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MUCH has been said and written by courts and authors on different aspects of the question of liability for injuries by animals, but there remains the task of fitting all these pieces into a complete pattern. The general subject of liability of the possessor[1] of harm-

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[1] Liability for injuries by dangerous animals is predicated upon possession rather than upon ownership. What constitutes possession is ordinarily determined as in any other case involving possession of a chattel. The mere presence of an animal on the premises, even with the occupier's acquiescence, is not enough to render him liable as possessor, but harboring the animal with the assumption of custody, management and control is evidence of possession. The law does not require the landowner to eject every animal that may come on his land at peril of being adjudged its keeper and responsible for its depredations. Maillet v. Mininno, 266 Mass. 86, 165 N. E. 15 (1929); Whittemore v. Thomas, 153 Mass. 347, 26 N. E. 875 (1891); Manger v. Shipman, 30 Neb. 352, 46 N. W. 527 (1890); Hayes v. Miller, 150 Ala. 621, 43 So. 818, 11 L. R. A. (N. S.) 748 (1907); Trumble v. Happy, 114 Iowa 624, 87 N. W. 678 (1901); Alexander v. Crosby, 143 Iowa 50, 119 N. W. 717 (1909); Connor v. Princess Theatre, 27 Ont. 466, 10 Dom. L. R. 143 (1912); Redmond v. Nat. Horse Show Assn., 78 Misc. 383, 138 N. Y. S. 364 (1912); Laguttuta v. Chisolm, 65 App. Div. 326, 72 N. Y. S. 905 (1901); McCosker v. Weatherbee, 100 Me. 25, 59 A. 1019 (1905); Boylan v. Everett, 172 Mass. 453, 52 N. E. 541 (1899); McKone v. Wood, 5 Car. & P. 1, 172 Eng. Rep. 850 (1831).

However, if a person permits another to harbor on his premises an animal which he knows is dangerous, especially if he furnishes it food, or even occasionally assumes control, or if he is head of the family and the animal is owned by a member of the family, even an adult member, he may be regarded as its "keeper" or, for purposes of this branch of the law, as possessor. Cummings v. Riley, 52 N. H. 368 (1872); Koetting v. Conroy, 223 Wis. 550, 270 N. W. 625, 271 N. W. 369 (1936); Harris v. Williams, 160 Okla. 103, 15 P. (2d) 580 (1932); Missio v. Williams, 129 Tenn. 504, 167 S. W. 473 (1914); Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47 (1892); McLaughlin v. Kemp, 152 Mass. 7, 25 N. E. 18 (1890).

Where an employee keeps his dog on his employer's premises without the latter's permission or knowledge, the employer is not liable for injuries inflicted by the dog unless it was kept for the purpose of protecting his property or for some use connected with the employment. Baker v. Kinsey, 38 Cal. 631 (1869); Auchmuty v. Ham,

producing animals has been treated on two separate and independent theories: (1) trespass, for injuries by marauding cattle; (2) case, for harms caused by animals other than trespassing cattle. The explanation for the separation of these two bodies of law is in part historical, the possessor of straying cattle being historically so identified with them that their trespass was his own act—"for I am the trespasser with my beasts"[2]—and, also, that the interests protected are altogether dissimilar. In cattle-trespass law the interest served is the interest in the exclusive and uninterrupted enjoyment of one's land, and in the law redressing harms caused by animals otherwise than by trespassing cattle the interest is primarily that in personal security and, occasionally, the safety of one's personal property. It is to this latter topic that this study is directed, excluding from consideration the rather well-defined principles of cattle-trespass.

The familiar pattern of the older cases fastens liability on the possessor according to the classification of his animal. There are, the courts have said, two classes of animals, those *ferae naturae* and those *mansuetae naturae*.[3] If an animal of the first class ran amuck, its possessor was said to be absolutely liable.[4] If the animal belonged to the second class, its keeper was held not liable unless he was proved to have had notice of that particular mischievous trait which in fact led to the injury.[5] Having notice of it, he was liable, irrespective of his diligence

1 Denio (N. Y.) 495 (1845); Serio v. American Brewing Co., 141 La. 290, 74 So. 998 (1917); Barrett v. Malden & M. R. R., 3 Allen (85 Mass.) 101 (1861); Pinson v. Kansas City So. Ry., (C. C. A. 5th, 1930) 37 F. (2d) 652.

[2] Anonymous, Keilwey 3 b, (1496), reprinted BOHLEN, CASES ON TORTS, 3d ed., 604 (1930).

[3] Filburn v. People's Palace & Aquarium Co., 25 Q. B. D. 258 (1890); State v. Harriman, 75 Me. 562, 46 Am. Rep. 423 (1884); Connor v. Princess Theatre, 27 Ont. 466, 10 Dom. L. R. 143 (1912); Hayes v. Miller, 150 Ala. 621, 43 So. 818 (1907).

[4] Hayes v. Miller, 150 Ala. 621, 43 So. 818 (1907); Besozzi v. Harris, 1 F. & F. 92, 175 Eng. Rep. 640 (1858); Spring Co. v. Edgar, 99 U. S. 645 (1878); Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99 (1857); Molloy v. Starin, 191 N. Y. 21, 83 N. E. 588, 16 L. R. A. (N. S.) 445 (1908); Phillips v. Garner, 106 Miss. 828, 64 So. 735, 52 L. R. A. (N. S.) 377 (1914).

[5] The dangerous qualities of wild animals are a matter of common knowledge, deduced from the general experience of mankind, so that it is presumed that everyone has notice that such beasts are dangerous. To render the possessor liable, however, the injury must be of the type which would result from the usual dangerous propensity of the animal. Besozzi v. Harris, 1 F. & F. 92, 175 Eng. Rep. 640 (1858); Moss v. Pardridge, 9 Ill. App. 490 (1881); Spring Co. v. Edgar, 99 U. S. 645 (1878); Botcher v. Buck, 265 Mass. 4, 163 N. E. 182 (1928); Candler v. Smith, 50 Ga. App. 667, 179 S. E. 395 (1935); Bostock-Ferari Amusement Co. v. Brocksmith, 34 Ind. App. 566, 73 N. E. 281 (1905); Scribner v. Kelley, 38 Barb. (N. Y.) 14 (1862);

in attempting to control it. If the owner were shown not to have known, nor to have had reason to know of any unusual, dangerous characteristics of his domestic animal, he might nevertheless be liable for injuries inflicted by it on the basis of negligence.[6]

The law, however, has been over-simplified in statement. Generalizations too wide have been made from inadequate data. When the

HARPER, TORTS, § 172 (1933); 3 TORTS RESTATEMENT, § 507, comments c and e (1938).

In the case of domestic animals, to be held liable the possessor must be shown to know or to have reason to know the abnormally dangerous propensity to attack human beings which causes the injury. 3 TORTS RESTATEMENT, § 509, comment g (1938); Barclay v. Hartman, 2 Marv. (16 Del.) 351, 43 A. 174 (1896); Quigley v. Adams Express Co., 27 Pa. Super. 116 (1905); Trumble v. Happy, 114 Iowa 624, 87 N. W. 678 (1901); Jackson v. Smithson, 15 M. & W. 563, 153 Eng. Rep. 973 (1846); Oakes v. Spaulding, 40 Vt. 347, 94 Am. Dec. 404 (1867); Fink v. Miller, 330 Pa. St. 193, 198 A. 666 (1938). Knowledge of a propensity to do some other kind of harm, as where a dog was known to have attacked goats, does not fulfill the scienter requirement. Osborne v. Chocqueel, [1896] 2 Q. B. 109; Glanville v. Sutton, [1928] 1 K. B. 571; Crowley v. Groonell, 73 Vt. 45, 50 A. 546 (1901); Boatman v. Miles, 27 Wyo. 481, 199 P. 933 (1921).

It is not necessary, however, that the animal have inflicted a previous like injury, if it has shown a tendency to do the type of harm. That is, every dog is not entitled to one bite, nor a horse to one kick, if its master knew it had exhibited an inclination to do that kind of hurt. Andrews v. Smith, 324 Pa. 455, 188 A. 146 (1936); Barnes v. Lucille, Ltd., 96 L. T. R. (K. B.) 680, 23 T. L. R. 389 (1907); Warner v. Chamberlain, 7 Houst. (12 Del.) 18, 30 A. 638 (1884); Hardiman v. Wholley, 172 Mass. 411, 52 N. E. 518 (1899).

The possessor's knowledge of his animal's evil quality may be inferred from the circumstances, some courts have said. Thus the fact that a man customarily kept his dogs tied up during the day was the basis of an inference that he knew they were vicious. Goode v. Martin, 57 Md. 606 (1881); Worth v. Gilling, L. R. 2 C. P. 1 (1866). It may be inferred, also, that where a husband knew the dog would bite, his wife had the same knowledge. Harris v. Williams, 160 Okla. 103, 15 P. (2d) 580 (1932). See also Pettus v. Weyel, (Tex. Civ. App. 1920) 225 S. W. 191 (minor son's knowledge not necessarily imputed to his father). The knowledge of a servant may be imputed to the master. Indianapolis Abattoir Co. v. Bailey, 54 Ind. App. 370, 102 N. E. 970 (1913); Serio v. American Brewing Co., 141 La. 290, 74 So. 998 (1917); Brice v. Bauer, 108 N. Y. 428, 15 N. E. 695 (1888). Contra, Knott v. London County Council, [1934] 1 K. B. 126.

[6] In the case of domestic animals which, although not abnormally dangerous, are likely to cause harm to persons if they are not controlled or other precautions taken, the possessor is liable for the kind of harm usually done by them if he fails to use reasonable care to avoid the harm. For example, bees, while generally classed with the harmless domestic creatures, may cause serious harm if kept too near the highway where perspiring horses pass by, or so close to adjacent premises that they are likely to sting persons or animals there. Earl v. Van Alstine, 8 Barb. (N. Y.) 630, 1 Am. Neg. Cas. 368 (1850); Parsons v. Manser, 119 Iowa 88 (1903); Goosen v. Reeders, So. Afr. L. R. [1926] Transvaal Prov. Div. 436; Ammons v. Kellogg, 137 Miss. 551, 102 So. 562, 39 A. L. R. 351 at 352 (1925). Also, a horse left untended in a

many odds and ends are put together, the absolute liability dogma turns out to have a much narrower application than would be inferred from the opinions and the texts.

