CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

BEHRENS AND ANOTHER v. BERTRAM MILLS CIRCUS LTD.

1956 Dec. 3, 4, 5, 6, 7, 13, 14, 17, 18, 19, 21. 1957 Jan. 30.

Devlin J.

[1954 B. No. 711.]

Animal—Ferae naturae—Elephant—Whether ferae naturae—Liability of owner for acts of animal ferae naturae not flowing from savage disposition—Whether wrongful act of third party a defence—Midget injured when booth in funfair knocked down by elephant—Elephant irritated by dog introduced into booth by third party—Prohibition against introduction of dogs—Tame Burmese circus elephant—Midgets licensees of booth—Knowledge by midgets that elephants passing booth—Applicability of maxim volenti non fit injuria.

Rylands v. Fletcher. *Volenti non fit injuria.*

Damages—Personal injuries—Husband and wife—Both midgets—Choice of husband not to work while wife incapacitated—Exceptional dependence of married midgets upon each other—Choice reasonable —Husband entitled to recover loss of earnings during period of wife's incapacity.

Judicial Precedent—Ratio decidendi—Two reasons for decision—Both binding.

The plaintiffs, husband and wife, were both midgets and during the Christmas season beginning in December, 1953, were on exhibition in a booth in the funfair adjoining the defendants'

circus at Olympia, which they and their manager occupied under licence from the defendants. At the far end of the funfair the defendants kept six female Burmese elephants which performed in the circus. The plaintiffs' booth was in a passageway leading from the funfair to the circus ring along which the elephants, escorted by their trainer and grooms, passed several times a day on their way to and from the circus ring. On January 2, 1954, the plaintiffs' manager had in the pay box of their booth a small dog which had been introduced into the premises contrary to the defendants' rules. As the elephants were passing the booth, the dog ran out barking and snapping at one of them. The elephant turned and went after the dog, followed by some of the other elephants, and the plaintiffs' booth was knocked down, the female plaintiff being seriously injured by falling parts of the booth. None of the elephants directly attacked either of the plaintiffs.

The plaintiffs' custom was to work together touring fairgrounds and music halls where they appeared together, either on exhibition or on the stage, but the part played by the female plaintiff was only subsidiary to that of her husband who could have obtained work without her. The plaintiffs, as was normal in the case of married midgets, were utterly dependent upon each other and during the period of his wife's incapacity the male plaintiff, whose earning capacity was not affected by her injuries, did not take any work; and, although he could have taken work and gone away on tour without her, it was found reasonable for him not to do so.

The plaintiffs, alleging, inter alia, breach by the defendants of the absolute duty laid upon the keeper of a dangerous animal to confine or control it, claimed damages. On the following pleas raised, inter alia, by the defendants: (1) that the elephants in question were not animals ferae naturae within the meaning of the rule relating to strict liability; (2) that liability was only imposed in respect of injury resulting from the acts of an animal due to its vicious and savage nature; (3) that the maxim volenti non fit injuria applied to the plaintiffs; and (4) that the act of the elephant was caused by the wrongful act of the plaintiffs' manager in introducing the dog into the funfair:—

Held, (1) that, as a matter of law, all elephants were dangerous, and that it made no difference that the particular elephant in question was a highly trained Burmese elephant and in fact tame, for the harmfulness of an offending animal was to be judged, not by reference to its particular training and habits, but by reference to the general habits of the species to which it belonged.

Filburn v. *People's Palace and Aquarium Co. Ltd.* (1890) 25 Q.B.D. 258; 6 T.L.R. 402 followed.

(2) That the keeper of a dangerous animal was under an absolute duty to confine and control it so that it should do no harm, and where injury was caused by such an animal whilst out of control the rule of absolute liability applied whether or not the injury resulted from the animal's vicious or savage propensity.

Conceptions of mens rea and malevolence could not be introduced in the case of animals, nor could animals that were ferae naturae by virtue of their genus be put upon the same footing as those which became so by exhibition of a particular habit.

Dicta of Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156, 171; 62 T.L.R. 646; [1946] 2 All E.R. 471 applied.

Wormald v. *Cole* [1954] 1 Q.B. 614; [1954] 1 All E.R. 683 considered.

(3) That the plea of volenti non fit injuria did not avail the defendants, for the passing of the elephants did not create an obvious danger, and the plaintiffs' decision, made after they had discovered that the elephants passed their booth, to continue to exercise the right which they had paid for to use the booth was not foolhardy or reckless.

Clayards v. *Dethick and Davis* (1848) 12 Q.B. 439 followed.

(4) That the wrongful act of a third party afforded no defence to liability for injury done by a savage animal, and, therefore, although the status of the plaintiffs' manager as a licensee was irrelevant (since liability depended not upon occupation of land but upon possession of the animal) and he must be deemed to be a stranger for the purposes of the rule in *Rylands* v. *Fletcher*, the defendants could not rely upon the act of the manager in introducing the dog. It followed, therefore, that the defendants were liable to the plaintiffs for all the injury caused while the elephant was out of control.

Baker v. *Snell* [1908] 2 K.B. 825; 24 T.L.R. 811 applied.

If a judge gives two reasons for his decision both are binding.

