

The California Law of Liability for Domestic Animals: A Review of Current Status

This article examines the development of the California law of liability for domestic animals. Three principal areas are considered: strict liability for trespass, strict liability for known dangerous animals, and negligence. In addition, this article analyzes the defenses to all three theories in light of the California Supreme Court's increasing reliance on comparative principles in all areas of tort law.

The domestication of animals for agricultural purposes was a significant milestone in human social development. As animals became an increasingly important part of daily life as a source of food, clothing, and transportation, their ownership became subject to societal regulation.¹ Some of the earliest known legal systems included provisions dealing specifically with the law of animals. The Mosaic law,² Solon's law of Athens,³ and the Roman Institutes of Justinian, for example, embodied many of the principles that later evolved into the early common law.⁴ Much of the present law relating to the liability for domestic animals⁵ stems from early common law precedents.

In addition to modern animal law's historic roots, several societal factors have influenced its development. First, farming has been relegated to a small and specialized sector of an urban industrialized economy.

1. See generally C. CURWEN, *PLOUGH AND PASTURE—THE EARLY HISTORY OF FARMING* (1953); N. GRAS, *A HISTORY OF AGRICULTURE IN EUROPE AND AMERICA* (2d ed. 1940); *THE DOMESTICATION AND EXPLOITATION OF PLANTS AND ANIMALS* (P. Ucko & G. Dimbleby eds. 1969).

2. See 1 *Exodus* 21:28-36; 2 *Exodus* 22:1, 9-15.

3. See 1 PLUTARCH'S *LIVES OF THE NOBLE GREEKS AND ROMANS*, *Solon* 403, 471 (B. Perrin Trans. 1914).

4. See O.W. HOLMES, *THE COMMON LAW* 18-24 (1881).

5. The term "domestic animal" is defined in the *RESTATEMENT (SECOND) OF TORTS* § 506(2) (1976) as ". . . an animal that is by custom devoted to the service of mankind at the time and in the place in which it is kept." In the present article, "domestic animal" refers primarily to livestock, including cattle, pigs, sheep, and horses. While poultry, dogs, and cats might be included in this definition for other purposes, the present article does not consider liability issues related to these animals.

Consequently, the ownership and husbandry of domestic animals has become increasingly rare. Second, the western states' open ranges, once dedicated to grazing, now have been converted to the needs of either agriculture or increasing urban expansion, bringing about corresponding changes in the law. Third, the advent of the automobile made domestic animals a source of danger as obstacles upon the highway and new rules developed accordingly.

The focus of this article is on liability for harm done by livestock, including cattle, pigs, sheep, and horses. Its purpose is to serve as a guide to the practitioner and other professionals and students who are confronted with different and potentially conflicting liability theories, as well as to suggest desirable changes in the law. Accordingly, it will examine the basic elements of California law governing these animals, clarify some of the changes in the law that have taken place in response to the societal factors mentioned above, and point out some of the reasons for the continuing complexity in this branch of the law.

Under present law, recovery for harm caused by domestic animals may be based on one or a combination of three theories: strict liability for trespass, strict liability for known dangerous animals, or negligence. When a case arises involving harm caused by animals, it is important to survey all three theories since both the elements constituting the prima facie case and the available defenses differ for each. For example, a primary distinction among the three theories is geographic. If animals intrude onto the property of the plaintiff, causing property damage or personal injury, a cause of action in strict liability for trespass is the best remedy. However, if injury occurs on public property, such as a highway, or if the plaintiff is injured on property not his own, another theory must be used. Another distinguishing element is whether an animal is known to be dangerous. If the animal has a past history to warrant it, a cause of action based on its known dangerous propensities would be preferable because of the advantages afforded by strict liability. Additionally, a cause of action for negligence is available whenever the defendant's animal has caused harm that is a proximate result of its owner's lack of due care.

Part I of this article discusses the strict liability of possessors of domestic animals for personal injury and property damage caused by the animals trespassing onto another's land. Part II is concerned with the strict liability imposed on owners of those domestic animals with known dangerous propensities. Part III involves the application of the general principles of negligence law to situations involving domestic animals. Part IV discusses the defenses to these theories of liability in light of the adoption in California of comparative negligence and the application of comparative principles to strict products liability. The article concludes that these same comparative principles should be applied in cases of

strict liability relating to domestic animals, so that damages may be apportioned in relation to the plaintiff's degree of fault.

I. STRICT LIABILITY FOR TRESPASS

Where my beasts of their own wrong without my will and knowledge break another's close, I shall be punished, for I am the trespasser with my beasts . . . for I am held by the law to keep my beasts without their doing harm to anyone.⁶

This statement from an early case exemplifies the general rule of the common law that the possessor⁷ of domestic animals was strictly liable for their trespass.⁸ In applying this principle of strict liability, the common law courts used a specific writ known as *trespass quare clausum fregit*.⁹ The essence of this writ was an uninvited presence on the land of another. If such presence was proven, the owner of an intruding animal was liable for nominal damages even if the animal did no harm. The owner's exercise of due care to keep the animals confined was irrelevant.¹⁰ Once the action for simple trespass was found to lie, the land owner could claim for the property damage done by the animals as an "aggravation" of the trespass.¹¹ By the late 19th century, several American cases had held that the "aggravation" concept encompassed recovery for personal injuries as well as property damage.¹²

The common law rule of strict liability for animal trespass developed in England and the eastern United States in response to the needs of an agricultural community. In the western states, however, from the beginning of the western migration the grazing industry was the primary economic base.¹³ Efficient use of the land dictated the development of

6. 12 Hen. VII, Keilwey 3b, 72 Eng. Rep. 156 (1496) *as translated in* G. WILLIAMS, LIABILITY FOR ANIMALS 191 (1939).

7. In general, liability attaches to persons with custody, control, or management of domestic or agricultural animals. See RESTATEMENT (SECOND) OF TORTS §§ 504, 505, 509 (1976). In this article, for purposes of simplicity, it is often assumed that the possessor is also the owner.

8. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 76, at 496 (4th ed. 1971) F. HARPER & F. JAMES, THE LAW OF TORTS § 14.9, at 821 (1956).

9. See *Kimball v. Hilton*, 92 Me. 214, 42 A. 394 (1898).

10. *McKee v. Trisler*, 311 Ill. 536, 143 N.E. 69 (1924); *Hickey v. Freeman*, 198 Iowa 465, 198 N.W. 769 (1924); *Tonawanda R.R. Co. v. Munger*, 5 Denio 255 (N.Y. Sup. Ct. 1848), *aff'd*, 4 N.Y. 349 (1850).

11. *Beckett v. Beckett*, 48 Mo. 396 (1871); *Low v. Barnes*, 30 Okla. 15, 118 P. 389 (1911).

12. *E.g.*, *Marsh v. Hand*, 120 N.Y. 315, 24 N.E. 463 (1890) (recovery for attack by ram); *Troth v. Wills*, 8 Pa. Super. Ct. 1, 42 W.N.C. 504 (1898) (cow's butting of plaintiff constitutes aggravation of trespass). Apparently the first English case so holding was *Wormald v. Cole*, [1954] 1 Q.B. 614, 1 All E.R. 683.

