5003942, 2009 WL 1333918, at *5 (Conn. Super. Ct. Apr. 20, 2009); *see also supra* notes 49 (citing cases after *but see* signal), 53 (citing cases after *but see* signal), 117 (citing cases).

C. The Third Restatement

The *Third Restatement* is the current iteration of the ALI's tort project.[168] It is a series of discrete volumes on different topics. Pets are still classified as property.[169] Liability for standalone emotional harm is covered in the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*.[170] While the *Third Restatement* does a nice job of refining and clarifying the doctrine of negligent infliction of emotional distress, it inappropriately forecloses the tort's availability in the pet context.

Negligence claims for emotional distress, absent a physical injury to the plaintiff, are now governed by its sections 47 and 48.[171] These sections reflect the doctrinal structure that was developing at the state level. Section 47, "Negligent Conduct Directly Inflicting Emotional Harm on Another," captures in separate subsections both the zone-of-danger test as well as the *Burgess*-relationship test.[172] Section 48, "Negligent Infliction of Emotional Harm Resulting from Bodily Harm to a Third Person," addresses bystander recovery.[173] Gone are several of the *Second Restatement*'s sections, including section 313.[174] In jurisdictions that follow the *Third Restatement*, plaintiffs would presumably be unsuccessful arguing that recovery is appropriate when the defendant causes the plaintiff serious emotional distress and a consequent physical harm by negligently injuring the plaintiff's property.[175] Instead, plaintiffs would have to fit into one of the specific rules laid out in sections 47 and 48.

On its face, the new black-letter law suggests that a pet owner should be able to recover even when the plaintiff is not in the zone of danger, through either the bystander provision or the *Burgess*-relationship test. Section 48, on bystanders, applies to those who "contemporaneously" perceive harm to a "close family member."[176]

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[168] *See Completing the Restatement Third of Torts*, A.L.I. (Apr. 3, 2019), https://www.ali.org/news/articles/completing-restatement-third-torts [https://perma.cc/B2Y5-MLL7].

[169] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012).

[170] *Id.* at ch. 8, Scope Note.

[171] *Id.* §§ 47–48.

[172] *See id.* § 47. Subsection (a) is the zone-of-danger test. Subsection (b) is akin to the "direct victim" approach in *Burgess*. *Id.* § 47 cmts. b, f; *see* Burgess v. Superior Ct., 831 P.2d 1197, 1201–02 (Cal. 1992).

[173] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 48 (A.L.I. 2012).

[174] *Id.* §§ 47 cmt. a, 48 cmt. a.

[175] *Id.* § 47 cmt. m.

[176] *Id.* § 48.

The Institute chose to limit recovery to a "close family member," in part, because a plaintiff should experience "a more serious shock than if the injured party is not related."[177] Importantly, the Reporters' Notes acknowledge that many people consider their pets to be "family,"[178] and cases existed that allowed plaintiffs to recover on this theory.[179] In addition, the commentary suggests that "courts should take into account changing practices and social norms and employ a functional approach to determine what constitutes a family."[180]

Similarly, section 47(b), which reflects the *Burgess* direct-victim framework, appears on its face to be useful. The section says that negligence occurring in certain activities and relationships can give rise to liability if it causes serious emotional harm.[181] The basis for such a duty includes an "undertaking" or a contract.[182] It gave a nod to the *Restatement of Contracts*, section 353, which allows a claim for emotional damages when the parties are in privity and the contract is of a personal nature.[183]

The commentary to section 47 suggests that an award of emotional distress damages was the norm in situations to which it applied, and that only "weighty" policy considerations justified a no duty rule for "exceptional cases."[184] Consequently, when read with an illustration

[177] *Id.* § 48 cmt. f.

[178] *Id.* § 47 Reporters' Note cmt. m ("[V]arious studies have found between 70 and 99 percent of pet owners, encompassing 50 percent of U.S. households, consider their pet(s) to be members of the family.").

[179] *See, e.g.*, Vaneck v. Cosenza-Drew, No. MMX-CV-08-5003942, 2009 WL 1333918, at *4–5 (Conn. Super. Ct. Apr. 20, 2009). There are a number of cases post-2012. *See, e.g.*, *Field* v. *Astro Logistics, LLC*, No. MMX-CV-22-6033510, 2022 WL 2380560, at *3 (Conn. Super. Ct. June 30, 2022); Gordon v. Minck, No. DBD-CV-23-6045424, 2023 WL 8055855, at *3 (Conn. Super. Ct. Nov. 13, 2023); DeBlase v. Hill, No. 522689/2023, 2025 WL 1873243, at *17 (N.Y. Sup. Ct. Kings Cnty. June 17, 2025). *But see* Myers v. City of Hartford, 853 A.2d 621, 626 (Conn. App. Ct. 2004).

[180] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 48 cmt. f (A.L.I. 2012).

[181] *Id.* § 47(b) ("An actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct: . . . occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.").

[182] *Id.* § 47(b) & cmt. h.

[183] *See id.* § 47 cmt. h. While emotional distress damages are generally unavailable for a breach of contract, section 353 of the *Restatement (Second) of Contracts* provides an exception if "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." RESTATEMENT (SECOND) OF CONTRACTS § 353 (A.L.I. 1981).

[184] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. d (A.L.I. 2012) ("Just as § 7(b) provides that a no-duty ruling may, in exceptional cases, preclude liability on grounds of principle or policy, so too in the area of emotional harm, a court may decide that an identified and articulated policy is weighty enough to require the withdrawal of liability. Some of the policies that might dictate a withdrawal of liability are already reflected in limitations on liability in this Section, such as the requirement that the emotional harm suffered be serious.").

to section 42, on undertakings that impose a duty of care, one would expect that emotional distress damages would be appropriate in cases involving a pet:

> Ahmed's neighbor, Meena, agrees to make daily visits to Ahmed's house to care for Ahmed's cat and dog while he is out of town. Meena forgets to do so. Meena owes a duty of reasonable care to Ahmed because he relied on Meena to attend to his pets. Meena is subject to liability for harm caused by her negligent failure to visit Ahmed's home and attend to his pets.[185]

Section 47 also makes clear that a physical manifestation of the emotional distress is not required for recovery, although serious emotional distress is required,[186] thereby eliminating an obstacle that had hindered some plaintiffs in the past.

Despite the above, the *Third Restatement* then forecloses recovery for serious emotional distress that occurs from negligently inflicted harm to a pet.[187] It says the following in comment m to section 47:

> Recovery for emotional harm resulting from negligently caused harm to personal property is not permitted under this Section. Emotional harm due to harm to personal property is insufficiently frequent or significant to justify a tort remedy. *While pets are often quite different from other chattels in terms of emotional attachment, an actor who negligently injures another's pet is not liable for emotional harm suffered by the pet's owner. This rule against liability for emotional harm secondary to injury to a pet limits the liability of veterinarians in the event of malpractice and serves to make veterinary services more readily available for pets. Although harm to pets (and chattels with sentimental value) can cause real and serious emotional harm in some cases, lines—arbitrary at times—that limit recovery for emotional harm are necessary.* Indeed, injury to a close personal friend may cause serious emotional harm, but that harm is similarly not recoverable under this Chapter. However, recovery for *intentionally* inflicted emotional harm is not barred when the defendant's method of inflicting harm is by means of causing harm to property, including an animal.[188]

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185 *See id.* § 42 cmt. f, illus. 3.
186 *Id.* § 47 cmt. j.
187 *Id.* § 47 cmt. m.
188 *Id.* (first emphasis added).

Comment m is unduly prescriptive with respect to veterinarians. At the time, the rules about recovery for emotional distress were generally relaxing.[189] Yet comment m explicitly "limits the liability of veterinarians in the event of malpractice." It inappropriately tries to prevent future development of the common law on this issue. This incredible stance was later endorsed in the *Restatement (Third) of Torts: Remedies*.[190]

Despite its placement in section 47, comment m's broad language about the unavailability of recovery for emotional distress is not limited to cases covered by section 47 (i.e., the *Burgess* fact pattern), but presumably also applies to cases covered by section 48 (the bystander fact pattern). After all, the comment refers to bystander cases "under this Chapter" as an example of arbitrary line-drawing.[191] It also mentions intentionally inflicted emotional distress as the only avenue for recovery.[192] But the problem is not that comment m inappropriately restricted bystander recovery under section 48; rather, as discussed in the next Part, comment m should have *only* restricted bystander recovery, assuming any categorical limits at all were appropriate. It certainly should not have restricted cases in which the plaintiff and defendant have a relationship created by contract or an undertaking (i.e., those situations covered by section 47(b)).[193]

One wonders whether the ALI membership was fully cognizant of the protection the *Third Restatement* was giving to veterinarians, in particular. There was considerable divergence in the *Third Restatement* between the black-letter law and the commentary on this point. It is possible that membership would not have approved this policy decision if it were placed more prominently in the black-letter law. While balanced policy discussions are appropriate for the Reporter's Notes, this granular policy decision embedded in the commentary essentially substituted the Institute's view of duty for

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189 *See* Levit, *supra* note 29, at 144–45; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM at ch. 8, Scope Note (A.L.I. 2012) ("Since the publication of the Second Restatement, however, courts have become more comfortable permitting recovery for negligently inflicted emotional harm. While there remain substantial restrictions—considerably more than for physical harm—recovery for negligently inflicted emotional harm is more widely available today than when the Second Restatement was first published.").

190 *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. b (A.L.I., Tentative Draft No. 2, 2023) (mentioning the situation where a plaintiff "loses a pet to a veterinarian's malpractice," and noting, "The Restatement Second rejected nearly all such claims.").

191 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (A.L.I. 2012).

192 *Id.*

193 *Id.*

that of a common-law court. The commentary was inappropriately normative at a time when the law and social views were, and are, still developing. Comment m is also very hard to reconcile with tort law's own goals of compensation, corrective justice, and deterrence.[194]

III. THE REASONS THE *THIRD RESTATEMENT* GOT IT WRONG

Assuming the *Third Restatement* was right to give pet cases special treatment at all in the context of negligent infliction of emotional distress, the *Third Restatement* was wrong to foreclose liability in special relationship cases. Yet, the *Third Restatement* reflects the right approach for bystander cases involving pets if, in fact, comment m also applies to section 48. The *Third Restatement* would have been better, and clearer, if it had only foreclosed liability in pet cases in the bystander context and not when the pet owner and the defendant had a special relationship.

A. The Relationship Between the Plaintiff and the Defendant Should Matter

Sections 47(b) and 48 address very different situations in the pet context. In fact, tort liability is much more important for furthering tort law's objectives of deterrence and corrective justice in the special relationship context than in the bystander context.[195]

First, consider deterrence. Bystander cases (addressed in section 48) typically involve a stranger who negligently causes harm to the plaintiff's pet. This would include when the defendant's car hits the plaintiff's pet or when the defendant inadequately restrains his or her own pet who then injures the plaintiff's pet.[196] In these types of fact patterns, the defendant usually already has adequate incentives to avoid the negligent conduct, regardless of a NIED claim by the pet

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[194] *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 2 cmts. b, d (A.L.I., Tentative Draft No. 1, 2022).

[195] *Id.* (identifying compensation, corrective justice, and deterrence as the purpose of remedies). Other goals may exist, such as efficiency and civil recourse. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 901 (b), (d) (A.L.I. 1979); Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1327–30 (2017); John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1579–81 (2006).

[196] *See, e.g.*, Roman v. Carroll, 621 P.2d 307, 308 (Ariz. Ct. App. 1980); Gordon v. Minck, No. DBD-CV-23-6045424, 2023 WL 8055855, at *1 (Conn. Super. Ct. Nov. 13, 2023); Vaneck v. Cosenza-Drew, No. MMX-CV-08-5003942, 2009 WL 1333918, at *1 (Conn. Super. Ct. Apr. 20, 2009).

owner (e.g., there are other potential victims of unsafe driving or an unrestrained pet).[197]

In contrast, in the special-relationship cases (addressed in section 47(b)), the defendant may have inadequate incentives for safe behavior unless the plaintiff can recover emotional distress damages. That is because the defendant will never face a tort suit at all unless the plaintiff has the potential to recover emotional distress damages. Consider, for example, the veterinarian who negligently treats a pet. That veterinarian threatens no one else's safety and therefore only faces the prospect of liability if the pet owner sues. If recovery for negligence is limited to the market or replacement value of the animal, or an anemic intrinsic value measure,[198] damages will be inadequate to attract an attorney who will pursue the tort action.[199] Consequently, there are inadequate legal incentives for safe behavior.[200]

Second, corrective justice is a stronger rationale for recovery in the special-relationship context than in the bystander context because the defendant's action is likely to be more morally culpable in the former situation.[201] The defendant typically does not know the plaintiff in a bystander case, and consequently has no knowledge of the plaintiff's susceptibility to emotional harm. In contrast, when the plaintiff and defendant have a relationship, like a veterinarian and

[197] Scholars lament the insufficiency of damages in certain contexts and the concomitant absence of adequate deterrence. *See generally* Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 181, 193–94 (2012). One such example is when a child is stillborn. Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 NEV. L.J. 955, 960–61 (2019); *see* 12 AM. JUR. *Trials* 317, § 32 (1966) ("Certain especially difficult problems arise when damages must be awarded for the wrongful death of a child. The main stumbling block stems from the fact that the decedent has not yet been able to demonstrate his probable earning capacity."). However, a defendant never knows if tortious behavior will injure or kill a child. Therefore, there is always the prospect of a huge pain-and-suffering award that should promote deterrence. That prospect is missing in the veterinarian malpractice cases.

[198] *See* Peter Barton & Frances Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 N.Y.L. SCH. L. REV. 411, 414 (1989).

[199] Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. 957, 966 (2020) (explaining that plaintiffs' attorneys—who typically work on a contingent-fee basis—usually require that the case have the potential for a substantial collectible judgment before they will take the case); *see* also Rhee, *supra* note 143, at 835.

[200] *See Moreno v. Hughes*, 157 F. Supp. 3d 687, 688–91 (E.D. Mich. 2016) (allowing emotional distress damages for 42 U.S.C. § 1983 claim to further the policies of compensation and deterrence); *see also Henning v. Nicklow*, No. 08-CV-180, 2009 WL 3642739, at *4–5 (N.D. Ind. Oct. 30, 2009); Westmore v. Hyde, 14-CV-861, 2016 WL 2771801, *at* *6 (W.D. Wis. May 12, 2016).

[201] *See generally* Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 25–30 (1995) ("[C]orrective justice requires agency, rectification and correlativity" at a minimum.). The debate about the meaning of corrective justice or its centrality to the law of torts is beyond the scope of this Article.

pet owner, the defendant often knows of the plaintiff's sensitivities. Section 313 in the *First* and *Second Restatements* captured the importance of such knowledge by limiting recovery to situations when the defendant "from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm."[202] In section 313 cases, like section 47(b) cases, the defendant can usually foresee, or at least should foresee, that the defendant's negligent behavior can cause the plaintiff serious emotional distress.[203] Allowing recovery for cases in which the plaintiff and defendant have a special relationship (i.e., the *Burgess* fact pattern) usefully marks the defendant's action as a wrong.[204]

There are also practical reasons why courts should allow section 47(b) claims, but not necessarily section 48 claims, in the pet context. The primary reason is that liability under section 47(b) is much more limited than liability under section 48, and its limits are much easier to articulate. Courts are concerned about a multiplicity of suits and unlimited liability, and this concern is especially evident in the bystander cases.[205] Legitimate concerns are raised about the potential expansiveness of bystander recovery and the inherent arbitrariness of bright-line limits on bystander recovery in cases involving injury to humans.[206] After all, anyone who witnesses harm to another person might suffer severe emotional distress, and limiting recovery to close family members of the injured party is arbitrary, as reflected by the mantra that lines have to be drawn somewhere.[207] Because the limit is arbitrary, it is also subject to expansion as courts try to achieve justice in particular cases. In fact, the *Third Restatement* recognizes that the meaning of "close family" might expand in the future.[208] The same potential for expansive

[202] RESTATEMENT (SECOND) OF TORTS § 313(1)(b) (A.L.I. 1965).

[203] In fact, the *Third Restatement* requires that "the actor's conduct must be such that would cause a reasonable person to suffer serious emotional harm." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. l (A.L.I. 2012). Once that threshold is met, a plaintiff can recover for all emotional harm, even if more severe than the average person. *Id.*

[204] *Cf.* Scott Hershovitz, *Tort as a Substitute for Revenge, in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 86, 96–97 (John Oberdiek ed., 2014) (discussing Alcorn v. Mitchell, 63 Ill. 533 (1872), which assigned damages to a plaintiff who was spat on by an adversary in litigation for another matter).

[205] *See* Oberschlake v. Veterinary Assocs. Animal Hosp., 785 N.E.2d 811, 815 (Ohio Ct. App. 2003); Rabideau v. City of Racine, 627 N.W.2d 795, 802 (Wis. 2001).

[206] *See, e.g.*, Burgess v. Superior Ct., 831 P.2d 1197, 1200 (Cal. 1992) (discussing how bystander recovery was constrained because of the number of people who might have claims).

[207] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 48 cmt. f (A.L.I. 2012).

[208] *Id.* ("When defining what constitutes a close family relationship, courts should take into account changing practices and social norms and employ a functional approach to determine what constitutes a family.").

liability exists in the pet context if bystander recovery were allowed. Anyone who witnesses the pet's injury might suffer emotional harm. Would recovery extend to all members of the family who owned the pet? To the dog sitter? To everyone in the neighborhood who loved the animal?

In contrast, recovery predicated on a special relationship is limited by contractual privity or the defendant's own undertaking to the plaintiff.[209] While a defendant could give an undertaking to many people, that would be the defendant's choice. Even in that situation, courts would have some flexibility to redefine the scope of the defendant's undertaking or to focus on certain activities within the broader relationship.[210] Even if the defendant's undertaking extended to many people, the defendant's exposure would be cabined by the fact that most pets are loved only by a limited number of people.

