UNIVERSITY OF CAPE TOWN

School for Advanced Legal Studies

LIABILITY FOR ANIMALS

A COMPARATIVE STUDY: SOUTH AFRICAN AND GERMAN LAW

by

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BIBLIOGRAPHY

Ashton-Cross, D.I.C. — Liability in Roman Law for Damage caused by Animals in The Cambridge Law Journal Vol 11 (1951-1953), 395

Deutsch, Erwin — Gefährdungshaftung für Mikroorganism im Labor in NJW 1990, 751

Gefährdungshaftung für laborgezüchtete Mikro-organismen in NJW 1976, 1137

Dunz, Walter — Reiter wider Pferd oder Versuch einer Ehrenrettung des Handelns auf eigene Gefahr in JZ 1987, 63

Eberl-Borges, Christina — § 830 BGB und die Gefährdungs-haftung in Archiv für die civilistische Praxis 1996, 524

Erman — Handkommentar zum Bürgerlichen Gesetzbuch, 1. Band, 7th edition, 1981

Fikentscher, Wolfgang — Schuldrecht, 5th edition, 1975

Hasselblatt, Gordian N. — Reiten auf eigene Gefahr, aber fremde Rechnung in NJW 1993, 2577

Horn, Norbert/ Koetz, Hein/Leser, Hans G. — German Private and Commercial Law: An Introduction, 1992

Huebner, Rudolf — A History of Germanic Private Law, 1918

Hunt, P.M.A.	Bad Dogs in SALJ (1962) 326
	More Bad Dogs in SALJ (1962) 458
Jackson, Bernhard S.	Liability for Animals in Roman Law: An Historical Sketch in Cambridge Law Journal, 37 (1978), 123
Knütel, Rolf	Tierhalterhaftung gegenüber dem Vertragspartner in NJW 1978, 297
Larenz, Karl	Lehrbuch des Schuldrechts, 2. Band, Besonderer Teil, 12th edition, 1981
Markesinis, B.S.	A Comparative Introduction to the German Law of Tort, 1986
Macintosh, J.C./ Norman-Scoble, C.	Negligence in Delict, 5th edition, 1970
McKerron, R.G.	The Law of Delict, 7th edition, 1971
Miller, Carey D L	Volenti as a Defence to the Actio de Pauperie in SALJ (1991), 13
	A Restrictive Interpretation of the Actio de Pastu, in SALJ (1971) 177
Muechener Kommentar	Kommentar zum Bürgerlichen Gesetzbuch, Band 5, 3rd edition, 1997
Neethling, J./Potgieter, J.M./ Scott, T.J	Case Book on the Law of Delict, 2nd edition, 1994
Neethling, J./Potgieter, J.M./Visser,	The Law of Delict, 3rd edition, 1999

Nicholas, Barry	Liability for Animals in Roman Law in Acta Juridica 1958, 185
Opoku, Kwame	Delictual Liability in German Law in ICLQ 1972, 230
Palandt	Kommentar zum bürgerlichen Gesetzbuch, 50th edition, 1999
Parisi, Francesco	Liability for Negligence and Judicial Discretion, 2nd edition, 1992
Rosenthal, Heinrich	Bürgerliches Gesetzbuch, 15th edition, 1965
Soergel-Zeuner	Kommentar zum bürgerlichen Gesetzbuch, 11th edition, 1987
Staudinger-Schaefer	Kommentar zum bürgerlichen Gesetzbuch, 12th edition, 1978
Stone, F.F.	Liability for Damage caused by Animals in International Encyclopaedia of Comparative Law, Volume XI, Torts, Part I, 1983
Stroudd´s	Judicial Dictionary of Words and Phrases, 5th edition, Volume 1, 1986
Van der Merwe, C.G.	The defence of conduct of a third party in view of the rationale for strict liability in terms of the pauperien action in SALJ (1992), 398

	The defence of conduct of a third party in view of the rational for strict liability in terms of the pauperien action revisited in SALJ (1994), 47
van der Merwe, C.G./Rabie M.A.	The Law of South Africa, Volume 1, 1993
Owen, David G.	Philosophical Foundations of Tort Law, 1997
Visser, D P	Wille's Principles of South African Law, 8th edition, 1991
Zimmermann, Reinhard	The Law of Obligations, 1990
Zweigert, Konrad/Koetz, Hein	Introduction to Comparative Law, 3rd edition, 1998,

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LIABILITY FOR ANIMALS
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A. INTRODUCTION

The field of 'Liability for Animals' appears at first sight to be only of minor interest to academics. This, however, is a false syllogism as incidents involving animals are frequent, and courts constantly deal with claims regarding damages for injuries caused by animals. Indeed in many countries the law of animals forms a special subject. With respect to English law for instance Lord Simonds, using the metaphor of a train, remarked that the Common Law of torts has developed historically in separate compartments and that beasts have travelled in a compartment of their own.[1] However, it is also true, that within this "tort-train" a few animals lurking in the other compartments marked 'Negligence or Nuisance' may also be found.

Over the years the law of animals was subject to major developments.[2] Originally, the principle applied that the offending animal was responsible (thing-liability) for the damage itself and the only recognised remedy was the surrender of the respective animal by the owner for private vengeance.[3] Admittedly, this principle nowadays appears to be quite strange, but was common practice at the time. A passage in the Book of Exodus, for instance reads as follows: "if an ox gore a man or woman, that they die; then the ox shall be surely stoned, and his flesh shall not be eaten: but the owner of the ox shall be quit."[4] This attitude is also illustrated in a poem of Goldsmith (*Elegy on the Death of a Mad Dog*)[5]:

[1] F.F. Stone, Liability for Damage caused by Animals in International Encyclopaedia of Comparative Law, Volume XI, Torts, Part I, 1983, 5-38, 11; *Read v J. Lyons* & Co. Ltd. [1947] A.C. 156

[2] The assignment only gives a brief overview of the history. For further information see Bernhard S. Jackson, Liability for Animals in Roman Law: An Historical Sketch in Cambridge Law Journal, 37 (1978), 123

[3] Reinhard Zimmermann, The Law of Obligations, 1990, 1099

[4] Stone, 5-38

[5] cited in P.M.A. Hunt, Bad Dogs in SALJ 79 (1962), 326

'The dog, to gain some private ends,
went mad and bit the man.

The man recovered of the bite,
The dog it was that died.'

Later in Roman Law the principle of thing-liability was watered down by the recognition of the *actio de pauperie*, the *actio de pastu*, the *actio de feris* and the *actio legis Aquiliae*, which made, apart from the animal, the owner liable for damage caused by his animal. In modern law thing-liability was finally completely replaced by personal-liability, based either on the fact of having the animal at all, or having incited it to harm or being negligent in its control or guard.[6] This approach is undoubtedly favourable, as there are considerable discussions about the intelligence of animals. Moreover, it is questionable whether an animal can be held responsible for its behaviour, using the human measure of intellectual capacity. Be that as it may, the author is of the opinion that practical experience has shown that it is in general the keeper of the animal who is responsible for the animal's conduct. Hence, the burden of liability should also rest on the owner/keeper and today most countries generally accept this concept of personal-liability. Apart from this general understanding, major differences between the legal systems regarding the application of the law of animals exist. The aim of the present assignment is to present and compare the legal systems of South Africa and Germany with regard to 'Liability for Animals'.

But, before dealing with these particular legal systems, Part B will focus on some general considerations that arise when studying this special field of law.

[6] Stone, 11

B. GENERAL CONSIDERATIONS

An examination of the different legal systems with regard to the law of animals raises some of the following questions of general concern like whether:

- the fault-concept or strict liability should be the basis of the special law of animals
- the owner or/and the keeper should be held liable
- animals should be classified according to their nature or whether all animals should be subject to the same rules and, whether
- the law should have different standards of liability for animals kept purely for pleasure and that of economically useful animals.

In the following passages the author tries to find answers to these questions and gives examples of how different legal systems deal with these.

(1) Fault-concept or strict liability?

In so far as liability may arise under the general principles of tort/delict it may be based either on the fault-concept or it may be based on notions of strict liability. The law of tort/delict, however, is basically founded on the principle 'no liability without fault'[7] and the pertinent question is whether the risk presented by animals were of such a magnitude as to warrant the imposition of strict liability for harm caused by them. As Linde J stated in *Koos v Roth*: "Whether the danger is so great as to give rise to strict liability depends both on the probability and on the magnitude of the threatened harm."[8] This statement reflects the idea of the so-called risk or danger theory, which applies when a person's conduct creates a considerable increase in the risk of danger of causing damage, i.e. an increased potential for harm. In such a case, it was argued that there is sufficient justification for holding this person liable for damage even in the absence of fault.[9]

In applying this principle to the law of animals, it is an obvious fact that animals constitute a constant source of danger. As Zimmermann said: "they kick and butt

[7] Konrad Zweigert/Hein Koetz, Introduction to Comparative Law, 3rd edition, 1998, 647
[8] *Koos v Roth* 652 P.2d 1255, 1260 (Or.1982), cited by Ken Kress in David G. Owen, Philosophical Foundations of Tort Law, 1997, 278

and gore, they lie around in inappropriate places for people to stumble over them and they stray onto busy highways or railway lines where they collide with hapless cyclists or cause trains to be derailed, they attack human beings, as well as each other, they cause damage to movable and immovable property, they roam around, and they pick up and transmit all sorts of infectious diseases."[10] This listing of bad attributes could convince one of the necessity to impose strict liability in such cases. It is also true, however, that animals also have positive characteristics; they are of great benefit to humans in that they provide us with products such as meat, milk, wool and leather. Humans also derive great pleasure from their company, sometimes being used for sporting activities and other entertainment. Moreover dogs function as watch-, rescue- or guiding dogs and the latter for instance are indispensable to the blind. But, for, notwithstanding the usefulness of animals, the author's opinion is that their propensity for harm may well justify imposing on the owner a duty to protect the community, at his peril, against the typical risks involved in keeping them.

A second convincing argument in favour of the imposition of strict liability is the so-called interest or profit theory. According to this theory, where a person acts in his own interest, and causes harm to another, he bears the burdens and disadvantages, which his activity brings about.[11] In other words the owner or keeper of an animal is held strictly liable for damage caused by his animal because he derives a benefit from keeping it. The moral behind this is that a person should not be allowed to derive the benefit, without at the same time, being required to carry the concomitant risk[12]

Some writers, however, avoided theory discussions by simply stating that animals are things, not persons and as they can be owned like "cupboards, cars or toiletpaper", the person in charge of them has to be responsible for any mischief

[9] Neethling/Potgieter/Visser, The Law of Delict, 3rd edition, 1999, 362
[10] Zimmermann , 1095
[11] Neethling/Potgieter/Visser, 362
[12] Zimmermann, 1096

that they cause.[13] However, the German Civil Code for instance explicitly stipulates in § 90a BGB that animals are not comparable to things.[14]

After all, the author's opinion is that the owner/keeper of an animal which causes injuries should be made ultimately liable on principles of strict liability, irrespective of fault. This conclusion is especially satisfactory because it provides a remedy in cases where otherwise persons injured would be remediless. Instances certainly occur where a dog, a horse, or other domesticated animals inflict damage under circumstances which make it impossible to prove negligence of the owner/keeper. It is then only fair that the owner or keeper not the innocent sufferer should bear the loss. This is apparently also the view in most European countries, where strict liability regimes for injuries caused by animals were introduced and this without any great legal discussions or social difficulties.[15] Furthermore, strict liability is not an absolute liability, as defences like culpable conduct of the injured party could exclude, in appropriate circumstances, the liability of the owner/keeper of the animal.[16]

(2) Liability of the owner or/and keeper?