13. *Casad*, *The Kansas Law of Livestock Trespass*, 10 U. KAN. L. REV. 55, 57 (1961); Note, *Liability for Damage Caused by Trespassing Cattle*, 19 LA. L. REV. 733, 735 (1959).

a rule that allowed cattle to roam the open range.¹⁴

The very first California legislature, in order to protect the state's important grazing industry, enacted a law specifically abrogating the common law rule.¹⁵ In direct contrast to the common law rule, recovery for animal trespass was limited to those who had enclosed their land with a proper fence.¹⁶ Such statutes, once typical in the West, are generally referred to as "fencing out" statutes because there is strict liability only when the animal has broken into a fenced area; otherwise there is liability only when the animal owner can be shown to have been negligent.¹⁷

By 1872, California's agricultural possibilities were becoming apparent.¹⁸ Portions of the state had become more settled, and the production of grains and other foodstuffs had become an important industry. Accordingly, the legislature enacted a series of statutes¹⁹ that began restoring the rule of common law county by county.²⁰ By 1915, the Estray Act of 1915 was passed, restoring the common law to the entire state,²¹ excepting only the six northernmost counties.²² These counties are designated grazing areas,²³ and since the "fencing out" law still applies to them, the theory of strict liability is not applied unless the plaintiff has erected a fence.²⁴ In all other counties in California, an owner is strictly liable for the trespasses of his animals.²⁵

14. See, e.g., *Delaney v. Erickson*, 10 Neb. 492, 6 N.W. 600 (1880), *rev'd on other grounds*, 11 Neb. 533, 10 N.W. 451 (1881). Accord *Kerwhaker v. Cleveland, C., & C. R.R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246 (1854); *Wagner v. Bissell*, 3 Iowa 396 (1856).

15. 1850 Cal. Stats. 131, *construed in* *Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561 (1859).

16. *Comerford v. Dupuy*, 17 Cal. 308 (1861); *Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561 (1859).

17. *Buford v. Hartz*, 133 U.S. 320 (1889); *Merritt v. Hill*, 104 Cal. 184, 37 P. 893 (1894). See also *Garcia v. Sumrall*, 56 Ariz. 526, 121 P.2d 640 (1942); *Osborne v. Osmer*, 82 Colo. 80, 256 P. 1092 (1927).

18. *McMurry, A Review of Recent California Decisions in the Law of Property*, 9 CALIF. L. REV. 447, 452 (1921); Comment, *Trespass: Liability for Trespassing Animals*, 1 CALIF. L. REV. 548 (1913).

19. E.g., 1871-72 Cal. Stats. 99; 1871-72 Cal. Stats. 580; 1877-78 Cal. Stats. 176. See Comment, *Torts: Trespass by Animals Upon Unenclosed Lands in California*, 7 CALIF. L. REV. 365, 366-67 (1919).

20. *Hahn v. Garratt*, 69 Cal. 146, 10 P. 329 (1886); *Hicks v. Butterworth*, 30 Cal. App. 562, 159 P. 224 (2d Dist. 1916); *Blevins v. Mullally*, 22 Cal. App. 519, 135 P. 307 (3d Dist. 1913).

21. 1915 Cal. Stats. 636, *as construed in* *Montezuma Improvement Co. v. Simmerly*, 181 Cal. 722, 189 P. 100 (1919). See also *Moran v. Freeman*, 48 Cal. App. 514, 192 P. 155 (3d Dist. 1920).

22. Originally Del Norte, Lassen, Siskiyou, Modoc, Shasta, and Trinity. Today only Lassen, Modoc, Siskiyou, and parts of Trinity and Shasta are excluded. CAL. FOOD & AGRIC. CODE §§ 17123, 17125, 17126 (West 1968). The California Agriculture Code was renamed the California Food and Agriculture Code by 1972 Cal. Stats. 468.

23. CAL. FOOD & AGRIC. CODE § 17123 (West 1968).

24. *Id.* § 17122.

25. The present-day counterpart of the Estray Act of 1915 is contained in CAL. FOOD & AGRIC. CODE § 17041 (West 1968) which provides that "any person that finds any

Today possessors of domestic animals in most areas of California have a statutory duty to keep their animals from intruding onto another's land. Thus, a trespass action based on the theory of strict liability will be recognized whenever a trespass is proven.²⁶

Liability for trespass, while "strict," is not absolute. An animal owner may avoid liability if any one of several requirements of the action, some of which are highly technical, is not met. The first requirement is that the plaintiff show a trespass. The entry of farm animals onto the land of another is usually deemed to be a trespass because it is a violation of a statute that prohibits animals from running at large.²⁷ In the absence of a statute, the common law also provides a general rule requiring an owner to fence his animals in.²⁸

A major exception to the presumption of trespass is recognized when the landowner is shown to have consented to the animal's presence. Such consent can be either express or implied. For example, in *Hughey v. Fergus County*,²⁹ the plaintiff sought damages for personal injuries he had received when the defendant's bull jumped the fence and attacked the plaintiff on his own land. The Montana Supreme Court held that a trespass action would not lie because the plaintiff had requested that the bull be placed in the neighboring pasture with the exception that the bull would jump the fence in order to mate with the plaintiff's cow.³⁰

A second requirement is that the plaintiff be in actual and exclusive possession of the land upon which the animal has trespassed.³¹ This requirement reflects the nature of the action for trespass, which is designed to protect a person's interest in the exclusive possession of land. The rule recognizes the right to recover of all members of the

estrays domestic animal upon his premises . . . may take up the animal and have a lien for all expenses . . ." The remedy expressly provided by the act is distraint, but it has been held to provide for a cause of action based on common law trespass. See *Hahn v. Garratt*, 69 Cal. 146, 10 P. 329 (1886) and *Triscony v. Brandenstein*, 66 Cal. 514, 6 P. 384 (1885) for a construction of the same language in earlier statutes.

26. In addition to damages, the remedy generally sought, a land owner or occupier may also seek injunctive relief in an appropriate case. The rules that govern here are the same as those governing injunctive relief against trespasses generally. These include requirements of a repeated or continuous trespass such that damages will not fully compensate for the injury and a multiplicity of suits would be necessary to obtain relief. See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.6, at 348-47 (1973).

27. See, e.g., CAL. FOOD & AGRIC. CODE § 17041 (West 1968).

28. There is a long-recognized exception for the incidental trespasses of animals being driven along a highway. See *HARPER & JAMES*, *supra* note 8, § 14.9, at 824; *PROSSER*, *supra* note 8, § 76, at 498.

29. 98 Mont. 98, 37 P.2d 1035 (1934).

30. See also *Smith v. Garner*, 113 Wash. 368, 194 P. 375 (1920) holding that a cow on the plaintiff's property was not trespassing because the plaintiff had given implied permission.

31. *Williams v. Goodwin*, 41 Cal. App. 3d 496, 507, 116 Cal. Rptr. 200, 208 (3d Dist. 1974); *PROSSER*, *supra* note 8, § 13, at 68.

household actually residing on the property.³²

The extent to which a non-land-occupier may recover has been considered in only a few cases. The general rule, as stated in an early case, is that a trespass action is not available to a person injured on a neighbor's land.³³ In a later case, another court assumed that a girl at school was the equivalent of a household member and was therefore entitled to bring a trespass suit.³⁴ In still other cases, non-land-occupiers have been allowed damages even though the matter of their non-occupancy seems never to have been raised or discussed.³⁵

The third requirement, and the most important restriction on recovery under the theory of livestock trespass, is the causal one. The original Restatement provided that the animal possessor was liable for "any harm done."³⁶ However, as Dean Prosser asserted, this proposition "seems clearly to go too far."³⁷ Indeed, the second Restatement was reworded to say that the "liability extends to any harm . . . which might reasonably be expected to result from the intrusion of livestock".³⁸ The rationale behind this limitation is that liability should be narrower in cases where the defendant has not actually departed from a social standard.³⁹ Thus the boundaries of liability will be most extensive for intentional torts, which involve a willful disregard of social standards; somewhat narrower for negligent acts, which fall below the general standard of due care; and narrower still in cases of strict liability where liability may be assessed against one who adheres to all applicable standards, when harm nevertheless results.