For the reasons just suggested, section 47(b) claims seem more important and appropriate than section 48 claims for furthering tort law's objectives when pets are involved. But the *Third Restatement* foreclosed section 47(b) claims.

B. The Veterinarian and the Client May Have a Special Relationship

The argument for veterinary liability grounded in a special relationship assumes that there would, in fact, be a special relationship between the veterinarian and plaintiff. Comment m seems to acknowledge that there is one, or could be one, because it singles out veterinarians and shields them from section 47(b)'s application.[211]

A special relationship is often simply a conclusion that courts reach when they want liability to be imposed. Courts should reach that conclusion in the veterinarian-client context since it would further tort law's objectives, as discussed immediately above. But courts

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[209] Dan B. Dobbs, *Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress*, 50 ARIZ. L. REV. 49, 57 (2008) ("[The] fear of unlimited lawsuits that so often causes emotional distress in judges and lawyers is wholly misplaced when it comes to duties based on undertakings or special relationships. Only those in the relationship with the defendant or to whom he undertakes a duty could possibly recover based on the undertaking."). The *Third Restatement* emphasizes that foreseeability alone does not establish the duty, noting that otherwise a doctor might be liable to the fans of a popular movie star who suffer emotional harm upon hearing a negligent and incorrect diagnosis of cancer. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. i (A.L.I. 2012).

[210] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. b (A.L.I. 2012).

[211] *See id.* § 47 cmt. m.

usually do not base a special relationship on broad categories like veterinarian-client;[212] instead they find additional components that make the relationship in a particular case "special." Factors that are used to trigger a special relationship are diverse and include knowledge by the defendant of the plaintiff's particular vulnerability,[213] an objective determination that the breach is "especially likely" to cause the serious emotional distress,[214] specific types of transactions within the relationship that seem especially likely to cause serious emotional distress,[215] a particularized promise between the parties,[216] specific reliance by the plaintiff on the

[212] The *Third Restatement* perhaps implies otherwise. *See id.* § 47 cmt. i ("Instead of relying on foreseeability to identify appropriate cases for recovery, the policy issues surrounding specific categories of undertakings, activities, and relationships must be examined to determine whether they merit inclusion among the exceptions to the general rule of no liability."). Yet courts can define categories very narrowly, thereby requiring those facts that make liability particularly appropriate.

[213] *See, e.g.*, Freeman v. Harris Cnty., 183 S.W.3d 885, 890 (Tex. App. 2006) ("Special relationship cases generally have three common elements: (1) a contractual relationship between the parties, (2) a particular susceptibility to emotional distress on the part of the plaintiff, and (3) the defendant's knowledge of the plaintiff's particular susceptibility to the emotional distress, based on the circumstances.").

[214] *See* Hedgepeth v. Whitman Walker Clinic, 22 A.3d 789, 813 (D.C. 2011).

[215] For example, instead of focusing on the doctor-patient relationship writ large, the duty might exist within the context of childbirth. *See* Oswald v. LeGrand, 453 N.W.2d 634, 639 (Iowa 1990) ("[C]ontractual services that carry with them deeply emotional responses in the event of breach . . . ."). Similarly, not all contractual breaches by a wedding venue would allow a bride to recover for her serious emotional distress, but cancelation of the entire wedding could. *See* Murphy v. Lord Thompson Manor, Inc., 938 A.2d 1269, 1274–75 (Conn. App. Ct. 2008).

[216] *See, e.g.*, Lesesne v. District of Columbia, 146 F. Supp. 3d 190, 196 (D.D.C. 2015) (citing *Hedgepeth*, 22 A.3d at 814–15) (concluding that a custodial relationship undertaken by law enforcement did not constitute a special relationship for purposes of NIED because "[t]he *purpose* of the relationship must involve care for another's emotional well-being"); Simons v. Beard, 72 P.3d 96, 102–03 (Or. Ct. App. 2003) (quoting Curtis v. MRI Imaging Servs. II, 956 P.2d 960, 963 (Or. 1998)) (discussing that for negligent infliction of emotional distress, the professional standard of care must involve being aware of and protecting the plaintiff from the psychological consequences of the procedure).

defendant,[217] "social values and customs and appropriate social policy,"[218] or some combination of such factors.[219]

A court certainly could find a special relationship between a vet and a client based on some of these factors (contrary to the conclusion mandated by comment m). Evaluate, for example, "social values and customs." Today these considerations support the recognition of a special relationship between veterinarians and clients. Now admittedly, Dan Dobbs reached a contrary conclusion in 2008, around the time section 47(b) of the *Third Restatement* was approved by membership.[220] In discussing undertakings and special relationships, he suggested that veterinarians' tort duties should not extend to pet owners' emotional wellbeing.[221] While he noted that it would *not* be "radical" to use undertakings and special relationships to establish a duty,[222] he thought veterinarians do not undertake to protect the owner's emotional wellbeing as a factual matter.[223] Such

[217] *See* Shin v. Sunriver Preparatory Sch., Inc., 111 P.3d 762, 771 (Or. Ct. App. 2005) (quoting Curtis v. MRI Imaging Servs. II, 941 P.2d 602, 602 (Or. App. Ct. 1997), *aff'd on other grounds*, 956 P.2d 960 (Or. 1998)) ("The common thread among special relationships—that is, those warranting a heightened duty of care—is that 'the party who owes the duty has a *special responsibility* toward the other party': 'This is so because the party who is owed the duty effectively has authorized the party who owes the duty to exercise independent judgment in the former party's behalf and in the former party's interests. In doing so, the party who is owed the duty is placed in a position of reliance upon the party who owes the duty; that is, because the former has given responsibility and control over the situation at issue to the latter, the former has a right to rely upon the latter to achieve a desired outcome or resolution.'").

[218] Lanier v. President & Fellows of Harvard Coll., 191 N.E.3d 1063, 1073 (Mass. 2022) (noting that a duty to plaintiff did not arise merely out of its "voluntary representation to Lanier that it would keep her informed," but due to "the university's horrific, historic role in the coerced creation of the degrading daguerreotypes," in light of "social values and customs and appropriate social policy"); Mower v. Baird, 422 P.3d 837, 856–57 (Utah 2018) (determining that whether there is a special relationship to avoid negligent infliction of emotional distress "requires a three-prong analysis: (1) Does the relationship, activity, or undertaking 'necessarily implicate[] the plaintiff's emotional well-being?'; (2) Is there 'an especially likely risk' that the defendant's negligence in the course of performing obligations pursuant to such relationship[, activity,] or undertaking will result in [serious] emotional distress?'; and (3) Do general public policy considerations warrant rejecting a limited emotional distress duty where prongs one and two would otherwise find one to exist?" (alterations in original) (citations omitted) (quoting *Hedgepeth*, 22 A.3d at 810–11, 815)).

[219] *See, e.g.*, Toney v. Chester Cnty. Hosp., 36 A.3d 83, 95 (Pa. 2011) ("As with other states, we find it prudent to limit the reach of this NIED claim to preexisting relationships involving duties that obviously and objectively hold the potential of deep emotional harm in the event of breach. As explained by these states, the special relationships must encompass an implied duty to care for the plaintiff's emotional well-being. The potential emotional harm must not be the type that a reasonable person is expected to bear.").

[220] *See* Dobbs, *supra* note 209, at 61–62.

[221] *See id.*

[222] *Id.* at 57. He suggested the theory of *duty undertaken* might allow a duty to be imposed even "independent of any undertaking in some instances." *See id.* at 64.

[223] *See id.* at 61–62.

protection was not commonly understood to be part of a veterinarian's "role."[224] He wrote:

> Customs, social understandings, and the cultural background all combine to say the vet undertook a duty of care for the plaintiff's horse. But if we ask whether he also undertook a duty of care for the plaintiff's emotional well-being, so that he would be liable for the plaintiff's emotional distress if he negligently allowed the horse to die, the answer is *probably* no. Although the vet may have foreseen that the owner will be distressed if his horse is negligently killed, there is little in his role as a vet to suggest that the parties expected protection from emotional distress. The vet is, after all, licensed to treat animals rather than humans, even if humans may suffer distress at his mistreatment. *Quite likely*, then, the vet would be liable for emotional distress only if a stranger would be liable.[225]

Dobbs spoke equivocally, punctuating his statement with the words "probably" and "quite likely."[226] Dobbs acknowledged that the imposition of a duty should be established on a case-by-case basis and turns on social understandings of the defendant's undertaking.[227] But Dobbs did not examine current cases involving pets and vets to get a better sense of the veterinarian's role today.[228] His examples involved farm animals, not pets, and were often centuries old.[229] Nor did he delve into professional norms or empirical evidence describing clients' expectations.[230] If he had, he might have reached the opposite conclusion.

The veterinarian's role has changed over time. While veterinarians have always had a duty to treat the client's animal (i.e, the patient) competently,[231] the veterinary profession has now recognized the importance of the human-pet bond and a concomitant duty to human clients.[232] It wasn't until the 1970s that veterinary medicine even

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[224] *See id.*
[225] *Id.* (emphasis added).
[226] *See id.* at 62.
[227] *See id.* at 62–63.
[228] *See id.* at 62.
[229] *See id.* at 61 n.42, 62.
[230] *See id.* at 63.
[231] *See id.* at 61.
[232] *See, e.g.*, Human-Animal Bond, AM. VETERINARY MED. ASS'N, https://www.avma.org/resources-tools/one-health/human-animal-bond [https://perma.cc/UWF7-3CYM] ("The AVMA officially recognizes: (1) the existence of the human-animal bond[,] (2) its importance to human, animal, and community health and welfare, and (3) that the human-animal bond has major significance for veterinary medicine.").

identified the importance of the human-pet bond, and the public only gained awareness of this idea afterwards, in the 1980s.[233] But today, veterinarians appreciate that their actions can adversely affect the client's emotional wellbeing, and they strive to prevent such harm. In fact, "the profession is now more aligned with the field of human medicine than with the field of agriculture" because so many veterinarians today primarily treat animals whose principal value is companionship.[234] Veterinarians' ethical code requires that vets provide competent care to the patient with attention to the client's needs and health.[235]

Veterinarians' behavior today typically reflects their expanded responsibilities. That is because they understand that "recognition of the human-animal bond is an important determinant of a successful practice."[236] Consequently, for example, vets have shown a "growing interest" in how to communicate with clients regarding difficult

[233] *See* Linda M. Hines, *Historical Perspectives on the Human-Animal Bond*, 47 AM. BEHAVIORAL SCIENTIST 7, 7–8, 12 (2003).

[234] Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinarian Medicine*, 10 ANIMAL L. 125, 138 (2004).

[235] *See Principles of Veterinary Medical Ethics of the AVMA*, AM. VETERINARY MED. ASS'N, https://www.avma.org/resources-tools/avma-policies/principles-veterinary-medical-ethics-avma# [https://perma.cc/GRH2-C4YR] ("Three fundamental principles form the foundation of the Principles of Veterinary Medical Ethics: Stewardship, Integrity, and Respect . . . . Stewardship: Veterinarians have an ethical responsibility to alleviate suffering, promote health, and act in the best interests of their patients *in balance with the interests of their clients*, the environment, and the public. Integrity: Veterinarians have an ethical responsibility to be honest and truthful in all interactions *with clients*, patients, and their community. Respect: Veterinarians have an ethical responsibility to demonstrate respect to all patients, *clients*, and members of their community, including self and professional colleagues." (emphasis added)); *id.* ¶ A(1)(a) ("A veterinarian shall provide competent veterinary medical care under the terms of a veterinarian-client-patient relationship (VCPR), with compassion and respect for animal welfare and *human health*." (emphasis added)); *id.* ¶ B(1)(a) ("Contextual care . . . A veterinarian should be prepared to offer a range of diagnostic, treatment, and when deemed appropriate, referral options *that meet the needs of both the patient and the client*. . . . Contextual considerations include those related to the patient, *client*, veterinarian, and practice, and are often unique to each case." (emphasis added)); *id.* ¶ B(4)(a) ("Conflict of interest . . . A veterinarian should balance the welfare of the patient, *the communicated needs of the client*, the safety of the public, and the need to uphold the public trust vested in the veterinary profession; and should avoid conflict of interest or the appearance thereof. A veterinarian should not allow any interests, other than those mentioned above, to influence their choice of treatment for their patient." (emphasis added)); *id.* ¶ B(5)(a) ("One Health . . . *Humans*, animals, and the environment are *inextricably linked*, *and veterinarians should support collaborative efforts to attain optimal health for all three*." (emphasis added)); *id.* ¶ C(9)(a)–(b) ("Impairment . . . A veterinarian owes the same duties to self as to others, including the responsibility to promote health and safety, preserve wholeness of character and integrity, maintain competence, and continue personal and professional growth. . . . A veterinarian should refrain from offering professional services when their physical, mental, or emotional state could endanger themselves, a patient, or *others*." (emphasis added)).

[236] Brown & Silverman, *supra* note 11, at 172.

news.[237] Vet schools give more attention to meeting clients' needs.[238] Some teaching hospitals have entire departments dedicated to the study of the human-animal bond.[239]

At the same time, pet owners' expectations have also changed.[240] Veterinary clients have higher expectations of veterinary care than previously.[241] Clients' willingness to pay for sophisticated procedures to save a pet's life reflects these expectations.[242] Clients now expect their vets to recognize that their pets are very important to them.[243] Pet owners today arrive at their vets' offices in a more "psychologically vulnerable position" because they see their pets as family members.[244] Research by Beverly Brockman and colleagues found the following:

> Vets not only care for the animal patient but also provide an important service, with potentially deep emotional cathexis, for the owner. . . . [C]onsumers believe that high-quality veterinary care includes not only the quality and soundness of

[237] Jack K. H. Pun, *An Integrated Review of the Role of Communication in Veterinary Clinical Practice*, 16 BMC VETERINARY RSCH., art. no. 394, 2020, at 2; *see also* Cathy Jackson & Carol Gray, *Breaking Bad News*, 26 PRACTICE 103, 104 (2004); Jane R. Shaw & Laurel Lagoni, *End-of-Life Communication in Veterinary Medicine: Delivering Bad News and Euthanasia Decision Making*, 37 VETERINARY CLINICS N. AM.: SMALL ANIMAL PRAC. 95, 98, 105 (2007).

[238] *See* Brown & Silverman, *supra* note 11, at 172 ("Several veterinary teaching hospitals now have divisions or departments concerned with the human-animal bond. Their functions are to educate veterinary students and to perform research.").

[239] *Id.*

[240] *See, e.g.*, Anne Quain, Michael P. Ward & Siobhan Mullan, *Ethical Challenges Posed by Advanced Veterinary Care in Companion Animal Veterinary Practice*, 11 ANIMALS, no. 11:3010, 2021, at 1–2 ("As companion animals were increasingly considered family members, companion animal practice borrowed methods and values from human medicine. According to Knesl and colleagues, 'the strengthening of the bond between humans and their pets has changed the landscape for veterinary medicine, with highly bonded owners showing an increasing willingness to do whatever it takes to maintain the health of their animals.'" (endnote omitted)); Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 494 (2004).

[241] Nunalee & Weedon, *supra* note 234, at 139–40 ("Probably the most compelling reason for increased client expectations from the veterinary medical profession is the increasing recognition of the importance of the human-animal bond by society in general. . . . [M]any pet owners are . . . demanding a concomitant increase in the quality of care their pets receive from veterinarians.").

[242] *See* Daniel O'Connell & Kathleen A. Bonvicini, *Addressing Disappointment in Veterinary Practice*, 37 VETERINARY CLINICS N. AM.: SMALL ANIMAL PRAC. 135, 135–36 (2007) ("Conditions for which euthanasia was the obvious, albeit heartbreaking choice, are now candidates for extensive treatment.").

[243] Shaw & Lagoni, *supra* note 237, at 95 ("Rising acknowledgment of pets as family members has been associated with increasing expectations of pet owners for the highest quality medical care for their companion animals as well as compassionate care and respectful communication for themselves.").

[244] O'Connell & Bonvicini, *supra* note 242, at 137.

> the actual medical treatment but also the way the practitioner or service provider interacts with customers.[245]

The combination of vets' knowledge of the human-pet bond and clients' increased expectations regarding the quality and scope of care means that, at a minimum, clients expect their vets to avoid gross negligence that will cause them serious emotional distress.[246] A vet who knows or should know of an owner's emotional connection to the animal implicitly accepts a moral duty, and arguably a legal duty, to the owner as well.[247]

Consequently, when a veterinarian uses an inhumane method to euthanize a pet,[248] or when a veterinarian leaves a dog on a heating pad for several days without monitoring it so that the dog receives severe burns,[249] the vet's gross negligence violates a fundamental yet implicit undertaking by the veterinarian to the pet owner: *I will not cause you emotional distress by increasing your pet's pain and suffering through my gross negligence because you have employed me to reduce your pet's pain.* A breach of that duty should make the vet liable for the owner's emotional harm. That is justified in part because the vet knows the potential emotional repercussions of the vet's gross negligence, and in part because the law should deter gross negligence.

Allowing the claim for NIED when there is a special relationship between the vet and the client would be consistent with the *Restatement (Second) of Contracts*. While emotional distress damages

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[245] Beverly K. Brockman, Valerie A. Taylor & Christopher M. Brockman, *The Price of Unconditional Love: Consumer Decision Making for High-Dollar Veterinary Care*, 61 J. BUS. RSCH. 397, 405 (2008).

[246] *See* O'Connell & Bonvicini, *supra* note 242, at 138 ("In these instances [of veterinarian malpractice], pet owners may experience even greater distress at what they conclude was the preventable suffering or loss of their animal."); Nunalee & Weedon, *supra* note 234, at 138 (noting increased expectations for the quality of care).

