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TABLE OF CONTENTS

		Page #
CHAPTER 1 - INTRODUCTION		1
A.	OVERVIEW	1
B.	STRUCTURE OF THE REPORT	2
C.	ACKNOWLEDGEMENTS	2
CHAPTER 2 - SCIENTER		3
A.	PLAINTIFF AND DEFENDANT	3
B.	DANGEROUS ANIMALS	4
1.	Animals *Ferae Naturae*	4
2.	Animals *Mansuetae Naturae*	4
3.	Classification of Animals	6
C.	KNOWLEDGE	7
D.	LACK OF CONTROL	7
E.	DEFENCES	8
1.	Default of the Plaintiff	8
2.	Contributory Negligence	9
3.	Voluntary Assumption of Risk	9
4.	*Ex Turpi Causa Non Oritur Actio*	10
5.	Plaintiff's Trespass	10
6.	Act of God and Act of a Third Party	11
F.	DAMAGES	12
G.	STATUTORY PROVISIONS CONCERNING DOGS	13
1.	Absolute Liability	14
2.	Strict Liability	14
3.	Reverse Onus	14

CHAPTER 3 - CATTLE TRESPASS 16

A. SUBJECT OF THE ACTION 16

B. ACTIVITIES COVERED BY CATTLE TRESPASS 16

1. Trespass to Land 16

2. Consuming Harvested Crops 17

C. PLAINTIFF 18

D. DEFENDANT 18

E. DEFENCES 19

1. Default of the Plaintiff 19

2. Breach of the Plaintiff's Duty to Fence 19

3. Voluntary Assumption of Risk 20

4. Act of God 20

5. Act of a Third Party 20

6. Inevitable Accident 21

7. Cattle Distrained 21

F. DAMAGES 22

1. General Principles 22

2. Damage to Land and Chattels 22

3. Physical Harm to People 23

4. Mitigation 24

G. *THE ANIMAL HUSBANDRY ACT* 24

CHAPTER 4 - CRITICISMS OF THE LAW 26

A. SCIENTER 26

1. Propensity 26

2. Classification of Animals 26

3. Essence of the Tortious Act 27

4. Apportionment Unavailable 27

	5.	Trespass Defence	27
	6.	Act of God and Third Party Defences	28
	7.	Remoteness of Damage	28
	8.	Statutory Liability for Dogs	28
B.	CATTLE TRESPASS		28
	1.	Subjects of the Tort	28
	2.	Limits of the Action	28
	3.	Joint and Several Liability	29
	4.	Defences	29
	5.	Damages	29
	6.	Statutory Effects on the Common Law	29
C.	CONCLUSION		30
CHAPTER 5 - OPTIONS FOR REFORM AND RECOMMENDATIONS			31
A.	OPTIONS FOR REFORM		31
	1.	Retain Status Quo	31
	2.	Abolish Scienter and Cattle Trespass	32
	3.	Reform Scienter and Cattle Trespass	33
B.	THE NEW TORT		34
	1.	The Basis of Liability	34
	2.	Contribution by the Plaintiff	35
	3.	Contribution by Third Parties	36
	4.	Summary of the Tort	36
C.	ADDITIONAL ISSUES OF IMPLEMENTATION		37
	1.	Liability of the Crown	37
	2.	Implementation by Legislation	37

D. EFFECT OF THE PROPOSED REFORMS 37

1. Scienter 37

(a) Propensity and anomalies in classification 37

(b) Essence of the tortious act 38

(c) Apportionment 38

(d) Trespass defence 38

(e) Act of God or third party 38

(f) Remoteness of damage 38

(g) Section 26 of *The Animal Husbandry Act* 38

2. Cattle Trespass 38

(a) Subjects of the tort 38

(b) Limits of the action 39

(c) Joint and several liability 39

(d) Duty to fence 39

(e) Defences 39

(f) Remoteness of damage 39

(g) Effects of statutory provisions 39

E. EXAMPLES 40

CHAPTER 6 - THE ANIMAL OWNERS' LIABILITY AND CONSEQUENTIAL AMENDMENT ACT (ANNOTATED) 43

CHAPTER 7 - LIST OF RECOMMENDATIONS 46

APPENDIX A - THE EFFECT OF *THE ANIMAL HUSBANDRY ACT* ON CATTLE TRESPASS 47

A. THE PROBLEMS 47

B. THE CONFLICTING INTERPRETATIONS 48

C. CONCLUSION 49

APPENDIX B - THE ANIMAL OWNERS' LIABILITY AND CONSEQUENTIAL AMENDMENT ACT 50

EXECUTIVE SUMMARY 53

CHAPTER 1

INTRODUCTION

A. OVERVIEW

The obligation of owners of animals to prevent them from harming others or the property of others has been part of legal codes since ancient times.[1] It was also present early in the development of the English common law and is particularly evident in two torts - scienter and cattle trespass - which have been traced to the 14th century.[2] While these torts were probably more significant in an age when interaction between humans and animals was an integral part of everyday life, both torts have endured to the present day in Manitoba.

The first of these torts, scienter, is intended to address a situation in which an animal which is known to be dangerous causes physical harm to an individual. Cattle trespass, on the other hand, is designed to compensate victims for damage caused to land, property or the person by domesticated livestock or poultry which escape from their owner's land.

Of course, a person who has been harmed by an animal is not restricted to recovering for his or her loss only in scienter or cattle trespass. Other causes of action may also be available.

The primary alternative is negligence, which is relevant any time an accidental (that is, non-intentional) injury or damage is caused.[3] As such, negligence is the most common source of liability in Manitoba and in the common law world. Since its modern formulation in *Donoghue (M'Alister)* v. *Stevenson*,[4] negligence requires everyone in society to take reasonable care to ensure that their actions do not cause harm or damage to reasonably foreseeable victims. If this "duty of care" is breached, and no defences are available, the defendant will be found liable for all damage which was a reasonably foreseeable consequence of his or her conduct.

More specific than negligence is the duty of care owed by an occupier of property to entrants on his or her land. *The Occupiers' Liability Act*[5] requires an occupier to take reasonable care for the safety of all people entering his or her property.

Nuisance is a cause of action appropriate for cases in which the plaintiff suffers a continuing and unreasonable interference with the use and enjoyment of his or her land. Unlike negligence and occupiers' liability, which focus on the actions of the defendant, nuisance focuses

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[1]The Law of Moses, which governed the ancient Hebrews, required the death of an ox which had killed someone. If its owner had been aware of the ox's dangerous propensity and had failed to pen it properly, the owner was also to be executed: *Exodus* 22: 28-36.

[2]G.L. Williams, *Liability for Animals* (1939) 278.

[3]A.M. Linden, *Canadian Tort Law* (4th ed., 1988) 87.

[4]*Donoghue (M'Alister)* v. *Stevenson*, [1932] A.C. 562 (H.L.).

[5]*The Occupiers' Liability Act*, C.C.S.M. c. O8. This legislation was based on recommendations contained in Manitoba Law Reform Commission, *Occupiers' Liability* (Report #42, 1980).

on the harm suffered. However, the inclusion of the term "unreasonable" suggests a level of subjective analysis required of a judge in assessing the merits of a nuisance case.

While actions in negligence, nuisance and occupiers' liability are potentially available to a variety of victims, including victims of animal-caused damage, the torts of scienter and cattle trespass are exclusively available to those who have suffered harm from animals. Moreover, victims of animals tend to favour cattle trespass and scienter over other torts. Unlike nuisance, scienter and cattle trespass allow a victim to recover for a single incident of interference with land. Unlike fault-based torts like negligence or occupiers' liability, cattle trespass and scienter are torts of strict liability which do not rely on the judge's assessment of the reasonableness of the defendant's behaviour in order to determine liability. Once certain facts are shown and absent an appropriate defence, liability is automatic.

B. STRUCTURE OF THE REPORT

Chapters 2 and 3 of this Report set out the present state of the law in Manitoba concerning scienter and cattle trespass, respectively. This exposition of the law reveals certain anomalies and inconsistencies in both causes of action which have developed as a result of their adaptation by the courts over hundreds of years. These defects in the law are detailed in Chapter 4 of this Report.

After careful consideration of a variety of options, the Commission has decided to recommend a course of action which we believe will incorporate the best features of these torts into a new cause of action better suited for the contemporary world. Chapter 5 of the Report sets out the options available and contains our recommendations. Chapter 6 sets out proposed new legislation which would give effect to our recommendations, together with explanatory notes. Finally, Chapter 7 restates the recommendations contained in this Report.

Two appendices are attached to this Report. Appendix A contains a discussion of the effect of certain statutory provisions on the common law. These provisions are confusing and judicial interpretation has not cleared up the confusion. We believe a policy decision, which has more to do with municipal powers than with the law of liability, should be made concerning these matters but we see this decision as beyond the scope of this Report. Appendix B contains our proposed legislation without annotations.

C. ACKNOWLEDGEMENTS

This is the first of a series of Reports by the Commission on the law relating to the control and protection of animals. The Commission was able to undertake this project with the assistance of grants from the Manitoba Law Foundation over the course of two years and we gratefully acknowledge the Foundation's important support.

We also take this opportunity to thank the individuals whom we consulted in preparing this Report. Their views helped shape our thinking on a variety of issues and we are grateful to them for the time they took to assist us. They include numerous municipal secretaries and representatives as well as representatives from the Manitoba Cattle Producers Association, the Manitoba Milk Producers' Marketing Board and the provincial Department of Agriculture.

CHAPTER 2

SCIENTER

The Latin term "scienter" means "with knowledge" and was part of the ancient pleading which alleged that the defendant had knowingly kept the dangerous animal which had caused damage. This pleading contains the classic formulation of the tort of scienter: subject to defences, the defendant will be held liable if he or she knowingly kept a dangerous animal which caused harm to the plaintiff.

Scienter's status as a tort of strict liability is clearly revealed in such a formulation. Evidence of blameworthy or unreasonable conduct by a defendant is entirely irrelevant to his or her liability in scienter.

It is clear that some judges are uncomfortable with the strict liability qualities of scienter. Their uneasiness is evident in the pains taken by some to justify the imposition of liability in fault-based terms, arguing that the keeping of a dangerous animal is in itself wrongful behaviour.[1] Judicial discomfort may have also resulted in the addition of a requirement to the traditional formulation of scienter. Besides proving that the defendant knowingly kept a dangerous animal which did harm to the plaintiff, some judges have required the plaintiff to show that the defendant also failed to keep the animal under proper control.[2] As one commentator has noted, this additional criterion requires a judge to assess the reasonableness of the defendant's behaviour and substantially erodes the strict liability nature of scienter.[3]

This Chapter will discuss the present state of scienter. In the course of this discussion, anomalies and inconsistencies in the law will inevitably be revealed. These defects will be the focus of Chapter Four.

A. PLAINTIFF AND DEFENDANT

The proper plaintiff in a scienter action is any individual who has suffered damage or harm caused by an animal which is kept by another person.

Identification of the proper defendant is sometimes more difficult. Normally, liability for damage done by an animal will be borne by its owner, but any person in charge of the animal may be a suitable defendant. Courts often refer to the "keeper" or "harbourer" of an animal as

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[1]*May* v. *Burdett* (1846), 9 Q.B. 101 at 112, 115 E.R. 1213 at 1217. See also *Fleeming* v. *Orr* (1855), 2 Macq. 14, 9 S.R.R. 516 (H.L.), per Cranworth L.C.

[2]One formulation of this requirement is that of Lord Wright in *Knott* v. *London County Council*, [1933] All E.R. 172 (C.A.), in which he stated: "It is true that it is not unlawful or wrongful to keep such an animal [a dangerous animal]; the wrong is in allowing it to escape from the keeper's control with the result that it does damage. Damage is thus the gist of the action." (at 174).

[3]J.C. Irvine, "Case Comment on Lewis v. Oeming" (1983), 24 C.C.L.T. 81 at 85.

liable for the damage it has caused.[4] Moreover, liability need not be restricted to one person. Two or more people may be jointly liable, including someone who does not even have actual possession of the animal.[5]

B. DANGEROUS ANIMALS

Scienter only applies to damage caused by animals known to be dangerous. For the purposes of scienter, the courts have divided all species of animals into two categories: animals *ferae naturae* and animals *mansuetae naturae*.

1. Animals *Ferae Naturae*

Animals *ferae naturae* are defined as having "a wild nature or disposition."[6] For purposes of scienter, species classified as *ferae naturae* are conclusively presumed to be dangerous, no matter how tame individual members of the species may be. Moreover, their keepers are conclusively presumed to know of their dangerous nature. Most undomesticated animals, including bears, lions, elephants, tigers, wolves and monkeys fall into this category.[7]

2. Animals *Mansuetae Naturae*

"Tamed and domesticated animals"[8] are considered *mansuetae naturae*, a category which includes cattle, sheep, horses, cats and dogs. These species are presumed to be harmless and their keepers are not normally liable in scienter. However, individual members of the species may be found to be dangerous for purposes of scienter by demonstrating a particular propensity for dangerous behaviour. If so, and if their keepers are aware of this propensity, scienter comes into play.

The propensity for dangerous behaviour demonstrated by animals *mansuetae naturae* must be closely related to the damage in question if scienter is to apply.[9] For example, a dog which had previously chased and worried a goat was not found to have established a relevant propensity for dangerous behaviour when it bit a person.[10] Similarly, a dog's habit of rushing towards and barking at strangers coming onto the property was not considered relevant when it bit a child who was trying to pet it.[11] Yet it is not true that the animal must perform the same

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[4] *M'Kone* v. *Wood* (1831), 5 Car. & P. 1, 172 E.R. 850 (K.B.); *Walker* v. *Hall* (1876), 40 J.P. Jo. 456 (Exch.). But note *North* v. *Wood*, [1914] 1 K.B. 629, where the father of a 17-year-old owner of the dog was not liable for the dog's damage even though the dog lived on his premises.

[5] *Stanford* v. *Robertson*, [1947] 1 D.L.R. 493 at 495 (Alta. S.C. App. Div.) per Ford J.A. The question of the proper defendant is a question of fact, not law, according to Ford J.A.

[6] *Black's Law Dictionary* (6th ed., 1990) 619.

[7] Bears - *Wyatt* v. *Rosherville Gardens Co.* (1866), 2 T.L.R. 282 (Q.B.); Lions - *Pearson* v. *Coleman Brothers*, [1948] 2 K.B. 359 (C.A.); Elephants - *Behrens* v. *Bertram Mills Circus Ltd.*, [1957] 2 Q.B. 1; Tigers - *Lewis* v. *Oeming* (1983), 24 C.C.L.T. 81 (Alta. Q.B.); Wolves - *Maynes* v. *Galicz* (1975), 62 D.L.R. (3d) 385 (B.C.S.C.); Monkeys - *Brook* v. *Cook* (1961), 105 Sol. Jo. 684 (C.A.).

[8] *Black's Law Dictionary*, *supra* n. 6, at 964.

[9] In Canada, the rule was stated succintly by Conant, D.C.J. in *Morsillo* v. *Migliano* (1985), 13 C.C.L.I. 1 (Ont. Dist. Ct); he declared that the plaintiff was required to show "that the animal had previously committed, or attempted to commit, at least one act that showed the particular kind of viciousness now complained of. . . " (at 8).

[10] *Osborne* v. *Chocqueel*, [1896] 2 Q.B. 109.

[11] *Sgro* v. *Verbeek* (1980), 111 D.L.R. (3d) 479 (Ont. H.C.). See also *Kirk* v. *Trerise*, [1981] 4 W.W.R. 677 (B.C.C.A.).

dangerous activity twice before scienter will apply, a misunderstanding which has given rise to the adage that "every dog has one free bite." The animal need not have actually engaged in the activity complained of, so long as it has shown a willingness to do that kind of harm. For example, a dog which had never previously bitten anyone, but which had "jumped at everyone who passed his kennel, endeavouring to bite" was found to have established a propensity sufficient for the purposes of scienter.[12] Furthermore, so long as the dangerous propensity is in some way related to the damage caused by the animal, a single incident demonstrating that propensity will serve to bring scienter into play, even if that incident took place several years before the incident giving rise to the claim.[13]

The process of determining whether or not the propensity established by the animal is sufficiently connected to the damage to qualify the animal as dangerous is inherently uncertain.[14] This uncertainty is exacerbated by the fact that no clear and consistent criteria have been developed by which to determine the issue.

A major problem surrounds the use of the word "mischievous". In some older cases, "mischievous" was used in connection with "vicious" to describe the propensity an animal needs to display before an action in scienter may be maintained. In Canada, the British Columbia Court of Appeal has interpreted "mischievous" in these cases as a synonym for "vicious" and has declined to apply the modern notion of "mischievous" (that is, playful, excitable and boisterous behaviour) to an action in scienter.[15] By contrast, the Ontario Court of Appeal has adopted the modern definition of "mischievous" in ruling that mere playfulness on the part of an animal could be considered a dangerous propensity.[16]

Another source of confusion is the notion, expressed in a number of cases, that in order for scienter to apply, the propensity demonstrated by the animal must be one which is not common to its species.[17] This idea flows logically from the presumption that animals *mansuetae naturae* are inherently harmless. If a particular animal is to be treated as dangerous, therefore, its behaviour must be exceptional or anomalous to its species. This idea may explain why, for example, the playfulness typical of an unbroken filly was found not to be sufficient to establish a dangerous propensity[18] and why a dog which barked and lunged at people was not considered to

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[12]*Worth* v. *Gilling* (1866), L.R.2 C.P. 1. But note *Sycamore* v. *Ley* (1932), 147 L.T. 342 (C.A.), where a dog which jumped and barked at a passerby was not considered to have been of a ferocious character.

