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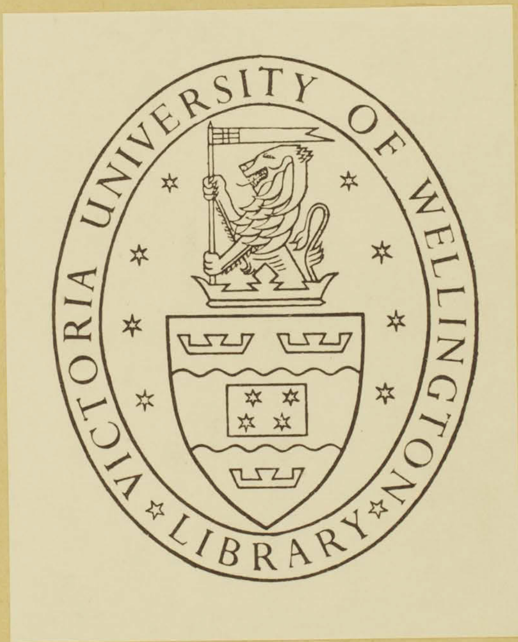
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LIABILITY FOR DANGEROUS ANIMALS:

ANALYSIS OF, AND OBSERVATIONS ON–

JAMES v. WELLINGTON CITY

D.W. Butler

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LIABILITY FOR DANGEROUS ANIMALS: ANALYSIS OF, AND OBSERVATIONS ON - JAMES v. WELLINGTON CITY [1972] N.Z.L.R.70 (S.C.); 978 (C.A.).

I. INTRODUCTION

The recent case of James v. Wellington City was the first case for some time to be brought under the scienter action. The scienter action, it will be remembered, is a distinct action in tort for damages for injury caused by animals. Liability is imposed on the keeper of an animal causing injury, on the basis of his knowledge of its dangerous propensity. The standard of knowledge required differs depending on which of two broad categories the animal in question comes within. Put simply, in the case of animals mansuetae naturae, that is of a species naturally harmless to man, actual knowledge (scienter) of the dangerous propensity causing the accident must be proved. However, in the case of animals ferae naturae, that is of a species naturally dangerous, then the keeper is deemed to have constructive knowledge of that dangerous propensity. Where an animal is of a species ferae naturae or where it is of a species mansuetae naturae and actual knowledge of the dangerous propensity is proved, then strict liability[1] is imposed on the keeper, for any injury arising from that propensity. The James case raised many interesting points, and serves well as an illustration of the complexities involved in the law relating to liability for animals. Tracing back to Mosaic times,[2] the scienter action

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1 "Strict liability" must not be confused with "absolute liability". By "strict liability" it is meant that the keeper is prima facie liable but may nevertheless raise a number of defences which may or may not absolve him of liability. Cf."absolute liability" where no defences are available. In the Supreme Court judgment the words "absolute" and "strict" are used interchangeably (see p.75 line 2 and p.77 line 2), it seems clear, however, that they are both used in the sense outlined above for "strict liability".

2 Exodus cxxi 28, 29.

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has evolved through the decisions of the courts. As a consequence of this there developed a certain amount of rigidity in the action, assumptions being created that have little accord with reality.[3] Nevertheless as New Zealand moves away from the law of torts with the introduction of the Accident Compensation Act 1972, and towards the "comprehensive entitlement" envisaged in the Woodhouse Report, it can be seen in retrospect that the _scienter_ action has played a small but important part in the field of accident compensation. It has provided a means for recompensing the victim of an animal attack where otherwise he might have failed. Quite apart from their academic interest, some of the points raised in _James_ v. _Wellington City_ may well turn out to be of practical significance. The question of the liability of a master to his servant for injury from the master's animal, for instance, could well arise again before that type of injury is covered by the Accident Compensation Act 1972, it being probable that there will be a backlog of accident cases for a number of years. Furthermore, as it stands at present, the Accident Compensation Act 1972 will not protect the non-earner involved in a non-motor-vehicle accident, thus a _scienter_ action could well come before the New Zealand courts again. With this in mind this paper sets out to provide primarily an analysis of the decisions in both the Supreme Court and the Court of Appeal, and secondly in doing this to illustrate the rationale on which liability under the _scienter_ action is imposed.

As with many of the other cases in this area, the facts in the _James_ case are slightly bizarre. James was employed by the defendant Corporation as a zoo-keeper. He had been employed by them for two years and at the time of his accident was the keeper in charge of the chimpanzee section of the zoo. On the day of the accident one of the chimpanzees was in an enraged state, James understandably went to the cage where the animal was kept, with the intention of pacifying him.

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3 E.g. It is now thought by some writers to be incorrect to classify all animals dangerous by species.

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Crouching down so as to be on a level with the animal, James succeeded after about two minutes in pacifying it. At this point there was a conflict of evidence, which in fact was never resolved by the judge. James said that as he rose and turned to leave the chimpanzee seized his hand, took it into the cage and bit off the left forefinger. The defendant corporation argued that in fact James had put his hand inside the cage, whereupon it was bitten. Nevertheless the outcome was that James lost his left forefinger.

James brought an action against the defendant corporation claiming damages, his sole allegation being that the chimpanzee was an animal *ferae naturae*, and that therefore there was strict liability on the defendant. In answer to this the defendant pleaded (i) that the chimpanzee was not an animal *ferae naturae*, and that even if it was there was (ii) no strict liability at common law in respect of injury by dangerous animals in the case of a master-servant relationship, and that (iii) the plaintiff's injury was not caused by any escape from security or control.

For reasons of convenience each defence is taken separately and both decisions (that of Quilliam J. in the Supreme Court and Richmond J. in the Court of Appeal) in so far as they relate to the particular defence, are dealt with under the same heading. The defence of *volenti non fit injuria* was not specifically pleaded yet was discussed by both judges, and for this reason a discussion of this aspect of the case follows the discussion of the "master-servant" defence. Further, some discussion of the defence of "no-escape" is included, although this defence was not discussed in either decision.

