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Lions & Lionesses, Tigers & Tigresses, Bears & . . . Other Animals: Sellers' Liability for Dangerous Animals

*Bruce A. Levin and Michael Spak**

In April 1982, an infant had her toes and fingers bitten off by her family's pet raccoon.¹ On February 13, 1982, a cougar, used in an automobile sales promotion gimmick, attacked a young boy observing an automobile show.² In another incident, a pet leopard severely mauled a woman caring for it.³

Unfortunately, injuries inflicted by dangerous animals occur with frightening frequency. Because of the growing number of people who sell and harbor exotic animals, such incidents would seem to be increasingly likely.

I. Background—The Problem

A. *Fascination with Pets*

Fascination with animals spans history. In the third century B.C., Ptolemy II staged a procession of beasts through Alexandria's stadium that even Ringling Brothers would be hard pressed to rival.⁴ The parade consisted of one hundred elephants, twenty-four lions, several rhinoceroses, and many other wild beasts.⁵ Julius Caesar had a pet giraffe, Tiberius a large snake, Napoleon's Josephine an orangutan, Jack Johnson a leopard, and Salvador Dali and Brigitte Bardot ocelots and cheetahs.⁶ The desire to own pets for amusement or show

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1 Chicago Tribune, Apr. 8, 1982, at 11, col. 1.

2 Chicago Sun Times, Feb. 14, 1982, at 6, col. 4.

3 E.R. RICCIUTI, *KILLER ANIMALS* 174, 175 (1976).

4 Muller, *Preposterous Pets Have Always Been Our Status Symbol*, *SMITHSONIAN*, Sept. 1980, at 83.

5 *Id.* Historically, no form of entertainment has been as widespread as the procession of wild and pet beasts. *Id.* at 86.

6 *Id.* at 83-90. Cardinal Pietro Riario used real animals to depict Bacchus attended by panthers. *Id.* at 86. Exotic birds were popular in Rome. Octavian, later Emperor Augustus, had a raven that said, "Aye, Caesar victor imperator," that is, "Hail, Caesar, victorious leader." Octavian required the bird's trainer to split his money with an informant as a pen-

was illustrated in the 1950's when the news regularly featured strange animals that notables kept as pets.⁷ Frequently, Johnny Carson features exotic animals on his *Tonight Show*.

Research proves that merely petting an animal or watching fish can lower one's blood pressure and decrease one's heart rate.⁸ "Everybody needs a warm fuzzy," states Dr. Leo Bustad, Dean of the College of Veterinary Medicine at Washington State University.⁹ People also experience a more humane disposition through understanding strange animals.¹⁰ This love and desire for pets, whether stemming from social, physiological, or psychological motives, is reflected in the current ownership of wild animals and growth of the pet industry.

Pets outnumber people in the United States. The latest pet census count reads: 48,000,000 dogs; 27,000,000 cats; 25,000,000 birds; 250,000,000 fish; and 125,000,000 hamsters, gerbils, ponies, snakes, lizards, and assorted other exotic creatures.¹¹ By 1988, according to a pet study done by the market research firm of Frost and Sullivan, the \$6,000,000,000 industry will grow to \$10,000,000,000.¹² Docktor Pet (the largest pet-retailing chain in the United States) does a \$45,000,000 a year business through 155 outlets.¹³ The television series, *Baretta*, so popularized large birds that sales of cockatoos, macaws, and parrots rose 70% in 1980.¹⁴ Cost seems to be no object, even though prices of palm cockatoos range between \$7,000 and \$8,000.¹⁵

Anyone who cares to purchase an exotic pet has a virtually unlimited selection of readily available animals. African lion cubs can be bought at most game farms for about \$750 each.¹⁶ Herpetofauna

alty for training another raven to say, "Aye, victor imperator Antoni," in case Caesar had lost the battle. *Id.* at 83.

7 "Lord Chesterfield may have started a trend" when he left large pensions to his pet cats. *Id.* at 88.

8 Mesdag, *Love For Sale at Docktor Pet*, FORTUNE, Apr. 6, 1981, at 51.

9 *Id.* Pet Partnership Program supplies pets to elderly people to "liven" them up.

10 M. SHAW & J. FISCHER, ANIMALS AS FRIENDS AND HOW TO KEEP THEM vii (1947).

11 Connelly, *The Great American Pet*, MONEY, Dec. 1981, at 42. Americans are pet crazy. Mesdag, *supra* note 8, at 51. About 58% of American households include one or more animals.

12 Connelly, *supra* note 11, at 42.

13 Mesdag, *supra* note 8, at 48. Like food in fast food restaurants, animals are sold in ordinary, antiseptic settings.

14 *Id.* at 50.

15 Connelly, *supra* note 11, at 40.

16 Interview with M. Schoebel, wholesale wild animal dealer, Wisconsin Game Farm, in Neshkoro, Wis. (July 24, 1982) [hereinafter cited as Schoebel Interview].

International's advertising brochure allows customers to choose from some sixty species of venomous snakes, sixty species of non-venomous snakes, fifteen species of lizards, fifteen species of turtles and tortoises, and six species of amphibians.¹⁷ Customers spend anywhere from \$10 to \$2,750 on over five hundred specimens of Green Mambas, Ceylon Cobras, West African Vipers, Mexican Green Rattlesnakes, Burmese Pythons, Diamond Pythons, Argentine Boas, Russian Rat Snakes, Gila Monsters, Rhinoceros Iguanas, Four-Eyed Turtles, Alligator Snappers, Argentine Horned Frogs, and African Groove Crowned Bullfrogs.¹⁸

Over 3,300,000 specimens of exotic wildlife¹⁹ were imported into the United States in 1975.²⁰ Significantly, less than one percent of these specimens went to the nation's public and private zoos.²¹ Importing exotic wildlife has become so popular that various federal agencies have uncovered massive illegal trade in fish and wildlife.²² Prices for birds have soared so high that breeders are robbed by birdnappers.²³ New quarantine restrictions from the Department of Health, Education, and Welfare, effective in October, 1975, have added to the cost of monkeys and consequently increased the number of illegally imported monkeys.²⁴

17 Price list of Herpetofauna International (available from same at 226-B Horsham Road, Horsham, Pa., 19044).

18 Since the 1950's, importation of exotic species has increased. S.A. MINTON, JR. & M. MINTON, *VENOMOUS REPTILES* 70 (rev. ed. 1980).

19 "Exotic" in this sense refers to almost any animal imported into the United States. *See NATIONAL WILDLIFE*, Feb. 1975, at 32. The words "exotic" and "dangerous" in this article are used to describe all animals other than dogs and cats. The word "wild," on the other hand, sometimes describes animals that are not owned and at times describes "untamed" or "nondomestic" animals when such terminology becomes significant in law. In a loose sense, "wild" refers to all animals other than dogs and cats.

20 Tropical birds are imported from Australian and South American jungles. *Mesdag, supra* note 3, at 51. Once an exotic species is imported into the United States, most animal dealers try to breed the exotic animals domestically.

21 *Id.*

22 S. REP. NO. 123, 97th Cong., 1st Sess. (1981). The Lacey Act Amendments of 1981 authorize forfeiture of illegal fish, wildlife, and plants on a strict liability basis. Civil penalties of up to \$10,000 can be assessed for fish, wildlife, or plants taken, possessed, or transported in violation of any underlying law, treaty, or regulation.

23 E.R. RICCIUTI, *supra* note 3, at 40. Regulations authorizing the Public Health Service to ban the importation of monkeys and other nonhuman primates, except for exhibition, scientific, or educational purposes, have added profitability to black market monkeys, baboons, and gorillas. Government regulations can cost animal buyers more than the price of primates obtained illegally.

24 *Id.* at 187.