[13]*Gladman* v. *Johnson* (1867), 36 L.J. C.P. 153.

[14]See *Kirk* v. *Trerise*, *supra* n. 11, where the Court differed on whether a dog's habit of greeting strangers by leaping on them excitedly was a relevant dangerous propensity vis-à-vis an incident in which the dog, while leaping on a stranger, bit her.

[15]*Kirk* v. *Trerise*, *supra* n. 11, at 680.

[16]*Morris* v. *Baily* (1970), 13 D.L.R.(3d) 150 at 153 (Ont. C.A.). Lambert J.A., dissenting in *Kirk* v. *Trerise*, *supra* n. 11, seems to agree with Gale C.J.O. when he states: "The fact that the risk arises from an excess of good nature rather than from a mean disposition makes no difference to the risk." (at 689).

[17]Willes J. in *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430 at 440, 143 E.R. 171 at 174 (C.P.) speaks of such an animal as "an exception to its class." The Lord Chancellor in *Fleeming* v. *Orr*, *supra* n. 1, stated:

> The reason why by the English law it is necessary to allege and prove *scientia* is, that in the case of an animal *mansuetae naturae* the presumption is that no harm will arise from leaving it at large. Starting from that presumption it follows that there cannot be blame or negligence in the owner merely from his allowing liberty to an animal which *has not by nature the propensity to cause mischief*. Blame can only attach to the owner when, after having ascertained that the animal *has propensities not generally belonging to his race*, he omits to take proper precautions to protect the public against the ill consequences of those *anomalous* habits . . . ." [emphasis added] (at 23, 520).

[18]*Fitzgerald* v. *E.D. and A.D. Cooke Bourne (Farms) Ltd.*, [1964] 1 Q.B.D. 249 (C.A.).

have demonstrated the sort of "ferocious character" required in scienter.[19] This notion has also been incorporated into the English *Animals Act 1971*.[20]

3. Classification of Animals

Because animals *ferae naturae* are conclusively presumed to be dangerous and because animals *mansuetae naturae* are presumed to be harmless until they have demonstrated a dangerous propensity, the classification of an animal as *ferae naturae* or *mansuetae naturae* is often critical to the success or failure of an action in scienter. The classification process is all the more important since it is a matter of law rather than fact, and a classification, once made, cannot be reconsidered.[21] However, despite the importance of this classification, courts have failed to develop consistent criteria in classifying animals.

One court, in classifying camels as *mansuetae naturae*, used as a determining factor the fact that camels are not found wild anywhere in the world.[22] Yet this criterion has not been universally applied, for dogs, horses and cattle have been classified as *mansuetae naturae* despite the fact that they can be found in an undomesticated state.[23]

Another court classified elephants as *ferae naturae* because, although they have a long history of domestication in Asia, elephants had not been "shewn by experience to be harmless in this country."[24] While factually correct, this criterion clearly has not been applied as a general test. For example, bulls have been classified as *mansuetae naturae* although it could hardly be said that they have been shown by experience to be harmless in Great Britain and Canada.[25]

An additional inconsistency lies in the fact that, although scienter allows recovery for property damage as well as personal injury, most classification tests focus on the threats posed by a species to personal safety while ignoring the threats posed by a species to property.[26]

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[19]*Sycamore* v. *Ley*, *supra* n. 12. Still, in other cases, the fact that dangerous characteristics are common to the species has not released the defendant from liability. For example, in *Scott* v. *Edington* (1888), 14 V.L.R. 41, the Supreme Court of Victoria (Full Court) found that wild cattle which had not demonstrated a previous propensity to charge people were dangerous because it was widely known that any one of them were likely to attack people.

[20]*Animals Act 1971* (U.K.), 1971, c. 22. Section 2(2) reads as follows:

> Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if -
> (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and
> (b) the likelihood of the damage or of its being severe was *due to characteristics of the animal which are not normally found in animals of the same species* . . . . [emphasis added]

[21]J.G. Fleming, *The Law of Torts* (7th ed., 1987) 332.

[22]*McQuaker* v. *Goddard*, [1940] 1 K.B. 687 (C.A.). This erroneous conclusion was the result of faulty testimony by experts at trial.

[23]Wild dogs in Australia, called dingoes, were ruled *ferae naturae* in *Fischer* v. *Stuart* (1979), 25 A.L.R. 336 (N.T. Sup. Ct.). On the other hand, wild cattle were ruled to be *mansuetae naturae* in *Scott* v. *Edington*, *supra* n. 19.

[24]*Filburn* v. *The People's Palace and Aquarium Co. Ltd.* (1890), 25 Q.B.D. 258 at 260 (C.A.). In *Behrens* v. *Bertram Mills Circus Ltd.*, *supra* n. 7, the Court was forced to adopt this classification for Burmese elephants despite the fact that they have been domesticated in Asia for centuries.

[25]*Shelfontuck* v. *Le Page*, [1938] 1 D.L.R. 513 (Man. C.A.); *Smith* v. *Blake* (1916), 10 O.W.N. 26 (C.A.); *Rands* v. *McNeil*, [1955] 1 Q.B. 253 (C.A.).

[26]In *Buckle* v. *Holmes*, [1926] 2 K.B. 125 at 129 (C.A.), Bankes L.J. ruled that, although dogs have a natural propensity to chase sheep and cats to kill pigeons, this was irrelevant because the proper test was a species' danger to mankind. Fleming notes that rabbits, notoriously destructive of property, are considered harmless: J.G. Fleming, *supra* n. 21, at 332. To some extent this problem is dealt with by the tort of cattle trespass, considered in the next Chapter.

C. KNOWLEDGE

As noted earlier, the term "scienter" is related to the requirement that the defendant *knowingly* kept a dangerous animal.[27] In the case of animals *ferae naturae*, this knowledge on the part of the owner is conclusively presumed, but the owner of an animal *mansuetae naturae* must be aware of its dangerous propensity before liability will result.[28]

Although in the case of animals *mansuetae naturae*, proof of knowledge on the part of the defendant is always required, it is not always necessary to prove actual knowledge. Knowledge may be inferred or imputed, as in the case where the defendant was found liable because his wife had knowledge of his dog's viciousness.[29] The knowledge of the defendant's employee will also sometimes be sufficient to establish liability.[30]

D. LACK OF CONTROL

As noted earlier, some judges, apparently uncomfortable with the strict liability characteristics of scienter, have imposed an obligation on the plaintiff to demonstrate that the defendant failed to keep the animal under proper control.

The differences between the orthodox approach and this fault-based model can be seen by comparing two cases: *Maynes* v. *Galicz*[31] and *Wyatt* v. *Rosherville Gardens Co.*[32] In both cases, animals *ferae naturae* (in *Maynes* a wolf and in *Wyatt* a bear) were being kept for public viewing and in both cases members of the public came too close to the cages and were mauled by the animals. There are no material facts to distinguish these cases from one another.[33] Yet the two courts took very different views of the matter. Huddleston J. in *Wyatt* had no difficulty in finding the defendant liable in scienter, explaining that a person choosing to keep a dangerous animal does so "at his peril" and is liable for any injuries the animal might cause.[34] By contrast, McKay J. in *Maynes* excused the defendant from liability in scienter. Since the wolf did not escape from the cage, he concluded that its keeper had not lost control of the animal and could not therefore be held liable in scienter.[35]

As one commentator has noted, the addition of the requirement that the animal escape from the keeper's control substantially weakens the strict liability characteristics of scienter. The only

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[27]J.G. Fleming, *supra* n. 21, at 332.

[28]Some argue that it is this knowledge requirement which links scienter to notions of blame or fault: *Fleeming* v. *Orr*, *supra* n. 1, at 23, 520.

[29]*Gladman* v. *Johnson*, *supra* n. 13. However, in *Miller* v. *Kimbray* (1867), 16 L.T. 360 (N.P.), knowledge on the part of the owner's husband was not considered sufficient proof of scienter.

[30]*Baldwin* v. *Casella* (1872), L.R. 7 Ex. 325. See also *Scott* v. *Edington*, *supra* n. 19, and *Nadeau* v. *City of Cobalt Mining Co.* (1912), 3 D.L.R. 495 (Ont. High Ct.). However, in *Applebee* v. *Percy* (1874), L.R. 9 C.P. 647 and *Stiles* v. *Cardiff Steam Navigation Co.* (1864), 33 L.J.Q.B. 310, notice to the defendant's employees was not sufficient to establish knowledge on his part.

[31]*Maynes* v. *Galicz*, *supra* n. 7.

[32]*Wyatt* v. *Rosherville Gardens Co.*, *supra* n. 7.

[33]The only significant difference, which does not appear material, is that in *Wyatt* there apparently were no barriers preventing the public from approaching the cage, while in *Maynes*, although there were some barriers, they were found to be grossly inadequate.

[34]*Wyatt* v. *Rosherville Gardens Co.*, *supra* n. 7, at 283.

[35]*Maynes* v. *Galicz*, *supra* n. 7, at 392.

way in which an animal attacking a person might be said to be under its keeper's control is to argue that the keeper had exercised *sufficient* control. The obvious test for determining whether sufficient control has been imposed is to ask whether such control was imposed as was reasonably necessary to protect the reasonably foreseeable victim from harm. However, this test departs substantially from strict liability. It focuses on the behaviour of the defendant and raises the notion of fault. It is, in essence, a negligence test.[36]

Nevertheless, despite these philosophical criticisms, it is clear that the "escape from control" test has gained considerable judicial acceptance in recent decades.[37] The "escape from control" model is now probably the dominant approach to scienter.

The philosophical differences revealed in the application of the "escape from control" requirement also play a role in determining relevant defences to scienter, and it is to the various defences that we now turn.

E. DEFENCES

1. Default of the Plaintiff

One defence available to the defendant is that the plaintiff brought the harm upon himself or herself.[38] This defence has resulted in an escape from liability in cases where a man was bitten while petting a zebra,[39] where a young boy was attacked while trying to tear a dog from his meal,[40] where a game farm employee entered a tiger's cage to retrieve a baseball cap,[41] and where a circus employee approached a leopard's cage to extinguish a cigarette burning in the straw and was mauled by the leopard for his troubles.[42] Still, the defence did not apply in the case of a visitor who moved too close to a bear cage in an effort to feed the animal,[43] nor did it apply when a young girl was mauled after crawling under a lion's cage while visiting the circus.[44]

The "default of the plaintiff" defence inevitably raises the issue of fault or negligence. It permits the defendant to show that the harm was not caused through his or her fault or negligence, but through the plaintiff's negligence or recklessness. In this way, this defence has an effect similar to that of the "escape from control" requirement discussed earlier: it mutes the

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[36]J.C. Irvine, *supra* n. 3.

[37]The "escape from control" test has been traced to the 19th century. In *Cox* v. *Burbidge*, *supra* n. 17, Willes J. said: "As to the former [ferae naturae], if a man choses to keep them, he must take care to *keep them under proper control*, and, if he fails to do so, he . . . is held answerable for any damage that may be done by them . . ." (at 174) [emphasis added]. Other cases which have used the "escape from control" criteria are *Knott* v. *London County Council*, *supra* n. 2; *Lee* v. *Walkers* (1939), 162 K.B. 89; *Rands* v. *McNeill*, *supra* n. 25; *Behrens* v. *Bertram Mills Circus Ltd.*, *supra* n. 7; *Lewis* v. *Oeming*, *supra* n. 7; *Witman* v. *Johnson* (1990), 74 D.L.R. (4th) 428 (Man. Q.B.).

[38]*Filburn* v. *The People's Palace and Aquarium Co. Ltd.*, *supra* n. 14, where Lord Esher said: "an elephant . . . falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, *unless the person to whom the injury is done brings it on himself*." (at 260) [emphasis added].

[39]*Marlor* v. *Ball* (1900), 16 T.L.R. 239 (C.A.).

[40]*Lee* v. *Walkers* (1939), 162 L..T. 89 (K.B.).

[41]*Lewis* v. *Oeming*, *supra* n. 7.

[42]*Sylvester* v. *G.B. Chapman Ltd.* (1935), 79 Sol.Jo. 777 (C.A.).

[43]*Wyatt* v. *Rosherville Gardens Co.*, *supra* n. 7.

[44]*Pearson* v. *Coleman Brothers*, *supra* n. 7.

strict liability characteristics of scienter and injects notions of fault into consideration of liability.[45]

2. Contributory Negligence

The "default of the plaintiff" defence has been referred to by some commentators as "contributory negligence" because the plaintiff's actions must have brought the injury on himself or herself wilfully or negligently if the defence is to be successful. At common law, the contributory negligence of the plaintiff was an absolute defence; it served to bar the plaintiff from any recovery.

In Manitoba, "contributory negligence" is associated with *The Tortfeasors and Contributory Negligence Act*[46] which allows the court to apportion liability between parties after assessing the responsibility each must assume for the incident. However, it appears clear that the Act, in its present form, does not apply to scienter.[47] Therefore, judges in Manitoba are unable to apportion liability between the victim and the owner of an animal in a scienter action. They are forced to decide on an "all or nothing" basis whether the plaintiff or the defendant will assume the costs of the incident.

3. Voluntary Assumption of Risk

Available for most torts, this defence (sometimes known by the Latin maxim *volenti non fit injuria* or simply *volenti*) may be seen as a specific example of the "default of the plaintiff" defence. In the context of negligence, this defence has been limited by the Supreme Court of Canada to cases in which a fully knowledgeable plaintiff "in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part" and when "there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and the plaintiff did not expect him to."[48]

In scienter, the voluntary assumption of risk defence has been allowed in the case of an employee whose job involved working with dangerous animals[49] and has been applied to a plaintiff who entered a yard fully aware of the presence of a vicious guard dog.[50] However, as

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[45]Indeed, L.N. Klar, *Canadian Tort Law* (1991) 411, so closely links the "act of the plaintiff" defence and the "lack of control" requirement that he disregards the act of the plaintiff as a defence and postulates that it would be considered only as a factor in determining whether or not the animal escaped from its keeper's control.

[46]*The Tortfeasors and Contributory Negligence Act*, C.C.S.M. c. T90.

[47]See *Witman* v. *Johnson*, *supra* n. 37. The Manitoba Law Reform Commission has recently issued an informal Report concerning this Act which, if implemented, would give the courts greater flexibility in this area: Manitoba Law Reform Commission, *Scope of Apportionment under The Tortfeasors and Contributory Negligence Act* (Report #22A, 1992).

[48]*Dubé* v. *Labar* (1986), 27 D.L.R.(4th) 653 at 658 (S.C.C.). Although the case dealt with negligence, presumably the same criteria would apply when the defence is raised in the context of scienter. See *Witman* v. *Johnson*, *supra* n. 37, at 434-435.

[49]*James* v. *Wellington City*, [1972] N.Z.L.R. 70 (S.C.), where a zoo employee whose job was to work with chimpanzees had his finger bitten off by one of them. Although the New Zealand Court of Appeal vacated the decision and ordered the case retried in the lower court, they did so because the judge's decision to consider *volenti* when it had not been pleaded prejudiced the plaintiff. The Court of Appeal did not suggest that *volenti* was not a legitimate defence in the context of the case.
On the other hand, in *Baker* v. *Snell*, [1908] 2 K.B. 825 (C.A.), an employee who had no dealings with her employer's dog in the course of her employment was not found to have assumed the risk when the dog bit her. Moreover, the Manitoba Court of Appeal, in *Shelfontuck* v. *Le Page*, *supra* n. 25, held that the employee's acceptance of risk must be clear before the defence will apply. *Stanker* v. *Anderson*, [1938] 3 W.W.R. 529 (Sask. C.A.), establishes a duty on the employer to warn employees of dangerous animals.

[50]*Cummings* v. *Granger*, [1977] 1 Q.B. 397 (C.A.).

suggested by the Supreme Court, *volenti* is a highly limited defence which will be successfully raised only in unusual circumstances.

4. *Ex Turpi Causa Non Oritur Actio*

This maxim has been translated as "Out of a base [illegal or immoral] consideration, an action does [can]not arise."[51] The gist of the maxim is that someone doing wrong runs his or her own risks in doing so; that person cannot sue for damages if harmed in the course of wrongful conduct. It may be seen, therefore, as an extreme example of the "default of the plaintiff" defence.

Courts have been reluctant to apply this maxim as a defence unless

> . . . there is proof of morally reprehensible activity on the part of the plaintiff, involving an actual or intended breach of the public peace, and the loss or injury complained of is so connected with the plaintiff's unlawful activity as to make it unconscionable that the court should come to his aid.[52]

While no cases have specifically used this defence in the context of scienter, there exist easily imagined scenarios in which it could be raised. For example, it might be raised if an animal reacted to cruelty on the part of the plaintiff by attacking him or her. Similarly, a burglar injured by an animal while breaking and entering would probably be precluded from recovering for his or her injuries on this principle.

