elephants,[79] wolves,[80] and monkeys,[81] and other similar animals.[82] No individual of such a species, however domesticated, can ever be regarded as safe, and liability does not rest upon any experience with the particular animal.[83] In the second class are cattle, sheep, horses, dogs and cats, and other creatures regarded as usually harmless. As to these, it must be shown that the defendant knew, or had reason to know, of a dangerous propensity in the one animal in question.[84] Undoubtedly the customs of the community, and the social utility of keeping the animal in the particular locality, have entered into the classification to a considerable extent, since an elephant is regarded as a safe, domesticated animal in Burma,[85] but a Burmese elephant transported to England is not; [86] and such uncooperative creatures as stallions,[87] mules,[88] bulls [89] and bees,[90] in spite of the known characteristics of their kind, are called harmless, while deer [91] and raccoons [92] have been regarded as inherently dangerous. The emphasis is placed upon the abnormal character of the animal in the particular community, and hence the abnormal character of the risk to which the defendant exposes his neighbors, as the justification for creating the strict responsibility. The more offensive members of a species customarily kept, domesticated, and traditionally devoted to the service of mankind are considered as so far sanctioned by common usage that there is no liability merely for keeping such an animal.

The special notice of the character of the particular animal which is required in such a case is known technically as "scienter." It must extend to the trait or propensity which has caused the damage. Notice that a dog or a horse will attack other animals is not necessarily notice that it will attack human beings,[93] and the vicious character of a dog is no notice that it will collide with a man and knock him down.[94] A horse which is difficult to control is not necessarily likely to bite or kick.[95] The strict liability is limited to the particular risk known to the defendant.

79. Filburn v. People's Palace & Aquarium Co., 1890, 25 Q.B.D. 258; Behrens v. Bertram Mills Circus, Ltd., [1957] 2 Q.B. 1; see Scribner v. Kelley, 1892, 38 Barb., N.Y. 14.

80. Hayes v. Miller, 1907, 150 Ala. 621, 43 So. 818; Collins v. Otto, 1962, 149 Colo. 489, 369 P.2d 564 (coyote); Temple v. Elvery, Sask., [1926] 3 W.W.R. 652 (cross between Great Dane and coyote).

81. May v. Burdett, 1846, 9 Q.B. 101, 115 Eng.Rep. 1213; Copley v. Wills, Tex.Civ.App.1913, 152 S.W. 830; Phillips v. Garner, 1914, 106 Miss. 828, 64 So. 735; Garelli v. Sterling Alaska Fur & Game Farms, Inc., 1960, 25 Misc.2d 1032, 206 N.Y.S.2d 130; cf. Candler v. Smith, 1935, 50 Ga.App. 667, 179 S.E. 395 (baboon). But in Abrevaya v. Palace Theatre & Realty Co., 1960, 25 Misc.2d 600, 197 N.Y.S.2d 27, it was held that a domesticated rhesus monkey was not a matter for strict liability in the absence of scienter.

82. Marlor v. Ball, 1900, 16 T.L.R. 239 (zebras); Smith v. Jalbert, 1966, 351 Mass. 432, 221 N.E.2d 744 (same). A humorous extension of the idea is York, In re Wrestlers, 1941, 13 Rocky Mt. L.Rev. 171.

83. Filburn v. People's Palace & Aquarium Co., 1890, 25 Q.B.D. 258, 59 L.J.Q.B. 471; Hayes v. Miller, 1907, 150 Ala. 621, 43 So. 818; Copley v. Wills, Tex.Civ.App.1913, 152 S.W. 830.

84. Talley v. Travelers Ins. Co., La.App.1967, 197 So. 2d 92 (horse) writ refused 250 La. 913, 199 So.2d 920; Berry v. Kegans, 1960, 186 Kan. 388, 411 P.2d 707 (dog); Maxwell v. Franz, Mo.App.1961, 344 S. W.2d 262 (dog); Mann v. Stanley, 1956, 141 Cal. App.2d 438, 296 P.2d 921 (bull); Pallman v. Great A. & P. Tea Co., 1933, 117 Conn. 667, 167 A. 733 (cat); May Co. v. Drury, 1931, 160 Md. 143, 153 A. 61 (parrot); Olson v. Pederson, 1939, 206 Minn. 415, 288 N.W. 856 (dog); Restatement of Torts, § 518.