B. *Injuries Caused by Exotic Animals*

The massive increase in the pet trade not only has spawned illegal importation of exotic species, but has also brought significant safety risks to the general public. Current trends, characterized by taking a pet raccoon for a walk or letting a pet lion take you for a walk, are dangerous. As stated, a nine month old girl had fingers and toes bitten off by her family's pet raccoon.²⁵ A leopard left in a garage near Clearwater, Florida attacked a woman when she brought a chicken for its feed; the leopard quit mauling her only after being shot at point blank range.²⁶ An owner's lion killed a neighbor's infant son; that neighbor had defended the owner's right to keep his lion in their New Jersey community.²⁷ An unwanted lioness brought to an animal shelter by a Houston family broke through its cage, attacked, and severely clawed a five year old who was looking at puppies.²⁸ Another lioness, enclosed in a fence on a fifteen foot chain link leash, leaped the barrier and mauled a three year old, severely biting her on the head and neck.²⁹ The Colorado Department of Health had previously ordered the father to get rid of his pet lioness.

Actor Steve Hawkes (Tarzan) brought his 300 pound pet tiger to the park to be blessed by local clergy at a "Blessing of Animals" gathering in Miami, Florida. Instead of placidly receiving the blessing, the tiger severely mauled the face and legs of a small boy who was riding his bike alongside the tiger and accidentally bumped into the predator.³⁰ In 1973, a pet ocelot, given run of the house, attacked a three year old girl. The ocelot's bites on the child's face caused her to lose an eye.³¹

A fourteen foot pet python, Monty, recently tried to swallow his owner whole.³² The owner had been about to feed Monty a live rabbit when the snake suddenly gaped open its jaw in anticipation of larger game. The owner's girlfriend observed the snake attached to the man's head while he was choking and bleeding from his mouth. Before the man could be swallowed, however, he jabbed at the

25 See note 1 *supra*.

26 See note 3 *supra*.

27 E.R. RICCIUTI, *supra* note 3, at 175.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* at 177.

32 *Snake Tried to Eat the Hand that Fed It*, Milwaukee J., Oct. 8, 1981, at 1, col. 4. Lest one regard the snake's efforts as unrealistic or uncharacteristic, consider that an anaconda disgorged a lost thirteen year old boy. C.H. POPE, *THE GIANT SNAKE* 228 (1969). Pythons of Monty's size are freely marketed for affordable prices. See note 17 *supra*.

snake's eyes and throat and, after struggling for six minutes, dislodged the snake. Three of Monty's teeth had to be medically removed from the owner's skull.

Although some owners have successfully raised pet bobcats, pumas, cougars, bears, bison, deer, ocelots, foxes, ringtails, badgers, coyotes, skunks, ferrets, squirrels, and coatimundis,³³ injuries caused by wild or exotic animals continue to occur. Animals have actually run away with children³⁴ and attacked customers in grocery stores.³⁵

33 See generally R. LESLIE, WILD PETS 12-235 (1971). The Johnsons live with a bobcat in a house trailer near Fortuna, California. The local school bus runs ahead of schedule so the school children can get out and pet the bobcat.

North of Carson, Washington, the Durdles own a thirty-five pound bobcat (Paddy Foot). It loves children and cries when neighbors punish their kids. But if the bobcat's tail is down, the Durdles carefully observe the bobcat until its mood improves.

In Aberdeen, Washington, the Vesseys own Charlie, a bobcat. Charlie naps with neighborhood cats, and is referred to by its owners as a natural babysitter. *Id.* at 20. The Vesseys insist that an animal never gets mean unless it is ill-treated.

The Youngs, in Santa Barbara, own a 155 pound puma named Desdemona. They claim Desdemona is the best babysitter they have had. It swats the children when they get out of hand.

The Hancocks, in Victoria, British Columbia, own two unleashed cougars, each weighing almost two hundred pounds. They also own and raise bald eagles and have a pet seal, Sam, which is eager to kiss visitors.

Happy Hazard, in Santa Barbara, California, owns Topsy, a pet black bear weighing 400 pounds. Topsy has been ridden horseback.

Clint Bronson, owner of several black bears, states that no one should take the responsibility of having a bear as a pet unless prepared to feed it. During prehibernation weeks, a bear can devour ten to thirty pounds of food per day. Each bear can require about two hours of attention per day, devoted to feeding, cleaning, and exercising. Mr. Bronson has an orphanage for cougars, bears, badgers, and bobcats. He regularly hauls in cougars with only a lasso and a six foot keep-your-distance ban. *Id.* at 30. Although he also has successfully raised badgers, they are not recommended because of their front teeth and claws. *Id.* at 88.

Chuck Story, in Utah, owns several Bison (American Buffalo). The only way to prevent the beasts from becoming as potentially dangerous as the African water buffalo is to keep them in daily contact with people, horses, sheep, and other farm animals.

The Whites, in Oregon, own a full grown buck, Bambi, that loves to jump on their guest room bed, as if it were a trampoline.

A tame Alaska gray wolf is owned by Pat and Ted Derby of Solvang, California. It weighs 110 pounds, stands thirty inches tall, and is five feet long. The Derbys say the wolf is as tame as a pet toy poodle.

Sandy, a coyote, owned by Gordon Meridith of Riverside, California, saved the lives of the entire Meridith family by alerting them to a fire which broke out at 3:00 a.m. *Id.* at 75.

James and Bertha Pitner, of Anacortes, Washington, own Stinky, a skunk which has not been disarmed. The skunk loves to play with their four children, pet dogs, and cats.

Ocelots, foxes, ringtails, and martins have all been trained to walk as a dog, on a leash with their owner. *Id.* at 97, 115, 119 & 125. Ferrets, squirrels, and coatimundis have also displayed an adaptability to being raised like dogs.

Perhaps one should observe, however, that situations where exotic animals suddenly inflicted serious injuries were cases of "successful" ownership until disaster occurred.

34 Only a mother's screams saved her three year old boy from a grizzly's jaws. The bear,

Animals have been used as murder weapons³⁶ and for attack purposes.³⁷ If the trend toward purchasing exotic animals continues to increase, presumably incidents of harm to persons will also increase.

Even "properly trained" wild animals are dangerous. John Helmich of Wapato, Washington, raises ferrets. He claims that ferrets are easy to raise and make excellent pets.³⁸ However, the late Lee S. Crandall of the Bronx Zoo maintained that the bite of a ferret, the domesticated version of the European polecat (*Mustela Putorius*), is deadly.³⁹ A small sleeping child suffered terribly when the family's pet ferret slipped into the youngster's bedroom and tore off most of her face.⁴⁰

It is hard to convince people that a cuddly raccoon or ferret

in an Alberta National Park, came across a bridge and kidnapped the three year old in its teeth. The bear did not release its hold until the mother chased it, screaming. *Stevens Point Daily J.*, July 26, 1982, at 1, col. 5-6. Lewis and Clark, on April 29, 1805, described the fearsome animal in their exploration journal: "He rather attacks than avoids a man, and such is the terror which he has inspired." Grizzly bears have claws more than two inches long. Gary Brown, head of Yellowstone's bear program, says that grizzlies are unpredictable. *Wall Street J.*, Jan. 8, 1982, at 1, col. 4.

Bears are always dangerous. In *Crunk v. Glover*, 167 Neb. 816, 95 N.W.2d 135 (1959), the defendant owned a sale barn and permitted buyers to inspect his livestock from the outside of the pens. The defendant kept a pet bear inside the pens with his livestock. Unaware of the bear, the plaintiff was leaning on a pen when the bear bit his finger off.

35 In *CeBUZZ v. Sniderman*, 466 P.2d 457 (Colo. 1970), the court held a grocery store negligent when its employee had seen a tarantula hiding in a bunch of bananas three days before plaintiff was bitten by a spider (presumed to be a tarantula—the "bug" which bit plaintiff escaped into a crack in the counter and, therefore, may not have been a tarantula or even a spider). The customer suffered continuous pain in her left arm from the time of the injury until the trial over three years later.

36 A dangerous weapon is "any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm." *Commonwealth v. Farrell*, 322 Mass. 606, 614-15, 78 N.E.2d 697, 702 (1948). *Lisenba v. California*, 314 U.S. 219 (1941), involved live rattlesnakes purchased to murder defendant's wife. The remarkable availability of such snakes today makes it more likely that they and other venomous species could be used as dangerous weapons.

37 Pit Bull Terriers, highly popular pets in the last few years, have the physical characteristics to be ferocious warriors. They can chew through chain link fences and devour their stainless steel feeding bowls. King, *Fighting Dogs' Attacks Raise Alarm on Coast*, *Milwaukee J.*, Feb. 12, 1982, at 8, col. 1.