5. Plaintiff's Trespass

Despite the limited nature of the *ex turpi causa* defence, it may serve as the basis for the defence that the plaintiff was trespassing at the time of the injury. Yet, while the maxim would likely apply to a burglar who is injured by an animal while breaking into a house, there are many other trespasses which would not fall within the ambit of *ex turpi causa*. A child wandering into a neighbour's yard, for example, or someone walking on land unaware that it does not belong to him are as guilty of trespass as the burglar. Yet, they can hardly be said to be engaged in a "morally reprehensible activity." The rather narrow ambit of *ex turpi causa* would not therefore seem to support a general defence of the plaintiff's trespass.

Still, the "plaintiff's trespass" defence is well established[53] and the more solid legal foundation for its existence probably lies in the duty formerly imposed by the common law on an occupier of land toward strangers on his property. While an occupier had the responsibility at common law to keep his or her premises relatively safe for certain types of visitors, virtually no duty was owed toward trespassers. The occupier was only required not to injure them deliberately and to avoid acting with reckless disregard as to their presence.[54] It appears to be with reference to this duty of an occupier that Lord Greene said in the context of scienter:

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[51] *Black's Law Dictionary*, *supra* n. 6, at 589.

[52] *Mack* v. *Enns* (1981), 30 B.C.L.R. 337 at 345 (S.C.), var'd 44 B.C.L.R. 145, leave to appeal to S.C.C. refused 52 N.R. 235. In *Hall* v. *Hebert* (1991), 53 B.C.L.R. (2d) 201 at 208, the British Columbia Court of Appeal reaffirmed this notion by stating that the doctrine should be applied ". . . wherever the conduct of the plaintiff giving rise to the claim is so tainted with criminality or culpable immorality that as a matter of public policy the court will not assist him to recover."

[53] Cases which have acknowledged trespass as a defence include: *Sycamore* v. *Ley*, *supra* n. 12, at 344; *Pearson* v. *Coleman Brothers*, *supra* n. 7, at 278; *Trethowan* v. *Capron*, [1961] V.R. 460 at 465-466 (Sup. Ct.); *Cummings* v. *Granger*, *supra* n. 50, at 404; *Wong* v. *Arnold* (1987), 19 O.A.C. 399 at 400 (C.A.).

[54] *Addie & Sons Collieries Ltd.* v. *Dumbreck*, [1929] A.C. 358 at 365 (H.L.). In Canada, the occupier is additionally bound to obey a "duty of common humanity" imposed by the Supreme Court in *Veinot* v. *Kerr-Addison Mines Ltd.* (1974), 51 D.L.R.(3d) 533.

> If facts established by the plaintiff herself show her to be a trespasser, then the obligation of the defendants must be treated on that footing, and it is impossible to put on them a greater obligation than the law insists they should be under, with regard to trespassers on their land.[55]

However, this basis for the defence also has some difficulties associated with it. The plaintiff's trespass has clearly excused the defendant from liability in cases where the plaintiff was attacked by a guard dog.[56] Yet if the guard dog is expected to attack trespassers, the keeping of it seems to violate the occupier's duty not to injure the trespasser deliberately.

In any event, in Manitoba, the common law duty owed by occupiers to visitors on their land has been superseded by the statutory provisions of *The Occupiers' Liability Act* which abolishes the various categories of visitors and requires occupiers to take reasonable care to ensure that all visitors, lawful or not, are reasonably safe while on the premises.[57]

If the trespass defence rests on the old common law duty of an occupier to trespassers and if that duty has been altered by *The Occupiers' Liability Act*, it is arguable that the trespass defence no longer exists in Manitoba. This is significant, especially for those relying on guard dogs to protect their property. If the trespass defence does not exist, they would be vulnerable to actions in scienter from those who were injured by a guard dog while trespassing. Only if a defence was based on *ex turpi causa* would the defendant be excused from liability, and then only (it would seem) if the trespass was morally reprehensible.[58]

At least two jurisdictions have attempted to deal statutorily with the problem of burglars attacked by animals. The *Animals Act 1971* in England grants an exemption to the defendant if the plaintiff was trespassing, so long as the attacking animal was not kept for the protection of property or persons or, if the animal was so kept, so long as the keeping of it was not unreasonable.[59] In Ontario, the *Dog Owners' Liability Act* exempts the owner of a dog from liability for an attack if the plaintiff was on the owner's premises with the intention of committing or in the commission of a criminal act, so long as the keeping of the dog was reasonable for the protection of people or property.[60]

6. Act of God and Act of a Third Party

The term "act of God" refers to some natural event which is unusual and catastrophic. Tornadoes, hurricanes, earthquakes and floods would fit into this category but it is doubtful that a blizzard or thunderstorm would. The act of a third party refers to actions taken by someone who is neither the plaintiff (that is, the injured or harmed person) nor the defendant (in this case, the keeper of the animal).

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[55]*Pearson* v. *Coleman Brothers*, *supra*, n. 7, at 278.

[56]See for instance *Trethowan* v. *Capron*, *supra* n. 53, where Adam J. of the Supreme Court of Victoria (Australia) stated: ". . . this much I consider to be clear, that in the absence of negligence . . . if [a] complainant were a trespasser, an action could not be maintained at common law by him for injuries caused by a dog kept by a defendant merely for the purpose of guarding and protecting his property." (at 465-466).

[57]*The Occupiers' Liability Act*, C.C.S.M. c. O8, ss. 2 and 3.

[58]Of course, the owner of a guard dog which attacked a trespasser might well be liable under *The Occupiers' Liability Act* in any event, depending on whether or not the owner acted reasonably.

[59]*Animals Act 1971* (U.K.), 1971, c. 22 s. 5(1).

[60]*Dog Owners' Liability Act*, R.S.O. 1990, c. D.16, s. 3(2). For a discussion of a similar provision in the Ontario *Occupiers' Liability Act* and, in particular, the difficulty in determining the ambit of the phrase "criminal act", see D.S. Ferguson, "The Battered Burglar: An Analysis of Section 4 and the Position of the Criminal Entrant under the Ontario Occupiers' Liability Act" (1991), 12 Advocates' Q. 257.

It is unclear whether or not either an act of God or the act of a third party serve as defences in scienter. Moreover, the issue of whether or not they *should* exist depends to some extent upon the resolution of the question concerning the essence of the tortious act. If the mere keeping of an animal known to be dangerous constitutes the tortious act and the defendant keeps the animal *"at his or her peril", it seems irrelevant that the proximate cause of the damage was the act of a* third party or an act of God.[61] On the other hand, if the failure of the defendant to properly *secure the animal is key to the tortious act, as some cases appear to suggest, the unforeseen* intervention of a third party or an act of God in releasing the animal ought to be a legitimate defence.[62]

The argument that these should be permitted as defences is buttressed by analogies to *Rylands* v. *Fletcher* torts[63] where both defences are allowed.[64] This analogy is especially strong because scienter is commonly seen as an antecedent of *Rylands* v. *Fletcher* and some courts have treated the two sources of liability as being merged.[65]

While one commentator has argued that justice and the analogy to *Rylands* v. *Fletcher* demand that these defences be permitted,[66] another has noted that, while superficially unfair, a denial of these defences

> . . . appears to proceed on the unexceptional premise that a stranger's intervention should be deemed within the risk created by the possession of dangerous animals. It finds additional support in the consideration that the owner is better placed to protect himself by insurance than the fortuitous victim of the animal's aggression.[67]

F. DAMAGES

If liability is imposed in scienter, it is clear that the defendant will be liable for immediate damage caused by the animal. The defendant may also be liable for less immediate damage flowing from the incident but, at some point, damage will be considered too remote to qualify for compensation. The problem of determining the point at which damage is too remote has been difficult for the courts in all areas of liability. In scienter, courts appear to have vacillated between two tests: directness and foreseeability. The first would make the defendant liable for

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[61]This view of the common law was adopted by Lindal Co.Ct.J. in *Christie* v. *Dobbyn* (1947), 55 Man.R. 316 at 319-320, who quoted *Halsbury's Law of England* (2nd ed.), vol.1, 539: ". . . where this knowledge exists, the owner keeps such an animal at his peril, and is answerable in damages for any harm done by the animal, *even though the immediate cause of the injury is the intervening voluntary act of a third person.*" [emphasis added].

[62]*Baker* v. *Snell*, *supra* n. 49, provides the best juxtaposition of these philosophical perspectives. In arguing that the owner of a dog was liable even when his employee, charged with taking care of the animal, actually incited it to attack a fellow employee, Farwell L.J. said: "It appears to me to be absolutely immaterial if the keeper of a dangerous animal keeps it at his own peril in all circumstances whether the injury arises from the actual negligence of the owner or from the act of a third person. The wrong is in keeping the fierce beast, and the person who keeps it is prima facie responsible for the injury arising from his wrongful act. . . ." (at 833). In response, Kennedy L.J. argued that the act of a third party should serve as a defence, claiming that ". . . there is nothing culpable or wrong in keeping an animal ferae naturae." (at 834).

[63]In a decision upheld by the House of Lords, Blackburn J. ruled that a person ". . . who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.": *Rylands* v. *Fletcher* (1866) L.R. 1 Ex. 265 at 279, aff'd (1868), L.R. 3 H.L. 330. This category of tort is usually applied to accumulations of inanimate substances and their escape.

[64]Kennedy L.J. made this argument in *Baker* v. *Snell*, *supra* n. 49.

[65]G.L. Williams, *Liability for Animals* (1939) 352.

[66]*Id.*, at 334-336.

[67]J.G. Fleming, *supra* n. 21, at 336.

all damage flowing directly from the incident, while the second would restrict the defendant's liability to damage which could be reasonably foreseen to have resulted from the animal's actions.

Apparently adopting the first test, the Ontario Court of Appeal awarded damages to a plaintiff who broke his leg when he fell trying to avoid the defendant's leashed dog.[68] Similarly, another court ruled a defendant liable for the plaintiff's toxic reaction to the anti-tetanus shot he received after being bitten by the defendant's dog.[69] One judge went so far as to suggest that, if a plaintiff suffered a heart attack because he found an escaped tiger in his bed, he could recover even if the tiger did not attack him.[70]

Other cases have restricted liability, apparently because the damage was not foreseeable. For example, a woman was not able to recover for her injuries after she was startled by the sudden appearance of a monkey and fell while running away.[71] In a recent Nova Scotia case, the owner of a dog was not obliged to pay damages for the death of a man who, after being bitten by the dog, subsequently developed an extremely rare bacterial infection. The judge adopted the view that, in strict liability torts, even if the defendant is found liable, he or she is only obliged to pay "'for the kind of damage that one would reasonably expect to ensue from the happening in question.'"[72]

One judge has suggested that a distinction should be drawn between damage caused by animals *ferae naturae* and *mansuetae naturae*. The owners of the former would have to pay for all damage they caused because "whenever they get out of control they are practically bound to do injury", while owners of animals *mansuetae naturae* would only have to pay for damage resulting from their dangerous propensity.[73]

G. STATUTORY PROVISIONS CONCERNING DOGS

In many jurisdictions, scienter has been altered or superseded by legislation, usually focused on dogs. In Manitoba, section 26 of *The Animal Husbandry Act* governs damage or harm caused by dogs. It reads as follows:

> In an action brought to recover damages caused by a dog, it is not necessary for the plaintiff to show or prove
>
> (a) that the dog was or is; or
>
> (b) that the owner or keeper or any person who harbours the dog, knew that the dog was or is;
>
> vicious or mischievous or is accustomed to causing injury.[74]

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[68] *Wong* v. *Arnold*, *supra* n. 53.

[69] *Winteringham* v. *Rae* (1965), 55 D.L.R. (2d) 108 (Ont. H.C.).

[70] *Behrens* v. *Bertram Mills Circus Ltd.*, *supra* n. 7, at 17-18.

[71] *Brook* v. *Cook*. *supra* n. 7.

[72] *Grant Estate* v. *Mathers* (1991), 100 N.S.R. (2d) and 272 A.P.R. 363 at 398 (S.C.T.D.). Boudreau, J. was quoting from *Clerk and Lindsell on Torts* (16th ed., 1989) 594.

[73] *Behrens* v. *Bertram Mills Circus Ltd.*, *supra* n. 7, at 18.

[74] *The Animal Husbandry Act*, C.C.S.M. c. A90, s. 26.

Manitoba courts have adopted two different interpretations of this provision and a third interpretation has been adopted in jurisdictions with similar legislation.[75]

1. Absolute Liability

In *Lupu* v. *Rabinovitch*,[76] Solomon J. interpreted this provision as imposing absolute liability without the possibility of defences. He concluded:

> According to the evidence, the dog Lucas was gentle, good-natured, friendly and did not have vicious or mischievous propensities. Section 27 [now section 26], however, imposes absolute liability on the owner of the dog and under this section plaintiffs need only prove that the child was bitten by the owner's dog.[77]

Obviously, this interpretation would treat the owner of a dog more harshly than either scienter or negligence. So long as the defendant's dog has caused the damage or injury, liability must be imposed. The character of the dog, the actions of the plaintiff, the steps taken to control the animal and all other circumstances are irrelevant. No defences can be raised.

Two subsequent cases have adopted Solomon J.'s interpretation of section 26.[78]

2. Strict Liability

Unlike Solomon J., Morse J. in *Witman* v. *Johnson*[79] treated section 26 as imposing only strict liability rather than absolute liability. Like scienter itself, Morse J.'s interpretation of the statutorily-created tort would allow the defendant to raise some defences after the plaintiff had proved that the defendant's dog had caused the harm.

Morse J. suggested three defences which the court could consider, all borrowed from the common law tort of scienter. The first is that the owner had "kept the animal under such control or restraint as would be sufficient to prevent the dog from doing injury to someone lawfully about."[80] This defence seems similar to the "loss of control" requirement discussed above in the context of scienter. Another defence suggested by Morse J. is that the victim brought the injury on himself or herself. Finally, still borrowing from the common law, Morse J. suggested that *volenti* could be raised as a defence in the proper circumstances.

3. Reverse Onus

Courts in British Columbia and Nova Scotia have viewed similar legislative provisions as affecting the evidentiary rules of scienter rather than the substance of the tort.[81] Their

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[75]An earlier but similar version of the provision was interpreted in yet another way in *Christie* v. *Dobbyn*, *supra* n. 61. Lindal Co.Ct.J. read this provision to mean that the obligation to prove the defendant's knowledge of the propensity had been eliminated but a propensity still had to be shown.

[76]*Lupu* v. *Rabinovitch* (1975), 60 D.L.R.(3d) 641 (Man. Q.B.).

[77]*Id.*, at 646.

[78]*Stubler* v. *Mattias*, Man. Q.B., Nov. 23, 1976, Nitikman, J. (unreported) and *Duke* v. *Reis* (1990), 64 Man R.(2d) 238 (Q.B.).

[79]*Witman* v. *Johnson*, *supra* n. 37.

[80]*Witman* v. *Johnson*, *supra* n. 37, at 434.

[81]See *Kirk* v. *Trerise* (1979), 103 D.L.R.(3d) 78 (B.C.S.C.); *Kirk*, v. *Trerise*, *supra* n. 11; *Brewer* v. *Saunders* (1986), 28 D.L.R. (4th) 45 (N.S.S.C. App. Div.); *Playter* v. *L'Esperance and Landry* (1989), 90 N.S.R. (2d) and 230 A.P.R. 393 (Co. Ct).

interpretation is that, rather than the plaintiff being required to prove that the dog had a dangerous propensity and that the defendant knew it, the defendant would have to prove to the court that the dog had not demonstrated such a propensity or that, if it had, the defendant was unaware of it.

CHAPTER 3

CATTLE TRESPASS

Like scienter, cattle trespass is an ancient tort imposing strict liability on defendants for the actions of their animals. Like scienter, its formulation is disarmingly simple: if a domestic animal (except a dog or a cat) leaves its owner's property and trespasses onto the property of someone else, the animal's owner is strictly liable for damages flowing from the animal's trespass. Unfortunately, like scienter, the application of its formulation has not always proven to be so simple.

A. SUBJECT OF THE ACTION

The term "cattle trespass" is somewhat misleading, since the action applies not only to cattle (as that term is commonly used), but to horses, donkeys, goats, sheep, pigs, ducks, geese and even possibly tame deer.[1] The action excludes dogs and cats,[2] but the reasons for this exemption are not entirely clear. One rationale for the rule is that, while large livestock are prone to do substantial damage when trespassing, dogs and cats are not.[3] This rationale is not particularly persuasive because it minimizes the amount of damage a dog or a cat can do and provides no explanation for the inclusion of poultry within the action. Nonetheless, it is clear that dogs and cats have historically been granted an exemption from actions in cattle trespass.

B. ACTIVITIES COVERED BY CATTLE TRESPASS

1. Trespass to Land

The most obvious and usual act which gives rise to an action in cattle trespass is the incursion of an animal to the land of the plaintiff. The slightest incursion onto the plaintiff's land (or even the air-space over the land) will result in liability.[4]

The presence of the animals need not constitute a trespass from the beginning; their presence may become a trespass at some point thereafter.[5] In this event, once their trespass

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[1]G.L. Williams, *Liability for Animals* (1939) Ch. 9.

[2]This exception is made clear in *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430, 143 E.R. 171 (C.P.) and *Buckle* v. *Holmes*, [1926] 2 K.B. 125 (C.A.). Bees are also excluded from the tort of cattle trespass: see *O'Gorman* v. *O'Gorman*, [1903] 2 I.R. 573 (K.B.) and *Petey Mfg. Co.* v. *Dryden*, 62 A. 1056 (Del. S.C. 1904).

[3]*Buckle* v. *Holmes*, *supra* n. 2, at 129 per Bankes L.J.