As the cases are classified according to their factual situations, three main categories present themselves. (1) A dangerous animal

busy street is likely to run away and cause damage in its flight. Illidge v. Goodwin, 5 Car. & P. 190, 172 Eng. Rep. 934 (1831); Haynes v. Harwood, [1935] 1 K. B. 146. Or, if a horse is insecurely fastened some distance from home, it may break loose and try to go home, endangering persons on the road. Deen v. Davies, [1935] 2 K. B. 282. See also, Rice v. Von Der Leith, 108 Misc. 284, 178 N. Y. S. 441 (1919); Gaylor v. Davies, [1924] 2 K. B. 75; Hadwell v. Righton, [1907] 2 K. B. 345; Jones v. Lee, 106 L. T. R. (K. B.) 123 (1911); Heath's Garage, Ltd. v. Hodges, [1916] 2 K. B. 370; Cox v. Burbidge, 13 C. B. (N. S.) 430, 143 Eng. Rep. 171 (1863). Similarly, an unbroken colt at large on the highway behind the mare is apt to cause injury. Turner v. Coates, [1917] 1 K. B. 670; Barnes v. Chapin, 4 Allen (86 Mass.) 444 (1862). In all these cases the possessor was held liable for failing adequately to guard against these foreseeable risks. But leaving a small dog closed up in a car was held not to be negligence toward a passerby whose eye was injured by splintering glass when the dog, jumping about in the car, put its paw through a window. Fardon v. Harcourt-Rivington, 146 L. T. R. (H. L.) 391, 48 T. L. R. 215 (1932).

If an animal of the harmless domestic species comes onto the plaintiff's land, however, its possessor may be held liable on the ground of trespass for consequential damages, but these cases must be sharply distinguished from those above as involving an entirely different ground for liability. The rule is somewhat loosely stated to be that a trespassing animal renders its owner liable for all damage not too remote. Ellis v. Loftus Iron Co., L. R. 10 C. P. 10, 31 L. T. R. 483 (1874); Light v. United States, 220 U. S. 523, 31 S. Ct. 485 (1911); Walker v. Nickerson, 291 Mass. 522, 197 N. E. 451 (1935); Lyons v. Merrick, 105 Mass. 71 (1870); Manton v. Brocklebank, [1923] 2 K. B. 212; Johnston v. Mack Mfg. Co., 65 W. Va. 544, 64 S. E. 841 (1909); Hickey v. Freeman, 198 Iowa 465, 198 N. W. 769 (1924); Tate v. Ogg, 170 Va. 95, 195 S. E. 496 (1938); Wilson v. White, 20 Tenn. App. 604, 102 S. W. (2d) 531 (1936); Van Leuven v. Lyke, 1 N. Y. 515 (1848). But certain exceptions must be noted: First, if the injury occurs while the animal is on the highway, there is no liability in trespass in the absence of negligence. Gaylor v. Davies, [1924] 2 K. B. 75; Amstein v. Gardner, 132 Mass. 28, 42 Am. Rep. 421 (1882). Second, if the animal strays from the highway onto adjoining premises, its custodian is not liable. Rightmire v. Shepard, 59 Hun (N. Y.) 620, 12 N. Y. S. 800 (1891); Hartford v. Brady, 114 Mass. 466 (1874); Tillett v. Ward, 10 Q. B. D. 17 (1882); Wood v. Snider, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912 (1907). Third, the rule does not apply to dogs or cats, although it does to domestic fowls. Mason v. Keeling, 12 Mod. 332, 88 Eng. Rep. 1359 (1699) (dog); Read v. Edwards, 17 C. B. (N. S.) 245, 144 Eng. Rep. 99 (1864) (dog); Van Etten v. Noyes, 128 App. Div. 406, 112 N. Y. S. 888 (1908) (dog); Buckle v. Holmes, [1926] 2 K. B. 125 (cat); Bischoff v. Cheney, 89 Conn. 1, 92 A. 660 (1914) (cat); McDonald v. Jodrey, 8 Pa. Co. 142 (1889) (cat); Lapp v. Stanton, 116 Md. 197, 81 A. 675 (1911) (fowls); Adams Bros. v. Clark, 189 Ky. 279, 224 S. W. 1046, 14 A. L. R. 738 at 745 (1920) (fowls); McPherson v. James, 69 Ill. App. 337 (1896) (fowls). Contra, Johnson v. Patterson, 14 Conn. 1 (1840) (fowls).

escapes from its possessor's premises or, while not entirely out of its possessor's custody, is imperfectly controlled and injures someone off the possessor's premises. (2) Such an animal injures a person rightfully on its possessor's premises. (3) Such an animal injures a person present on its possessor's premises against his will.

I

INJURIES TO PERSONS NOT ON POSSESSOR'S PREMISES

Where a wild animal or a domestic one which has a peculiar, dangerous trait, known to its possessor, escapes custody or, although still in custody, gets out of control and does injury to some person off the possessor's premises, the possessor is liable irrespective of his diligence in confining the animal. He keeps such a beast at his peril and if it breaks loose, he is liable without regard to negligence.[7] By the act of keeping it, the keeper has created an abnormally dangerous situation and it is probably this foreseeability of harm that has led some courts to say that the basis of liability is negligence of the owner in the mere keeping of such an animal.[8] However, such dicta overlook the fact that many acts which are almost certain to result in harm to others are not negligent.[9] Then, too, in many instances the keeping of dangerous animals is eminently proper, as where the purpose is public instruction or entertainment or where it is reasonably necessary for the protection of life or valuable property.[10] It is now generally recognized

[7] Triolo v. Foster, (Tex. Civ. App. 1900) 57 S. W. 698; Missio v. Williams, 129 Tenn. 504, 167 S. W. 473 (1914); Barklow v. Avery, 40 Tex. Civ. App. 355, 89 S. W. 417 (1905); Harris v. Fisher, 115 N. C. 318, 20 S. E. 461, 44 Am. St. Rep. 452 (1894); Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879 (1900); Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47 (1892); HOLMES, THE COMMON LAW 154 (1881).

[8] Popplewell v. Pierce, 10 Cush. (64 Mass.) 509 (1852); Jackson v. Smithson, 15 M. & W. 563, 153 Eng. Rep. 973 (1846); Card v. Case, 5 C. B. 622, 136 Eng. Rep. 1022 (1848); Muller v. McKesson, 73 N. Y. 195 (1878); Woolf v. Chalker, 31 Conn. 121 (1862); Fraser v. Chapman, 256 Mass. 1, 152 N. E. 44 (1926); Lynch v. McNally, 73 N. Y. 347 (1878); Brooks v. Taylor, 65 Mich. 208, 31 N. W. 837 (1887).

[9] HARPER, TORTS, § 72 (1933).

[10] Guzzi v. New York Zoological Society, 192 App. Div. 263, 182 N. Y. S. 257 (1920), affd. 233 N. Y. 511, 135 N. E. 897 (1922); Vaughan v. Miller Bros. "101" Ranch Wild West Show, 109 W. Va. 170, 153 S. E. 289, 69 A. L. R. 497 at 500 (1930); Bostock-Ferari Amusement Co. v. Brocksmith, 34 Ind. App. 566, 73 N. E. 281 (1905); Scribner v. Kelley, 38 Barb. (N. Y.) 14 (1862); Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925); Sarch v. Blackburn, 4 Car. & P. 297, 172 Eng. Rep. 712 (1830); Rider v. White, 65 N. Y. 54 (1875).

that the mere keeping is not culpable.[11] If, however, one does keep such an animal, he is bound to confine it securely, so that it cannot have access to and injure persons who are where they have a right to be. If it escapes or gets out of control and does harm, its possessor is liable. That is, absolute liability attaches only when the animal escapes its possessor's control, and not, it is submitted, when it is confined, although much of the legal writing on this subject is sufficiently broad to include every situation involving any injury by an animal naturally ferocious or having some known vicious propensity.[12] The usual statement of the rule is that the owner of an animal *ferae naturae* is absolutely liable. There are, however, almost no cases among those containing that generalization in which the animal was not running at large when the injury occurred. The passage in *Hale's Pleas of the Crown*, often cited to support the absolute liability rule, specifically limits it to injuries following the beast's escape:

> "If the owner have notice of the quality of his beast, and it does any body hurt, he is chargeable with an action for it.
>
> "Tho he have no particular notice, that he did any such thing before, yet if it be a beast, that is ferae naturae, as a lion, a bear, a wolf, yea an ape or monkey, *if he get loose* and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in Andrew Baker's case, whose child was bit by a monkey, that broke his chain and *got loose*.
>
> "And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for tho he use his diligence to keep him up, *if he escape* and do harm, the owner is liable to answer damages."[13]

The case of *May v. Burdett*,[14] a leading authority on absolute liability, involved a monkey allowed by its master to run at large. When restricted to its actual holding, this case stands only for the

[11] Bostock-Ferari Amusement Co. v. Brocksmith, 34 Ind. App. 566, 73 N. E. 281 (1905); Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879 (1900); Scribner v. Kelley, 38 Barb. (N. Y.) 14 (1862); Bormann v. City of Milwaukee, 93 Wis. 522, 67 N. W. 924 (1896); Oakes v. Spaulding, 40 Vt. 347 (1867); Knott v. London County Council, [1934] 1 K. B. 126 at 138; HOLMES, THE COMMON LAW 155 (1881).

[12] Filburn v. People's Palace & Aquarium Co., 25 Q. B. D. 258 (1890); City of Tonkawa v. Danielson, 166 Okla. 241, 27 P. (2d) 348 (1933); Opelt v. Al. G. Barnes Co., 41 Cal. App. 776, 183 P. 241 (1919); SALMOND, TORTS, 9th ed., 554 (1937); 1 R. C. L. 1086 (1914).

[13] 1 HALE, PLEAS OF THE CROWN (1736). Italics inserted.