II. THE DEFENCE THAT THE CHIMPANZEE WAS NOT FERAE NATURAE.

The sole allegation by the plaintiff was that the chimpanzee was an animal *ferae naturae*, and that therefore there was strict liability on the defendant. Thus the first issue in the case was whether the chimpanzee was indeed an animal *ferae naturae*. Quilliam J.'s approach to this issue can be summarised as follows. Firstly he said the categorisation into *ferae naturae* and *mansuetae naturae* was less precise than was desirable and that a better classification appeared to be

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into animals dangerous or harmless.[4] Secondly he said that the essence of the action was knowledge on the part of the person having control that the animal was dangerous, but that with certain animals this knowledge would be presumed. He then went on to say that this rule had been first applied in the case of dangerous animals in Besozzi v. Harris[5] and that it had been applied many times since. Moving on to the question of whether a particular animal was dangerous or not, Quilliam J. quoted the test to be applied from Lord Esher M.R.'s judgment in the case Filburn v. Peoples Pallace and Acquarium Co. Ltd.[6] In the extract Lord Esher said there were two classes of animals; in the first class there were (i) those animals harmless by nature, and (ii) those harmless by what may be called "cultivation" e.g. sheep, horses, oxen etc., and anything not in this class fell into the other class as to which the rule is that a man who keeps one must take the responsibility of keeping it safe. In regard to this test Quilliam J. felt a passage in McQuaker v. Goddard[7] was a useful guide to the consideration of which category an animal ought to be placed in. The passage quoted suggested that the degree of domestication of a species was a factor in deciding whether or not it was harmless. Before attempting to classify the chimpanzee, Quilliam J. said that once a member of a species of animal has been designated as dangerous, that designation attaches to the whole species. He also noted that chimpanzees still existed in their wild state and that the chimpanzee in this case may also have differed from the camel in McQuaker v. Goddard[8] in that it was possibly born in the wild. Having done this, Quilliam J. went on to discuss a number of reference books and the zoo manager's evidence as to whether chimpanzees were dangerous or harmless. Having reviewed this evidence, he said there was ample evidence to show that adult chimpanzees

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4 Literally translated the phrases mansuetae naturae and ferae naturae mean of a tame nature and of a wild nature. The lack of precision that Quilliam J. refers to presumably relates, for example, to the fact that a species need not have a wild nature to have a dangerous propensity, and that for such a species, actual knowledge of the dangerous propensity need not be proved.

5 (1858) 1 F. & F. 92.

6 (1890) 25 Q.B. 258.

7 [1940] 1 K.B. 687 at 694.

8 Ibid.

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were dangerous and that even young ones were highly unpredictable and given to sudden outbursts of rage and excitement. Consequently he found that the chimpanzee in the present case was a dangerous animal.

In the Court of Appeal it was held that Quilliam J. had[9] "dealt with the matter in accordance with the correct legal principles and arrived at a conclusion with which I completely agree.". It is respectfully submitted that while the conclusion is one with which we can completely agree, it is not quite so clear that the matter was dealt with in accordance with the correct legal principles. One point to be made before discussing the judgment proper is that while Besozzi v. Harris[10] was one of the first cases to apply the strict liability for dangerous animals rule, the principle was judicially recognised as far back as 1699 by Holt C.J. in Mason v. Keeling,[11] and the scienter action itself can be traced back in the common law at least as far as Dogge v. Cook[12] in 1537. While hardly a criticism of the judgment, one might question the choice of the extract from Lord Esher's speech in Filburn v. Peoples Palace.[13] While the statement of the law there is undoubtedly correct, there does seem to be a lack of clarity in it, in as much as it might be interpreted as referring to an individual animal rather than the class to which that animal belongs. That is to say, it is not necessary to decide whether the particular chimpanzee is dangerous, rather it is necessary to decide whether chimpanzees as a species are dangerous. That this is in fact what Lord Esher meant is clear from the statement he made a few lines further on, that is - [14]"It was, therefore, immaterial in this case whether the particular animal was a dangerous one.". Because of that lack of clarity it is submitted that a statement by Bowen L.J. in the same case, while covering the same ground, better expresses the correct

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9 [1972] N.Z.L.R. 978 per Richmond J. at 984.
10 Ante, n.5.
11 (1699) 12 Mod. Rep. 332, at 335. For fuller discussion of this aspect see - post, p. 12.
12 (1537) 1 Dyer 25b.
13 Ante, n.6. at p.260.
14 Ibid.

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position, Bowen L.J. said: [15]"People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of the damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief.". In this respect it is interesting to note that in McQuaker v. Goddard[16] MacKinnon L.J. chose to quote the above passage from Bowen L.J.'s judgment. Consistently with this when Quilliam J. says [17]"The inquiry therefore, is not so much whether the animal falls into the dangerous class, but whether it is shown to be harmless.", he is presumably not referring to the particular chimpanzee, Bobby, but rather to the chimpanzee species.

There is a second minor criticism that might be made. In the passage quoted from McQuaker v. Goddard[18] the statement is made "But nowhere in the world are camels wild.", on page 696 of the report this statement is elaborated - "If an animal does not exist in a wild state in any part of the world, it has ceased altogether to be a wild animal, whether in England or in any other country.". It is interesting to note that the logical conclusion of this argument is that if all tigers living in a wild state were to become extinct and the only ones left were in zoos, the species would cease to be ferae naturae. Further, classifying animals according to their degree of domestication can be inappropriate to many species.[19] Nevertheless, provided these limitations are recognised, it may well be that the "domestification test" can be of some assistance as a guide.

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15 Ante, n.6. at p.261.
16 Ante, n.7. at p.690.
17 [1972] N.Z.L.R. 70 at 73.
18 Ante, n.7.
19 E.g. Bees.

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It is respectfully submitted that stronger objection can be taken to the statement by Quilliam J. that [20]"It remains to observe that once a member of a species of animal has been designated as dangerous that designation attaches to the whole of the species.". This statement purports to be based on the passage quoted from Lord Esher's judgment in *Filburn* v. *Peoples Palace*[21] and approved in *Behrens* v. *Bertram Mills Circus*.[22] While *Filburn's* case was indeed approved in *Behrens*' case, it is equally clear that the designation of one member of a species as dangerous does not mean that all members are dangerous. It is only if the court designates it dangerous because it belongs to a dangerous species, that the designation will apply to all other members of the species. That this is the case is clearly illustrated by the extract from Lord Esher's judgment referred to earlier.[23] That is, it is immaterial whether the particular animal was a dangerous one.

A final comment that might be made on whether the matter was "dealt with in accordance with the correct legal principles", is that it is questionable whether in fact it was necessary to be referred to reference books. That is to say, while there is little doubt in the finding of the judge that chimpanzees are animals *ferae naturae*, it may well be that the matter could have been dealt with in another way. In *Behrens* v. *Bertram Mills Circus*[24] Devlin J. said he was bound to follow the classification of elephants given in *Filburn* v. *Peoples Palace*,[25] similarly in *Heath's Garage Ltd*. v. *Hodges*[26] Neville J. said: "But in my opinion it is not competent to the courts to reconsider the classification of former times.". Thus the classification is a question of law,[27] and provided there is a previous classification, the ordinary rules of precedent bind the court. In the absence of a

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20 Ante, n.17 at p.73.
21 Ante, n.6 at p.260.
22 [1957] 2 Q.B. 1 at 15.
23 Ante, p.5.
24 Ante, n.22 at p.30.
25 Ante, n.6.
26 [1916] 2 K.B. 370 at 383.
27 Ante, n.7. per Scott L.J. at p.696 and per Clausen J. at p.701.