Held, further, on the question of damages, that in the exceptional circumstances of the case and since in choosing to remain at home rather than go on tour he was acting reasonably, the male plaintiff was entitled to recover as damages his loss of earnings during the time when he was fit for work and his wife was incapacitated.

Burgess v. *Florence Nightingale Hospital for Gentlewomen* [1955] 1 Q.B. 349; [1955] 1 All E.R. 511 distinguished.

ACTION.

The following statement of facts is taken substantially from the judgment of Devlin J.: The plaintiffs, Johannes Heinrich Wilhelm Behrens and his wife, Emmie Behrens, were midgets. The male plaintiff was 30 inches high and claimed to be the smallest man in the world; he was uncommon among midgets in that he was perfectly proportioned. His wife was 36 inches high and was not perfectly proportioned; she was trained to play a number of musical instruments, such as an accordion and a saxophone of a special size, well enough to enable her to contribute to the entertainment with some form of musical act when she was on the stage. The plaintiffs were married in 1932 and from 1937 to 1949 appeared together in South America, mostly

in music halls. From 1949 to 1953 they were with a troupe of midgets which one Lester was taking round this country; subsequently they toured the west country with one Whitehead as their manager or impresario. There were no animals involved in this, and no stage or musical act; the plaintiffs were simply exhibited in a booth and members of the public paid their entrance money and walked into the booth to see the plaintiffs and then walked out again.

The defendant company, Bertram Mills Circus Ltd., well-known circus proprietors, held a circus at Olympia in London every Christmas season, and for that purpose rented the Grand Hall at Olympia and the annexe behind it. The circus ring and theatre surrounding it were built in the half of the Grand Hall nearest the main entrance, and in the other half of the hall and the annexe behind it there was a funfair; a space underneath a gallery running round the main hall was left outside the theatre and formed a corridor, with small booths on either side, giving access to the funfair. Beyond the funfair the defendants had a menagerie where they kept animals for show, some of the animals being those which performed in the circus, among them six Burmese elephants. Every time there was a circus performance the elephants were twice taken from the elephant house to the circus ring and back, once for the parade at the beginning of the circus and once for their act.

The defendants operated the circus themselves, but not the funfair; having rented the whole of the Grand Hall and the annexe they let out concessions to different amusement caterers, giving them the right to set up their various forms of entertainment, but they retained general control of the funfair and had two funfair managers for that purpose.

In August, 1953, Whitehead, the plaintiffs' manager, obtained from the defendants a licence for a booth in the funfair for the Christmas season beginning on December 18, 1953. He paid the defendants £172 10s. for the licence, and he and the plaintiffs in return took the whole of the money paid by members of the public for seeing their show. The terms on which they worked were that the plaintiffs put up half the money and got half the takings; they regarded themselves as partners with Whitehead, as in a commercial sense they were, although it was not admitted that they were partners in law.

The space which the plaintiffs obtained in the funfair was in a passageway underneath the gallery of the Grand Hall, with a frontage of about 20 feet. There was a front advertising " the

"smallest man on earth," an entrance and an exit and between them a paybox at which Whitehead sat taking the money and attracting visitors. There were booths on both sides of the passageway, which was 13 feet wide and primarily intended for the use of the public. When the elephants left their elephant house and crossed the funfair to the circus ring they came down that passageway, in single file, the trainer walking beside the leading elephant and five other grooms walking beside the other elephants. The camels which performed in the circus came that way, too.

The plaintiffs and the Whitehead family for the duration of the show lived in two caravans which were parked at or near Earls Court. Mr. and Mrs. Behrens had a cat to which they were greatly attached and which had featured in their show and which they took every day to Olympia in one of those shopping baskets that are on wheels. Their custom was to go to Olympia in a taxi with Whitehead and the cat every morning about 11 o'clock, going to the entrance for the staff and standholders, in Blythe Road at the back of the premises. Whitehead had a daughter, Santa, then aged 11 or 12, who had a little Pomeranian dog about 12 inches long called Simba, which she kept in the caravan as a pet. On Saturday, January 2, 1954, the circus and funfair having then been going on for about a fortnight, it was arranged that Whitehead's two children should go to Olympia in the afternoon and Whitehead would try to get tickets for them for the circus show, and it was arranged that Whitehead should meet them in the foyer at the main entrance.

The children arrived in the main entrance about 2 o'clock and Whitehead was there to meet them. Santa had brought with her the dog Simba. Whitehead had not succeeded in getting them tickets for the circus and he took them round to the funfair, going first of all to his own booth, which one of the other concessionaires had been looking after for him; he then sent the two children to look around the funfair while he resumed his place at the pay box. He kept the dog. The pay box was semi-circular and had a space underneath the desk or counter so that whoever was sitting there had room for his knees. The dog was put in this space; it had a lead attached to it, and Whitehead fastened the end of this lead to one of the legs of his chair.