[14] 9 Q. B. 101, 115 Eng. Rep. 1213 (1846).

proposition that a plaintiff injured by an animal of natural viciousness need not allege negligence in the keeping of the animal. The court said,

> "whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable . . . without any averment of negligence or default in the securing or taking care of it."[15]

In a Mississippi case,[16] the court, after pronouncing the usual rule that the liability of the owner of a wild animal is absolute, said,

> "Lou Garner [the defendant] should not have permitted her monkey to run at large. She should have kept it confined and secure, so that it would do no harm. It was at large and did harm. She is answerable in damages for the hurt it has done."

When expressed in the court's own vernacular, the legal reasoning is obvious: that Lou Garner is responsible for the injury because, having undertaken to keep a savage beast, she failed to prevent its having access to other persons.

Other cases frequently cited to substantiate the absolute liability rule, and also involving an escape of the animal, include cases of a wolf running at large,[17] a rabid dog, previously known to be vicious, which inflicted fatal injuries on a small child as she was playing in her own yard,[18] a buck allowed the freedom of its keeper's public gardens,[19] a bear which broke its chain and escaped from the defendant's pasture into an adjoining field where it killed a man,[20] a vicious horse straying from its own enclosed field into a neighboring pasture where it fatally injured the plaintiff's horse,[21] a wolf broken loose from a state park where it attacked the plaintiff.[22]

If the escaping wild animal is indigenous to the locality, the possessor of the land, even though he had had the animal in captivity, is not liable for its depredations after escape.[23] This is true even though

[15] May v. Burdett, 9 Q. B. 110-111, 115 Eng. Rep. 1213 (1846).
[16] Phillips v. Garner, 106 Miss. 828 at 831, 64 So. 735 (1914).
[17] Manger v. Shipman, 30 Neb. 352, 46 N. W. 527 (1890).
[18] Clinkenbeard v. Reinert, 284 Mo. 569, 225 S. W. 667 (1920).
[19] Spring Co. v. Edgar, 99 U. S. 645 (1879).
[20] Vredenburg v. Behan, 33 La. Ann. 627, 1 Am. Neg. Cas. 349 (1881).
[21] Decker v. Gammon, 44 Me. 322 (1857) (dictum).
[22] Jackson v. Baker, 24 App. D. C. 100 (1904), in which the defendant was exempt from liability because he was required by statute to keep the wolf which had escaped and injured the plaintiff.
[23] Stearn v. Prentice Bros., Ltd., [1919] 1 K. B. 394; Hinsley v. Wilkinson, 4 Cro. Car. 387, 79 Eng. Rep. 938 (1633); Boulston's Case, 5 Co. Rep. 104b, 77 Eng. Rep. 216 (1598); Mitchil v. Alestree, 1 Vent. 295, 86 Eng. Rep. 190

he has permitted or caused such animals to accumulate on his premises in large numbers. The theory of non-liability here is that the landowner has not created any risk unusual to the community.[24] For instance, a national park in South Africa which preserved wild animals within its borders was held not liable for the death of the plaintiff's mother caused by two lions escaping from the park into her garden.[25]

In all the cases referred to above, the animal had escaped from its possessor's premises. It is not necessary, however, in order that strict liability attach, that the animal entirely escape from its possessor's custody and run at large if, although the possessor accompanies it in a public place, it is so controlled that it has access to persons passing by. After noting the distinction between animals *ferae naturae* and *mansuetae naturae*, an Alabama court[26] said that the owner of a wild animal is generally liable for its damage without proof of knowledge of its viciousness, or of negligence *in permitting it to be at large*. The defendant was leading a wolf by a long chain when it attacked the plaintiff who was walking down the public street. It can hardly be said that the beast had "escaped," but it was not effectively controlled. In instructing the jury, a Delaware court[27] said in another case,

> "a man may own animals of a vicious character by nature. That *per se*, of itself is not sufficient—if a man, for instance, owns a tiger and attempts to take it around, unless secured so as to give notice of danger to the public, it would render him liable for any accident which might happen to any person."

The facts before the court were that the plaintiff, while walking down the street, had been bitten, not by a tiger, but by the defendant's notoriously ferocious dog. In another instance, a defendant was driving his cattle, among them a bull, admitted by its keeper to have a generic

(1676) (dictum); Hilton v. Green, 2 F. & F. 821, 175 Eng. Rep. 1302 (1862). In Birkbeck v. Paget, 31 Beav. 403, 54 Eng. Rep. 1194 (1862), the court said that it is legal for a person to have rabbits on his land and he is not liable for the damage done by them if they escape onto adjoining premises, but this principle is subject to the modification that the land must not be so overstocked with rabbits and game as necessarily to cause injury to neighboring land. Accord, Farrer v. Nelson, 52 L. T. R. (Q. B.) 766 (1885).

[24] 3 TORTS RESTATEMENT, § 508, comment b (1938).

[25] Sambo v. Union Government, So. Afr. L. R. [1936] Transvaal Prov. Div. 182.

[26] Hayes v. Miller, 150 Ala. 621, 43 So. 818 (1907).

[27] Barclay v. Hartman, 2 Marv. (16 Del.) 351 at 355-356, 43 A. 174 (1896). Similarly, allowing a notoriously fierce dog to follow one into a public place unsecured renders the possessor absolutely liable. McCaskill v. Elliott, 5 Strob. L. (S. C.) 196 (1850).

antipathy to red, in the public highway, when the plaintiff, decked out with a red kerchief, was attacked and seriously injured by the enraged animal. The court held that if the jury found the defendant had knowledge of the bull's propensity to attack persons wearing red, it was his duty not to drive the bull along the public ways where he was likely to encounter persons so attired.[28]

However, even an animal of notoriously untamed and dangerous nature may be led along a public street if its possessor maintains an effective control over it. The dangerous propensity may be recognized, but if the keeper effects a complete restraint and yet some injury occurs, the injured person must prove that the injury resulted from the dangerous propensity itself. That is, while the owner must absolutely prevent injuries due to the beast's inherently dangerous qualities, he is not responsible for injuries which are not so caused. For example, where an elephant in a parade gave fright to the plaintiff's mount which became unmanageable so that the plaintiff was thrown and hurt, the court held that the injury did not proceed from the propensity of the animal to do mischief, but was more attributable to a lack of ordinary discipline in the horse, something akin to equine contributory fault.[29] The plaintiff would have to show that this accident was caused by the usual and general effect on horses of the appearance of elephants and this he failed to do. Similarly, where another plaintiff's horse shied and bolted at the defendant's bear which was being led along the street from the station to the exhibition grounds, the Indiana Appellate Court said that the injury did not result from any vicious propensity of the bear, which was being moved quietly along a public thoroughfare, for a lawful purpose, under complete control of its keeper.[30] But if the injury results from a particular mischievous characteristic known to the possessor, though not actual viciousness, then the possessor is liable.[31]

Since the liability for depredations of an escaped animal is absolute, the possessor cannot plead his careful attempts to restrain it. It is not sufficient that the possessor of a dangerous beast merely take measures to prevent its escape even though he acts in a reasonably prudent way, if the measures are in fact ineffective. Thus, where a man chained his

[28] Hudson v. Roberts, 6 Exch. 697, 155 Eng. Rep. 724 (1851); Barnum v. Terpening, 75 Mich. 557, 42 N. W. 967 (1889); Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 50 P. 373 (1897).

[29] Scribner v. Kelley, 38 Barb. (N. Y.) 14 (1862).

[30] Bostock-Ferari Amusement Co. v. Brocksmith, 34 Ind. App. 566, 73 N. E. 281 (1905).

[31] Crowley v. Groonell, 73 Vt. 45, 50 A. 546 (1901).

fierce dog in his cellar, but the chain was so long that the dog could and did cross the street where it bit a child, Lord Kenyon said, "it is not sufficient to say, 'I did use a certain precaution.' He ought to use such as would put it out of the animal's power to do hurt...."[32] Similarly, the owner of a monkey tied to a tree on the owner's premises by a rope long enough to let it get over the fence and bite a passerby was held liable because the animal was not under proper control.[33] Also, if a team of horses is known to be likely to bite, the driver is liable for injuries to a person passing along the sidewalk if he hitches the team with heads facing the walk and within "biting distance."[34] Or if a horse or mule is being led behind a wagon by a halter and does harm to a person or thing, his master is liable if he knew the animal was unruly or vicious, but not otherwise, unless negligence is proved.[35]

In all these cases the policy back of the rule of absolute liability is that a person who undertakes to keep a ferocious animal must at his peril prevent its having access to persons who have a right, independent of any consent or license by the possessor of the animal, to be where they are. Such persons have no means of avoiding the danger, other than by giving up their right to be upon their own premises, the public ways, or some third person's premises. To impose less than absolute liability upon one who renders the exercise of this right dangerous would substantially impair it. On the other hand, to impose absolute liability for an injury inflicted upon a person coming onto the possessor's premises would impair his right to the utility of his own land. The injured person comes on the land only by the possessor's consent, express or implied; he has not the right to be

[32] Jones v. Perry, 2 Esp. 482 at 483, 170 Eng. Rep. 427 (1796).

[33] Myburg v. Jorgenson, So. Afr. L. R. [1914] East Dist. Loc. 89. The defendant here escaped liability because he was not custodian of the animal. See, also, Lehnhard v. Robertson's Admx., 176 Ky. 322, 195 S. W. 441 (1917), where a pet bear, tied two or three feet from the sidewalk, bit a small boy.

[34] In Quigley v. Adams Express Co., 27 Pa. Super. 116 (1905), the defendant was held not liable because there was no competent evidence of its knowledge of the horse's propensity to bite people.

[35] In Lyman v. Dale, 262 Mo. 353, 171 S. W. 352 (1914), the celebrated "mule case," a poetic eulogy to the Missouri mule, citing as examples of the worth and valor of the animal in history and literature, Sancho Panza's story, Spanish, French and German folklore, and even Samson's exploits with the jawbone of an ancestor of the Missouri mule and Absalom's unfortunate contretemps, the court concludes that if the owner in the case before it knew his beast was not an ordinary sweet-tempered Missouri mule, but was likely to kick and be unruly, leading him by a five-foot halter through city streets would be such negligence as would render the possessor liable for damage done by him. See also, Kocha v. Union Transfer Co., 188 Wis. 133, 205 N. W. 923 (1925).

in that place except by permission of the landowner, so that he may be expected to assume the risk of injury except by the possessor's negligence. He may always avoid the danger by staying off the premises, which denies him nothing he would have had except by grace of the possessor.