[4]In *Ellis* v. *Loftus Iron Co.* (1874), L.R.10 C.P.10, the defendant's horse kicked the plaintiff's horse through or over the fence dividing the properties. The incursion into the air-space over the plaintiff's land gave rise to an action in cattle trespass.

[5]For example, livestock may have been permitted on land for a limited period of time. Once that time has elapsed, the presence of the animals becomes actionable in cattle trespass.

becomes apparent, the defendant will have a reasonable time to remove the animals. Thereafter, he or she is liable for the trespass.[6]

There is one large exception to the general rule that animal owners are liable for their animals' trespasses: animals being driven on a road or street will not make their owner liable in cattle trespass if they stray onto adjoining property.[7] This exception appears to be based on the belief that the owner of livestock has a right to take cattle along the highway and that, since straying is virtually inevitable, the damage to adjoining property is "a necessary evil" or an inevitable accident, the costs of which must be borne by the owner of the land.[8] While earlier cases seemed to suggest that the presence of a proper fence might give the victim of these strays a right to recover, it now seems clear that in every case, no matter what the precautions, the owner of property adjoining a highway must bear the loss.[9] Other than the possibility of an action in negligence, the only comfort available to the owner of land adjoining a road is that the incursion of animals while being driven down a road will become a trespass if their owner does not retrieve them within a reasonable period of time after receiving notice of their escape.[10]

If the animal is not lawfully on the road (that is, not being driven on it in pursuance of the right of passage), but instead strays from the defendant's land onto the road and then to the plaintiff's land, the plaintiff can recover in cattle trespass.[11]

2. Consuming Harvested Crops

A second, much less common act which gives rise to an action in cattle trespass is the devouring of chattels in the form of harvested crops. The most obvious case is one in which A's harvested crop is being stored on B's land. If C's cattle trespass onto B's land and eat A's crop, A will be able to recover despite the fact that they have not trespassed on A's land.[12] If A's cattle are licensed to graze on B's land, but eat B's haystack instead, B will also have recourse to cattle trespass even though the animals were not trespassing on B's land.[13] Similarly, if A is licensed to place a haystack on B's land and if B's cattle consume it, A will have an action although no trespass to A's land took place.[14]

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[6]G.L. Williams, *supra* n. 1, at 150-152.

[7]See *Tillet* v. *Ward* (1882), 10 Q.B.D. 17 where an ox being driven down a city street wandered through an open door into the plaintiff's shop and apparently spent some time there before being driven out. See also *Street* v. *Craig* (1920), 56 D.L.R. 105 (Ont. S.C.), where a cow being driven into a railway car refused to enter, escaped from its owner, ran from the highway into the plaintiff's yard and trampled her. In neither of these cases was liability found.

[8]*Goodwyn* v. *Cheveley* (1859), 28 L.J. Ex. 298 at 300-301. See also G.L. Williams, *supra* n. 1, at 372-373.

[9]*Gayler and Pope, Ltd.* v. *B. Davies and Son, Ltd.*, [1924] 2 K.B. 75 at 82-83. In that case, a drapery shop owner was denied compensation after he had the unfortunate experience of seeing a horse and milk cart bolt through his shop window.

[10]*Goodwyn* v. *Cheveley*, *supra* n. 8.

[11]*Jack* v. *Stevenson* (1910), 19 Man. R. 717 (C.A.). See also J.G. Fleming, *The Law of Torts* (7th ed., 1987) 327, and G.L. Williams, *supra* n. 1, at 373.

[12]In *Wellaway* v. *Courtier*, [1918] 1 K.B. 200, the plaintiff, who had purchased a crop of turnips from a third party on condition that half of them be consumed on the ground, was able to recover from the owner of trespassing cattle which devoured his prize.

[13]*Craven* v. *Hanley* (1736), 2 Com. 548, 92 E.R. 1202 (C.B.).

[14]*Cronin* v. *Connor*, [1913] 2 I.R. 119 (K.B.).

C. PLAINTIFF

If the activity giving rise to the action is the destruction of harvested crops, the owner of the crop is the proper plaintiff.[15]

Logically, the same principle should apply if the activity which gives rise to the tort of cattle trespass is the animal's trespass to land; the proper plaintiff should be the person occupying the property on which the trespass occurred. However, two Canadian courts allowed plaintiffs to bring actions in cattle trespass for personal injuries incurred when cattle trespassed onto land occupied by someone else.[16] On the other hand, the English Court of Appeal has specifically denied the right of a non-occupier to recover in cattle trespass.[17]

Despite the fact that some non-occupiers have been allowed to bring an action in cattle trespass, travellers on highways have been consistently prohibited from doing so because they are not occupiers of the land on which they are travelling. Their only remedy lies in negligence or in scienter.[18]

The occupier of land may sometimes recover from the owner of trespassing animals for damage to chattels which belong to a third party. For example, the bailee of a horse was granted damages when the horse was gored by a trespassing bull.[19]

D. DEFENDANT

Normally, the proper defendant is the owner of the trespassing animals, but a person with possession of them, even if not the owner, is potentially liable in cattle trespass.[20] However, it is an open question whether the owner of an animal which is in the care of another person would be jointly and severally liable with the harbourer for its trespass.[21]

If animals owned by several defendants have been trespassing together, it appears that the owners will not be held jointly and severally liable. Instead, the court will have to apportion damages as between the various defendants.[22]

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[15]G.L. Williams, *supra* n. 1, at 176.

[16]In *Whalley* v. *Vandergrand* (1918), 44 D.L.R. 319 (Sask. C.A.), the plaintiff was the son and employee of the occupier of the land. The plaintiff was successful in his action. In *Street* v. *Craig*, *supra* n. 7, the plaintiff was the sister of the occupier of the property. Although the defendant was successful on other grounds, no objection was taken to the plaintiff's standing.

[17]*Wormald* v. *Cole*, [1954] 1 Q.B. 614 (C.A.).

[18]In England, recovery in negligence for animals straying onto highways has traditionally been difficult because courts have held that the owner of land owes no duty of care to travellers to prevent his animals from cavorting on public thoroughfares. In what one commentator has called "a singular pique of antiquarianism" (J.G. Fleming, *supra* n. 11, at 337), the House of Lords confirmed this position in *Searle* v. *Wallbank*, [1947] A.C. 341 arguing that ". . . road users cannot expect to have roads kept clear of animals" (at 351). In Canada, the Supreme Court took a more realistic view in *Fleming* v. *Atkinson*, [1959] S.C.R. 513, noting that the law in England was based on historical peculiarities resulting from the enclosure movement. It found that, in Ontario at least (the province from which the case arose), a landowner did owe a duty of care to travellers on roads and could be held liable in negligence. *Fleming* v. *Atkinson* has been applied in Manitoba in cases such as *Gash* v. *Wood* (1960), 31 W.W.R. 177 (Man. Co.Ct.) and *Baty* v. *Parkdale Farms Ltd.* (1986), 38 Man. R.(2d) 242 (Q.B.).

[19]*Mason* v. *Morgan* (1865), 24 U.C.Q.B. 328.

[20]See *Broderick* v. *Forbes* (1912), 5 D.L.R. 508 (N.S.S.C.), where the person liable was the husband of the woman who owned the cow, because the cow was in his custody.

[21]A case from 1405 suggests that joint and several liability will be imposed, but Williams believes that it will not: G.L. Williams, *supra* n. 1, at 176-178.

[22]*Broderick* v. *Forbes*, *supra* n. 10; *Pixley* v. *Bedford*, [1918] 2 W.W.R. 1055 (Sask. C.A.); *Allen* v. *Popika*, [1946] 3 D.L.R. 783 (Man. K.B.).

E. DEFENCES

1. Default of the Plaintiff

In 1443, a landowner, in an attempt to extort money from his neighbour, actually drove his neighbour's cattle onto his own land and then sued his neighbour in cattle trespass.[23] Obviously, the plaintiff's outrageous conduct allowed the defendant successfully to raise a defence to the action. It has also been possible for the defendant to escape liability by blaming the plaintiff in less dramatic circumstances. In a Saskatchewan case, a dispute arose between two farmers. The plaintiff had refused to allow his neighbour (the defendant) to reinforce a boundary fence between their properties and went so far as to remove a strand of barbed wire the defendant had installed. When the defendant's cattle broke through the fence and damaged the plaintiff's crops, the Saskatchewan Court of Appeal found the defendant not liable and ruled that the plaintiff had brought the damage on himself.[24]

In the case of harvested crops being consumed, the plaintiff's default can be raised in an instance where the plaintiff, although licenced to place his haystack on the defendant's land, failed to secure it by way of a fence or some other means from the defendant's cattle.[25]

2. Breach of the Plaintiff's Duty to Fence

Cattle trespass places a general duty on the owner of cattle to prevent them from trespassing. There is no general duty placed on occupiers of land to keep another's cattle out, whether by fencing or otherwise. However, a duty to fence out against cattle may arise through contract or statute.[26]

Adjoining landowners may come to a contractual arrangement concerning the maintenance of a boundary fence, a breach of which would normally give rise to an action for breach of contract. However, if the contract divides the responsibility for maintaining the fence geographically (that is, each agrees to maintain a certain section of fence), the courts have treated the contract as creating a duty to fence out against straying livestock. In this case, the defendant can defeat an action in cattle trespass if he or she can show that the livestock entered through the plaintiff's stretch of fence because of the plaintiff's failure to maintain it.[27]

If the adjoining landowners agree to a more cooperative arrangement, the courts have been reluctant to use the agreement to imply a duty to fence against cattle on the part of the plaintiff which is relevant to cattle trespass. Typically, they have held that the common law is not disturbed: each landowner is still responsible to prevent his or her own cattle from straying to

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[23]This case is cited by G.L. Williams, *supra* n. 1, at 179.

[24]*Armstrong* v. *Thompson*, [1923] 3 D.L.R. 74 (Sask. C.A.).

[25]*Plummer* v. *Webb* (1619), Noy 98, 74 E.R. 1064 (K.B.).

[26]*Garrioch* v. *McKay* (1901), 13 Man. R. 405 at 409 (C.A.). A duty to fence out may also arise through prescription: see *Jones* v. *Price*, [1965] 2 Q.B. 618 (C.A.), *Crow* v. *Wood*, [1971] 1 Q.B. 77 (C.A.), *Egerton* v. *Harding*, [1975] Q.B. 62 (C.A.) and S.G. Maurice, *Gale on Easements* (15th ed., 1986) 39-43. Whether a prescriptive duty to fence could arise in modern times is in doubt and, in any event, has never been recognized in Canada.

[27]*Barber* v. *Cleave* (1901), 2 O.L.R. 213 (H.C.). In deciding this case, however, MacMahon J. seems to suggest that the onus would be on the plaintiff to prove that the livestock entered through the defendant's stretch of fence rather than the other way around.

adjoining land. The defence of the plaintiff's breach of a duty to fence apparently cannot be raised.[28]

In theory, legislation could create a duty to fence out which could be raised as a defence to cattle trespass. However, there does not appear to be any legislation in Manitoba which creates such a duty.[29]

3. Voluntary Assumption of Risk

Based on the Latin maxim *volenti non fit injuria*, this defence is closely related to and may well be part of the "default of the plaintiff" defence. It prevents a plaintiff who has knowingly accepted a risk from recovering damages for harm flowing from that acceptance. This defence is of very limited application in the context of cattle trespass; there are few other conceivable scenarios in which a voluntary assumption of risk might be relevant.

4. Act of God

It is not clear whether a storm, tornado, flood or some other natural (but unusual) occurrence could provide a defence for a defendant in cattle trespass. No cases have raised the issue to date. However, an analogy to *Rylands* v. *Fletcher* suggests that such a defence might be available.[30] In cases of non-natural accumulations of dangerous things on land, the fact that their escape was caused by an act of God is considered a defence. How much more the case, it may be asked, should the defence be available for cattle trespass, given that livestock cannot be considered inherently dangerous and their accumulation cannot be viewed as a "non-natural use of land"?

On the other hand, permitting such a defence detracts from the strict liability nature of cattle trespass. It provides an instance in which the defendant, by demonstrating that reasonable steps were taken to prevent the harm, can escape liability. Someone will have to pay the costs of the damage caused by trespassing cattle. The only issue is whether the plaintiff or the defendant will bear the cost. An argument could certainly be made that the defendant should do so because he or she was better situated to foresee any potential hazard from a natural disaster and to mitigate against the harm.

5. Act of a Third Party

Whether or not the intervening actions of a third party amount to a defence in common law is a matter of some uncertainty. One Irish judgment has permitted the defence,[31] *obiter*

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[28]See, *e.g.*, *Garrioch* v. *McKay*, *supra* n. 26. *Armstrong* v. *Thompson*, *supra* n. 24, may be an exception to this rule. However, it is probably not so much a "duty to fence" case as a "plaintiff's own fault" case. Despite the fact that the plaintiff had not failed in his duty to fence, the Court held that refusing to allow the defendant to perform his duty was sufficient to disentitle the plaintiff from recovery.

[29]*The Boundary Lines and Line Fences Act*, C.C.S.M. c. B70, does not create this obligation: see *Garrioch* v. *McKay*, *supra* n. 26, where the Court held that, since the Act did not require the plaintiff to maintain a particular portion of the fence, the defendant was liable for his cattle trespassing on the plaintiff's land.

[30]*Rylands* v. *Fletcher* (1866), L.R. 1 Ex. 265, aff'd (1868), L.R.3 H.L. 330. The analogy is made in G.L. Williams, *supra* n. 1, at 184-185.

[31]*McGibbon* v. *McCurry* (1909), 43 I.L.T. 132.

comments in a trial court in Canada suggest that it exists[32] and another court decided with barely concealed relief that it did not have to deal with the issue.[33]

If the analogy to *Rylands* v. *Fletcher* torts makes sense for the act of God defence, it would also justify the inclusion of a defence for the acts of a third party. Yet, while agreeing that it should be allowed for deliberate or negligent acts of a third party, one commentator argues that cases in which the actions of third parties are foreseeable should not allow the defendant to escape liability.[34]

Once again, the strict liability nature of the tort of cattle trespass is at issue here. If the defendant is allowed to raise the third party defence, the plaintiff will have no choice but to seek compensation from the third party, who may be unknown or impecunious. The same option is open to the defendant if he or she is held responsible for the damage and is not allowed to raise this defence.

6. Inevitable Accident

At least one commentator has suggested that the inevitability of the animals straying would serve as a defence to cattle trespass.[35] Such a defence would allow the defendant to prove that he or she had taken all reasonable steps to prevent the trespass and that the trespass was beyond his or her control. Like the "act of God" and "act of a third party" defences, the inclusion of this defence would seriously impair the strict liability quality of cattle trespass. This defence would use the same test as negligence (did the defendant take reasonable care to prevent harm to a reasonably foreseeable victim?) but would place the onus on the defendant to prove a lack of negligence.

7. Cattle Distrained

The ancient remedy of distress damage feasant is an alternative to an action for damages in cattle trespass. Distress damage feasant has been defined as ". . . the taking of chattels, whether animate or inanimate, that are doing damage to . . . land, or depasturing chattels, and the retaining of them by way of security until compensation is paid."[36]

Anyone with a proprietary interest in land may distrain any object (including an animal) which is harming the land and may hold it until satisfactory payment has been made by the owner of the object for the damage to the land and the costs of holding the object.

The victim of trespass by an animal may sue in cattle trespass or may distrain the offending animals, but not both. Therefore, the fact that the cattle have been distrained is a complete defence to cattle trespass. However, it is unclear whether provisions in *The Animal*

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[32]*Acker* v. *Kerr* (1973), 2 O.R.(2d) 270 (Co.Ct.).

[33]*Sutcliffe* v. *Holmes*, [1947] 1 K.B. 147 (C.A.).

[34]G.L. Williams, *supra* n. 1, at 183-184. Williams believes that the fact scenario in *McGibbon* v. *McCurry*, *supra* n. 31, was very nearly one in which the act of a third party should not have been allowed as a defence because it should have been foreseen. The third party made use of a right of way through the defendant's field and left the gate open through which the defendant's cattle escaped.

[35]G.L. Williams, *supra* n. 1, at 185-194.

[36]G.L. Williams, *supra* n. 1, at 7.

Husbandry Act concerning stray animals replace the common law remedy of distress damage feasant or merely add to it.[37]

F. DAMAGES

If the activity which gives rise to the action is the destruction of harvested crops, damages will be limited to the loss of the crop. However, if the triggering activity is the trespass to land, a variety of possible harms will be considered for compensation.