85. Maung Kyan Dun v. Ma Kyian, 1900, 2 Upper Burma Rulings, Civ. 570.

86. Behrens v. Bertram Mills Circus, Ltd., [1957] 2 Q.B. 1. Similarly, the Indian buffalo is regarded as "cattle" in India. Madho v. Akaji, 1912, 17 Ind. Cas. 899. But not in Ceylon, where it is said not to be so domesticated as to be "harmless." Anonymous, 1851, Austin's Rep., Ceylon, 153.

Camels, which are now domesticated virtually everywhere they are found, were held not to be "wild" animals in McQuacker v. Goddard, [1940] 1 K.B. 687, and Nada Shah v. Sleeman, 1917, 19 West. Aust.L.Rep. 119; but the contrary was held in Gooding v. Chutes Co., 1909, 155 Cal. 620, 102 P. 819.

87. Hammond v. Melton, 1891, 42 Ill.App. 186.

88. Rector v. Southern Coal Co., 1926, 192 N.C. 804, 136 S.E. 113; Robidoux v. Busch, Mo.App. 1906, 400 S.W.2d 631. See the justly noted remarks of Lamm, J., on the Missouri mule in Lyman v. Dale, 1914, 262 Mo. 353, 360, 171 S.W. 352, 354.

89. Banks v. Maxwell, 1933, 205 N.C. 233, 171 S.E. 70; Mann v. Stanley, 1956, 141 Cal.App.2d 438, 296 P.2d 921. Cf. Yazoo & M. V. R. Co. v. Gordon, 1939, 184 Miss. 885, 186 So. 631 (steer); Young v. Blaum, La.App.1933, 146 So. 168 (male goat); Oakes v. Spaulding, 1867, 40 Vt. 347 (the battering ram). As to this last, see Browne, The Sign of the Ram, 1889, 1 Green Bag 528.

90. Earl v. Van Alstyne, 1850, 8 Barb., N.Y., 630; Parsons v. Manser, 1903, 119 Iowa 88, 93 N.W. 86; Ammons v. Kellogg, 1925, 137 Miss. 551, 102 So. 562.

Thus it has been said that the keeper of such animals is not liable for acts normal to the kind, in the absence of some notice of a special propensity in the individual, or some negligence. Clinton v. Lyons & Co., [1912] 3 K.B. 198; Manton v. Brocklebank, [1923] 2 K.B. 212; Buckle v. Holmes, [1926] 2 K.B. 125; Goodwin v. E. B. Nelson Groc. Co., 1921, 239 Mass. 232, 132 N.E. 51.

91. Congress & Empire Spring Co. v. Edgar, 1879, 99 U.S. 645; Marble v. Ross, 1878, 124 Mass. 44; Briley v. Mitchell, 1959, 238 La. 551, 115 So.2d 851, on remand, 1960, 119 So.2d 668.

92. Andrew v. Kilgour, 1910, 19 Man.L.Rep. 545.

93. Fowler v. Helck, 1939, 278 Ky. 361, 128 S.W.2d 564; Warrick v. Farley, 1914, 95 Neb. 565, 145 N. W. 1020; Knightlinger v. Egan, 1872, 65 Ill. 235; Glanville v. Sutton, [1928] 1 K.B. 571.

In Perkins v. Drury, 1953, 57 N.M. 269, 258 P.2d 379, this together with the fact that the owner kept the dog on a leash and frequently warned others to keep their children away from it was held to justify a finding of scienter. See Note, 1954, 11 Wash. & Lee L.Rev. 119.