A question of concern with regard to animals is also whether it is the owner or/and the keeper of the animal who should be held responsible for damage caused by them. German law for instance places responsibility on the keeper whereas under South African law the owner is the subject of liability. France and Belgium would hold the owner or alternatively the user responsible.[17] However, in practice these differences only become acute where possession and ownership are separated as where, for instance, a person lends an animal to another or gives it to another under a contract. But such cases are not uncommon and therefore to decide the above raised question one should consider very carefully whether only the owner of the animal creates the opportunity that the risk involved in keeping the animal might bring about. This is according to the author's opinion not the case; the keeper of

[13] ibid.
[14] § 90a BGB
[15] Stone, 11 seq.
[16] See for instance in South African law
[17] Stone, 14

the animal has in the above mentioned situations a closer relationship to the animal than the owner; he got control and consequently he creates the risk of injury materialising. Be that as it may, the author is of the opinion that ultimately, any person who 'harbours' or controls the animal should be held strict liable, irrespective of whether he is the owner or the keeper.[18] This conclusion also follows the dictates of fairness and justice since where the owner of an animal has taken care to entrust his animal to another as its custodian, the former has no means of exercising control over it. However, to ascertain a sufficient protection of the victim one could imagine the owner and the keeper as joint wrongdoers, liable jointly and severally. But since the conduct of the person in control is the cause of the damage or considered more decisive than the risk created by the owner of the animal, the owner should be allowed a right to full contribution against the keeper. Stone decided the question whether the owner or the keeper should be held liable in a different way. He suggested that where no demonstrable negligence is involved liability should rest upon the owner or with that person who receives benefit from the animal. Where negligence can be shown, the victim should seek compensation from the one responsible for that negligence either solitarily with the owner or individually.[19] With respect, this suggestion is not practicable. Firstly; the liability for damages caused by animals should be, as discussed above, a strict one; negligence is not necessary. Secondly, such negligence could only be determined during the court proceedings[20] and hence, the plaintiff cannot be certain about whom to sue in the first instance.

(3) Classification according to the animals nature?

Broadly speaking, there are two different categories of animals: the wild and the domestic and indeed there is a world of difference between for instance a playful cat in a city flat and a wild lion in the bush. The question is hence whether the same rules should apply to all animals notwithstanding its nature. This apparently is the French position where strict liability is imposed regardless of the animal's

[18] Temporary control should not be sufficient to shift the burden of liability on the third party, e.g. hiring a horse for some hours.
[19] Stone, 15
[20] South African law for example gives the owner an effective defence in case the damage was the result of the negligence of a third person, who controlled the animal. See under C. 5. B (ii)

nature. English law, in contrast, differs between animals and only imposes strict liability with regard to damage caused by some animals, e.g. by wild animals or tame animals which their keeper knows to have a vicious, mischievous or fierce propensity.[21] Other criteria, which were taken into consideration when determining the nature of an animal, were characteristics like 'harmless' or 'dangerous', 'tamed' or 'untamed' and 'indigenous' or 'foreign'. But, it is questionable whether such a distinction of animals with the help of these criterions is really satisfactory as it might lead to some unwanted results. Certain animals, for example circus animals, might be wild and foreign but would not in normal usage be untamed and dangerous. The fact that an animal is not normally domesticated does not necessarily mean that it is *ferae naturae*. A dog, conversely, which might belong to a domesticated species indigenous to the country, could nevertheless be untamed and dangerous. Moreover, the danger, which the different species may present is also not constant but varies according to sex, health, individual disposition, time of the year and many other factors. These examples illustrate that the criteria used may become crucial for classification purposes and therefore are not satisfactory.

Moreover the division of animals itself raises some questions, like how far is the court to have recourse to natural classifications; can it have recourse to the differences between sub-species and should the test be limited to whether the species as a whole presents a danger? In view of these uncertainties and the fact that the distinction of animals is artificial and cannot be found in nature, the question of whether there should be a distinction at all should be raised. Strict liability should certainly be imposed with respect to wild animals. To the author's opinion the same is true for domestic animals. Even domesticated animals have instincts and wills of their own and are often prone to unpredictable acts in a totally unforeseen manner. Hence, the same liability should apply as in the case of damage caused by a wild animal and accordingly a division of animals is not necessary. Moreover, for the plaintiff it does not matter whether he was severely injured for example by a wildebeest or an ox. It is not justifiable that the victim should be faced in the latter case with the burden of proving negligence on the part of the defendant.

[21] Stone, 13

(4) Different standards for animals kept for pleasure, and economically useful animals?

The question is whether the law of animals should draw distinctions between different types of situations. In more concrete terms, should as Zimmermann argues, the farmer who depends for his livelihood on breeding sheep be treated differently from the city dweller, who keeps a horse to ride for pleasure?[22] German law for instance, which generally imposes strict liability on the keeper of an animal, draws such a distinction with § 833 (2) BGB. This provision stipulates that the keeper of a domestic animal used for his profession, business or maintenance will not be held liable for the injuries caused by such animal if the keeper can show either that he took reasonable care or that damage would have occurred even if he had taken such care (see below under C.5).[23]

But how can such an unequal treatment be justified? The main argument, which was constantly raised in that regard, is the need for protection of live-stock. Farmers had to be protected from massive legal actions claiming damages for injuries caused by their animals, which could endanger their livelihood. This view, however, was probably justified after World War II, when the agriculture was on the lowest level and had to be supported in order to feed the people. Times have changed and at present the agricultural sector is, at least in developed countries, well established and has no real need to rely on this protection. The author is therefore of the opinion that an exception for economically useful animals is no longer justified. This even more so in the light that farmers could protect themselves by obtaining sufficient insurance, which could cover such extensive claims.

Summary

To sum up, the author is of the opinion that (i) the law of animals should be based on notions of strict liability, (ii) the person who controls the animal should be held

[22] Zimmermann, 1096
[23] § 833 (2) BGB

liable, (iii) no distinctions should be drawn between animals and (iv) the same standards should be applied for all animals.

After dealing with these general questions Part C and D will examine both the South African and German legal system with regard to the law of animals. The following parts will also examine how these deal with the above-discussed questions.

C. SOUTH AFRICAN LAW

In South Africa remedies for damages caused by animals traditionally may be granted under five different actions: the *actio de pauperie*, the *actio de pastu*, the *actio de feris*, which are special rules of animal liability, and further the *actio legis Aquiliae* and an action based on nuisance.[24] The special rules of animal liability when they apply, generally impose strict liability on the defendant, whereas the general rules of delict liability still require the plaintiff to prove fault on the part of the defendant. Hence, there may be an advantage for the plaintiff to attempt in the first instance to have the special rules applied to his case, but if he fails he can still proceed, in appropriate circumstances, under any of the above general actions.

The special actions, originate in Roman law and no major developments have been made since then. This fact begs the questions whether these actions are still 'up to date' and whether one should have three different actions in the field of the special law of animals (see under VI.).

I. ACTIO DE PAUPERIE

With the *actio de pauperie* an injured person may claim damages from the owner of a domestic animal which has caused damage. Liability is based on mere ownership of the animal; fault on the part of the owner is therefore not required.[25]

[24] C.G. van der Merwe/M.A. Rabie, The Law of South Africa, Volume 1, 1993, 231; Although, these actions often overlap, each has its own special sphere of application and therefore will be considered separately.

[25] Neethling/Potgieter/Visser, 363-364

1. History

The *actio de pauperie*, which originates in the law of ancient Rome and dates back to the Twelve Tables[26], was introduced into South Africa as part of Roman-Dutch law.[27] By *pauperies* was meant damage caused by an animal in such circumstances that no one was to blame (*damnum sine injuria facientis datum*).[28] The action originally did not cover the misdeeds of every animal, but only damages caused by quadrupeds (four-footed animals) belonging to the class of *pecus*, i.e. cattle.[29] Subsequently by adopting the *lex Pesolania de cane* in particular dogs were brought within the application of the *actio de pauperie*.[30]

Based on the noxal liability in Roman law the owner of an animal which caused damage was originally entitled to choose whether (i) to compensate for the damage caused by the animal or (ii) to hand the animal over to the injured party for private vengeance.[31] Later, in Roman-Dutch law this option became obsolete; the owner's obligation to pay compensation became predominant and the practice of handing over the animal fell more and more into disuse. However, in modern South Africa the practice of noxal surrender as full compensation has never been recognised.[32] In *Le Roux & others v Fick* for instance the court stated: "I am afraid a suitor would scarcely think that, *moribus hujus seculi*, a judge was acting in accordance with the highest principles of equity in deciding that a ... dog was all the compensation he could obtain for the loss of a valuable breeding bird that had been

[26] The most credible reconstruction regarding the Twelve Tables tells that in the year 452 B.C. ten commissioners were appointed for one year with the mandate of compiling a complete code of laws, which was, at the end of their mandate, approved by the senate and the *comitia centuriata* and imprinted on ten tables of bronze. A new decemvirate, elected for one additional year for the completion of the 450 B.C. compilation, did not succeed in their mandate. After the resignation of the second generation of decemviris in 449 B.C., consuls Valerius and Honoratius – after making some changes upon the two supplemental tables drafted by the second decemvirate – passed and published two additional tables. The ten decemviral tables of 450 B.C. and the two consular tables of 449 B.C. constitute what is now known as the Laws of the Twelve Tables, see Francesco Parisi, Liability for Negligence and Judicial Discretion, 2nd edition, 1992, 54-55

[27] see *Lever v Purdy* 1993 (3) SA 17, at 21

[28] R.G. McKerron, The Law of Delict, 7th edition, 1971, 251

[29] Jackson, 125

[30] *O'Callaghan, N.O. v Chaplin*, 1927 A.D. 310, at 313; The facts are as follows: The plaintiff's young child was taken by his nursemaid to the defendant's house to visit the defendant's maid. The defendant's servant admitted the nursemaid. In the house, the defendant's dog bit the child.

[31] van der Merwe/Rabie, 232

[32] ibid.; van der Merwe, The Defence of Conduct of a Third Party in View of the Rationale for Strict Liability in Terms of the pauperien action in SALJ Vol. 109 (1992), 398, at 401

bitten to death by that dog."[33] Kotze J.A. also remarked in *O'Callaghan, N.O. v Chaplin* that "[t]he surrender of a harmful, and it may be worthless, animal is no compensation to an injured person."[34] But not only the noxal surrender was questioned, it was also the *actio de pauperie* itself. In *Parker v Reed*[35] the Cape Supreme Court held that not only the noxal surrender was obsolete but also the law relating to *pauperies*. In *O'Callaghan, N.O. v Chaplin*, however, the Appellate Division rejected the decision in *Parker v Reeds* and held that it went too far in deciding that anything more than noxal surrender had become obsolete, and that the law relating to *pauperies* was still in force. The finding in *O'Callaghan, N.O. v Chaplin* was subsequently approved in *South African Railways and Harbours v Edwards* where De Villiers C.J. confirmed that "[t]he *actio de pauperie* is in full force in South Africa"[36] but "the right to surrender the offending animal in lieu of paying damages – *noxae deditio* – is obsolete with us."[37] Thus it can be assumed that the *actio de pauperie* is still part of modern South African law.

2. Animals within the ambit of the *actio de pauperie*

The *actio de pauperie* is applicable in cases where damage is caused by a domestic animal. Old authorities were of the opinion that the *actio de pauperie* was also applicable in respect of wild animals.[38] This view, however, did not prevail in South Africa and today it is generally accepted that as De Villiers stated in *South African Railways and Harbours v Edwards* "[t]he action lies against the owner in respect of harm (*pauperies*) done by domesticated animals, such for instance as horses, mules, cattle, dogs ...".[39] In general domestic animals are those which are not as a species savage or vicious, though individual members of that species may be.[40] However, the requirement of 'domestic animal' occasionally was not interpreted too strictly. Although, the culprit was a bee in *Goosen v Reeders*[41] and

[33] *Le Roux and others v Fick* 1879 Buchanan's Supreme Court Reports, 29, at 40
[34] *O'Callaghan, N.O. v Chaplin*, at 360
[35] *Parker v Reed* (1904) 21 S.C. 496
[36] *South African Railways and Harbours v Edwards*, 1930 AD 3, at 9
[37] ibid.; *Lever v Purdy* 1993 (3) AD 17, at 21
[38] D.I.C. Ashton-Cross, Liability in Roman Law for Damage caused by Animals in The Cambridge Law Journal Vol 11 (1951-1953), 395, 397
[39] *South African Railways and Harbours v Edwards*, at 9-10
[40] Ashton-Cross, 400
[41] *Goosen v Reeders*, 1926 TPD 436

a meercat in *Klem v Boshoff*[42], the courts applied the *actio de pauperie*. But indeed, these species belong rather to the category 'wild animal'. Nevertheless, according to South African law a clear division between domestic and other animals has to be made and as discussed above the author is of the opinion that such a distinction is generally neither necessary nor desirable.