[247] Dobbs, *supra* note 209, at 51 (mentioning that undertakings can be implicit).

[248] *See* Repin v. State, 392 P.3d 1174, 1179–80 (Wash. Ct. App. 2017). All the plaintiff's claims failed. The tort claims failed because of the "historic treatment" of pets "as property" and "the limitation on emotional distress damages for such injury except in cases of malicious or intentional infliction of injury to those animals." *Id.* at 1181–82 (quoting Hendrickson v. Tender Care Animal Hosp. Corp., 312 P.3d 52, 57 (Wash. Ct. App. 2013)); *see also* Berry v. Frazier, 307 Cal. Rptr. 3d 778 (Cal. Ct. App. 2023) (remanding to allow claim against veterinarian based upon allegedly inhumane euthanasia to proceed on intentional tort and fraud claims).

[249] Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978); *cf.* Harabes v. Barkery, Inc., 791 A.2d 1142, 1143, 1146 (N.J. Super. Ct. Law Div. 2001) (granting defendant's motion for summary judgment in a case in which plaintiff sought damages for mental distress and loss of companionship for the death of plaintiff's pet dog, Gabby, who was allegedly negligently subjected to extreme heat for ten hours at dog groomer's, while analogizing the holding to the lack of emotional distress recovery under a wrongful death statute for loss of a child or spouse).

are generally unavailable for a breach of contract,[250] section 353 of the *Restatement (Second) of Contracts* provides an exception if "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."[251] No physical manifestation of the serious emotional distress is required.[252] The *Restatement (Second) of Contracts* eliminated the requirement found in the initial iteration of the *Restatement of Contracts* that the breach must be "wanton or reckless," thereby introducing the possibility that a negligent, or even an innocent, contract breach might qualify.[253] The Reporters were skeptical about removing the "wanton or reckless" requirement, but older cases permitted such recovery.[254]

The commentary to section 353 in the *Restatement (Second) of Contracts* suggested that damages for emotional distress would be "exceptional,"[255] although its explanation for when such damages would be appropriate left the opposite impression. The commentary defined "exceptional" as when "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."[256] The "common examples" of such exceptional circumstances involved some contracts that, if breached, seem much less likely to result in serious emotional disturbance than when a vet's gross negligence injures or kills a companion animal.[257] The common examples included contracts between carriers and passengers, contracts between innkeepers and guests, contracts related to dead bodies, and contracts for the delivery of messages related to death.[258] It is questionable whether serious emotional injury is, in fact, a "particularly likely result" when an innkeeper wrongfully ejects a

[250] RESTATEMENT (SECOND) OF CONTRACTS § 353 (A.L.I. 1981). Some scholars have argued such damages should be available. *See, e.g.*, John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1655 (1986) (arguing that nonpecuniary damages should always be available for contract breaches, so long as they are "reasonably foreseeable at the time of contract formation").

[251] RESTATEMENT (SECOND) OF CONTRACTS § 353 (A.L.I. 1981).

[252] *See id.* at cmt. a.

[253] *Compare* RESTATEMENT (FIRST) OF CONTRACTS § 341 (A.L.I. 1932) (limiting recovery in actions for breaches of contract to mental suffering resulting from wanton or reckless breach), *with* RESTATEMENT (SECOND) OF CONTRACTS § 353 (A.L.I. 1981) (expanding recovery for emotional disturbance resulting from breach of contract by eliminating the "wanton or reckless" requirement).

[254] *See, e.g.*, Stewart v. Rudner, 84 N.W.2d 816, 824, 826 (Mich. 1957). The history of the ALI proceedings on then-section 774A of the *Second Restatement of Torts* was reported in Mooney v. Johnson Cattle Co., 634 P.2d 1333, 1335 n.6 (Or. 1981).

[255] RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (A.L.I. 1981).

[256] *Id.*

[257] *See id.*

[258] *Id.*

guest while using foul language and accusing the guest of immorality, as illustration 2 in the *Restatement (Second) of Contracts* suggested.[259] To its credit, the *Restatement (Second) of Contracts* did not limit the "exceptional" cases to the examples that were listed.[260]

A notable recent case accepted the NIED claim on a special relationship theory and has potential ramifications for veterinarians. In *Levy v. Only Cremations for Pets*,[261] the plaintiffs sought recovery against a pet crematorium for emotional distress damages on both contract and negligence theories.[262] The plaintiffs' veterinarian had sent the plaintiffs' two dogs, Wesley and Winnie, to the defendant's crematorium for a private cremation,[263] but the defendant allegedly cremated the dogs as part of a group, scattered their ashes at sea, and returned random and mislabeled ashes to the plaintiffs.[264] The plaintiffs "were devastated at not having received their pets' ashes."[265] The dogs "were cherished members of the family."[266] The plaintiffs had intended "to bury Wesley's ashes next to their deceased daughter, as Wesley was their daughter's beloved pet. . . . [and] to bury Winnie's ashes at their vacation home, which was Winnie's favorite place."[267]

The California Court of Appeal allowed the plaintiffs to allege that they were third-party beneficiaries to the contract between the vet and the crematorium.[268] It noted that the *raison d'être* of the contract was the plaintiffs' emotional tranquility, and that the cost of a private cremation "is incurred solely for an emotional benefit."[269] The defendant's "Web site described one of its goals . . . [as providing customers] 'with a dignified and proper farewell to [their] beloved pet.' Plainly, this is an appeal to the emotional satisfaction of potential customers."[270] Consequently, the contract claim was remanded to give the plaintiffs the opportunity to develop this basis for recovery.[271]

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[259] *See id.* at cmt. a, illus. 2.
[260] *See id.* at cmt. a.
[261] Levy v. Only Cremations for Pets, Inc., 271 Cal. Rptr. 3d 250 (Ct. App. 2020).
[262] *Id.* at 254.
[263] *Id.* at 254–55.
[264] *Id.* at 260–61.
[265] *Id.* at 255.
[266] *Id.* at 254.
[267] *Id.* at 255.
[268] *Id.* at 254, 258–59.
[269] *Id.* at 259.
[270] *Id.* at 260 (second alteration in original).
[271] *Id.*

The court also found that the plaintiffs had adequately pled tort claims allowing them to recover emotional distress damages. The NIED claim was appropriate because the plaintiffs were direct victims based on their special relationship with the defendant.[272] The court cited precedent involving the disposal of human remains and noted that the tort duty extended even to family members who did not have a possessory interest in the body and who did not contract with the funeral home.[273]

The court recognized the tort claim, despite the refusal of the California Court of Appeal in *McMahon* to extend *Burgess*'s special-relationship theory to the veterinarian context.[274] The *Levy* court spoke in ways that suggested *McMahon* was wrongly decided. First, the *Levy* court recognized the importance of pets to humans' emotional wellbeing, implicitly highlighting the need for competent veterinary care: "It is certainly true that people generally form stronger bonds with human family members than with pets, but that is a difference in degree, not in kind."[275] While losing a beloved animal's ashes may be emotionally traumatizing for the owners, losing the pet itself or knowing the pet suffered unnecessary pain must be far more traumatic. Second, the *Levy* court recognized that monetary expenditures can signify a "strong" human-pet emotional bond.[276] That applies to the vet context, too. Third, the *Levy* court recognized that the defendants' representations can create the duty.[277] In *Levy*, it was the defendant's assurance of "dignified treatment of pet remains."[278] Veterinarians make similar representations, albeit sometimes implicitly, including that their treatment is humane and competent. Fourth, the *Levy* court recognized the importance of policy and foreseeability to the establishment of a duty.[279] The policy considerations "generally involve balancing the harm to the plaintiff and the moral approbation of defendant's conduct against the burden on society of imposing a duty."[280] The weight of these considerations varies in different contexts, but in the veterinarian context the plaintiff's harm is sometimes great, the defendant's moral blame is sometimes also

[272] *Id.* at 262–63 (citing Christensen v. Superior Ct., 820 P.2d 181, 183–86 (Cal. 1991)).
[273] *Levy*, 271 Cal. Rptr. 3d at 262–63 (citing *Christensen*, 820 P.2d at 183–86).
[274] *Levy*, 271 Cal. Rptr. 3d at 254; *see supra* text accompanying notes 161-165.
[275] *See Levy*, 271 Cal. Rptr. 3d at 262.
[276] *See id.* at 263.
[277] *Id.*
[278] *Id.*
[279] *See id.*
[280] *Id.* at 262–63.

great, and the societal cost of liability is debatable, as discussed below.[281]

Despite the clear parallels that suggest both crematoriums and veterinarians should have a tort duty to clients to avoid the negligent infliction of emotional distress, the *Levy* court provided a reason the duty might not extend to veterinarians.[282] After all, it had to distinguish *McMahon*.[283] The *Levy* court said the "critical distinction . . . is that here we have that more explicit undertaking. Emotional harm was not merely foreseeable from defendant's negligence, plaintiffs' emotional well-being was the product it was selling."[284]

The more explicit undertaking in *Levy* is a good reason for imposing a duty on the crematorium, but its absence in vet cases is a weak and indefensible reason for shielding veterinarians. In *Levy*, the court emphasized the explicitness of the undertaking, but implicit undertakings have generally been sufficient to establish duties.[285] Moreover, in *Levy*, the defendant did not actually give an express promise to protect the owner's mental wellbeing.[286] Rather, the contract to treat the dog's ashes in a particular way in *Levy*, just like a contract to provide competent veterinary care, is one step removed from an undertaking to protect the owner's mental wellbeing.[287] In both contexts the emotional harm is foreseeable.[288] In fact, not long after *Levy* was decided, the California Court of Appeal, in a case against a veterinarian who was hired to euthanize a cat humanely, commented on the similarities between the duties crematoriums and veterinarians undertake.[289] Of course, once a court holds that some veterinarians undertake to protect some owners from emotional harm attributable to the vet's grossly negligent treatment of a pet, as

[281] *See infra* text accompanying notes 355–87.

[282] *See Levy*, 271 Cal. Rptr. 3d at 262–63.

[283] *See id.*

[284] *Id.* at 263; *see also* McMahon v. Craig, 97 Cal. Rptr. 3d 555, 563–64 (Ct. App. 2009) (rejecting that the contract to treat the dog was an explicit enough undertaking to protect the owner's mental wellbeing).

[285] *See* Dobbs, *supra* note 209, at 51 (noting undertakings can be either "explicit or implicit").

[286] *Levy*, 271 Cal. Rptr. 3d at 256.

[287] *See id.* at 263.

[288] *See id.* The *McMahon* case didn't explicitly address that question, *see McMahon*, 97 Cal. Rptr. at 664, but it did recognize a dog's love can create an emotional bond, *see id.* at 568.

[289] Berry v. Frazier, 307 Cal. Rptr. 3d 778, 792 (Ct. App. 2023) ("Here, too, the veterinarian and pet owner are alleged to have had a relationship predicated on the veterinarian's agreement to provide for a humane euthanasia of a dying animal (i.e., 'dignified treatment' of a dying pet), thereby giving 'emotional solace' to a grieving pet owner who has made the difficult decision to euthanize the pet."). The plaintiff's complaint alleged only intentional torts, and the case was allowed to proceed after appeal.

this Article later recommends, then the potential duty will be crystal clear unless the veterinarian disclaims it.

Unfortunately, the Idaho Supreme Court recently reached a contrary result in a suit against a vet in *Schriver v. Raptosh*.[290] The court rejected the special relationship theory because the vet-client relationship did not involve "custody and control," the "hallmark characteristic[] of a special relationship."[291] *Schriver* is not persuasive authority for several reasons. First, the opinion confuses special relationships in the context of the tort of NIED with special relationships in the context of affirmative duties (such as a duty to rescue).[292] "Custody and control" is not typically a prerequisite to finding a special relationship in the context of the NIED tort,[293] although it is often relevant to finding a special relationship for purposes of affirmative duties.[294] But *Schriver* was not an affirmative-duty case. Affirmative-duty cases impose liability for a failure to act. *Schriver* involved a vet who had acted and had caused the plaintiff's harm. Moreover, even in the context of affirmative duties, the law generally conceives of special relationships more broadly than only relationships that involve custody and control.[295]

Second, the Idaho court's discussion of intentional torts reveals its overall conservative approach to recovery for loss of the human-pet bond, an approach that is out of step with many other jurisdictions.[296] Idaho law forecloses recovery for emotional distress even if the plaintiff establishes a conversion or trespass to chattels involving a pet, unless the plaintiff proves the tort of intentional infliction of emotional distress.[297] The court reinterpreted cases that had allowed recovery of parasitic damages for a conversion, claiming that they

[290] Schriver v. Raptosh, 557 P.3d 398, 411–12 (Idaho 2024).

[291] *Id.* at 412. The decision also rested, in part, on the "direct victim" concept rejected by the *Restatement* in section 47, comment f. *See id.*

[292] *Id.* at 411 (saying "Idaho recognizes two circumstances in which a special relationship exists: (1): "[when] a special relation exists between the actor and a third person which imposes a duty upon the actor to control the third person's conduct," or (2) "[when] a special relation exists between the actor and the other which gives the other a right to protection").

[293] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. f (A.L.I. 2012) ("Typically, the undertaking or relationship is one in which serious emotional harm is likely *or* where one person is in a position of power or authority over the other and therefore has greater potential to inflict emotional harm.") (emphasis added).

[294] *Schriver*, 557 P.3d at 411; *see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 (A.L.I. 2012).

[295] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. f (A.L.I. 2012).

[296] Courts are divided on whether a plaintiff has to prove intentional infliction of emotional distress or whether the plaintiff can rely on parasitic damages following an intentional tort to property. *See* Weiner, *supra* note 12, at 535–36.

[297] *See Schriver*, 557 P.3d at 403–04.

essentially required the plaintiff to establish intentional infliction of emotional distress.[298] That interpretation misread those cases given their historical context.[299] In addition, the court thought it went "too far" to make parasitic damages available after a conversion or trespass to chattels,[300] not recognizing that the *Restatement of Torts* had always required a more nuanced assessment of wrongdoing before such damages could be awarded following an intentional tort.[301] Overall, the Idaho court showed a general hostility to emotional distress damages in the pet context that infected its analysis of the NIED claim.

The courts in each state must determine for themselves which special relationships qualify for the imposition of a duty in light of the relevant factors, including policy and social custom.[302] The Institute inappropriately assumed the position of a common-law court and made a blanket determination about duty that was much too granular.[303] The Institute inappropriately singled out veterinarians for protection in comment m, although it simultaneously acknowledged in other comments that courts have imposed duties in a wide variety of ever-expanding activities and relationships.[304] The Institute even admitted that there are not yet "clear guidelines to identify precisely" when a duty exists.[305] The law is clearly still evolving. Some courts impose a duty based on undertakings in pet cases,[306] while others refuse.[307] Recent cases go

[298] *See, e.g.*, *id.* at 407 (citing Fredeen v. Stride, 525 P.2d 166 (Or. 1974), and equating the "aggravated conduct" of a vet, who treated a pet and gave it to a new owner instead of euthanizing it, with "extreme and outrageous conduct").

[299] *See* Weiner, *supra* note 12, at 585–86 (discussing Fredeen v. Stride, 525 P.2d 166 (1974), in historical context).

[300] *See Schriver*, 557 P.3d at 408.

[301] *See* Weiner, *supra* note 12, at 571, 595, 608 (discussing § 916 of the *First Restatement*, § 435B of the *Second Restatement*, and § 21 of the *Third Restatement: Remedies*).

[302] *Cf.* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. g (A.L.I. 2012) (discussing the role of the judge and jury).

[303] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (A.L.I. 2012).

[304] *See id.* at cmts. b, f (mentioning that hospitals, funeral homes, and telegraph companies are commonly subject to a duty, and some jurisdictions extend the duty to physicians, employers, and spouses).

[305] *See id.* at cmt. f.

[306] *See, e.g.*, Smith v. Univ. Animal Clinic, Inc., 30 So. 3d 1154, 1157–58 (La. Ct. App. 2010). Cases like Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37 (Fla. Dist. Ct. App. 1978), that allow emotional distress damages for veterinarian malpractice, can be understood as special relationship cases.

[307] *See, e.g.*, Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554, 562 (Tex. App. 2004) (rejecting that a dog groomer and client had a special relationship giving rise to liability in a gross negligence case, but not foreclosing the theory altogether).

both ways.[308] The *Third Restatement* should not have singled out the veterinary profession for protection, especially because its commentary might have a ripple effect and insulate a wide spectrum of defendants who also provide services to animals.[309]

C. Why Were Veterinarians Protected?

Why exactly is the *Third Restatement* so normative with respect to veterinarians? Perhaps comment m simply reflects courts' pro-defendant orientation, evident since the 1980s.[310] The Reporters state that the cases since the *Second Restatement* "have not expanded to encompass emotional harm due to damage to property."[311] Yet some cases existed,[312] including pet cases predicated on special relationships and/or undertakings.[313] For example, in *Smith v. University Animal Clinic*, the Louisiana Court of Appeal affirmed a verdict in the plaintiffs' favor.[314] The defendant boarded the plaintiffs' cat, and mistakenly gave the cat to the wrong client.[315] The cat subsequently escaped and was never found.[316] The plaintiffs claimed a duty existed based upon a contract of deposit (akin to a

[308] *Compare* Quesada v. Compassion First Pet Hosps., No. A-1226-19, 2021 WL 1235136 (N.J. Super. Ct. App. Div. Apr. 1, 2021), *and* Levy v. Only Cremations for Pets, 271 Cal. Rptr. 3d 250 (Ct. App. 2020), *with* Schriver v. Raptosh, 557 P.3d 398, 411–12 (Idaho 2024).

[309] *See* Strickland v. Medlen, 397 S.W.3d 184 (Tex. 2013) (mentioning amici's argument that liability might snowball to "shelter and kennel workers, animal-rescue workers, even dog sitters").

