

Animal Consortium

A New Use of an Old Action¹

By David Favre

Imagine that a seven-year-old golden retriever named Goldie has been an adopted part of the Jones family for many years. She is an integrated family member, spending evenings with the human members and often accompanying them on walks or trips. One day, she is out in the front yard, barking. A neighbor gets upset at the noise, calls Goldie over, and stabs her five times with a knife; she staggers to her yard and dies within minutes. Thirty minutes later, she is discovered dead by the family's 16-year-old daughter. The family sues the neighbor for damages consisting of loss of companionship, comfort, and affection. What damages are actually recoverable?

Existing legal context

In a majority of states, the Joneses could recover only the fair market value of Goldie at the time of the incident, perhaps the \$200 adoption fee at best.² Repeatedly, plaintiffs have filed property damage lawsuits seeking recovery for the negligent or intentional injury or death of a companion animal only to run into a wall of negativity at

the state supreme court level. For example, the Texas Supreme Court has stated, "Therefore, like courts in the overwhelming majority of other states, the Restatement of the Law of Torts, and the other Texas courts of appeals that have considered this question, we reject emotion-based liability and prohibit recovery for loss of the human-animal bond."³

A more rewarding approach occurs when plaintiffs leave the world of property damages and enter the world of individual civil rights with roots in the Constitution. The federal constitutional claim arises as a Section 1983 action under the federal Civil Rights Act.⁴ The basic purpose of a Section 1983 damage award is to compensate persons for injuries caused by the deprivation of their constitutional rights.⁵ A 2016 opinion in Michigan clarified that this purpose applied when government agents shot the plaintiffs' dog while performing government functions.⁶ In rejecting the defendant's position that damages should be limited to the Michigan view of the dog's property value, the court allowed that damages could be much broader and include noneconomic damages.⁷

The primary limitation of a civil rights cause of action is that the actor must be a government agent when the event occurs. Thus, there can be two very different jury awards for the death of a companion animal depending on whether the bad actor is a neighbor or a local police officer. This discrepancy does not seem appropriate, and the adoption of animal consortium as a cause of action will allow for more consistent outcomes.⁸

Common law consortium

The nominal recovery available for the loss of a companion animal such as Goldie doesn't sit well with many people. That is because people increasingly view companion animals less like property, as they are seen in the law, and more like family members. When someone kills a member of a family, it is a harm recognized at common law under the umbrella of loss of consortium. This cause of action, which initially recognized only the economic part of family relationships, has expanded over the past 100-plus years to include the social



aspect of relationships between humans.⁹ The term was defined by a modern Ohio Supreme Court: “Consortium includes services, society, companionship, comfort, love and solace.”¹⁰ But the umbrella of consortium can expand further. This article proposes a new cause of action for the intentional killing of a companion animal: animal consortium.

The existing tort of loss of consortium can be expanded to include companion animals who have increasingly become integral parts of our emotional and physical families. While the term “family” traditionally speaks in term of persons living together under one roof, many individuals today define family to include companion animals. Once it is agreed that, for some individuals, their four-legged beings are part of the family, the public policy underlying loss of consortium should also support recovery for the intentional killing of a companion animal.¹¹

This process of expansion can be charted in the cases of the New Mexico Supreme Court. In 1998, the court set a national precedent by allowing a grandmother to bring a loss of consortium claim for the negligently inflicted death of her 22-month-old granddaughter.¹² The court emphasized the closeness of the grandmother’s relationship to her granddaughter in reaching its holding and rejected the argument that allowing the claim would lead to increased insurance costs and litigation. In 2003, the New Mexico Supreme Court again expanded the availability of loss of consortium, this time to unmarried cohabitating partners who shared “intimate familial relationship[s].”¹³

With the expansion of loss of consortium claims to cover various familial relationships, a natural next step is to include companion animals. The “property” status of animals should not be considered a hindrance to the expansion of the doctrine to companion animals. At one time, both wives and children did not possess full legal rights and were considered a husband’s property.¹⁴ As society has already decreed that the intentional, unjustified killing of an animal can result in a felony conviction in criminal courts,¹⁵ it is time to allow for civil recovery by family members harmed by the felon’s intentional acts. However, this proposal is not to suggest that the killed animal would have any residual legal cause of action; instead, the proposal focuses on the harm to the human member based on the animal-human bond.