The circus performance had begun at 1.45. The elephants had already been out for the opening parade and back again to their house. In due course they came out again in order to do their act. As the third elephant in the procession, Bullu, was

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passing opposite Whitehead the dog, Simba, ran out snapping and barking. It is a fact well known to those who have to do with elephants that they are easily frightened by small dogs running out at them in this way. Bullu trumpeted with fright, Simba turned back and made to go into the booth and Bullu went after her. The elephant in front of Bullu went too. The trainer and grooms followed the elephants. The male plaintiff was got out of the booth and then Mrs. Behrens. The dog was killed. None of the elephants touched either of the plaintiffs, but the front of the booth and other parts of it were knocked down and some part fell on Mrs. Behrens, causing her serious injuries. The trainer got the elephants back into line again very quickly—the whole thing was over in a few seconds—and the procession went on and they performed their act.

Mrs. Behrens was seriously injured and was incapacitated until the middle of June, 1954, when she was fit to do light work. After her recovery she was unable to play her musical instruments as well as she had done before the accident, but was not completely incapacitated from taking part in any musical act and could play well enough to afford supplementary interest while her husband was on the stage. Although they received offers of work in May or June, 1954, and in 1955, the plaintiffs did not take work again until April 2, 1956, two and a quarter years after the accident, when they resumed exhibition or fairground work. They justified that long period of inactivity on the ground that their occupation consisted of a joint act of entertainment and that Mrs. Behrens was by the accident rendered unfit to play her musical instruments, the playing of which formed an essential part of the joint act. In fact the act was not a joint act, for the part played by Mrs. Behrens was only subsidiary, the main attraction being the advertisement of Mr. Behrens as the smallest man on earth, and Mr. Behrens could have obtained work without her and her injuries did not put an end to his professional livelihood. The plaintiffs, when on tour, lived in a caravan, and there was evidence that married midgets were exceptionally dependent upon each other and that it would not even be considered that one should go away to work without the other. No diminution in joint earning power after a period of eight months from the accident was proved.

One of the clauses in the licence granted by the defendants to Whitehead purported to prohibit the introduction of any cat, dog or any other animal on the stand, but, owing to a misprint, did not in fact do so; this clause was one of a very large number

in one of three schedules to the licence and, although it was unlikely that Whitehead had read the clause, he did in fact know that dogs were not allowed into Olympia.

The plaintiffs, alleging, inter alia, that the defendants wrongfully kept the elephants, which were wild animals and of a dangerous, mischievous and/or vicious nature, and that the injuries and loss which they had suffered were the result of the failure of the defendants, their servants or agents, to control certain of their elephants, claimed damages; they also alleged trespass, negligence, and breach of duty by the defendants.

The defendants denied liability; they denied that the elephants were wild or of a dangerous, vicious or mischievous nature, or that they were wrongfully kept on the premises at Olympia. They contended, inter alia, that the plaintiffs by their occupation and their manner of life were well acquainted with the risks involved in their presence near to circus elephants, and well knew and understood that there was a small risk that tame elephants, such as their elephants, however carefully kept and well looked after, might on occasion while being escorted at large, through fright or other similar cause act in a manner such as to cause damage to persons in their vicinity, and that the plaintiffs had voluntarily accepted the risk.

The defendants further contended that the matters complained of were caused by the wrongful act of a third party in causing or permitting the dog to be on the premises. The allegations of trespass, negligence and breach of duty were denied.

Harold Brown Q.C. and *F. B. Purchas* for the plaintiffs. The keeper of an animal ferae naturae is under an absolute duty to confine or control it so that it shall not do injury to others: *per* Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*[1]: and is liable for all the injury which it does if it escapes out of control. In *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[2] it was held that elephants are animals ferae naturae. The class of an animal is a matter of law, and it makes no difference that an animal is in fact tame: see *McQuaker* v. *Goddard.*[3] The defendants, therefore, as the keepers of animals ferae naturae are liable to the plaintiffs for all the injury caused by the elephants while out of control.

[1] [1947] A.C. 156, 171; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[2] (1890) 25 Q.B.D. 258; 6 T.L.R. 402.

[3] [1940] 1 K.B. 687.

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If, as a matter of law, the defendants' elephants are not animals ferae naturae, the plaintiffs will rely on their cause of action in trespass.

M. Dunbar Van Oss and *John Griffiths* for the defendants. Elephants are not animals ferae naturae as a matter of law. The question whether or not a particular animal is wild is a matter of law for the judge in each case; judicial notice is taken of the ordinary course of nature and evidence is admissible to assist the judge in that respect: see *McQuaker* v. *Goddard*,[3] in particular the judgment of Clauson L.J.[4] In *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[5] no attempt was made to inform the court that the elephant there in question came under any particular species. The defendants' elephants are highly trained Burmese elephants and in fact tame. It has never been suggested that African elephants are tame, but the court is not being asked to say that elephants as a whole are tame, and, therefore, is not precluded by the decision in *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[5] from taking judicial notice of special facts relating to Burmese elephants; in this respect the decision of a Burmese court in *Maung Kyow* (*Maney Kyaw*) v. *Ma Kyin*[6] that Burmese elephants are not ferae naturae is significant.