[310] *See* Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VALPARAISO U. L. REV. 859, 860 (1996).

[311] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012).

[312] *See, e.g.*, Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37 (Fla. Dist. Ct. App. 1978); Johnson v. Wander, 592 So. 2d 1225 (Fla. Dist. Ct. App. 1992). The Reporter cited Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981) and Barrios v. Safeway Ins. Co., 97 So. 3d 1019 (La. Ct. App. 2012). RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporter's Note cmt. m (A.L.I. 2012). Moreover, there are numerous cases that permit recovery for emotional distress when the defendant commits an intentional tort. *See generally* Weiner, *supra* note 12, at 532 n.19, 535 n.39 (citing cases that allow recovery for loss of the human-pet bond following intentional torts).

[313] *See, e.g.*, Smith v. Univ. Animal Clinic, Inc., 30 So. 3d 1154, 1157–58 (La. Ct. App. 2010). Admittedly, the Institute approved comment m in 2007, prior to when *Smith* was decided, although the volume in which section 47 appears was not published until 2012. Cases that allow emotional distress damages for veterinarian malpractice, such as Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37 (Fla. Dist. Ct. App. 1978), can be understood as special relationship cases.

[314] *Smith*, 30 So. 3d at 1158–59.

[315] *Id.* at 1155–56.

[316] *Id.* at 1156.

bailment).[317] While the plaintiffs' claim for damages rested on a statutory provision, in many ways the statute was similar to section 47(b) of the *Restatement (Third) of Torts* and section 353 of the *Restatement (Second) of Contracts*.[318] Louisiana law said:

> Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.[319]

The *Smith* court explained that a contract "intended to gratify a nonpecuniary interest" included one "involving matters of sentimental value."[320] Here, the boarding contract "went beyond simply paying someone to feed a cat."[321] The defendant advertised its services as providing "tender loving care" and keeping pets "happy and active" because "pets are like our children."[322] Its website noted how the loss of a pet can be "devastating" because "pets can be among our closest companions."[323] In this context, the court affirmed the damage award of $800, noting it was within the range of recovery for pet cases generally.[324]

Moreover, the Reporter's Note to comment m overemphasizes the strength of the case law on its side by including many cases that did not involve pets. Of the seventeen cases it cites in support of the *Third Restatement*'s position, only seven specifically rejected the claim of NIED.[325] Of those seven cases, only five involved a pet,[326]

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[317] *Id.* at 1156–57. For the difference between a common law bailment and a contract of deposit in Louisiana, see generally Michael H. Rubin, *Bailment and Deposit in Louisiana*, 35 LA. L. REV. 825 (1975).

[318] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47(b) (A.L.I. 2012); RESTATEMENT (SECOND) OF CONTRACTS § 353 (A.L.I. 1981); *supra* note 183 and accompanying text.

[319] LA. CIV. CODE. ANN. art. 1998 (2024 First Extraordinary, Second Extraordinary, and Regular Sessions); *Smith*, 30 So. 3d at 1157.

[320] *Smith*, 30 So. 3d at 1157 (quoting LA. CIV. CODE. ANN. art. 1998 cmt. c).

[321] *Smith*, 30 So. 3d at 1157.

[322] *Id.* at 1157–58.

[323] *Id.* at 1158.

[324] *Id.* at 1159.

[325] *See* Kaufman v. Langhofer, 222 P.3d 272 (Ariz. Ct. App. 2009); Lachenman v. Stice, 838 N.E.2d 451 (Ind. Ct. App. 2005); Castillo v. City of Las Vegas, 195 P.3d 870 (N.M. Ct. App. 2008); Allstate Ins. v. Burger King Corp., 808 N.Y.S.2d 74 (App. Div. 2006); Pacher v. Invisible Fence of Dayton, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003); Goodby v. Vetpharm, Inc., 974 A.2d 1269 (Vt. 2009); Womack v. Von Rardon, 135 P.3d 542 (Wash. Ct. App. 2006).

[326] *Kaufman*, 222 P.3d at 273; *Lachenman*, 838 N.E.2d at 453; *Pacher*, 798 N.E.2d at 1125; *Goodby*, 974 A.2d at 1271; *Womack*, 135 P.3d at 543.

only two involved a veterinarian,[327] and none involved gross negligence.[328]

The authority cited means little unless courts specifically rejected liability for NIED in cases appropriate for such recovery. Cases in which courts rejected parasitic damages under a general negligence theory, for example, are irrelevant because those courts might still adopt the NIED tort with its built-in limits. In fact, in the intentional tort context, some courts reject parasitic mental distress damages for conversion of a pet, but allow claims for intentional infliction of emotional distress.[329] Moreover, even a court's rejection of a NIED claim is only persuasive authority if the plaintiff had a claim that was likely to succeed: i.e., the case actually involved a special relationship between the plaintiff and defendant, the defendant was grossly negligent, the plaintiff experienced serious emotional distress, and that distress was especially likely. Consequently, one cannot conclude that the cited case law supported comment m's tremendously broad rejection of liability.

Comment m and its emphatic statement shielding veterinarians does not appear to be the result of any direct lobbying by the animal health industry. Interest groups sometimes try to influence the Institute's drafting process,[330] and one might have thought veterinarians would try to do so because they are a powerful and active lobby, as evidenced by their amicus briefs in court to limit their

[327] *Kaufman,* 222 P.3d at 273; *Goodby*, 974 A.2d at 1271.

[328] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012). The Note does cite a few cases recognizing the tort of NIED in the pet context. *Id.* (citing Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981); Barrios v. Safeway Ins. Co., 97 So. 3d 1019 (La. Ct. App. 2012) (noting that HAW. REV. STAT. § 663-8.9 may overrule *Campbell*)). It also mentions the academic division regarding whether the tort should be available in the pet context. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (citing Richard L. Cupp Jr., *Barking Up the Wrong Tree*, L.A. TIMES (June 22, 1998), https://www.latimes.com/archives/la-xpm-1998-jun-22-me-62429-story.html [https://perma.cc/8VP8-WQAG]; Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. REV. 3 (2007) (defending the status quo); John Diamond, *Rethinking Compensation for Mental Distress: A Critique of the Restatement (Third) §§ 45–47*, 16 VA. J. SOC. POL'Y & L. 141, 151–63 (2008)).

[329] *See, e.g.*, Burgess v. Taylor, 44 S.W.3d 806, 809 (Ky. Ct. App. 2001).

[330] Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 440, 472 (2004); Tilley, *supra* note 195, at 1338–39.

liability and damages.[331] But an examination of the archives reveals no comments from the industry.[332]

Nonetheless, the industry was able to share its views indirectly. Comment m had proponents who had ties to the industry. Victor Schwartz is a lawyer who represents the "animal health industry"[333] and he was an advisor to this particular project.[334] He attended the ALI annual meeting and spoke in favor of comment m.[335] Mr.

[331] *See, e.g.*, Brief for Arizona Veterinary Medical Association et al. as Amici Curiae Supporting Defendants, *Kaufman*, 222 P.3d 272 (No. 1 CA-CV-08-0655), 2009 WL 3563041, at *14; Brief for Georgia Veterinary Medical Association et al. as Amici Curiae Supporting Appellants, Barking Hound Vill., LLC v. Monyak, 787 S.E.2d 191 (Ga. 2015) (No. S15G1184), 2015 WL 10549678, at *24; Brief for California Veterinary Medical Association et al. as Amici Curiae Supporting Defendant/Respondent, McMahon v. Craig, 97 Cal. Rptr. 3d 555 (Ct. App. 2009) (No. G040324), 2009 WL 872524, at *8; *see also* Anne Arundel Cnty. v. Reeves, 252 A.3d 921, 934 n.12 (Md. 2021) (mentioning amicus brief by veterinary organizations); Brooks v. Jenkins, 104 A.3d 899, 906 n.8 (Md. Ct. Spec. App. 2014) (referencing amicus briefs).

[332] *See* e-mail from Francesco Fasano to author (Sept. 23, 2024) (on file with author); e-mail from Francesco Fasano to author (Sept. 25, 2024) (on file with author); e-mail from Francesco Fasano to author (Sept. 26, 2024) (on file with author).

[333] Victor Schwartz is Chairman of the Public Policy Group in the Washington, D.C. office of the law firm of Shook, Hardy & Bacon L.L.P. *See Victor E. Schwartz*, SHOOK, HARDY & BACON, https://www.shb.com/professionals/s/schwartz-victor [perma.cc/6XMH-2FMF]; Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 227 n.a.1 (2006). Shook, Hardy & Bacon represents the "animal health industry," and its public policy group has filed amici on behalf of veterinary groups and others. *See Animal Health and Agribusiness*, SHOOK, HARDY & BACON, https://www.shb.com/services/industries/animal-health [perma.cc/52AX-24Z5]; *Public Policy Group Files Amicus Brief Urging New York High Court to Deny Legal Personhood Status to Animal at Behest of Animal Rights Group*, SHOOK, HARDY & BACON, https://www.shb.com/intelligence/publications/2022/q2/amicus-ny-animal-personhood [perma.cc/V98Z-N9X6]. Mr. Schwartz was an advisor to the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM (A.L.I. 2010). *Victor E. Schwartz*, SHOOK, HARDY & BACON, *supra*.

[334] *Victor E. Schwartz*, SHOOK, HARDY & BACON, *supra* note 333; *Discussion of Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm*, 84 A.L.I. PROC. 320, 341 (2007).

[335] *Discussion of Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm*, *supra* note 334, at 341. Mr. Schwartz remarked:

> I just think you did get it right with respect to the pet cases. The law of unintended consequences comes up because if you add emotional-harm damages, the effect on the veterinary community would be tremendous. The estimates of the costs of their liability insurance, if that door opens, is four or five times current cost, and vets don't make what other people make, although they go to school as long as doctors do.
>
> There is deterrence. If anybody in the pet-food business thinks it is a good idea to harm pets, now all they have to do is look at the sales of the companies that engaged in this behavior. You have thousands of cases pending, and if it's economic losses, it is enough to deter.
>
> But the courts have gotten it right, and it is not so much whether pets are property or not, it's whether this type of damage will lead to consequences that are very bad for our society, bad for pet owners and pets themselves. I think you've got it right, and you should be commended. Thank you.

Schwartz's views were presumably his own—and not merely his clients'—as required by ALI rules.[336] Unfortunately, he did not disclose his clients' interests at the time he spoke in favor of comment m, as recommended by the rules.[337]

Comment m is extremely beneficial for Mr. Schwartz's clients. In fact, Mr. Schwartz filed several amicus briefs on behalf of veterinarians that cited the Institute's position at approximately the same time that comment m was adopted.[338] He did the same a few years later in a case before the Texas courts, then-titled *Medlen v. Strickland*.[339] The brief cited the draft *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* for the proposition that it "excludes emotion-based damages from pet cases."[340]

The second speaker at the Annual Meeting was animal law scholar Richard Cupp, and he also opposed liability.[341] He argued that

Id.

[336] A.L.I., RULES OF THE COUNCIL 4.03 (2024), https://www.ali.org/sites/default/files/2025-01/council-rules-2025.pdf [https://perma.cc/SMS7-M6Q2] ("To maintain the Institute's reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door. In communications made within the framework of Institute proceedings, members should speak, write, and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest. It is improper for a member to represent a client in Institute proceedings and such conduct constitutes good cause for termination of Institute membership under Rule 5.02. If, in the consideration of Institute work, a member's statements can be properly assessed only if the client interests of the member or the member's firm are known, the member should make appropriate disclosure, but need not identify clients."). Mr. Schwartz published an article in his own name that argued that the law should disallow noneconomic damages in the pet context, suggesting that the views Mr. Schwartz expressed were in fact his own. *See, e.g.*, Schwartz & Laird, *supra* note 333, at 229–30.

[337] RULES OF THE COUNCIL 4.03, *supra* note 336; *Discussion of Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm*, *supra* note 334, at 341.

[338] Victor Schwartz and Phil Goldberg represented eight organizations, including the American Veterinary Medical Association, when they filed an amicus brief arguing against emotional distress damages in *Kaufman v. Langhofer*. Brief for Arizona Veterinary Medical Association et al. as Amici Curiae Supporting Defendants, Kaufman v. Langhofer, 222 P.3d 272 (Ariz. Ct. App. 2009) (No. 1 CA-CV-08-0655), 2009 WL 3563041, at *1, *15. That brief cites Preliminary Draft 5 of the *Restatement*, dated 2007, and says it is in its "final form" and that emotional distress damages for negligent harm to a pet are "not permitted." *Id.* at *10. They also filed an amicus in *McMahon v. Craig*, 97 Cal. Rptr. 3d 555 (Ct. App. 2009), that cited the *Third Restatement*'s comment m. *See* Brief for California Veterinary Medical Association et al. as Amici Curiae Supporting Defendant/Respondent, McMahon v. Craig, 97 Cal. Rptr. 3d 555 (Ct. App. 2009) (No. G040324), 2009 WL 872524, at *36.

[339] *See* Brief for The American Kennel Club et al. as Amici Curiae Supporting Petition for Review, Strickland v. Medlen, 397 S.W.3d 184 (Tex. 2013) (No. 12-0047), 2012 WL 6044379, at *1.

[340] *Id.* at *8 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. j (A.L.I., Tentative Draft No. 5, 2007)). The Texas Court of Appeals issued its decision in 2011. Medlen v. Strickland, 353 S.W.3d 576 (Tex. App. 2011). The Texas Supreme Court reversed in 2013. Strickland v. Medlen, 397 S.W.3d 184, 186 (Tex. 2013).

[341] *See Discussion of Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm*, *supra* note 334, at 341–42.

liability would make vet services less economically accessible to people, and he offered as support an industry-sponsored study, which he identified as such, by John Brown and Jon Silverman.[342] Professor Cupp's views on the topic date back to at least 1998,[343] well before he met anyone associated with the veterinary medical associations.[344] But his position aligns with the interests of the animal health industry,[345] and consequently, the industry had an ally speaking in favor of comment m at the ALI meeting. Whether the industry knew that Professor Cupp was going to speak in favor of comment m is unknown, but Professor Cupp interacted with industry representatives for several years before his 2007 statement at the Annual Meeting. For example, in 2004, he made a presentation at a symposium sponsored by the Animal Health Institute on noneconomic damages following injury to companion animals.[346] In 2005, he spoke about veterinary malpractice to the American Veterinary Medical Association Task Force on Legal Remedies and also addressed damages for pet loss with the American Veterinary Medical/Legal Association at its annual meeting.[347] In 2006, he made a presentation on noneconomic damages after injury to a companion animal at the annual meeting of the American Animal Hospital Association's Board of Directors.[348] His interaction with the industry appears to have continued after his comment.[349] Professor Cupp's 2020 curriculum vitae says he advises organizations, including the American Veterinary Medical Association, the Animal Health Institute, and the American Animal Hospital Association.[350]

It is unclear how much influence these two speakers had on the ultimate adoption of comment m. However, no one else at the meeting

[342] *See id.* at 341–42; *infra* notes 371–74 (discussing the Brown and Silverman study).

[343] *See Discussion of Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm*, *supra* note 334, at 341–42; Richard L. Cupp Jr., *Barking Up the Wrong Tree*, *supra* note 328; *see also* Richard L. Cupp Jr. & Amber E. Dean, *Veterinarians in the Doghouse: Are Pet Suits Economically Viable?*, 31 BRIEF 43, 48 (2002).

[344] *See* e-mail from Richard Cupp to author (June 10, 2025) (on file with author). Professor Cupp states his thinking "was not influenced by veterinary organizations." *Id.*

[345] *See Strickland*, 397 S.W.3d at 194 ("The Texas Veterinary Medical Association sounds alarms of 'vast unintended consequences,' asserting its members would have no choice but to practice defensive medicine 'to safeguard against potential claims of malpractice.'").

[346] *See* Curriculum Vitae of Richard L. Cupp Jr., John W. Wade Professor of L., Pepperdine Caruso Sch. of L., https://law.pepperdine.edu/faculty-research/richard-cupp/rick-cupp-cv-2020.pdf [https://perma.cc/UEJ8-NWLY].

[347] *Id.*

[348] *Id.*

[349] In 2009, he participated in a national webinar for the American Veterinary Medical Association, entitled, "Engaging Veterinarians in the Animal Law Debate over Noneconomic Damages for Negligent Death of a Pet." *Id.*

[350] *Id.*

addressed it.[351] No one spoke on behalf of pet owners who had suffered, or might one day suffer, serious emotional harm from veterinary malpractice.

Comment m itself clearly rested on the industry's arguments for foreclosing liability. Comment m mentioned a fear that veterinary care would become more expensive if vets faced increased liability.[352] It claimed that rejecting liability "serves to make veterinary services more readily available for pets."[353] The Reporters' Note for comment m called this a "critical concern."[354]

For several reasons, this concern should not have led the Institute to reject a duty for all veterinarians. First, the effect of liability on access to veterinary care is not the only consideration that should go into a duty analysis. The imposition of the duty, like all duty issues, turns on theory, policy, and justice informed by the common law traditions.[355] Second, the *Third Restatement*'s conclusion about the effect of liability on veterinary care is fraught with problems. Its dire prediction assumes that malpractice claims will be so numerous and expensive that insurance prices will rise dramatically, assuming insurance will remain available to spread the loss,[356] and that these costs will be passed on to consumers who will have no choice but to reduce veterinary care for their pets.[357]

There are many reasons to doubt this conclusion, including that the *Restatement*'s formulation of the NIED tort itself has built-in limits to constrain liability.[358] Among other things, the plaintiff must

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[351] *Discussion of Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm*, *supra* note 334, at 341–42. Perhaps it is mere coincidence, but the Reporters' Notes to section 21 of the *Restatement (Third) of Torts: Remedies*, when discussing the substantive law in earlier volumes, cite an article that "extensively defend[s]" the rule rejecting emotional distress claims for negligent harm to a pet. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 Reporters' Notes cmt. c (A.L.I., Tentative Draft No. 2, 2023). That only article cited was written by Phil Goldberg, a law partner of Victor Schwartz's. *See id.*

[352] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012).