94. Koetting v. Conroy, 1936, 223 Wis. 550, 270 N.W. 625, 271 N.W. 369. Cf. Melicker v. Sedlacek, 1920, 189 Iowa 946, 179 N.W. 197 (dog barking at car). The Massachusetts court seems to have carried this entirely too far in holding that notice that a horse will bite is not notice that he will kick. Greeley v. Jameson, 1928, 265 Mass. 465, 164 N.E. 385. See contra, Reynolds v. Hussey, 1886, 64 N.H. 64, 5 A. 458 (frontal attack by horse known to kick); cf. McCullar v. Williams, 1928, 217 Ala. 278, 116 So. 137 (dog attacking in street rather than on premises). Fright at a vicious dog is clearly within the risk. Netusil v. Novak, 1931, 120 Neb. 751, 235 N. W. 335; cf. Candler v. Smith, 1935, 50 Ga.App. 667, 179 S.E. 395. See Note, 1935, 13 Neb.L.B. 422.

95. Webber v. McDonnell, 1928, 254 Mass. 387, 150 N.E. 189; Cockerham v. Nixon, 1850, 11 Ired. 269, 33 N.C. 269. The dangerous trait must be pleaded and proved. F. Giovannozzi & Sons v. Luciani, 1941, 2 Terry, Del., 211, 18 A.2d 435.

But a known tendency to attack others, even in playfulness,[96] as in the case of the overly friendly large dog with a propensity for enthusiastically jumping up on visitors,[97] or to chase motor vehicles,[98] will be enough to make the defendant liable for any damage resulting from such an act.

While the owner may not be liable for a mere failure to discover the traits of his dog,[99] it is sufficient that he has notice of facts which would put a reasonable man on his guard, and he is charged with knowledge of the characteristics that are reasonably apparent to him.[1] Notice that a dog has once bitten a man is ordinarily sufficient to establish scienter that he may do it again,[2] but the often repeated statement that "every dog is entitled to one bite" is not and never has

96. Evans v. McDermott, 1886, 49 N.J.L. 163, 6 A. 653; Oakes v. Spaulding, 1867, 40 Vt. 347; Mercer v. Marston, 1925, 3 La.App. 97.

97. Crowley v. Groonell, 1901, 73 Vt. 45, 50 A. 546; Groner v. Hedrick, 1961, 403 Pa. 148, 169 A.2d 302; Dansker v. Gelb, Mo.1961, 352 S.W.2d 12. Cf. Russo v. Schieber, 1958, 11 Misc.2d 842, 175 N.Y.S.2d 188, affirmed memo., 1959, 8 App.Div.2d 986, 191 N.Y.S.2d 146, reargument denied and appeal denied, 1959, 9 App.Div.2d 629, 191 N.Y.S.2d 549 (dog lunging out of window); Owen v. Hampson, 1952, 258 Ala. 228, 62 So.2d 245 (running after motor vehicles).

98. Owen v. Hampson, 1952, 258 Ala. 228, 62 So.2d 245. See, generally, Note as to liability in non-bite cases, 1969, 23 U. Miami L.Rev. 848.

99. Domm v. Hollenbeck, 1913, 259 Ill. 382, 102 N.E. 782. But if such failure to discover is unreasonable, it may amount to negligence. Lloyd v. Bowen, 1915, 170 N.C. 216, 86 S.E. 797.

1. Knowles v. Mulder, 1889, 74 Mich. 202, 41 N.W. 896; Butts v. Houston, 1915, 76 W.Va. 604, 86 S.E. 473; Bachman v. Clark, 1916, 128 Md. 245, 97 A. 440; Mungo v. Bennett, 1961, 238 S.C. 79, 119 S.E. 2d 522.