3. Act *contra naturam sui generis*

The animal must have acted *contra naturam sui generis* ('contrary to the nature of its kind') when inflicting the damage.[43] This requirement, which could be characterised as a compromise between strict liability for all damage caused by one's animal and liability based on fault, reflects the idea underlying the *actio de pauperie*. This idea was to render the owner liable only in cases where, so to speak, there has been fault in the animal; something corresponding to *culpa* in a human being.[44] However, it was pointed out that one must be careful not to attribute the human qualities of *dolus* or *culpa* to animals for the purpose of determining the liability of the owner. Hunt stated in that regard: "The contra naturam concept seems, in fact, to have come to connote ferocious conduct contrary to the gentle behaviour expected of domestic animals. This imports an objective standard suited to humans."[45]

But which standard should be taken as a basis and when do animals act contrary to the nature of its kind? It is accepted *a priori* that domestic animals have been under the influence of man for such a long time that a minimum standard of good behaviour can be expected from them. Consequently, domestic animals can be expected to abstain from aggressive or harmful conduct towards mankind and towards other animals.[46] Apart from this general understanding courts have interpreted the requirement of *contra naturam sui generis* in two different ways. In several cases it was held that the animal must have acted from inward excitement

[42] *Klem v Boshoff*, 1931 CPD 188
[43] Neethling/Potgieter/Visser, 364; van der Merwe/Rabie, 235; D P Visser in Wille's Principles of South African Law, 8th edition, 1991
[44] *South African Railways and Harbours v Edwards*, at 10; J.C. Macintosh/C. Norman-Scoble, Negligence in Delict, 5th edition, 1970, 158
[45] Hunt, 328

or vice (*sponte feritate commota*) or from inner wildness, viciousness or perverseness. In *O'Callaghan, N.O. v Chaplin* for instance it was laid down that "[t]he action was maintainable only in respect of harm done by an animal acting contrary to the nature of its class – *contra naturam sui generis* – that is to say, under excitement or vice which was contrary to the nature of such animal."[47] In *Cowell v Friedmann & Co.* Laurence J. remarked: "*Voet* then proceeds to cases of *pauperies* proper when the animal does mischief *contra naturam*, and this he says occurs *quoties mansueta feritatem assumunt*, when tame animals become fierce, as when a horse or an ox, *feritate commotus*, proceeds to kick or gore"[48] and in *Rocky Lodge (Pty.) Ltd. v Livie* Lewis J.P. pointed out that the essence of the pauperian liability "involves an aggressive and vicious act on the part of the animal itself."[49]

Other decisions support a more objective test by which the animal's conduct is compared with the conduct of a decent and well-behaved animal of its kind.[50] It is for instance the nature of a mule to kick; but a domesticated mule which draws a vehicle in a public street behaves *contra naturam* if it kicks at a pedestrian, even though the pedestrian passes close to its hind legs.[51] According to Hunt, the question should simply be: would a normal domestic animal abandon its tameness in these circumstances?[52] In *Da Silva v Otto* the court held that in cases "where the injured person has acted lawfully and reasonably, the dog was presumed to have acted *contra naturam sui generis*: an objective test of the reasonable dog was applied and it was expected of the dog that it distinguish between a lawful attack and an unlawful attack on itself."[53] With respect, the 'test of the reasonable dog' seems insufficient as an animal -being a thing- lacks the capacity to have any duties, including the duty to behave reasonably and there can thus be no such

[46] Macintosh/Norman-Scoble, 158; *South African Railways and Harbours v Edwards*, at 10; van der Merwe/Rabie, 234
[47] *O'Callaghan, N.O. v Chaplin*, at 313-314
[48] *Cowell v Friedmann & Co.* (1888) 5 HCG 22, at 46-47
[49] *Rocky Lodge (Pvt.) Ltd. v Livie* 1977 AD 3 231, at 236
[50] McKerron, 252; Macintosh/Norman-Scoble, 158, Neethling/Potgieter/Visser, 364
[51] see *South African Railways and Harbours v Edwards*, at 11-12
[52] Hunt, 329
[53] *Da Silva v Otto* 1989 (3) SA 538, at 539; The facts are as follows: The plaintiff was walking his dog –wich was on a leash- down a public street in a residential suburb when the defendant's bulldog, without warning, rushed out of an open gateway onto the defendant's property and began to attack the plaintiff's dog. The plaintiff who had brought a cane with him for use in just such an emergency, hit the bulldog with the cane in order to ward it off. The bulldog responded by biting the plaintiff on the lower right leg.

juristic animal as the 'reasonable dog'. Apparently Beadle CJ also struggled with this test when he stated in *Bristow v Lycett* which concerned damage done by an elephant:" Courts have enough difficulty in speculating on the behaviour of the "reasonable man", without having the additional burden thrust upon them of speculating on the motives of "a reasonable elephant", and it relieves me to be able to find that I am not asked to shoulder this burden."[54] Furthermore the courts' expectation in *Da Silva v Otto* that a dog should be able to distinguish between lawful and unlawful attacks upon it, requires that the dog at least has knowledge of some principles of criminal law and the law of delict, which is of course, not the case.In the past courts occasionally did not clearly distinguish between the two above discussed interpretations of the *contra naturam* requirement. In *South African Railways and Harbours v Edwards* for instance the court defined conduct *contra naturam sui generis* as follows: "If the animal does damage from inward excitement or, as it is also called, from vice, it is said to act *contra naturam sui generis*; its behaviour is not considered such as is usual with a well-behaved animal of the kind."[55]

Behaviour, which was not to be considered as *contra naturam sui generis*, but rather as *secundum naturam sui generis* is for instance: a sheep or cattle eating grass, a ram which is attacked defends itself, a horse kicks out while in pain, a ram jumps a fence to cover the neighbour's ewes, a hungry dog satisfies his hunger by devouring a chicken or a cow wanders across the road in front of traffic.[56] However, the author is of the opinion that the *contra naturam* requirement remains quite confusing despite the extensive case law. Is it for instance against the nature of a dog to fight, to bark or even snap at cars and cyclists? Or is it really against the nature of a mule, as stated in *South African Railways and Harbours v Edwards*, to kick a pedestrian when it is frightened?[57] Be that as it may, the ultimate question is, taken into account these uncertainties, whether the *contra naturam* requirement is really needed or whether it could rather be abolished (see under VI.)

[54] *Bristow v Lycett* [1971 (4)] SA 223, at 243
[55] *South African Railways and Harbours v Edwards*, at 10
[56] van der Merwe/Rabie, 234
[57] *South African Railways and Harbours v Edwards*, at 10

The plaintiff has to prove that the animal acted *contra naturam sui generis*, but the allegation may be implicit. An allegation of the plaintiff for instance that the animal attacked him was considered as a sufficient allegation that the animal acted *contra naturam sui generis*.[58] In *South African Railways and Harbours v Edwards* the court confirmed that principle by stating: " No doubt the *onus* is on the plaintiff to prove that the mule acted from vice or inward excitement. But the *onus* is *prima facie* discharged when the plaintiff has proved that he was kicked by the mule without apparent cause."[59] However, the mere proof that the plaintiff was injured by contact with the animal is not sufficient.[60]

4. Ownership

Liability under the pauperien action rests upon the defendant's ownership of the animal when the damage is inflicted, and it matters not that the defendant acted neither wrongfully nor negligently in keeping his animal. As Innes C.J. said in the *Callaghan's* case "it [the *actio de pauperie*] was a noxal action, and it lay against the owner of the offending animal, who was in possession of it at *litis contestatio*. The basis of liability was ownership"[61] and further "[b]y our law, therefore the owner of a dog that attacks a person who was lawfully at the place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable, as owner, to make good the resulting damage."[62] In *South African Railways and Harbours v Edwards* the court also made clear that "the [pauperien] action is based upon ownership."[63] To ascertain who was owner at the time of the injury, the accepted principles of law of property and the law of contract are applicable. The ownership of the animal must be established affirmatively by the plaintiff.[64]

[58] Macintosh/Norman-Scoble, 157; van der Merwe/Rabie, 234
[59] *South African Railways and Harbours v Edwards*, at 12
[60] McKerron, 252-253
[61] *O'Callaghan, N.O. v Chaplin*, at 314
[62] ibid., at 329
[63] *South African Railways and Harbours v Edwards*, at 9
[64] Macintosh/Norman-Scoble, 158; van der Merwe/Rabie, 233-234

The above quoted passages imply that the mere control over the animal is insufficient for a successful claim under the *actio de pauperie*; the action has to be directed against the owner of the animal.[65] This fact, however, as already mentioned above may become a problem of fairness, when ownership and possession are separated as where, for instance, a person lends an animal to another or gives it to another under a contract. In such a case it may be more appropriate to sue the keeper of the animal instead of the owner. The special law of animal liability in South Africa, however, does not provide this alternative. The owner is only entitled to raise the defence of culpable conduct of a third party (see below) and, if successful, the plaintiff has to sue the third party under the *actio legis Aquiliae*, where he is of course faced with the problem of proving negligence.

5. Defences

Against the *actio de pauperie* several defences are available, namely (a) *vis maior*, (b) culpable conduct of the injured party, of a third party or another animal and (c) *volenti non fit iniuria*. These defences, apart from the latter, have the effect of excluding liability because the animal did not act from "inward excitement or vice" and consequently did not act *contra naturam sui generis*.[66]

(a) Defence of *vis maior*

As already stated, according to the prevailing opinion the animal must have acted *sponte feritate commota*, ie from inward excitement or vice. *Vis maior*[67] excludes a spontaneous conduct, and therefore provides a successful defence against the *actio de pauperie*.[68] However, the scope of that defence seems quite undetermined. In *Cowell v Friedmann*[69], just to give one example, where the plaintiff was knocked down on a public highway by a runaway horse it was held that the conduct of the horse did not amount to *pauperies*, but was rather considered as *vis maior*. In that

[65] Macintosh/Norman-Scoble, 157-158; Neethling/Potgieter/Visser, 364
[66] Neethling/Potgieter/Visser, 365
[67] *Vis maior* or "Act of God" means not a mere misfortune, but something overwhelming, which could not happen by the intervention of man, and loss from which could not have been prevented, or avoided, by any reasonable amount of foresight, pains, or care; see Stroud's Judicial Dictionary of Words and Phrases, 5th edition, Volume 1, 1986, 40
[68] Neethling/Potgieter/Visser, 365

case one of the shafts of the vehicle to which the horse was harnessed had broken loose and struck the horse's leg, which frightened the horse and caused it to bolt along the road.[70] On the other hand, it was not considered to be *vis maior* where a horse kicked because a horsefly had stung it.[71]

Apart from this uncertainty regarding the scope of the defence, there is a difference of opinion regarding the nature of the outside influence, which would exclude spontaneous behaviour on the part of the animal and thus amount to *vis maior*.[72] Some are of the opinion that this outside influence must penetrate directly to the sense of the animal. In *Van Zyl v Van Biljon* for instance the court held that "*vis maior* could constitute a defence ... in suitable, relatively strictly circumscribed circumstances, viz where the animal is directly motivated to act by *vis maior*...."[73] The court pointed out that "where *vis maior* did not directly act or operate upon the animals, but merely made available to them an access from their own volition to graze on the damaged land, the damage would have been caused by their own independent conduct and they would then themselves be the direct cause thereof: *vis maior* would then not be a defence ... and the owner of the animals would be strictly liable for the damages done on the basis of the principle of causality."[74] Others took a broader view and defined this outside influence as a stimuli to which the animal reacts *contra naturam sui generis*, contrary to the nature of a well-behaved animal.[75]

(b) Culpable conduct of the injured party, of a third part party or another animal

(i) Culpable conduct of the injured party

As De Villiers LJ stated in *South African Railways and Harbours v Edwards*: "To escape liability the owner must ... prove either that it was the fault of the plaintiff