It is conceivable that even where a dangerous animal has escaped from custody or is permitted to be at large and the possessor's liability is absolute, a person injured may be barred from recovery because of his own conduct. However, a mere failure to use reasonable prudence to discover the animal's presence and to avoid injury does not preclude recovery. It is only when a person, fully aware of the risk, voluntarily and unnecessarily puts himself in the way of a wild or vicious animal that the possessor is not liable.[86] In such a case the injured person has brought the injury upon himself. Since negligence is not the basis of liability in escape cases, it is a misnomer to call this type of conduct on the part of the plaintiff contributory negligence. It is more in the nature of a deliberate assumption of a known and unreasonable risk.

II

INJURIES TO PERSONS RIGHTFULLY ON POSSESSOR'S PREMISES

If a wild animal or a domestic animal with a known vicious trait injures a person lawfully on its possessor's premises, the possessor is liable, if, but only if, he failed to exercise care commensurate with the risk involved in the light of the relationship of the parties. He is not absolutely liable.

A business guest coming on the premises is entitled to assume that they are in reasonably safe condition, or if otherwise that he will receive adequate warning. A licensee may assume only that the premises are no more dangerous than they appear to be, that there are no dangers which he would not discover upon reasonable inspection. Thus, unlike the business guest, a licensee must rely upon his own investigation and is entitled to warning only of those dangers which such an investigation would not disclose. However, where the danger involved is a ferocious animal, the distinction between the duty owed a business guest and that owed a licensee becomes immaterial, inasmuch as the presence of an abnormally vicious beast is not in all probability such

[86] May v. Burdett, 9 Q. B. 101 at 113, 115 Eng. Rep. 1213 (1846); Lynch v. McNally, 73 N. Y. 347 (1878); Fraser v. Chapman, 256 Mass. 1, 152 N. E. 44 (1926); Raymond v. Hodgson, 161 Mass. 184, 36 N. E. 791 (1894); Matteson v. Strong, 159 Mass. 497, 34 N. E. 1077 (1893); 3 TORTS RESTATEMENT, § 515 (1938).

a danger as even a licensee would reasonably expect, and a warning should be given in either case.

While there are cases which pay lip service to the absolute liability rule in this factual situation,[37] the vast numerical majority substantiate the less strict rule.[38] Indeed, if the ownership and exhibition of wild animals and the harboring of vicious dogs to protect property are recognized as lawful, it would be anomalous to declare that because of the very act of keeping them, one is liable under all circumstances to persons injured by them. Obviously, a jungle beast held captive away from its natural habitat does not passively resign itself to captivity, but will forever seek escape. Once it breaks its bars, the community is endangered, and for harm resulting from such escape, the owner, who has created this risk for his own advantage by introducing into the community an abnormal and dangerous element, should suffer the loss, rather than one who had no part in the creation of the risk. But if someone coming on the possessor's permises is injured, in order to recover damages the injured person must prove that the possessor was negligent, whether the animal is running loose on the grounds or is tied up.

Among those cases involving an injury on the possessor's premises which base their decisions upon absolute liability, there seems to be none in which the possessor of the animal could not have been found liable on a negligence basis. That is, there is no case holding the possessor liable for an injury which occurred while the animal was properly confined on the premises. In *Muller v. McKesson*[39] the

[37] Muller v. McKesson, 73 N. Y. 195 (1878); Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269 (1871); Copley v. Wills, (Tex. Civ. App. 1913) 152 S. W. 830; Stamp v. Eighty-Sixth Street Amusement Co., 95 Misc. 599, 159 N. Y. S. 683 (1916).

[38] Panorama Resort v. Nichols, 165 Va. 289, 182 S. E. 235 (1935); Vaughan v. Miller Bros. "101" Ranch Wild West Show, 109 W. Va. 170, 153 S. E. 289 (1930); De Gray v. Murray, 69 N. J. L. 458, 55 A. 237 (1903); Curtis v. Mills, 5 Car. & P. 489, 172 Eng. Rep. 1066 (1833); Parker v. Cushman, 117 C. C. A. (8th) 71, 195 F. 715 (1912); Hahnke v. Friederick, 140 N. Y. 224, 35 N. E. 487 (1893); Brock v. Copeland, 1 Esp. 203, 170 Eng. Rep. 328 (1794); Rider v. White, 65 N. Y. 54 (1875); Bormann v. City of Milwaukee, 93 Wis. 522, 67 N. W. 924 (1896); Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925); Bottcher v. Buck, 265 Mass. 4, 163 N. E. 182 (1928); Marquet v. La Duke, 96 Mich. 596, 55 N. W. 1006 (1893); Jacoby v. Ockerhausen, 13 N. Y. S. 499 (S. Ct. 1891), affd. 129 N. Y. 649, 29 N. E. 1032 (1891); Guzzi v. New York Zoological Soc., 192 App. Div. 263, 182 N. Y. S. 257 (1920), affd. 233 N. Y. 511, 135 N. E. 897 (1922); Meibus v. Dodge, 38 Wis. 300 (1875); Worthen v. Love, 60 Vt. 285, 14 A. 461 (1888).

[39] 73 N. Y. 195 (1878).

plaintiff, a factory employee whose duty it was to open the gate for the workmen in the mornings, was severely bitten by a savage watchdog which ran loose on the premises at night, but was usually tied up before the plaintiff came on duty. The court cited *May v. Burdett*[40] with approval and reiterated that the gravamen of the action was the keeping of the animal, not negligence in failing to restrain it. "There is no legal excuse," the court said, "for exposing human life to the ferocity of such an animal,"[41] and with this statement there can be no quarrel. The defendant's wrong *was* exposing persons to a "brute as savage as a tiger." Keeping it so as to permit opportunity for injury was wrongful—failing to fasten it up, and without warning, at a time when people would be coming onto the premises rightfully was negligence.

In a similar case,[42] a fierce dog was so chained under steps leading up to the defendant's door that it could not have access to persons ascending. Unfortunately one step which was in disrepair gave way, causing the plaintiff's leg to go through, and the alert watchdog grabbed it in his teeth, inflicting serious lacerations. The defendant was in obvious violation of his duty to keep his premises in a safe condition for persons rightfully coming on, the dog-bite being an injury consequential to the faulty step. But the court disregarded this ground of liability and in its decision for the plaintiff quoted the rule that the owner of a vicious animal keeps it at his peril.

The same rule was invoked in the case of *Copley v. Wills.*[43] There the defendant operated an amusement resort wherein he permitted monkeys to run at large about the halls for the entertainment of his patrons who were accustomed to feed them peanuts. The plaintiff was bitten while so engaged. Obviously the defendant was under a duty to maintain his resort to which the public was invited with a due regard for their safety. Allowing monkeys, even those supposed to be tamed, to run about the premises unrestrained might well be regarded as a violation of this duty and the defendant could have been found liable on the grounds of negligence.

In another case[44] frequently cited on absolute liability, the court said that had the plaintiff asked a decision on the law alone, it would have been given, for negligence had nothing to do with the defendants' liability; nevertheless the court submitted the questions of negligence

[40] 9 Q. B. 101, 115 Eng. Rep. 1213 (1846).
[41] Muller v. McKesson, 73 N. Y. 195 at 205 (1878).
[42] Laverone v. Mangianti, 41 Cal. 138 (1871).
[43] (Tex. Civ. App. 1913) 152 S. W. 830.
[44] Wyatt v. Rosherville Gardens Co., 2 T. L. R. (Q. B.) 282 (1886).

on the defendants' part and contributory negligence by the plaintiff to the jury and a verdict against the defendants was rendered. The plaintiff had been a visitor at the defendants' public gardens in which was a bear cave only partially enclosed by rockwork and bars, with a gallery around next to the den. There was no warning against going onto this gallery and it was easily accessible to visitors. The plaintiff, to get a better view of the bears and to feed them, stepped onto this inner walk and one of the bears stuck its paw through the bars, seized the plaintiff's arm and "for four or five minutes munched and crunched on it." Clearly the defendants were guilty of negligence in not protecting the public adequately, and it would not be necessary in such a case to resort to the absolute liability rule.

Much the same situation was involved in a recent Oklahoma case.[45] The city owned a park in which was a bear pit, adjacent to the public swimming pool. The pit was constructed with a wall which rose only two feet above the level of the surrounding ground and the bear climbed out. A visitor at the park, a "friend" of the bear, after attempting to push him back over the wall and down into the pit, was leading him back by the only other entrance to the pit, other than by jumping down the way the bear came out, past the pool and bathhouse. The plaintiff had been swimming and was standing by the bathhouse when the bear and his "friend" came past. The bear grabbed the plaintiff by the leg and hung on for several minutes until it was finally beaten off with a hammer. The court based its decision on the absolute liability doctrine, although the same result could have been reached on the grounds of negligence. Indeed, an English court[46] some years earlier dealt with a similar situation as a negligence problem. In that case the defendant opened his premises to excursionists and the plaintiff was injured when seized by a pet bear, fastened in the gardens by a six-foot chain. There were no warnings, verbal or written, to the visitors. The court said, "If it [an animal of savage nature] be insufficiently kept, or so kept that a person passing is not sufficiently protected, the owner is liable."[47]

When three performing lions escaped from their cages backstage at the defendant's theatre and entered the orchestra pit, a patron was injured in the ensuing panic. The court said:

> "the keeping of the lions insecurely confined constituted a public nuisance. The defendant was responsible in the first instance for

[45] City of Mangum v. Brownlee, 181 Okla. 515, 75 P. (2d) 174 (1938).
[46] Besozzi v. Harris, 1 F. & F. 92, 175 Eng. Rep. 640 (1858).
[47] Ibid., 1 F. & F. 92 at 93, 175 Eng. Rep. 640 (1858).