The liability imposed by law on the keeper of a wild animal is of a high order; the rule must be limited to its proper scope and it is submitted that the keeper is only liable for damage due to the vicious or savage propensity of the animal. The keeper of a domestic animal which is known to have dangerous proclivities is in the same position as the keeper of a wild animal, but he is not liable for injury caused by the animal which is not due to its dangerous proclivity. The extent of liability in the case of an animal ferae naturae has still to be investigated by the courts, but it is submitted that the principles are the same as in the case of a domestic animal. In all cases where the scienter rule has been applied the injury was due to the mischievous, vicious or other quality of the animal's nature; regard must be had to whether the damage is relevant to its nature: see *Hadwell* v. *Righton.*[7] It would be harsh to extend the rule of strict liability in the case of animals ferae naturae to remoter matters, and where the damage is accidental and unrelated to the fact that the animal is wild it is too remote. If a wild animal attacks,

[3] [1940] 1 K.B. 687.
[4] Ibid. 700.
[5] 25 Q.B.D. 258.
[6] (1900) 7 Bur.L.R. 73; 2 Upper Burma Rulings 570.
[7] [1907] 2 K.B. 345; 23 T.L.R. 548 (sub nom. *Hadwell* v. *Rightson*).

liability follows, but if the injury arises not because the animal is wild but because it is, for example, a moving object, it is not within the scope of the rule. Here there was no attack. The elephant simply turned aside to drive off the dog and in doing so knocked down the booth. The damage occurred because the elephant was a moving object and the defendants, therefore, are not liable.

Wormald v. *Cole* [8] was a case of cattle trespass. There is no analogy between the action of cattle trespass and the scienter action. In cattle trespass the wrong flows from the trespass; in the case of wild animals, in the absence of negligence, there is no wrong until the animal does the kind of damage which its wild nature leads it to do. There is no wrong in harbouring a wild animal. The owner's duty is to confine and control it so that it will not do that sort of injury: *Read* v. *J. Lyons & Co. Ltd.*[9] As to the kind of mischief to be expected of elephants, see *Vedapurratti* v. *Koppan Nair.*[10]

Where the injury caused by a wild animal is due to the voluntary act of a third party, that affords a defence in a scienter action. Animals are no longer to be regarded as dangerous things within the rule in *Rylands* v. *Fletcher*,[11] but are in a class by themselves: see the observations of Lord Macmillan and Lord Simonds in *Read* v. *J. Lyons & Co. Ltd.*[12] The act of Whitehead in introducing the dog when he knew that it was wrong to do so is relied on. *Baker* v. *Snell* [13] is not an authority to the contrary. That decision has been the subject of much criticism: see Charlesworth on Negligence, 3rd ed., p. 346; Winfield on Tort, 6th ed., p. 647; Salmond on the Law of Torts, 11th ed., p. 657; see also *Knott* v. *London County Council*,[14] in particular the observation of Lord Wright.[15] In *Fleeming* v. *Orr*,[16] a Scottish case turning on a slightly different point, the court held that the act of a third party was material, and exonerated the owner of a dog. [Reference was also made to *Arneil* v. *Paterson.*[17]] In *Baker* v. *Snell*,[18] in the Divisional Court, Channell J.[19] considered that the act of a third party was a defence; Sutton J.[20] did not, and the Court of Appeal [21] was

[8] [1954] 1 Q.B. 614; [1954] 1 All E.R. 683.
[9] [1947] A.C. 156.
[10] (1911) I.L.R. 35 Mad. 708.
[11] (1868) L.R. 3 H.L. 330.
[12] [1947] A.C. 156, 171, 172.
[13] [1908] 2 K.B. 825; 24 T.L.R. 811.
[14] [1934] 1 K.B. 126; 50 T.L.R. 55.
[15] [1934] 1 K.B. 126, 139.
[16] (1855) 2 Macq. 14.
[17] 1931 S.C.(H.L.) 117.
[18] [1908] 2 K.B. 352.
[19] Ibid. 354.
[20] Ibid. 355.
[21] [1908] 2 K.B. 825.

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divided on that point. Cozens-Hardy M.R.[22] and Farwell L.J.[23] agreed with Sutton J.,[24] but Kennedy L.J.[25] dissented on that point. It is submitted that, as the order of the Divisional Court was affirmed on another ground on which all three judges in the Court of Appeal were in agreement, the observations of Cozens-Hardy M.R.[26] and Farwell L.J.[27] as to the act of a third party were obiter and are not binding on this court.

The maxim volenti non fit injuria applies to the plaintiffs. It is conceded that as licensees they were entitled to have the premises made reasonably safe for them, but it is their knowledge at the time of the accident which is material. They knew then that the elephants passed their booth and that there was a danger of them bumping into the booth; by choosing to remain they accepted that risk. [Reference was also made to *Sylvester* v. *G. B. Chapman Ltd.*[28] and *Murray* v. *Harringay Arena Ltd.*[29]]

The plaintiffs' claim for damages must be considered separately in relation to each of them. Their act was not a joint act, and, further, the claim by the male plaintiff for damages in respect of loss of livelihood because of the injuries sustained by his wife is not tenable: *Burgess* v. *Florence Nightingale Hospital for Gentlewomen*,[30] applying the principle in *Best* v. *Samuel Fox & Co. Ltd.*[31]

[DEVLIN J. That principle applies so far as the female plaintiff's musical talent is concerned, but if she had a special value as a wife to her husband is he not entitled to compensation for loss of her services as a wife?]