[353] *Id.* at cmt. m.

[354] *Id.* at Reporters' Note cmt. m.

[355] Dobbs, *supra* note 209, at 64, 69.

[356] It seems likely that veterinarians' liability could be spread through insurance, although one would expect new intentional act exclusions, something that veterinarians' policies typically lack. Mark Sadler, *Can the Injured Pet Owner Look to Liability Insurance for Satisfaction of a Judgment? The Coverage Implications of Damages for the Injury or Death of a Companion Animal*, 11 ANIMAL L. 283, 300, 304 (2005). If insurers decide to exclude all emotional damages from coverage, veterinarians would presumably self-insure. If damages could not be spread economically through insurance or self-insurance, the government could provide insurance or cap damages for emotional distress.

[357] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (A.L.I. 2012).

[358] *Id.* at cmt. a.

establish the underlying negligence claim. A professional malpractice claim requires the plaintiff to establish the standard of care and deviation from the standard of care with expert testimony.[359] Professional malpractice claims are notoriously difficult to win.[360] The plaintiff must also establish causation, i.e., that the defendant's negligence caused the patient's injury or death, and this is especially hard to prove in veterinary malpractice cases because patients cannot talk and the industry has poor recordkeeping.[361] In addition, the plaintiff must establish the other elements of the NIED tort. As for duty, only the person for whom the services were performed can bring suit, thereby limiting "the scope of liability . . . , [and] avoiding concern about indeterminate and excessive liability."[362] Furthermore, any emotional harm must be "serious,"[363] thereby excluding recovery for some plaintiffs even if they can prove breach of a duty.[364] Finally, not every case of veterinary malpractice will involve the required special relationship to trigger the duty. The determination of a special relationship is not necessarily categorical, but much more case specific.[365]

Forces external to the existing doctrine also make any conclusion about the effect of liability on access to veterinary care very speculative. For example, recovery for emotional distress damages may be very modest because of new theories on how they should be calculated. Sebastien Gay persuasively argues that noneconomic damages should be calculated as "the difference between the pain felt at the death of the companion animal if wrongfully killed and the hypothetical pain felt when the companion animal would have died naturally."[366] In addition, veterinarians would be able to use

[359] Quigley v. McClellan, 154 Cal. Rptr. 3d 719, 726 (Ct. App. 2013); *see* Adam P. Karp, *Litigation Concerning Veterinary Medical Malpractice*, 123 AM. JUR. *Trials* 305, § 17 (2012).

[360] *Cf.* BUREAU OF JUST. STATS., MEDICAL MALPRACTICE INSURANCE CLAIMS IN SEVEN STATES, 2000–2004 1 (2007) ("Most medical malpractice claims were closed without any compensation provided to those claiming a medical injury (claimant)."); BUREAU OF JUST. STATS., TORT CASES IN LARGE COUNTIES 5 (1995) (describing that plaintiffs in medical malpractice cases win a lot less at trial (26%) than plaintiffs generally (53%)).

[361] Jayne De Young, Note, *Toward a More Equitable Approach to Causation in Veterinary Malpractice Actions*, 16 HASTINGS WOMEN'S L.J. 201, 203, 213–15 (2005).

[362] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. b (A.L.I. 2012).

[363] *Id.* § 47.

[364] Pacher v. Invisible Fence of Dayton, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003).

[365] *See supra* text accompanying notes 212–19.

[366] *See* Sebastien Gay, *Companion Animal Capital*, 17 ANIMAL L. 77, 94–95 (advocating for a "companion animal capital model"); *see also* Zachary Paterick, Timothy Paterick & Sandy Sanbar, *A Stepping Stone Toward Companion Animal Protection Through Compensation*, 22 ANIMAL L. 79, 95–99 (2015) (proposing establishing a range of damages through the principles of loss of investment used in wrongful death cases).

contracts to limit liability for negligently inflicted emotional distress,[367] assuming such a provision did not violate public policy, as discussed below.[368] Assuming such a limitation would be enforceable, pet owners could then purchase vet services that protected their emotional wellbeing, or not, depending upon their preferences.

Facts also belie the "critical concern" in comment m. Simply, demand for veterinary services may not fall if veterinarians incur more malpractice liability, as the Reporters acknowledge.[369] The Reporters cite to the report by Brown and Silverman, offered by Professor Cupp at the annual meeting,[370] for the proposition that "a 10 percent increase in prices would result in a 4.3 percent drop in demand."[371] Tellingly, that industry-commissioned study characterizes demand for veterinary services as "inelastic" compared to other services.[372] Demand declines "only" 4.3%.[373] It cites other studies that found even less price elasticity.[374]

The Brown and Silverman study also provides no information about the effect of increased liability on pricing for malpractice insurance. As of 2012, veterinarians paid only $300 per year for one million dollars of coverage.[375] Additional liability may cause the cost of insurance to rise modestly, if at all, and any resulting price increases for veterinary services may be too low to affect demand. Some evidence suggests the price increase would be extremely modest. In 2004, one author calculated the increase at only $212 per year for vets and $0.13 per year for patients, assuming liability were capped at $25,000.[376] In today's dollars, that would be an increase of approximately $363 per year for vets and $0.22 per year for clients. Even if insurance premiums increased tenfold and veterinarians passed the increased cost on to pet owners, the cost of owning a dog

[367] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. h (A.L.I. 2012).

[368] *See infra* text accompanying notes 462–63.

[369] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012) ("The Reporters did not find any evidence about the impact of increased liability on the care exercised by veterinarians.").

[370] *See supra* text accompanying note 342.

[371] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporters' Note cmt. m (A.L.I. 2012) (citing Brown & Silverman, *supra* note 11, *at* 167).

[372] *See* Brown & Silverman, *supra* note 11, at 167.

[373] *Id.*

[374] *Id.* (citing research).

[375] *See* Karp, *supra* note 359, § 19.

[376] Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163, 218 (2004).

or cat would still only increase by $0.52 per year in 2004 dollars,[377] or $0.89 per year in 2025 dollars.

A concern about reduced demand for vet services also assumes that price increases would not be offset by price reductions from other factors, such as efficiency (through the use of assistants or better drugs) or competition (including with over-the-counter medicines).[378] It also assumes that consumers would have no options to offset price increases, such as selecting from a "spectrum of care" for vet services, taking advantage of industry stratification, or purchasing pet insurance.[379] Vets may also stimulate demand to offset the effect of price increases on demand, by reinforcing the human-pet bond and enhancing owners' interest in additional veterinary services.[380] Ultimately, the legislature could always cap damages or offer its own insurance if private insurance prices rose to problematic levels.[381]

Not surprisingly, arguments against veterinarian liability for emotional harm parrot arguments made by advocates of medical malpractice reform. For example, advocates of medical malpractice reform claim that malpractice liability "increase[s] healthcare costs and diminish[es] healthcare availability" because doctors practice "defensive medicine" and leave the practice of medicine.[382] A law review article, written by a law student who is also a veterinarian, drew upon these arguments.[383] Much to that author's credit, he concedes that many factors likely cause price increases for medical care in the U.S.,[384] and acknowledges, "Obviously, no one knows whether noneconomic damages will have a negative effect on the delivery of veterinary care."[385] Nonetheless, he concludes—with

[377] *Id.* at 219. Goldberg, *supra* note 9, at 70–72, has raised questions about Green's analysis.
[378] *See* Brown & Silverman, *supra* note 11, at 168–69, 180, 182.
[379] *See generally* Jules Benson & Emily M. Tincher, *Cost of Care, Access to Care, and Payment Options in Veterinary Practice*, 54 VETERINARY CLINICS N. AM.: SMALL ANIMAL PRAC. 235, 240 (2024).
[380] *See* Brown & Silverman, *supra* note 11, at 172; *see also* Todd W. Lue, Debbie P. Pantenburg & Phillip M. Crawford, *Impact of the Owner-Pet and Client-Veterinarian Bond on the Care That Pets Receive*, 232 J. AM. VETERINARY MED. ASS'N 531, 534 (2008) ("Owners who exhibited behaviors indicative of a strong owner-pet bond were more likely to seek higher levels of veterinary care for their pets, were less sensitive to the price of veterinary care, and were more willing to follow the recommendations of veterinarians, compared with other owners.").
[381] *See* Huss, *supra* note 240, at 539.
[382] Douglas A. Kysar, Thomas O. McGarity & Karen Sokol, *Medical Malpractice Myths and Realities: Why an Insurance Crisis Is Not a Lawsuit Crisis*, 39 LOY. L.A. L. REV. 785, 787–88 (2006).
[383] *See* Steve Barghusen, *Noneconomic Damage Awards in Veterinary Malpractice: Using the Human Medical Experience as a Model to Predict the Effect of Noneconomic Damage Awards on the Practice of Companion Animal Veterinary Medicine*, 17 ANIMAL L. 13 (2010).
[384] *Id.* at 55.
[385] *Id.* at 54.

unfounded certitude—that increased legal liability "is likely to have significant and far-reaching effects."[386] Perhaps a better lesson to draw from the U.S. healthcare response to medical malpractice liability is that the industry's claims of doom are greatly exaggerated and often a "well coordinated public-relations creation . . . ."[387]

Despite the problems with comment m, it was immediately picked up by courts to justify their rulings. For example, the Texas Supreme Court cited it in *Strickland v. Medlen*.[388] That case rejected liability when an animal shelter euthanized a pet, allegedly negligently.[389] The court used the *Third Restatement*'s language in comment m about the unavailability of damages for standalone emotional distress to foreclose consideration of sentimental value as part of intrinsic value.[390] Other courts have since cited *Strickland* and denied recovery for emotional harm.[391]

In sum, the *Third Restatement* sounded the death knell for emotional distress recovery in the context of negligent injury to a pet, notwithstanding a special relationship between the plaintiff and the defendant. The Institute could have taken a more neutral position on the special relationship theory, recognizing that some relationships between a plaintiff and a defendant might justify recovery. But it did not do so.

IV. HOW COURTS CAN CONSTRAIN LIABILITY WHILE ALSO ALLOWING THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

As suggested, there should not be across-the-board protection for veterinarians from NIED claims by pet owners. The empirical evidence does not justify protecting vets, and the harm experienced

386 *Id.* at 55.

387 Kysar et al., *supra* note 382, at 787–88 ("[T]he 'lawsuit' crisis appears to be nothing more than a well coordinated public-relations creation aimed at imposing radical restrictions on common law liability. The best available empirical evidence suggests that the civil justice system is not inundated with baseless claims, that insurance companies' losses in malpractice lawsuits are not driving premium hikes, that doctors are not disappearing, and that there is no surge in 'defensive medicine' contributing to increased healthcare costs.").

388 Strickland v. Medlen, 397 S.W.3d 184, 191 n.50 (Tex. 2013).

389 *Id.* at 186, 198.

390 *See id.* at 190–92, 191 n.50. This part of the decision was right. Otherwise, the damage rules would undermine the substantive law. *See* Weiner, *supra* note 12, at 616.

391 *See, e.g.*, Barking Hound Vill., LLC v. Monyak, 787 S.E.2d 191, 198 (Ga. 2016); Hensley v. Bulk Transp., No. 13cv3, 2014 WL 2515201, at *2–3 (S.D. Miss. June 4, 2014); Simmons v. Farmer, No. S16C-12-011, 2017 WL 5593524, at *3 n.23 (Del. Super. Ct. Nov. 7, 2017); Puffenbarger v. Hadacek, CL190001610-00, 2020 WL 8971532, at *1 (Va. Cir. Ct. June 24, 2020).

by owners can be serious.[392] Compensation, corrective justice, and deterrence all weigh in favor of allowing the claim.

The common law develops incrementally, but it may stagnate altogether if judges fear change will bring an unwarranted expansion of liability.[393] Therefore, judges are most likely to allow a claim for NIED in the pet context (and to reject the *Third Restatement*'s position) if every negligent vet would not be responsible for an owner's emotional distress damages. Sensible limits should exist. This Article proposes that courts only entertain NIED claims in the pet context when there was a special relationship between the plaintiff and defendant, the plaintiff suffered serious emotional harm, the emotional distress was especially likely, and the defendant was grossly negligent.

These four requirements are sensible prerequisites to recovery for NIED in this context and build on the NIED tort as set out in the *Third Restatement*, although it bears repeating that plaintiffs' claims in this context are not really standalone claims for emotional harm. Claims for loss of the human-pet bond are a far cry from the *First* or *Second Restatement*'s references to cases involving pure emotional harm.[394] Instead, pet cases involve negligently inflicted harm to the plaintiff's property. This is an important distinction because the defendant's actions are already tortious regardless of the availability of the NIED claim. Therefore, unlike the classic case of standalone emotional harm, allowing recovery does not limit a defendant's freedom of action solely for the purpose of protecting a plaintiff's peace of mind. Rather, permitting recovery affords make-whole relief when the defendant is already a tortfeasor and the plaintiff has suffered an injury to property.[395] But the *Third Restatement*

[392] Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 831 (2015) (citing research that emotional injuries "are often as damaging as physical harms").

[393] Moody v. Or. Cmty. Credit Union, 542 P.3d 24, 36 (Or. 2023) (noting that allowing emotional distress damages in a new context requires "that we proceed incrementally" because "stability and consistency are critical aspects of common-law decision-making").

[394] *See* RESTATEMENT (FIRST) OF TORTS § 46 illus. 1–3 (A.L.I. 1934). These illustrations involved tricking someone into dressing inappropriately for a dance, telling someone that neighbors believe the plaintiff is grossly immoral, and telling someone that his or her professional music performance was very bad. *Id.* Generally, emotional tranquility was not an interest protected by law, except in the narrow instance when the harm was caused by servants of common carriers who insulted passengers. *See id.* § 1 cmt. a, § 46 cmt. a. Section 46 stated the background rule about the importance of emotional tranquility to the law: there is no interest in freedom from emotional distress, absent otherwise tortious conduct. *Id.* § 46.

[395] If the law treated these claims as regular negligence claims, proximate cause would protect the defendant from responsibility for the plaintiff's emotional wellbeing when the emotional harm was not reasonably foreseeable. *See, e.g.*, Henderson v. Vanderbilt Univ., 534 S.W.3d 426, 433 (Tenn. Ct. App. 2017) (citing Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996)); Engler v. Illinois Farmers Ins., 706 N.W.2d 764, 767 (Minn. 2005).

characterizes these claims as standalone claims for emotional harm,[396] and reform will be more likely by proposing a new element for its NIED tort than by advocating for recovery under section 313 of the *Second Restatement* or suggesting a new approach altogether.

First, the requirement of a special relationship, discussed above,[397] gives courts flexibility to ensure the imposition of the duty is fair to the defendant. The veterinarian-client relationship will often provide a strong basis for finding the special relationship in light of social customs and the parties' expectations.[398] But because special relationships are typically determined on a case-by-case basis,[399] the special relationship in a particular case may be absent on the facts.

Second, the requirement of serious emotional harm has been a staple of standalone claims from the beginning. The fact that the defendant did not physically injure the plaintiff raises questions about the legitimacy of emotional disturbance, which this requirement helps quell.[400] The *Second Restatement* fleshed out an additional policy reason for the requirement of serious emotional distress.[401] Without that requirement, the claim might be trivial and "so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants."[402] In practice, the heightened harm requirement should not foreclose access to the courthouse because plaintiffs' attorneys—who usually work on a contingent-fee basis—already require the potential for a substantial collectible judgment before they will take the case.[403]

Third, the requirement that the plaintiff's serious emotional harm was "especially likely" at the time of the defendant's negligent act already appears in section 47(b) itself, like the previous two

[396] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (A.L.I. 2012).

[397] *See supra* text accompanying notes 212–19.

[398] *See supra* text accompanying notes 231–47.

[399] Courts currently use a variety of tests to establish the "special relationship." *See supra* text accompanying notes 213–19.

[400] RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (A.L.I. 1965). *For arguments against requiring serious emotional harm, at least in the fraud context, see* Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 1, 34–35 (1989).

[401] RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (A.L.I. 1965). This was done when it imposed a physical manifestation requirement for compensable standalone emotional harm, something that has been dropped by many states. *Id.*; Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 101, 107 (2015). Many recognize that there is little connection between serious mental harm and a physical manifestation. *See, e.g.*, John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 816–18 (2007).

[402] RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (A.L.I. 1965).

[403] *See supra* note 199 and accompanying text.

requirements.[404] The requirement is a good one, as it suggests the defendant has a higher level of culpability. Courts often require this or something akin to it when deciding if a special relationship exists.[405] A vet will likely know that his or her gross negligence is "especially likely" to cause serious emotional distress to the client when the vet sees a strong human-pet bond between the client and the patient. For such clients, grossly negligent acts that harm the pet are very likely to cause the client distress as well as sadness from the loss of the companionship.[406]

Fourth, gross negligence is an appropriate requirement.[407] While this requirement is obviously more restrictive than the *Third Restatement*'s requirement of mere negligence, pet owners cannot use the *Third Restatement*'s formulation of the tort of NIED.[408] Therefore, this more restrictive requirement is an attempt to make a modest inroad into the *Third Restatement*'s exclusion.

Although pragmatic considerations undergird my suggestion that gross negligence be an element of the NIED tort when a pet owner seeks recovery for emotional distress, my recommendation is also principled. This requirement would protect defendants in those cases in which liability for the plaintiff's emotional harm seems very disproportionate to the blameworthiness of the defendant's acts. After all, negligence cases involve a wide range of fault. "Negligence" covers both the prolonged disregard of an animal's wellbeing, as well as a momentary lapse of judgment. It applies both to a mistake with very high stakes (e.g., euthanizing a dog before its time) as well as to a mistake with low stakes (e.g., letting two dogs play unsupervised when neither has a known propensity for violence). It applies when the defendant exhibits a great departure from his or her capacity

404 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47(b) (A.L.I. 2012). *But see, e.g.*, Mower v. Baird, 422 P.3d 837, 856–57 (Utah 2018).