Within the family

This proposal is predicated on the fact that companion animals can indeed be part of an intimate family. Many articles in the general press support the existence of this relationship. Science also supports the recognition of this relationship and the positive physiological effects of companion animal ownership, and a wealth of studies demonstrate the

At a Glance

The reality is that animals are property, and courts are typically unwilling to extend financial recovery to include the value of the emotional loss of an animal to the animal’s owner.

The history of the concept of consortium shows that the legal system has come to accept that the compensable harm is not limited to economic consequences, nor is it limited to husband and wife relationships.

Companion animals are emotionally and psychologically important to the human members of many families, and animals have been elevated above a property context in other family-related legal areas. It is appropriate to extend the common law cause of action of consortium to encompass intentional harm for an animal’s death.

positive psychophysiological and psychosocial effects of human-animal interactions. Companion animals provide owners with social attention, interpersonal interactions, and elevated mood.¹⁶

It should also be noted that animals have been elevated above a property context in other family-related legal areas. In Michigan, a human may create a trust for the benefit of his or her companion animal.¹⁷ Another area involves human divorce: under a 2017 Alaska law, the court may take into account the “best interests” of the animal when deciding on placement between contesting spouses, similar to the placement of a child.¹⁸ Finally, many states have expanded domestic protective orders to include companion animals.¹⁹ These examples reflect the increasing recognition and acknowledgment of the importance of companion animals to the humans within a family.

An action in consortium

The expansion of the cause of action for loss of consortium should be available only for intentional harm resulting in the *death* of a companion animal—not for injuries. This proposal should not be viewed as a step toward awarding the animal damages for wrongful death. Additionally, as the science underlying the human-animal bond exists primarily for dogs, animal consortium claims should be available only for the loss of dogs and cats. Only one claim per family could be allowed. The plaintiff would have the obligation to show both the defendant's tortious action and the animal's standing as a member of the intimate family at the time of death. These limitations are a logical starting point from a practical implementation and a public policy standpoint.²⁰

If the courts of a particular state are unwilling to allow the expansion of animal consortium, then the legislative route is possible. Indeed, as of 2016, five states have adopted modest laws that provide some level of damages beyond market value for injury or death of animals. However, their provisions are diverse, and there is no attempt to invoke the concept of consortium.²¹

The best reference point for a statutory approach is Florida.²² It would be relatively easy to amend this well-written statute to allow an action for companion animals. The bracketed language is provided as optional language:

(Sec.3a) For the intentional harm of a companion animal that results in the death of the animal, surviving intimate family members may recover for loss of companionship and the mental pain and suffering associated with the death. Companion animals are defined as the domestic species of dogs and cats that live their daily lives as part of the family. [There can be only one action filed for each deceased companion animal.] [The total recovery for an action under this section shall not exceed [\$50,000].] [Intimate family members are those who interacted with the animal on a regular basis so as to form an emotional bond with the animal.] [Damages for loss of companionship shall relate to the strength of the bond with the deceased that existed at the time of the harm to the companion animal.]²³

Conclusion

Judges have the power to adapt the common law by expanding the loss of consortium doctrine to provide appropriate damages for intentionally killing a person's companion animal. Just as judges can empower juries to value lost relationships, legislatures may do the same by codifying the common law with the modifications suggested here. For all of the above reasons, a cause of action for loss of consortium should be made available to any owner whose companion animal is intentionally killed. ■



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Animal Law: Welfare, Interest, and Rights (2nd ed).