[69] *Cowell v Friedmann* (1988) 5 H.C.G., 22
[70] McKerron, 252; van der Merwe/Rabie, 235
[71] van der Merwe/Rabie, 235
[72] ibid.
[73] *Van Zyl v Van Biljon* 1987 (2) AD 372, at 373
[74] ibid., at 374
[75] *South African Railways and Harbours v Edwards*, at 10; *Swart v Honeyborne*, at 976

or that the mule had been provoked by some extrinsic cause."[76] Hence, for a successful claim with the *actio de pauperie* the blame for the harm must not lie in whole or in part with the injured party himself; if for instance the plaintiff provoked the animal[77], or in some other way by 'substantial negligence or imprudence' contributed to his own injury.[78] As Innes C.J. pointed out in *O'Callaghan, N.O. v Chaplin* "... there must have been no "substantial negligence or imprudence" on the part of the person injured – by which I understand no unreasonable conduct contributing to the injury" and further "[i]f the injury were due to provocation by the injured person no compensation could be claimed *de pauperie*."[79] In *South African Railways and Harbours v Edwards*, De Villiers C.J. formulated the principle that "...if the act was not due to vice on the part of the animal but was provoked – in other words if there has been *concitatio*, the action does not lie."[80] Accordingly, the provocation of the animal generally excludes a claim under the *actio de pauperie*. However, the question whether certain behaviour amounts to a provocation might be difficult to answer. It was held for instance that hitting a dog on the nose or pulling his tail is a sufficient provocation.[81] In *Harmse v Hoffman*, where the plaintiff, having trodden on a dog, bent down to pat it and was bitten, the court held that in the circumstances the plaintiff's conduct was imprudent and he had only himself to thank for the fact that he was bitten. The court reasoned that "it is natural that a dog, already excited by an injury, would snap at a person, a stranger, who, immediately after having caused it pain, stooped down to stroke it."[82] But however, the imprudence of stroking or patting a strange dog or horse will not necessarily debar the plaintiff's action. In *South African Railways and Harbours v Edwards* for instance De Villiers C.J. formulated the principle that:" ... stroking or petting a horse is not considered to be provocation (*concitatio*). If a horse kicks when petted, its behaviour is due to vice. The fault lies with the horse, not with the man who petted it, unless he had reason to know that the horse might kick."[83] But in case of a mule the learned judge is of the opinion "that if the attentions of a person who stroked or petted a mule were

[76] *South African Railways and Harbours v Edwards*, at 12
[77] Ashton-Cross, 400
[78] McKerron, 253
[79] *O'Callaghan, N.O. v Chaplin*, at 329
[80] *South African Railways and Harbours v Edwards*, at 10
[81] *Smith v Burger* 1917 CPD 662, at 664
[82] *Harmse v Hoffman* 1928 T.P.D. 572, at 575

met with a kick, such person would only have himself to blame for doing such a foolish thing. The kick, in the case of a mule, could have been foreseen."[84] In *Da Silva v Otto* it was held that the appellant had not acted negligently in striking the bulldog: he had been legally entitled, and indeed morally obliged ('geroepe'), to attempt to protect his dog against the bulldog's attack, and had done so in the only manner reasonably available to him.[85]

The cited passages illustrate that that it is not exactly clear from the case law what degree of carelessness amounts to substantial negligence, imprudence or provocation.

(ii) Culpable conduct of a third party

Lever v Purdy[86] was probably the first case, where the Appellate Division had the opportunity to consider whether conduct on the part of a third party that contributes to injury caused by a domesticated animal exonerates the owner of liability in terms of the *actio de pauperie* and will therefore be discussed in length.[87] The facts of *Lever v Purdy* are as follows:

> The plaintiff (respondent) (Purdy) was bitten by the dog belonging to the defendant (appellant) (L) on L's property. The incident occurred whilst L was temporarily overseas and a third person (Cohen) was in charge of L's home and his dog. On the date on which the event took place, Cohen summoned Purdy to effect some adjustments to a video recorder and television set on the premises. Cohen had informed Purdy of the presence of a vicious dog on the premises, but undertook to lock it up before Purdy's arrival. Unfortunately, Cohen did not keep his word and after the arrival of the unsuspecting Purdy, who in fact went out of his way to announce his arrival by, *inter alia*, hooting, he was set upon by the free-walking dog and severely mauled.[88]

Joubert ACJ and Kumleben JA both classified the negligent conduct on the part of a third party as a defence against the *actio de pauperie* in three categories:

[83] *South African Railways and Harbours v Edwards*, at 10
[84] ibid.
[85] *Da Silva v Otto*, at 451
[86] *Lever v Purdy* 1993 (3) SA 18
[87] van der Merwe, The Defence of Conduct of a Third Party in View of the Rationale for Strict Liability in Terms of the pauperien action Revisited in SALJ Volume 111, 1994, 47

- first category

The first category "comprises those instances in which a third party as a mere outsider, through his culpable conduct caused the animal to inflict the injury upon the victim, for example where the animal was provoked by him; or where he hit or wounded the animal."[89] In this category the conduct of the third party is the *causa causans* of the conduct of the domestic animal giving rise to the damage, and not a vicious propensity inherent in the animal.[90] This exception is generally recognised as an effective defence to the pauperien action[91] and the injured party's remedy is an action under the *actio legis Aquiliae* against the third person.[92]

- second category

The second category "relates to those instances in which a third party in charge or control of the animal by his negligent conduct failed to prevent the animal from injuring the victim."[93] Whether this category provides an effective defence against the pauperien action was according to Kumleben JA the pertinent and only question calling for decision in that case.[94]

Both judges concluded that reliance on the negligence of a third party, as a defence to the *actio de pauperie* is *res nova* as far as South African case law is concerned.[95] Hence, they examined the old authorities on this point, i.e. Roman and Roman-Dutch law. With regard to Roman law Joubert ACJ quoted a text of Ulpianus, which reads in the translation as follows: "On the other hand, if an animal should upset its load onto someone because of the roughness of the ground or a mule driver's negligence or because it was overloaded, this action will not lie and proceedings should be brought for wrongful damage."[96] According to Joubert ACJ this passage illustrates that the owner of the mule is not held liable in pauperien in

[88] Neethling./Potgieter/ Scott., Case Book on the Law of Delict, 2nd edition, 1994, 757
[89] *Lever v Purdy*, at 21
[90] van der Merwe, 48-49
[91] Kumleben JA in *Lever v Purdy* at 26; *O'Callaghan NO v Chaplin* , at 329
[92] McKerron, 253
[93] *Lever v Purdy*, at 21
[94] *Lever v Purdy*, at 26
[95] Joubert ACJ at 20
[96] *Lever v Purdy*, at 21-22

this instance because the mule was entrusted to a muleteer who by his negligent driving caused the injury. Kumleben JA interpreted the same passage in a different way. He concluded that the real reason why the owner of the mule was not held liable under the *actio de pauperie* was that the mule had not acted *contra naturam sui generis*, but had remained a mere instrument in the hands of the negligent muleteer.[97]

Both Joubert ACJ and Kumleben JA then relied on another Roman law text by Ulpian: "Take the case of a dog which, while being taken out on a lead by someone, breaks loose on account of its wildness and does some harm to someone else: If it could have been better restrained by someone else or if it should never have been taken to that particular place, this action will not lie and the person who had the dog on the lead will be liable."[98] Joubert ACJ held that this passage "clearly establishes the principle of law that the owner of a domesticated animal, which *contra naturam sui generis* harmed a victim, may successfully avoid pauperien liability by proving as a defence that the harm was caused by the controller's negligence in his control of the animal."[99] Kumleben JA considered that it was a justifiable inference that the dog was in those circumstances entrusted to the person leading it. He concluded that the cited passage supports the view that the negligence of the person who is in control of the dog constitutes a valid defence to the *actio de pauperie*.[100] Joubert ACJ's reflections regarding the causative position of the third person illustrates nicely the rationale for this defence: "The question of causality in regard to the conduct of the controller or handler of a dog is determined in the same manner by application of the same legal principles. By his negligent conduct he fails to exercise proper, i.e. reasonable, control over the dog in his care. He accordingly provides the dog with the opportunity to injure the victim. As a result of his negligent conduct he fails to prevent the dog from biting the victim. *He did not by any positive act cause the dog to bite.* His negligent conduct likewise renders him liable under the *lex Aquiliae*, whereas the owner of the dog will be exonerated from pauperien liability."[101]

[97] ibid.; van der Merwe, 49
[98] *Lever v Purdy*, Joubert AJC at 22, Kumleben JA at 27
[99] ibid., at 22
[100] ibid., at 27
[101] ibid., at 23-24C

- third category

This category comprises culpable conduct on the part of the third party which contributes to the injury caused by the animal, but which falls short of being the *causa causans* of it.[102] The court did not decide the controversial question, whether this category should be recognised as a valid defence. Kumleben JA only stated in that regard that "[t]here is authority favouring or pointing towards the recognition of this exception ... However, this question as far as this Court is concerned remains an open one and for the purpose of this appeal need not be decided."[103] Hence, the case of damage caused by an animal as a result of such an intentional or negligent conduct of a third party would still appear to be *res nova*.

The court finally came to the conclusion that "... Cohen as controller of the dog, was in the circumstances guilty of negligent conduct which resulted in the injury to Purdy despite the fact that he did not by any positive act cause the dog to bite Purdy. Cohen's Aquilian liability to Purdy afforded Lever, the owner of the dog, a defence which exonerated him from pauperien liability to Purdy."[104]

To sum up, where the owner of the animal had left it under the control of a third person and the animal was offered the opportunity to cause damage as a result of such person's wrongful and intentional or negligent conduct, the owner thereof has an effective defence.

(iii) Culpable conduct of another animal

The provocation of another animal, which contributed to the damage being caused, has also been recognised as a defence against the *actio de pauperie*.[105] However, it was held in *Maree v Diedericks* that the mere 'seduction' of a small dog to join in a chase after chickens is not sufficient provocation."[106] In *Le Roux & others v Fick*

[102] van der Merwe, 49
[103] *Lever v Purdy*, at 26
[104] ibid., at 25-26
[105] *South African Railways and Harbours v Edwards*, at 10; Ashton-Cross, 401; van der Merwe/Rabie, 236; Macintosh/Scoble, 160
[106] *Maree v Diedericks* 1962 (1) SA 231, at 236

the court held that where two animals acted together, each owner was at first liable for half the damage.[107]

(c) Defence of *volenti non fit iniuria*

In *Joubert v Combrinck*, where the plaintiff was bitten by the defendant's dogs when she was present on his property, the court formulated the principle that "[t]he defence of *volenti non fit iniuria* applies to a claim under the *actio de pauperie*: thus a defendant sued under the *actio de pauperie* will not be liable for damage done to a plaintiff where the plaintiff, with full knowledge of the risk of sustaining such damage, voluntarily accepts it."[108] This decision was without doubt an important one on the scope of the pauperien action.

The defence of *volenti non fit iniuria* was already known and applied in relation to modern Aquilian law.[109] Innes CJ for instance declared on the earlier occasion of *Waring & Gillow Ltd v Sherborne*: "He who, knowing and realising a danger, voluntarily agrees to undergo it, has only himself to thank for the consequences."[110] With respect to the pauperien liability and the special law of animals, however, this defence was not expressly recognised until the above mentioned decision in *Joubert v Combrinck*. Subsequent cases also approved the applicability of *volenti non fit injuria* against a claim based upon the *actio de pauperie*.[111] In *Maartens v Pope* for instance Didcott J pointed out that the defence of *volenti non fit injuria* is "a recognised answer to the *actio de pauperie* in the sort of situation that existed."[112] Furthermore he held that regarding its application it had to be proved "that the nature and extent of the danger which subsequently materialised was apparent to and appreciated by the claimant, and that he assented to undergo the risk entailed in it."[113]

Today it seems settled that the defence of *volenti non fit injuria* is also applicable against the pauperien action. Notwithstanding this recognition, the application of

[107] *Le Roux and others v Fick*, at 37; van der Merwe/Rabie, 236
[108] *Joubert v Combrinck* 1980 (3) SA 680
[109] D L Carey Miller, Volenti as a Defence to the Actio de Pauperie in SALJ Vol. 98 (1991), 13
[110] *Waring & Gillow Ltd. V Sherborne* 1904 TS 340, at 344
[111] see for instance *Lawrence v Kondotel Inns (Pty) Ltd*, 1989 (1) SA 44, at 55; *Maartens v Pope* 1992 (4) SA 883, at 886
[112] *Maartens v Pope*, at 886

volenti non fit injuria in this field was also criticised as producing a weakening of the form of strict liability arising from damages caused by domestic animals.[114] As Miller stated: "Allowing the broad defence of *volenti* to apply to the *actio de pauperie* will, it is submitted, undermine the idea that the owner of a domestic animal should be liable for damage or injury caused by ferocious conduct contrary to the gentle behaviour normally expected of domestic animals."[115] But however, the author is of the opinion that one must bear in mind that the law is not supposed to provide a complete protection in every situation of life. In general people from a certain age on, apart from exceptions, are capable of making their own decisions and should therefore also be responsible for these.