> the keeping of the animals on its premises . . . and unless security was assured it took part in the maintenance of a public nuisance. . . . The manner in which they were kept there is immaterial since the event shows that they were not securely confined."[48]

Disregarding the somewhat dubious nuisance theory, it seems a fair inference from the language of the court that there was negligence in the control of the lions, although just what safety measures were attempted does not appear in the record, and judgment for the plaintiff could probably have been rested on negligence. At least, the plaintiff might have invoked the *res ipsa loquitur* rule and cast upon the defendant the burden of disproving negligence. Somewhat similar language is used by a Missouri Court of Appeals[49] in holding that keeping a dog after learning of its viciousness is a nuisance and that the possessor's duty is to dispose of the animal; however, the court concludes that the owner is chargeable for neglect to keep it with such care that it could not do damage to a person who is without essential fault.

These cases invoking the absolute liability rule in situations where a dangerous animal injures a person who lawfully comes onto the possessor's premises are a small minority. Most courts hold the possessor liable only if he has not fulfilled his duty of due care under the circumstances. Some courts expressly refute the doctrine of absolute liability;[50] some disregard it without comment.[51]

A. *Factors Bearing on Negligence of the Possessor*

In determining the issue of negligence, many factors have influenced the courts, but whether the defendant has exercised due care depends chiefly upon (a) the magnitude of the risk involved, (b) the economic and social usefulness of the defendant's conduct in keeping the particular animal, and (c) the relative positions of the parties.

1. *Magnitude of the Risk Involved*

The possessor of dangerous animals is required to use a quantum of care in restraining them commensurate with the risk involved. The

[48] Stamp v. Eighty-Sixth Street Amusement Co., 95 Misc. 599 at 601-602, 159 N. Y. S. 683 (1916).

[49] Speckmann v. Krieg, 79 Mo. App. 376 (1899). The defendant was clearly negligent in directing a nine-year old child to deliver eggs at his barn, knowing his vicious dog was at large in the barnyard.

[50] Panorama Resort v. Nichols, 165 Va. 289, 182 S. E. 235 (1935); Vaughan v. Miller Bros. "101" Ranch Wild West Show, 109 W. Va. 170, 153 S. E. 289 (1930); Parker v. Cushman, 117 C. C. A. (8th) 71, 195 F. 715 (1912).

[51] Marquet v. La Duke, 96 Mich. 596, 55 N. W. 1006 (1893); Netusil v. Novak, 120 Neb. 751, 235 N. W. 335 (1931).

risk in these cases may be measured by the seriousness of the threatened harm and by the likelihood of injury, depending in part upon the number of people endangered. Thus, while the possessor is held to a uniform standard of due care, the precautionary measures which may be adequate to control a small, comparatively harmless animal will not meet the standard in the case of a powerful beast or one apt to inflict critical or fatal hurts. The protection effected must be designed to cope with the propensities of the particular animal involved. The keeper of wild animals must use that superior caution to prevent their doing mischief which their propensities in that direction demand of him.[52] The character of such animals necessitates restraints designed to prevent indulgence in their particular dangerous behavior. For example, a bear is inclined to grab people within reach of its paws and to crush them; consequently, stretching a rope in front of a chained bear is not adequate protection of persons invited to watch the bear's antics and feed it candy,[53] nor is enclosing the bear in a pit with only a bar across the approach to the pit,[54] nor is chaining a "tame" bear within reach of persons passing by and not warned of its presence.[55]

Of course, the size of the animal is not necessarily a determinant of its dangerous qualities. A very small dog with good teeth may do considerable damage, just as, to adopt the simile of a Nebraska court,[56] a small bandit behind a good gun will produce as grave a result as a large man. However, the likelihood of serious injury resulting from the mischievous nature of dogs and cats is slight,[57] so the protective measures required are less elaborate. For this reason chaining a watch-dog so that it could not reach persons traversing the walk from the

[52] Connor v. Princess Theatre, 27 Ont. 466, 10 Dom. L. R. 143 (1912); Goosen v. Reeders, So. Afr. L. R. [1926] Transvaal Prov. Div. 436; Vaughan v. Miller Bros. "101" Ranch Wild West Show, 109 W. Va. 170, 153 S. E. 289 (1930); 2 COOLEY, TORTS, 4th ed., § 270 (1932); 1 THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE 776 (1901).

[53] Bottcher v. Buck, 265 Mass. 4, 163 N. E. 182 (1928); Marquet v. La Duke, 96 Mich. 596, 55 N. W. 1006 (1893); City of Tonkawa v. Danielson, 166 Okla. 241, 27 P. (2d) 348 (1933).

[54] Wyatt v. Rosherville Gardens Co., 2 T. L. R. (Q. B.) 282 (1886).

[55] Besozzi v. Harris, 1 F. & F. 92, 175 Eng. Rep. 640 (1858).

[56] Netusil v. Novak, 120 Neb. 751, 235 N. W. 335 (1931).

[57] ". . . a dog following its natural propensity to stray is not likely to do substantial damage in ordinary circumstances, although it might do so by rushing about in a carefully tended garden," the court said in Buckle v. Holmes, [1926] 2 K. B. 125 at 129. See also, Bischoff v. Cheney, 89 Conn. 1, 92 A. 660 (1914); McDonald v. Jodrey, 8 Pa. Co. 142 (1889); Read v. Edwards, 17 C. B. (N. S.) 245, 144 Eng. Rep. 99 (1864); Earl v. Van Alstine, 8 Barb. (N. Y.) 630 (1850).

gate to the house would apparently be sufficient,[58] but keeping a mean dog in a "run" beneath a shop, or in the courtyard, from which it could get out, was not proper care.[59] *A fortiori,* keeping ferocious dogs unmuzzled and unsecured on one's premises without warnings is negligence.[60] Even a "Beware" sign may be inadequate warning against a watchdog chained to its house, in its possessor's yard, so an early English case says, if the injured person could not read.[61]

Even insects, especially bees, may cause serious injury, but the probability of any substantial hurt as a result of their attacks is rather slight. Therefore, white-painting the hives,[62] or setting them a reasonable distance away from adjoining premises or highways[63] will satisfy the requirement of due care.

While it is the inherently dangerous quality of the beast which is one of the yardsticks of the amount of care required, a naturally ferocious beast may be domesticated to some degree so that it seems not to create any serious risk. However, since a leopard does not change its spots, nor its long claws and sharp fangs, the fact that it has been "tamed" will not excuse its owner for relaxing his vigilance to prevent injury to persons rightfully on his premises, nor from absolute liability if the animal escapes and does harm.[64] The previous good behavior of the beast, however, has been held pertinent to the question of damages.[65]

Besides the seriousness of the threatened harm, the number of persons likely to suffer possible injury also contributes to the magni-

[58] Curtis v. Mills, 5 Car. & P. 489, 172 Eng. Rep. 1066 (1833).

[59] Barnes v. Lucille, Ltd., 96 L. T. R. (K. B.) 680, 23 T. L. R. 389 (1907); Worth v. Gilling, L. R. 2 C. P. 1 (1866).

[60] Jacoby v. Ockerhausen, 13 N. Y. S. 499 (S. Ct. 1891), affd. 129 N. Y. 649, 29 N. E. 1032 (1891).

[61] Sarch v. Blackburn, 4 Car. & P. 297, 172 Eng. Rep. 712 (1830). Quaere: If a blind man comes on my premises, must I give warning of my watchdog in braille?

[62] Parsons v. Manser, 119 Iowa 88, 93 N. W. 86 (1903).

[63] Goosen v. Reeders, So. Afr. L. R. [1926] Transvaal Prov. Div. 436; Earl v. Van Alstine, 8 Barb. (N. Y.) 630 (1850).

[64] Filburn v. People's Palace & Aquarium Co., 25 Q. B. D. 258 (1890); Copley v. Wills, (Tex. Civ. App. 1913) 152 S. W. 830; Spring Co. v. Edgar, 99 U. S. 645 at 653 (1878); Lehnhard v. Robertson's Admx., 176 Ky. 322, 195 S. W. 441 (1917); City of Tonkawa v. Danielson, 166 Okla. 241, 27 P. (2d) 348 (1933); Hayes v. Miller, 150 Ala. 621, 43 So. 818 (1907).

[65] The exemplary past of a "tamed" wolf and the previous good record of a pet bear appealed to the leniency of the court in Hayes v. Miller, 150 Ala. 621, 43 So. 818 (1907), and Besozzi v. Harris, 1 F. & F. 92, 175 Eng. Rep. 640 (1858), respectively.

tude of the risk. If ferocious animals are kept in a public place or one which many persons frequent, a greater amount of care will be required to prevent harm. Or even less dangerous animals, if left unrestrained in a place where many persons will be subjected to their propensities to do damage, may make the possessor liable.[66] This consideration has been given weight in many cases. An early English case says, "Where there is a public way, or the owner suffers a way over his close to be used as a public one, if he keeps such animal in his close, he shall answer for any injury any person may sustain from it."[67] One who keeps deer, domesticated to some degree, in a place of public resort "is or may be" liable to one injured by them.[68] Even bees, generally not classed as dangerous, as indicated above, must be located where they will not come in contact with the many persons traveling the public roads and similar places.[69] One who kept a bear caged on a vacant lot in a business section was chargeable with knowledge that it would attract children who would be likely to be injured.[70] A fierce dog kept to drive off tramps must be chained up and warning signs put up where the premises are open to the public, or where there is nothing to indicate that the public has no right to go there.[71] The public is entitled to act on the presumption that all animals likely to cause harm are confined, and contributory negligence is not available as a defense if no notice of such animal's presence had been given.[72]

2. *Utility of Keeping the Animal*

The purpose of the defendant's conduct in harboring a harm-producing animal is another element to be considered in determining whether the defendant has met the due care standard under the circumstances. Where the defendant is engaged for his own pecuniary profit in an enterprise which he invites the public to patronize, par-

[66] McCaskill v. Elliott, 5 Strob. L. (S. C.) 196 (1850); Haynes v. Harwood, [1935] 1 K. B. 146; Rice v. Von der Leith, 108 Misc. 441, 178 N. Y. S. 441 (1919); Deen v. Davies, [1935] 2 K. B. 282; Barnes v. Chapin, 4 Allen (86 Mass.) 444 (1862).