1. General Principles

As with other torts, courts have had difficulty in setting down rules which determine the point at which the damage suffered will be considered too remote to qualify for compensation. Some courts have been prepared to award compensation for any damage which flowed directly from the cattle trespass.[38] Others have not been so generous, allowing damages only for harm which was consonant with the ordinary nature or instinct of the trespassing animal.[39] This latter approach suggests that the harm must be foreseeable. The difference between the two approaches can be seen in cases like *Theyer* v. *Purnell* and *Cooke* v. *Waring*.[40] In both cases, the owner of sheep was unaware that they had developed scab. When they trespassed onto the plaintiff's field, the sheep passed the disease on to the plaintiff's flock. Under a "direct consequence" test, the defendant would clearly be liable, but might not be liable for this harm if the test was one of foreseeability.[41]

2. Damage to Land and Chattels

From the beginning, cattle trespass has supported claims for the consumption of crops and trampling of land.[42] Courts have now moved well beyond this point, however, and have held that remoteness principles do not prevent the recovery by plaintiffs for damage caused by the infection of the plaintiff's animals by disease carried by trespassing animals,[43] a physical attack

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[37]Under common law, if animals are distrained, they must be kept in an enclosure known as a pound and the distrainor must follow certain rules as to their keeping. In Manitoba, provisions of *The Animal Husbandry Act*, C.C.S.M. c. A90, permit municipalities to create public pounds for the keeping of stray animals. In addition, ss. 9-19 of *The Animal Husbandry Act* contain extensive provisions for dealing with stray livestock in unorganized territories, provisions which closely parallel distress damage feasant. It may be that *The Animal Husbandry Act* will be read as displacing the common law remedy entirely or doing so in unorganized territories and in municipalities which have acted on the powers delegated to them in the Act. No Canadian case was found which would provide direction in this area. The closest Manitoba case, *Brown* v. *R.M. of St. François Xavier*, [1925] 1 W.W.R. 42 (Man. Co.Ct.), was one in which a horse had strayed onto the land of the local poundkeeper, who was referred to as both poundkeeper and distrainor.

[38]*Ellis* v. *Loftus Iron Co.*, *supra* n. 4, where Lord Coleridge C.J. spoke of "the natural and direct consequence of the trespass committed" (at 12).

[39]*Cox* v. *Burbidge*, *supra* n. 2.

[40]*Theyer* v. *Purnell*, [1918] 2 K.B. 333; *Cooke* v. *Waring* (1863), 2 H. & C. 332, 159 E.R. 138 (Exch.).

[41]In *Theyer* v. *Purnell*, the Court appears to have held the defendant liable under both tests, claiming that it is ". . . quite within the ordinary course of nature that an animal may develop disease, and that anything which follows as a natural consequence and may reasonably be foreseen as a possible consequence is recoverable as damages. . . .": *Theyer* v. *Purnell*, *supra* n. 40, at 336. However, in *Cooke* v. *Waring*, *supra* n. 40, the Court used a foreseeability test to excuse the defendant from liability for this damage in the same scenario.

[42]J.G. Fleming, *supra* n. 11, at 328; G.L. Williams, *supra* n. 1, at 163.

[43]*Anderson* v. *Buckton* (1719), 11 Mod. 303, 88 E.R. 1054 (K.B.) established this damage as recoverable. In *Cooke* v. *Waring*, *supra* n. 40, the Court found that, because the owner of the trespassing animals was unaware of their disease, he could not be found liable. Despite this, the Court in *Theyer* v. *Purnell*, *supra* n. 40, found the defendant liable although he too was unaware of the disease his sheep were carrying.

by the trespassing animal on an animal belonging to the plaintiff,[44] damage to inanimate objects by trespassing animals[45] and the impregnation of the plaintiff's animal by a trespassing male of the species.[46]

3. Physical Harm to People

Cases in which trespassing animals cause physical harm to people have been difficult for courts to deal with. Of course, a person so injured may sue in scienter, but often recovery is not possible in that tort. A test based on the ordinary nature of the species would result in liability in some cases, but the issue has been complicated by the fact that the ordinary nature of an animal does not function in a vacuum. An animal may act in different ways under different conditions.[47] Therefore, the circumstances of the particular incident have resulted in different results for similar damage caused by animals of the same species.[48]

Another complicating factor is that most species designated as "cattle" in cattle trespass have been classed, for purposes of scienter, as *mansuetae naturae*. Species *mansuetae naturae* have been deemed "harmless" for the purposes of an action in scienter, which is merely a way of saying that an anomalous and dangerous propensity must be shown by the individual animal before liability will result; it does not mean that they are in fact harmless. Yet, at least one judgment has clearly used scienter classifications to deem cattle harmless to humans in cattle trespass.[49] This confusion may also have given rise to the view that, while recovery can be had for non-vicious harm done by trespassing animals to the occupiers of property, vicious behaviour (seen as unnatural) is the proper subject of an action in scienter.[50]

However, the most noteworthy feature of this aspect of the tort is the fact that, since the right of action in cattle trespass arises from the occupation of land, only occupiers can recover for physical harm done by cattle trespassing on their property; family members, visitors and

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[44]*Lee* v. *Riley* (1865), 34 L.J.C.P. 212; *Ellis* v. *Loftus Iron Co.*, *supra* n. 4; *Messenger* v. *Stevens* (1910), 91 E.L.R. 9 (N.S.S.C.).

[45]*Moon* v. *Stephens* (1915), 23 D.L.R. 223 (Sask. S.C.); *Welch* v. *Dominion Transport Co.* (1922), 69 D.L.R. 588 (Ont. S.C. App. Div).

[46]*McLean* v. *Brett* (1919), 49 D.L.R. 162 (Alta. S.C.); *Cousins* v. *Greaves* (1920), 54 D.L.R. 650 (Sask. C.A.). Both of these cases dealt with situations where thoroughbred heifers were serviced by trespassing 'scrub' bulls. The courts allowed the difference in value between the worth of the calf born and one which would have been born had the heifer been served by a thoroughbred bull. In addition, damages were awarded for the fact that, because the heifer was bred too early, her growth was stunted. An Australian case, *Halstead* v. *Mathieson*, [1919] V.L.R. 362 (Sup. Ct.), has even allowed damages to a plaintiff who, because a bull had trespassed, could not guarantee that none of his cows were in calf to the bull.

[47]G.L. Williams, *supra* n. 1, at 169. This difficulty is illustrated by *Rosenthal* v. *Hess*, [1927] 1 D.L.R. 493 (Sask. C.A.) in which a steer, "heated and excited" after several unsuccessful attempts to drive it into a stockyard, trespassed onto the plaintiff's land. When the plaintiff moved to drive it out, it attacked the plaintiff. Despite evidence that an excited steer would "charge man and boy", the Court found that the attack was not an ordinary consequence of the trespass because the steer had never acted in this way before.

[48]In *Street* v. *Craig*, *supra* n. 7, the plaintiff was knocked down and crippled by a cow which, having become excited while being loaded into a train car, escaped from its owner, ran down the road and entered her garden. The damage was deemed too remote to justify compensation. Similarly, in *Hatton* v. *Morton* (1921), 61 D.L.R. 365 (Alta. S.C.), a steer attacked a man who was trying to drive it from his premises. The Court did not consider such an attack normal for a steer and the damage was not therefore an ordinary consequence of the trespass. On the other hand, in *Wormald* v. *Cole*, *supra* n. 17, a plaintiff was trying to chase several trespassing cows out of her garden when one ran her over and trampled her. Unlike the courts in the previous two cases, the Court did not view this damage as too remote and granted damages.

[49]G.L. Williams, *supra* n. 1, at 171, refers specifically to *Mark* v. *Burkla*, [1935] N.Z.L.R. 350 (Sup. Ct.), where Myers C.J. declared the irrelevance of scienter to cattle trespass but then used scienter cases to conclude that, as a matter of law, bulls, boars and rams are harmless to humans and therefore no recovery can be had in cattle trespass for personal injuries.

[50]This view was expressed in *Wormald* v. *Cole*, *supra* n. 17, although Lord Goddard C.J. was not prepared to say that the plaintiff could not recover if the cow had done the harm viciously and Hodson L.J. thought that the distinction between vicious and "natural" behaviour should be abolished.

employees are precluded from recovery unless they can show negligence or scienter.[51] Despite the logic of this position, two Canadian cases have allowed non-occupier victims to bring actions in cattle trespass.[52] However, neither case is binding on courts in Manitoba and, since neither case addressed this issue explicitly, their persuasiveness may be minimal. It therefore remains unclear which approach will be adopted by courts in this province.

4. Mitigation

Victims of a cattle trespass have a duty to mitigate their losses; they must take reasonable steps to drive out the livestock upon learning of the trespass.[53] A failure to do so will reduce damages to the amount needed to compensate for the damages suffered to the point at which mitigation ought reasonably to have begun.

Often the duty to mitigate raises a dilemma for the plaintiff. Driving out livestock may turn out to cause more harm than simply leaving the animals alone.[54] In this case, the law is that, if reasonable care is taken in attempting to mitigate the damage, the plaintiff will be compensated for any expenses or damages sustained while attempting to mitigate the loss,[55] so long as the damage sustained is consistent with the nature of the trespassing animal.[56]

G. *THE ANIMAL HUSBANDRY ACT*

The Animal Husbandry Act[57] contains several provisions which have an impact on tortious liability for stray animals. For example, section 3 prohibits certain animals from running at large at certain times of the year and section 5(1)(a) authorizes municipalities to further restrict animals from running at large. Section 4 imposes absolute liability on the owner of any animal running at large in violation of the Act or municipal by-laws. This section has been interpreted as creating a new source of liability for the owners of stray animals in addition to the common law.[58]

Two other sections of the Act are more problematic. One allows municipalities to expressly permit animals to run at large[59] and the other permits municipalities to limit the

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[51]In *Wormald* v. *Cole*, *supra* n. 17, Singleton L.J. of the English Court of Appeal stated: "It may seem strange to some that the plaintiff is entitled to recover, whereas if her [hired] man had been injured he would, in the absence of negligence, have no cause of action. The right of action arises, as I have said, from the occupation of land." (at 631). *Bradley* v. *Wallaces, Ltd.*, [1913] 3 K.B. 629 (C.A.) may be read (and was read by Lord Goddard C.J. in *Wormald* v. *Cole*) as standing for the same proposition.

[52]*Whalley* v. *Vandergrand*, *supra* n. 16, and *Street* v. *Craig*, *supra* n. 7. The view that a possessory right in land must exist before a plaintiff can recover may be eroding. In nuisance, which in this respect is very similar to cattle trespass, some judges have rejected the notion that the possessor's family cannot recover damages for harm suffered in the absence of negligence: see *Devon Lumber Co. Ltd.* v. *MacNeill* (1987), 42 C.C.L.T. 192 (N.B.C.A.).

[53]*Brox* v. *The Edmonton, Yukon and Pacific Ry. Co.* (1909), 2 Alta. L.R. 379 (S.C.).

[54]For example, in *Moon* v. *Stephens*, *supra* n. 45, two mule colts trespassed on the plaintiff's yard. When the plaintiff tried to drive them away, they became excited and the excitement rubbed off on the plaintiff's own horses, one of which injured itself in the confusion.

[55]*Murray* v. *Muir* (1915), 8 O.W.N. 222 (C.A.).

[56]In *Hatton* v. *Morton*, *supra* n. 48, for example, the plaintiff was injured while trying to chase a steer out of his field. This damage was seen as too remote because the damage was ". . . not of such a nature as is likely to arise from such an animal. . . " (at 369).

[57]*The Animal Husbandry Act*, C.C.S.M. c. A90.

[58]*Doble* v. *Canadian Northern Railway Co.* (1916), 27 D.L.R. 115 (Man. C.A.); *Fedoruk* v. *Kalynuik*, Man. Q.B., May 14, 1970 (unreported).

[59]*The Animal Husbandry Act*, C.C.S.M. c. A90, s. 5(1)(a).

liability of the owner of stray animals.[60] The Court of Appeal has considered these provisions in several cases, but no clear understanding of the impact of these provisions on the common law has emerged from these decisions. This area of the law is discussed fully in Appendix A of this Report.

Finally, section 24 of the Act prohibits anyone driving animals on a road from allowing them to stray onto private property. If convicted of this offence, the drover will also be liable to the victim for damage caused by the animals. Damages will be assessed by three arbitrators selected by the drover and the victim. Section 25 makes clear that this liability does not preclude additional damages from being awarded in a civil action.

[60]*The Animal Husbandry Act*, C.C.S.M. c. A90, s. 5(1)(e).

CHAPTER 4

CRITICISMS OF THE LAW

Chapters 2 and 3 have revealed a number of inconsistencies, anomalies and difficulties in the common law torts of cattle trespass and scienter. This Chapter will focus on these problems.

A. SCIENTER

1. Propensity

As will be recalled, domestic animals are generally classified as *mansuetae naturae* and are presumed (for the purposes of scienter) to be harmless. Before scienter becomes applicable, the animal must display a dangerous propensity of a kind that caused the harm. This state of affairs forces a judge to consider the sometimes difficult issue of the degree to which the conduct which caused the harm resembles the previously displayed dangerous propensity.

Such a task, while perhaps difficult in practice, is not conceptually problematic. However, it is made more difficult by the failure of the courts to resolve other, more fundamental issues. For example, it remains unclear whether or not merely playful behaviour (which, although not intended to harm humans, could well be dangerous to people) can justify the application of scienter. In addition, judges have not finally decided whether or not the propensity demonstrated by the animal must be exceptional or anomalous to its species before liability in scienter may be imposed.

The difficulty with this latter issue is that, while it is perfectly logical to demand that an animal *mansuetae naturae* demonstrate a propensity anomalous to its species before finding liability in scienter, it does not work in practice. For example, were the courts to adopt this criteria, bulls which charged at people could not be considered dangerous because such a habit is common to bulls and bulls are considered *mansuetae naturae*. This absurdity is directly due to the lack of realistic and consistent assessment criteria.

2. Classification of Animals

Since animals *ferae naturae* are conclusively presumed to be dangerous and their owners are conclusively presumed to be aware of their danger to others, it is to the plaintiff's advantage to have the animal in question classified as *ferae naturae*. Conversely, it is clearly in the defendant's interest to have the animal classed *mansuetae naturae*. A case may be won or lost on this classification.

However, despite the importance of the classification process, no clear and consistent criteria have been used by the courts in classifying animals. Moreover, little effort has been made in trying to ascertain the real threat posed by specific species. As a result, bulls and wild

cattle have been held as a matter of law to be harmless, even when their danger to humans is clear.[1] Conversely, despite the fact that Asian elephants have served humans for centuries, they are considered as a matter of law to be wild and ferocious.[2]

3. Essence of the Tortious Act

As noted, there appear to be two schools of thought on what constitutes the tortious action. The traditional, orthodox position is that scienter is a strict liability tort and that no fault or unreasonable behaviour on the part of the defendant need be shown before liability can be imposed. On the other hand, another school of thought seems to have added another criterion to the traditional formulation of the tort: the failure of the animal keeper to properly restrain the animal. This additional qualification has injected scienter with fault-based characteristics and results in a tort which resembles negligence. Whether or not the movement from a strict liability to a fault-based tort is positive or negative, it is clear that, until the judicial disagreements can be resolved, the law is in a state of substantial uncertainty.

4. Apportionment Unavailable

Conceptually, apportionment rests on the basis of fault and the notion that an injury or damage may be the fault of more than one person. If both the plaintiff and defendant are to blame for the harm caused, they should share the cost of the harm in proportion to their percentage of the fault.

Given this conceptual framework, logic does not permit the application of apportionment to torts which are not based on fault and, indeed, apportionment is not available to judges in Manitoba when considering strict liability torts. Nevertheless, it seems clear that the availability of apportionment is one of the greatest advantages of fault-based torts such as negligence. Dividing the cost of damage between parties is widely viewed as fairer than always obliging one party to bear the cost, especially since responsibility for harm can rarely be attributed to only one person.

5. Trespass Defence

Given the existence of *The Occupiers' Liability Act*, it is uncertain whether or not the trespass defence remains relevant in Manitoba. As has been pointed out, *ex turpi causa* appears to be too narrow to support a defence of this nature and its more likely foundation is the common law concerning occupiers' liability. Since the Act has imposed greater obligations on occupiers with respect to trespassers than was present at common law, it is now doubtful that the mere fact that the plaintiff was trespassing at the time of the injury will serve as a defence.

This uncertainty is especially problematic for the many residents of the province who keep dogs for the purpose of guarding their property. If the trespass defence no longer exists, these individuals may well be vulnerable, unknowingly, to substantial liability.

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[1] *Shelfontuck* v. *Le Page*, [1938] 1 D.L.R. 513 (Man. C.A.); *Smith* v. *Blake* (1916), 10 O.W.N. 26 (C.A.); *Rands* v. *McNeil*, [1955] 1 Q.B. 253; *Scott* v. *Edington* (1888), 14 V.L.R. 41 (Sup. Ct. F.C.).

[2] *Behrens* v. *Bertram Mills Circus Ltd.*, [1957] 2 Q.B.1.

6. Act of God and Third Party Defences

It remains unclear whether or not the intervention of a natural disaster or of a third party will absolve the defendant of liability for the harm caused by his or her animal.

7. Remoteness of Damage

Courts have been unable to determine conclusively whether defendants in a scienter action will be liable for all harm flowing directly from the actions of dangerous animals or whether their liability is limited to harm which was reasonably foreseeable.

8. Statutory Liability for Dogs

Section 26 of *The Animal Husbandry Act* has been interpreted in two different ways by courts in Manitoba and yet another interpretation has been adopted in other jurisdictions with similar legislation. While this confusion may eventually be resolved by the Manitoba Court of Appeal, the uncertainty engendered by this state of affairs is not beneficial for the law in Manitoba.

B. CATTLE TRESPASS

1. Subjects of the Tort

The first anomaly in cattle trespass is the fact that it applies to livestock and even poultry, but excludes dogs and cats. It seems obvious that a dog or cat is as capable of doing damage to a neighbouring property as a goose or chicken. Indeed, dogs are so notorious for the harm they can do that most provinces in Canada have enacted specific provisions for dealing with stray dogs. In Manitoba, for example, dogs may be shot on sight if they are harassing or disturbing livestock.[3] There do not appear to be good reasons why the keepers of ducks and geese are strictly liable for the damage they cause while the keepers of dogs and cats can allow them to roam without liability in cattle trespass for the harm they may cause.