405 *See supra* text accompanying note 214.

406 *See infra* text accompanying notes 430–31.

407 Admittedly, gross negligence is an amorphous concept. Scholars *in the criminal law field debate its meaning. See, e.g.,* Michael S. Moore, Heidi M. Hurd & Charles R. Walgreen, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L & PHIL. 147, 148–49 (2011); *see also Taylor v. Dep't of Commerce, 952 P.2d 1090 (Utah Ct. App. 1998) (involving a licensure appeal by vet after losing his license for "gross negligence" and "gross incompetence").* Courts give it different meanings. *See generally* Olga Voinarevich, *An Overview of the Grossly Inconsistent Definitions of "Gross Negligence" in American Jurisprudence*, 48 J. MARSHALL L. REV. *471, 472 (2015). The precise meaning is beyond the scope of this Article.*

408 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (A.L.I. 2012).

(such as a veterinarian),[409] as well as when a defendant exhibits a slight departure from his or her capacity (such as a child who performs just below how other children of that age and maturity would perform).[410] Negligent conduct can be accompanied by wrongful motives (e.g., dislike for the owner) or benevolent motives (e.g., an attempt to help the animal). Other circumstances of wrongdoing may accompany the act, such as fraudulent conduct.[411] The point is that facts matter. It is unnecessary and unwise to treat all negligence cases the same. Blameworthiness should be relevant to recovery for emotional distress in this context.[412]

Admittedly, degrees of negligence have been irrelevant to most tort liability for a long time. The common law did away with degrees of negligence in the early 1900s.[413] While degrees of negligence are irrelevant to liability in an ordinary negligence case, degrees of negligence should be relevant here because the alternative is no liability for emotional harm even when gross negligence exists. In the context of an ordinary negligence claim involving a physical injury, the degree of risk, the defendant's awareness of risk, and the defendant's experience and capacity all figure into whether the defendant was reasonable in acting as the defendant did.[414] Once liability is determined, emotional harm is compensable.[415] In cases involving negligently inflicted property damage, however, damages for emotional harm are precluded, regardless of the level of fault, unless the special requirements of NIED are met,[416] and that claim is denied to pet owners. That makes the negligence label, like any bright line,[417] overbroad. The negligence label forecloses compensation for some very worthy plaintiffs who suffer severe

[409] *See* Moore et al., *supra* note 407, at 151 (discussing Hart's view that "unexercised capacity is the true touchstone of culpability and deterrability").

[410] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 10 (A.L.I. 2012).

[411] Cases with allegations of fraud include McMahon v. Craig, 97 Cal. Rptr. 3d 555, 559 (Ct. App. 2009) and Berry v. Frazier, 307 Cal. Rptr. 3d 778, 787 (Ct. App. 2023).

[412] *See* David B. Millard, *Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation*, 15 IND. L. REV. 617, 636 (1982) ("[D]rawing one straight black line between intentional and negligent infliction cases on the grounds of moral fault ignores the fine gradations of negligence."); *cf.* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1696 (2002) (arguing that fear-of-future disease claims should "depend to a certain extent on how responsible the defendant's conduct was for creating the plaintiff's state of affairs").

[413] Mo. Pac. Ry. Co. v. Walters, 96 P. 346, 347 (Kan. 1908).

[414] *See id.*

[415] *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 20 (A.L.I., Tentative Draft No. 2, 2023).

[416] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 47, 48 (A.L.I. 2012).

[417] *See* Prosser, *supra* note 90, at 880–81.

emotional harm following injury to property, and protects some grossly negligent defendants.[418] A few courts already use gross negligence as a trigger for emotional distress damages in the pet context (without the requirement that the case meet the elements of NIED),[419] although other courts find even gross negligence insufficient to permit recovery for emotional harm.[420] The *Third Restatement* sides with the courts that find gross negligence irrelevant, embracing a strict division between emotional distress damages for intentionally and negligently inflicted torts to property.[421] The law should not be so strict in negligence cases involving pets, especially when the result is no liability for emotional harm from grossly negligent acts.

The way to liberalize the law, sensibly and incrementally, is to recognize a finer gradation of responsibility for wrongdoing in the context of the NIED tort. At early common law, a defendant's responsibility for emotional distress damages increased with moral blame.[422] For the intentional torts to property, all three iterations of the *Restatement of Torts* link emotional distress damages to the defendant's moral blameworthiness: first in section 916,[423] then in

[418] *See* Harabes v. Barkery, Inc., 791 A.2d 1142, 1142–45 (N.J. Super. Ct. 2001) (granting summary judgment for defendants on mental distress and loss of companionship claims for the death of plaintiffs' pet dog, Gabby, who was allegedly negligently subjected to extreme heat for ten hours at dog groomer's, and noting as an analogy that emotional distress is not available under a wrongful death statute for loss of a child or spouse); Green, *supra* note 376, at 191–92.

[419] Johnson v. Wander, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992); Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978).

[420] *See, e.g.*, Brooks v. Jenkins, 104 A.3d 899, 921 (Md. Ct. Spec. App. 2014) (holding that emotional distress damages for the common law trespass claim were unavailable despite gross negligence because "a plaintiff must show an *intent, i.e.,* an intent to deceive or an intent to harm, rather than negligence or something "'more akin to reckless conduct,'"" and evidence in case did not qualify (quoting Barbre v. Pope, 935 A.2d 699, 717 (Md. 2007))); Petco Animal Supplies, Inc. v. Schuster, 144 S.W.3d 554, 562 (Tex. App. 2004) ("Schuster asserts at most gross negligence. . . . [G]rossly negligent property damage can support a claim for mental anguish only where there is evidence of some ill-will, animus, or desire to harm the plaintiff personally. There is no such evidence here." (citation omitted) (citing Seminole Pipeline Co. v. Broad Leaf Partners, Inc., 979 S.W.2d 730 (Tex. App. 1998))); Anne Arundel Cnty. v. Reeves, 252 A.3d 921, 940–41 (Md. 2021) (Hotten, J., dissenting).

[421] The *Third Restatement* recognizes the relevance of recklessness to emotional distress damages in the context of physical harm to property. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 2 (A.L.I. 2010). However, reckless conduct differs from gross negligence. *Id.* § 2 cmt. a.

[422] *See* Weiner, *supra* note 12, at 533–68 (noting that at common law mental distress damages increased with moral blame because, *inter alia*, the law held defendants liable for the natural and probable result of the defendant's acts, and smart money compensated for pain and suffering when aggravated circumstances existed).

[423] Section 916, "Unintended Consequences of Intentional Invasions," said: "Where a person has intentionally invaded the legally protected interests of another, his intention to commit an invasion, the degree of his moral wrongfulness in acting and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting unintended

section 435B,[424] and now in section 33 of the volume on Liability for Physical and Emotional Harm and section 21 of the volume on Remedies.[425] This approach protects the defendant who lacks moral blame and commits a technical conversion or trespass to chattel,[426] but also facilitates the imposition of liability when the defendant's behavior is more wrongful.[427] The more culpable the defendant, the more responsible the defendant should be for the effects of his or her acts.[428] That same reasoning should apply to the tort of NIED.[429]

Finally, a gross negligence requirement would capture those cases in which the emotional distress is likely to be the most serious. Justice Holmes once said, "even a dog distinguishes between being stumbled over and being kicked."[430] Jane Larson, commenting on that quote, has explained that "[s]ocial science research supports Holmes' quip, indicating that the intentional nature of a legal wrong intensifies the emotional distress that a victim suffers, causing feelings of self-doubt, self-blame, humiliation, and distrust of others not suffered by victims of less purposeful or targeted wrongdoing."[431] I have not found similar research on the effects of gross negligence, but it seems intuitive that grossly negligent acts would also intensify a pet owner's emotional distress. In such cases, plaintiffs would experience not only the distress accompanying the loss of the human-pet bond, but also the grief that comes from knowing a pet suffered unnecessarily, such as when the pet is negligently tortured during euthanasia. A plaintiff may also experience self-blame and regret for selecting the vet.

harm." RESTATEMENT (FIRST) OF TORTS § 916 (A.L.I. 1939). "Unintended harm" included emotional harm, at least where it had a physical manifestation like illness. *See id.* at illus. 2; *see also id*. at cmt. a.

[424] RESTATEMENT (SECOND) OF TORTS § 435B cmt. a (A.L.I. 1965).

[425] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 33(b) (A.L.I. 2010); RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 cmt. f (A.L.I., Tentative Draft No. 2, 2023).

[426] *See, e.g.*, DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 62 (2d ed. 2024) (noting a defendant's "bad motive or good faith" is not relevant to show conversion, but only to punitive damages).

[427] *See id.*

[428] Others have justified a similar formula, citing, *inter alia*, the principle of proportionality. *See, e.g.*, Rhee, *supra* note 143, at *868–69.*

[429] *See id.* at 870.

[430] OLIVER WENDELL HOLMES, THE COMMON LAW 7 (Mark DeWolfe Howe ed., Belknap Press of Harvard Univ. Press 1963) (1881).

[431] Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 460–61 n.374 (citing Ronnie Janoff-Bulman, *Criminal vs. Non-Criminal Victimization: Victims' Reactions*, 10 VICTIMOLOGY 498, 501–08 (1985)).

Obviously, judges are free to reject the decisions embodied in the *Third Restatement*. Judges may be more willing now to accept the tort of NIED in the context of harm to pets, perhaps with the requirements proposed, than in the past. Certainly, judges' views about pets and the law have previously shifted. In the late 1800s, judges finally eschewed "artificial reasoning" that denied that dogs were property capable of being the object of larceny, and recognized that times had changed.[432] Judges may again be at such a juncture,[433] given the confluence of three factors: (1) the liberalization of recovery in negligence cases generally for emotional distress damages independent of physical harm;[434] (2) the relatively new recognition of the importance of the human-pet bond;[435] and (3) the shifting cultural norms about companion animals and concomitant shifting expectations about veterinarians.[436]

V. RESPONSES TO ARGUMENTS AGAINST THIS PROPOSAL

This section sets out and then responds to the three biggest arguments against the proposal: (1) whether the proposal is necessary given both the availability of punitive and contract damages; (2) whether the proposal sufficiently aligns with tort

[432] *See* Mullalay v. People, 86 N.Y. 365, 367–68 (1881); *see also* Duff v. Louisville & Nashville R.R., 292 S.W. 814, 815 (Ky. 1927) (explaining the reasoning for the rule that dogs were not "regarded as the subject of larceny"); Sabin v. Smith, 147 P. 1180, 1181 (Cal. Dist. Ct. App. 1915).

[433] *See* Geordie Duckler, *Between Price and Pricelessness: Calculating the Specific Monetary Value of a Dog Intentionally Harmed by Another*, 3 J. ANIMAL L. & ETHICS 121, 125 (reporting that judges appear to have a new receptiveness to claims involving pets).

[434] *See* Goldberg & Zipursky, *supra* note 412, at 1660; Philip Petrov, *The Physical-Emotional Distinction in Tort*, 37 CAN. J.L. & JURIS. 231, 235 (2024) ("[T]ort has been moving in the direction of liberalizing recovery for emotional harm since at least the late nineteenth century.").

[435] *See supra* text accompanying note 233. The legal profession started recognizing the concept of the human-pet bond sometime after it entered the public's consciousness in the 1980s. *See* Hines, *supra* note 233, at 10–11. The earliest case in which this terminology was used was Nichols v. Sukaro Kennels, 555 N.W.2d 689 (Iowa 1996).

[436] Nicole R. Pallotta, *Chattel or Child: The Liminal Status of Companion Animals in Society and Law*, 8 SOC. SCI., no. 5:158, 2019, at 2, 7 (discussing the "shifting cultural norm" by examining, *inter alia*, spending on companion animals, increased "societal acceptance of companion animals as legitimate objects of grief," and increasing number of custody battles over companion animals); Dustin S. Stoltz, Justin Van Ness & Mette Evelyn Bjerre, *The Changing Valuation of Dogs*, 35 SOCIO. FORUM 1183, 1184, 1200 (2020) (drawing on "economic sociology and the sociology of consumption to specify the shifting sociocultural and economic relationships between people and nonhuman animals in the United States" and concluding "dogs have become increasingly 'priceless'"); Andrea Laurent-Simpson, *Considering Alternate Sources of Role Identity: Childless Parents and Their Animal "Kids"*, 32 SOCIO. FORUM 610, 630 (2017) (using identity theory to note a "fundamental shift in the cultural definition of family" that includes now a "multispecies family"); *see also supra* notes 231–47.

doctrine more generally; and (3) whether the proposal's benefits outweigh its disadvantages. As the discussion reveals, these concerns should not stop courts from adopting this Article's proposal.

A. The Proposal Is Necessary

Opponents of this proposal might argue that it is unnecessary because a plaintiff can already recover for his or her emotional harm after a grossly negligent veterinarian injures his or her pet. Opponents might point to both the availability of punitive damages and contract remedies. In addition, opponents might suggest that because the NIED tort is unnecessary, its availability will cause problematic doctrinal redundancy.[437] Unless the various doctrines line up perfectly to produce the same result, doctrinal redundancy will increase the unpredictability of the law and allow each court "a greater ability . . . to achieve the outcome it desires."[438]

This section argues that neither punitive damages nor contract damages eliminate the need for the tort of NIED in this context. In addition, if there is a doctrinal redundancy, it is more likely than not that the doctrines point to the same, not different, answers.

1. Punitive Damages

Tort law often allows punitive damages for gross negligence.[439] In fact, there are pet cases in which courts have acknowledged that plaintiffs may recover punitive damages because a defendant's negligent conduct was sufficiently egregious.[440] At one time, punitive damages were the mechanism by which plaintiffs received compensation for pain and suffering.[441]

Punitive damages, however, are not always available to plaintiffs. There are a number of barriers. Some states preclude punitive damages altogether.[442] Others preclude them when there is only property damage.[443] Some states limit the availability of punitive

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[437] *See* F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635, 668 (2016).

[438] *See id*.

[439] *See* Smith v. Wade, 461 U.S. 30, 48 (1983).

[440] *See* Plotnik v. Meihaus, 146 Cal. Rptr. 3d 585, 600 (Cal. Ct. App. 2012) (citing CAL. CIV. CODE § 3340 (West 2024)); *cf.* Scheele v. Dustin, 998 A.2d 697, 700 (Vt. 2010) (quoting Goodby v. VetPharm, Inc., 974 A.2d 1269, 1272 (Vt. 2009)).

[441] *See, e.g.*, Grenada Bank v. Lester, 89 So. 2, 3 (Miss. 1921).

[442] LORI S. NUGENT & ROBERT W. HAMMESFAHR, PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE § 7:3 (2012–2013 ed. 2012).

[443] *See* Soucek v. Banham, 524 N.W.2d 478, 480 (Minn. Ct. App. 1994) (quoting Indep. Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728, 732 (Minn. Ct. App. 1994)).

damages depending upon the identity or status of the defendant.[444] Some states require malicious behavior, not just grossly negligent behavior, for punitive damages.[445] Punitive damages are typically unavailable if the plaintiff does not recover actual damages, such as when the pet has no market value.[446]

Moreover, punitive damages are the wrong mechanism to address the plaintiff's emotional harm. Punitive damages are supposed to punish and not compensate.[447] The situation used to be otherwise when there was "smart money," but Sedgwick won the famous debate against Greenleaf back in the 1800s.[448] Today, punitive and compensatory damages have very different purposes.[449] In fact, courts typically disallow compensation for pain and suffering as part of a punitive damage award.[450] This is a good practice because otherwise trial and appellate judges would have more difficulty reviewing these awards for excessiveness.[451] It also ensures that plaintiffs who cannot establish the NIED tort will not circumvent the substantive law's restriction on emotional distress damages by obtaining a punitive award.

Even if a plaintiff could receive compensation for emotional distress through a punitive damages award, a plaintiff might receive a *lower* amount of punitive damages overall than if the emotional damages were awarded as part of compensatory damages. This point deserves elaboration because it is counterintuitive. In short, compensatory damages serve as a baseline for the constitutionally

444 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, 2A AMERICAN LAW OF TORTS § 8:57 (Monique C. M. Leahy ed., 2024).

445 *See* Anne Arundel Cnty. v. Reeves, 252 A.3d 921, 932–33 (Md. 2021).

446 *See* Elliott v. Hurst, 817 S.W.2d 877, 881 (Ark. 1991).

447 State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 416 (2003) (citing Cooper Indus., Inc. v. Leatherman Tool Grp. Inc., 532 U.S. 424, 432 (2000)) (noting that compensatory damages are for redress and punitive damages are for deterrence and retribution); Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008); *see* Philip Morris v. Williams, 549 U.S. 346, 358–59 (2007) (Stevens, J., dissenting). Some scholars argue the punishment is a form of private retribution for the plaintiff, not to vindicate the public's interest. *See* Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 423, 435 (2008) (arguing that punitive damages punish private wrongs and act as a form of revenge); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA. L. REV. 957, 961 (2007).

448 *See* Weiner, *supra* note 12, at 566.

449 RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (A.L.I. 1979).

450 *Cooper*, 532 U.S. at 437 n.11. *But see* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 204 (2003) (contesting the Court's description of the historical purpose of punitive damages).