In Pleasonton, California, a two year old boy was attacked in his yard by a 60 pound pit bull that dragged the youngster along the ground until his grandmother managed to free him. Fifty stitches were required to close gashes on the boy's head and body. In February 1982, a San Francisco man was mauled by a pit bull that the owner had trained for fighting. The man was bitten on his abdomen, arm, hand, and leg. A mounted policeman was thrown to the pavement in a pit bull assault, also in February 1982, that caused wounds to his horse requiring 30 stitches.

38 R. LESLIE, *supra* note 33, at 98.

39 E.R. RICCIUTI, *supra* note 3, at 185.

40 *Id.*

makes an unsuitable pet; the disadvantages of owning a lion seem more obvious.⁴¹ A young lion or a tiger cub can flatten a man with a love tap, or inflict serious bites while playing.⁴² Gidget, a remarkable, loveable pet of eight year old Nina, unexpectedly and for the first time growled fiercely at Nina's mother and prepared to spring at her when she returned home one evening.⁴³ A completely tame exotic animal would be a miracle.⁴⁴

"Tame" defines the relationship between a wild animal and a human.⁴⁵ However, animals may be tame with their master and wild with everyone else.⁴⁶ A captive pet may revert at any time to its normal behavior by striking out against the human affection that usually evokes acceptance.⁴⁷ Most animal attacks are mistakes or "accidents"⁴⁸—responses to actions interpreted as territorial incursions or threats to young. Unfortunately, the ability to label such responses as mistakes and unintended accidents provides small consolation when someone is mauled by a pet. Love cannot conquer all—it takes a colossal ego for people to think they can undo millions of years of evolution.⁴⁹ Even Robert Leslie, author of *Wild Pets*,⁵⁰ a true lover and experienced handler of wild animals as pets, states:

Although we interviewed several pet-owning families living on much less than national-average income, we feel that only people with adequate finances, housing, exercising facilities, zoning, and a certainty that they will wish to remain as daily companions of bears, lions, wolves, coyotes, raccoons, or foxes for between fifteen and twenty-five years should undertake the raising of one of these demanding and heavy-eating species. The prospective owner of a predator should also consider that individuals of these genera are not always satisfactory with children, neighbors, visitors, or other animals.⁵¹

The false sense of security often conveyed to an unknowing

41 *Id.* at 184.

42 *Id.* at 173.

43 R.K. MATHEWS, *WILD ANIMALS AS PETS* 98 (1941).

44 F.J. ZEE HANDELAAR *as told to* PAUL SARNOFF, *ZEEBONGO: THE WACKY WILD ANIMAL BUSINESS* 131 (1971).

45 *Id.*

46 *Id.* at 132.

47 E.R. RICCIUTI, *supra* note 3, at 183.

48 R.A. CARAS, *DANGEROUS TO MAN* 333 (1964). An eyewitness account by a noted herpetologist describes a one year old mistaken for food and swallowed by a seventeen foot python. C.H. POPE, *supra* note 32, at 226.

49 E.R. RICCIUTI, *supra* note 3, at 171.

50 *See* note 33 *supra*.

51 R. LESLIE, *supra* note 33, at 236. One should never keep a monkey as a pet unless one has unlimited time to make friends. Monkeys must be spanked, bathed, fed, cuddled, and

buyer presents additional danger. A Florida pet dealer recently advertised that two tigers could come right into your home and watch T.V.⁵² When questioned further, this same dealer said, "Leopards make nice pets, tigers make terrific pets. We have a super tame cougar for \$750.00 that is broken to the leash and eager to ride in your car and sleep in your bed." The dealer added, "None of the big cats would endanger you or your family."⁵³ Ignorance of a pet's true character is particularly likely when the animal is one of an exotic species.⁵⁴ The dangers resulting from such ignorance are obvious.

This article suggests that when an exotic animal causes injury, the injured party should be afforded an adequate remedy.⁵⁵ Compensation for injuries caused by exotic animals should be provided by those who introduce the dangerous animals into the marketplace. Generally, neither common law nor present statutes hold sellers liable for the injuries their animals inflict. Current legislation that regulates the importation and harboring of wild animals does not compensate one injured by an animal after the animal is legally admitted and released in the United States. A uniform statute or common law rule must be developed to impose liability upon those responsible for bringing exotic animals into the marketplace.

II. The Origin, Development, Current State, and Effect of the Law

A. *Common Law Rules*

Since medieval times, specialized rules of liability have addressed the question of harm done by animals:

Not only is liability imposed for such harm under the general application of torts of nuisance, negligence, trespass, but two common

watched continuously. As the monkeys near adolescence, there is no assurance they will be gentle. They are fully capable of inflicting fatal wounds. Schoebel Interview, *supra* note 16.

52 E.R. RICCIUTI, *supra* note 3, at 172.

53 *Id.*

54 BRITISH SMALL ANIMAL VETERINARY ASS'N SYMPOSIUM, PET ANIMALS AND SOCIETY 3 (R.S. Anderson ed. 1975).

55 We propose that liability should be placed upon pet store owners, their suppliers, and all other sellers in the distributive chain. Liability need not be limited to merchants, but if it is so limited, then imposition of liability should follow the liberal definition of "merchant" under the Uniform Commercial Code ("a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved . . . or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." U.C.C. § 2-104(1) (1978)). Liability should not eliminate responsibility of those liable at common law or by statutes.

law actions, the scienter action and cattle trespass.⁵⁶

The common law contained such a mixture of specialized rules of medieval origin that causes of action could arise under modern principles of negligence or special rules peculiar to liability for damage done by animals, or both.⁵⁷ The general common law rule provides that owners and harborers of wild animals are strictly liable for damage done by their animals.⁵⁸ The keeper of an animal was liable without proof of fault for injuries to person or property if the animal belonged to the class of wild animals, *ferae naturae*.⁵⁹

If the animal was tame, *mansuetae naturae*, liability was imposed if the animal had a vicious propensity known to the keeper.⁶⁰ Thus, the common law imposed strict liability for dangerous animals, and required knowledge (scienter) of an animal's vicious propensity to impose liability for damage caused by tame animals. However, the scienter requirement did not resolve how specific animals are to be classed. For example, snakes are popular household pets and considered tame by their owners (at least until an accident takes place). Are pet snakes *mansuetae naturae* or *ferae naturae*?⁶¹

B. *The Restatement*

In addition to the common law rule imposing absolute liability⁶² on one who harbors a wild animal for injury inflicted by such animal, the Second Restatement of Torts (§ 507) imposes liability upon possessors of wild animals:

(1) A possessor of a wild animal is subject to liability to another for harm done by the animal to the other, his person, land or chattels, although the possessor has exercised the utmost care to confine the animal, or otherwise prevent it from doing harm.

(2) This liability is limited to harm that results from a dangerous propensity that is characteristic of wild animals of the particular class, or of which the possessor knows or has reason to know.

56 P.M. NORTH, *THE MODERN LAW OF ANIMALS* 1 (1972).

57 *Id.* at 2.

58 See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 76 (4th ed. 1971). See also Annot., 21 A.L.R.3d 603 (1968).

59 P.M. NORTH, *supra* note 56, at 3.

60 *Id.* Knowledge of the animal's vicious propensity might be constructive. *Reeves v. John A. Cooper Co.*, 304 F. Supp. 828, 833 (W.D. Ark. 1969).

61 Snakes, like other animals, should be classed with regard to the species and not according to the conduct of the particular animal. Danger to mankind is the controlling criterion of *wildness*. P.M. NORTH, *supra* note 56, at 3, 4.

62 *Collins v. Otto*, 149 Colo. 489, 492, 369 P.2d 564, 566 (1962).

Section 509 (Harm Done by Abnormally Dangerous Domestic Animals) reads:

- (1) A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.
- (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.

The Restatement parallels common law, imposing strict liability on owners of wild animals,⁶³ but requiring knowledge (actual or constructive) of vicious propensities to impose liability on owners of domestic animals. Under both common law and the Restatement, owners or possessors, but not sellers, assume the risk that wild animals may revert to their vicious tendencies.