2. Limits of the Action

Cattle trespass is based on the concept, standard in all actions for trespass, that only the occupier of property can recover for damage flowing from the trespass. In an action for cattle trespass, this rule means that only the occupier of land can recover for damage caused by the trespassing animal to land, chattels and for physical harm to himself or herself; the occupier's family or visitors on the property cannot recover if they are physically harmed or their chattels are damaged.[4] Unlike the occupier, these victims can only rely on an action in negligence or some other tort for compensation.

This same principle means that users of the highway whose person or chattels are harmed by trespassing animals must also rely on negligence or some other tort for compensation. They are precluded from recovery under cattle trespass because they are not occupiers of the road on which they are travelling.

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[3] *The Animal Husbandry Act*, C.C.S.M. c. A90, ss. 29 and 30.

[4] As noted in Chapter 3, two recent Canadian cases appear to have discarded this view. However, the fact that neither case is binding on Manitoba courts, the fact that in both cases the judges seemed unaware of this issue, and the lack of logic of this result (even if perceived as fairer) suggest that the preponderance of case law will still be viewed as good law in this province.

One further anomaly in common law is the rule that animals which are being driven on a road may stray onto adjoining property without any redress in cattle trespass on the part of the property's occupier. While inconsistent with the principles of cattle trespass, this rule is based on the view that damage caused by these animals is a natural and inevitable consequence of herds passing along a thoroughfare. With less reliance placed on transporting livestock on the roads in herds, it is doubtful that the view on which this rule is based would find widespread acceptance today.[5]

3. Joint and Several Liability

It is unclear whether an owner of trespassing animals would be jointly and severally liable with the harbourer of the animals for their trespass.

4. Defences

As noted in Chapter 4, it is uncertain whether or not the "act of God" and "act of a third party" defences are applicable in Manitoba.

The fact that livestock have been distrained also serves as a defence in common law, since distress damage feasant is an alternative to an action in cattle trespass. However, it is unclear whether or not the common law remedy of distress damage feasant has survived the provisions of *The Animal Husbandry Act* which permit municipalities to create pounds and make arrangements for compensation.

5. Damages

A significant degree of uncertainty presently exists with respect to the test for remoteness of damage in cattle trespass. While some courts have adopted the broad "direct consequences" test, others have preferred a narrower test which incorporates notions of foreseeability. While the two approaches may only occasionally lead to different results in practice, it is clear that the issue has not been settled.

6. Statutory Effects on the Common Law

Provisions of *The Animal Husbandry Act* which delegate to municipal governments the power to regulate animals appear to have been enacted without regard to their effect on liability at common law. The difficulties faced by courts in attempting to reconcile legislation with the common law are nowhere more evident than in the four Manitoba Court of Appeal cases discussed in Appendix A. They have resulted in still further anomalies and contradictions in the law. For example, while section 5(1)(e) ostensibly permits municipalities to limit the liability of owners of stray animals, the Court's decisions effectively prevent them from merely limiting liability; municipalities are in fact restricted to a choice between leaving common law liability intact or eliminating it altogether.

Even more problematic is the Court's ruling that animals trespassing on adjoining property are not running at large. Among other effects, this decision means that if a municipal by-law

[5]Although section 24 of *The Animal Husbandry Act*, C.C.S.M. c. A90, creates a statutory right of recovery for owners of land damaged by animals which strayed while being driven on a road, this right of recovery is contingent upon a successful prosecution of the drover under section 24(2). Therefore, the common law in this area is still of importance in Manitoba.

permitting animals to run at large were passed, the owner of animals found on adjoining property would be subject to municipal penalties and civil liability, but the owner of animals found farther afield would escape both.

C. CONCLUSION

It is fair to say that the development of both scienter and cattle trespass has been characterized by judicial reactions to specific situations which have then hardened into legal principles. Little attempt has been made to set out sensible and generally applicable rules for achieving a just outcome in all cases. As a result, we are left with two strict liability torts which are rife with inconsistency and uncertainty. Statutory provisions have frequently affected the common law for the worse and have certainly created greater confusion.

In the following Chapter, we will outline the options available to deal with the problems discussed in this Chapter and will offer our recommendations.

CHAPTER 5

OPTIONS FOR REFORM AND RECOMMENDATIONS

In Chapter 4, we identified the problems and anomalies associated with the current state of the law in scienter and cattle trespass. We now examine the options available to address them and make our recommendations.

In our view, three options are available. First, the status quo could be retained; this would allow the courts to correct the problems with the torts over time as and when the problems come before them. Secondly, the torts could be abolished; injured persons would then rely primarily on the tort of negligence. Finally, the torts could be reformed legislatively. We will examine each of these options in turn.

A. OPTIONS FOR REFORM

1. Retain Status Quo

The first option available to the Commission is to recommend that the status quo be retained. Despite the defects identified in the present state of the law, there are in fact some reasons to consider this approach.

First, the two torts in question are relatively obscure and are not as frequently used as are torts such as negligence, nuisance and occupiers' liability. The problems associated with them are therefore not as great a concern to members of the public as other issues might be.

On the other hand, most legal practitioners are aware of the existence of scienter and cattle trespass and, while scienter and cattle trespass are not as common as some other torts, they are used more often than one might expect. A rough estimate would be that fifteen or twenty court judgments involving harm or injury caused by animals are reported in Canada every year; no doubt, there are many other unreported judgments. Moreover, even if these torts are used infrequently, their relative obscurity should not serve as an argument for ignoring or permitting unfairness or inconsistency to continue.

Secondly, it could be argued that, although the law is presently in a state of some confusion on these matters, this is not uncommon in our legal system. It may take years or even decades to do so, but eventually the common law evolves to resolve difficulties which have arisen. If this is the case, legislators should exercise caution when considering intervention in this organic process.

To some extent, this argument is undermined by the first. Because scienter and cattle trespass are only infrequently available for judicial consideration, the organic process of common law development will work much more slowly than it would with more common causes of action. The anomalies and problems with scienter and cattle trespass will therefore take

decades, rather than years, to be resolved. Moreover, because cases in this area of law arise relatively infrequently, legal counsel and judges are not as familiar with case law in the area as with other torts. Consequent misinterpretation or misapplication of the law, it could be argued, is one of the factors which has resulted in the areas of confusion previously discussed. Finally, because cases involving animals do not generally involve large damage awards, few will find their way to the highest courts for the resolution of ambiguities and inconsistencies in the law.

We believe that the difficulties identified in the previous Chapter are serious and must be addressed. In our view, the fact that the evolution of the common law is unlikely to deal with these problems in the near future confirms the need for reform by the Legislature.

2. Abolish Scienter and Cattle Trespass

A second option is to recommend the abolition of scienter and cattle trespass entirely. Such a solution would force victims of animal-caused harm to rely primarily on the law of negligence and, occasionally, on nuisance and occupiers' liability in order to obtain compensation for the harm done.

This option has the obvious advantage of eliminating all the difficulties and anomalies previously identified in scienter and cattle trespass. Judges would no longer be required to deal with these difficult and somewhat obscure areas of law. They would be free to apply the familiar principles of more commonly used causes of action.

Moreover, in the minds of some, the abolition of scienter and cattle trespass would have the additional advantage of ridding tort law of two strict liability causes of action which can be seen as increasingly anomalous. While strict liability was once the rule rather than the exception in tort law, the maxim, "no liability without fault", appears to have been the governing principle in the development of tortious liability in the past century.[1] The most common torts, including negligence and statutory occupiers' liability in Manitoba, adopt this principle. Furthermore, the notion of fault-based liability appears to be widely seen as fair by people both within and outside the legal system (evidence of the former is the discomfort exhibited by some judges in applying the strict liability principles of scienter). Since it is critical that the legal system be seen as just and fair, such an argument is exceptionally powerful.

However, despite the strength of this argument, we are of the view that there is a role for strict liability principles when it comes to dealing with animals.

Our reasons for this view flow from a recognition that animals are unlike any other substance or thing which can create harm. An animal has a mind and will of its own and always retains a degree of unpredictability in its behaviour. Because of this, many cases will arise in which animals will cause harm which is not foreseeable. Because it is unforeseeable, neither plaintiff nor defendant can be faulted for failing to prevent it.

Furthermore, besides resulting in unpredictable behaviour, an animal's independence of will can result in actions which are not attributable to the keeper's activities. Unlike inanimate objects, the behaviour of animals is not motivated exclusively by either natural and inevitable processes or their manipulation by humans. The fact that animals will not always do what humans want them to do results in many instances where neither keeper nor victim can be fairly blamed for the harm.

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[1]Of course, this century has also seen the rise of a number of no-fault compensation schemes, the best-known being the workers compensation scheme.

In a fault-based tort, a situation in which neither plaintiff nor defendant is to blame would be dealt with by focusing exclusively on the defendant. So long as the defendant has not been negligent, no liability will be imposed and the plaintiff will be left to bear the loss.

Our view is that such an approach is unfair in the case of animal-caused damage. When neither party can be blamed for the immediate circumstances surrounding the harm, the injured party should not have to pay the price. Instead, we believe that it is appropriate to look beyond the immediate incident to determine which party has created the situation of risk.

If animals are inherently unpredictable, it seems clear that the person who chooses to keep an animal has created a risk. Therefore, the decision to keep an animal, in our view, should amount to an assumption of legal responsibility for the animal's actions. In the absence of fault on the part of the plaintiff, this assumption of responsibility includes an acceptance of liability, even when the harm could not be foreseen or prevented. It ought to apply even when the defendant has not been negligent.

We believe that this view of the matter is consonant with the general understanding of ordinary men and women in this province. For centuries, strict liability has been the dominant principle in imposing tortious liability for animals. No great effort has been mounted to change this fundamental principle. Indeed, we believe that most people would react with outrage if told that a person injured by a dog, a horse or a leopard needed to prove negligent conduct on the part of the defendant before liability would be imposed. We believe that most people would find fair and just the idea that, in the absence of blame on either party, the person creating the risk should have to pay for the damage caused.

We do not believe that insurance considerations alter the validity of our perspective. It is true that potential victims of animals may protect themselves by accident or disability insurance. However, it seems to us unreasonable to expect that ordinary citizens would - or should - take out insurance to deal with the risk of injury by animals. It is surely more appropriate that the keepers of animals take out insurance against the risk they have created. Liability insurance is already utilized by many livestock farmers, kennel owners and other professional animal keepers. Insurance distributes the risk among many and, in cases of animals kept for profit, is eventually passed along to consumers. In this way, the costs of the risks posed by animals are borne by those who gain the benefits of keeping animals.

3. Reform Scienter and Cattle Trespass

We believe that reform of the common law is the appropriate approach in dealing with cattle trespass and scienter. The problems with the common law are too significant to ignore and yet we accept the utility and fairness of strict liability principles in this area.

We believe that the problems associated with both scienter and cattle trespass can best be resolved with the creation of a new tort retaining some of the characteristics of cattle trespass and scienter, but based on the principles enunciated in our rejection of an outright abolition of these torts.

RECOMMENDATION 1

The common law torts of cattle trespass and scienter should be abolished and section 26 of The Animal Husbandry Act should be repealed. In their place, a new tort should be created by statute.

B. THE NEW TORT

1. The Basis of Liability

We begin the process of setting out the elements of this new tort by reiterating the principle that the defendant (that is, the keeper of the animal) should be held liable even if he or she is not at fault in the immediate circumstances of the harm. As between an innocent keeper and an innocent victim, the loss should fall on the keeper. In this sense, the tort we propose will retain the strict liability elements of scienter and cattle trespass.

The appropriate plaintiff is any person who has suffered harm, injury or damage as a result of the actions of an animal.

The proper defendant ought to be any individual who has acted in a manner which justifies imposing on him or her legal responsibility for the animal's behaviour. Of course, a person who has legal ownership of the animal ought to be a proper defendant; in our view, the act of acquiring ownership of an animal implies an acceptance of responsibility for it. However, we believe that the law is correct in recognizing that ownership is not the only relationship with an animal which can give rise to legal liability for its actions. The law has used the term "harbourer" to describe an individual who has acted in a manner and developed a relationship with an animal which justifies the imposition of liability.[2] Case law has identified such actions as providing an animal with food, shelter, care and protection and exercising control over it for a significant period of time as elements of harbouring.[3] The identification of an individual as a harbourer depends on the facts of each situation and a person may be a harbourer even in the absence of one of these factors. However, it is clear that "a meal of mercy to a stray dog" or a brief and temporary possession of an animal does not constitute harbouring. The key is the extent to which an individual has acted in a manner which indicates his or her acceptance of responsibility for the animal. We approve of the law in this respect and recommend that anyone who harbours an animal ought to be a suitable defendant in the tort we propose.[4]

RECOMMENDATION 2

The owner or harbourer of an animal should be held strictly liable to the victim for damage to real or personal property or physical injuries caused by the animal.

Given our adoption of a relatively broad definition of a proper defendant, it is clear that we contemplate the possibility of several defendants: two or more individuals may have jointly harboured an animal, or one may own it and another may have harboured it. In cases involving several defendants, we are of the view that their liability to the plaintiff ought to be joint and several. They are, of course, entitled to take other legal steps to have their liability toward one another determined, but the focus of this tort is the apportionment of liability as between plaintiffs and defendants.

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[2]See for example *Christie* v. *Dobbyn* (1947), 55 Man.R. 316 (Co.Ct.); *M'Kone* v. *Wood* (1831), 5 Car.& P. 1, 172 E.R. 850 (K.B.); *Hunt* v. *Hazen*, 254 P.2d. 210 (Ore. S.C. 1953).

[3]Perhaps the most succinct statement of what harbouring implies is found in *Hunt* v. *Hazen*, *supra* n. 2, where Perry J. stated that harbouring implies ". . . *an intent* to exercise control over the animal and to provide food and shelter of at least a semi-permanent nature."(at 213). Some cases have stressed the importance of control over the animal: see *North* v. *Wood*, [1914] 1 K.B. 629 and *Walker* v. *Hall* (1876), 40 J.P.Jo. 456 (Exch.). Others have emphasized the provision of protection as the key to harbouring: see *Fitzgerald* v. *Brophy*, 1 Pa.Co.Ct.R. 142; *Wood* v. *Campbell*, 132 N.W. 785 (S.D.S.C. 1911); *McClain* v. *Lewiston Interstate Fair & Racing Ass'n Ltd.*, 104 P. 1015 (Ida. S.C. 1909).

[4]The term "keeper" is also used in common law to refer to a proper defendant and is often equated with "harbourer". The reason we have chosen not to use "keeper" is that the corresponding term, "keep", as colloquially used, suggests that a merely temporary or momentary possession will be sufficient to make the possessor a "keeper".

RECOMMENDATION 3

Where there is more than one owner or harbourer of an animal, they should be held jointly and severally liable for the harm caused by the animal.

As noted in Chapter 4, the issue of remoteness of damage was not resolved by courts under the common law. In setting out a test on remoteness for our proposed tort, our primary consideration is that the test should not differ substantially from those utilized in torts which the plaintiff could use as alternatives to our proposed tort. To impose a different test would create unnecessary inconsistencies in the law; being found liable in one tort would subject a defendant to greater obligations than being found liable in another. Primarily for this reason, we propose that our statutory tort adopt the same test for remoteness as is used in negligence, its primary alternative. Negligence has adopted the test of foreseeability, which we see as entirely suitable for the purposes of the statutory cause of action we recommend.

RECOMMENDATION 4

Damages awarded to the defendant should be calculated in the same manner as in the tort of negligence.

2. Contribution by the Plaintiff

In asserting that, as between an innocent owner or harbourer and an innocent victim of an animal, the liability should fall on the owner, we do not propose to impose liability on the owner of the animal in every circumstance. Instead, we recommend that the owner be permitted to raise a defence which, if proven, would reduce or even eliminate his or her liability.

In our view, the only relevant defence to the defendant's liability for his or her animal's actions is the fact that the plaintiff, through fault or negligence, has contributed to the incident which resulted in the harm. The plaintiff may have contributed to the incident in a number of ways. The plaintiff may have brought the harm on himself or herself by behaving recklessly or by provoking the animal's rage. This would be the case, for example, if the plaintiff struck an animal so that it reacted in self-defence. Alternatively, the plaintiff may have accepted the risk of harm in interacting with an animal, warned and fully aware of the danger. Agreeing with full knowledge of the risk to ride an unbroken horse might be an example of this situation. A third example of a victim's contribution to the harm is that of a burglar who is attacked by a guard dog.

If the plaintiff has been able to prove that the harm was caused by the defendant's animal, and absent any contribution to the harm on the part of the plaintiff, a judge should have no choice but to impose on the defendant full liability for the harm or damage suffered. However, if the harm resulted, at least in part, from the plaintiff's actions, a judge should be allowed to reduce the defendant's liability in proportion to the degree to which the plaintiff's fault or negligence contributed to the harm. Indeed, if the plaintiff's fault or negligence may be said to be the sole contributing factor, a judge should be allowed to reduce the defendant's liability to zero. In essence, we are permitting judges to apportion liability on the basis of fault or negligence except that, unlike negligence and similar torts, it is not the fault of the defendant which is key but the fault of the plaintiff. The defendant will be assumed to be fully liable for his or her animal's actions except to the extent that the plaintiff's fault or negligence has contributed to the event causing harm.