In struggling to express this causal limitation on liability, the courts have developed several formulations. In some of the cases the question was said to be whether the harm was a natural or direct consequence of the trespass;⁴⁰ in some, whether the harm was a proximate result;⁴¹ and in others, whether the harm was a result of the normal or natural propensities of the type of animals involved.⁴² Perhaps the most widely accepted phraseology is whether the injury was within the scope of the

32. RESTATEMENT (SECOND) OF TORTS §§ 162, 504, Comment f (1976).

33. *Peterson v. Conlan*, 18 N.D. 205, 119 N.W. 367 (1909) (bull gored the plaintiff while the plaintiff was present on a third party's land).

34. *Leipske v. Guenther*, 7 Wis. 2d 86, 95 N.W.2d 774 (1959).

35. *See, e.g.*, *Robinson v. Kerr*, 144 Colo. 48, 355 P.2d 117 (1960) (grandson kicked by trespassing horse while visiting grandparents).

36. RESTATEMENT OF TORTS § 504 (1938).

37. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 57, at 322, n.75 (2d ed. 1955).

38. RESTATEMENT (SECOND) OF TORTS § 504(2) (1976).

39. PROSSER, *supra* note 8, § 79, at 517.

40. *E.g.*, *Robinson v. Kerr*, 144 Colo. 48, 355 P.2d 117 (1960).

41. *E.g.*, *Peterson v. Conlan*, 18 N.D. 205, 119 N.W. 367 (1909).

42. *E.g.*, *Troth v. Wills*, 8 Pa. Super. Ct. 1, 42 W.N.C. 504 (1898); *Leipske v. Guenther*, 7 Wis. 2d 86, 95 N.W.2d 774 (1959).

risk created by the trespass of the animals.⁴³ The types of damage universally held to be within the scope of the risk of the trespass of domestic animals are damage to crops,⁴⁴ harm to other animals,⁴⁵ the transmission of disease,⁴⁶ or an inopportune mating.⁴⁷

In cases involving more improbable events, the courts have held that the plaintiff's injuries were not within the scope of the risk. A famous illustration involves a cow which escaped and wandered into the plaintiff's barn, falling through the rotten floor boards into a nine-foot deep cistern.⁴⁸ The plaintiff came along later, fell into the resulting hole, and was seriously injured. The court held that the plaintiff was not guilty of contributory negligence but nevertheless could not recover for his injuries, since they were not of the type reasonably to be expected from the trespass of a cow.⁴⁹

The cases are also uniform in holding that a landowner's injuries received while attempting to drive an animal away are within the scope of the risk.⁵⁰ The theory seems to be that landowners' attempts to protect their property are "reasonably to be expected," and any injuries they receive are a direct result of the trespass. As a corollary, Dean Prosser has maintained that injuries received from an unprovoked attack are not within the scope of the risk because they could not reasonably be expected to follow from the trespass.⁵¹ However, recently a California appellate court in *Williams v. Goodwin*⁵² held that personal injuries received as a result of a sudden attack are within the scope of the risk. In that case, the plaintiff, while working in his garden, was charged by the defendant's bull. He tried to protect himself but was knocked down and trampled. The defendant argued that strict liability was inappropriate because the harm was not within the scope of the risk, since the injuries resulted from an unprovoked attack. The court held, however, that the plaintiff's injuries were a direct result of the trespass and could

43. See PROSSER, *supra* note 8, § 79, at 517.

44. *Hahn v. Garratt*, 69 Cal. 146, 10 P. 329 (1886); *Moran v. Freeman*, 48 Cal. App. 514, 192 P. 155 (3rd Dist. 1920).

45. *McKee v. Trisler*, 311 Ill. 536, 143 N.E. 69 (1924); *Wenndt v. Latore*, 200 N.W.2d 862 (Iowa 1972). In this connection, note CAL. CIVIL CODE § 3341 (West 1970).

46. *Lee v. Burk*, 15 Ill. App. 651 (1885).

47. *Crawford v. Williams*, 48 Iowa 247, 29 Am. R. 479 (1878); *Kopplin v. Quade*, 145 Wis. 454, 130 N.W. 511 (1911).

48. *Hollenbeck v. Johnson*, 79 N.Y. Sup. Ct. 499, 29 N.Y.S. 945 (1894).

49. See also *Leipske v. Guenther*, 7 Wis. 2d 86, 95 N.W.2d 774 (1959).

50. *E.g.*, *Robinson v. Kerr*, 144 Colo. 48, 355 P.2d 117 (1960); *Walker v. Nickerson*, 291 Mass. 522, 197 N.E. 451 (1935); *Nixon v. Harris*, 15 Ohio St. 2d 105, 238 N.E.2d 785 (1968); *Troth v. Wills*, 8 Pa. Super. Ct. 1, 42 W.N.C. 504 (1898).

51. PROSSER, *supra* note 8, § 79, at 518, *relying on* *Harvey v. Buchanan*, 121 Ga. 384, 49 S.E. 281 (1904); *Klenburg v. Russell*, 125 Ind. 531, 25 N.E. 596 (1890); *Bradley v. Wallaces Ltd.* [1913] 3 K.B. 629.

52. 41 Cal. App. 3d 496, 116 Cal. Rptr. 200 (3d Dist. 1974).

reasonably have been anticipated under all the circumstances. The court said, "The manifest danger that inheres in exposure of the person to the immediate presence of an uncontrolled bull is strongly suggested by human experience and common sense."⁵³ The court also referred to the Restatement (Second) of Torts which provides that the natural propensities of the animal will bear on the determination of whether the harm done was within the scope of the risk.⁵⁴

Williams seems to have reached the proper result. There is a general presumption that domestic animals of any variety are not dangerous unless prior acts have shown them to be so.⁵⁵ But this presumption is limited to cases of strict liability based on known dangerous propensities; it is in part the result of a policy decision that, in some sense, domestic animals have earned treatment different from wild ones. The presumption is particularly inappropriate in cases such as *Williams* where recovery is sought for personal injuries. When the test is the entirely different one of whether a personal injury was reasonably to be expected as a result of the animal's trespass, it is logical to look at the natural propensities of the animal. If an animal has a natural propensity toward unprovoked attacks on humans, such attacks should certainly be considered within the scope of the risk. Therefore, it is appropriate to distinguish among types of animals; rams and boars, as well as bulls, could fall within the *Williams* rule.

The preceding discussion has traced the law of animal trespass in California from an early rejection of the common law to its later legislative and judicial acceptance. As a consequence of this development, the strict liability that characterizes trespass actions is applicable to the trespasses of domestic animals that cause property damage or personal injury. This strict liability is limited, however, by a "scope of the risk" test which, as noted in *Williams*, should include a consideration of the natural propensities of the animals involved.

