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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Starcher, J., dissenting:

This opinion is simply medieval. The majority blithely says that “our law categorizes dogs as personal property” – that “damages for sentimental value, mental suffering, and emotional distress are not recoverable” when one’s pet is injured or killed by the negligence of another person. In coming to this conclusion, the majority overlooks the fact that the “law” in question is the common law which is controlled by this Court. There was nothing stopping the majority from changing that common law other than their lack of concern for pet owners and the emotional bonds that exist between owners and their pets.

When the common law of the past is no longer in harmony with the institutions or societal conditions of the present, this Court is constitutionally empowered to adjust the common law to current needs. As we stated in Syllabus Point 1 of *Powell v. Sims*, 5 W.Va. 1 (1871), “[t]he common law of England is in force in this State only so far as it is in harmony with its institutions, and its principles applicable to the state of the country and the condition of society.” As Justice Holmes succinctly reflected, “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasisovereign that can be identified.” *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) (Holmes, J., dissenting).

We have since made clear that our courts retain the power to change the common law, holding in Syllabus Point 2 of *Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979) that “Article VIII, Section 13 of the West Virginia Constitution and W.Va.Code, 2-1-1, were not intended to operate as a bar to this Court’s evolution of common law principles, including its historic power to alter or amend the common law.” *See also*, James Audley McLaughlin, “The Idea of the Common Law in West Virginia Jurisprudential History” *Morningstar v. Black & Decker Revisited*,” 103 W.Va.L.Rev. 125 (2000).

The majority opinion notes in footnote 4 that, as far back as 1984, the Legislature permitted a cause of action for the wrongful or unlawful killing or injury of a pet – perhaps suggesting that pet owners could recover emotional distress damages. However, the statute limited the recovery for *dogs* to the “assessed value of such dog,” a limitation that was removed by the Legislature in 2003.

Yet the majority opinion continues to maintain the primitive limits of the common law, and refuses to adjust to the realities of the modern world, and permit recovery of damages for sentimental values, mental suffering, or emotional distress.

Today, 63% of all American households have one pet, 45% have more than one. In fact, there are more pets in America than there are citizens (360 million pets, 290 million people). Americans will spend upwards of \$36 billion pampering those pets this year, an amount nearly equal to the amount Americans spend on toys and candy *combined*. *See American Pet Products Manufacturers Association, Inc., Fact Sheet: Industry Statistics*

& Trends, www.appma.org. Beyond question, many Americans love their cats, their dogs, their birds, as well as they love their children. But like the children of the pre-industrial revolution, the majority opinion chooses to categorize those pets as nothing more than chattel.

I was saddened when I read the majority's opinion, and was reminded of an old country music song by Red Foley called "Old Shep:"

When I was a lad
And old Shep was a pup
Over hills and meadows we'd stray
Just a boy and his dog
We were both full of fun
We grew up together that way.

I remember the time at the old swimmin' hole
When I would have drowned beyond doubt
But old Shep was right there
To the rescue he came
He jumped in and then pulled me out.

As the years fast did roll
Old Shep he grew old
His eyes were fast growing dim
And one day the doctor looked at me and said
I can do no more for him Jim.

With hands that were trembling
I picked up my gun
And aimed it at Shep's faithful head
I just couldn't do it
I wanted to run
I wish they would shoot me instead.

He came to my side
And looked up at me
And laid his old head on my knee

I had struck the best friend that a man ever had
I cried so I scarcely could see.

Old Shep he has gone
Where the good doggies go
And no more with old Shep will I roam
But if dogs have a heaven
There's one thing I know
Old Shep has a wonderful home.

I'm sure Groucho has a wonderful home too. I'm sorry, however, that Ms. Carbasho has no
remedy for her grief and emotional distress in our common law.

I therefore respectfully dissent.