A second objection raised by Miller was that *volenti*, in its general application to limit delictual liability, does not extend to situations in which the risk assumed is incidental to the assertion of a right. He argued that if the concept of 'assertion of a legitimate right' precluded recourse to *volenti* in the context of an action based upon *culpa*, it would be illogical if it did not do the same in the context of the *actio de pauperie*, because the latter is a form of strict liability.[116] This objection however collides with the requirement of the *actio de pauperie* that the prejudiced person must be lawfully present at the location where the damage was inflicted (see below).

6. Lawful presence at the location where the damage was inflicted[117]

The requirement of lawful presence of the injured person or animal at the place where the injury was caused was introduced in *Drummond v Searle* where De Villiers CJ held: "[B]ut all the authorities ... must be taken with this limitation, that the animal injured was lawfully at the place where it was injured."[118] Innes CJ approved that requirement in *O'Callaghan, N.O. v Chaplin* by stating: "I entirely agree with the ruling in *Drummond v Searle* that one of those limitations must be

[113] ibid., at 887
[114] Miller, 13
[115] ibid., 14
[116] ibid., 15
[117] some see the lawful presence as a requirement of the pauperien action (Neethling/Potgieter/Visser), others see the unlawfully presence as a defence against the *actio de pauperie* (van der Merwe/Rabie)

that the injured person, or the injured animal, was lawfully at the place where it was injured. It was not so laid down in the *Digest*, but there is no *lex* inconsistent with that view, and the limitation is one, which is obviously necessary. A trespasser upon property, if he were bitten by the watchdog, could not sue the owner merely because he was the owner."[119]

The courts differ in their interpretation of the requirement of lawful presence; while some cases merely require a 'lawful purpose', others demand a 'legal right' to be there.[120] The *dicta* in *Le Roux and others v Fick* for instance supports the view that all persons who enter premises with a lawful purpose, such as the delivery of milk or post or ask for directions are lawfully present at the place.[121] In *Veiera v van Rensburg* on the contrary it was held that "... there was no tacit invitation for a person to come on the ground to enquire the way, and that consequently a person who goes on to ground for that purpose and who is bitten is not entitled to the relief which is given in the *actio de pauperie*."[122] Accordingly, only persons who are on the premises by invitation or permission, expressed or implied, would have a legal right to be on the premises.[123]

The quoted passages illustrate that the 'legal rights' test is narrower than the 'lawful purpose' test since persons having a lawful purpose in being on the premises do not necessarily have a legal right to be there. The author is, nevertheless, of the opinion that the 'legal rights' approach is preferable because the *actio de pauperie* is a special action, which should be narrow in its scope.

7. Nature of damage

According to case law both damage to property and personal injuries, including pain, suffering and shock may be claimed with the pauperien action.[124] The damage done by the animal has not to be caused directly. In the *Digest* (9.1.1.

[118] *Drummond v Searle* (1879) 9 Buch 8, at 9; McKerron, 253; van der Merwe/Rabie, 160
[119] *O'Callaghan, N.O. v Chaplin*, at 329
[120] Neethling/Potgieter/Visser, 366
[121] *Le Roux and others v Fick*, at 42
[122] *Veiera v van Rensburg* [1953 (3)] 647, at 651
[123] van der Merwe/Rabie, 236
[124] ibid., 237-238; Neethling/Potgieter/Visser, 366

par.9) it is said that "[t]his action will lie whether the animal did *pauperies* with its own body or through some external object with which it was in contact, as, for example where an ox crushes someone by upsetting a wagon or anything else." Furthermore Voet (9.1.5.) shows that this principle also applied in Roman-Dutch law: "For it is not necessary that a quadruped should do damage with its body, but it is sufficient if the damage has been done by some other thing which the quadruped has incited or put in motion."[125] It was also proposed by some writers that the extent of the defendant's liability should be limited in accordance with the criterion for legal causation.[126]

II. ACTIO DE PASTU

With the *actio de pastu*, which also originated in the Twelve Tables, an injured person may recover compensation for damage done to his land by a domestic animal trespassing and eating plants thereon.[127] The first reported South African case in which the *actio de pastu* is specifically referred to is *Le Roux and others v Fick* where Smith J stated: "In the case of damage caused by ordinary animals *mansuetaie naturae*, according to their natural disposition, as for example by cattle depasturing another man's herbage, the owner was liable to the action *de pastu pecorum*, under the law of the Twelve Tables."[128] In *Van Zyl v Kotze* it was argued that the *actio de pastu* had fallen into a state of discussion in South Africa, but De Wet JP rejected that argument and rather held: "In my opinion no ground has been advanced which would justify the Court in holding that the action in question had fallen into disuse, more especially as the analogous action based on *pauperies* is still part of our law."[129] This finding was approved by several subsequent decisions, for instance in *Potgieter v Smit* where Friedmann J remarked that "[i]t seems reasonably clear that the *actio de pastu* is an action which forms part of our

[125] quoted in *South African Railways and Harbours v Edwards*, at 12
[126] Neethling/Potgieter/Visser, 366
[127] ibid.; McKerron, 254-255; D L Carey Miller, A Restrictive Interpretation of the Actio de Pastu, in SALJ Vol. 88 (1971) 177, at 178; the *actio de pastu* may overlap with the so-called pound statutes, a power granted by provincial ordinances to a landowner to impound animals trespassing on his land, see van der Merwe/Rabie, 240, McKerron, 255
[128] *Le Roux and others v Fick*, at 37
[129] *Van Zyl v Kotze* [1961 (4)] 214, at 216

law... "[130] Thus, after initial doubts, as to the applicability of the *actio de pastu* in modern South African law, it may now be accepted that it is still part of the law.

The requirements of the *actio de pastu* are not identical to the requirements of the pauperien action, although it seems that both actions fall within the same category. Like the *actio de pauperie* the *actio de pastu* is based on ownership, i.e. strict liability, not on *culpa*. However it has to be noted that under the *actio de pastu* the owner is liable for his animal acting *secundam naturam*, and indeed, the probable reason for the development of the *actio de pastu* was the fact that by grazing the animal does not act *contra naturam sui generis* and hence the *actio de pauperie* was not applicable in such cases.

1. Animals within the ambit of the *actio de pastu*

In general, the *actio de pastu* is applicable to animals, which can cause damage by grazing. However, there is an agreement that not only fourfooted animals, such as *inter alia* cattle, sheep and pigs are included, but also chickens and other birds.[131]

2. Ownership

The *actio de pastu* resembled *the actio de pauperie* in that liability was based on ownership, not on *culpa*. In *Van Zyl v Kotze* for instance the court held that proof of *culpa* is superfluous to a claim based on the *actio de pastu*.[132]

3. Nature of Damage

The *actio de pastu* is applicable in all cases where damage is caused by grazing. However, the damage is not restricted to that caused by grazing, but also includes damage, which is caused in the process of grazing.[133] It does therefore not matter whether the damage is to grass, crops, shrubs or trees.[134]

[130] *Potgieter v Smit* 1985 (2) SA 690, at 695; see also *Van Zyl v Kotze* at 214
[131] van der Merwe/Rabie, 239
[132] *Le Roux and others v Fick*, at 5
[133] Neethling/Potgieter/Visser, 367
[134] ibid.; Macintosh/Scoble, 167

4. Defences

Similar to the *actio de pauperie* the defences of *vis maior*[135] and culpable conduct of the injured party[136] may be raised against the *actio de pastu.* But on the contrary to the pauperien action it seems that culpable conduct of a third party does not constitute a valid defence against the *actio de pastu.* In *Van Zyl v Van Biljon* the court held that since the owner derived a benefit from the crops that the cattle grazed on, he was liable under the *actio de pastu* even if the cattle had entered the land because of a third party's negligence, or if a third party had intentionally driven the cattle onto the land.[137] This decision was criticised by several academic writings.[138]

III. ACTIO DE FERIS

In terms of an edict of the *aediles curules* the keeping of wild or dangerous animals in the vicinity of a public place was prohibited. As in the case of the previous actions, liability is not based on fault, but is an instance of strict liability.[139] In contrast to the *actio de pauperie* and *actio de pastu* in this action not the owner, but the person in control of the animal, i.e. the person who brought the animal on to the public place is held liable.[140] As stated above (B (2)) this attempt is more satisfactory than basing the liability on mere ownership of the animal.

The *actio de feris* was taken over by Roman-Dutch law writers and was also applied in early South African law.[141] The necessity of the existence of the *actio de feris* in addition to the *actio de pauperie* is evident from the fact that wild animals do not act *contra naturam sui generis* when inflicting damages.[142] It is however uncertain whether the *actio de feris* is also part of modern South African law. In *Le Roux and others v Fick* where a dog, apparently acting *secundum naturam sui*

[135] *Van Zyl v Van Biljon* at 373
[136] *Pieters v Botha* 1989 (3) SA 607
[137] van der Merwe/Rabie, 239; different opinion Macintosh/Scoble, 167
[138] Miller, 179-180; van der Merwe/Rabie, 239
[139] Neethling/Potgieter/Visser, 367
[140] Barry Nicholas, Liability for Animals in Roman Law in Acta Juridica 1958, 185; Macintosh/Scoble, 162
[141] van der Merwe/Rabie, 241
[142] Neethling/Potgieter/Visser, 367

generis killed an ostrich in a public street, it was held that the owner was liable for the *pauperies* committed by his dog under the old Aedilitian action.[143] The old Aedilitian action must therefore found applicability in modern South African law. That was apparently the view of Innes CJ in *O'Callaghan, N.O. v Chaplin* where he remarked that "[i]t is not necessary for the purpose of the case to decide whether the Aedilitian principle is still in force with us; but I desire to guard myself against being taken to imply that it is not."[144] In *Bristow v Lycett* the court came to the conclusion that "... the Aedilitian action is still part of our law".[145] There is thus some support that the *actio de feris* also forms part of modern South African law; nevertheless it seems that today this action is of little practical importance.

1. Basis of Liability

The *actio de feris* applies to wild animals, which are in particular those of an innate or natural *feritas*,[146] and vicious or ferocious dogs[147], which were brought or kept in the vicinity of a public road (*quo vulgo iter fit*).[148] Some writers, like Grotius, Voet and Damhounder held that it was sufficient if the animal was kept at an unauthorised place or even at a private house.[149] Courts, however, did not accept this view; they rather favoured a more restrictive interpretation. Kotze JA for instance remarked in *O'Callaghan, N.O. v Chaplin*: "It will be observed that Paulus in the *Digest*, as well as *Ayliffe* and *Damhounder*, is here speaking of a dog kept on the premises of its owner, and not in a public place, such a street or road. In the case of the latter kind, the edict of the Aediles ... will be the suitable remedy."[150] This remark implies that in the first case, the *actio de feris* was not considered to be applicable.