2. Zarck v. Fredericks, 3 Cir. 1943, 138 F.2d 689; Grissom v. Hofius, 1905, 39 Wash. 51, 80 P. 1002; Tubbs v. Shears, 1916, 55 Okl. 610, 155 P. 549; Tamburello v. Jaeger, La.App.1965, 176 So.2d 707, affirmed 249 La. 25, 184 So.2d 544 (horse had kicked two others). But in Chandler v. Vaccaro, 1959, 167 Cal.App.2d 786, 334 P.2d 908, it was held that a bite five years before, with good behavior in the meantime, was not enough.

been the law.[3] It is enough that the dog has manifested a vicious disposition, and a desire to attack or annoy people or other animals.[4] Such knowledge may be inferred from the fact that the dog is kept confined,[5] or even from continued ownership of an animal whose tendencies are obvious,[6] or from its reputation in the neighborhood.[7] Under familiar agency principles, the owner is charged with the knowledge of a servant,[8] or a member of his family,[9] to whom he has entrusted its custody. In some jurisdictions statutes have been enacted imposing absolute liability for certain types of damage done by animals, such as dog bites—usually with an exception made in the case of injuries to trespassers or tortfeasors.[10] And scienter is of course not required where any negligence can be shown in the keeping or control of the animal.[11]

Since the gist of the tort is the keeping of a thing known to be dangerous, one who keeps or harbors an animal owned by another may be liable if he has such knowledge.[12]

3. Mailhot v. Crowe, 1918, 99 Wash. 623, 170 P. 131; Carrow v. Haney, 1920, 203 Mo.App. 485, 219 S.W. 710; Harris v. Williams, 1932, 160 Okl. 103, 15 P.2d 580; Andrews v. Smith, 1936, 324 Pa. 455, 188 A. 146. The statement may perhaps be traced to "the dog has the privilege of one worry." Burton v. Moorhead, 1881, 8 Sess.Cas., 4th Ser., 892.

4. Barger v. Jimerson, 1955, 130 Colo. 459, 276 P.2d 744; Perrotta v. Picciano, 1919, 186 App.Div. 781, 175 N.Y.S. 16; Perazzo v. Ortega, 1927, 32 Ariz. 154, 256 P. 503; Warwick v. Mulvey, 1964, 80 S.D. 511, 127 N.W.2d 433; Davis v. Bedell, 1963, 123 Vt. 441, 194 A.2d 67.

5. Radoff v. Hunter, 1958, 158 Cal.App.2d 770, 323 P.2d 202; Barger v. Jimerson, 1955, 130 Colo. 459, 276 P.2d 744; Shuffian v. Garfola, 1959, 9 App.Div.2d 940, 195 N.Y.S.2d 45. Cf. Perkins v. Drary, 1953, 57 N.M. 269, 258 P.2d 379 (warning children to keep away); Ford v. Steindon, 1962, 35 Misc.2d 339, 232 N.Y.S.2d 473 ("Beware of the Dog").

6. Thompson v. Wold, 1955, 47 Wash.2d 782, 289 P.2d 712; Dauber v. Boyajian, 2 Cir. 1933, 62 F.2d 1002; Stapleton v. Butensky, 1919, 188 App.Div. 237, 177 N.Y.S. 18; Radoff v. Hunter, 1958, 158 Cal.App.2d 770, 323 P.2d 202.

7. Fake v. Addicks, 1890, 45 Minn. 37, 47 N.W. 450; Stewart v. Gwinn, 1924, 136 Miss. 806, 101 So. 689; Hill v. Moseley, 1941, 220 N.C. 485, 17 S.E.2d 676.

See, generally, Note, 1968, 33 Mo.L.Rev. 89.

8. Herbert v. Ziegler, 1958, 216 Md. 212, 139 A.2d 699; Buck v. Brady, 1909, 110 Md. 568, 73 A. 277; Grissom v. Hoffus, 1905, 39 Wash. 51, 80 P. 1002; Dauber v. Boyajian, 2 Cir. 1933, 62 F.2d 1002; Restatement of Agency, Second, § 283.