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previous classification the court will take judicial notice of the nature of the animal.[28] In this regard then it would have been proper for the judge to have reviewed the authorities to see whether in fact the chimpanzee has been classified. Before going into whether or not there was sufficient authority for the judge not to have needed to hear evidence, it is necessary to clarify the effect of the finding of a "monkey" *ferae naturae*, as nearly all the authorities that do exist refer only to monkeys. A. Scrivener[29] suggests that the word "monkey" covers so many genera that it may be a ground for distinguishing them from elephants, which Devlin J. refused to distinguish between in *Behrens* v. *Bertram Mills Circus*[30] because "minute sub-divisions would destroy the generality of the rule.". According to the *Oxford Dictionary* (Scrivener's source also), however, it is said that "monkey" in its restricted sense (as opposed to its biological sense) excludes "anthropoid apes and baboons" and thus the word "monkey" used in this sense covers little more genera than does "elephant". Consequently, Devlin J.'s denial of minute sub-divisions would tend to indicate that the finding of a monkey *ferae naturae* is sufficient, subject to the rules of precedent, to bind any later court deciding which way to classify chimpanzees.

The only reported English cases[31] which appear to have involved monkeys occurred over one hundred years apart. The first was *May* v. *Burdett*[32] in 1846, although in that case it was not necessary to decide either way whether the monkey was *ferae naturae*, there being *scienter*, nevertheless, there is an indication in the last paragraph of Lord Denman C.J.'s judgment that it was *ferae naturae*. Furthermore, that case was referred

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28 See *McQuaker* v. *Goddard* (ante, n.7. (per Clausen L.J. at p.700 - 701, and *Behrens* v. *Bertram Mills Circus* (ante, n.22) per Devlin J. at p.16.
29 Scrivener, "Yea, An Ape Or Monkey" (1961) 105 So. Jo. 1095.
30 Ante, n.22 at p.16.
31 In *Micheal* v. *Alestree* (1676) 2 Lev. 172; 3 Keb. 650, reference is made to a case where a monkey bit a child, and in Hale's *Pleas of the Crown* (vol. 1, p.430) reference is made to *Andrew Baker's* case involving a monkey bite. Both indicate that a monkey is an animal *ferae naturae*, as does Hale's *Pleas of the Crown* (idem).
32 (1846) 9 Q.B. 101.

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to again that same year in *Jackson* v. *Smithson*,[33] a case involving a ram. In that case counsel argued - "In *May* v. *Burdett* the animal that did the injury was a monkey, a creature altogether *ferae naturae*", and Alderson B. accepted this when he said that he was bound by *May* v. *Burdett* because "In truth, there is no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and known by the owner to be so, and one which is *ferae naturae*". The only other reported English case on monkeys is the Court of Appeal decision in *Brook* v. *Cook*,[34] where unfortunately the court felt it unnecessary to consider that point, deciding the case on a narrower ground. It is to be noted that counsel for the plaintiff in that case relied on Hale's *Pleas of the Crown*[35] which includes monkeys and apes as animals *ferae naturae*. As there is no reason to believe that the nature of monkeys kept in North America is any different to to those kept in the United Kingdom or New Zealand, it is of interest to note the position there. There are in fact considerably more American cases on this point than of any other country,[36] the position there being well stated by J. Irwin Shapiro in *Garelli* v. *Sterling-Alaska Fur and Game Farms Inc.*[37] when he said: "There is no doubt that a monkey is denominated

> by law as *ferae naturae*, that is, wild by nature as contrasted to domesticated animals, *domitae naturae*, which are by nature tame and are ordinarily not expected to inflict injury or damage.".

Similarly, in the only Canadian case that seems in point, *Connor* v. *Princess Theatre*,[38] the monkey was again held to be of a species *ferae naturae*. Thus it would seem that every judicial pronouncement on the point suggests that the monkey is an animal *ferae naturae*. Consequently, the judge might properly have

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33 (1846) 15 M. & W. 563 at p.564.
34 (1961) 105 So. Jo. 684.
35 Vol. 1, p.430 "...yet if it be a beast that is *ferae naturae*, as a lion, ..., yea an ape or a monkey, ...". Also, see ante, n.31.
36 *Copley* v. *Wills* 152 S.W. 830; *Candler* v. *Smith* 179 S.E. 395; *Phillips* v. *Garner* 64 So. 735.
37 206 N.Y.S. 2d 130 at p.134.
38 (1913) 10 D.L.R. 143.

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considered this aspect, or at least made mention of the fact that in the absence of adequate authority he would take judicial notice of the nature of chimpanzees, though obviously this would not have affected his ultimate finding.

III. THE "MASTER-SERVANT" DEFENCE.

One of the defences put forward by the defendant in the Supreme Court was that strict liability in common law in respect of injury by dangerous animals will not lie in the case of a master and servant relationship. This defence was based on a statement by Denning L.J. in Rands v. McNeil.[39] In that case the plaintiff was a senior farm-hand employed by the defendant. The defendant owned a bull which he knew to have a fierce disposition. Following an attack on another employee, the bull was permanently kept in a loose-box, and the beast man was given instructions by the defendant that when he was cleaning out the box he was to take care. Further he was told to secure the bull by means of a hook staff through a ring in its nose, then to tether it by means of a rope. On one occasion the beast man had difficulty securing the bull, and asked the plaintiff to give him some assistance. The plaintiff entered the box and while trying to hook the ring of the bull, was charged and severely injured. In deciding this case, all three of the English Court of Appeal judges relied on the absence of escape.[40] However, in his judgment Denning L.J. also said: [41]"This is the

> first case, so far as I know, where the court has had to consider the liability of a farmer towards the men whom he employs to look after a bull or to help in looking after it. We were urged to say that his liability to his men was the same as to the public at large: and that, inasmuch as the farmer knew the bull was dangerous, it was his strict duty to keep it under control so that it should do no damage. The farmer keeps the bull, it was said, at his peril, even so far as his own men are concerned. I do not think that is the law. The duty of the farmer to his men is not a strict duty. It is the same as the duty of any other

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39 [1955] 1 Q.B. 254.
40 Post, p. 26.
41 Ante, n.39 at p.257.

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employer. He must take reasonable care not to subject his men to unnecessary risk. The only difference is that when he has a dangerous bull he must take very great precautions. It is trite knowledge that the greater the danger the greater the precautions that should be taken.".