[143] *Le Roux and others v Fick*, at 29
[144] *O'Callaghan, N.O. v Chaplin*, at 330
[145] *Bristow v Lycett* [1971 (4)] SA 223, at 229
[146] Ashton-Cross, 395
[147] However it has to be noted that the dog in *Le Roux and others v Fick* was not expressly fierce, although the claim was founded on the *actio de feris*
[148] McKerron, 255; van der Merwe/Rabie, 243; *O'Callaghan, N.O. v Chaplin*, at 371
[149] van der Merwe/Rabie, 241
[150] *O'Callaghan, N.O. v Chaplin*, at 367

2. Defences

The only expressly recognised defence to the *actio de feris* is the unlawful presence of the plaintiff on the premises. The finding of Smith J in *Le Roux and others v Fick* illustrates this recognition: "A person whose premises are liable to depredations has a right to keep a fierce dog to protect them and to turn it loose at night, provided he takes care that he is properly secured during such time as it may reasonably be expected that persons may lawfully come on to the premises ... ."[151] However, in analogy to the defences to the *actio de pauperie*, namely *vis maior* and fault of the injured party one may assume that these defences also apply to a claim based on the *actio de feris*.[152]

IV. ACTIO LEGIS AQUILIAE

Rather than claim damages under the previous actions an injured person may instead or in the alternative seek compensation under the general Aquilian action; the special rules of animal liability are in no way exclusive rules of liability. The *actio legis Aquiliae* applies in the case of both wild and domestic animals and is in particular the appropriate remedy for harm done (i) by a domestic animal falling outside the scope of the *actio de pauperie* and the *actio de pastu* and (ii) by a wild animal falling outside the application of the *actio de feris*. However, the 'crux' of the Aquilian action is that it is based on fault and thus to succeed the plaintiff must prove either intention or fault on the part of the defendant.[153]

1. Relationship between defendant and animal

In contrast to the *actio de pauperie* and *actio de pastu* under the Aquilian action it need not be established that the defendant was the owner of the animal; the gist of the action is his personal negligence.[154] However, it must be shown that the relationship of the defendant and the animal was so close that the defendant can be

[151] *Le Roux and others v Fick*, at 42
[152] van der Merwe/Rabie, 241; Macintosh/Scoble, 162
[153] van der Merwe/Rabie, 243
[154] Macintosh/Scoble, 153

presumed to have a duty of preventing the animal from doing harm.[155] Such a close relationship was for instance considered in *S. v Fernandez* where the appellant, although not the owner of the baboon, fed it and cleaned its cage.[156]

2. Negligence

There must have been fault on the part of the defendant, which may take the form of either intention -for instance when the defendant deliberately sets his dog upon the plaintiff- or negligence. To establish negligence on the part of the defendant various factors have to be taken into consideration like for instance the knowledge of the defendant of the harmful characteristics of his animal[157], the class to which the animal belongs, the individual characteristic of the particular animal[158], the manner in which the damage was caused, the nature of the damage, the use to which the animal had been put and the place where it did the damage.[159] In earlier cases there was a trend to presume *culpa* on the part of the owner when an animal was by nature vicious.[160] However, today there is an authority in case law for the view that the owner of a vicious animal cannot be held liable in cases where the animal was properly secured and clear warning notices were displayed.[161]

The most important instances in which an action under the *lex Aquilia* may be successful are the following:

(1) Probably the most frequent instance is the failure to secure wild or vicious animals properly. Several cases came before the courts involving in particular vicious dogs, but also meercats, baboons and wildebeests, which were not adequately secured.[162] In *Zietsman v Van Tonder EN 'N Ander* for instance, where a blue wildebeest attacked the defendant, the court held "that the defendant was negligent in allowing dangerous animals into the fenced area by not building the

[155] van der Merwe/Rabie, 243
[156] *S v Fernandez* [1966 (2)] SA 259, at 262
[157] *Bouwer v Williamson* [1954 (1)] SA 522, at 524
[158] Macintosh/Scoble, 153
[159] van der Merwe/Rabie, 243; Macintosh/Scoble, 153
[160] McKerron, 256; *Bristow v Lycett* [1971 (4)] SA 223, at 231-232
[161] van der Merwe/Rabie, 243; see for instance *Veiera v van Rensburg* [1953 (3)] SA 647
[162] for instance *Veiera v van Rensburg*, *Lever v Purdy* and *S v Fernandez*, van der Merwe/Rabie, 244

pipes across the motor gate wide enough to ensure that animals could not step over or jump them ..."[163]

(2) Another instance where a claim under the *actio legis Aquiliae* may be successful is where damage is caused by wild or domestic animals being brought or strayed onto a public road without reasonable care being taken to ensure the safety of persons and property on and adjacent to the road.[164] In *O'Callaghan, N.O. v Chaplin* it was even held, that the mere fact that an owner has permitted his dog to stray into a public road amounts to negligence.[165] In *Double v Delport*, however, De Wet J came to the conclusion that Kotze JA's proposition was incorrect as he had "overstated the law".[166] The author's opinion is that the finding of De Wet J is correct, as it would be hardly fair, as said by Hunt, "to tar with the same brush of negligence the city and suburban possessors of *dolce* fox-terriers, tempestuous collies, elephantine St. Bernards and trap-jawed bulldogs."[167] Today it is settled that the mere allowing of a dog in a public street would not amount to negligence on the part of the owner.[168]

It seems, however, as if this principle is not applicable for cattle or other livestock straying on the street. In general it was accepted that in particular farmers in control of domestic animals are duty-bound to take reasonable precautions to ensure that their animals do not wander of their land onto a public road. But as stated in *Kruger v Coetzee* "[w]hether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case."[169] In that regard it was of particular concern whether there is a 'duty to fence'. In a number of cases it was decided that a farmer whose land is situated in a farming district through which a public road runs is under no duty to fence off his property from the road. In *Moubray v Syfret* for instance the court held that there was at common law no duty on the owner of a cattle farm traversed by a public

[163] *Zietsman v Van Tonder EN N' Ander* 1989 (2) SA 484, at 485
[164] van der Merwe/Rabie, 244
[165] *O'Callaghan, N.O. v Chaplin*, at 368
[166] *Double v Delport* 1949 (2) SA 621, at 625
[167] Hunt, More Bad Dogs SALJ (1962) 458
[168] *Deysel v Carsten* 1992 (3) SA 290, at 296; Macintosh/Scoble, 154
[169] *Kruger v Coetzee* [1966 (2)] SA 428, at 430

road to fence his land or to take other steps to keep his cattle from straying onto the road.[170] Apparently, the court did not want to discourage the important cattle industry by requiring farmers to take such expensive precautions for the protection of motorists that his own livelihood would be endangered. As Wessels CJ stated: "In a country where cattle ranching is an important industry we must see that we do not make it intolerable for the owner by imposing upon him unnecessarily onerous conditions."[171] In the subsequent decision of *Van der Merwe v Austin*, it was held that where a national road runs through a farm in a cattle area and therefore cattle can be expected on and alongside the road, the owner has no obligation towards traffic on the road in respect of any of his horses which may for no reason run across the road in an unusual manner.[172] This decision clearly took into account the judicial reasoning that animals have just as much right to public roads as other road users and that motorists, knowing that the behaviour of animals is unpredictable, should watch out for them to avoid a collision.[173]

But, without doubt these decisions are "farmer-friendly" and hence were criticised as inequitable towards motorists.[174] Probably because of this criticism and the fact that traffic conditions have changed: fast moving vehicles speed on wide and well surfaced roadways even in cattle areas, courts today apparently tend towards the improvement of the legal position of the motorists. In *Coreejees v Carnarvon Munisipaliteit* it was held that although there is no duty on a farmer to fence off his land "...once a wire fence has been erected alongside a public road, it is the duty of the owner of that fence to see that the fence is effective in so far as this can be reasonably achieved."[175] In *Jamnick v Wagner*, where a motor vehicle collided with an escaped horse on a public road, the court held that "the appellant could have prevented the gap in the fence and thus the collision by taking reasonable steps, and that the accident was due to his negligence."[176] These decisions have been criticised as illogical as there is in the first instance no "duty to fence".[177] However, the author is of the opinion that this criticism is ill founded; practical

[170] *Moubray v Syfret* 1953 A.D. 199, at 203
[171] ibid.
[172] *Van der Merwe v Austin* [1965 (1)] 63
[173] van der Merwe/Rabie, 245
[174] ibid.
[175] *Coreejes v Carnarvon Munisipaliteit En 'N Ander* [1964 (2)] SA 454
[176] *Jamneck v Wagner*, 1993 (2) SA 54, at 55

experience shows that once there is a fence motorists assume that no animal will suddenly emerge through a hole in the fence in front of them and accordingly will adjust their driving behaviour.

Another improvement of the legal position of the motorist are the provisions regarding culpability and penalties for permitting animals to be upon public roads enacted by the different provincial legislatures after considerable pressure by the Automobile Association of S.A.

The provinces for instance provide in Section 125(1) of each Ordinance, that:

"No person shall leave or allow any bovine animal, horse ass, mule, sheep, goat, pig or ostrich to be on any section of the public road where such section is fenced or in any other manner enclosed on both sides, and no person shall leave such animal or ostrich in a place from where it may stray on to any such section of a public road."[178]

Non-compliance with these regulations is considered to be a factor indicating negligence on the part of the owner of the animal.[179]

3. Defences

Defences, which may be raised against the liability under the *actio legis Aquiliae* are the common defences which can be raised against any delictual action, namely necessity, self-defence, *volenti non fit iniuria* and fault on the part of the plaintiff.[180] Some of these defences are already dealt with before (see above), but the justification of self-defence is restricted to the Aquilian action. According to van der Merwe self-defence can be pleaded where a shopkeeper employs a fierce watchdog to protect his shop against burglars.[181] But it remains to be seen whether this defence will be accepted by the courts.

[177] McKerron, 258; van der Merwe/Rabie, 247
[178] see Macintosh/Scoble, 170
[179] van der Merwe/Rabie, 245
[180] ibid., 247; Macintosh/Scoble, 154, 156
[181] van der Merwe/Rabie, 247

V. NUISANCE

Another possible remedy in case of damage caused by animals is an action based on nuisance, which in general applies in cases where the keeping of animals on a person's land creates a nuisance. In more recent decisions nuisance was considered as only one instance of general delictual liability and therefore it is unclear whether this remedy will still form a separate delict in the future.[182] However, the review of the case law has showed that with respect to animal liability nuisance never played a major role and will therefore be not further examined.

VI. PRELIMINARY CONCLUSION AND CRITIQUES

The South African law of animals is very much like the law of animals in classical Roman law in its retention of single, limited categories of liability and its inability or unwillingness to develop a general principle of liability for animals. Admittedly, with its three special actions (*actio de pauperie*, *actio de pastu* and *actio de feris*) South African law covers damage caused by all kinds of animals, but the disadvantage of these separate actions is that each has its own requirements and legal uncertainties. Undoubtedly, one general provision would simplify the special law of animals and would provide a clear legal rule which would also reduce litigation in this area. The question is hence whether there is any merit in retaining three separate actions or, conversely, what reasons could be brought up against a combination of these.

As stated by some writers: it is only the *contra naturam sui generis* requirement of the *actio de pauperie* that stands in the way of a single general action based on strict liability for all damage caused by any animal.[183] This statement is certainly true. The *actio de pastu* and the *actio de feris* were developed because neither a grazing animal nor wild animals causing damage act *contra naturam sui generis*. So why not set aside the requirement *of contra naturam sui generis*? And indeed, some writers support such abolition. They argue that the *contra naturam*

[182] van der Merwe/Rabie, 247-248
[183] Neethling/Potgieter/Visser, 368

requirement is not satisfactory as it (i) points to a personification or humanisation of animals by means of the objective "reasonable animal" test and (ii) it could be interpreted in such a variety of ways that it not only leads to legal uncertainty, but has the effect of classifying as *contra naturam* any harmful conduct by an animal which for policy reasons should found an action for damages."[184]

Both arguments are to the author's opinion convincing. As already stated, a juristic animal like for instance the 'reasonable dog' does not exist and furthermore differing court decisions, indeed, have already led to some uncertainties in law when to call the behaviour of an animal *contra naturam sui generis*. More importantly, the author is of the opinion that the owner/keeper of an animal should be held liable for any damage caused by his animal, irrespective whether the animal acted contrary to the nature of ist kind. As already stated under B (1) the one who derives a benefit or decides to keep an animal should also being required to carry any concomitant risk. Therefore the requirement of *contra naturam* should be abolished and one general action should be developed, which compresses all three actions into one.[185] This action should also be based on possession or physical control and not as it is presently the case with the *actio de pauperie* and the *actio de pastu* on ownership. Legislation should act accordingly and as Hunt stated "...clear up some of the anomalies and uncertainties of liability for damage caused by animals."[186]

D. GERMAN LAW

In Germany remedies for damage caused by animals may be granted under § 833 BGB and § 834 BGB, which are special rules of animal liability. Additionally § 823 BGB, which is the general rule for delictual liability, also applies with respect to the law of animals. Similar to South African law, the special rules generally impose strict liability (*Gefährdungshaftung*) on the defendant (with the exception of § 833 (2) BGB), whereas § 823 BGB requires the plaintiff to prove fault on the

[184] ibid., with further references

[185] For the determination whether *vis maior* or culpable conduct of the injured party, of a third person or another animal gives the defendant an effective defence (see under 5.), the requirement of *contra naturam sui generis* is not necessary. These defences are not limited to the law of animals, but are rather generally applicable in the law of delict.

part of the defendant. It is notable that § 833 BGB is the only example of strict liability under the BGB itself.