What is in fact a business loss cannot be claimed under that head. [Reference was made to *Lee* v. *Sheard*[32] and *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.).*[33]] The male plaintiff suffered fright but no physical injury; he cannot recover damages for fright alone. Damages may be recoverable for illness resulting from shock, but the shock must be physical and ascertainable by a physician: *Owens* v. *Liverpool Corporation.*[34] Fear is not physical, but is a preliminary to shock. [Reference was also made to *Victorian Railways Commissioners*

[22] [1908] 2 K.B. 825, 828, 832.
[23] Ibid. 833.
[24] Ibid. 355.
[25] Ibid. 834, 835.
[26] Ibid. 828, 832.
[27] Ibid. 833.
[28] (1935) 79 S.J. 777.
[29] [1951] 2 K.B. 529; [1951] 2 All E.R. 320n.
[30] [1955] 1 Q.B. 349; [1955] 1 All E.R. 511.
[31] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.
[32] [1956] 1 Q.B. 192; [1955] 3 All E.R. 777.
[33] [1955] A.C. 457; [1955] 1 All E.R. 846.
[34] [1939] 1 K.B. 394; 55 T.L.R. 246; [1938] 4 All E.R. 727.

v. *Coultas*[35]; *Hambrook* v. *Stokes Brothers*[36]; *Mitchell* v. *Rochester Railway Co.*,[37] and *Dulieu* v. *White & Sons Ltd.*[38]]

Harold Brown Q.C. in reply. *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[39] establishes as a matter of law that elephants are animals ferae naturae; that decision cannot be distinguished and is binding in this court. Further, the elephant in that case, as here, was a performing animal in a circus.

Liability for damage done by a wild animal while out of control cannot be limited, as suggested by the defendants, to the damage flowing from its vicious or wicked propensities. Wild animals are not in the same category as domestic animals; the owner of a wild animal keeps it at his peril and is liable for all the damage which it does if it escapes from control. The statement of the law by Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*[40] is relied on. In any event, the danger from escaping elephants comes not only from their mouths or teeth but from their momentum and natural quality of bulk. A frightened stampeding elephant does not stop to reason but bulldozes its way through whatever lies in its path.

The maxim volenti non fit injuria has no application in this case. This is not a case of a plaintiff having approached a wild animal, but of plaintiffs who were acting not recklessly but reasonably in remaining where they had a right to be. The fact that they knew that the elephants passed the booth is immaterial because there was no obvious danger; in any event the defendants never informed Whitehead or the plaintiffs of the elephants before the grant of the licence. [Reference was also made to *Smith* v. *Baker & Sons*,[41] *McQuaker* v. *Goddard*[42] and *Bowater* v. *Rowley Regis Corporation*.[43]] Before defendants can rely on the maxim volenti non fit injuria the court must be satisfied that there was a clear and obvious danger: *Clayards* v. *Dethick and Davis*.[44] The question is whether the plaintiffs, in choosing to remain in the booth, were acting reasonably. [Reference was also made to *Dann* v. *Hamilton*.[45]]

The introduction of the dog by Whitehead affords no defence to this action. Liability in respect of a savage animal has long

[35] (1888) 13 App.Cas. 222; 4 T.L.R. 286.

[36] [1925] 1 K.B. 141; 41 T.L.R. 125.

[37] (1896) 151 N.Y. 107.

[38] [1901] 2 K.B. 669; 17 T.L.R. 555.

[39] 25 Q.B.D. 258.

[40] [1947] A.C. 156, 171.

[41] [1891] A.C. 325; 7 T.L.R. 679.

[42] [1940] 1 K.B. 687.

[43] [1944] K.B. 476; 60 T.L.R. 356; [1944] 1 All E.R. 465.

[44] (1848) 12 Q.B.D. 439.

[45] [1939] 1 K.B. 509; 55 T.L.R. 297; [1939] 1 All E.R. 59.

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been considered to be based on the rule in *Rylands* v. *Fletcher*,[46] and there is nothing to the contrary in *Read* v. *J. Lyons & Co. Ltd.*[47] The rule in *Rylands* v. *Fletcher*[48] allows as a defence the act of a third party only if the third party was a stranger, and, therefore, the defendants can only escape liability if they prove that the damage was due to the act of one who was a stranger within the authorities relating to that defence. Whitehead was not a stranger, but a licensee of the defendants; they were in control of the funfair and are responsible for his acts. Reliance is placed on *Hale* v. *Jennings Brothers*,[49] and see *Lawrence* v. *Jenkins*,[50] *Black* v. *Christchurch Finance Co. Ltd.*[51] and *Balfour* v. *Barty King*.[52] It is submitted, further, that *Baker* v. *Snell*[53] is conclusive on this point; the decision of the Court of Appeal was given on two grounds, and the observations of Cozens-Hardy M.R.[54] and Farwell L.J.[55] are not obiter but binding. [Reference was also made to *Box* v. *Jubb*[56]; *Rands* v. *McNeil*[57]; *Sutcliffe* v. *Holmes*[58]; *Rickards* v. *Lothian*[59]; *Northwestern Utilities Ltd.* v. *London Guarantee and Accident Co. Ltd.*,[60] and the essay by Professor Goodhart in Current Legal Problems (1951), p. 186.]