9. Perazzo v. Ortega, 1927, 32 Ariz. 154, 256 P. 503; Harris v. Williams, 1932, 160 Okl. 103, 15 P.2d 580.

10. See McEvoy v. Brown, 1958, 17 Ill.App.2d 470, 150 N.E.2d 652; Tanga v. Tanga, 1967, 94 N.J.Super. 5, 226 A.2d 723; Nelson v. Hansen, 1960, 10 Wis.2d 107, 102 N.W.2d 251; Schonwald v. Tapp, 1955, 142 Conn. 719, 118 A.2d 302; Dragonette v. Brandes, 1939, 135 Ohio St. 223, 20 N.E.2d 367 (leash law). See Hallen, Liability of Dog Owners, 1951, 12 Ohio St.L.J. 343; Notes, 1948, 1 Okl.L. Rev. 110; [1960] Duke L.J. 146.

It has been held that the statute does not abrogate the common law action based on scienter. Reeves v. Eckles, 1966, 77 Ill.App.2d 408, 222 N.E.2d 530. Or negligence. Warner v. Wolfe, 1964, 176 Ohio St. 389, 199 N.E.2d 860.

11. Weaver v. National Biscuit Co., 7 Cir. 1942, 125 F.2d 463; Drew v. Gross, 1925, 112 Ohio St. 485, 147 N.E. 757; Parsons v. Manser, 1903, 119 Iowa 88, 93 N.W. 86; Gardner v. Koenig, 1961, 188 Kan. 135, 360 P.2d 1167; McAbee v. Daniel, 1968, — Tenn. —, 445 S.W.2d 917.

12. Missio v. Williams, 1934, 129 Tenn. 504, 167 S.W. 473; Dauber v. Boyajian, 2 Cir. 1933, 62 F.2d 1002; Smith v. Royer, 1919, 181 Cal. 165, 183 P. 669; Harris v. Williams, 1932, 160 Okl. 103, 15 P.2d 580. A corporation may be liable for harboring an animal kept by its employee. Tidal Oil Co. v. Forcum, 1941, 189 Okl. 268, 116 P.2d 572. But not where it is outside of the scope of his employment, unauthorized, and unknown. Dickson v. Graham-Jones Paper Co., Fla.1956, 84 So.2d 309.

"Harboring" has been said to mean protecting. Wood v. Campbell, 1911, 28 S.D. 197, 132 N.W. 785. Probably more than this is required, since the United States has been held not to harbor wild bears in its national parks. Ashley v. United States, D.C.Neb. 1963, 215 F.Supp. 39, affirmed 326 F.2d 449; Claypool v. United States, D.C.Cal.1951, 98 F.Supp. 702. It seems to mean housing, keeping or caring for the animal as it usually is kept by an owner. Hancock v. Finch, 1939, 126 Conn. 121, 9 A.2d 811; Schulz v. Griffith, 1897, 103 Iowa 150, 72 N.W. 445. Feeding deer is not enough. Swain v. Tillett, 1907, 269 N.C. 46, 152 S.E.2d 297. One who has given away a dog and will not take him back is not harboring him when he keeps returning. Hunt v. Hazen, 1953, 197 Or. 637, 254 P.2d 210.

A bailee with scienter is of course liable.[13] What little authority there is tends to hold the owner strictly liable, as well as the bailee in such a case, either upon the basis of negligence in allowing the animal to be used,[14] or on the ground that the danger is such that the responsibility cannot be shifted.[15] While the latter view has been criticized,[16] there is perhaps a sufficient analogy to the entrusting of a dangerous activity to an independent contractor.[17]

The various questions which arise as to the extent of the liability for the keeping of abnormally dangerous animals can more conveniently be dealt with at a later point.[18]

77. FIRE

The dangerous potentialities of fire seem to have been recognized very early. Something approaching strict liability for fire apparently was imposed upon landholders by the early common law, although it is a matter of dispute just what its limitations may have been.[19] Certainly some excuses were recognized, such as the intervention of an act of God, or the act of a stranger.[20] But whatever the early rule may have been, it was altered by a statute passed in 1707, and amended in 1774,[21] which provided that no action should be maintained against one in whose building or estate a fire accidentally began. Under this statute, the English courts have held that the landholder ordinarily is not liable,[22] unless the fire originates or spreads through his negligence,[23] or is intentionally set.[24] But where the fire has its origin in the course of an activity which is regarded as abnormally dangerous, even on the defendant's land, they have reverted to their present understanding of the earlier rule, and have held him to strict responsibility.[25] Thus the owner of a steam engine, driven along the highway, has been held liable without