ENDNOTES

1. This is a short summary of a related law-review article, Favre & Dickinson, *Animal Consortium*, 84 *Tenn L Rev* 893 (2017).
2. Barton & Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 *NYL Sch L Rev* 411, 411 (1989) and Roukas, *Determining the Value of Companion Animals in Wrongful Harm or Death Claims: A Survey of US Decisions and an Argument for the Authorization to Recover for Loss of Companionship in Such Cases*, MSU College of Law (2011) <<https://www.animallaw.info/article/determining-value-companion-animals-wrongful-harm-or-death-claims-survey-us-decisions-and>>. All websites cited in this article were accessed June 1, 2018.
3. *Strickland v Medlen*, 397 SW3d 184, 191–192, n 49; 56 *Tex Sup Ct J* 470 (Tex 2013) and *Animal Consortium*, 84 *Tenn L Rev* at 896.
4. 42 USC 1983.
5. *Smith v Heath*, 691 F2d 220, 226 (CA 6, 1982).
6. *Moreno v Hughes*, 157 F Supp 3d 687, 688 (ED Mich 2016).
7. *Id.* at 689–690. For the same result under a state constitutional claim, see *Brooks v Jenkins*, 220 Md App 444, 461–462; 104 A3d 899 (2014).
8. *Animal Consortium*, 84 *Tenn L Rev* at 902 and 42 USC 1983.
9. *Animal Consortium*, 84 *Tenn L Rev* at 905–907.
10. *Gallimore v Children's Hosp Med Ctr*, 67 Ohio St 3d 244, 251; 617 NE2d 1052 (1993).
11. *Animal Consortium*, 84 *Tenn L Rev* at 909–911.
12. *Fernandez v Walgreen Hastings Co*, 126 NM 263, 265, 271; 968 P2d 774 (1998).
13. *Lozoya v Sanchez*, 133 NM 579, 588; 66 P3d 948 (2003).
14. *Animal Consortium*, 84 *Tenn L Rev* at 893.
15. *Animal Consortium*, 84 *Tenn L Rev* at 925. For Michigan, see MCL 750.50b.
16. See, e.g., Beetz et al., *Psychosocial and Psychophysiological Effects of Human-Animal Interactions: The Possible Role of Oxytocin*, 3 *Frontiers Psych* 234 (2012) <<https://www.frontiersin.org/articles/10.3389/fpsyg.2012.00234/full>>.
17. MCL 700.2722.
18. Alaska Stat § 18.65.520(a) and *Animal Consortium*, 84 *Tenn L Rev* at 922. See also Pallotta, *Alaska Legislature Becomes First to Require Consideration of Animals' Interests in Custody Cases*, Animal Legal Defense Fund (posted January 20, 2017) <<http://aldf.org/blog/alaska-legislature-becomes-first-to-require-consideration-of-animals-interests-in-custody-cases/>> and Brulliard, *In a first, Alaska Divorce Courts Will Now Treat Pets More Like Children*, *The Washington Post* (January 24, 2017) <https://www.washingtonpost.com/news/animalia/wp/2017/01/24/in-a-first-alaska-divorce-courts-will-now-treat-pets-more-like-children/?hpid=hp_hp-top-table-main-alaska-divorce-pets_3ba3c72e04ab>.
19. Wisch, *Domestic Violence and Pets: List of States that Include Pets in Protection Orders*, MSU College of Law (2017) <<https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders>>.
20. *Animal Consortium*, 84 *Tenn L Rev* at 926.
21. Conn Gen Stat § 22-351a, 510 Ill Comp Stat 70/16.3, Md Code Cts & Jud Proc § 11-110, Nev Rev Stat § 41.740, and Tenn Code 44-17-403(a)(1). *Animal Consortium*, 84 *Tenn L Rev* at 926–928.
22. Fla Stat § 768.21.
23. *Animal Consortium*, 84 *Tenn L Rev* at 928–929.