The essential words, on which the defence pleaded rested, were those underlined. It is submitted that this was either an attempt to create an exception to the strict liability principle of the scienter action, or a confusing of the principles of negligence and scienter.

The first explanation of Denning L.J.'s statement is that he was attempting to create a new exception to the principle of strict liability, to overcome what he saw as a potentially unjust situation. The unjust situation would have arisen as follows - under the authority of Knott v. L.C.C.,[42] the knowledge of the servant could be imputed to the master. The consequence of this being that if it had been held in Rands v. McNeil that the servant could claim, it would have meant that a servant could set up his own knowledge of the dangerousness of the animal, as the ground for a claim against the master. If this was an attempt to create a new exception, then there would appear to be little, if any, authority to support it. One of the first cases of injury caused by an animal where a master-servant relationship existed was Brock v. Copeland.[43] The defendant there succeeded on the ground of contributing negligence, and there is nothing to suggest that he might also have succeeded by setting up the master-servant relationship as a defence. In Mansfield v. Baddely[44] the law came as close as it was to come to suggesting such a defence existed, prior to Rands v. McNeil. In that case Grove J. said: [45]"...[N]o doubt she cannot recover for risks incidental to service." It seems, however, that by this Grove J. was only referring to the defence of volenti, for later he adds: "...[S]uch a risk was not incidental to the

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42 [1934] 1 K.B. 126; see also Wilson v. Harvey (1894) 6 Q.L.J. 57; Scott v. Edginton (1888) 14 V.L.R.41; Suisted v. Carahar (1878) 4 N.Z.Jur. N.S. 96; Stiles v. Cardiff Steam and Navigation Co. (1864) 33 L.J. (Q.B.) 310.

43 (1794) 1 Esp. 203.

44 (1876) 34 L.T. 696.

45 Ibid at p.697.

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service, nor one which by her conduct she has undertaken to bear.". In _Baker_ v. _Snell_[46] the plaintiff, a housemaid in the employment of the defendant, was bitten by a dog known by the defendant to be savage, and yet again there is no suggestion that the mere relationship of master and servant provides a defence. In _Knott_ v. _L.C.C._[47] there is again no suggestion that the servant is denied a claim under the _scienter_ action on the ground that a servant cannot claim. This case turned on questions of whether ownership was necessary and common employment, and as in the other cases referred to above, a defence based on the ground of no liability in _scienter_ to a servant was neither raised no discussed. If indeed there was a principle lying dormant, then it is reasonable to expect that at least one of the judges in the cases involved would have made some statement about it as a possibility.[48] It is clear then that there is no authority for the creation of a new exception and further, the creation of such an exception would be a shifting away from the "let the keeper pay" ratinale behind the _scienter_ action towards one of "moral culpability". It is submitted that there is sufficient protection for the master in such cases under the defence of contributory negligence, and to a lesser extent under the defence of _volenti non fit injuria_. To allow him to escape completely from liability, just because he is an employer, would seem far more unjust.

It seems more likely, however, that what Denning L.J. was in fact doing was confusing the negligence action with the _scienter_ action. The principle of strict liability for dangerous animals is one long established in the common law, indeed as far back as 1699 the principle was clearly stated by Holt C.J. in _Mason_ v. _Keeling_[49] when he said of animals: "[I]f

> they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of tame nature, there must be notice of the quality.". Again, in 1730 the Lord Chief Justice in the

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46 [1908] 2 K.B. 825.
47 Ante, n.42.
48 Similarly in the negligence actions by a servant against a master for injuries by an animal. e.g. _Barnes_ v. _Lucille_ (1907) 96 L.T. 680; _Bowater_ v. _Rowley Regis Corporation_ [1944] K.B.476.
49 Ante, n.11.

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case R. v. Huggins[50] said: "There is a difference between beasts that are ferae naturae, as lions and tygers, which a man must always keep at his peril; and beasts that are mansuetae natura, and break through the tameness of their nature, such as oxen and horses. In the latter case an action lies if the owner had notice of the quality of the beast; in the former case an action lies without such notice.".

Over the last two hundred years many cases have been decided on this principle, without any reliance at all on the principles of the negligence action. This aspect of the law of torts has been stressed in several cases; in the Scottish case of Henderson v. John Stuart (Farms) Ltd.[51] Lord Hunter said: "The same appears to be true of English law, and perhaps the distinction is more obvious there because of the different origins and history of the scienter and negligence actions respectively, and the different compartments in which they travelled as the law of torts developed. Indeed, in England they were not only different grounds of action, they were separate and distinct remedies or forms of action, each with its own special rules and conditions of liability.". Similarly, Lord Simonds in his judgment in Read v. Lyons[52] said, when talking of strict liability: "It is clear for instance that if a man brings and keeps a wild beast on his land or a beast known to him to be ferocious of a species generally mansuetae naturae he may be liable for any damage occurring within or without his premises without proof of negligence. Such an exception will serve to illustrate the proposition that the law of torts has grown up historically in separate compartments and that beasts have travelled in a compartment of their own.".

Thus, while in the negligence action there is no principle of strict liability and a breach of a reasonable standard of care must be shown, this does not affect liability under the scienter principle. It may well be that the negligence action will often not lie, a reasonable standard of care having been taken, and consequently the employer will not be liable if

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50 (1730) 2 Ld. Raym. 1574 at p. 1583.
51 [1963] S.C. 245 at p. 248.
52 [1947] A.C. 156 at p. 182.

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negligence is the only cause of action open to the servant. It is respectfully submitted that where Denning L.J. falls into error, however, is when he says "The duty of the farmer to his men is not a strict one. It is the same as the duty of any other employer.". The liability of an employer keeping dangerous animals is not the same as other employers, for as well as the duty to take care imposed by the negligence principle, there is also what has been termed "the duty to confine" imposed by the scienter action. Thus, while the defences of volenti, contributory negligence and no loss of control will be available to the employer, they will not of necessity always succeed, and consequently a master may be strictly liable.

Two factors would tend to support this explanation of the statement in Rands v. McNeil,[53] as opposed to the explanation that Denning L.J. was consciously creating a new exception to the principle of strict liability in the scienter action. Firstly, Denning L.J. in his judgment relied primarily, as did the other judges, on the "absence of escape" in reaching the decision he arrived at. That he does not expand on his proposition, and that he refers to his observations as only "general considerations", tend to indicate that he did not give the matter a great deal of attention and that he was content to rest his decision on the narrower ground that there was no escape. In this regard it may well be that Quilliam J. was too generous to the statement in Rands v. McNeil when he said of it: "It is nevertheless a considered statement by Denning L.J. and must therefore be accorded considerable respect, ...".