As to damages, the matter must be approached with regard to the physical peculiarities of the plaintiffs and of their limited sphere of employment and enjoyment. The male plaintiff, in the circumstances of this case, is entitled to damages in respect of the fright which he suffered. Fright is similar to physical injury, and the only difference is that it results in mental instead of physical pain: reliance is placed on the observations of Kennedy J. in *Dulieu* v. *White & Sons*.[61] It is difficult to see why damages may be awarded for physical pain and not for mental pain caused by fright. [Reference was also made to *Victorian Railways Commissioners* v. *Coultas*[62]; *Wilkinson* v. *Downton*[63]; *Mitchell* v. *Rochester Railway Co.*[64]; *Hambrook* v. *Stokes Brothers*[65]; *Owens* v. *Liverpool Corporation*[66]; *Hay* (*or*

[46] L.R. 3 H.L. 330.
[47] [1947] A.C. 156.
[48] L.R. 3 H.L. 330.
[49] [1938] 1 All E.R. 579.
[50] (1873) L.R. 8 Q.B. 274.
[51] [1894] A.C. 48.
[52] [1957] 2 W.L.R. 84; [1957] 1 All E.R. 156.
[53] [1908] 2 K.B. 825.
[54] Ibid. 828, 832.
[55] Ibid. 833.
[56] (1879) 4 Ex.D. 76.
[57] [1955] 1 Q.B. 253; [1954] 3 All E.R. 593.
[58] [1947] K.B. 147; 62 T.L.R. 733; [1946] 2 All E.R. 599.
[59] [1913] A.C. 263; 29 T.L.R. 281.
[60] [1936] A.C. 108; 52 T.L.R. 93.
[61] [1901] 2 K.B. 669, 670.
[62] 13 App.Cas. 222.
[63] [1897] 2 Q.B. 57; 13 T.L.R. 388.
[64] 151 N.Y. 107.
[65] [1925] 1 K.B. 141.
[66] [1939] 1 K.B. 394.

Bourhill) v. *Young*,[67] and *King* v. *Phillips*.[68]] The female plaintiff is entitled to damages for her physical injuries as such and also for the consequent limitation of her power to play musical instruments and inability ever to be part of a joint act with her husband. In addition to his damages for shock and fright the male plaintiff is entitled to damages for loss of earnings during his wife's incapacity, as she was part of his joint act and necessary to his existence as a performer or exhibitor.

Cur. adv. vult.

January 30, 1957. DEVLIN J. read the following judgment: This is a claim for damages by the plaintiffs, who are husband and wife, in respect of injuries they sustained on January 2, 1954, as the result of the behaviour of an elephant belonging to the defendants and used in their circus. The elephant knocked down a booth in a funfair adjoining the circus and a part of the booth fell on the female plaintiff causing her serious physical injuries; the male plaintiff, while outwardly uninjured, claims to have suffered from shock.

[His Lordship stated the facts substantially as set out above and continued:] These being the facts, the plaintiffs rely upon three causes of action, trespass, breach of the absolute duty laid upon the keeper of a dangerous animal to confine and control it, and negligence. Mr. Brown has not pursued before me the cause of action in trespass, while reserving his right to do so in a higher court.

The second cause of action, generally known as the scienter action, is the one on which Mr. Brown chiefly relied. Since one of the defendants' submissions goes to the root of that form of action, I propose to begin by stating just what I take its basis to be. Before doing this I must acknowledge my indebtedness to Professor Glanville Williams, who in his book on Liability for Animals (1939) has dealt with the whole subject in such detail and with such clarity as to make it possible for me at least to hope that I can successfully grapple with this antiquated branch of the law and also to omit from this judgment much of the elaboration that would otherwise have to be there.

A person who keeps an animal with knowledge (scienter retinuit) of its tendency to do harm is strictly liable for damage it does if it escapes; he is under an absolute duty to confine

67 [1943] A.C. 92; [1942] 2 All E.R. 396.

68 [1953] 1 K.B. 429; [1953] 1 All E.R. 617.

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or control it so that it shall not do injury to others. All animals ferae naturae, that is, all animals which are not by nature harmless, such as a rabbit, or have not been tamed by man and domesticated, such as a horse, are conclusively presumed to have such a tendency, so that the scienter need not in their case be proved. All animals in the second class mansuetae naturae are conclusively presumed to be harmless until they have manifested a savage or vicious propensity; proof of such a manifestation is proof of scienter and serves to transfer the animal, so to speak, out of its natural class into the class of ferae naturae. Professor Williams has traced at p. 265 the origin of this "primitive rule," as Lord Macmillan described it in *Read* v. *J. Lyons & Co. Ltd.*[1] No doubt in its time it was a great improvement on the still more primitive notion that only the animal was "liable" for the harm it did. But now this sort of doctrine with all its rigidity—its conclusive presumptions and categorisations—is outmoded and the law favours a flexible and circumstantial approach to problems of this sort. Four years ago a committee[2] appointed by the Lord Chancellor and presided over by Lord Goddard C.J. recommended that the scienter action should be abolished and that liability for harm done by an animal should be the same as in the case of any other chattel; it should depend on the failure to exercise the appropriate degree of care; which might in the case of very dangerous animals be "so stringent as to amount practically to "a guarantee of safety": *per* Lord Macmillan in *Donoghue* v. *Stevenson*.[3] I wish to express the hope that Parliament may find time to consider this recommendation, for this branch of the law is badly in need of simplification.