II. STRICT LIABILITY FOR DANGEROUS ANIMALS

Apart from any liability based on trespass principles, an owner may be strictly liable for damage done by animals known to be dangerous. The general rule, as stated by a California appellate court, is that if a person in control of an animal knows of the animal's dangerous propensities, that person is liable for injuries caused by the animal as a result of

53. *Id.* at 506, 116 Cal. Rptr. at 208.

54. RESTATEMENT (SECOND) OF TORTS § 504, Comment g (1976). The Comment also states that "any trespassing bull may be expected to attack and gore any other animal, or any person who gets in his way." *Accord*, *Elkin v. Johnson*, 260 Iowa 46, 148 N.W.2d 442 (1967).

55. *Mann v. Stanley*, 141 Cal. App. 2d 438, 296 P.2d 921 (3d Dist. 1956); *Durham v. Barnes*, 124 So. 2d 792 (La. Ct. of App. 1960).

that propensity.⁵⁶ Proof of negligence is not required for liability in such circumstances.

The basis for strict liability in these circumstances is the social judgment that those who, even while acting with the utmost care, expose the community to the risk of a very dangerous thing must bear responsibility for any resulting damage.⁵⁷ The probability of harm is considered sufficiently great that any loss must be shifted to the one who created the danger.

"Dangerous," as used here, means "likely to inflict serious damage."⁵⁸ This can be expressed as viciousness, that is, a tendency to attack people or animals,⁵⁹ or it can simply be a propensity to run around recklessly,⁶⁰ rear up suddenly,⁶¹ or playfully jump up on people.⁶²

Wild animals⁶³ are always considered dangerous. The courts presume that all wild animals possess the dangerous characteristics generally recognized as normal to their species.⁶⁴ On the other hand, domestic animals are usually considered harmless, so that it must be shown that a particular animal was known to have a dangerous propensity.⁶⁵ Thus, in *Mann v. Stanley*,⁶⁶ the court held that without proof of such propensities in the particular animal, even a bull would not be presumed to be dangerous.

56. *Talizin v. Oak Creek Riding Club*, 176 Cal. App. 2d 429, 437, 1 Cal. Rptr. 514, 518 (1st Dist. 1959). PROSSER, *supra* note 8, § 76, at 499 states that only two or three jurisdictions require negligence in these circumstances.

57. HARPER & JAMES, *supra* note 8, § 14.11, at 834; PROSSER, *supra* note 8, § 79, at 499.

58. See *Palmquist v. Mercer*, 43 Cal. 2d 92, 272 P.2d 26 (1954); *Talizin v. Oak Creek Riding Club*, 176 Cal. App. 2d 429, 1 Cal. Rptr. 514 (1st Dist. 1959).

59. *Gooding v. Chutes Co.*, 155 Cal. 620, 102 P. 819 (1909) (camel "addicted to biting people"); *Clowdis v. Fresno Flume & Irrigation Co.*, 118 Cal. 315, 50 P. 373 (1897) (bull with tendency to charge driven along road, attacked bystander); *Heath v. Fruzia*, 50 Cal. App. 2d 598, 123 P.2d 560 (4th Dist. 1942) (history of attacks by horse established dangerousness).

60. *Hicks v. Sullivan*, 122 Cal. App. 635, 10 P.2d 516 (3d Dist. 1932) (muzzled dog attacked by leaping and lunging).

61. *Bocker v. Miller*, 213 Cal. App. 2d 345, 28 Cal. Rptr. 818 (2d Dist. 1963) (horse had tendency to rear up).

62. *Hillman v. Garcia-Ruby*, 44 Cal. 2d 625, 283 P.2d 1033 (1955) (dog with a habit of jumping on people considered dangerous).

63. RESTATEMENT (SECOND) OF TORTS § 506(1) (1976) defines a wild animal as "an animal that is not by custom devoted to the service of mankind at the time and in the place in which it is kept." Compare the definition of domestic animal in note 5 *supra*.

64. See *Baugh v. Beatty*, 91 Cal. App. 2d 786, 205 P.2d 671 (2d Dist. 1949); *Opelt v. Barnes Co.*, 41 Cal. App. 776, 183 P.2d 41 (1st Dist. 1919); RESTATEMENT (SECOND) OF TORTS § 507 (1976).

65. This statement may seem to conflict with one of the reasons given for supporting strict liability for trespass—that domestic animals are considered to be likely to wander and do damage. But the trespass tort exists primarily for the protection of interests in land and crops while "dangerous" here almost always means dangerous to humans.

66. 141 Cal. App. 2d 438, 296 P.2d 921 (3d Dist. 1956).

The focus of the cause of action of strict liability for dangerous domestic animals is scienter.⁶⁷ The plaintiff must show that the defendant knew or had reason to know of the animal's dangerous propensities.⁶⁸ This knowledge can be shown by the fact that the animal was known to have attacked a person or animal on some previous occasion.⁶⁹ In some instances, however, such a history may not be necessary. If the animal was known to have a tendency to attack but had not actually done so, a person of ordinary prudence would have reason to know of the animal's dangerousness.⁷⁰ Therefore, it is inaccurate to state, as a general principle, that "every dog is entitled to one bite" because an animal's obvious propensity to bite will put its owner on notice of its dangerous nature as well as a "first bite."

Liability may also be imposed in cases where owners "should have known" of the dangerous characteristics of their animals.⁷¹ Owners must exercise reasonable care to discover such characteristics, but it is important to note that liability is not being measured by a negligence standard; only scienter is. For example, in *Talizin v. Oak Creek Riding Club*,⁷² a horse at a horse show jumped out of the ring and struck the plaintiff with its hooves. The evidence showed that the horse had also jumped the ring at another show one month previously and that a horse who has jumped once will do so again unless it receives special training. Based on this evidence, the court found that, with the exercise of reasonable care, the defendants could have known of such a dangerous propensity and therefore held them strictly liable for the plaintiff's injuries.

The scope of the defendant's strict liability under this theory is also limited by a "scope of the risk" test. In order to recover, the plaintiff

67. The principle of scienter is of ancient origin. In *Exodus* 21:28-29, the Law of Moses says, "if an ox gore a man to death . . . then the ox shall surely be stoned . . . but if the ox were wont to gore in time past and it hath been testified to his owner, and he hath not kept him in . . . his owner shall also be put to death." Perhaps a modern equivalent is stated in CAL. PENAL CODE § 399 (West 1970) which provides that the owner of a mischievous animal who knows of its dangerous propensities is guilty of a felony if the animal kills any non-negligent human being.

68. *Chandler v. Vaccaro*, 167 Cal. App. 2d 786, 334 P.2d 998 (2d Dist. 1959); *Fineran v. Wood*, 249 Md. 643, 241 A.2d 579 (1968).

69. *Field v. Viraldo*, 141 Ark. 32, 216 S.W. 8 (1919) (bull previously attacked mare); *Fraser v. Chapman*, 256 Mass. 1, 152 N.E. 44 (1926) (ram previously butted several persons); *Morgan v. Treadwell*, 23 Tenn. App. 100, 126 S.W.2d 888 (1938) (boar had been running at large attacking people for weeks).

70. *Andrews v. Smith*, 324 Pa. 455, 188 A. 146 (1936) ("a dog may show ferocious propensities without biting anyone and if he does so, it is his master's duty to see to it that he is not afforded an opportunity to take a 'first bite'"); *Mungo v. Bennett*, 238 S.C. 79, 119 S.E.2d 522 (1961) (horse had not kicked a person before, but other factors indicated a tendency to do so). See RESTATEMENT (SECOND) OF TORTS § 509, Comment g (1976).