We recognize that our approach is not "pure" in that it permits fault to be considered by the judge in apportioning the cost of the injury. However, we believe that our approach is justified if

one considers that the rationale for imposing *prima facie* liability is that the defendant created the risk of harm by choosing to keep the animal. In cases when the plaintiff's foolishness or lack of foresight contributed to the risk or can be said to have been the sole cause of the damage, the plaintiff must share or, in appropriate cases, bear entirely the costs of the harm suffered.

RECOMMENDATION 5

The liability of the defendant should be reduced, in proportion to the degree, if any, to which the fault or negligence of the plaintiff caused or contributed to the harm.

3. Contribution by Third Parties

We have considered the inclusion of the "act of God" and "act of a third party" defences in our proposed statutory tort and have come to the conclusion that both ought to be rejected. Both defences rest on the premise that there cannot be liability without fault on the part of the defendant. Since the defendant cannot be blamed in the event of either an act of God or the act of a third party, the argument is that the defendant cannot be held liable once either of these defences are proven.

However, we have already rejected the principle of fault-based liability in the case of animal-caused injuries. We have accepted the principle that liability ought to be imposed on the defendant even in the absence of fault because of his or her assumption of responsibility in choosing to keep the animal. In other words, the defendant cannot escape liability by arguing that the event was out of his or her control. If this is the case, consistency demands that the defendant should be just as liable when it is an act of nature or the actions of a third party which makes possible the harm as when the actions of the animal are the sole cause of the damage.

More importantly, it must be remembered that, in the case of the intervention of a natural disaster or a third party, the real question being posed to the court is not whether it is fair to impose liability on an owner for an event which was outside of his or her control. The real issue is which of two innocent parties - the innocent owner or the innocent victim - must bear the loss. In our view, justice demands that the owner compensate the victim.

Of course, a third party who contributes to the harm caused by an animal clearly ought to be held accountable for his or her actions. A defendant should certainly be authorized to seek indemnification from such a third party.

RECOMMENDATION 6

The owner or harbourer of an animal should be allowed to bring an action for indemnification against a third party to the extent that the third party's fault or negligence contributed to the incident.

4. Summary of the Tort

In short, we recommend that a cause of action be created which will impose liability on the owner or harbourer of an animal for the harm caused by the animal. To the extent that the plaintiff's actions contributed to the harm, the defendant's liability ought to be reduced or even eliminated. The defendant ought to have a right of indemnification against any third party whose actions contributed to the harm.

C. ADDITIONAL ISSUES OF IMPLEMENTATION

1. Liability of the Crown

To the extent that the provincial government is the owner of animals, it is our view that it should be liable under the proposed tort for any injury or harm caused by them, like any other owner. However, no specific provision to that effect should be necessary. Subsections 4(1)(c) and (d) of *The Proceedings Against the Crown Act*[5] already clearly provide that the Crown is subject to all those liabilities ordinarily imposed in tort in respect of any breach of the duties attaching to the ownership, possession or control of property, and under any statute.

Of course, it is not our intention to make the provincial government liable for injury or harm caused by wildlife. Although section 85(1) of *The Wildlife Act* vests title to wildlife in the Crown,[6] section 85(2) specifically exempts the Crown from liability for "death, personal injury or property damage caused by wildlife."[7]

2. Implementation by Legislation

The reforms which we have recommended will require legislation. To facilitate the enactment of new legislation, we have prepared a draft statute. It is set out in the following Chapter with commentary and is restated without commentary in Appendix B.

RECOMMENDATION 7

The recommendations contained in this Report should be implemented by enactment of a new statute similar to the draft Act set out in Appendix B.

D. EFFECT OF THE PROPOSED REFORMS

We believe that our recommendations would rectify many, if not all of the defects apparent in the present common law rules concerning scienter and cattle trespass. What follows is an outline of the difficulties identified in scienter and cattle trespass in Chapter 4 and the manner in which our proposal would rectify the difficulties.

1. Scienter

(a) Propensity and anomalies in classification

Our proposed tort would treat all animals in the same manner, there would be no need to classify animals as *mansuetae naturae* or *ferae naturae*. Among those species previously classed as *mansuetae naturae*, a previously demonstrated dangerous propensity would be irrelevant.

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[5]*The Proceedings Against the Crown Act*, C.C.S.M. c. P140, ss. 4 (1)(c) and (d).

[6]*The Wildlife Act*, C.C.S.M. c. W130, s. 85(1).

[7]*The Wildlife Act*, C.C.S.M. c. W130, s. 85(2).

(b) Essence of the tortious act

As noted, some judges have held that only if the defendant has failed to properly restrain the animal or has lost control over it can he or she be held liable. Other judges have held that this factor is irrelevant. Our proposed tort would eliminate this uncertainty. The defendant would be held liable whenever his or her animal caused damage unless he or she could reduce the liability by showing that the plaintiff contributed to the incident.

(c) Apportionment

The new tort allows a judge to apportion liability between the parties.

(d) Trespass defence

As noted earlier, the defence that the plaintiff was trespassing means that individuals who were not even aware that they were trespassing and toddlers who wandered onto the defendant's property are unable to recover for harm suffered. The new tort would not allow the defendant to raise such a defence. However, a judge would be permitted to reduce or eliminate liability altogether if the trespass were of such a nature as to justify this conclusion.

(e) Act of God or third party

The proposed tort would end the ambiguity in the common law concerning the existence of these defences by eliminating both.

(f) Remoteness of damage

Our proposal would resolve the current tension between the directness test and the foreseeability test by adopting the test which is used in negligence, that is, foreseeability.

(g) Section 26 of *The Animal Husbandry Act*

Our proposed tort would resolve the dispute over the proper interpretation of section 26 by treating dogs in the same manner as every other animal. In effect, it would apply one interpretation of section 26 to every animal.[8]

2. Cattle Trespass

(a) Subjects of the tort

Since the new tort would apply to every animal, the traditional exclusion of keepers of dogs and cats from liability in cattle trespass would be eliminated. All animal owners would face the same liability.

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[8]Our proposal would adopt the interpretation of section 26 offered in *Witman* v. *Johnson* (1990), 74 D.L.R. (4th) 428 (Man.Q.B.) and would expand it to include every animal.

(b) Limits of the action

The new tort would apply to any harm or damage caused by an animal and the victim of such harm could seek recovery from the animal's keeper. Unlike cattle trespass, the occupier of land onto which the animal trespassed would not be the only potential plaintiff. Non-occupiers, including travellers on roads and highways, would be entitled to bring an action against the keeper of an animal.

The new tort would also allow someone to bring an action if animals, while being driven down a road, entered his or her property and caused damage.[9]

(c) Joint and several liability

While this issue was unresolved in common law, the new tort would make defendants jointly and severally liable to the plaintiff for harm caused by their animals.

(d) Duty to fence

The duty to fence would not be considered a defence in and of itself, although it may well be considered relevant in determining the contribution to the harm on the part of the plaintiff. A judge would then have the right to take this duty into account in reducing or eliminating liability.

(e) Defences

The new tort would eliminate the "act of God" and "act of a third party" defence, although an act of a third party could give rise to an action on the part of the defendant for an order of indemnification.

(f) Remoteness of damage

As with scienter, the present uncertainty in cattle trespass with respect to the test for remoteness of damage is resolved in our proposed tort by adopting the test of foreseeability, the current test in the tort of negligence.

(g) Effects of statutory provisions

Appendix A contains a discussion of the present state of confusion concerning provisions of *The Animal Husbandry Act* which affect statutory liability for damage caused by animals. Briefly, the legislation grants municipalities the power to allow animals to run at large and also gives them the power to limit the liability of the owners of such animals. As noted in Appendix A, Manitoba courts have had a difficult time interpreting these provisions. As the law presently stands, a municipality may not merely limit liability as section 5(1)(e) of *The Animal Husbandry Act* ostensibly allows. Cases emanating from the Manitoba Court of Appeal have resulted in a "Catch-22": municipalities cannot limit liability without expressly permitting animals to run at large, but in permitting them to run at large, liability for the harm they cause has been eliminated altogether.

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[9]We considered recommending the elimination of section 24 of *The Animal Husbandry Act* which grants an additional cause of action against drovers who have been convicted of allowing animals under their care to stray from roadways. However, such a recommendation would be beyond the scope of this Report.

In addition, the Court of Appeal has defined running at large in a manner which has a significant and, we believe, negative effect on the law of liability for animal-caused harm.

The issue of whether a municipal government ought to reduce or eliminate liability for animal-caused harm and, if so, under what circumstances and to what extent, is not addressed by our proposed new tort and is, in our view, beyond the scope of this Report. A decision on such an issue would have to be made after consultations with municipal authorities and as part of a comprehensive municipal planning scheme. We suggest that it is a decision best left to the government department responsible for municipal affairs.

E. EXAMPLES

To illustrate further the way in which we envision our proposals working, we set out several fact situations, indicating what the result would likely be at common law and then how they would be dealt with under our recommendations.

> *A owns a dog and keeps it locked up behind a fence. Someone (perhaps the mail carrier, a casual visitor or a mischievous child in the neighbourhood) opens the gate to the fence. The dog escapes and bites B, who is walking down the street and does nothing to provoke the attack.*

At common law, A would be held liable only if the dog had previously demonstrated a propensity for violent behaviour of this sort and A knew it. Even then, it is unclear whether the act of the third party in opening the gate would clear A of liability for the incident. However, the common law has been changed in Manitoba by section 26 of *The Animal Husbandry Act*. The courts have interpreted section 26 in two ways. The first would make A absolutely liable despite the actions of a third party. The second interpretation might allow A to raise a third party defence. If a suit were brought under the law of negligence, A would not be liable unless A's precautions in fencing the dog were found to be unreasonable.

Under our proposed statutory tort, A would be held liable because the dog bit B, the dog belonged to A and B did nothing to contribute to the incident.

> *A owns a herd of cattle and keeps them behind a barbed wire fence. An unusually powerful thunderstorm startles the cattle and they rush around the pasture in a frenzy. A, realizing the danger, goes to the pasture and tries to restrain the cattle. Despite these efforts, the cattle break through the fence, charging onto B's property where they trample B's crop. The next morning, as they are rounding up the cattle, one of the cattle attacks C, B's hired hand.*

A would not likely be held liable in negligence as long as the fence was found to be of reasonable size and strength. Certainly, A's actions the night of the storm cannot be said to be negligent. A would be liable in cattle trespass for the damage to B's crop but would not be liable for the injury to C in cattle trespass, since C is not the owner or occupier of the land. The tort of scienter would be unavailable for C unless the animal which attacked her had demonstrated a previous propensity for such behaviour and A knew it.

Under our proposed tort, A would be liable for B's trampled crop and the injuries to C, unless A could show that B or C somehow contributed to the incident.

A owns a dog which has a dangerous temperament and has attacked people in the past. A keeps it chained and enclosed in a fence. Signs warn visitors of the dog's dangerous nature. B comes to visit and decides to pet the dog. A warns B that the dog will bite but B shrugs off the warning, saying "I'm good with dogs." The dog bites B.

A would not likely be found liable in negligence because A has taken every reasonable precaution to prevent the harm. A would be *prima facie* liable in scienter but could raise the defence that B had voluntarily and with full knowledge exposed himself to the risk of being harmed. A would almost certainly escape liability. If the "escape from control" model were used, A would be even less likely to be held liable, since the animal remained chained at all times. However, section 26 of *The Animal Husbandry Act* is relevant in this situation as well. One interpretation of it would make A liable in spite of B's actions. The second interpretation would permit A to point to B's actions and his own precautions as a defence.

Under our tort, A would also have to raise a defence in order to escape liability. Here, A's defence is that B contributed to the incident by petting the dog while fully aware of the risk of doing so. B's contribution to the incident is so substantial that the judge might well eliminate A's liability altogether.

A owns a cat. While leaving for work one day, A opens the door and the cat escapes the house. A decides not to look for the cat until after work. The cat wanders around the neighbourhood and finds its way to B's home. There, it digs up B's flower garden and gets into a fight with B's dog. Hearing the fight, B comes out to investigate and tries to chase the cat away. Instead of running away, the cat scratches B. B contracts cat scratch fever.

Since cats are excluded from cattle trespass, no recovery can be made in that tort. B can recover in scienter only if the cat has previously demonstrated a propensity for this sort of behaviour and A knew it. If the cat has never before attacked or threatened to attack a person, B cannot recover in scienter. Even if the cat has shown these inclinations, A must be shown to have known of them before A will be held liable. B might well recover in negligence since A should not have allowed the cat out of the house and should have known that the failure to get it back might have resulted in the kind of incident which actually took place. Whether B would be held to be contributorily negligent in trying to chase the cat from her yard depends on how reasonable her actions were in the eyes of a judge.

In our tort, A would be 100% liable unless she could show that B contributed to the incident in a manner which should reduce her liability; again, this will depend on a judge's assessment of the reasonableness of B's actions.

A is driving his cattle down a country road. Some of them stray off the road into B's field. A decides to stay with the main herd, believing that if he leaves the main herd to pursue the few which escaped, even more harm could result. After getting the main herd safely home, A returns immediately to find the ones which strayed. However, before they can be rounded up, they cause damage to B's prizewinning pumpkins.

B could not recover in cattle trespass, since straying is viewed as an inevitable incident to A's right to drive cattle down the road. B could have recovered something if A had not responded within a reasonable time to round up the cattle. In Manitoba, B might be in a position to recover by virtue of section 24 of *The Animal Husbandry Act.* A would have to be found guilty of allowing his animals to stray under section 24(2), at which point he would be fined at

least $10. Then, A and B could each choose an arbitrator who would themselves choose a third arbitrator. The three arbitrators would determine the amount of damage suffered by B and A would be forced to pay it. However, the arbitration process could only take place if A was prosecuted under section 24(2). After recovering damages through the arbitration process, B could seek further damages by suing A in negligence or some other tort.

In our new tort, the procedure set out in section 24 would not be affected, but B would have the option of proceeding in our new tort, rather than in negligence. If B could prove that A's cattle caused the damage, B would win the case since B did not contribute to the incident in any way.

CHAPTER 6

THE ANIMAL OWNERS' LIABILITY AND CONSEQUENTIAL AMENDMENT ACT (ANNOTATED)

In this Chapter, we attempt to demonstrate how our recommendations would be implemented. We set out a draft Animal Owners' Liability Act, together with annotations explaining the intent and effect of each section. The Act is restated without annotations in Appendix B.

Draft Act	Annotations
HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:	
Definitions 1 In this Act,	
"animal" means any creature that is not human;	*The definition of animal is purposefully broad. The species of animal should not make a difference in its owner's liability.*
"court" means the Court of Queen's Bench;	
"owner", when used in relation to an animal, includes a person who harbours the animal.	*An "owner" is the person who will be held liable for the harm caused by his or her animal. The word "owner" is defined broadly to include anyone who "harbours" an animal. The term "harbour" has been defined by courts in Canada, the United States and Britain to mean controlling an animal and providing it with food, shelter, care and protection over a significant period of time. Whether or not a person is harbouring an animal must be a question of fact determined from the circumstances of each case. A judge must determine whether, in all the circumstances, an individual's*

relationship with an animal is such that he or she should be expected to accept responsibility for the animal's actions.

Liability of owner
2(1) The owner of an animal is liable for damages resulting from any harm that the animal causes to a person or to property, but a court shall reduce the damages awarded in proportion to the degree, if any, to which the fault or negligence of the plaintiff, in whole or in part, caused or contributed to the harm.

Subsections 2(1) and 2(2) form the core of the new cause of action. The owner of an animal will be prima facie liable for its actions. As emphasized in subsection (2), the actions and precautions taken by the owner are irrelevant to this liability and it is not necessary to show that the owner acted negligently or was to blame in any way. The common law requirement that the owner know of an animal's dangerous propensity is also expressly disavowed.

No-fault liability
2(2) Liability under this section does not depend upon the owner's knowledge of any propensity of the animal or upon any fault or negligence by the owner.

While the owner of the animal is prima facie liable for his or her animal's actions, the court may reduce or eliminate the liability if it can be shown that the plaintiff contributed to or caused the harm due to fault or negligence. The use of the term "fault", in addition to "negligence", makes it clear that judges will have an even broader scope than in the case of contributory negligence to reduce or eliminate liability on the part of the defendants.

Calculation of damages
2(3) Damages awarded under this section shall be calculated in the same manner as in the tort of negligence.

The main problem faced by courts when assessing damages is the point at which they become too remote. Subsection (3) resolves this problem by adopting the test used in negligence: damages will be awarded for all harm which was reasonably foreseeable in the circumstances. To ensure that inconsistencies between our proposed tort and the tort of negligence do not develop, we have explicitly linked our test to that of negligence; as negligence evolves in this area, the statutory tort will evolve with it.

Joint and several liability
2(4) Where there is more than one owner of an animal, they are jointly and severally liable under this section.

It is possible that there will be two or more owners of an animal. For example, two people may have joint title to an animal or one may have title to it while another may have harboured it. Whenever there is more than one owner, the plaintiff can look to any one of them for the entire amount of the judgment.

Contribution and indemnity

2(5) An owner who is liable to pay damages under this section is entitled to recover contribution and indemnity from any other person in proportion to the degree to which the other person's fault or negligence, in whole or in part, caused or contributed to the harm.