The particular rigidity in the scienter action which is involved in this case—there are many others which are not—is the rule that requires the harmfulness of the offending animal to be judged not by reference to its particular training and habits, but by reference to the general habits of the species to which it belongs. The law ignores the world of difference between the wild elephant in the jungle and the trained elephant in the circus. The elephant Bullu is in fact no more dangerous than a cow; she reacted in the same way as a cow would do to the irritation of a small dog; if perhaps her bulk made her

[1] [1947] A.C. 156, 171; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[2] The Committee appointed to consider the Law of Civil Liability for damage done by Animals. Report presented January, 1953. Cmd. 8746.

[3] [1932] A.C. 562, 612; 48 T.L.R. 494.

capable of doing more damage, her higher training enabled her to be more swiftly checked. But I am compelled to assess the defendants' liability in this case in just the same way as I would assess it if they had loosed a wild elephant into the fun-fair. This is a branch of the law, which, as Lord Goddard C.J. (quoting Blackburn J.[4]) said recently in *Wormald* v. *Cole*,[5] has been settled by authority rather than by reason. But once the fundamental irrationality is accepted of treating circus elephants as if they were wild, I think it is possible to determine sensibly in the light of the scienter rule the other points on liability that arise in this case.

The defendants submit five answers to the scienter action. They are: First, that elephants are not ferae naturae within the meaning of the rule. Secondly, that the rule does not impose liability for every act that an animal does if it escapes control, but only for those acts which are vicious and savage, which the action of Bullu was not. Thirdly, that the plaintiffs' injuries were caused by their own fault. Fourthly, that the maxim volenti non fit injuria—that is that the plaintiffs accepted the risk—applies to them. Fifthly, that it is a good defence to liability under the rule if the action of the animal is caused by the wrongful act of a third party, in this case Whitehead and his dog.

The first submission is, in my judgment, concluded so far as this court is concerned by the decision of the Court of Appeal in *Filburn* v. *People's Palace and Aquarium Co. Ltd.*,[6] which held that as a matter of law an elephant is an animal ferae naturae. Mr. Van Oss has sought to distinguish this case on the ground that the elephants belonging to the defendants are Burmese elephants and he submits that it is open to me to hold that while elephants generally are ferae naturae, Burmese elephants are not. In my judgment, it is not open to me to consider this submission. It is not stated in *Filburn* v. *People's Palace*[6] what the nationality of the elephant was with which the court was there dealing, and the case must be regarded as an authority for the legal proposition that all elephants are dangerous. The reason why this is a question of law and not a question of fact is because it is a matter of which judicial notice

[4] In *Smith* v. *Cook* (1875) 1 Q.B.D. 79, 82.

[5] [1954] 1 Q.B. 614, 621; [1954] 1 All E.R. 683.

[6] (1890) 25 Q.B.D. 258; 6 T.L.R. 402.

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has to be taken. The doctrine has from its formulation proceeded upon the supposition that the knowledge of what kinds of animals are tame and what are savage is common knowledge. Evidence is receivable, if at all, only on the basis that the judge may wish to inform himself. This was clearly settled by the Court of Appeal in *McQuaker* v. *Goddard*,[7] where Clauson L.J.[8] said: "The reason why the evidence was given was for the "assistance of the judge in forming his view as to what the "ordinary course of nature in this regard in fact is, a matter of "which he is supposed to have complete knowledge." Common knowledge about the ordinary course of nature will extend to a knowledge of the propensities of animals according to their different genera, but cannot be supposed to extend to the manner of behaviour of animals of the same genus in different parts of the world. Nor can one begin a process of inquiry which might lead in many directions (for example, I am told that female elephants are more docile than male, and that that is why circus elephants are usually female) and be productive of minute subdivisions which would destroy the generality of the rule.

The defendants' second contention raises a point of doubt and difficulty. It may be approached in this way. The reason for imposing a specially stringent degree of liability upon the keeper of a savage animal is that such an animal has a propensity to attack mankind and, if left unrestrained, would be likely to do so. The keeper has, therefore, in the words of Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*[9] "an absolute duty to "confine or control it so that it shall not do injury." But if it escapes from his control, is he liable (subject, of course, to the rules on remoteness of damage) for any injury which it causes, or only for such injury as flows naturally from its vicious or savage propensity?

Mr. Van Oss submits that it is the latter part of this question which suggests the correct answer and that the rule of absolute liability applies only when an animal is acting savagely and attacking human beings. On the facts of this case, he submits that Bullu was not acting viciously but out of fright; she was seeking to drive off the small dog rather than to attack it; maybe she or another elephant trampled on the dog (there is no conclusive evidence of that, and it might have been crushed by falling timber) but there is nothing to show that she trampled on it deliberately. Certainly she never attacked Mrs. Behrens

[7] [1940] 1 K.B. 687; 56 T.L.R. 409; [1940] 1 All E.R. 471.