451 *See* Merritt, *supra* note 400, at 38; Sebert, *supra* note 250, at 1655.

permissible size of the plaintiff's punitive damages award.[452] Punitive damages are limited by constitutional law concepts like proportionality.[453] Jury instructions often inform juries about ratios and proportionality.[454] If compensatory damages include damages for emotional harm, then the jury would multiply a larger coefficient by a ratio to calculate punitive damages, assuming the jury computes punitive damages in this way. However, this multiplier effect is lost if the jury folds emotional distress damages into punitive damages. This loss is not affected by a court's willingness to bypass the proportionality guidelines and assess the constitutionality of the punitive damage award flexibly, such as by finding an exception when the compensatory damages are very small, or by including uncompensated harm in its evaluation of the ratio.[455] These tools allow a court to uphold a punitive damage award that would otherwise exceed proportionality guidelines, but they do not allow a court to enhance a punitive damage award that is smaller than it could otherwise be.

Some law and economics scholars have argued that punitive damages should be augmented, or extra-compensatory, in order to assure adequate deterrence.[456] They promote augmented punitive damages because compensatory damages can exclude compensation for some of the real harm caused by the defendant's conduct, such as emotional distress damages. However, currently, punitive damages are not augmented. As one proponent noted, such a vision would "require extensive change" and "is unlikely given the powerful political forces battling."[457] It seems much easier and more transparent to promote the application of the NIED tort in the pet context than to wait for punitive damages to include an augmented

[452] *See State Farm*, 538 U.S. at 425 (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (1991)).

[453] *See State Farm*, 538 U.S. at 426.

[454] *See* Alexandra B. Klass, *Punitive Damages After* Exxon Shipping Company v. Baker*: The Quest for Predictability and the Role of Juries*, 7 U. ST. THOMAS L.J. 182, 191 (2009).

[455] *See* William A. Reppy, Jr., *Punitive Damage Awards in Pet-Death Cases: How Do the Ratio Rules of* State Farm v. Campbell *Apply?*, 1 J. ANIMAL L. & ETHICS 19, 23 (2006).

[456] Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 11–12 (1990) ("Augmented awards would not be designed to punish the defendant for otherwise evil behavior; they would be designed to encourage actors to consider the costs of their action, costs for which our current legal rules do not account.").

[457] *Id.* at 74; *see also* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 245, 324 (2009) (explaining that retributive damages are "a sanction falling between compensatory damages and criminal fines," and the extra-compensatory damage would "go to the plaintiff as compensation for uncompensated dignitary harms, separate and apart from pain and suffering").

amount to make up for the missing compensation for pain and suffering.

Overall, the substantive law should allow pet owners to recover emotional distress damages when a defendant's gross negligence harms the plaintiff's pet, the plaintiff suffers serious emotional harm, that harm was especially likely, and a special relationship existed between the plaintiff and defendant. Courts should not confuse matters by using punitive damages to compensate for emotional harm. The law should be clear.

2. Contract Claims

If a precondition for tort liability is that the plaintiff and defendant have a certain type of relationship, won't that often be contractual? If so, won't the plaintiff have a contract claim that could produce the same sort of damages for emotional harm?[458]

Contract damages are not a complete substitute for the tort of NIED in this context. Sometimes the plaintiff and defendant will not have a contract, although the defendant may have undertaken a duty that constitutes a special relationship. Recall the *Restatement*'s illustration, mentioned above, involving the neighbor who agreed to make daily visits to the plaintiff's house to care for the pets while the plaintiff was out of town.[459] In fact, any gratuitous undertaking could give rise to a duty, although the undertaking would not subject the defendant to contract damages.[460] Even a veterinarian's duty could be predicated on a gratuitous undertaking: imagine a vet who stops at a roadside emergency and offers to treat an injured pet.

In addition, a tort claim is preferrable to a contract claim for plaintiffs for some obvious reasons, even assuming the contract claim would work. First, a tort claim offers the possibility of punitive damages, something that is unavailable with a contract claim.[461] Given the fact that these cases involve gross negligence, the availability of punitive damages seems particularly important. Second, contract damages may be limited by the contract. While tort liability can also be limited by the contract, such contractual provisions would be subject to greater scrutiny because they must be

[458] *See supra* text accompanying notes 183, 251–61.

[459] *See supra* text accompanying note 185 (discussing illustration 3 to section 42, comment f of the *Restatement (Second) of Contracts*).

[460] *See* Joseph H. Beale, Jr., *Gratuitous Undertakings*, 5 HARV. L. REV. 222 (1891).

[461] *See* Sebert, *supra* note 250, at 1569.

consistent with tort law and policy.[462] For example, some professionals, such as lawyers and accountants, cannot use a contract to insulate themselves from tort liability for malpractice.[463] It is unknown whether grossly negligent veterinarians would be able to use contracts to insulate themselves from liability for emotional harm. Consistent with the common law tradition, judges would figure this out as they decide cases. Third, as a practical matter, plaintiffs may be more inclined to seek legal assistance and pursue a claim if the lawyer would work for a contingent fee. This is the standard practice among tort lawyers. While a tort lawyer might also take a contract claim on a contingency basis if it has a similar expected value, this option might be less obvious to a layperson and inhibit the engagement of legal counsel.[464]

Finally, contract claims for emotional distress damages have not typically worked in the pet context.[465] In *Repin v. State*, the case of the botched euthanasia discussed at the outset of this Article, all of the claims for emotional distress failed.[466] The contract claim failed because foreseeability could not alone determine the availability of emotional damages, for that would undermine "the traditional predictability and economic efficiency associated with contract damages."[467] The tort claims failed because of the "historic treatment" of pets "as property" and "the limitation on emotional distress damages for such injury except in cases of malicious or intentional infliction of injury to those animals."[468]

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[462] *See* Ryan Martins, Shannon Price & John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265, 1278 (2020) (talking of the "increased role for public values over private interests"); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 2 cmt. e (A.L.I. 2020) ("Whether a contractual limitation on liability is unenforceable depends on the nature of the parties and their relationship to each other, including whether one party is in a position of dependency; the nature of the conduct or service provided by the party seeking exculpation, including whether the conduct or service is laden with 'public interest'; the extent of the exculpation; the economic setting of the transaction; whether the document is a standardized contract of adhesion; and whether the party seeking exculpation was willing to provide greater protection against tortious conduct for a reasonable, additional fee.").

[463] *See, e.g.*, Swift v. Choe, 674 N.Y.S.2d 17, 19–20 (App. Div. 1998) (involving attorney malpractice); Magic Circle Corp. v. Crowe Horwath, LLP, 72 N.E.3d 919, 925, 927 (Ind. Ct. App. 2017) (involving accountant malpractice).

[464] *See* Sebert, *supra* note 250, at 1578.

[465] *But see* Levy v. Only Cremations for Pets, Inc., 271 Cal. Rptr. 3d 250, 259 (Ct. App. 2020).

[466] *See* Repin v. State, 392 P.3d 1174, 1183–84, 1191 (Wash. Ct. App. 2017); *supra* text accompanying notes 30–39.

[467] *Repin*, 392 P.3d at 1181 (quoting Gaglidari v. Denny's Rest., Inc., 815 P.2d 1362, 1373 (Wash. Ct. App. 1991)).

[468] *Repin*, 392 P.3d at 1182 (quoting Hendrickson v. Tender Care Animal Hosp. Corp., 312 P.3d 52, 57 (Wash. Ct. App. 2013)); *see also* Flynn v. Woodinville Animal Hosp., P.S., No. 84106-8-I, 2023 WL 2366663, at *5 (Wash. Ct. App. March 6, 2023). *But see Levy*, 271 Cal. Rptr. at 254.

While the contract claim is not an adequate substitute for the tort claim, there is an obvious synergy between the contract and tort claims. The contract should enhance the probability that there is the special relationship for purposes of the NIED claim. In *Levy*, for example, the contract was relevant to the establishment of a special relationship,[469] although a contract has not always enhanced the special relationship analysis.[470] Regardless, both *Repin* and *Levy* suggest that courts tend to decide the contract claim and the NIED claim the same way, with the plaintiff able to rely on both claims or neither.[471] This is a good outcome, as it prevents a doctrinal redundancy from becoming problematic.

B. The Proposal Fits with Tort Doctrine Generally

Some readers may be asking themselves why recovery should be available in this context when the law is so grudging with respect to recovery for emotional harm when the plaintiff's friend, or a more distant family member, is tortiously injured. Courts, in fact, sometimes make this point in denying the claim for NIED in the pet context.[472] This concern raises two interrelated questions: Does this proposal undermine tort law's general refusal to recognize standalone emotional harm as legally cognizable harm? Does this proposal embody some arbitrary line-drawing by allowing some plaintiffs, but not all, to recover for serious emotional distress that is negligently inflicted?

First, this proposal is consistent with tort law's general reluctance to allow recovery for standalone emotional harm. Undeniably, emotional harm, independent of physical harm, is often not a legally cognizable harm.[473] Yet plenty of exceptions exist, even in the negligence context, and even without the tort of NIED. Consider, for example, torts like defamation and legal malpractice, both of which

[469] *Levy*, 271 Cal. Rptr. at 262 (quoting Christensen v. Super. Ct. of L.A. Cnty., 820 P.2d 181, 193 (Cal. 1992)).

[470] *See, e.g.*, Steller v. Bischoff, No. 07-CV-24, 2007 WL 9710251, at *6 (D. Wyo. June 25, 2007). *But see Smith v. Univ. Animal Clinic, Inc.*, 30 So. 3d 1154, 1157–58 (La. Ct. App. 2010). *But cf.* Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1199–1201, 1206 (11th Cir. 2007) (permitting suit under the Rehabilitation Act against medical facility when it denied guide dog's access to area where blind mother's child was located).

[471] *See Repin*, 392 P.3d at 1177, 1180; *Levy*, 271 Cal. Rptr. at 260–61.

[472] *See, e.g.*, Altieri v. Nanavati, 573 A.2d 359, 361 (Conn. Super. Ct. 1989); Kaufman v. Langhofer, 222 P.3d 272, 278–79 (Ariz. Ct. App. 2009).

[473] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 48 cmt. g (A.L.I. 2012) ("Pure emotional harm is generally not recoverable not because the harm is not genuine or foreseeable, but because as a matter of policy it is an injury whose cost the legal system should not normally shift, even to someone who is negligent."); *id.* at ch. 8, Scope Note.

may allow a plaintiff to recover for emotional harm,[474] and can be committed negligently.[475]

Moreover, the recognition of legally cognizable harms is constantly evolving and expanding.[476] Courts engage in a policy choice every time they decide whether to recognize a new legally cognizable harm,[477] similar to courts' analysis when they decide duty questions.[478] Courts that recognize a new legally cognizable harm often pair it with new duty requirements to cabin the expansion sensibly.[479] This nuanced approach is evident with the standalone torts for emotional harm themselves.

This Article's proposal follows this familiar path. It encourages courts to recognize emotional distress as a legally cognizable harm in the context of negligently inflicted property damage, but limits the expansion to cases in which the property is a companion animal, the emotional distress is serious, the distress was especially likely, a special relationship existed between the plaintiff and the defendant, and the defendant was grossly negligent. In this way, the proposal maintains tort law's general divide between emotional and physical harm, as it is a useful heuristic for judges.[480] But for reasons of policy

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[474] *See, e.g.*, 53 C.J.S. LIBEL AND SLANDER; INJURIOUS FALSEHOOD § 292 (2025) (discussing recovery for mental suffering from defamation). In a minority of states, emotional distress is available for legal malpractice, especially when the matter was of a personal nature. *See* BARRY LINDAHL, 3 MODERN TORT LAW: LIABILITY AND LITIGATION § 25:52 (2d ed. 2025); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. *g* (A.L.I. 2000); Stewart A. Sutton, *Emotional Distress Damages – Recoverable in Legal Malpractice Actions*, 43 MD. BAR J. 52, 52 (2010) (discussing legal malpractice in Maryland).

[475] *See* RESTATEMENT (SECOND) OF TORTS § 558(c) (A.L.I. 1977) (discussing elements of defamation); Frederick v. Wallerich, 907 N.W.2d 167 (Minn. 2018) (articulating elements of legal malpractice).

[476] Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 302 (2008) ("[T]ort law now recognizes more legally cognizable injuries than it did a century ago, including stand-alone emotional distress, fear of cancer, and a variety of prenatal harms.").

[477] *See* Meyer v. 4-D Insulation Co., 652 P.2d 852, 857 n.5, 857–58 (Or. Ct. App. 1982) (rejecting claim for emotional distress for negligent harm to real property and noting the ad hoc and policy-based nature of the caselaw); *see, e.g.*, Lininger v. Eisenbaum, 764 P.2d 1202, 1210 (Colo. 1988) (rejecting that being born is a legally cognizable injury supporting a wrongful life claim); O'Toole v. Greenberg, 477 N.E.2d 445, 448 (N.Y. 1985) (rejecting that birth of a healthy child is a legally cognizable injury supporting a wrongful conception case); Falcon v. Mem'l Hosp., 462 N.W.2d 44, 52, 56–57 (Mich. 1990) (holding that the loss of a 37.5% chance of living due to a doctor's failure to conduct a potentially life-saving procedure is a legally cognizable injury in a medical malpractice case).

[478] *See* BARRY A. LINDAHL, MODERN TORT LAW § 3:19 n.1 (2024).

[479] For example, after courts in New Mexico recognized that parents could recover the costs associated with a wrongful conception in a medical malpractice action, the courts later refined the elements of the tort of wrongful conception to require that the doctor breached the duty to inform the patient of the mistake as a prerequisite to the recovery of child-rearing expenses. *See* Provencio v. Wenrich, 261 P.3d 1089 (N.M. 2011).

[480] Petrov, *supra* note 434, at 231–33.

and justice, the proposal also makes the plaintiff's emotional distress a legally cognizable harm in this particular context.

It again bears repeating that the proposal would not really expand recovery for standalone emotional harm, anyway. It addresses cases that already involve other legally cognizable harm. The *Third Restatement* defines legally cognizable harm as physical harm, which includes property damage.[481] The emotional distress suffered in pet cases is not like cases in which the emotional distress is unanchored to legally cognizable harm, such as when students suffer anxiety, a loss of self-esteem, or even fright because their teacher negligently gives them a surprise quiz before teaching the tested material. Rather, pet cases involve a defendant who has invaded another legally protected interest of the plaintiff, a fact that should be relevant to the availability of emotional distress damages.[482] The property damage should take these cases outside the category of standalone emotional harm. The property damage, like bodily harm, serves many functions, including corroboration of the genuineness of the emotional harm,[483] especially because the property is a companion animal. It also legitimizes the expansion of liability because people tend to perceive property damage as more morally wrongful than the infliction of pure emotional harm.[484] Most important, the property damage means that the defendant's freedom of action will not be limited solely because the plaintiff can recover for standalone emotional harm,[485] a concern that rightfully limits recovery for freestanding emotional harm.[486] Consequently, emotional distress should be legally cognizable *in this context*.

Second, this proposal would not result in more arbitrary line-drawing. Rather, it is consistent with the existing limits on emotional distress recovery. Undeniably, the law limits the categories of people who can recover for their own emotional loss when another person is

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[481] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 4 (A.L.I. 2010) ("'Physical harm' means the physical impairment of the human body ('bodily harm') or of real property or tangible personal property ('property damage'). Bodily harm includes physical injury, illness, disease, impairment of bodily function, and death."); Petrov, *supra* note 434, at 232, 235.

[482] Johnson v. Supersave Markets, Inc., 686 P.2d 209, 213 (Mont. 1984) (allowing mental distress damages for invasion of plaintiff's liberty by causing a negligent arrest for writing a bad check).

[483] *See* Petrov, *supra* note 434, at 241; *supra* notes 394–96.

[484] *See* Petrov, *supra* note 434, at 240.

[485] *See supra* notes 394–95 and accompanying text.

[486] *See, e.g.*, *supra* note 394 (referring to the *First Restatement*'s examples, including telling the plaintiff that her musical performance was very bad).

tortiously injured.[487] Within the context of the standalone torts for emotional harm, the bystander's claim for emotional harm is restricted to a small group, narrowly defined. The *Second Restatement* requires a bystander's claim for intentional infliction of emotional distress (IIED) to be brought by an "immediate family" member who was present at the location of the outrageous act, unless the plaintiff was present and suffered bodily harm from the distress.[488] The *Third Restatement* narrows the group of bystanders who can recover for IIED to a "close family member," eliminating third parties altogether.[489] For the tort of NIED, the plaintiff seeking bystander recovery must also be a "close family member,"[490] and contemporaneously perceive the injury.[491] The *Third Restatement* defends the requirement by saying it "reflects a pragmatic recognition that a line must be drawn and that witnessing physical injury to a close family member will, in general, cause a more serious shock than if the injured party is not related."[492]

Critics concerned about the disparate treatment between pet owners and distant relatives or friends focus, incorrectly, on bystander recovery. In that context, they may be right that it would be irrational to allow emotional distress recovery for observing an accident involving a dog, but not a close friend. However, this proposal leaves the *Third Restatement*'s approach to bystander recovery unchanged for injury to a pet. Rather, this proposal seeks to allow recovery for emotional distress when a *special relationship* exists between the plaintiff and the defendant. Consequently, the law would not be irrational if it allowed pet owners to use the *special relationship* theory to recover for their emotional distress, but denied distant family members and friends recovery for their emotional distress in the *bystander* context. If anything, this proposal would eliminate the existing irrationality caused by excluding pet owners—and pet owners alone—from using the special relationship theory.

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[487] Loss of consortium is typically available for a spouse, but not necessarily for a child or a parent. *See generally* Robert Michael Ey, *Cause of Action by Parent for Loss of Child's Consortium*, 7 CAUSES OF ACTION 2D 319 §§ 3–5 (2024); George L. Blum, *Action by or on Behalf of Minor Child, or Presumed Minor Child, for Loss of Parental Consortium—General Considerations*, 4 A.L.R 7th Art. 1 § 32 (2015).

[488] RESTATEMENT (SECOND) OF TORTS § 46(2) (A.L.I. 1965).

[489] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 46 cmts. i, m (A.L.I. 2012); *id.* § 48 cmt. f.