A second factor which would tend to support the explanation submitted for the statement in Rands v. McNeil is that in the case of an injury by an animal arising from the work situation, the servant may have alternative causes of action, firstly in negligence and secondly under the scienter action. Thus, in Barnes v. Lucille,[54] Bowater v. Rowley Regis Corporation,[55] and in Beer v. Wheeler[56] a case very similar on its facts to Rands v.

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53 Ante, n.39.
54 (1907) 96 L.T. 680.
55 1944 K.B. 476.
56 (1965) 109 So. Jo. 457.

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McNeil, the plaintiff servant rested his claim in negligence.[57] The point of this is that the bringing of most actions in negligence has tended to confuse the situation slightly and obscure the perfectly valid scienter action.

The foregoing discussion of Rands v. McNeil was necessitated by the fact that it appeared to be the only authority for the defence pleaded[58] that a master cannot be strictly liable to a servant. If the arguments put forward are correct, then the defence pleaded would appear to be unsupportable, and it is with this in mind that we now turn to Quilliam J.'s judgment on this defence.

After initially having appeared to accept the implication from Rands v. McNeil that there is no strict liability on a master to a servant in respect of injury by a dangerous animal, Quilliam J. would seem to misapply both the defence pleaded and Denning L.J.'s statement in Rands v. McNeil. The defence pleaded was not based on the actual nature of the employment, rather it was based on the general principle, said to be enunciated in Rands v. McNeil, that there is no strict liability where the master-servant relationship exists. That Quilliam J. is in fact talking of the actual nature of the employment involved in the present case (there being no dispute that the plaintiff was a servant of the defendant) is clear from his concluding remarks on the defence:[59] "The very nature of the

> plaintiff's employment from the moment he commenced it, was to work among dangerous animals, and he must be presumed to have known and accepted that fact. I accordingly find that the defence based on the relationship between the parties of master and servant is sufficient to mean that the plaintiff's action must fail.".

As soon as he starts discussing the actual nature of the employment, Quilliam J. is really just discussing the question of volenti and he appears to have decided the case on that basis. Nevertheless, while he appears to have incorporated into the defence pleaded the

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57 Similar examples can be found in Canada: Shelfontuck v. Le Page [1937] 3 D.L.R. 137, and Scotland: Henderson v. John Stuart (Farms) Ltd. ante, n.51, and Clelland v. Robb [1911] S.C. 253.

58 N.B. The principle said to be established by Rands v. McNeil was, if it existed, reversed in the U.K. by the Animals Act 1971 s. 6(5).

59 Ante, n.17 at p. 77.

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defence of volenti, he still seems to support the proposition that a master will not be strictly liable to a servant for injuries from a dangerous animal, although he thinks there may be exceptions, for he says:[60] "I should hesitate to go so far as to say that strict liability can never arise as between master and servant. If a person is employed on a farm to work among domestic animals and a dangerous animal, altogether unrelated to the employer's farming business, is brought onto the property by the employer, then one might hesitate to say that the employer was not strictly liable to the employee for injury caused by that animal.".

In the Court of Appeal, Richmond J. explained Quilliam J.'s judgment in the following way. Firstly, he said Quilliam J. rejected the broad proposition that the rule as to strict liability for dangerous animals has no application as between a master and servant. Furthermore, in regard to Denning L.J.'s statement: "The duty of a farmer to his men is not a strict duty. It is the same as the duty of any other employer.", Richmond J. said:[61] "It has been emphasised on many occasions that the language used by judges must be related to the particular facts of the case with which the Court was concerned.". He then went on to say that Quilliam J. had turned to the question of volenti in relation to the facts of the present case and that he had concluded that the plaintiff must be presumed to have known and accepted that he was working with dangerous animals. Then he held that Quilliam J. had taken the general denial by the defendant of liability as letting in the defence of volenti. Finally he held that as the case was decided on the defence of volenti, and as volenti was not specifically pleaded, which as an affirmative defence it was required to be by R. 128 of the Code of Civil Procedure, then the appeal must be allowed and the matter remitted to the Supreme Court for further consideration.

There would appear to be a number of inconsistencies between this interpretation of Quilliam J.'s judgment and the judgment itself. Firstly, Richmond J. said that:[62] "Quilliam J.

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60 Idem.
61 Ante, n.9 at p. 980.
62 Idem.

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was not prepared to entertain any such sweeping proposition as had been put to him by counsel.", and later he went on to say:[63] "Quilliam J. was perfectly right in rejecting the wide proposition.". The broad proposition referred to is, of course, that the rule as to strict liability for dangerous animals has no application as between master and servant. It is questionable whether Quilliam J. did in fact "reject" the broad proposition, indeed while admittedly he seems to have confused it with the defence of volenti, he still appears to accept it but with a minor qualification. That is, the statement:[64] "I should hesitate to go so far as to say that strict liability can never arise as between master and servant.", seems hardly a rejection, rather it seems to indicate that there may be exceptional cases (such as where an animal unrelated to the farm business is brought onto the property) where strict liability will apply.

Secondly, Richmond J. said[65] in relation to the statement in Rands v. McNeil[66] that judges' language must be related to the particular facts of the case with which the court was concerned. It is submitted that even relating the language used by Denning L.J. to the facts in that case, it is unsupportable. If the argument outlined earlier is valid, then the duty of a farmer with dangerous animals on his property is not the same as the duty of any other employer.

A third inconsistency would appear to arise out of Richmond J.'s statement that:[67] "The learned Judge then considered the question of volenti in relation to the facts of the present case and came to the conclusion that 'the very nature of the plaintiff's employment from the moment he commenced it was to work among dangerous animals, and he must be presumed to have known and accepted that fact'.". The inconsistency here lies in the fact that while Quilliam J. did refer to the defence of volenti,[68] the part of his judgment

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63 Ibid. at p. 981.
64 Ante, n.17 p. 77.
65 Ante, n.9 p. 980.
66 Ante, n.39.
67 Ante, n.9 at p. 981.
68 Ante, n.17 at p. 76.

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quoted by Richmond J. comes from later in the judgment[69] where Quilliam J. was in fact talking about the defence "based on the relationship between the parties of master and servant". It is submitted that the discussion Quilliam J. gives of the nature of the employment is not intended to provide the basis of a defence in volenti, rather it is to show that the present case is not an exception to the rule said to be propounded in Rands v. McNeil and apparently accepted by Quilliam J. This is supported by the preceding lines to those quoted:[70] "The present case, however, involves no such unusual circumstance". However, this approach of Quilliam J.'s raises a difficulty inasmuch as once one starts looking at the particular fact situation, and starts deciding whether or not the case is an exception on the ground of presumed knowledge and acceptance, then one is into the realm of volenti and has left the absolute denial of liability pleaded in the defence.