When courts impose strict liability upon owners and possessors under common law or a statute, negligence in keeping such an animal is not at issue. No matter how well an owner protects the general public from a wild animal, if the animal somehow injures persons or property, the owner will be held liable. The same is true when courts impose absolute liability; negligence is not at issue. However, where strict liability is imposed, a defendant may assert that plaintiff assumed the risk that the animal would cause injuries.⁶⁴ Under an absolute liability standard, a defendant is not afforded this defense.⁶⁵

Arguably, one could also be held responsible for damage caused by a dangerous animal one sells. The Restatement (§ 519) provides:

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

63 Because these rules impose liability on owners and possessors of *wild* animals, the word *wild* obviously refers to the nature of the beast and not whether such an animal is unowned and free of restraint.

64 *Franken v. City of Sioux Center*, 272 N.W.2d 422, 425 (Iowa 1978).

65 This statement is made with some reservation. Though case law seems to distinguish between "absolute" and "strict" liability, the distinction is far from clear. See *id.* at 425, wherein the court suggests that there is no real difference between absolute and strict liability. It should also be noted that Prosser mentions but makes no clear distinction between strict and absolute liability. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (4th ed. 1971).

Section 520 defines "abnormally dangerous activity" as follows:

In determining whether an activity is abnormally dangerous, the following factor is to be considered: the existence of a high degree of risk of some harm to the person, land, or chattel of others.

Under these sections (§§ 519, 520), selling exotic animals such as lions, tigers, venomous snakes, badgers, buffalo, scorpions, and sharks should be regarded as an abnormally dangerous activity because of the degree of harm the animals could potentially inflict.

The difference between liability for one who performs an abnormally dangerous activity and one who possesses a wild animal may lie in how the word "one" (the person who carries on this activity) is defined. The Restatement never defines the word "one" as a possessor, buyer, seller, owner, merchant, or otherwise. Although both common law and the Restatement (§§ 507, 509) use the words "owner" and "possessor," no case law interprets the definition of "one" as used in the context of liability for selling dangerous animals. Hence it is uncertain whether liability should arise from the underlying policy that imposes upon anyone who for his own purposes creates the abnormal danger the responsibility of relieving against that harm when it occurs.⁶⁶ If, for example, dynamite explodes when it has been stored alongside a road, and the explosion causes harm to persons or chattel, the person engaging in this abnormally dangerous activity is liable.⁶⁷ Does the seller or the owner cause the harm when a tiger or baboon escapes from its cage and injures someone? Will the underlying purpose be compromised somehow by placing liability on the seller as well as the owner?

C. *Federal Regulation*

Other than the common law and Restatement principles, federal laws⁶⁸ govern the importation and harboring of wild animals, and state and municipal laws govern the possession of wild animals.⁶⁹ Federal statutes prohibit importing wildlife into the United States through importation, shipping, transportation, licensing, health, and conservation regulations.⁷⁰ The Lacy Act Amendments of November

⁶⁶ RESTATEMENT (SECOND) OF TORTS § 519 comment d (1979).

⁶⁷ *Id.* at comment e.

⁶⁸ See notes 102-03 *infra*.

⁶⁹ See notes 77-82 *infra*.

⁷⁰ F.J. ZEE HANDELAAR, *supra* note 44, at 13. See also 50 C.F.R. §§ 10, 13, 13.11, 14.11, 17 (1981-82).

16, 1981⁷¹ give the Secretary of the Interior and the Secretary of Commerce authority over importation and interstate commerce in wild animals. The Amendments permit the Secretary of the Interior to ban the importation of virtually all dangerous animals for the pet trade, while continuing importation for zoos and scientific institutions.⁷² The Department of Agriculture has the right to disapprove importation of animals which carry diseases infectious to domestic livestock.⁷³ The Department of Treasury may issue regulations to effectuate the Lacey Act.⁷⁴ Regulations also govern the shipment of injurious wildlife.⁷⁵ Although these federal regulations might control importation, prevent infectious diseases, encourage responsible game management, and provide public records of animals kept in the United States, they offer no panacea for the problems addressed in this article. Once the regulations are complied with, the animals may be bought, sold, in some cases slaughtered, or bred in captivity. In some ways, the concern for public safety, health, and welfare only begins after compliance with the importation regulations.

Implicit in the federal importation regulations is the desire to protect the public from the dangers of exotic animals. This desire could be more effectively implemented by specifically directing federal legislation at protecting the public from injuries that such animals might cause. Recently, Congress recognized the need to simplify existing law and write new legislation in conformity with the public concern:

No one would argue with the goals of most regulations: They are intended to protect us from health hazards, discrimination, accidents, and a host of other harmful results. The regulatory controversy focuses less on goals we strive for than on other concerns: The sheer number of regulations designed to protect us; the heavy-handed approach used to achieve health, safety and environmental

71 Pub. L. No. 97-79, 95 Stat. 1073 (1981).

72 18 U.S.C.S. § 42(a)(3) (Law. Co-op. 1979).

73 19 U.S.C.S. § 1306 (Law. Co-op. 1979). Strict federal regulations can be justified solely on the diseases present in the exotic pet trade. E.R. RICCIUTI, *supra* note 3, at 188. Tuberculosis, shigellosis, and hepatitis can be contracted from apes. The trade in baby turtles as pets was banned in 1975 by the Food and Drug Administration because of Salmonella bacteria transmitted to people. *Id.* at 190. In 1975, hamsters infected fifty-seven people that had contact with one Florida pet dealer. They contracted lymphocytic choriomeningitis, a flu-like sickness.

Examples of harm by animals discussed in this article generally concern harm done by animal attacks, but sellers' liability should also result when animals cause harm because they transmit diseases.

74 18 U.S.C.S. § 42(c) (Law. Co-op. 1979).

75 50 C.F.R. § 16.11(a) (1981-82).

goals; the costs of complying with regulations. There is no need to abandon legitimate health, safety, and environmental objectives; there is a clear need to be more thoughtful in developing regulations and to look for alternative ways of achieving our national goals.⁷⁶

Although current federal law does not impose liability on sellers of exotic animals for injuries caused by the animals, such liability certainly seems consistent with the goals of protecting the public from health hazards, accidents, and other harmful results.

D. *State and Municipal Legislation*

Some states have started to recognize and address the absence of applicable federal regulation after an animal is legally in their state. For example, some state and municipal laws govern the keeping of certain animals and reptiles:

Each person who shall possess, keep or maintain any wild, or nondomesticated animal, including any wild animal native to the State of Illinois, shall upon demand by the Executive Director or his authorized representative, furnish proof of compliance with such restrictions and/or permit requirements as may be imposed by statutes of the State of Illinois and/or Federal law.⁷⁷

* * * *

No person, business association, or corporation may keep any lion, tiger, leopard, ocelot, jaguar, cheetah, margay, mountain lion, canda lynx, bobcat, jaguarundi, hyena or coyote, or any poisonous reptile in any place other than a properly maintained zoological park, circus, scientific or educational institution, research laboratory, veterinary hospital or animal refuge.⁷⁸

* * * *

It is unlawful for any person or persons to possess any wildlife as defined in this act, whether indigenous to Florida or not, until he has obtained a permit as provided by this section from the game and fresh water fish commission.⁷⁹

* * * *

(a) An offer to sell or the sale of the following wild animals or wild animal products, or any part thereof, whether raw or manufactured, is prohibited:

(1) Leopard

⁷⁶ Regulatory Reform Legislation of 1981, S. 1080, 97th Cong., 1st Sess. 4-5 (1981).

⁷⁷ CHICAGO, ILL., MUN. CODE ch. 98, § 16 (amended Jan. 1, 1981).

⁷⁸ ILL. REV. STAT. ch. 8, § 241 (1969).

⁷⁹ FLA. STAT. ANN. § 372.92 (West 1981). Since October 1975, state permits have been required for people in Florida to own gorillas, rhinos, elephants, tigers, leopards, jaguars, baboons, cougars, ocelots, hyenas, African hunting dogs, and wolves. Lions, tigers, and gorillas can be kept only in facilities greater than or equal in strength to zoo cages. E.R. RICCIUTI, *supra* note 3, at 172.