After the enactment of § 833 BGB, German law became clearer, and indeed, today there are only a few legal discussions regarding the scope and content of the special law of animals. However, the occurring problems in that regard will be analised in the following passages.

I. § 833 BGB

§ 833 BGB comprises two different actions; § 833 (1) BGB, which imposes genuine risk-based liability for damage caused by all kinds of animals and § 833 (2) BGB, which establishes a rebuttable presumption of fault against the keeper of domestic animals. § 833 BGB reads as follows:

"If a person is killed or injured, or the health of a person is affected, or a thing is damaged by an animal, the person who keeps the animal is bound to compensate the injured party for any damage arising therefrom. The duty to make compensation does not arise if the damage is caused by a domestic animal which is intended to serve the profession, the business activities, or the support of the keeper of the animal and if the keeper has either exercised the requisite care in supervising the animal or if the damage would have occurred notwithstanding the exercise of such care." [187]

1. History

In ancient Germany, animals were also personified and the primitive Germans assumed that animals, although "dumb things", "speechless wights", were well able to commit misdeeds. Consequently, the owner was punished if he retained an animal, which has caused damage for giving it food and shelter. Like in old Roman law, the owner of the animal could only free himself from criminal responsibility by abandoning the animal to the injured person for private vengeance.[188] In modern German law, however, thing-liability was also replaced by personal-liability and German legislature accordingly enacted § 833 BGB, which transferred the noxal liability of Roman law into strict liability. As Huebner said "for – this is the idea which characterises the modern law as distinguished from the conception of

[186] Hunt, 330
[187] § 833 BGB, translation by Markesinis, 14

antiquity – whoever enjoys the benefits of property shall also answer for all dangers resulting from it."[189] The moral behind this was that although the keeping of animals was not itself unlawful, the person who chooses to keep them must be prepared to take responsibility for all risks that this involves.[190] And indeed, § 833 BGB was originally exclusively based on strict liability, but social-political reasons, or to be more concrete the German agricultural lobby in the German *Reichstag*, later caused the legislature to make a derogation from this total regime of strict liability.[191] Thus, the amendment to § 833 BGB effected by law of May 30, 1908 admits an exception to its theory of strict liability, requiring proof of fault in cases involving domestic animals to serve the keeper in his profession or business or otherwise for his maintenance.[192] In other words, in the case of an animal used in a keeper's trade, notions of culpability replaced strict liability. Accordingly, strict liability as stipulated in § 833 (1) BGB today only applies to so-called luxury animals (*Luxustiere*).[193]

2. Animals within the ambit of § 833 BGB

The scope of § 833 BGB generally includes all kinds of animals, irrespective of their nature, i.e. wild, domestic, harmless, foreign or vicious animals.[194] German law therefore, unlike South African law, does not distinguish between animals and accordingly the same rule applies to all animals, even if they are infinitely small, like insects and vermin.[195]

However, among contemporary legal writers it is disputed whether bacterium and bacilli are animals within the ambit of § 833 BGB. Some are of the opinion that bacterium and bacilli are more closely linked to plants, and therefore cannot be regarded as animals. Moreover, they argue that the special animal law only

[188] Rudolf Huebner, A History of Germanic Private Law, 1918, 581
[189] ibid., 582
[190] Kwame Opoku, Delictual Liability in German Law in ICLQ 1972, 230, at 237
[191] Zimmermann, 1117
[192] Erman, Handkommentar zum Buergerlichen Gesetzbuch. 1. Band, 7th edition, 1981, Rz.1
[193] Heinrich Rosenthal, Buergerliches Gesetzbuch, 15th edition, 1965, § 833 BGB, Rz. 2809
[194] Palandt, Kommentar zum Buergerlichen Gesetzbuch, 50th edition, 1999, Rz. 5; § 90 a BGB stipulates that animals are not things. Nevertheless the provisions which apply to things are also applicable to the law of animal, see Palandt, § 90a BGB Rz. 1
[195] Opoku, 237; Instead German law classifies animals according to the purpose for which they are being used by the keeper, see under 5.

includes "big animals" and an extension to micro-organisms would lead to an inadmissible analogy. [196] Others are of the opinion, taking into account the specific danger micro-organisms may have for the public, that strict liability should also be imposed on the keepers of these organisms, which are in general laboratories.[197] The author's opinion supports the latter view as preferable, as the importance of micro-organism in many areas has increased enormously in the past years and without doubt, these forms of organism, which are generally not visible, represent a great danger to the public health. In addition to that, the term 'animal' was never limited to big animals and therefore no logical reason exist as to why § 833 BGB should be limited to these.

3. Realisation of a specific danger arising from the animal's nature (*tierspezifische Gefahr*)

The plaintiff has to show that the harm caused was the result of the specific dangers arising from the animal's nature. According to some court decisions this harm has to be the result of the animal's energy and the animal's own will, i.e. it must have acted in a spontaneous, arbitrary or capricious manner, unguided by a reasonable purpose or intention.[198]

The Federal Supreme Court and the dominant opinion, on the contrary, demand a manifestation of the animal's incalculability.[199] They argue that the requirement of acting voluntary is unsuitable, as animals only act according to their innate or gained instinct program and therefore can never act "arbitrarily". The specific risk associated with the keeping of animals lies rather in the utter unpredictability of the animal's conduct.[200] Accordingly, the Federal Supreme Court held for instance that the injury suffered by a rider, who borrowed a horse from a friend, which he knew

[196] Soergel-Zeuner, BGB, 12th edition, 1987, § 833 Rz. 2; Staudinger-Schaefer, BGB, 12th edition, 1978, § 833 Rz.. 10 ff.
[197] Erwin Deutsch, Gefaehrdungshaftung fuer Mikroorganismen im Labor in NJW 1990, 751 and Gefaehrdungshaftung fuer laborgezuechtete Mikroorganismen in NJW 1976, 1137, at 1138
[198] Wolfgang Fikentscher, Schuldrecht, 5th edition, 1975, 671; BGH in NJW 1971, 509; RGZ 141, 406, at 407
[199] Muenchener Kommentar zum Buergerlichen Gesetzbuch, Band 5, 3rd edition, 1997, § 833, Rz. 13; BGH in NJW 1977, 2158
[200] Zimmermann, 1117

to be unruly when ridden by strangers, would not lead to strict liability of the owner of the horse.[201]

But it is also questionable whether the natural unpredictability of an animal is a particularly appropriate criterion as the liability for animals does not in every single case require an incalculable conduct of the animal.[202] It is for instance not incalculable that a dog may bite the postman or that a horse could bolt in certain situations; and certainly the intent of § 833 BGB is to cover such cases as well. Be that as it may, these discussions are more theoretical; in practice the determination of whether an animal-specific danger was the cause for the harm is unproblematic. Even so, the question remains, which conduct of an animal can be considered incalculable.

Incalculable conduct was for instance assumed where a horse or dog bites or where animals escape from the pasture.[203] It is agreed that incalculable conduct of an animal can also be assumed if outside influences had an effect on the animal's body or sense, like for instance the noise of an engine, the stitch of a fly, the barking of a dog or painful touches.[204] On the other hand, the application of § 833 BGB has been excluded in cases where the damage was not the result of the specific danger inherent in the animal's nature, but for instance the result of physical forces moving the animal[205] or of mere reflex movements of the animal.[206] Such cases are for instance where a horse stumbles and falls because of excessive loading and crushes somebody or where a dog that has been narcotised, bites the veterinarian on the operating table.[207]

According to the dominant opinion § 833 BGB is also excluded in case the animal was used by a human being as a mere instrument of his or her will; i.e. when the animal's actions were entirely determined by a human being. In that case the injury of the plaintiff, similar to the latter exception, cannot be traced back to a special

[201] BGH in NJW 1974, 243; 1977, 2158
[202] Muenchener Kommentar, § 833, Rz 13
[203] Palandt, § 833, Rz. 6
[204] ibid.; BGH in NJW 1971, 509
[205] RGZ 50, 221; 60, 68
[206] Zimmermann, 1117
[207] ibid.; Muenchener Kommentar, § 833, Rz. 14

risk inherent in the animal.[208] One typical example is the horse led by the bridle that treads on a person's heels. This exception, however, was criticised by some writers as too far-reaching. Firstly, they argue that although the animal is used as a mere instrument, its specific danger still has an effect. Secondly they cannot see why a defendant who for example rushed his dog on a third person should be less liable than a defendant, whose dog pulled itself from the leash.[209] Admittedly, in particular the latter argument is convincing as it seems quite unfair that in the first case the plaintiff is faced with the difficulty of proving fault on the part of the defendant (§ 823 I BGB) whereas in the second case strict liability (§ 833 BGB) would be imposed.

Under German law it is sufficient to establish liability that the animal's activity was one element in the chain of causation.[210] If for instance a child flees from a dog that bites and gets run over by a car, the keeper is liable under § 833 BGB. A realisation of the animal-specific danger was also assumed in cases where harm was caused while dividing two fighting dogs or while driving animals away from the property. However in cases of nonsensical or careless interventions, for instance in a dog-fight, the courts tend to apply § 254 BGB (contributory negligence).[211] See under 6.

As seen, German law also limits the liability of the keeper by requiring the realisation of a specific danger arising from the animal's nature. This requirement is comparable to the *contra naturam* requirement in South African law. As already stated, the owner/keeper should be held liable for any damage caused by his animal, irrespective whether it acted incalculable or not. Hence, the requirement 'realisation of a specific danger' should be abolished. See also the considerations under C VI.

[208] Palandt, § 833, Rdnr. 7; B.S. Markesinis, A Comparative Introduction to the German Law of Tort, 1986, at 373; Ermann, § 833, Rz. 6
[209] Muenchener Kommentar, § 833, Rz. 16
[210] BGH in NJW 1971, 509; Stone, 20
[211] Muenchener Kommentar, § 833, Rz. 17

4. Keeper of the Animal

In contrast to South African law, German law considers ownership irrelevant and places responsibility upon the keeper of the animal (*Tierhalter*). The term 'keeper' is not defined by law and hence has to be determined according to the general attitude (*Verkehrsauffassung*). Undisputed is that the characterisation 'keeper of an animal' does not depend on the legal, but on the actual relationship.[212] Accordingly, ownership and proprietorship are not necessary requisites for the application of § 833 BGB, but indeed in most cases the owner of the animal is also its keeper.[213]

German case law defines the keeper of an animal as (i) one to whose enterprise (*Wirtschaftsbetrieb*) the animal belongs or (ii) one who uses the animal for his own interest in his household (*Hausstand*) or business (*Wirtschaft*), where such is not just temporary.[214]

In general one can assume that the keeper of the animal will be the person who controls it and bears the risk of the loss of the animal.[215] As already mentioned, the keeping of the animal must be permanent, thus, in cases of hiring out animals, the lessor will remain its keeper, unless the animal has been completely set apart from the lessor's enterprise for the entire lease-period.[216] Accordingly, the borrower or lessee borrowing or renting an animal for his mere pleasure or for a short time, for instance the carrier, veterinary or innkeeper are normally not considered to be the keeper, and hence are not held responsible. Similarly, temporary dispossession, for instance where the animal has strayed or been lost, does not affect the liability of the keeper for damages caused by his animal. Only if the animal is stolen, the liability of the keeper will dissolve.[217]

[212] Rosenthal, § 833, Rz. 2818
[213] Fikentscher, 671
[214] Karl Larenz, Lehrbuch des Schuldrechts, 2. Band, Besonderer Teil, 12th edition, 1981, 704-705
[215] BGH in NJW 77, 2158; Palandt, § 833, Rz. 9
[216] Palandt, § 833, Rz. 9

5. Exculpation

As seen earlier, the German Civil Code admits with § 833 (2) BGB an exception to its theory of strict liability, requiring proof of fault in cases involving domestic animals to serve the keeper in his profession or business or otherwise for his maintenance. Farmers, foresters, officers, the police and the owners of horse cabs are thus allowed to exculpate themselves, i.e. show that they are not at fault. Such fault is, however, presumed under § 833 (2) BGB, so the keeper escapes liability only if he can prove that he exercised due care in looking after the animal or that the damage would have occurred despite such care.[218]

(a) Domestic animal

Domestic animals (*Haus- und Nutztiere*) are tame animals permanently used in the household or business, namely horses, donkeys, mules, cows, goats, sheeps, pigs, dogs, cats, poultry, pigeons and also tamed rabbits. Animals, which are commonly not treated as domestic, are for instance bees, birds, monkeys, reptiles and ostriches. Relevant is the general attitude (*Verkehrsanschauung*), i.e. even if a camel or ostrich are exclusively used for agricultural purposes, they are not considered to be domesticated in the sense of § 833 (2) BGB. The same is true for animals, which could considered domesticated according to their specie, but which are not used as such, for example, pet animals like cats and dogs.