Thus, while Richmond J. may have misinterpreted what Quilliam J. said, his ultimate finding is nevertheless correct for as the case was decided on a volenti point, albeit under a different guise, it was bad for want of specific pleading. It is submitted that how this arose can be explained from the five lines previous to those quoted above (and which were also quoted by Richmond J. in the Court of Appeal), that is, Quilliam J. said, after spending a page discussing volenti as an example of an exception to the principle of strict liability, that:[71] "The defence of volenti was not specifically pleaded

> in the present case. The plaintiff's case was, however, based solely on the allegation of strict liability for damage caused by a dangerous animal, and the defendant's denial of liability upon that pleading raises the question of whether there can be a cause of action.".

Richmond J. interpreted these lines as meaning that:[72] "The defendant's general denial of liability was sufficient to let in the defence of volenti". It is submitted that what in fact Quilliam J. meant by those lines was this - (i) that the defence of volenti was not

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69 Ante, n.17 at p. 77.
70 Idem.
71 Idem.
72 Ante, n.9 at p. 983.

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specifically pleaded in the present case as it was required to be by R 128 of the Code of Civil Procedure, and (ii) that nevertheless, as the plaintiff's case was based on the allegation of strict liability for damage caused by a dangerous animal, the defendant's denial of liability on that pleading (that is, on the ground pleaded by the defendant that strict liability in common law in respect of injury by dangerous animals will not lie in the case of a master and servant relationship) raised the question of whether or not the plaintiff's action can be maintained. Such an interpretation is consistent with the view propounded earlier as to what Quilliam J. was discussing on page seventy-seven of the report,[73] and furthermore it would also seem to be the most logical explanation of the decision.

The appeal thus having been successful on the ground that volenti was not specifically pleaded, any further comments made by Richmond J. were obiter. However, in the few remarks he did make it seems clear that the principle said to be established in Rands v. McNeil[74] (which was criticised earlier in this paper), and put forward by counsel, is not an exception to liability for a dangerous animal, for Richmond J. said:[75] "In the usual case

> of a hazardous occupation, no question of absolute liability exists, and in the absence of negligence there is no claim. But where the injury is caused by an animal ferae naturae, of which the employee is the keeper, quite different questions arise, and in the absence of negligence the principle issue to be decided may be whether the ordinary rule of absolute liability is ousted by the defence of volenti.".

It is submitted that this statement represents the correct state of the law, which after deviating in Rands v. McNeil, was, possibly unintentionally, returned to something nearer its correct position by Quilliam J. (when he in effect held - (i) that the master will not be liable unless the case is an exception to the general rule, and (ii) that it wont be an exception if there is express or presumed knowledge and acceptance - or in other words, the master wont be strictly liable if the servant is volens), and

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73 Ante, p. 18 (first paragraph).
74 Ante, n.39.
75 Ante, n.9 at p. 984.

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was finally clarified and set right in the quote from Richmond J.'s judgment above. It seems a trifle ironical that after the tortured path the law has followed to get back to its correct position, it is possible that there will be no further *scienter* actions by servants before the Accident Compensation Act 1972 comes into operation.[76]

One final comment that can be made in relation to this defence is that although Quilliam J.'s interpretation of the pleading, that is, that strict liability in common law in respect of injury by dangerous animals will not lie in the case of a master and servant relationship, raised the interesting point first suggested in *Rands* v. *McNeil*,[77] it appears that there was some doubt at the time as to whether this was what the defendant actually pleaded. In view of the shaky nature of the *Rands* v. *McNeil* "defence", it seemed that defence counsel relied more on the fact of the plaintiff's position as a keeper rather than as a servant. That is, that there are different considerations in discussing the liability of the owner to a keeper than the liability of the owner to the public. Presumably the basis of such a contention would, when broken down, be little more than a combination of *volenti* (keeper knows, appreciates and accepts risk) and contributory negligence (keeper has a duty of care to himself). Both of these are affirmative defences and would have to be specifically pleaded. Consequently it is doubtful whether the ultimate result would have been any different.

IV. THE DEFENCE OF VOLENTI NON FIT INJURIA.

The third major area canvassed in the course of this case was the defence of *volenti non fit injuria*. This defence although relied on by Quilliam J., albeit in a different form, was not specifically pleaded, and it was for this reason that the Court of Appeal allowed the appeal. While it was not pleaded, *volenti* nevertheless occupied a significant part of both judgments. First to summarise Quilliam J.'s comments. Quilliam J. discussed

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76 N.B. The Accident Compensation Act 1972, s.5(1)A provides there can be no claim for damages for injury covered by the Act. Thus, while as mentioned earlier a back-log of cases in the field of torts will remain for a number of years, with the infrequency of *scienter* cases in the past, there is a possibility that no further will arise, especially master-servant actions, before the Act takes effect.

77 Ante, n.39.

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volenti as an example of an exception to the principle of strict liability for dangerous animals. He pointed out that the defence has been confined within narrow limits, but that *Morrison* v. *U.S.S. Co. Ltd.*[78] had shown that it was still alive. In support of this he referred to Turner J.'s judgment in that case stating that *volenti* will apply where there is an express or implied term in the contract between the parties or where the "whole bargain" "can be inferred from the existing relationship of the parties". As a further illustration of when *volenti* might apply, Quilliam J. quoted an extract from *Salmond on Torts*.[79] The passage contained a statement of the principle established in *Smith* v. *Baker*,[80] and then went on to quote from Goddard L.J.'s judgment in *Bowater* v. *Rowley Regis Corporation*.[81] The quotation bears repeating:[82] "The maxim

> *volenti non fit injuria* is one which in the case of master and servant is to be applied with extreme caution. Indeed, I would say that it can hardly ever be applicable where the acts to which the servant is said to be *volens*, arises out of his ordinary duty, unless the work for which he is engaged is one in which danger is necessarily involved.".

Quilliam J. then concluded his discussion of *volenti* with the observation that *volenti* was not specifically pleaded. However, consistent with the argument advanced earlier in this paper, it is submitted that when he reverts to his discussion of the master-servant defence, Quilliam J. introduces elements of *volenti* into the discussion. Firstly he says he could not accept that it was a term of the plaintiff's employment that the defendant should be strictly liable, and later, he goes on to say that he must be presumed to have known and accepted that he was working with dangerous animals. The introduction of what in effect was *volenti* provided the basis of the Court of Appeal's ground for allowing the appeal. In the Court of Appeal, Richmond J.'s judgment begins with a discussion of the appellant's contention that it was not open to the learned Judge, in all the circumstances of the case, to consider a

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78 [1964] N.Z.L.R. 468.
79 *Salmond on Torts* fourteenth edition p. 52.
80 [1891] A.C. 325.
81 Ante, n.55.
82 Ibid. at p. 480.