- (2) Snow Leopard
- (3) Clouded Leopard
- (4) Tiger
- (5) Cheetah
- (6) Alligators
- (7) Calman or Crocodile of the Order Crocodylia
- (8) Virguna
- (9) Red Wolf
- (10) Polar Bear
- (11) Mountain Lion (sometimes called Cougar)
- (12) Jaguar
- (13) Ocelot
- (14) Margay⁸⁰

* * * *

No person may take, transport, possess or sell within this state any wild animal specified by the department's endangered and threatened species list.⁸¹

* * * *

No person shall keep any animal . . . except dogs or cats unless a permit is obtained from the Public Protection Committee.⁸²

No uniformity exists in state and municipal legislation governing the keeping of wild animals. Some states and municipalities ban certain wild animals altogether, some require permits for certain species, and others allow the possession of wild animals only for education, scientific, and exhibition purposes. In Illinois, it is illegal to possess a wild cat, hyena, coyote, or poisonous reptile unless it is kept for exhibition, scientific, or medical purposes.⁸³ Similarly, in Florida, a person may not keep a wild animal without a permit.⁸⁴ Pennsylvania⁸⁵ and Wisconsin⁸⁶ prohibit the possession of any species on an endangered species list. Local zoning ordinances, such as in Stevens Point, Wisconsin,⁸⁷ ban the keeping of all animals within the city except cats or dogs. Stevens Point has never approved any permits for any exotic or wild animal.

New York has the most progressive wild animal legislation of any state. In New York, any person harboring a wild animal or reptile capable of inflicting bodily harm could be punished by fine or imprisonment if the animal attacks someone. An owner, possessor, or

80 34 PA. STAT. ANN. tit. 34, § 1351 (Purdon 1982).

81 WIS. STAT. ANN. § 29.415 (West 1979-80 & Supp. 1982).

82 STEVENS POINT, WIS., MUN. CODE § 2103(17) (amended May 1977).

83 See note 78 *supra*. Under § 242, violation of § 241 merely constitutes a petty offense.

84 See note 79 *supra*.

85 See note 80 *supra*.

86 See note 81 *supra*.

87 See note 82 *supra*.

harborer of a wild animal is guilty of a misdemeanor whether or not that person has knowledge of the animal's vicious propensities:

Any person owning, possessing or harboring a wild animal or reptile capable of inflicting bodily harm upon a human being, who shall fail to exercise due care in safeguarding the public from attack by such wild animal or reptile, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or by both. "Wild animal" within the meaning of this section, shall not include a dog or cat or other domestic animal. Previous attacks upon a human being by such wild animal or reptile, or knowledge of the vicious propensities of such wild animal or reptile, on the part of the possessor or harborer thereof, shall not be required to be proven by the people upon a prosecution hereunder; and neither the fact that such wild animal or reptile has not previously attacked a human being, nor lack of knowledge of the vicious propensities of such wild animal or reptile on the part of the owner, possessor or harborer thereof shall constitute a defense to a prosecution hereunder.⁸⁸

New York's statute focuses on the harm inflicted rather than on the possessor's knowledge. *Scienter* is not required. The penal remedy serves to deter the keeping of wild animals without adequate safeguards. Even so, the New York statute does not provide that sellers be punished, nor that sellers or owners be civilly liable for injuries.

III. The Inadequacy of Existing Law

Existing law is only as good as its meaning is clear. One cannot effectively enforce a law when its terms are ambiguous or when its application yields inapposite results. Present rules (common law, re-statement, federal regulation, state statutes, and municipal ordinances) regulating the importation and possession of dangerous animals are inadequately drafted.

A. *Problems in Categorizing Wild and Domestic Animals*

Under present rules, the extent of liability for injuries caused by an animal depends largely on how the animal is categorized. New York law imposes criminal liability upon a person owning a "wild animal or reptile"⁸⁹ that causes injury to a human. Common law

⁸⁸ N.Y. AGRICULTURE & MKTS. LAW § 370 (McKinney 1972).

⁸⁹ *Id.* The New York statutes define "animal" as "every living creature except a human being." *Id.* § 350. In *Freel v. Downs*, 136 N.Y.S. 440 (1911), the court held that a turtle was an animal under an earlier statute which also defined animals as broadly.

If New York truly intended to use the broad definition of "animal" that is given in § 350, it is curious that the draftsmen chose to use the language "wild animal or reptile" in § 370;

liability depends upon whether the animal is classified as wild or tame. The common law imposes liability upon owners of animals *ferae naturae* or beasts of a vicious class for all injuries inflicted by such animals.⁹⁰ However, harm done by animals *mansuetae naturae* brings no common law liability unless the owner knows or should know of the animal's propensity to attack.⁹¹

Restatement liability similarly addresses the question of whether an animal is wild⁹² or domestic.⁹³ Restatement § 506 defines wild and domestic animals:

- (1) A wild animal is an animal that is not by custom devoted to the service of mankind at the time and in the place in which it is kept.
- (2) A domestic animal . . . is an animal by custom devoted to the service of mankind at the time and in the place in which it is kept.

The Restatement definitions add more confusion than clarification as to which species are wild and which are domestic. "Devoted to the service of mankind" is ambiguous.⁹⁴ Presumably rattlesnakes, alligators, ostriches, or tsetse flies are wild. Yet, the comment to § 506 states that an animal may be wild in one place but domestic in another.⁹⁵ An elephant in England and America is wild but is domestic in Burma where it is customarily used as a heavy draft animal.⁹⁶ Using the Restatement definition, the owner of an elephant in Burma is not liable when the elephant drops a 500 pound log on a child or runs amuck, unless the owner has knowledge of the elephant's propensity to do so. One might even argue that a tiger in the United States is a domestic animal if used as a promotional gimmick; is it "customarily" devoted to the television producer's service at the time and in the place it is kept?

Animals do not logically fit into neat categories. Each animal is an individual and cannot summarily be placed in the wild or domes-

seemingly, the words *or reptile* are surplusage since reptiles would be included within the broad meaning of animal anyway. One of the standard definitions of "animal" includes only mammals, as opposed to fish and birds. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 59 (1967). Since New York added *or reptile* and later excluded dogs and cats from the category *animal*, the legislators may have intended to include only mammals when drafting the statute. Whatever the intention or result, the statute is not a model of clarity.

90 2 AM. JUR. *Animals* § 43 (1936), cited in *Collins v. Otto*, 369 P.2d 564, 566 (Colo. 1962).

91 P.M. NORTH, *supra* note 56, at 3.

92 RESTATEMENT (SECOND) OF TORTS § 507 (1979).

93 *Id.* § 509.

94 Jamaica was once troubled by snakes and, therefore, imported mongeese. Would such mongeese be domestic until they killed all of the snakes?

95 RESTATEMENT (SECOND) OF TORTS § 506 comment a (1979).

96 Could circus elephants be regarded as domestic? Are they devoted to the service of mankind?

tic category.⁹⁷ Even ordinarily gentle animals are likely to be dangerous under particular circumstances.⁹⁸

Although the law cannot cover every exception to the general rule that only lions, tigers, bears, elephants, wolves, monkeys, and other similar animals are wild, the law could approach liability in a considerably different manner from that of the rules discussed previously. Liability could be expanded to cover any animal that causes injury, dropping the distinction between domestic and wild animals. Rather than using the ambiguous labels "wild," "tame," or "domestic," a specific list of excepted animals could be formulated with liability ensuing for all unlisted animals.⁹⁹ In any event, liability should be extended to sellers rather than limited to owners and possessors.

B. *Difficulties in Defining Abnormally Dangerous Activity*

Restatement § 519, which imposes liability only on persons carrying on an abnormally dangerous activity, is defectively drafted. Selling a wild animal may or may not be an abnormally dangerous activity. Even though selling exotic pets may be considered normal (certainly frequent) activity, a normal activity can give rise to a dangerous condition.¹⁰⁰ Any unreasonable risk to the public may render a natural condition a dangerous one. Rather than allowing for speculation as to whether an activity is abnormally dangerous and whether an unreasonable risk to the public exists, a clearer rule could simply provide that selling animals is abnormally dangerous if such animals cause harm.

C. *Lack of Uniformity in Regulation*

The diverse approaches to regulating dangerous animals are almost as varied as the animal kingdom itself. Unfortunately, all are defective in various manners. Lack of uniformity in federal, state, and municipal laws results in confusion at best.¹⁰¹ At worst, the pres-

97 Within each species, the degree of danger varies according to age, sex, and time of year. REPORT OF THE NEW SOUTH WALES LAW REFORM COMMISSION § 9 (1970).