If the harm can be attributed to the actions of someone other than the owner, the owner is still liable for the harm to the victim, but may recover all or part of the damages from this other person. Such a person will often be a third party (that is, he or she is neither an owner nor a victim). However, this section may also be used by one owner to recover contribution or indemnity from another owner. The extent of an owner's recovery from this other person is determined by the extent to which the other person's fault or negligence contributed to or caused the harm.

Cause of action not exclusive

3 The cause of action created by this Act is in addition to any other cause of action that exists at common law or by statute.

The cause of action created by this statute will likely be more attractive to plaintiffs than actions in negligence, nuisance, occupiers' liability or other torts. Nevertheless, section 3 makes it clear that these other causes of action may still be pleaded by a plaintiff.

Scienter and cattle trespass abolished

4 No person shall bring an action or recover damages in the common law torts of scienter and cattle trespass where the cause of action arises after this Act comes into effect.

Section 4 abolishes the common law torts of cattle trespass and scienter for any harm caused by an animal after this Act takes effect. Any harm caused prior to the effective date of the Act must, of course, be dealt with under the law which existed before this Act came into force.

C.C.S.M. c. A90 amended

5 Section 26 of The Animal Husbandry Act is repealed.

Since the new tort relates to all animals, including dogs, and sets out a formula for liability which is to be applied uniformly, there is no need for section 26, which modified the common law as it related to dogs.

C.C.S.M. reference

6 This Act may be cited as The Animal Owners' Liability Act and referred to as chapter XXX of the Continuing Consolidation of the Statutes of Manitoba.

Coming into force

7 This Act comes into force on the day it receives royal assent.

CHAPTER 7

LIST OF RECOMMENDATIONS

We now restate this Report's recommendations:

1. The common law torts of cattle trespass and scienter should be abolished and section 26 of *The Animal Husbandry Act* should be repealed. In their place, a new tort should be created by statute. (p. 33)

2. The owner or harbourer of an animal should be held strictly liable to the victim for damage to real or personal property or physical injuries caused by the animal. (p. 34)

3. Where there is more than one owner or harbourer of an animal, they should be held jointly and severally liable for the harm caused by the animal. (p. 35)

4. Damages awarded to the defendant should be calculated in the same manner as in the tort of negligence. (p. 35)

5. The liability of the defendant should be reduced, in proportion to the degree, if any, to which the fault or negligence of the plaintiff caused or contributed to the harm. (p. 36)

6. The owner or harbourer of an animal should be allowed to bring an action for indemnification against a third party to the extent that the third party's fault or negligence contributed to the incident. (p. 36)

7. The recommendations contained in this Report should be implemented by enactment of a new statute similar to the draft Act set out in Appendix B. (p. 37)

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 23rd day of November 1992.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

THE EFFECT OF *THE ANIMAL HUSBANDRY ACT* ON CATTLE TRESPASS

The liability of an owner of an animal for cattle trespass may be affected by two provisions in *The Animal Husbandry Act*.[1] Unfortunately, these two sections are conceptually problematic and have proven difficult for the courts to interpret. Ultimately, they raise issues of local control and should be addressed in the context of municipal policy; however, because of their impact on liability in tort, we offer a brief discussion of the problem.

A. THE PROBLEMS

The first problematic section of *The Animal Husbandry Act* is section 5(1)(a) which, among other things, gives municipalities the power to allow animals to run at large. However, the *Act* fails to state what, if any, effect this express permission would have on the liability of the owners of animals which do damage while legally running at large.

Unfortunately, legislative provisions which permit or even authorize certain actions without addressing the issue of liability are not uncommon. In these situations, courts are faced with a dilemma. Should a defendant be held liable for doing something permitted or even required by statute? On the other hand, is it fair that a plaintiff be left without redress when the statute has not eliminated liability?

Courts have come down on both sides of this difficult question[2] and the Supreme Court of Canada has not offered any clear direction on the matter.[3]

Municipal by-laws passed pursuant to section 5(1)(a) are typical examples of statutory authorization. They permit cattle to run at large (an action which would normally result in strict liability under the common law), without addressing the issue of liability. Courts are left with a classic problem: in passing section 5(1)(a), did the Legislature intend to permit municipalities to eliminate liability or were owners of livestock still expected to be responsible for the damages their cattle caused?

One clue to interpreting section 5(1)(a) is the fact that, at common law, no prohibition exists against animals running at large; instead, their owner is liable for their trespass. What purpose would then be served by a by-law permitting animals to run at large? It could not be an

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[1]*The Animal Husbandry Act*, C.C.S.M. c. A90.

[2]A.M. Linden, "Strict Liability, Nuisance and Legislative Authorization" (1966), 4 Osgoode Hall L.J. 196, has attempted to find patterns of judicial decisions.

[3]In *Tock* v. *St. John's Metropolitan Area Board* (1990), 64 D.L.R. (4th) 620 (S.C.C.), six judges of the Court offered three views of the law without one view receiving the support of a majority.

attempt to override section 3(1) of *The Animal Husbandry Act* (the statutory provision prohibiting certain animals from running at large), because section 3(1) specifically states that municipal by-laws do not affect its prohibitions. Logically, then, only two options exist: either the by-law envisioned by section 5(1)(a) is declaratory (and largely superfluous in that it permits something which has always been permitted), or it contemplates a municipality limiting or eliminating liability.

However, another clue suggests an opposite conclusion. Section 5(1)(e) of *The Animal Husbandry Act* permits municipalities to pass by-laws

> . . . for limiting the right to recover damages for any injury done by animals or poultry permitted by the by-law to run at large and to trespass upon land, or for the trespass, to cases in which the land is enclosed by a fence of the nature, kind and height required by the by-law.

In other words, municipalities are given the power to limit the traditional liability imposed by the common law. The fact that municipalities are specifically permitted to limit liability in section 5(1)(e) suggests that a by-law permitting animals to run at large should not be interpreted as eliminating liability altogether. If the Legislature felt it necessary to authorize in express terms a municipality's power to *limit* liability, it is arguable that it would also have been necessary to authorize in express terms a municipality's power to *eliminate* liability altogether.

Section 5(1)(a) also raises another issue: how does a municipality go about limiting the liability of owners of stray animals? In particular, is a by-law permitting an animal to run at large necessary before the liability of its owner may be limited?

B. THE CONFLICTING INTERPRETATIONS

These two issues were considered by the Manitoba Court of Appeal in four cases between 1907 and 1923; they have not been litigated since. Unfortunately, the four decisions are inconsistent and even contradictory, leaving the present state of the law in some confusion.

The Court first considered the latter issue. In 1907, it ruled that a municipality could not limit the liability of animal owners under section 5(1)(a) unless it also passed a by-law permitting animals to run at large. Only if an animal were permitted to run at large could its owner's liability be limited.[4]

In 1910, however, the Court, while not admitting it had done so, altered the position it had taken in 1907. In *Jack* v. *Stevenson*,[5] it decided to allow a municipality to limit an owner's liability even without passing a by-law permitting the animal to run at large. However, rather than overruling its earlier decision, the Court decided that animals which had strayed onto adjoining property were not in fact running at large. In effect, the Court severed the concepts of trespass and running at large: animals would be trespassing whenever they entered the property of someone other than their owner but would be running at large only if they entered non-adjoining property.

On the same day as it decided *Jack* v. *Stevenson*, the Court determined its position on the initial question: whether statutory authority to allow one's animals to run at large would exempt the owner from liability for their trespass while doing so. In *Dalziel* v. *Zastre*,[6] a municipality had tried to comply with the Court's 1907 ruling by passing both a by-law permitting animals to

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[4]*Watt* v. *Drysdale* (1907), 17 Man. R. 15 (C.A.).

[5]*Jack* v. *Stevenson* (1910), 19 Man. R. 717 (C.A.).

[6]*Dalziel* v. *Zastre* (1910), 19 Man. R. 353 (C.A.).

run at large and another limiting liability. When it struck down the by-law which purported to limit liability, the Court was forced to consider the effect of the remaining by-law which allowed animals to run at large. It held that the common law was still fully applicable. In other words, a by-law permitting animals to run at large did not have any effect on the liability of the owner of animals which caused damage while doing so.

In 1923, the Court reversed itself on this issue as well although, again, it did not admit to doing so. Faced with a municipality which had permitted animals to run at large but which had not tried to limit liability, the Court ruled that the by-law allowing animals to run at large extinguished completely any liability of animal owners for damage they might cause while roaming free. There was no need to pass a by-law which merely limited liability.[7]

Because this latter case, *Jukes* v. *Miskelly*, is the most recent Manitoba decision in the area of cattle trespass and because no higher court has addressed the defence of statutory authorization conclusively, it appears that the decision is still good law in Manitoba. If so, it stands for the proposition that municipalities can extinguish the law of cattle trespass by simply passing a by-law permitting animals to run at large.

However, the four decisions of the Manitoba Court of Appeal raise a number of serious questions. For example, the Court in *Jack* v. *Stevenson* held that cattle which trespass onto adjoining land are not considered to be running at large. If this is the case, what are the implications for section 4, which expressly imposes liability on the owner of animals running at large when prohibited from doing so? Does *Jack* v. *Stevenson* mean that, if animals are prohibited from running at large, the owner of cattle trespassing onto adjoining land is not liable under section 4, but the owner of cattle crossing the road to trespass is liable?[8]

Jukes v. *Miskelly* has held that, merely by permitting animals to run at large, a municipality has eliminated the liability of their owners for the damage they cause. But the effect of *Jack* v. *Stevenson* on this principle is unclear. Juxtaposing the two cases suggests that, in a municipality which allows animals to run at large, the owner of animals which cross the road before trespassing or move through several fields would not be liable for their trespass, while the owner of animals which merely trespass onto adjoining land would be liable.[9]

C. CONCLUSION

In the light of these decisions, a municipality faces real difficulties if it wishes to pass a by-law limiting the liability of the owner of animals to cases where the victim has protected his or her property by a proper fence. Despite the fact that this is exactly the sort of by-law envisioned by section 5(1)(e), two of the Court of Appeal's decisions have made this sort of by-law impossible. *Watt* v. *Drysdale*[10] (which has not been overruled) held that, in order to limit liability, a municipality would have to pass two by-laws: one which would limit liability to cases where the victim has erected a proper fence, and another expressly permitting animals to run at large. But *Jukes* v. *Miskelly*[11] stands for the proposition that passing the second of these by-laws would eliminate liability entirely. Given these two decisions, it appears that a municipality has no avenue open to it if it merely wishes to limit, rather than extinguish, liability.

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[7] *Jukes* v. *Miskelly* (1923), 33 Man. R. 67 (C.A.).

[8] Presumably, even if the owner was not liable pursuant to the absolute liability created in section 4, he or she might still be found liable in common law under cattle trespass.

[9] The municipality could escape from this situation by allowing the animals to run at large *and* to trespass, as section 5(1)(a) allows the municipality to do.

[10] *Watt* v. *Drysdale*, *supra* n. 4.

[11] *Jukes* v. *Miskelly*, *supra* n. 7.

APPENDIX B

THE ANIMAL OWNERS' LIABILITY AND CONSEQUENTIAL AMENDMENT ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions
1 In this Act,

"animal" means any creature that is not human;

"court" means the Court of Queen's Bench;

"owner", when used in relation to an animal, includes a person who harbours the animal.

Liability of owner
2(1) The owner of an animal is liable for damages resulting from any harm that the animal causes to a person or to property, but a court shall reduce the damages awarded in proportion to the degree, if any, to which the fault or negligence of the plaintiff, in whole or in part, caused or contributed to the harm.

No-fault liability
2(2) Liability under this section does not depend upon the owner's knowledge of any propensity of the animal or upon any fault or negligence by the owner.

Calculation of damages
2(3) Damages awarded under this section shall be calculated in the same manner as in the tort of negligence.

Joint and several liability
2(4) Where there is more than one owner of an animal, they are jointly and severally liable under this section.

Contribution and indemnity
2(5) An owner who is liable to pay damages under this section is entitled to recover contribution and indemnity from any other person in proportion to the degree to which the other person's fault or negligence, in whole or in part, caused or contributed to the harm.

Cause of action not exclusive
3 The cause of action created by this Act is in addition to any other cause of action that exists at common law or by statute.

Scienter and cattle trespass abolished

4 No person shall bring an action or recover damages in the common law torts of scienter and cattle trespass where the cause of action arises after this Act comes into effect.

C.C.S.M. c. A90 amended

5 Section 26 of The Animal Husbandry Act is repealed.

C.C.S.M. reference

6 This Act may be cited as The Animal Owners' Liability Act and referred to as chapter XXX of the Continuing Consolidation of the Statutes of Manitoba.

Coming into force

7 This Act comes into force on the day it receives royal assent.

REPORT ON TORT LIABILITY FOR ANIMALS

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

The Manitoba Law Reform Commission's Report on *Tort Liability for Animals* proposes a new, statutory source of liability for owners and keepers of animals which cause harm or damage to the person or property of others. In so doing, the Report recommends the repeal of two ancient torts which the Commission believes are riddled with inconsistencies and anomalies. The new tort is designed to achieve a fair balance between the owners of animals and people who are harmed by them.

THE CURRENT LAW

Other than the broad tort of negligence, liability in Manitoba for harm caused by animals is based on two ancient torts which are over 600 years old. These torts are known as scienter and cattle trespass.

Scienter

Scienter holds an animal owner liable for harm which the animal causes so long as the animal had previously demonstrated a propensity for the sort of behaviour which caused the harm and the owner knew of this propensity. It divides all species of animals into two categories: animals which are "naturally fierce" (*ferae naturae*) and those which are "naturally tame" (*mansuetae naturae*). Animals in the former category are deemed to have demonstrated a dangerous propensity and their owners are deemed to have known of it. This presumption does not apply to animals in the latter category and both the previously demonstrated propensity and the owner's knowledge must be shown before liability will be imposed.

Problems with scienter include the fact that no universal criteria have been developed with which to categorize species of animals. As a result, some anomalies have developed; for example, bulls have been categorized as tame, but domesticated Asian elephants are classified as wild. Courts have also had to deal with the problem of connecting the harm caused with the previously demonstrated propensity. For example, had a dog which habitually leapt on people as a friendly greeting established a dangerous propensity relevant to the bite it gave someone while leaping on him or her? Finally, courts have taken differing views on the obligation of the owner. Some courts have held that any precautions taken by the owner are irrelevant, while others have taken into account the reasonableness of the precautions in reaching a verdict. As a result, courts have reached opposite conclusions concerning liability in cases with virtually identical facts.

In Manitoba, scienter has been altered with respect to dogs by a statutory provision. Unfortunately, courts in this province have interpreted this provision in two different ways and courts in other provinces with similar legislation have adopted yet another interpretation.

Cattle Trespass

Despite its name, cattle trespass is not restricted to cattle. It applies to livestock generally and includes horses, goats, sheep, pigs, ducks and geese; however, it does not apply to dogs or cats. The tort makes the owner of livestock liable for harm which they may cause while they are wrongfully on another person's property.

As in scienter, cattle trespass is rife with anomalies. For example, there is no logical reason for the exclusion of dogs and cats from the tort while including ducks and geese. Another anomaly is the rule that, if the trespassing livestock harm the occupier of the property on which they are trespassing, he or she can recover for the injuries suffered. However, if anyone other than the occupier (his or her family or employees, for example) are harmed, no recovery is possible in this tort. We believe that such a law would be widely perceived as unjust. Finally, cattle trespass carries with it vestiges of a more rural, less technological past. For example, livestock being driven down a road are permitted to trespass onto adjoining property without any compensation for the landowner in cattle trespass; the courts apparently viewed the damage such animals caused as a necessary incident of holding land adjacent to a public thoroughfare. Another example is the rule that, while occupiers of land can recover for livestock trespassing upon it, drivers of vehicles on roads and highways cannot get compensation under cattle trespass if livestock wander onto roads and cause injury or damage. While this position flows logically from the definition of the tort as a trespass, it is also based on the belief (no longer widespread) that travellers on highways can expect to deal with animals on the road from time to time.

In addition to problems with the common law, legislation in Manitoba has affected liability for stray animals. However, the legislation is confusing and the courts have had great difficulty in interpreting it.

THE PROPOSED TORT

The Manitoba Law Reform Commission proposes that scienter and cattle trespass be abolished and recommends a new statutory source of liability. Although based on the principles of cattle trespass and scienter, the proposed tort would eliminate the inconsistencies and anomalies of the old torts.

The statutory tort being proposed by the Commission would adopt the presumption that the owner or harbourer (keeper) of animals are liable for the harm or damage they cause. This presumption is based on the belief that, if neither the owner nor the victim can fairly be blamed for the incident, the owner, rather than the victim, should bear the cost of the harm because the owner receives the benefits of income or companionship from keeping the animal. The Report notes that owners are also generally better able to prevent the animal from causing harm than are victims and are able to obtain insurance to protect themselves from the costs of liability.

The tort does not make liability absolute, however. Although animal owners are presumed to be liable, they may have their liability reduced or even eliminated if they can show that the victim contributed to the harm through his or her fault or negligence. For example, if a victim tried to pet a dog after being warned that it was dangerous, a judge could reduce or even eliminate the owner's liability.

If a third party (that is, someone who was neither the owner nor the victim) had contributed to the incident, the owner would still be liable to the victim, but would have the right to seek compensation from the third party.