[67] Brock v. Copeland, 1 Esp. 203, 170 Eng. Rep. 328 (1794) (headnote paraphrasing dictum of court). In Mason v. Keeling, 12 Mod. 332 at 335, 88 Eng. Rep. 1359 (1699), it was said that one must not keep fierce dogs near the highway "where all sorts of people pass at all hours."

[68] Spring Co. v. Edgar, 99 U. S. 645 (1878).

[69] Ammons v. Kellogg, 137 Miss. 551, 102 So. 562 (1925).

[70] City of Tonkawa v. Danielson, 166 Okla. 241, 27 P. (2d) 348 (1933); Lehnhard v. Robertson's Admx., 176 Ky. 322, 195 S. W. 441 (1917).

[71] Chicago & A. R. R. v. Kuckkuck, 197 Ill. 304, 64 N. E. 358 (1902); Rider v. White, 65 N. Y. 54 (1875).

[72] Chicago & A. R. R. v. Kuckkuck, 197 Ill. 304, 64 N. E. 358 (1902).

ticularly if the whole purpose of it is the display of dangerous animals, as is the case with circuses, zoos and sometimes with dog and cat shows and horse races, the proprietor is required to use every practical means to prevent injury to his patrons. The defendant's profit derives from the very act which creates the risk of harm to the public; it is the presence of the public on the possessor's land that is the immediate source of profit and it has been attracted to his land because of the presence of the animals there. Extreme caution is exacted by the law for the protection of the patrons.[73] Where the purpose of the exhibition is non-profit, for public education or entertainment, somewhat less elaborate precautions would seem to be sufficient.[74]

Although the interest in animals as such is recognized by the law,[75] especially in the case of normally harmless animals, if the defendant keeps a dangerous and non-useful animal merely for his own whim or enjoyment, great care in guarding against injury is required.[76] Of course, ferocious watchdogs are useful in the protection of property, and the courts have gone far to shield the keepers of such dogs from liability for injuries inflicted by them. But if the watchdog is so ferocious as to endanger the safety of innocent persons, the possessor must give sufficient warning and exercise extreme caution to prevent injuries.[77] Usefulness to society has been a prominent factor in cases involving the sometimes serious injuries inflicted by bees.[78]

[73] Bottcher v. Buck, 265 Mass. 4, 163 N. E. 182 (1928); Vaughan v. Miller Bros. "101" Ranch Wild West Show, 109 W. Va. 170, 153 S. E. 289 (1930); Stamp v. Eighty-Sixth Street Amusement Co., 95 Misc. 599, 159 N. Y. S. 683 (1916); Copley v. Wills, (Tex. Civ. App. 1913) 152 S. W. 830; May Co. v. Drury, 160 Md. 143, 153 A. 61 (1931); Cruikshank v. Brockton Agr. Soc., 260 Mass. 283, 157 N. E. 357 (1927); Parker v. Cushman, 117 C. C. A. (8th) 71, 195 F. 715 (1912).

[74] Guzzi v. New York Zoological Soc., 192 App. Div. 263, 182 N. Y. S. 257 (1920), affd. 233 N. Y. 511, 135 N. E. 897 (1922). But in Byrnes v. City of Jackson, 140 Miss. 656 at 670, 105 So. 861 (1925), the court said, "While the city may be maintaining the zoo for educational purposes, it is not such an education as the city is required by law to furnish the public."

[75] Buckle v. Holmes, [1926] 2 K. B. 125; dissent in State v. Harriman, 75 Me. 562 (1884).

[76] Guzzi v. New York Zoological Soc., 192 App. Div. 263, 182 N. Y. S. 257 (1920), citing Ervin v. Woodruff, 119 App. Div. 603, 103 N. Y. S. 1051 (1907); Lehnhard v. Robertson's Admx., 176 Ky. 322, 195 S. W. 441 (1917); Stevens v. Hulse, 263 N. Y. 421, 189 N. E. 478 (1934); Loomis v. Terry, 17 Wend. (N. Y.) 496 (1837); Candler v. Smith, 50 Ga. App. 667, 179 S. E. 395 (1935).

[77] Rider v. White, 65 N. Y. 54 (1875); Sycamore v. Ley, 147 L. T. R. (App.) 342 (1932).

[78] Ammons v. Kellogg, 137 Miss. 551, 102 So. 562 (1925); Earl v. Van Alstine, 8 Barb. (N. Y.) 630 (1850).

3. *Relationship of the Parties*

The relation between the plaintiff and the defendant also bears upon the negligence issue. The relationship between the parties may itself give rise to special duties or call for added caution on the part of the animal possessor. For instance, where the defendant is a business entrepreneur and the plaintiff a business guest, invited to patronize the enterprise for the defendant's profit, more care is required of the defendant because of the business relationship. This is true whether the purpose of the enterprise is the exhibition of wild animals or whether the presence of the harm-producing animal is only incidental. Of course, in the former case the risk is usually more serious and the care taken must be commensurate therewith. A shopkeeper must use reasonable care to maintain his premises in a safe condition for customers and business invitees, and what would otherwise be sufficient precautionary measures are not due care where a business relationship exists.[79] This duty is involved both in the situation where the storekeeper is the possessor of the animal[80] and in that where he merely permits a stray animal[81] or one in the custody of a third person[82] on his premises; in the former case his duty as the possessor of a dangerous animal is no greater than in the latter as storekeeper. The business relationship is a factor in determining the quantum of care necessary to meet the due care standard, whether the injured person is a customer in a store,[83] a postmaster who is in the habit of delivering telegrams to the defendant's residence,[84] one who calls regularly at the defendant's

[79] Clinton v. J. Lyons & Co., Ltd., [1912] 3 K. B. 198; Goodwin v. E. B. Nelson Groc. Co., 239 Mass. 232, 132 N. E. 51 (1921); May Co. v. Drury, 160 Md. 143, 153 A. 61 (1931); Gardner v. H. C. Bohack & Co., 179 App. Div. 242, 166 N. Y. S. 476 (1917); Worth v. Gilling, L. R. 2 C. P. 1 (1866); Pallman v. Great Atlantic & Pacific Tea Co., 117 Conn. 667, 167 A. 733 (1933). See also, Redmond v. Nat. Horse Show Assn., 78 Misc. 383, 138 N. Y. S. 364 (1912); Hart v. Washington Park Club, 157 Ill. 9, 41 N. E. 620 (1895); Windeler v. Rush County Fair Assn., 27 Ind. App. 92, 59 N. E. 209, 60 N. E. 954 (1901); Wilson v. Norumbega Park Co., 275 Mass. 422, 176 N. E. 514 (1931).

[80] Gardner v. H. C. Bohack & Co., 179 App. Div. 242, 166 N. Y. S. 476 (1917); Clinton v. J. Lyons & Co., Ltd., [1912] 3 K. B. 198; Goodwin v. E. B. Nelson Groc. Co., 239 Mass. 232, 132 N. E. 51 (1921); May Co. v. Drury, 160 Md. 143, 153 A. 61 (1931).

[81] Andrews v. Jordan Marsh Co., 283 Mass. 158, 186 N. E. 71, 92 A. L. R. 726 at 732 (1933), criticized in 13 BOST. UNIV. L. REV. 768 (1933); Smith v. Great Eastern Ry., L. R. 2 C. P. 4 (1866); Creeger v. Springfield Rendering Co., (Mass. 1936) 200 N. E. 352.

[82] Gallagher v. Kroger Groc. & Bkg. Co., (Mo. App. 1925) 272 S. W. 1005.

[83] See cases in note 77, supra.

[84] Carbury v. Measures, 4 S. R. (N. S. W.) 569 (1904).

house to buy or sell milk or produce,[85] or a cattle dealer bringing animals to a slaughter-house.[86]

Similarly, duties attendant upon the carrier-passenger relationship are the basis of the liability of the carrier where a passenger is injured by a stray animal[87] or one in the custody of another passenger.[88] But if the animal is in the carrier's custody,[89] either for shipment[90] or as the pet of an employee,[91] the carrier may be liable as the possessor if it has been negligent. The quantum of care generally owed a passenger has been the subject of dissension among judges, but the standard of due care under the circumstances is usually applied.[92] If a dangerous animal escapes from the carrier's custody or while in the carrier's possession and injures a member of the general public, the carrier is said to be liable, not as an owner would be even in those jurisdictions adhering to the absolute liability rule, but only for failing in its duty to adopt reasonable precautions to prevent accidents while the animal is in its possession.[93] The carrier is never liable in the absence of negligence, for the reason that it is not permitted to refuse to carry such animals merely because they are dangerous. Like the superintendent of the state game preserve, it is required by law to assume the custody of the animals and should not, therefore, be subject to liability without fault.[94]

Where the relationship is bailment for use, the bailor is obliged to exercise the care of a reasonably prudent man to furnish a safe animal

[85] Warner v. Chamberlain, 7 Houst. (12 Del.) 18, 30 A. 638 (1884); Crowley v. Groonell, 73 Vt. 45, 50 A. 546 (1901); Speckmann v. Krieg, 79 Mo. App. 376 (1899); Goode v. Martin, 57 Md. 606 (1881); Curtis v. Mills, 5 Car. & P. 489, 172 Eng. Rep. 1066 (1833).

[86] Creeger v. Springfield Rendering Co., (Mass. 1936) 200 N. E. 352.

[87] Smith v. Great Eastern Ry., L. R. 2 C. P. 4 (1866).

[88] Westcott v. Seattle, R. & S. R. R., 41 Wash. 618, 84 P. 588, 4 L. R. A. (N. S.) 947 (1906).

[89] West Chicago St. R. R. v. Walsh, 78 Ill. App. 595 (1898).

[90] Trinity & S. Ry. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389 (1898).

[91] Barrett v. Malden & M. R. R., 3 Allen (85 Mass.) 101 (1861); Pinson v. Kansas City So. Ry., (C. C. A. 5th, 1930) 37 F. (2d) 652.

[92] Trinity & S. Ry. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389 (1898).