98 *See, e.g.*, *Vigue v. Noves*, 113 Ariz. 237, 550 P.2d 234 (1976) (a horse kicked a child in the head while another person was carrying feed).

99 The historic development of common law and statutory liability for injuries caused by animals manifests a clear intent to regard dog and cat owners and possessors differently than persons keeping lions, for example. Rather than imposing strict liability for injuries caused by all animals, creating a list of excepted animals would seem more acceptable to the public, legislators, and the courts, and would appear consistent with the purposes of such rules.

100 *Hawk v. City of Newport Beach*, 293 P.2d 48, 50 (Cal. 1956) (minor dove from cliffs into shallow water, sustaining a head injury).

101 A Wisconsin game farm owner recently expressed displeasure with the myriad of fed-

ent regulations allow for injuries to take place that are not even compensable. Rather than regulating liability for injury done by wild animals, the federal laws regulate the shipment¹⁰² and importation of fish and wildlife.¹⁰³ Once the animal is legally in the United States, some state statutes selectively ban or regulate the introduction and sale of animals within their jurisdictions for various health, safety, and environmental reasons.

Although there is no case law on the constitutional right to own a dangerous pet, a court would either guarantee the right, deny it, or balance the individual's interest against the state's interest in protecting its citizens. At least one court stated (while quoting Am. Jur.) that all people have a right to own a pet.¹⁰⁴ If courts ever establish an absolute freedom to own wild animals, laws banning their possession would presumably fail (one is tempted to say "fall like flies"). It seems more probable, however, that courts would not deny the government a right to protect endangered species. Regardless of whether the Constitution protects the right to own animals, liability for the harm done by such animals is a different issue, just as free speech does not guarantee the right to falsely shout "fire" in a crowded theater.

States and municipalities need statutory guidance to create legislation that imposes liability on pet sellers and owners for harm caused by dangerous animals. A concern for safety risks and desire to impose liability for harm caused by animals is currently reflected in a multitudinous fashion: (1) federal import regulations; (2) state permit requirements; (3) state and municipal species bans; (4) common law and restatement liability for possessors of wild and domestic animals; and (5) restatement liability for dangerous activities. Federal import regulations and state permit regulations should not be eliminated, but should be changed to emphasize concerns for public

eral, state, and municipal laws which he must obey when selling animals to zoos, exhibitions, and pet dealers. Schoebel Interview, *supra* note 16. He claimed to have trouble complying with all the paperwork necessary to obtain permits for certain animals. The game farm owner faces complicated state regulation of wild animals. Some animals can be shipped into but not sold in Wisconsin; others shipped into the state can be sold only to certain communities. See generally WIS. STAT. ANN. § 29.425 (West 1980-81). A skunk cannot be brought into Wisconsin at all, but skunks bred on a game farm from breeder stock can be shipped into other states.

The problems of such game farm owners seem to underscore the maze created by the variety of laws. Besides complicating life for game farm owners, such a maze creates a hazardous forest for the public.

102 Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, 90 Stat. 417 (1976).

103 Lacy Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (1981).

104 Collins v. Otto, 149 Colo. 489, 491, 369 P.2d 564, 566 (1962).

health, safety, and the environment. These same concerns should also carry over to the regulation of the possession of animals.

IV. Extending Liability to Sellers

A. *Placing Liability on Those Who Deserve It*

Common law, restatement doctrines, and liability statutes are steps toward protecting the public from obvious risks presented by dangerous animals. However, these rules apply only to owners and possessors, and fail to extend liability to sellers. Sellers should not be able to escape liability merely because they have no prior knowledge of the vicious propensity of a particular animal or species of animal. However, sellers (like owners or possessors) should be able to defend on the ground that plaintiff assumed the risk. This defense was illustrated in *Franken v. City of Sioux Center*,¹⁰⁵ where the defendant was not liable when plaintiff stuck his hand into a Bengal Tiger's cage despite a warning to refrain from doing so.

Liability imposed on sellers, including not only the immediate seller but all sellers in the distributive chain, would put the responsibility on the parties that set the danger in motion. Courts have held that public policy demands that liability for product-caused injuries be placed on those who market the products and know the risks.¹⁰⁶ In *Lartigue v. R.J. Reynolds Tobacco Co.*,¹⁰⁷ the court stated that only unknowable risks would absolve manufacturers of injury caused by their products; as indicated by the court's dicta, keeping a tiger in a crowded city involves an obvious, known risk.¹⁰⁸ The court also recognized that injuries from risks are a cost of production passed on to the consumer, and stated that "[t]he consumer . . . is entitled to a

105 272 N.W.2d 422 (Iowa 1976). Citing Restatement § 507(1), the court noted that Iowa imposes strict liability on owners of wild animals. *Id.* at 424. However, the defendant was not liable because of the plaintiff's assumption of risk.

In *Collins v. Otto*, 144 Colo. 489, 369 P.2d 564 (1962), the court imposed absolute liability upon the owner of a wild animal. The defendant denied having any knowledge of the animal's viciousness. In imposing liability, the *Collins* court noted that a coyote is a wild animal with vicious propensities. Therefore, proof of defendant's knowledge was not required. *Id.* at 492, 369 P.2d at 566.

The true distinction between such cases is not the defendant's knowledge but the *plaintiff's* knowledge (the extent to which the plaintiff appreciated and therefore assumed the risk).

106 *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 36 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963) (however, liability denied because of plaintiff's contributory negligence and assumption of risk). Thus, liability may be denied against sellers if the buyer is guilty of contributory negligence or assumption of risk. Considering the parties' comparative negligence, the seller may be only partly liable.

107 *Id.*

108 *Id.* at 36.

maximum of protection . . . [from] those who receive the benefits from . . . marketing the products."¹⁰⁹ Manufacturers have also been held liable for not giving appropriate warning of foreseeable dangers to the public.¹¹⁰

A statute holding sellers liable for injuries caused by dangerous animals would create a uniform standard for states and municipalities to regulate the possession of animals. The statute would place liability upon parties who logically deserve it and who are in a position to adequately compensate victims for harm. Sellers should realize the risks of their products; if somehow they do not, then liability should prove educational.

B. *Analogy to Dram Shop Statutes*

Proposed legislation that places liability on sellers of dangerous animals for the injuries caused by those animals is directly analogous to dram shop acts, which place liability on sellers of liquor which contributed to the harm of a person other than the buyer of the liquor. Fourteen states have passed "dram shop" or "civil damage" acts to compensate victims for harm caused by an intoxicated person.¹¹¹ These statutes generally provide that any person, other than the one intoxicated, who is injured in person, property, or means of support by an intoxicated person has a right of action against the person who sold liquor to the intoxicated person.¹¹² The dram shop statutes in four states also impose dram shop liability upon the owner of the building wherein the liquor was sold.¹¹³

109 *Id.* Commerce in venomous species is an excellent reason for imposing liability upon the merchant or wholesaler. E.R. RICCIUTI, *supra* note 3, at 192. California dealers sell cobras, green mambas, tiger snakes, and fer de lances shipped overnight via Federal Express. *Id.* An untrained and unwary consumer could buy poisonous snakes that should be handled only by professional herpetologists. E. ROSS ALLEN, *HOW TO KEEP SNAKES IN CAPTIVITY* 3 (1971). One of the deadliest snakes, a Diamondback Rattlesnake, can be purchased from Herpetofauna International. All one needs to do is to send \$3.00 for a price list and then the proper amount for any one (or more) of many poisonous snakes.

110 *Crane v. Sears Roebuck & Co.*, 218 Cal. App. 2d 855, 861, 32 Cal. Rptr. 754, 757 (1963).

111 ALA. CODE § 6-5-71 (1975); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. § 30-102 (1975); DEL. CODE ANN. tit. 4, § 71 (1974 & Supp. 1980) (criminal action); ILL. REV. STAT. ch. 43, § 135 (West Supp. 1981-82); IOWA CODE ANN. § 123.92 (West Supp. 1982-83); ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. COMP. LAWS § 436-22 (1978); MINN. STAT. ANN. § 340.95 (West Supp. 1982); N.Y. GEN. OBLIG. § 11-101 (McKinney 1978 & Supp. 1980-81); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. § 4399.01 (Page 1973); R.I. GEN. LAWS § 3-11-1 (1975); VT. STAT. ANN. tit. 7, § 501 (1972).