[490] *Id.* § 48. The *Third Restatement* leaves the definition of "close family member" to each state. *Id.* at cmt. f.

[491] *Id.* at cmts. e, f.

[492] *Id.* at cmt. f.

The special relationship theory could, in fact, also allow recovery for the emotional distress associated with the serious injury of a close friend. Nothing precludes it. Imagine, for example, that the plaintiff interviews several caregivers and hires the defendant to care for her best friend, telling the caregiver that she loves her best friend and will be devastated if the friend cannot be treated well and respectfully. The caregiver promises the plaintiff to treat her friend well, recognizing that the friend's unnecessary hardship would devastate the plaintiff. If the caregiver's gross negligence causes the best friend unnecessary pain, agony, and permanent disability, it is arguable that the defendant should be liable to the plaintiff too, both for her own pain and agony from watching her friend suffer, as well as for her loss of her best friend's companionship. The special relationship between the plaintiff and the defendant arguably created a moral, and legal, obligation to the plaintiff as well as the friend. The defendant undertook this obligation voluntarily.

Admittedly, a court might resist the plaintiff's attempt to recover for her own emotional distress based on a special relationship between the plaintiff and the caregiver. Such a claim would subject the caregiver to multiple suits for gross negligence. The best friend herself would also have a claim against the caregiver. While a court might be concerned about the multiplicity of suits and therefore refuse to label the relationship between the friend and the caregiver as a "special relationship" for purposes of tort liability, that response rests upon a pragmatic concern that does not negate the underlying principle—i.e., a defendant can acquire a tort duty when the defendant voluntarily undertakes a responsibility that is inextricably tied to the plaintiff's emotional wellbeing. Importantly, the pragmatic concern about a multiplicity of suits is absent in the pet context. While the best friend has her own tort action against the wrongdoer, a pet does not. Because the possibility of damages for emotional distress is an important part of deterrence in the pet context (i.e., these damages are necessary to attract legal counsel to bring the claim in the first place),[493] the law should subject the defendant to liability for the pet owner's distress under the special relationship theory.

As already discussed, bystander recovery and special relationship recovery in the pet context further tort law's objectives differently.[494] Deterrence and corrective justice are implicated much more by the

[493] *See supra* text accompanying notes 198–99.
[494] *See supra* Part III.A.

special relationship fact pattern than by the bystander fact pattern. So too the danger of a multiplicity of suits is much greater in the bystander context.[495] In short, there are compelling reasons to allow recovery for loss of the human-pet bond only in the special relationship context. Doing so would not create irrational lines.

To the extent any irrationality would exist, it would come from the definition of *special relationship* and the term's grudging application in some contexts. In *Burgess*, the mother could use the special-relationship theory to recover for her emotional distress associated with the harm to her child, but the father could not.[496] He was seen as an indirect victim, i.e., a bystander.[497] While the distinction would matter little if he observed the injury to his child (since he was a close family member), the absence of a special relationship would make a difference if he were outside the operating room.[498] A similar issue could exist with a co-owned pet if only one owner entered the contract with the veterinarian, although both owners suffered serious emotional distress from the veterinarian's gross negligence. This inconsistency may be resolved if an undertaking were also given to the other owner, or if the court relaxed the requirements for a special relationship.[499] Or, the inconsistency might persist, but be no more problematic than in any other special relationship context.

Perhaps a less satisfying answer to some readers' unease about potential arbitrary line-drawing, but nonetheless a true answer, is that the current doctrinal structure is full of arbitrariness. It is baked into the system. For example, even slight negligence will support a claim for emotional distress damages if the plaintiff suffers any physical injury, no matter how small, and even if the plaintiff's emotional distress is minor.[500] Yet gross negligence will not support a claim for emotional distress damages, even if the plaintiff suffers great injury to property and severe emotional distress.[501] The *Third Restatement* defends the current arbitrary lines with the often-

[495] *See supra* text accompanying notes 205–10.

[496] *See* Burgess v. Superior Ct., 831 P.2d 1197, 1208 n.8 (Cal. 1992).

[497] *See id.* Technically, this language was obiter as the father's suit was dismissed by the trial court for "failure to comply with discovery requests." *Id.* at 1199.

[498] The case implies he was outside the operating room. *See id.* at 1199 n.4, 1201, 1204 n.8.

[499] *See, e.g.*, Tomlinson v. Metro. Pediatrics, LLC, 412 P.3d 133, 142–43 (Or. 2018) (holding that the parents' lack of privity with doctor did not stop a NIED claim for emotional distress damages considering "whether the relationship between the parties is a type of relationship that generally entails a mutual expectation of service and reliance[,]" "whether recognizing such a claim would interfere with or impair the loyalties that the professional owes to the client[,]" and "whether the potential plaintiffs were identifiable to the defendant or otherwise could be defined as a class that avoids indeterminate liability").

[500] *See supra* note 47 and accompanying text.

[501] *See supra* text accompanying note 188.

repeated phrase, "a line must be drawn" somewhere.[502] The question at hand is not whether there will be arbitrary lines (for there always will be some), but whether the doctrinal structure furthers the general aims of tort law.[503] As this Article has argued, an explicit carveout from NIED tort liability solely for vets does not advance the general aims of tort law. Consequently, this proposal eliminates the arbitrariness caused by comment m's categorical exclusion of one profession—veterinarians—from potential liability for emotional distress.[504]

All in all, this proposal is consistent with tort law generally.

C. Other Concerns Do Not Have Merit

There are undoubtedly other questions and concerns that this proposal raises. I briefly tackle five issues that seem likely to arise. None of them are compelling.

First, opponents may worry that "juries may impose liability that is not commensurate with the culpability of defendant's conduct."[505] This is always a concern and there is no reason to think it would be worse in the pet context than the personal injury context or other contexts that permit emotional damages (e.g., defamation). If anything, this concern is less pressing here because gross negligence would be a requirement for recovery. In addition, the special relationship between the plaintiff and defendant suggests the defendant would have a higher level of culpability: in most cases the defendant would have foreseen, or should have foreseen, the potential harm.[506] The other elements of the tort also afford protection. The

[502] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 48 cmt. f (A.L.I. 2012); *see also supra* text accompanying note 188 (saying "lines—arbitrary at times— . . . are necessary"); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (A.L.I. 2012).

[503] *See generally* Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (arguing that equity and fairness are more important than strict lines that promote consistency and certainty).

[504] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (A.L.I. 2012).

[505] Portee v. Jaffee, 417 A.2d 521, 525–26 (N.J. 1980); *see also* Goldberg, *supra* note 9, at 48.

[506] While not the be-all and end-all, the foreseeability of result often suggests culpability. *See* Gonzales v. Pers. Storage, Inc., 56 Cal. App. 4th 464, 477 (1997). This is true even when the claim sounds in contract. *See, e.g.*, Levy v. Only Cremations for Pets, Inc., 271 Cal. Rptr. 3d 250, 254, 261 (Ct. App. 2020). *But see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. i (A.L.I. 2012) (suggesting that foreseeability alone cannot be "the standard to limit liability for emotional harm," although courts often state the test of "foreseeability" in determining negligently caused emotional harm is recoverable). *See also* MODEL PENAL CODE § 2.02(2)(d) (A.L.I. 2023) (requiring an examination of the nature and purpose of conduct as part of a negligence assessment).

harm must have been "especially likely."[507] The plaintiff must have, in fact, suffered serious emotional distress.[508] Nonetheless, if these protections against excessive liability fail, courts have tools to combat the problem: new trials and remittiturs.

Second, opponents may raise concerns about fake claims.[509] Others already have dealt well with the issue of spurious claims (i.e., plaintiffs who fake an injury or the extent of the injury),[510] so I will only focus on the other possible issue: whether the causal uncertainty in these cases cautions against expanding recovery.[511] I think not. While emotional harm caused by property damage is unlike physical pain that flows from a physical injury (i.e., it is not nociceptive or neuropathic pain),[512] the law has never limited recovery for emotional harm to that which is physiologically linked to a physical injury.[513] For example, pain and suffering damages can include a plaintiff's sadness from being unable to partake in activities that the plaintiff once enjoyed.[514] While juries will have to figure out whether the plaintiff's emotional injury is attributable to the pet's injury or death, the law should not allow wrongdoers to benefit from causal uncertainty by foreclosing recovery.[515] A court could always, on a case-by-case basis, consider the strength of the causal connection as

[507] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47(b) (A.L.I. 2012).

[508] *Id.*

[509] *See* Goldberg, *supra* note 9, at 48.

[510] On spurious claims, see Levit, *supra* note 29, at 187–88 (suggesting there are now tools to distinguish valid and invalid claims). *See also* Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 617–22 (2010); Betsy J. Grey, *Neuroscience, Emotional Harm, and Emotional Distress Tort Claims*, 7 AM. J. BIOETHICS 65, 66–67 (2007). *See generally* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 212–13 (1941) (arguing it is a matter of proof and not a reason to deny such claims).

[511] *See also* Goldberg, *supra* note 9, at 48; *cf.* Goldberg & Zipursky, *supra* note 412, at 1703 (noting for medical monitoring claims, "the absence of evidence of a causal link might render the emotional distress unreasonable as a matter of law").

[512] *See Pain*, NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE (July 22, 2024), https://www.ninds.nih.gov/health-information/disorders/pain [https://perma.cc/MQD5-FQWK].

[513] *See* Goldberg & Zipursky, *supra* note 412, at 1660, 1663–64. Thanks to Ben Zipursky for this insight.

[514] *See, e.g.*, Rounds v. Rush Trucking Corp., 51 F. Supp. 2d 374, 379 (W.D.N.Y. 1999) ("[L]oss of enjoyment of life and mental suffering or anguish 'based on a plaintiff's inability to engage in certain activities,' are considered elements of pain and suffering for the purposes of damage awards . . . .").

[515] *Cf.* Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948); Sindell v. Abbott Labs., 607 P.2d 924, 929–30 (Cal. 1980).

part of its duty analysis,[516] which would also encompass a consideration of the defendant's moral blame.[517]

Third, opponents may prefer the status quo because they believe the law should encourage individuals to "get over it."[518] This argument seems much more appropriate when the injury is to property that is not a pet. Research suggests that some individuals suffer more from the loss of a pet than from the loss of a family member.[519] Part of the reason owners can experience great pain and suffering is because companion animals are sentient.[520] Dogs, for instance, "experience positive emotions, like love and attachment, and . . . have a level of sentience and awareness comparable to a human child."[521] People whose pets are injured tend to grieve not only for their own loss of the human-pet bond, but also for the animal's own pain and suffering.[522] Moreover, this get-over-it attitude is inconsistent with many other areas of the law involving animals. For instance, the law encourages owners to care for their pets by imposing criminal liability for animal cruelty, including neglect.[523] The law also encourages humane treatment of pets by awarding plaintiffs compensation for the cost of taking an injured pet to the vet.[524] As stated at the outset of this Article, to deny the importance of the human-pet bond produces "a hopelessly inauthentic account of humanity."[525]

Fourth, opponents may claim the proposal invites difficult line-drawing between pets.[526] Will a court allow claims for emotional distress when the plaintiff loses a fish? This Article bypassed the line-

[516] *See, e.g.*, Steller v. Bischoff, No. 07-CV-24, 2007 WL 9710251, at *9 (D. Wyo. June 25, 2007) (citing Clomon v. Monroe City Sch. Bd., 572 So. 2d 571, 583 (La. 1990)) (noting a court is to consider whether "the circumstances present a great likelihood of genuine mental distress").

[517] *Steller*, 2007 WL 9710251 at *10.

[518] *See* Goldberg & Zipursky, *supra* note 412, at 1680–81, 1688; *see also* Goldberg, *supra* note 392, at 847–50 (considering whether plaintiffs have a "duty to reasonably regulate one's own emotional well-being"); Eugene Kontorovich, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 493 (2001).

[519] *See* Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 806 (2003).

[520] *See id.* at 806–07.

[521] *See* Paterick et al., *supra* note 366, at 84–85.

[522] *Cf.* Lue et al., *supra* note 380, at 539 (noting that owners consistently demonstrate—through a preference for pain medication for their pets before, after, and during surgery—that they do not want their pets to experience pain while in the hospital).

[523] *See* Geoffrey C. Fleck, *Ethical Considerations in the Prosecution of Animal Cruelty Cases*, 45 PROSECUTOR 38, 39 (2011) ("[W]e currently enjoy an exponential growth in the interest, awareness, and prosecution of animal crimes.").

[524] *See supra* text accompanying note 41.

[525] *See supra* text accompanying note 29.

[526] *See, e.g.*, Pacher v. Invisible Fence of Dayton, 798 N.E.2d 1121, 1126 (Ohio Ct. App. 2003); Rabideau v. City of Racine, 627 N.W.2d 795, 802 (Wis. 2001).

drawing issue early on by defining pets as companion animals, specifically cats and dogs.[527] Others have tackled this question and so it is not considered again here.[528] Line-drawing between pets will undoubtedly be fleshed out through the common law process.

Finally, some have asserted that allowing recovery for any noneconomic harm based on the loss of a pet is "a sweeping change to two hundred years of tort law."[529] Actually, that is not true. Quite a few cases exist at early common law, prior to the *Restatement of Torts*, in which juries included recovery for the sentimental value of the pet even in cases of negligence.[530] That history has been lost, but my companion article resurrects it.[531] As time passed, many courts limited recovery for emotional harm, but others allowed emotional distress damages in the intentional tort context, and occasionally in the negligence context.[532] Certainly today the Remedies volume of the *Third Restatement* recognizes the importance of pets to their owners and makes express the possibility of emotional distress damages in the intentional tort context.[533]

Moreover, this Article's proposal is not a sweeping change: it would change the NIED tort only marginally, but the change would allow recognition of the importance of the human-pet bond, capture the

[527] *See supra* note 15.

[528] On the ability to draw lines between companion animals and other types of animals, see Rebecca J. Russ, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 84–88 (2002) (arguing line-drawing occurs between animals in many contexts).

[529] *See* Schwartz & Laird, *supra* note 333, at 258.

[530] *See* Weiner, *supra* note 12, at 539–53, 560–61 (citing, *inter alia*, *Sentell v. New Orleans & Carrollton R.R. Co.,* 166 U.S. 698, 700–01 (1897); Pardee v. Royal Baking Co., 221 P. 847, 848 (Utah 1923); Citizens' Rapid-Transit Co. v. Dew, 45 S.W. 790, 791 (Tenn. 1898); Flowerree v. Thornberry, 183 S.W. 359, 361 (Mo. Ct. App. 1916)); *see also* Buchanan v. Stout, 108 N.Y.S. 38, 39 (App. Div. 1908) (dictum); *cf.* Weiner, *supra* note 12, at 565 nn.256–57 (citing statutes). For more modern cases, see, for example, Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1070–71 (Haw. 1981); Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978) (involving gross negligence); Johnson v. Wander, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (involving gross negligence).

[531] *See generally* Weiner, *supra* note 12, at 539–68 (explaining how jury awards included such recovery after plaintiffs testified about their attachment to their pets, and the doctrinal hooks courts used to allow such damages).

[532] *E.g.*, *id.* at 579–82 (discussing the negligence cases of Brousseau v. Rosenthal, 443 N.Y.S.2d 285 (Civ. Ct. 1980) and Anzalone v. Kragness, 826 N.E.2d 472, 475 (Ill. App. Ct. 2005)); Weiner, *supra* note 12, at 585–89 (discussing intentional tort cases of Fredeen v. Stride, 525 P.2d 166 (Or. 1974), Hatahley v. United States, 351 U.S. 173, 181 (1956), and La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964)); Weiner, *supra* note 12, at 590–91 (discussing intentional tort cases of Plotnik v. Meihaus, 146 Cal. Rptr. 3d 585, 592 (Ct. App. 2012) and Womack v. Von Rardon, 135 P.3d 542, 543 (Wash. Ct. App. 2006)). For other negligence cases in which recovery for emotional harm was allowed, see *supra* notes 49 (citing cases after *but see* signal), 144 (citing cases after *but see* signal), 167, 179, and 312–13.

[533] *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 21 (A.L.I., Tentative Draft No. 2, 2023); *see also supra* note 13.

changing expectations about veterinary medicine, and advance tort law's objectives. What is inconsistent with two hundred years of tort law is the *Third Restatement*'s singling out of pet owners to deny them a claim, as well as protecting one profession—veterinarians—from liability for emotional harm.[534] Hopefully, this Article will breathe life back into the tort of NIED and convince common law courts to allow it when appropriate.

CONCLUSION

Tort law fails to provide make-whole relief to pet owners for their loss of the human-pet bond when it rejects sentimental value as part of the pet's intrinsic value, parasitic damages for negligent injury to property, *and* the tort of NIED for standalone emotional harm. The *Restatement (Third) of Torts* unfortunately eliminated the special relationship theory as a mechanism to trigger tort liability for NIED in cases involving pets. The *Restatement (Third) of Torts* went too far in doing so. This Article has suggested that recovery for loss of the human-pet bond is appropriate when the pet is (or was) a companion animal, the plaintiff and defendant had a special relationship, the defendant acted with gross negligence, the plaintiff experienced serious emotional distress, and the emotional harm was especially likely to occur. Liability in this context would further tort law's objectives of compensation, deterrence, and corrective justice. It would also be consistent with tort doctrine generally, including the differences between bystander and special relationship cases in the context of the NIED tort. This proposal builds upon the *Third Restatement*'s recent recognition in the Remedies volume that the loss of the human-pet bond is real harm that can be compensated, albeit after an intentional tort. In short, this Article's modest proposal would move the common law in the right direction.

[534] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (A.L.I. 2012) (explaining that an actor who negligently injures the plaintiff's pet is not liable for the emotional harm suffered by the plaintiff, and that such a rule is meant to make veterinary services more readily available for pets).