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defence of _volenti_. He said that _volenti_ was an affirmative defence in whatever form it may be advanced, that the onus of proving it lay on the defendant, and that therefore by R128 of the Code of Civil Procedure,[83] ought to be expressly pleaded. However, Richmond J. went on, the absence of any such pleading would not prevent the court from entertaining the defence if in all the circumstances of the case it were just to do so. Having said this Richmond J. then set out to determine whether in fact in the present case it would be just to allow the defence. To do this Richmond J. looked at the two ways the defence of _volenti_ might apply to the present case, discussing them separately to see whether any factual matters of significance might have been opened up which could have assisted the appellant. The first way he thought _volenti_ might be alleged to arise was as an implied term in the appellant's contract of employment. In regard to this he thought that such an allegation could well open various factual matters, such as the contemplated course of the employment, and the question whether the presence of the danger was a mutually recognised element in the bargain for renumeration. The second way he thought _volenti_ might be alleged to arise was through some course of dealing or communication between the parties. In this regard he felt the appellant was entitled to know what dealings were relied on and precisely what inference it was intended to draw from them. Consequently, Richmond J. felt that the appellant was not given a fair opportunity either by the pleadings or by the conduct of the defence to meet the allegation which was made against him. For this reason the Court of Appeal allowed the appeal, vacated the judgment of the Supreme Court, and remitted it back to Quilliam J. in the Supreme Court for further consideration, including consideration of any amendments of the pleadings which may be sought. Having given the reason for his decision, Richmond J. proceeded to make some comments on the relationship of _volenti_ to hazardous occupations. In most cases, he pointed out, the question will not arise as (i) the employer is not responsible in negligence for risks which reasonable care could not remove

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83 R128 of the Code of Civil Procedure reads: "Affirmative defence - Where an affirmative defence is intended the statement of defence shall show the general nature thereof.".

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or lessen, and (ii) no question of strict liability exists. In the case of an injury by an animal ferae naturae of which the employee is the keeper, Richmond J. thought that in the absence of negligence, volenti might be the principle issue. Richmond J. made no further comment on this other than to say that there was very little authority on the point.

There can be little argument with Richmond J.'s decision to allow the appeal, and there are only two points on the question of volenti that I would add. The first point is the relationship of the statement of Goddard L.J. in Bowater v. Rowley Regis Corporation[84] to the three situations, in Morrison v. U.S.S. Co. Ltd.,[85] in which it was held volenti might apply. It will be remembered that the three situations were - (i) express term of contract (ii) implied term of contract (iii) course of relations between the parties.[86] As Goddard L.J.'s statement incorporated the element of higher renumeration, it is clear that it will now be caught by either (i) or (ii), and in the present case as it was not express, by (ii) alone. This raises the question of the implications of this rule on the possibility of the plaintiff in the present case being volens. The importance of the point being that it would appear to be difficult for the defendant to establish volenti under (iii). With this in mind it is possible to look at Goddard L.J.'s test, and by applying it to the present case, assess what questions of fact would have been important and what the outcome might have been. The logical starting point is a re-statement of what Goddard L.J. said:[87] "The maxim volenti non fit injuria is one

> which in the case of master and servant is to be applied with extreme caution. Indeed, I would say that it can hardly ever be applicable where the act to which the servant is said to be volens arises out of his ordinary duty, unless the work for which he is engaged is one in which danger is necessarily involved." — [Emphasis added]. The question becomes - is

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84 Ante, n.55 at p. 480.
85 Ante, n.78.
86 N.B. Turner J. ([1964]N.Z.L.R. at p. 475 line 46) thought that such an agreement need not be contractual, but that there must be a transaction between the parties of such a nature that assent to the risk of damage is a proper inference to be drawn.
87 Ibid. n.84.

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the job of zoo-keeper one in which danger is necessarily involved? The phrase - "in which danger is necessarily involved" must be taken to mean "risks which reasonable care could not remove or lessen" to use the words of Fleming[88] quoted by Richmond J.[89] In some occupations the safest system of work possible still leaves the job a dangerous one, an example of this is that given by Scott L.J. in Bowater v. Rowley Regis Corporation[90] of the house-breaker. In such occupations this inherent danger which even the safest system of work will not obviate, is compensated for by higher pay (e.g. 'danger money' paid to bulldozer drivers required to work in precarious places). Against this type of occupation must be contrasted the occupation where an element of danger exists but is not "necessarily involved". Many jobs in factories, for example, are not necessarily dangerous, as a safe system of work has obviated any danger involved. In occupations such as these, if an accident were to occur in the ordinary course of the servant's employment, under the principle stated by Goddard L.J. the servant will not be volens. Which category then does the zoo-keeper fit into? Is his job such that the utilization of the safest system of work still leaves the job a dangerous one, for which he is paid a higher wage, or is it a job with an element of risk but in which, because of a safe system of work, danger is not necessarily involved? The answer is to be found by looking at the nature of the employment, the system of work, and the renumeration received. It is clear that a zoo-keeper would know and accept the fact that some animals may be dangerous to human life if given the opportunity. This in itself, however, does not make the job "necessarily dangerous" and the servant volens. If the brakes on a bus fail, the bus will be dangerous to the bus driver's life, nevertheless the job is not "necessarily dangerous" because of this. Is the system of work then such as to obviate the dangers of the job? It is not clear from the case whether there was in fact a safe system of work or how safe the system of work was. That is,

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88 Fleming, Law of Torts (4th edition) at p. 429.
89 Ante, n.9 at p. 984.
90 Ante, n.55 at p. 479.

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while instructions had been given to the keepers regarding their safety, the keepers were of necessity allowed where the public was not. Thus whether there was a safe system of work such as would obviate the dangers of the job, would be a necessary question of fact to be decided. If the dangers of the job were not obviated then the question of wages would arise inasmuch as this would indicate a recognition of the danger in the bargain for renumeration. To summarise the position then, it would appear the defendant would have had to show (i) that the job was "necessarily dangerous", or (ii) that the danger was not obviated by a safe system of work,[91] and that (iii) there was a high renumeration indicating mutual recognition of the servant undertaking the risks as part of the bargain.