71. CAL. CIV. CODE § 19 (West 1954): "Every person who has actual notice of circumstances sufficient to put a prudent person on inquiry as to a particular fact has constructive notice of the fact . . ."

72. 176 Cal. App. 2d 429, 1 Cal. Rptr. 514 (1st Dist. 1959).

must show that the harm suffered is the type to be expected from the animal's known propensities.⁷³ The harm must result from those propensities which put the owner on notice and gave rise to the possible strict liability. The fact that a dog is known to fight with other dogs is not necessarily notice that it is likely to cause harm to humans;⁷⁴ a horse known to bite is not necessarily one known to be likely to kick.⁷⁵

The distinction between the two strict liability theories, trespass and dangerous propensities, exists primarily because they serve different purposes. The rule of strict liability for trespass developed in an agricultural economy as a result of the need to protect growing crops from hungry, wandering livestock. Liability results primarily from the animal's presence on the land of the plaintiff, with liability for injury existing only as an "aggravation" of the trespass. On the other hand, strict liability for dangerous animals exists primarily as a protection for people. Its rationale is that once an animal is known to be dangerous, the risk it poses outweighs its social utility and justifies the imposition of strict liability on its owner. Once it is seen that the two forms of strict liability focus on different conduct and exist to protect different interests, their concurrent existence is more easily understood.

III. NEGLIGENCE

Instead of always being held strictly liable, an owner or possessor of an animal sometimes will be held liable only if the plaintiff can establish an act of negligence that was proximately responsible for the harm done.⁷⁶ The rules applied in these cases are simply general negligence principles.

The principal situation where negligence is applied involves collisions between motor vehicles and domestic animals on the highway. The general common law rule was that owners of domestic animals had no duty to keep their animals off the highway unless, under the circumstances, they reasonably should have anticipated that harm would result.⁷⁷ With the rapid increase of automobile traffic and the resulting

73. HARPER & JAMES, *supra* note 8, § 14.12, at 840; PROSSER, *supra* note 8, § 79, at 518-19.

74. *Hensley v. McBride*, 112 Cal. App. 50, 296 P. 316 (1st Dist. 1931); *Fowler v. Helck*, 278 Ky. 361, 128 S.W.2d 564 (1939), *But see Perkins v. Drury*, 57 N.M. 269, 258 P.2d 379 (1953) ("the fact finder may infer the vicious nature of a dog from one act, especially if it be an attack on a person").

75. *Greely v. Jameson*, 265 Mass. 465, 164 N.E. 385 (1928) (analogy made in jury instructions).

76. "[O]ne who possesses or harbors a domestic animal . . . is subject to liability . . . if . . . he is negligent in failing to prevent the harm." RESTATEMENT (SECOND) OF TORTS § 518 (1976).

77. *E.g., Pelham v. Spears*, 222 Ala. 365, 132 So. 886 (1931); *Marsh v. Koons*, 78 Ohio St. 68, 84 N.E. 599 (1908). This is apparently still the English rule. *See Searle v.*

crowding of the highways, however, the courts began stressing the exception rather than the rule. Modern traffic conditions now make injuries a result reasonably to be anticipated, and owners of livestock and other farm animals have a duty to keep them off the highways.⁷⁸

Some courts have gone so far as to find that the mere presence of an unattended animal on the highway is sufficient to allow the doctrine of *res ipsa loquitur* to apply.⁷⁹ *Res ipsa loquitur* generally applies when a particular instrumentality is involved in an accident and the accident is one that does not occur in the absence of someone's negligence. The courts then infer the presence of negligence on the part of the one in control of the instrumentality.⁸⁰ The courts that apply *res ipsa loquitur* in collisions between an auto and a domestic animal therefore must have concluded that such animals could not get out to wander on the highway unless their keeper was negligent. These courts hold that the presence of animals on a highway is sufficient evidence to allow the jury to infer negligence and establish the plaintiff's prima facie case.⁸¹

The California Supreme Court initially accepted this reasoning and held that *res ipsa* would apply to auto-animal highway collisions.⁸² The legislature, however, responded with a statute which provided that in such collisions, "there is no presumption or inference of negligence,"⁸³ thus eliminating the application of the doctrine in this type of case.⁸⁴ A California plaintiff must now be able to point to some particular negligent act of the defendant which proximately resulted in his or her damage or injury, because proof that the animal was on the highway unattended is not enough without the support of *res ipsa loquitur*.⁸⁵

Wallbank, [1947] 1 All E.R. 12 and discussion in Comment, *Bativa v. West (Liability for Animals)*, 4 ADELAIDE L. REV. 219 (1971).

78. Barber v. Kreig, 172 Ohio St. 433, 178 N.E.2d 170 (1961); Rice v. Turner, 191 Va. 601, 62 S.E.2d 24 (1950). For a similar development in Australian law see Comment, *Bativa v. West (Liability for Animals)*, 4 ADELAIDE L. REV. 219 (1971).

79. E.g., Law v. Hulsey, 109 Ga. App. 379, 136 S.E.2d 161 (1964); Ritchie v. Schaefer, 254 Iowa 1107, 120 N.W.2d 444 (1963); Keefer v. Hartzler, 351 S.W.2d 479 (Mo. Ct. App. 1961).

80. See HARPER & JAMES, *supra* note 8, §§ 19.5-19.7, at 1075-92; PROSSER, *supra* note 8, § 39, at 214.

81. See cases cited note 79 *supra*.

82. Kenney v. Antonetti, 211 Cal. 336, 295 P. 341 (1931).

83. 1935 Cal. Stats. 951, now found at CAL. FOOD & AGRIC. CODE § 16904 (West 1968). Originally, the legislature provided that there would be no *presumption* of negligence in an auto-animal collision. 1933 Cal. Stats. 60,129. In response, the supreme court held that *res ipsa* raised merely an inference, not a presumption, and could still be applied to auto-animal collisions. Anderson v. I.M. Jameson Corp., 7 Cal. 2d 60, 59 P.2d 962 (1936). The legislature finally clarified its formulation in 1935, which the court recognized in *Anderson*. It is interesting to note that the CAL. EVID. CODE § 646 (West Cum. Supp. 1977) now provides that *res ipsa loquitur* is a "presumption affecting the burden of producing evidence."

84. Anderson v. I.M. Jameson Corp., 7 Cal. 2d 60, 59 P.2d 962 (1936).

85. Pepper v. Bishop, 194 Cal. App. 2d 731, 15 Cal. Rptr. 346 (1st Dist. 1961); Sum-

Although some states still apply *res ipsa loquitur*,⁸⁶ the California approach is preferable. As at least one court has stated, the "self-propulsion" of domestic animals renders *res ipsa* inapplicable.⁸⁷ Most courts have simply found that a sufficient number of animals manage to wander onto highways without their owner's negligence—either in an unexplained way⁸⁸ or as a result of the acts of third persons⁸⁹—to defeat the blanket inference that presence on the highway is due to negligence.⁹⁰

Thus, proof of a particular negligent act continues to be required. Such negligent acts have included the failure to secure gates,⁹¹ the failure to maintain effective fences,⁹² the failure to diligently pursue an animal known to have escaped,⁹³ the driving of cattle along a road at night,⁹⁴ and knowingly allowing an animal to run at large.⁹⁵

Since all persons must use ordinary care to avoid injury to others,⁹⁶ animal owners have been held liable for a wide range of negligent acts other than those occurring on highways. For example, auctioneers have been held liable for failing to provide a safe enclosure for spectators⁹⁷ or for failing to provide for sufficient control of the animals.⁹⁸ Animal possessors have been held liable when their animals escaped

mers v. Parker, 119 Cal. App. 2d 214, 259 P.2d 59 (2d Dist. 1959); Jackson v. Hardy, 70 Cal. App. 2d 6, 160 P.2d 161 (2d Dist. 1945).