[93] Holt v. Leslie, 116 Ark. 433, 173 S. W. 191 (1915); Molloy v. Starin, 191 N. Y. 21, 83 N. E. 588 (1908). See also, The Lord Derby, (C. C. La. 1833) 17 F. 265.

[94] Molloy v. Starin, 191 N. Y. 21, 83 N. E. 588 (1908). See also, Madras Ry. v. Zemindar of Carvatenagarum, L. R. 1 Indian App. 364, 30 L. T. 770 (1874); Price v. South Metropolitan Gas Co., 65 L. J. (Q. B.) 126 (1895); Jackson v. Baker, 24 App. D. C. 100 (1904).

and one suitable for the purpose contemplated in the bailment.[95] It is his duty to know the dispositions and propensities of the animals he bails, and if he learns of some vicious characteristic, or could by reasonable diligence ascertain it, he is liable for any injuries to the bailee because of the animal's viciousness unless he warns the bailee.[96] Some courts have based a liability upon the bailment contract and have found an implied warranty of suitability for purpose.[97] Where the injured person is the bailee, he may recover either for breach of this warranty, or in tort for the negligence, if any, of the defendant in failing to use proper care in ascertaining and disclosing the dangerous quality of the animal.[98] Where the injured person is not a party to the bailment contract but is a member of the bailee's family or household, for whose use the animal was hired, recovery must be upon a tort basis.[99]

If the bailor has duly warned of the dangerous character of the animal and injury occurs while the bailee is in possession, generally the bailee only is liable, responsibility being predicated upon the possession of a dangerous animal. If the injury, as is often the case, is the result of the negligent conduct of the bailee in failing to control the animal, it is said that his negligence is not imputed to the bailor;[100]

[95] Cooper v. Layson Bros., 14 Ga. App. 134, 80 S. E. 666 (1914); Foley v. O'Flynn, 288 Mass. 504, 193 N. E. 44 (1934); Vaningan v. Mueller, 208 Wis. 527, 243 N. W. 419 (1932); Copeland v. Draper, 157 Mass. 558, 32 N. E. 944 (1892); Troop A Riding Academy v. Steverding, 39 Ohio App. 560, 177 N. E. 601 (1931).

[96] Artificial Ice & Cold Storage Co. v. Martin, 102 Ind. App. 74, 198 N. E. 446 (1935); Kissam v. Jones, 56 Hun (N. Y.) 432, 10 N. Y. S. 94 (1890); Emmons v. Stevane, 77 N. J. L. 570, 73 A. 544, 24 L. R. A. (N. S.) 458 (1909); Talmadge v. Mills, 80 App. Div. 382, 80 N. Y. S. 637 (1903).

[97] Conn v. Hunsberger, 224 Pa. 154, 73 A. 324, 25 L. R. A. (N. S.) 372 (1909); Windle v. Jordan, 75 Me. 149 (1883); Copeland v. Draper, 157 Mass. 558, 32 N. E. 944 (1892).

[98] Conn v. Hunsberger, 224 Pa. 154, 73 A. 324 (1909); Vaningan v. Mueller, 208 Wis. 527, 243 N. W. 419 (1932); Ohlweiler v. Lohmann, 82 Wis. 198, 52 N. W. 172 (1892); Dickie v. Henderson, 95 Ark. 78, 128 S. W. 561 (1910).

[99] Horne v. Meakin, 115 Mass. 326 (1874); White v. Steadman, [1913] 3 K. B. 340; Vaningan v. Mueller, 208 Wis. 527, 243 N. W. 419 (1932); Foley v. O'Flynn, 288 Mass. 504, 193 N. E. 44 (1934). In these cases it is suggested that if the injured person is the intended beneficiary of the bailment contract, he may recover as third party beneficiary of the contract. The usual theory of liability, however, is tort, for failure to exercise ordinary care in providing an animal suitable for the use intended, whether for the bailee's own use, or for someone for whom he expressly or impliedly provided in the bailment.

[100] McColligan v. Pennsylvania R. R., 214 Pa. 229, 63 A. 792 (1906); Jones v. Mayor of Liverpool, 14 Q. B. D. 890 (1885); Herlihy v. Smith, 116 Mass. 265 (1874).

that whether the bailment is for hire or gratuitous, the bailor, being out of possession and having no control over the animal, cannot be held responsible for losses caused by failure of the bailee properly to control it.[101] Of course, if the bailee does not know of and has no opportunity to discover the dangerous quality of the animal before the injury and the bailor had failed to warn him about it, the bailor may be held liable to injured third persons.[102] He is responsible to third persons, also, if he entrusts a dangerous animal to a forewarned but incompetent bailee.[103]

Where the parties are master and servant, the usual duties of that relationship devolve upon them, and recourse to the special rules of law for animal cases seems unnecessary and confusing. The employer must furnish reasonably safe working conditions and equipment or warn his employee of the dangers, so that if there is on the premises an animal known to be dangerous, the master is liable for injuries it inflicts on his servant unless he has warned him of its presence.[104] The servant assumes such risks as are ordinarily incident to his work, and a mature person is presumed to realize them whether warned or not.[105] He assumes, also those unusual risks which he does know about or which are quite apparent.[106] Thus, a man employed to care for park grounds where deer are known to be kept assumes the risk of injury by them unless he was induced to enter upon the work by misrepresentations of his employer that the animals were harmless.[107] In spite

[101] Herlihy v. Smith, 116 Mass. 265 (1874); Bard v. Yohn, 26 Pa. St. 482 (1856); Quarman v. Burnett, 6 M. & W. 499, 151 Eng. Rep. 509 (1840); Reuter v. Swarthout, 182 Wis. 453, 196 N. W. 847 (1924); Jones v. Mayor of Liverpool, 14 Q. B. D. 890 (1885); Marsel v. Bowman, 62 Iowa 57, 17 N. W. 176 (1883). Contra, Stapleton v. Butensky, 188 App. Div. 237, 177 N. Y. S. 18 (1919), noted 20 COL. L. REV. 89 (1920).

[102] State v. Katcef, 159 Md. 271, 150 A. 801 (1930) (vendor of vicious horse); Emmons v. Stevane, 77 N. J. L. 570, 73 A. 544 (1909); White v. Steadman, [1913] 3 K. B. 340; Logan v. Hope, 139 Ga. 589, 77 S. E. 809 (1913); Cooper v. Layson Bros., 14 Ga. App. 134, 80 S. E. 666 (1914).

[103] 2 TORTS RESTATEMENT, § 390 (1934). See also, Otoupalik v. Phelps, 73 Colo. 433, 216 P. 541 (1923); Priestly v. Skourup, 142 Kan. 127, 45 P. (2d) 852 (1935); Rounds v. Phillips, 166 Md. 151, 170 A. 532 (1934).

[104] Gooding v. Chutes Co., 155 Cal. 620, 102 P. 819, 23 L. R. A. (N. S.) 1071 (1909).

[105] Schnell v. Howitt, 158 Ore. 586, 76 P. (2d) 1130 (1938); Boatman v. Miles, 27 Wyo. 481, 199 P. 933 (1921).

[106] Boatman v. Miles, 27 Wyo. 481, 199 P. 933 (1921); Farley v. Picard, 78 Hun (N. Y.) 560, 29 N. Y. S. 802 (1894); Brock v. Copeland, 1 Esp. 203, 170 Eng. Rep. 328 (1794).

[107] Bormann v. City of Milwaukee, 93 Wis. 522, 67 N. W. 924 (1896); Fererira v. Silvey, 38 Cal. App. 346, 176 P. 371 (1918); Moore v. American Express

of the availability of these general grounds of liability, many courts have disregarded them and based the master's liability upon his possession of a dangerous animal.[108] This reasoning led the English court to its much criticized opinion in *Baker v. Snell*,[109] where the master was held absolutely liable as keeper of a dog known to be vicious, although the dog was unleashed and incited by one servant to attack another servant. The absolute liability of the master as possessor of a notoriously vicious animal was not modified by the fact that the damage flowed from the act of a third person. The defense of common employment was not specifically raised, but the implication from the decision is that that defense is not available where the absolute liability rule is applied.[110]

Where the basis of liability of an animal possessor is negligence, ordinary rules of contributory fault would seem to apply. Courts frequently, however, have dealt indiscriminately with all animal cases as involving absolute liability. "Some slight negligence" or "mere inadvertence" is said not to bar recovery; on the other hand, "gross negligence" or "consciously putting oneself in the way of the animal" does preclude recovery.[111] As has been pointed out above,[112] such statements as these are accurate where injury occurred while the animal was at large and the possessor's liability is absolute. However, in situations involving the failure of the possessor to use due care to restrain the animal or to warn business guests and licensees coming on his premises, a lack of reasonable care on the part of the injured person would logically seem to prevent his recovery. It is in those cases where the plaintiff, not knowing of the animal's presence or of its viciousness, failed to guard against injury, that the courts, assuming liability to be

Co., 186 Mo. App. 593, 172 S. W. 416 (1915); Gatliff Coal Co. v. Wright, 157 Ky. 682, 163 S. W. 1110 (1914).

[108] Muller v. McKesson, 73 N. Y. 195 (1878); Barnes v. Lucille, Ltd., 96 L. T. (K. B.) 680, 23 T. L. R. 389 (1907).

[109] [1909] 2 K. B. 352. Criticized by Thomas Beven, "Responsibility at Common Law for the Keeping of Animals," 22 HARV. L. REV. 465 (May 1909), and defended by Sir Frederick Pollock in 25 L. Q. REV. 317 (July 1909).

[110] The same proposition is given as dictum in Knott v. London County Council, [1934] 1 K. B. 126.

[111] Copley v. Wills, (Tex. Civ. App. 1913) 152 S. W. 830; Curtis v. Mills, 5 Car. & P. 489, 172 Eng. Rep. 1066 (1833); Muller v. McKesson, 73 N. Y. 195 (1878); Stevens v. Hulse, 263 N. Y. 421, 189 N. E. 478 (1934); Hughey v. Fergus County, 98 Mont. 98, 37 P. (2d) 1035 (1934).

