Torts–Wild Animals–Negligence as Basis of Liability for Personal Injuries

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The liberal courts, following the minority rule, advance these reasons for permitting the action:

1. The Married Women's Statutes have completely changed the common law rule.
2. There is a changing conception of the marital relation and therefore the result is justifiable.

The writer believes that insurance has played an important part in bringing about this minority rule. Today almost every motorist carries liability insurance. The husband, in driving the car, is negligent. The wife is injured. In order to reach his insurance she must sue him. The courts, the writer believes, have gone far to recognize this minority rule, thereby to permit the wife to recover this insurance fund. This, as a reason, cannot be openly stated as evidence of insurance in such cases is inadmissible because prejudicial.

On the ground of recovering the insurance the minority rule may well be sustained. But to permit such a rule in this type of case necessarily calls for its extension into the field of intentional wrongs. As such, it is entirely too broad. The common law justifications for the rule still apply. The interpretation of the statutes under the majority rule may not seem logical—but law is not always a matter of logic. The desirable social results should be the deciding factor in construing statutes. It may seem unfair to allow the wife an opportunity to reach this insurance fund—but greater harm would result from a rule of law which disturbs domestic tranquility and leads to social evils.

—Jerome Katz.

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Torts—Wild Animals—Negligence as Basis of Liability for Personal Injuries.—The question of liability for injury done by vicious animals, wild or domesticated, has not often reached the Supreme Court of Appeals of this State. The recent adjudication of Vaughan v. Miller Brothers "101" Ranch Wild West Show is therefore interesting, throwing light as it does on a hitherto unadjudicated point. In an appeal to an order quashing an affidavit for attachment against defendant, which affidavit merely set forth the injury, ownership of the ape which bit off the plaintiff's finger and the fact that the animal was on exhibition, the court said in

1 153 S. E. 289 (1930).
the syllabus: "In an action against an exhibitor of a wild animal for injury caused thereby, facts constituting negligence in its restraint must be alleged." An affidavit of attachment must contain the substance of the cause of action although such particularity in the manner of stating it is not required as in a declaration. There is thus no reason why this decision should not have the same effect as the sustaining of a demurrer to a declaration in an action at law.

This point of the law has been commonly treated as a part of the "at peril" or "liability without fault" phase of the law of torts. Under English law absolute liability has been imposed for several classes of acts. Excepting certain natural uses and an act of God or "vis major" what ever is brought on the land is brought there at the owner's peril. The owner is an insurer for the damage done by his straying cattle. And the owner or keeper is absolutely liable for the injury done by wild animals or by those with known vicious propensities. The first proposition has met with general recognition in this country and has seemingly been adopted by West Virginia although the language used will certainly not permit an unqualified statement to that effect. The "at peril" doctrine in regard to straying cattle has seldom, with perhaps the exception of the New England States, received sanction in this country and is repudiated in this state except where adopted by local vote according to statute. This was true chiefly because the open nature of the country, particularly in the early days of settlement, made that law an absurdity which for England was a necessity.

The third class in which absolute liability has been imposed, injuries by vicious animals, is commonly divided into two groups.

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3 CLERK AND LINDSELL IN TORTS (7th ed. 1921) 114; POLLOCK ON TORTS (13th ed. 1929) 516.
4 Patent Candle Co. v. London County Council, 2 Ch. 528 (1908) (fifth from privy); Fletcher v. Rylands, 1 Ex. 265, L. P. 3 H. L. 330 (1866) stored water; Tennant v. Goldwin, 1 Salk 21 and 360 (1704); for recent cases and applications of the doctrine in England see CLERK AND LINDSELL ON TORTS (7th ed. 1921) 424-5; POLLOCK ON TORTS (13th ed. 1929) c. XII, 500.
5 Lee v. Riley 18 C. B. N. S. 722 (1865).
7 See Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S. E. 126 (1911); Wigal v. City of Parkersburg, 74 W. Va. 25, 81 S. E. 554 (1914). Language in each opinion will support both doctrines, i. e., absolute liability and liability based on negligence applying rule of res ipsa loquitur.
(1) undomesticated wild animals (*ferae naturae*), (2) domesticated animals whose viciousness cannot be presumed. The liability has in each case (*scienter* having been found in the latter) been held to be the same. Indeed, one is but the corollary of the other the difference consisting solely in the mode of showing the *scienter.* In the case of animals *ferae naturae* the *scienter* is presumed from the type of animal. In the other *it* must be proved.