86. Nuclear Corp. v. Lang, 337 F. Supp. 914 (D. Neb. 1972) (applying Neb. law), *aff'd*, 480 F.2d 990 (8th Cir. 1973); Shepard v. Smith, 74 Idaho 459, 263 P.2d 985 (1953); Bender v. Welsh, 344 Pa. 292, 25 A.2d 182 (1942).

87. Pepper v. Bishop, 194 Cal. App. 2d 731, 734, 15 Cal. Rptr. 346, 349 (1st Dist. 1961).

88. Moon v. Johnston, 47 Tenn. App. 208, 337 S.W.2d 464 (1959) (shortly before accident bull had been seen grazing leisurely and gate was securely fastened); Primeaux v. Kinney, 256 So. 2d 140 (La. Ct. of App. 1971) (defendant maintained and regularly checked multiple fences); Nixon v. Harris, 15 Ohio St. 2d 105, 238 N.E.2d 785 (1968) (adequate, closed fences).

89. Audubon Ins. Co. v. Falgout, 234 So. 2d 842 (La. Ct. of App. 1970) (horse evidently released by third person); Gordon v. Sutherland, 131 So. 2d 520 (Fla. Dist. Ct. App. 1961) (cow, same); Thomas v. Wright, 75 So. 2d 559 (La. Ct. of App. 1954) (tethered horse broke rope when attacked by dog).

90. *E.g.*, Barnes v. Frank, 28 Colo. App. 389, 472 P.2d 745 (1970); Carillo v. Hoyle, 85 N.M. 751, 517 P.2d 73 (1973); Rice v. Turner, 191 Va. 601, 62 S.E.2d 24 (1950).

91. Hanna v. Wright, 504 S.W.2d 779 (Tex. Ct. App. 1974); Matteson v. Polanchek, 164 N.W.2d 54 (N.D. 1969).

92. Soran v. Schoessler, 87 Idaho 425, 394 P.2d 160 (1964); Templeton v. Crull, 16 Wis. 2d 416, 114 N.W.2d 843 (1962).

93. Corey v. Smith, 233 Ind. 452, 120 N.E.2d 410 (1954); Shepard v. Smith, 74 Idaho 459, 263 P.2d 985 (1953).

94. Olden v. Babicora Dev. Co., 107 Cal. App. 399, 290 P. 1062 (4th Dist. 1930).

95. Roberts v. Griffith Co., 100 Cal. App. 456, 280 P. 199 (1st Dist. 1929); Caperon v. Tuttle, 100 Utah 476, 116 P.2d 402 (1941).

96. *See* CAL. CIV. CODE § 1708 (West 1973): "Every person is bound . . . to abstain from injuring the person or property of another," one of the many maxims enacted in the 1872 codification of California law.

97. Porter v. Thompson, 74 Cal. App. 2d 474, 169 P.2d 40 (3d Dist. 1946).

from a stockyard⁹⁹ or rodeo¹⁰⁰ to cause injury to those nearby. In addition, owners have been found negligent for failing to warn another of an animal's particular dangerous traits.¹⁰¹

As in other cases of liability based on negligence, negligence in keeping domestic animals is not actionable unless it is the proximate cause of the injury.¹⁰² Proximate cause is seldom discussed in the appellate opinions concerning animal-related negligence since in most such cases the harm results directly from the negligence. For example, if a person leaves a gate open or neglects to repair a broken fence and as a result cattle wander onto the adjacent highway, any collision that occurs is considered a foreseeable, natural, and probable result.¹⁰³

Another reason proximate cause is seldom discussed is that unpredictability under stress is considered to be a natural trait of most domestic animals, who are often described as having a "mind of their own."¹⁰⁴ According to the courts, if the reasonably prudent person considers this unpredictability, many events otherwise unusual will be foreseeable. For example, in *Sutton v. Duke*¹⁰⁵ the defendant left a gate open allowing a pony to escape. The pony ran over to the defendant's mule pen and so agitated the mules that they broke out of their pen, wandered onto the highway three-quarters of a mile away, and caused an accident which injured the plaintiff. The North Carolina Court of Appeals held that the accident was proximately caused by the defendant's negligence.¹⁰⁶ The court rested its finding on the principle that since some injury to some person was foreseeable, any similar result would also be foreseeable.

Similarly, in *Darnold v. Voges*¹⁰⁷ the defendant authorized a photographer to take a photograph in a barn the defendant leased to the plaintiff's employer. When the flash bulb went off, it startled a cow which

98. *Slaughter v. Sweet & Piper Horse & Mule Co.*, 259 S.W. 131 (Mo. Ct. App. 1924).

99. *Saldi v. Brighton Stock Yard Co.*, 344 Mass. 89, 181 N.E.2d 687 (1962); *Campbell v. White*, 357 S.W.2d 849 (Ky. 1962).

100. *Zuniga v. Storey*, 239 S.W.2d 125 (Tex. Ct. App. 1951).

101. *Dolieslager v. Excelsior Farms*, 225 Cal. App. 2d 565, 37 Cal. Rptr. 567 (4th Dist. 1964) (well-behaved bull's tendency to wheel around on entering his stall). In all these situations, one with prior knowledge of a dangerous trait in the animal may be strictly liable, *see* discussion in text accompanying note 56 *supra*.

102. *See, e.g., Alfred v. Lee*, 71 So. 2d 601 (La. Ct. of App. 1954); *Daily v. Lawson*, 119 Vt. 82, 119 A.2d 684 (1956).

103. *See* cases cited in notes 91 & 92 *supra*.

104. *See Darnold v. Voges*, 143 Cal. App. 2d 230, 246, 300 P.2d 255, 265 (2d Dist. 1956) and cases cited therein.

105. 7 N.C. App. 100, 171 S.E.2d 343 (1970).

106. On further appeal, the North Carolina Supreme Court doubted that the accident could be considered proximately caused, unless the plaintiff could prove some more direct relation. Nevertheless, the court refused to foreclose the plaintiff's attempts to do so, and disallowed the defendant's demurrer. 277 N.C. 94, 176 S.E.2d 161 (1970).

107. 143 Cal. App. 2d 230, 300 P.2d 255 (2d Dist. 1956).

kicked and then fell on the plaintiff. The court, by analogy to other cases where animals had been suddenly frightened, held that otherwise unpredictable behavior will be considered proximately caused when a reasonable person would have expected a certain occurrence to frighten an animal.

In contrast to the limited nature of strict liability theories, the more fluid concepts of negligence are applicable in a wide range of circumstances. A plaintiff must establish the usual elements of negligence, primarily the breach of a duty of due care, and proximate cause. In addition, however, animal-specific attributes, such as "self-propulsion" and unpredictability, should be considered.