13. Quilty v. Battie, 1892, 135 N.Y. 201, 32 N.E. 47; Frammell v. Little, 1861, 16 Ind. 251.

See Donaldson, Liability Arising from Owning or Harboring Animals, 1969, 26 Ins.Couns.J. 268.

14. White v. Steadman, [1913] 3 K.B. 340; Corliss v. Keown, 1910, 207 Mass. 149, 93 N.E. 143.

15. Stapleton v. Butensky, 1919, 188 App.Div. 237, 177 N.Y.S. 18. Cf. Austin v. Bridges, 1912, 3 Tenn.Civ. App. 151; Pinn v. Rew, 1916, 32 T.L.R. 451 (independent contractor authorized to take dangerous animals upon the highway); Yazoo & M. R. Co. v. Gordon, 1939, 184 Miss. 885, 186 So. 631 (independent contractor loading cattle); Luick v. Sondrol, 1925, 200 Iowa 728, 205 N.W. 331 (under statute).

16. See Note, 1920, 20 Col.L.Rev. 89; Harper, Law of Torts, 1933, § 175.

17. See supra, § 70. Cf. Black v. Christchurch Finance Co., [1894] A.C. 48. "Can the person who has acquired a tiger, so long as he remains its owner, relieve himself of responsibility by contracting with a third person for its custody?" Atkin, L. J., in Belvedere Fish Guano Co. v. Rainham Chemical Works, [1920] 2 K.B. 497, 504.

18. See infra, p. 518.

19. See Beaulieu v. Fingham, 1401, Y.B. 2 Hen. 4, 18, pl. 61; Tubervil v. Stamp, 1697, variously reported in 1 Salk. 13, 1 Ld.Raym. 264, Carthew 425, 91 Eng.Rep. 1072. The allegation was for "negligently" keeping the fire; but it seems clear that this meant less than the modern significance of negligence, and the only uncertainty is as to how much less. See Wigmore, Responsibility for Tortious Acts: Its History, 1893, 7 Harv.L.Rev. 315, 448; Winfield, The Myth of Absolute Liability, 1926, 42 L.Q.Rev. 37, 46.

20. Tubervil v. Stamp, 1697, 1 Salk. 13, 1 Ld.Raym. 264, 91 Eng.Rep. 1072. Cf. Rayonier, Inc. v. United States, 9 Cir. 1955, 225 F.2d 642, vacated on other grounds 352 U.S. 315 (fire from other land sweeping across defendant's).

21. 6 Anne, c. 31, § 6, made permanent by 10 Anne, c. 14, § 1, later amended by 14 Geo. 3, c. 78, § 86.

22. Job Edwards, Ltd. v. Birmingham Navigations, [1924] 1 K.B. 341; Collingwood v. Home and Colonial Stores, [1936] 3 All Eng.Rep. 200.

23. Vaughan v. Menlove, 1837, 3 Bing. 468, 132 Eng. Rep. 490; Maclenan v. Segar, [1917] 2 K.B. 325; Sochacki v. Sas, [1947] 1 All.Eng.Rep. 344; Vaughan v. Taff Vale R. Co., 1860, 5 H. & N. 679, 157 Eng.Rep. 1357; Howard v. Furness Houlder Argentine Lines, [1936] 2 All Eng.Rep. 781, 41 Com.Cas. 290.

24. In Filliter v. Phippard, 1847, 11 Q.B. 347, 116 Eng.Rep. 506, the statute was held inapplicable to a fire intentionally kindled, as not of "accidental" origin.

25. See Bankes, L. J., in Musgrove v. Pandelis, [1919] 2 K.B. 43.