112 *See, e.g.*, *Maples v. Chinese Palace Inc.*, 389 So.2d 120 (Ala. 1980) (interpreting Ala. Code § 6-5-71).

113 *See* ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1982-83); ME. REV. STAT. ANN.

Dram shop statutes place liability on sellers who obviously have knowledge of their product's risks and who earn a profit therefrom. Liability becomes a cost of doing business, and victims become entitled to protection from those who receive the benefits of such a business. Dram shop statutes also provide a uniform standard for states and municipalities in regulating alcohol consumption. Statutes placing liability on sellers do not require any special knowledge of a drinker's propensity to harm others.

Animal statutes placing liability on sellers could parallel dram shop statutes and solve some of the problems that haunt common law and existing statutes. Ambiguities would be cleared, uniformity would be advanced, and public policy would be furthered. The parallels are apparent; furnishing dangerous animals (alcohol) to irresponsible (intoxicated) people would be discouraged, and victims would be compensated.¹¹⁴

The Superior Court of Connecticut in *Sander v. Officers' Club of Connecticut* stated:

"Dram shop" or Civil Liability Acts are classified as a form of strict liability. This reflects a strong public policy favoring the imposition of liability upon vendors who sell goods possessing considerable risk to the public at large regardless of reasonable care on behalf of the vendor, in this case the sale of alcohol to an intoxicated person.¹¹⁵

When an innocent person is injured by an animal, that person should be fully compensated for his damages. Sellers of animals, like sellers of liquor, are generally in the business of selling dangerous goods.¹¹⁶ One who profits from selling a harmful animal should also be held accountable for harm caused by that animal.¹¹⁷ As has resulted from

tit. 17, § 2002 (1964); OHIO REV. CODE ANN. § 4399.01 (Page 1973); VT. STAT. ANN. tit. 7, § 501 (1972). The Maine and Vermont statutes hold the building owner jointly and severally liable with the seller of the liquor when the building owner knows that liquor is being sold on the premises contrary to law. In Illinois and Ohio, only knowledge of the use of the premises, and not of an unlawful sale, is required.

114 A further analogy might not be unfair. When a seller contributes to someone's inebriation, the ultimate injury often results because the inebriated party acts more "animal-like" than human. The seller of liquor, for whom liability exists, can thus be likened to a seller of animals.

115 35 Conn. Supp. 91, 93, 397 A.2d 122, 124 (1978) (citation omitted).

116 "'Goods' means all things . . . which are movable at the time of identification to the contract for sale 'Goods' also includes the unborn young of animals" U.C.C. § 2-105 (1978).

117 In *Smith v. Jalbert*, 221 N.E.2d 744 (Mass. 1966), a licensor who actively participated in exhibiting a zebra and shared in the profits was held to the same degree of responsibility as the owner for injuries caused by the zebra.

the enactment of dram shop statutes, imposing liability on sellers of dangerous animals would compel sellers to carry some kind of animal attack insurance.

The proposed seller liability statute for dangerous animals that cause injury would parallel the dram shop acts:

Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or property, or means of support, by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person.¹¹⁸

Thus, the proposed statute imposing sellers' liability for dangerous animals causing injuries would read:

Any person who, without intentional provocation, is injured (in person or property) by any animal (including the entire animal kingdom and not limited to mammals) other than a dog, a puppy, a cat, or a kitten, shall have a cause of action, severally or jointly, against every seller in the distributive chain, owner, and possessor of such animal, jointly and severally, for any injury caused by such animal.

Under this statute, any injury caused by such animal would be compensated. Absolute liability would be applied, for assumption of risk is no defense unless the animal is provoked. An acceptable alternative rule might permit an assumption of risk defense when, for example, an injured person inserts a finger in the cage of a known dangerous animal.¹¹⁹ Such conduct could simply be interpreted as provocative.

C. *Assessing Punitive Damages*

The civil damage acts, although penal in nature, are also remedial in character and should be liberally construed "so as to suppress the mischief and advance the remedy."¹²⁰ This view implies that while the victim is compensated for his injuries, the seller of such animal is penalized because insurance costs will rise. However, sellers will simply pass their costs on to consumers, and sellers or owners of such animals would be actually penalized only if punitive damages were assessed.

118 ILL. REV. STAT. ch. 43, § 135 (West Supp. 1981-82).

119 See *Franken v. City of Sioux Center*, 272 N.W.2d 422 (Iowa 1976) (plaintiff stuck his finger in a Bengal Tiger's cage despite a warning).

120 *Hempstead v. Minneapolis Sheraton Corp.*, 166 N.W.2d 95, 97 (Minn. 1969).

Punitive damages should be assessed when the owner or seller demonstrates a reckless indifference to the rights of others.¹²¹ Under the proposed statute, failure to warn customers of the true dangers of owning a wild animal may constitute grounds for awarding punitive damages. In *Barth v. B.F. Goodrich*,¹²² the California Court of Appeals held that the manufacturer's failure to warn consumers of known tire hazards clearly justified a punitive damage charge to the jury. Similarly, the Florida pet dealer¹²³ who claimed that tigers make terrific pets and will not endanger your family could be held liable for his failure to warn customers of known hazards, and punitive damages would be justified.

D. *Difficulties in Tracing*

One problem in holding sellers liable arises from the difficulty in tracing animals back to any particular seller. One tarantula might look like another. The harm might be caused by the offspring of the animal sold. This tracing problem can be solved by placing the burden of proof on sellers; any seller of such animals will be presumed to have been in the chain of distribution. Sellers could keep good records or tag animals to sometimes rebut the presumption. In many cases, sellers simply could not prove that they were outside the chain of distribution.

Placing the burden on sellers to prove they were not in the chain of distribution is not inconsistent with allocation of burdens in other damage actions. In *Ybarra v. Spangard*,¹²⁴ a patient underwent an operation while unconscious. Though the operation was for appendicitis, the patient suffered an injury to the shoulder. Clearly, negligence had occurred during the operation, but there was no way of knowing which doctor or nurse was responsible. The court decided that it was unreasonable to require the patient to identify the negligent defendant, and therefore placed the burden on the defendants to identify the tortfeasor.¹²⁵

121 *Sturm, Roger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979). On rehearing, punitive damages were raised to \$500,000 for injury caused by a bullet. *Sturm, Roger & Co. v. Day*, 615 P.2d 621 (Alaska 1980).

122 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968). Goodrich knew of the danger of overloading and deliberately failed, for business reasons, to warn the public of the tires' true condition. *Id.* at 236, 71 Cal. Rptr. at 313.

123 See text accompanying note 53 *supra*.

124 25 Cal. 2d 486, 154 P.2d 687 (1944).

125 Courts have applied *res ipsa loquitur* against multiple defendants in other situations. In *Loch v. Confair*, 373 Pa. 212, 93 A.2d 451 (1953), and *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953), *res ipsa loquitur* was applied against the bottler and the distributor of a bot-

E. *The Doctrine of Rylands v. Fletcher*

The doctrine of strict liability for abnormally dangerous activities was formulated in an 1868 decision by the House of Lords, *Rylands v. Fletcher*.¹²⁶ That doctrine provides a case law basis for the proposed seller liability statute. Defendant in *Rylands* stored water in a reservoir on his land. The water broke through the reservoir and flowed onto plaintiff's adjacent property. Since water was brought onto defendant's land for a non-natural use,¹²⁷ defendant was held liable without proof of fault because of the harm such water would cause if it escaped. American courts simultaneously developed the doctrine of ultrahazardous activity, which imposes strict liability for harm caused by one carrying on an abnormally dangerous activity.¹²⁸ In *Clark-Aiken Co. v. Cromwell-Wright Co.*,¹²⁹ the court stated that the policy underlying *Rylands v. Fletcher* is that one who keeps a dangerous instrumentality on his land is liable per se for its escape.¹³⁰ In a footnote, the court stated:

It could be argued that blasting and wild animal cases are really just other applications of the *Rylands* doctrine. In each, a dangerous instrumentality used by the defendant, for his own benefit, escapes causing damage.¹³¹

Liability for harm resulting from the dangerous activity of keeping an animal that may escape and cause injury should be strictly applied. Liability would not require knowledge of the specific danger.¹³² This standard of liability would parallel liability imposed through food and drug regulation, where guilty intent is not always a prerequisite. Food and drug regulation, "in the interest of a larger good . . . puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public dan-

bled beverage that exploded. At the time, both states imposed strict liability upon sellers of food to the ultimate consumer.