The doctrine is very ancient. Hale in Pleas of the Crown sets it forth thus: "Though he have no particular notice, that he did any such thing before, yet if it be a beast, that is *ferae naturae,* as a lion, a bear, a wolf, yea an ape or monkey, if he gets loose and do harm to any person, the owner is liable to an action for the damage." It is even referred to in the Mosaic Law. In *May v. Burdette* the modern rule had its inception. That case was for injuries resulting from the bite of a monkey and the declaration averred *scienter* but no negligence and was upheld, the court saying that if the animal was of the proper class not even the *scienter* was necessary. In *Filburn v. People's Palace Car Company* the plaintiff was injured by an elephant on exhibition and no *scienter* was alleged. The sole question was whether the beast was of a class sufficiently wild to impute knowledge and it was decided that it was. The American states passing upon the question have, with the exception of New Jersey, given sanction to the doctrine. The

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10. See Alderson B., in Jackson v. Smithson, 15 M. & W. 565, 15 L. J. Ex. 311 (1896): "I can see no distinction between the case of an animal which breaks thru the tameness of its nature and one that is *ferae naturae.*"


15. Congress, etc., Springs Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487 (1879); see collection cases 3 C. J. 87, note 16. See collection of cases on liability of exhibitors in 22 A. L. R. at page 629. In Oopley v. Wills, 153 S. W. 830 (Texas, 1913) the court says: "(the feeding of a monkey by a boy) was a natural thing to do and but emphasizes the reason and necessity of the rule that requires such animals to be so kempt as to absolutely prevent such occurrences."
dissent of New Jersey is quite consistent since liability without fault is allowed in no case whatever.\textsuperscript{15}

Naturally such a rule could not remain long without some defense becoming recognized. Since negligence in the ordinary sense was not the gist of the action contributory negligence could be no defense. But if the plaintiff wilfully invites the attack, or imprudently places himself in a position to be attacked the owner or keeper is not liable.\textsuperscript{17} Most of the apparent contradictions found by the court in Vaughan v. Wild West Show, supra, are varying examples of this rule of defense. In Marlor v. Ball\textsuperscript{16} the plaintiff quite imprudently stroked a zebra. To allow persons injured by their own folly a recovery would be absurd. Nevertheless this rule can, of course, be carried to such an extreme as to rob the rule of absolute liability of any efficacy just as the rule of evidence called \textit{res ipsa loquitur} can practically impose absolute liability where negligence is the ground. This fact does not affect the reason of the rule of liability. In Johnson v. Mack Manufacturing Company\textsuperscript{15} the West Virginia court adopted the rule of absolute liability as regards domesticated vicious animals. The injury was caused by a boar but no recovery was allowed as there was not sufficient evidence to establish the \textit{scienter}. Since, as pointed out before, this rule is but the corollary of the wild animal rule it would seem that the case is no longer law since the decision in Vaughan v. Wild West Show, supra. It is not logically possible to have absolute liability in the one case and not the other.

\textsuperscript{15}Marshall v. Welwood, 38 N. J. Law 339 (1876) was a case involving the explosion of a steam boiler in which the court repudiated the entire doctrine of Fletcher v. Rylands, 1 Ex. 265 (1866). De Gray v. Murray, 69 N. J. Law 458, 55 Atl. 237 (1903) following the principle in the preceding case held that injuries by a vicious dog kept for home protection created only a liability for negligence in its restraint.

\textsuperscript{16}Marlor v. Ball, 16 T. L. R. 239 (1900); Besozzi v. Harris, 1 F. & E. 92; Wyatt v. Rosherville Gardens Co., 2 T. L. R. 292; Mallory v. Starn, 191 N. Y. 21, 83 N. E. 588 (1908.)

\textsuperscript{15}16 T. L. R. 239 (1900). Other decisions cited in Vaughn v. Wild West Show, supra, are: Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879 (1900) (negligence in restraining a vicious dog was held the gist of the action, the failure to restrain being prima facie evidence of same); Bischoff v. Cheney, 89 Conn. 1, 92 Atl. 660 (1914) (the plaintiff was bitten by a cat and the court said negligence in its keeping must be shown). Both the preceding cases are contra to the general rule but the syllabus of Fake v. Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716 (1890) cited as contra, reads: "In an action to recover damages for an injury caused by a vicious animal, the gravamen is the neglect to restrain after notice of its vicious propensity." An examination of the opinion discloses that the word "neglect" is used in the sense of "fail."

\textsuperscript{15}65 W. Va. 544, 64 S. E. 841, 131 Am. St. Rep. 979 (1908).
As a question of original justice the "at peril" doctrine may be open to doubt but it seems to be spreading, particularly in reference to the use of land. Reading between the lines in Vaughan v. Wild West Show, supra, and considering the care with which exhibitors do usually surround their wild animal displays it seems likely that the rule of defense stated above might be applicable and hence it was an injustice to defendants to have their property tied up by an attachment proceeding. One might well doubt the wisdom of overthrowing a generally-recognized rule of law to avert a single case of injustice.

—ROBERT E. STEALEY.

See references in note 4, supra.