IV. DEFENSES

In actions brought to recover damages for injuries by animals, the traditional defenses have been contributory negligence and assumption of the risk. In recent years, especially in California, courts have begun to reevaluate these traditional defenses, a process which has resulted in substantial modification of their operation.

Whether the defendant may rely on the defense of contributory negligence depends primarily on the theory upon which the plaintiff's cause of action is based.¹⁰⁸ The rule generally stated is that in cases of strict liability contributory negligence is not a defense.¹⁰⁹ The reason for this rule is that, in cases where a person's conduct subjects the community to a risk of harm, the law requires that person to bear the total responsibility when harm occurs.¹¹⁰ Thus, when individuals fail to exercise reasonable care to discover the presence of an animal or to take precautions that would protect themselves, their recovery under strict liability theories is not barred.¹¹¹ If, however, the cause of action is based on negligence, contributory negligence has been a bar.¹¹² In cases involving highway accidents with animals, for example, courts have frequently discussed the motorist's speed and attentiveness as evidence of potential contributory negligence.¹¹³

108. See generally Note, *Torts—The Trend Away From Absolute Liability in Animal Injury Cases*, 12 SYRACUSE L. REV. 541 (1961).

109. *Anderson v. Anderson*, 259 Minn. 412, 107 N.W.2d 647 (1961); *Muller v. McKesson*, 73 N.Y. 195, 29 Am. R. 123 (1878); *Marshall v. Ranne*, 511 S.W.2d 255 (Tex. 1974); RESTATEMENT (SECOND) OF TORTS § 515(1) (1976).

110. See PROSSER, *supra* note 8, § 79, at 522; RESTATEMENT (SECOND) OF TORTS § 515, Comment b (1976).

111. *Burke v. Fischer*, 298 Ky. 157, 182 S.W.2d 638 (1944); *Sandy v. Bushey*, 124 Me. 320, 128 A. 513 (1925); *Muller v. McKesson*, 73 N.Y. 195, 29 Am. R. 123 (1878).

112. *Sparks v. Doe*, 379 S.W.2d 252 (Ky. 1964); *Peart v. Slocum*, 142 So. 2d 421 (La. Ct. of App. 1962); *Scherffius v. Orr*, 442 S.W.2d 120 (Mo. Ct. App. 1969).

113. *Anderson v. I.M. Jameson Corp.*, 7 Cal. 2d 60, 59 P.2d 962 (1936) (speed and

The defense of contributory negligence was abolished in California and replaced with a system of comparative negligence in 1975 in *Li v. Yellow Cab Co.*¹¹⁴ Under comparative negligence, lack of due care no longer bars a plaintiff's negligence claim; instead, the damages awarded are reduced in proportion to the degree of negligence attributable to the plaintiff.¹¹⁵

Throughout the history of strict liability for animal trespass and for known dangerous animals, courts have recognized a defense which consists of voluntarily encountering a known danger.¹¹⁶ For example, in *Hughey v. Fergus County*,¹¹⁷ a man attempted, for no urgent reason, to lead several horses through a corral which he knew to contain a bull with a history of attacking people. He turned his back on the bull, which then attacked and injured him. His claim was denied because the court found that he had "voluntarily and unnecessarily" placed himself in a position of danger.

This defense is known as assumption of the risk,¹¹⁸ though most authorities have recognized that it overlaps with contributory negligence in many situations because the plaintiff's conduct in voluntarily encountering a known risk is usually unreasonable as well.¹¹⁹ There is, however, a theoretical distinction between the two defenses. Assumption of the risk involves a subjective test (whether the plaintiff knows and appreciates the risk) and rests upon a plaintiff's voluntary actions in encountering such a known risk.¹²⁰ Contributory negligence, on the other hand, involves the objective standard of the reasonable person and rests upon the plaintiff's failure to exercise the care for his or her own safety

lookout); *Pepper v. Bishop*, 194 Cal. App. 2d 731, 15 Cal. Rptr. 346 (1st Dist. 1961) (same). See also cases cited in note 112 *supra*.

114. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

115. *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

116. *Smythe v. Schacht*, 93 Cal. App. 2d 315, 209 P.2d 114 (2d Dist. 1949); *Heath v. Fruzia*, 50 Cal. App. 2d 598, 123 P.2d 560 (4th Dist. 1942); *Anderson v. Anderson*, 259 Minn. 412, 107 N.W.2d 647 (1961); *Marshall v. Ranne*, 511 S.W.2d 255 (Tex. 1974).

117. 98 Mont. 98, 37 P.2d 1035 (1934).

118. We are here concerned with implied assumption of the risk only. Express assumption of the risk, where an individual agrees orally or in writing to hold another blameless in the event that the assumed risk causes injury, is an absolute defense. See PROSSER, *supra* note 8, § 68, at 442; V. Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747 (1976).

119. Cardozo described this area of the law as "a border land where the concept of contributory negligence merges almost imperceptibly into that of acceptance of the risk and where very often the difference is chiefly one of terminology". *McFarlane v. Niagara Falls*, 247 N.Y. 340, 349, 160 N.E. 391 (1928). See also *Grey v. Fibreboard Paper Products Co.*, 65 Cal. 2d 240, 245, 418 P.2d 153, 156, 53 Cal. Rptr. 545, 548 (1966); RESTATEMENT (SECOND) OF TORTS § 496A (1976).

120. *Grey v. Fibreboard Paper Prod. Co.*, 65 Cal. 2d 240, 418 P.2d 153, 53 Cal. Rptr. 545 (1966); *Vierra v. Fifth Ave. Rental Serv.*, 60 Cal. 2d 266, 383 P.2d 777, 32 Cal. Rptr. 193 (1963); *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963).

that a reasonable person would.¹²¹ Yet the same conduct—encountering a risk when such action is unreasonable—may implicate both defenses, and thus the overlap and the confusion.

In *Li* the California Supreme Court observed that in situations where a plaintiff unreasonably undertakes to encounter a known risk, the plaintiff's conduct is in reality a form of contributory negligence. The court therefore held that, in negligence cases where the form of assumption of the risk is "no more than a variant of contributory negligence," the adoption of a system of comparative negligence should entail the merger of the defense into the general scheme of assessing liability in proportion to fault.¹²²

Since it appears that the assumption of the risk defense to strict liability actions involving animals is equivalent to the "unreasonable" type discussed in *Li*,¹²³ a question naturally arises as to the continued vitality of the defense. Will the plaintiff's unreasonable assumption of the risk remain an absolute defense or will damages now be apportioned?

Essentially, two solutions have been proposed.¹²⁴ The first would require continued adherence to the principle that assumption of the risk is a complete defense to strict liability actions. The rationale for this view is that one of the reasons for strict liability is to relieve the plaintiff of

121. *Grey v. Fibreboard Paper Prod. Co.*, 65 Cal. 2d 240, 418 P.2d 153, 53 Cal. Rptr. 545 (1966); RESTATEMENT (SECOND) OF TORTS § 463 (1976).

122. 13 Cal. 3d 804, 824-25, 532 P.2d 1226, 1240-41, 119 Cal. Rptr. 858, 872-73 (1975).

123. *Opelt v. Barnes Co.*, 41 Cal. App. 776, 779, 183 F. 241, 242, (1st Dist. 1919); *Hughey v. Fergus County*, 98 Mont. 98, 37 P.2d 1035, 1038 (1934); *Heidemann v. Wheaton*, 72 S.D. 275, 34 N.W.2d 492, 493 (1948).