[112] Supra, p. 1191.

absolute, have treated the plaintiff's inadvertence as immaterial.[113] Since the plaintiff had no reason to expect the danger, due care required no precautions against it. It is hard to imagine a case where a person, warned of the presence of the animal, could inadvertently contribute to his own injury.[114] If he is not warned or the purported warning is not reasonably adequate, even though his conduct is not that of a duly careful person after warning, he may recover because the possessor has failed in his duty and because he, the plaintiff, has not been negligent at all.[115] If the injured person knows of the animal's presence but is induced to come on the premises by representation of the possessor that he will not be harmed, the possessor is liable for failing in his duty of adequate warning and the plaintiff is not negligent.[116] Where, however, a business guest or licensee has been adequately warned and thereafter fails to be reasonably prudent in avoiding the danger, it would seem that he could not recover for his injuries.

III

INJURIES TO TRESPASSERS

If a dangerous animal injures a person present on the premises against the possessor's will, the basis of liability, if any, is the usual duty of the occupier of land toward trespassers. Unless privileged, he may not intentionally hurt trespassers whose presence is known to him. While a landowner may use reasonably necessary force to protect

[113] Fake v. Addicks, 45 Minn. 37, 47 N. W. 450 (1890); Smith v. Pelah, 2 Strange 1264, 93 Eng. Rep. 1171 (1747); Blackman v. Simmons, 3 Car. & P. 138, 172 Eng. Rep. 358 (1827).

[114] Lehnhard v. Robertson's Admx., 176 Ky. 322, 195 S. W. 441 (1917); Goodwin v. E. B. Nelson Groc. Co., 239 Mass. 232, 132 N. E. 51 (1921); Ervin v. Woodruff, 119 App. Div. 603, 103 N. Y. S. 1051 (1907); Marlor v. Ball, 16 T. L. R. (App.) 239 (1900); Farley v. Picard, 78 Hun (N. Y.) 560, 29 N. Y. S. 802 (1894); Guzzi v. New York Zoological Soc., 192 App. Div. 263, 182 N. Y. S. 257 (1920), affd. 233 N. Y. 511, 135 N. E. 897 (1922).

[115] Panorama Resort v. Nichols, 165 Va. 289, 182 S. E. 235 (1935); City of Tonkawa v. Danielson, 166 Okla. 241, 27 P. (2d) 348 (1933); McCaskill v. Elliott, 5 Strob. (S. C.) 196 (1850); Plumley v. Birge, 124 Mass. 57 (1878); Earhart v. Youngblood, 27 Pa. St. 331 (1856); Chicago & A. R. R. v. Kuckkuck, 98 Ill. App. 252 (1901), affd. 197 Ill. 304, 64 N. E. 358 (1902); Muller v. McKesson, 73 N. Y. 195 (1878); Matteson v. Strong, 159 Mass. 497, 34 N. E. 1077 (1893).

[116] Carbury v. Measures, 4 S. R. (N. S. W.) 569 (1904); Fuhrer v. Jones, 251 App. Div. 735, 295 N. Y. S. 866 (1937); Boatman v. Miles, 27 Wyo. 481, 199 P. 933 (1921); Bormann v. City of Milwaukee, 93 Wis. 522, 67 N. W. 924 (1896).

his property from trespass, the intentional use of unreasonable force renders him liable. Keeping a vicious dog to protect one's premises from intruders is an act intended to produce hurt, the *raison d'etre* of a watchdog being that it will bite people. Is it, then, such an act as is within the privilege to use reasonable force to expel or prevent intruders?

Where a dangerous animal is kept not for the purpose of inflicting injuries upon intruders, but which nevertheless may endanger them, as where a landowner keeps a vicious stallion or a fierce bull in a field where he has reason to know people may go and be injured, the keeping of such an animal is in itself not culpable; indeed, it has great social utility, but the possessor must not unexpectedly put the beast in the way of intruders who habitually cross the land and who have been lulled into false security by their past experience there.

These two types of situations involving injuries to intruders by dangerous animals receive different analytical treatment. In the case of the watchdog, kept for the purpose of injuring trespassers, intended to produce the very injury which does occur, the burden is on the defendant, the possessor, to show that his conduct was privileged, that he used only necessary force to expel the trespasser. On the other hand, if the injury is inflicted by an animal not kept for that purpose, an unintended injury, the injured person has the burden of proving that under all the circumstances the keeping of the vicious animal created an unreasonable risk. The problem arises as a question of privilege to inflict an intentional hurt in the one instance and as negligence in the other.

Although the analytical treatment is different, to determine whether a particular intended hurt is within the privilege to use reasonable force and to determine whether particular conduct creates an unreasonable risk, the same standard is used—reasonableness under all the circumstances. Thus, whether the injury is an attack by a ferocious watchdog, kept on the premises to protect them by biting intruders, or whether it is an attack by an angry bull, kept for breeding purposes, the test of the keeper's liability is the same: Was his conduct reasonable under these particular circumstances? Factors to be considered in determining the reasonableness of the conduct are the advantage to the keeper of having such a beast, the social interest in general, the nature and extent of foreseeable harm to the trespasser, and the purpose for which the trespasser came on the land. Emphasis is placed differently, of course, by different courts. A New York court balances the foreseeable harm to trespassers against the benefit to the

possessor.[117] The seriousness of the harm likely to ensue outweighs the interest in protecting one's property from trivial intrusions, according to a well-reasoned Connecticut case.[118] The dangerous means of defense in a Georgia case was held not privileged where the intruder was not on the land for any evil purpose.[119] An English court considered primarily important the purpose for which the trespasser came on the land and secondarily whether the means adopted by the landowner to prevent harm were adequate.[120] That the unlawful character of the plaintiff's act did not affect the possessor's negligence was considered by another court in allowing recovery by a trespasser.[121]

Whether the landowner has acted unreasonably in creating a new

[117] Loomis v. Terry, 17 Wend. (N. Y.) 496 at 499-500 (1837): "But what shall we say of a case involving human safety, perhaps human life . . . where a fierce dog is kept without semblance of necessity. . . . The law of self defence and defence of property are out of the case. . . . Here is no criminal wrongdoer entering for the purpose of committing felony or a breach of the peace . . . but the mildest of all technical trespasses. . . . In short, a man must be governed in these things even as against trespassers, by the nature and object of the article which is kept upon his premises. The business of life must go forward, and the fruits of industry must be protected. A man's gravel pit is fallen into by trespassing cattle, his corn eaten, or his sap drunk whereby the cattle are killed; his unruly bull gores the intruder, or his trusty watch dog properly and honestly kept for protection, worries the unseasonable trespasser. Such consequences cannot be absolutely avoided. . . . In the case before us, we think the defendant below transgressed the plainest out-lines of his duty. He put his neighbors in danger without the semblance of benefit to himself."

[118] Johnson v. Patterson, 14 Conn. 1 (1840).

[119] Conway v. Grant, 88 Ga. 40, 13 S. E. 803, 14 L. R. A. 196 (1891); Woolf v. Chalker, 31 Conn. 121 (1862); Harris v. Hoyt, 161 Wis. 498, 154 N. W. 842 (1915); Sanders v. O'Callaghan, 111 Iowa 574, 82 N. W. 969 (1900); Meibus v. Dodge, 38 Wis. 300 (1875) (child trespasser); Lynch v. Nurdin, 1 Q. B. 29, 4 P. & D. 672, 113 Eng. Rep. 1041 (1841) (child trespasser).

[120] Sarch v. Blackburn, 4 Car. & P. 297, 172 Eng. Rep. 712 (1830). In Blackman v. Simmons, 3 Car. & P. 138 at 140, 172 Eng. Rep. 358 (1827), it was said, "We have heard much of steel traps and spring guns, but they are not so cruel as the mode which this defendant has adopted of guarding his supposed rights. . . ." The defendant in this case kept a vicious bull in his pasture to prevent persons from crossing to a fishing spot. In Spellman v. Dyer, 186 Mass. 176, 71 N. E. 295 (1904), a junk dealer came on the defendant's land in spite of signs warning of the dog kept to guard the premises and was bitten as he picked up a piece of rope. The court said if he had an implied license to enter the premises, it was confined to usual paths and entrances and gave him no right to meddle with property nor to enter buildings. See also, Riley v. Harris, 177 Mass. 163, 58 N. E. 584 (1900).

[121] Marble v. Ross, 124 Mass. 44 (1878); Carroll v. Marcoux, 98 Me. 259, 56 A. 848 (1903); Leonorovitz v. Ott, 40 Misc. 551, 82 N. Y. S. 880 (1903). Cf. Login v. Waisman, 82 N. H. 500, 136 A. 134 (1927), in which it is said that a plaintiff must establish a relationship between the parties imposing a duty on the defendant to exercise care and that there is no such duty where the plaintiff is trespassing.

and unexpected danger on his land must involve not only the seriousness of the harm, but also the frequency of the trespasses. Thus while it may not be unreasonable to place an ugly bull in a field across which some person has been known to go on rare occasions in the past, if the public has made a practice of cutting across the field daily, it is unreasonable for the landowner without warning or some other precaution suddenly and unexpectedly to pasture a vicious animal there.[122]

The case law of England as well as the United States does not support the proposition that, as a general principle, the possessor of a dangerous animal keeps it at his peril. Analysis indicates that it is only in a comparatively narrow fact-pattern that he is subject to liability so strict. Where the factual situation involves an escape from the possessor's premises or an imperfect control while still technically in custody but off the premises, an absolute liability is indeed imposed. On the other hand, where the animal remains on its possessor's premises and some one rightfully there suffers injury, liability therefor is predicated, according to the actual holdings without regard to judicial generalizations and dicta, upon the negligence of the possessor in failing in due care to restrain the animal or warn of its presence. To determine whether the possessor has been negligent, the courts have considered the gravity of the particular risk, the likelihood of the harm and the number of persons threatened, the utility of the possessor's conduct in keeping the particular animal and the relationship of the parties. If the injured person was a trespasser at the time of the injury, the possessor is liable for negligence in failing to warn habitual intruders of the presence on the land of a dangerous animal which their previous experience would not lead them to expect, and for unprivileged keeping of animals to protect his property.

[122] Lowery v. Walker, [1911] A. C. 10.