The second point I would make in relation to volenti, is that there would appear to be a good policy reason for limiting the availability of the defence of volenti in the master-servant situation. As pointed out in the Law Commission Report in the United Kingdom,[92] the justification of imposing strict liability is that the person carrying out the dangerous activity is in the best position to take precautions against, or to mitigate damage which may flow from that activity. The Commission considered that in the context of liability for animals the employer is in a better position to effect insurance cover against liability for his animals than is the employee to effect insurance against his injury. Under the principle of 'loss distribution' the employer covers the cost of insurance through raised entrance fees etc., and the loss is thereby spread over society (at least those using the zoo), rather than on the unfortunate individual. It is to be noted that section 6(5) of the Animals Act 1971 (U.K.) specifically denies volenti as a defence to an employer. The foregoing policy reasons would appear to justify the courts not following Glanville Williams' suggestion[93] that volenti is easier to establish in a case of strict liability, should the question arise again.

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91 N.B. Defendant runs the risk that if the danger could have been obviated, an action may lie in negligence for failure to provide a safe system of work.

92 See the Law Commission Report on Civil Liability for Animals paragraph 20.

93 G. Williams, Joint Torts and Contributory Negligence at p.313.

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V. THE DEFENCE OF NO ESCAPE FROM CONTROL.

Quilliam J. felt it unnecessary to decide the question whether or not escape was a necessary element of the action or whether there had in fact been an escape. Nevertheless, as counsel for the defendant appeared to place strong reliance on this point, some discussion of this defence is in order. The similarity of the *scienter* action to the *Rylands* v. *Fletcher*[94] action has been one of the major reasons for the development of the escape requirement. However, it would seem that the type of escape differs between the two actions. Under *Rylands* v. *Fletcher* the escape must be to adjoining land, whereas under the *scienter* action the escape is an escape from control. That the animal need not escape on to adjoining land is clear from what Lord Symond said in *Read* v. *Lyons*:[95] "It is clear

> for instance that if a man brings and keeps a wild beast on his land or a beast known to him to be ferocious of a species generally *mansuetae naturae* he may be liable for any damage occurring *within* or *without* his premises without proof of negligence." [Emphasis added].

This requirement of escape from control which now appears to be an established part of the *scienter* action has been phrased in many ways. In *Filburn* v. *Peoples Palace*[96] Lord Esher speaks of "the responsibility of keeping it safe". In *Christian* v. *Johanneson*[97] it was held that insufficiently securing was equivalent to escape from control. In *Chittenden* v. *Hale*[98] it was referred to as the requirement on the defendant to confine his dog, and in *Read* v. *Lyons*[99] Lord MacMillan described it as the "absolute duty to confine or control it so that it shall not do injury to others.". The problem case is again *Rands* v. *McNeil*[1] with its introduction of the "controlled space" concept. The positions of the three judges can be briefly summarised as follows. Denning L.J. felt that the man had no claim as the bull never escaped at all and that the man actually went into the loose-box, where it was kept,

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94 (1868) L.R. 3H.L. 330.
95 Ante, n.52 at p. 182.
96 Ante, n.6 at p. 260.
97 [1956]N.Z.L.R. 664 at p. 667.
98 [1933] N.Z.L.R. 836 at p. 852.
99 Ante, n.52 at p. 171.

1 Ante, n.39.

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and thus brought the danger on himself. Jenkins L.J. said[2] that the true basis of absolute liability was the escape of a wild animal from its place of incarceration or from the control of its keeper. Morris L.J. after quoting from Knott v. L.C.C.[3] held that strict liability would not lie as the bull was in a shed from which it could not and did not escape. This concept of escape from a "controlled space" may, however, be nothing more than escape from control. That is, if for a "controlled space" we use Jenkins L.J.'s words "place of incarceration" and if by "incarceration" we mean a type of control, then as long as the animal is kept secure[4] by incarceration, the absence of any escape from the place of incarceration will mean that the animal has been kept secure. Thus at first glance it would appear that "escape from a place of incarceration" is synonomous with "escape from control". However, there is another aspect of "keeping secure", in that an absence of escape from the place of incarceration must also be associated with sufficient safeguards to keep people who are unprotected from getting in.

It is submitted that the approach of the court to the requirement of escape, in Rands v. McNeil leads to an unsatisfactory result, inasmuch as the servant, while admittedly negligent, was denied any redress at all against the employer. It is further submitted that the approach taken was not an inevitable one, and that should the question arise again there is a valid alternative which the court might adopt. This relates to the second aspect of "keeping secure" mentioned above, that is, that the absence of escape from the place of incarceration must also be associated with the prevention of unprotected people getting in. The main point of the alternative approach is that the mere fact that an injury occurred, would be prima facie evidence of an escape from control. At this stage it is relevant to note the different approach taken by the courts in two cases where the facts were broadly similar. The two cases are Rands v. McNeil[5] and Marlor v. Ball,[6] in both cases the

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2 Ibid. at p. 267.
3 Ante, n.42.
4 See Marlor v. Ball (1900) 16 T.L.R. 239 per. Collins L.J. p. 240.
5 Ante, n.39.
6 Ante, n.4.

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animal was kept secure, in both the plaintiff brought his injury on himself, and in both the plaintiff was denied a remedy. However, the decision in Marlor v. Ball was based on contributory negligence (which was then a complete defence), while the decision in Rands v. McNeil was based on the principle of "no escape". Following the Law Reform (Contributory Negligence) Act 1947, (Law Reform (Contributory Negligence) Act 1945 (U.K.)), apportionment is now possible, consequently were Marlor v. Ball to be decided now, the result would be reduced damages for the plaintiff. This would seem a more satisfactory result than the approach in Rands v. McNeil leads to, and it is a result that can be arrived at if the alternative approach suggested is followed. It hardly needs mentioning that the more secure an animal is kept the greater the degree of negligence will be required of the plaintiff before he is injured, consequently where the injury only arises from the gross negligence of the plaintiff, the damages, if any, the keeper has to pay will be nominal.

To summarise this section, it is the writer's view that the concept of escape as an ingredient of the action should be limited as much as possible, and where the plaintiff has brought the injury on himself, his damages should be reduced under the Law Reform (Contributory Negligence) Act 1947.

VI. CONCLUSION.

James v. Wellington City was settled out of court following the Court of Appeal decision, thus many of the questions it raised remained unanswered by the court. The afore-going analysis has been aimed at clarifying the position of liability for dangerous animals following that case. It is the writer's opinion that as until such time as comprehensive entitlement and real compensation are introduced, there is still a place for the scienter action. Nevertheless, while filling a gap in the field of accident compensation, the scienter action has given rise to a number of anomalies and fictions, and for this reason it is submitted that the time is ripe for a codification and rationalisation of the case law in a statute, in much the same way as the Animals Act 1971 did in Britain. In this respect it is heartening that this area of the law is currently under the consideration of the Law Reform Committee.

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