(b) Serving the keeper

§ 833 (2) BGB requires that the domestic animal serves the keeper in (i) his profession, (ii) business or (iii) maintenance.

(i) Animals, which serve the profession of the keeper are for instance military horses or police horses, hunting dogs of game-keepers, watch-dogs of shepherds, guiding-

[217] Muechener Kommentar, § 833, Rz. 21; Palandt, § 833, Rz 10
[218] Norbert Horn/Hein Koetz/Hans G. Leser, German Private and Commercial Law: An Introduction, 1982, 163; Larenz, 645

dogs used by the keeper in carrying out his profession and cats used for the protection of stock.

(ii) Animals, which are considered to serve the business are those, which are kept as draught-animals (*Lasttier*), breeding cattle (*Zuchttier*) or stock for slaughtering (*Schlachtvieh*).[219]

Horses used in a horse rental business or racing horses are also, according to the dominant opinion, domestic animals in the sense of § 833 (2) BGB. This opinion, however, was criticised by some writers, who argued that the purpose of 'gaining money' is not sufficient to free the keeper from the risk of strict liability; the legislature only intended to privilege domestic economical or agricultural purposes. Nevertheless, there is an agreement that the application of § 833 (2) BGB is excluded in cases where animals are kept purely for pleasure, even if they, in individual cases, may aid its keeper in gaining money.[220]

(iii) Animals, which serve for the keeper's maintenance, are *inter alia* milk cows, goats, pigs and poultry kept for the keeper's own household. But also the guide-dog, which is used for every day purposes can serve the purpose of maintenance.

(c) Reasonable care

To successfully exculpate himself, the keeper must show, either that he took reasonable care or that damage would have occurred even if he had taken such care (§ 833 (2) BGB). Reasonable care includes the care for the keeping, maintenance and control of the animal. The scope of the duty to care has to be determined according to the characteristics of the animal known to the keeper and the animal's intended use. In general terms, the keeping of animals is only permitted in case the keeper is capable of controlling them in a way that they cannot harm other people and the community. If for instance a horse stood for a long period in the stable, special precautions have to be made before riding the horse.[221] The keeper is

[219] Larenz, 646
[220] BGH in NJW 1971, 509
[221] BGH in JZ 55, at 87

generally obliged to keep and control his animal in such a way that it cannot get out of control and harm other people.[222] He has in particular to take care that no third person, especially children, goes near a dangerous animal or that his animals stray onto public roads and injure other road users. Moreover, dogs have to be kept on a lead while on busy roads.[223]

With regard to cattle herds it was held that cattle-runs on public roads require the control of a sufficient number of herdsmen. German law, in contrast to South African law, also knows a 'duty to fence'. Farmers therefore have to fence in their land to prevent animals from straying onto busy roads. Fences generally have to be in good condition; they should even withstand a panicky refusal of animals at the fence. Hence, there are high expectations with respect of fencing in pastures properly.[224] In case of a pasture situated near a busy road it was even held that the fence has to be secured with a safety lock in order to prevent third persons from opening the gate.[225]

In case the keeper shifts his duty to maintain safety (*Verkehrssicherungspflicht*) on a third person, who undertakes to supervise the animal (see § 834 BGB) the keeper's responsibility may be limited to the appointment of a qualified person (see under II.).[226]

As already stated, today there is no need for the limitation of the liability as stipulated in § 833 (2) BGB. German legislature therefore should consider to go back to the roots of § 833 BGB and exclusively base the special law of animals on notions of strict liability.

[222] BGH in NJW-RR 1992, 981
[223] BayObLG in NJW 87, 1094
[224] BGH in NJW 85, 2416
[225] BGH in MDR 1967, 829
[226] Ermann, § 833, Rz 18: Muenchener Kommentar, § 833, Rz 36

5. Contributory Negligence (*Mitverschulden*)

In case the injured party has contributed to the damage § 254 BGB applies.[227] This provision, which applies to claims for damages in contract as well as in tort, stipulates the obligation to compensate the negligent plaintiff depending on how far the injury has been caused predominantly by the one or the other party.[228] § 254 BGB reads as follows:

"If any fault of the injured party has contributed to the occurrence of the damage, the duty to compensate and the extent of the compensation to be made upon the circumstances, especially upon how far the injury has been caused predominantly by the one or the other party ..."

This means that if the defendant can prove, and it is for him to prove it, that the plaintiff was also responsible for the damage to a greater or lesser degree, his liability will be reduced, to the extent that the plaintiff's fault contributed to the harm.

With respect to claims based on § 833 BGB, contributory negligence was in particular assumed if the injured party has provoked the animal or irresponsibly exposed himself to the animal specific danger; e.g. coming near a bee hive[229] or entering a courtyard despite the warning "beware of the dog". Contrary to South African law (see *Da Silva v Otto*), German law also assumes contributory negligence on the part of a dog-keeper when he intervenes in a fight between his dog and the attacking dog and is injured.

Some writers are of the opinion that the voluntary assumption of risk could in appropriate circumstances exclude the liability of the keeper. They argue that § 833 BGB is for instance not applicable in cases where an injured rider took control over a horse without paying a fee knowing about the dangers of the horse.[230] The Federal Supreme Court, however, decided in such cases that the keeper of the horse is strictly liable for any damage but taken into account a contributory

[227] BGH in NJW 1976, 2130; Christina Eberl-Borges, § 830 BGB und die Gefaehrdungshaftung in Archiv fuer die civilistische Praxis 1996, 524
[228] Markesinis, 25
[229] Ermann, § 833, Rz 25

negligence of the rider.[231] It has to be seen whether this legislature will change in the future.

6. Contractual exclusion of liability

The liability of the keeper for damage caused by his animal can be contractually excluded.[232] Generally, signing an indemnity form or a similar document can do this. However, a sign 'Riding at one's own risk' at a horse stable is for instance not sufficient for effectively excluding liability. In practice, an explicit exclusion of liability for animals is quite uncommon. The exclusion, however, may also be tacitly agreed on. This was for instance assumed in cases where an animal was for the purpose of undertaking certain transactions completely taken out of the keeper's control. Such cases are for instance where a horse was handed over to a trainer or were an animal was handed over to a veterinarian for an operation.[233]

II. § 834 BGB

German law provides with § 834 BGB a special provision for the liability of the person who has undertaken to take care of the animal under a contract with the keeper. § 834 BGB reads as follows:

"A person who undertakes to supervise an animal under a contract with the keeper of the animal is responsible for any damage which the animal causes to a third party in the manner specified in § 833. The responsibility does not arise if he has exercised the requisite care in supervising the animal or if the damage would have occurred notwithstanding the exercise of such care."[234]

Animal attendants (*Tierhüter*) are for instance custodians, borrowers, hirers and herdsmen, who undertake the contractual obligation to supervise the animal. However, not every servant of the keeper is an animal attendant, since it is necessary that a certain amount of control be transferred to this party.[235] The

[230] Gordian N. Hasselblatt, Reiten auf eigene Gefahr, aber fremde Rechnung? In NJW 1993, 2577 ff.; Walter Dunz, Reiter wider Pferd oder Versuch einer Ehrenrettung des Handelns auf eigene Gefahr in JZ 1987, 63 ff.Gordian
[231] BGH in NJW 1992, 2474 ff.; Rolf Knütel, Tierhalterhaftung gegenüber dem Vertragspartner in NJW 78, 297 ff.
[232] BGH in NJW 1977, 2155, Rosenthal, § 833, Rz.2860
[233] Palandt, § 833, Rz. 2-4: Ermann, § 833, Rz. 22
[234] § 834 BGB, translation by Markesinis, 12
[235] Stone, 15; Ermann, § 834, Rz. 1; Rosenthal, § 834, Rz. 2826

animal attendant is jointly and severally liable with the keeper, unless he is able to exculpate himself. In contrast to § 833 (2) BGB exculpation is available for domestic animals as well as for other animals.

III. § 823 I BGB

The special rules of animal liability are non-exclusive rules; § 823 BGB is also applicable.[236]But in contrast to South African law, in Germany the general rule of delictual liability, is of no relevance in the field of liability for animals. Actions in case of damages caused by animals are almost exclusively based on § 833 BGB.[237]However, one example where § 823 BGB could become relevant is when a vehicle collides in darkness with a corpse of a dead animal. In this case the plaintiff cannot sue the keeper under § 833 BGB since the hurt of the plaintiff cannot be traced back to a special risk inherent in the animal. Instead he is able to make the keeper liable under § 823 I BGB.[238]Apart from this situation, cases of an obligatory application of § 823 BGB are rare; the present assignment will therefore not further examine § 823 BGB.

IV. PRELIMINARY CONCLUSION AND CRITIQUES

The German law of animals is clear and comprehensive with its special regulations in §§ 833, 834 BGB. These paragraphs regulate the entire field of liability for animals and indeed the review of the relevant case law shows that an application of the general delictual provision § 823 I BGB is in general not necessary. Moreover, today, no major discussions about the scope and content of § 833 BGB exist, which also helped to reduce the litigation in this area. Nevertheless, the author is of the opinion that § 833 BGB should be amended in so far as (i) the keeper should be liable for any damage caused by his animal (not only in case of the realisation of a specific danger arising from the animals danger) and (ii) the possibility of exculpation in cases of damage caused by economic useful animals (§ 833 (2) BGB) should be abolished.

[236] Erman, § 833 Rz 2

[237] The relevant literature regarding § 823 BGB does not deal with damage caused by animals, see for instance Palandt, § 823

E. COMPARISON AND CONCLUSION

The examination of the South African and German legal system with respect to liability for animals has shown that both systems have based their special law of animals on notions of strict liability. However, it is also true, that both systems are not willing to make the owner/keeper liable for any damage caused by his animal. Consequently, in South Africa the *contra naturam* requirement was introduced and in Germany a successful claim requires the realisation of a specific danger arising from the animal´s nature. Moreover German legislature implemented § 833 (2).

Apart from this similarities both systems seem very different: In South Africa on the one hand the owner of the animal is held liable and animals are classified as wild or domestic. Furthermore, the South African law system provides three special actions -the *actio de pauperie*, the *actio de pastu* and the *actio de feris*. In Germany, on the other hand, the keeper of the animal is held liable, animals are generally not classified (but with the exception for economically useful animals) and § 833 BGB regulates almost the entire field of liability for animals.

Despite these differences, the review of the case law has lead to the conclusion that both systems generally achieve similar results. However, the South African law system with respect of liability of animals is much more complicated, mainly because of its altogether five different actions. Endless and sometimes confusing discussions regarding the scope and extent were common; even so actions to simplify the special law of animals in South Africa are not recognisable so far. The author would therefore give the preference to the German system for the reason that it provides one clear and comprehensive general rule.

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[238] Markesinis, 373