126 L.R. 3 H.L. 330 (1868), *affg* L.R. 1 Ex. 265 (1866).

127 *Rylands* did not define non-natural uses. It probably means something between a traditional and a novel use. The non-natural use of the water reservoir in *Ryland* was to construct a dam to get water power. Regardless of what *Rylands* meant by non-natural use, it entails a one-sided or abnormally dangerous situation. *See also* Gutierrez v. Rio Ranch Estates Inc., 607 P.2d 622, 625 (N.M. 1979).

128 *See* RESTATEMENT (FIRST) OF TORTS §§ 519, 520 (1934). *See also* RESTATEMENT (SECOND) OF TORTS § 519 (1979).

129 323 N.E.2d 876 (Mass. 1975).

130 *Id.* at 885.

131 *Id.* at 885 n.17.

132 *Id.* *See also* Smith v. Jalbert, 351 Mass. 432, 435, 221 N.E.2d 744, 746 (1966).

ger."¹³³ A proposed statute placing liability on sellers for harm caused by dangerous animals would likewise place the burden of the hazard on parties in a position of responsibility to the general public.

F. *The Uniform Commercial Code*

Animals are goods under section 2-105 of the Uniform Commercial Code.¹³⁴ A statement merely purporting to be the seller's opinion¹³⁵ or sales puffing is not actionable as an express warranty.¹³⁶ However, a buyer who asks the seller for a large, but tame cat for his two three year olds, relying upon the seller's judgment, would have an action for breach of implied warranty of fitness for a particular purpose¹³⁷ if sold a not-so-tame 200 pound mountain lion. The seller's warranty may also extend to any guest or member of the family when it is reasonable to assume such person is affected by the goods.¹³⁸ The two three year olds would, therefore, have a cause of action against the seller.

A manufacturer who sells goods to the public impliedly represents that the goods are suitable for their intended use.¹³⁹ Reliance is an element of the warranty of fitness for a particular purpose¹⁴⁰ but not of the warranty of merchantability.¹⁴¹ Goods must conform to any promises or affirmations of fact made on the container or label¹⁴² and must be adequately contained, packaged, and labeled,¹⁴³ otherwise, the warranty of merchantability is breached. Thus, an explod-

133 *United States v. Wiesenfeld*, 376 U.S. 86, 91 (1964).

134 In *Ziebarth v. Kalenze*, 238 N.W.2d 261, 265 n.1 (N.D. 1976), the court stated that cattle were goods governed by the U.C.C. because the sale of the unborn young of animals fell within the U.C.C. definition of a contract for the sale of goods under U.C.C. § 2-105 (1978).

135 For example, a seller of a Doberman Pinscher in *Whitmer v. Schneble*, 331 N.E.2d 115, 117 (Ill. App. Ct. 1975) asserted that "this seems like a docile dobe." The purchasers of the Doberman were later sued when the dog bit a child. The purchasers brought in their seller as a third party defendant, claiming an express warranty when the dog was described as a "docile dobe." However, the court found that claim controverted by the bill of sale which had described the dog as "medium aggressive." Further, the court stressed that the dog had been purchased two and a half years earlier (too long, it said, even if a warranty had been given), and that the dog had just had puppies shortly before biting plaintiff.

136 U.C.C. § 2-313 (1978). See *Royal Business Machs., Inc. v. Lorraine Corp.*, 633 F.2d 34 (7th Cir. 1980).

137 U.C.C. § 2-315 (1978).

138 U.C.C. § 2-318 (1978) (Alternative A). See also *Handy v. Uniroyal Inc.*, 327 F. Supp. 596, 599 (D. Del. 1971).

139 *Santor v. A. and M. Karagheusian, Inc.*, 207 A.2d 305, 311 (N.J. 1965).

140 U.C.C. § 2-314(2)(f) (1978).

141 U.C.C. § 2-315 (1978). See *S-Creek Ranch, Inc. v. Monier and Co.*, 509 P.2d 777, 783 (Wyo. 1973).

142 U.C.C. § 2-314(2)(f) (1978).

143 U.C.C. § 2-314(2)(e) (1978).

ing bottle¹⁴⁴ can bring shattering results to a seller. Similarly, when an animal is not adequately confined, carries no warning label, and explodes by attacking his owner or a third party, the seller's warranty of merchantability is breached. Since warranties are implied from the parties' presumed intentions,¹⁴⁵ if an animal is sold as a pet, then the seller warrants it will behave like one.¹⁴⁶ A seller's ignorance of the danger lurking in his product does not matter; nor does his innocence or care. The classic notion of warranty liability is that a seller is liable when a can of peas contains broken glass that harms a buyer. The Uniform Commercial Code thus reinforces the imposition of liability on sellers of animals causing injury, regardless of the seller's knowledge of the animals' danger.

V. Conclusion

If the trend toward purchasing dangerous animals continues to increase, incidents of harm to persons and property will also increase. The dangers to the public are alarmingly clear. Equally clear is the inadequacy of present law to remedy the situation. No uniformity exists in the rules; confusion reigns as to whether an animal fits into the right category for liability; the "standard" for liability often allows foreseeable harm to go uncompensated; and liability is limited to owners and possessors.

In an era of government regulation of toys, fabrics, fireworks, drugs, and ultrahazardous activities in general, the time has come to regulate the sale of exotic animals. Consumer product safety regulations, strict liability in tort for defective goods, and liability of suppliers of dangerous chattels share a common purpose: to protect the unsuspecting public. Consistent with the policy of protecting the public from unreasonable risks of harm, individuals injured by dangerous animals should be compensated for their injuries.

Currently, common law and the Restatement impose liability on owners and possessors of wild animals, but do not impose liability for domestic animals' vicious tendencies. The Restatement also imposes strict liability on one who engages in an abnormally dangerous activity. Selling dangerous animals should be regarded as carrying

144 *See* *San Antonio v. Warwick Club Ginger Ale Co.*, 248 A.2d 778 (R.I. 1968) (judgment entered for defendant on other grounds).

145 *Horner v. David Distributing Co.*, 599 S.W.2d 100, 102 (Mo. Ct. App. 1980).

146 *But cf.* *Whitmer v. Schneble*, 331 N.E.2d 115 (Ill. App. Ct. 1975). The court suggests that animals cannot be inherently dangerous products under *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965), because a product must have a fixed nature when it leaves the manufacturer's or seller's control, whereas owners shape an animal's character.

on such an activity. Federal regulations also govern the importation and harboring of wild animals. Implicit in these federal regulations is the desire to protect the public from the dangers of exotic animals. However, this concern for public protection could better be met if federal regulations also governed the possession of exotic animals after they are legally imported. Some states, recognizing the absence of applicable federal legislation, have enacted their own statutes. However, no uniformity exists, and such statutes contain serious problems discussed earlier.

The present patchwork of rules reflects the conflict between the desire to protect the public and the historic notion that keeping pets, particularly dogs and cats, is legitimate. A uniform rule that provides the best of both worlds would impose liability on sellers of all animals except dogs and cats, whenever harm is caused by such other animals. This rule should prove acceptable to the vast bulk of pet owners and to those who would protect and encourage such ownership, and will place liability where it logically belongs. It also avoids the confusion of determining whether an animal is wild, exotic, tame, or domestic: the simple question would be whether any animal other than a dog or cat was involved and whether harm occurred. Any harm caused by such animals would be compensable, with liability imposed on the persons who placed such animals in the market.

In imposing liability on sellers of dangerous animals, the adage that one is responsible when one sets a bull loose in a china shop seems especially appropriate. With regard to the laws that apply to the animal kingdom, the time for evolution has come.