It should be noted that, at least theoretically, a plaintiff's assumption of the risk can also be a *reasonable* encountering of a known risk. The two principle California cases adopting comparative principles, *Li* and *Daly v. General Motors Corp.*, 20 Cal. 3d 725, — P.2d —, — Cal. Rptr. — (1978), have not considered this possibility in their discussions of assumption of the risk. Instead, these cases seem to assume that plaintiff fault (or unreasonable conduct) is required.

As a practical matter, the animal strict liability cases have invariably found the plaintiff's assumption of the risk to be unreasonable, at times denominating the defense "contributory negligence." See, e.g., *Whalen v. Streshey*, 205 Cal. 78, 81, 269 P. 928, 929 (1928); *Hughey v. Fergus County*, 98 Mont. 98, 37 P.2d 1035, 1038 (1934). Therefore, for purposes of clarity and simplicity, the rest of this discussion will refer only to unreasonable assumption of the risk.

124. These arguments have been made primarily with regard to the application of *Li* to strict products liability. See J. Fleming, *Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976); H. Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337 (1977); M. Robinson, *Square Pegs (Products Liability) in Round Holes (Comparative Negligence)*, 52 CAL. ST. B.J. 16 (1977); V. Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747 (1976). However, the two forms of strict liability are analogous because in products liability it has also been held that ordinary contributory negligence does not bar recovery but that the voluntary and unreasonable assumption of the risk will do so. See *Luque v. McLean*, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50 (1972).

the burden of showing fault on the part of the defendant.¹²⁵ If a comparison of the plaintiff's unreasonable assumption of the risk with the defendant's conduct were allowed, the plaintiff would again have to prove the extent of the defendant's fault; otherwise, there would be nothing for the jury to compare. To this extent, the policy behind strict liability would be frustrated.

On the other hand, if unreasonable assumption of the risk were a defense in a strict liability action but not in a negligence action, there would be an anomalous result. The same conduct would serve to bar a plaintiff from a strict liability action and only reduce his or her damages in a negligence action. Such a result would contradict the social policy behind strict liability—a judgment that the law should facilitate an injured plaintiff's recovery in certain circumstances.¹²⁶

A second solution is available and should be adopted. The comparative principles of *Li* should be applied to apportion damages in all cases of strict liability where the plaintiff has unreasonably assumed the risk. The supreme courts of Wisconsin,¹²⁷ Alaska,¹²⁸ and, very recently, California¹²⁹ have adopted this approach in cases of strict products liability. The California case, *Daly v. General Motors Corp.*,¹³⁰ is based on reasoning that should apply equally to animal-related strict liability. The *Daly* court recognized the semantic and conceptual difficulties of comparing strict liability with negligence but stated that "fixed semantic consistency is less important than the attainment of a just and equitable result."¹³¹ The court felt that the principles of *Li* required that when a plaintiff's own fault contributed to his or her injury, the entire burden of liability should not be placed on the defendant but should be borne by the plaintiff in proportion to his or her fault.¹³² The court noted that fault was not really an issue in regard to a strict liability defendant and that the term "equitable apportionment of loss" more accurately describes the process than "comparative fault."¹³³

Daly's facts limit its application to strict products liability. There is nothing in the court's reasoning, however, that prevents an "equitable apportionment of loss" for other types of strict liability, including those relating to domestic animals. In such cases, plaintiffs who are partially

125. See Levine, *supra* note 124; Robinson, *supra* note 124.

126. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

127. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

128. *Butaud v. Suburban Marine & Sporting Goods Inc.*, 555 P.2d 42 (Alas. 1976).

129. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, — P.2d —, — Cal. Rptr. — (1978).

130. *Id.*

131. *Id.* at 736, — P.2d —, — Cal. Rptr. — (1978).

132. *Id.* at 737, — P.2d —, — Cal. Rptr. — (1978).

133. *Id.* at 736, — P.2d —, — Cal. Rptr. — (1978).

at fault and would formerly have been barred by the assumption of the risk doctrine should now be allowed merely reduced recovery.

Moreover, future courts could also apply the principles of *Daly* to contributory negligence. California has a strong policy against allowing contributory negligence which amounts to mere inadvertence to bar a plaintiff's recovery in strict liability actions.¹³⁴ However, under comparative fault, there would be no bar to recovery, and it would therefore be possible to penalize plaintiffs' failure to protect themselves without denying them all recovery. This view may also put judicial pressure on the side of accident prevention without sacrificing the interest in accident compensation.¹³⁵

In summary, the principles of *Li* and *Daly* would seem to govern *all* defenses to the torts discussed above. Therefore, liability in all cases involving animal-created harm should now be measured through a system of "comparative fault."

CONCLUSION

When livestock or other farm animals injure a person or damage property, three separate theories of liability may be involved in a suit for recovery. The first theory is strict liability for animal trespass, which generally requires that plaintiffs be injured on their own property by an intruding animal. The second theory is strict liability for known dangerous animals, which is applicable if the person in control of the animal knew of the dangerous propensities that led to the damage. The third theory is negligence. An owner or possessor of domestic animals may be liable for negligence in accord with general negligence principles. The defenses available to the animal owner may vary with the theory of liability used by the plaintiff. However, it is submitted that the comparative principles of *Li v. Yellow Cab Co.* and *Daly v. General Motors Corp.* should operate to reduce plaintiffs' damages in proportion to their fault under all three theories.

The need for three different theories of liability may not be readily apparent. Although it may be possible to adopt one of two simpler alternatives, neither result would be satisfactory. One alternative is to adopt strict liability for all harm done by domestic animals, as is done in the dog-bite statutes.¹³⁶ Yet it is difficult to see why members of the public should be insured in all circumstances against damage by ani-

134. See, e.g., *Luque v. McLean*, 8 Cal. 3d 136, 145, 501 P.2d 1153, 1169, 104 Cal. Rptr. 443, 449 (1972).

135. Fleming, *supra* note 124, at 270.

136. Such statutes make an owner strictly liable for any bites by his or her dog. See, e.g., ARIZ. REV. STATS. § 24-521 (1956); CAL. CIV. CODE § 3342 (West 1970); MICH. COMP. LAWS § 12.544 (1970).

mals, when they are not insured against damages arising in many other ways. It seems unfair, in the absence of special circumstances such as trespass or known dangerousness, to burden only the owners of domestic animals with strict liability.

A second alternative is to abandon strict liability and rely totally on negligence. Two factors in the law of torts militate against this approach. First, there is the growing trend of emphasis on insuring the compensation of injured plaintiffs, well illustrated by the rise of strict products liability and the demise of contributory negligence. Reliance on the negligence theory would make compensation less probable since it would require proof of a specific negligent act, and such evidence is not always available. Second, there is the long history of the two strict liability actions here involved. They are both products of a theory of law that identified a person and his or her possessions as one, a theory that long predates the development of negligence.¹³⁷ While the theory is no longer relevant, the rule is, because it has been found applicable to modern conditions as well.¹³⁸

The modern trend in the law of torts is in favor of strict liability, as modified by comparative principles, and a long history supports it in the form of these two actions. On the other hand, there is no reason to expand strict liability beyond its present scope, especially considering the value of domestic animals to society. We can thus assume that all three theories of liability will remain in the law of animals for some time.

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137. See O.W. HOLMES, *THE COMMON LAW* 19-24 (1881).

138. PROSSER, *supra* note 8, § 76, at 496.