[8] [1940] 1 K.B. 687, 700.

[9] [1947] A.C. 156, 171.

who was injured only indirectly. In short, if Bullu could be treated as a human being, her conduct would not be described as vicious but as quite excusable.

It does not, to my mind, necessarily follow that the scope of the rule is co-extensive with the reason for making it. It may equally well be argued that once the rule is made, the reason for making it is dissolved and all that then matters are the terms of the rule. That would certainly be the right approach in the case of any statutory rule of absolute liability. Is it so in the case of this rule of common law? There appears to be no authority directly in point. Mr. Van Oss derives the chief support for his contention from an argument which may be summarized as follows. If an animal mansuetae naturae manifests a vicious tendency, the scienter rule applies to it as if it were ferae naturae. The law has often been put in that way; for example, by Lord Wright in *Knott* v. *London County Council*.[10] How is the principle applied? Suppose a large dog collides with a child and knocks him down, that is an accident and not a manifestation of a vicious propensity and the scienter rule does not apply at all; if it bites a child, it becomes ferae naturae, and the strict rule thereafter applies. But it would seem to be unreasonable that the strict rule should require it to be kept under complete restraint. Suppose that its keeper muzzles it and that while muzzled it playfully or accidentally knocks a child down, ought the keeper to be liable? There is a good deal of authority, referred to by Professor Williams, to show that the keeper is not liable; and the learned author considers that the damage must have in some way been intended by the animal, that its benevolence or its mens rea is relevant and that at least in the case of harmless animals the rule is that the injury must be the result of a vicious propensity.

This is an impressive argument. But it does not seem to me that the logic of the matter necessarily requires that an animal that is savage by disposition should be put on exactly the same footing as one that is savage by nature. Certainly practical considerations would seem to demand that they should be treated differently. It may be unreasonable to hold the owner of a biting dog responsible thereafter for everything it does; but it may also be unreasonable to limit the liability for a tiger. If a person wakes up in the middle of the night and finds an escaping tiger on top of his bed and suffers a heart attack, it would be nothing to the point that the intentions of the tiger were quite

[10] [1934] 1 K.B. 126, 139; 50 T.L.R. 55.

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amiable. If a tiger is let loose in a funfair, it seems to me to be irrelevant whether a person is injured as the result of a direct attack or because on seeing it he runs away and falls over. The feature of this present case which is constantly arising to blur the reasoning is the fact that this particular elephant Bullu was tame. But that, as I have said, is a fact which must be ignored. She is to be treated as if she were a wild elephant; and if a wild elephant were let loose in the funfair and stampeding around, I do not think there would be much difficulty in holding that a person who was injured by falling timber had a right of redress. It is not, in my judgment, practicable to introduce conceptions of mens rea and malevolence in the case of animals.

The distinction between those animals which are ferae naturae by virtue of their genus and those which become so by the exhibition of a particular habit seems to me to be this: that in the case of the former it is assumed (and the assumption is true of a really dangerous animal such as a tiger) that whenever they get out of control they are practically bound to do injury, while in the case of the latter the assumption is that they will only do injury to the extent of the propensity which they have peculiarly manifested. It would not be at all irrational if the law were to recognize a limited distinction of this sort while holding that both classes of animals are governed by the same scienter rule. In the case of dangerous chattels, for example, the law has recognized, though it is not perhaps now of much importance, the distinction between chattels that are dangerous in themselves and chattels that are dangerous when used for certain purposes; and animals ferae naturae have frequently been compared with chattels in the former class: see, for example, *per* Hilbery J. in *Parker* v. *Oloxo Ltd.*[11] and *per* Lord Wright in *Glasgow Corporation* v. *Muir.*[12]

As I have said, there is really no authority on this point. There are indeed not many cases which have dealt with an animal that is ferae naturae by genus as distinct from disposition. In such cases as there are—*Besozzi* v. *Harris*[13] and *Filburn* v. *People's Palace*[14]—the rule was stated in the widest terms; but in these cases the court was dealing with an attacking animal, so that the point did not arise. Nevertheless, in my judgment, they laid down the principle that I should follow; and I think that the statement of the law by Lord Macmillan in *Read* v.

11 [1937] 3 All E.R. 524, 528.

12 [1943] A.C. 448, 464; 59 T.L.R. 266; [1943] 2 All E.R. 44.

13 (1858) 1 F. & F. 92.

14 25 Q.B.D. 258.

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J. Lyons & Co. Ltd.,[15] which I have quoted, namely, that there is " an absolute duty to confine or control it so that it shall not " do injury " needs no qualification.

This conclusion is supported by *Wormald* v. *Cole*.[16] I do not rely on that decision as an authority directly in point because it concerned the rule of absolute liability for cattle trespass, and these rules of absolute liability, while similar in effect, have different origins. But it furnishes strong support by way of analogy. In that case the plaintiff, when she was trying to get straying cattle out of her garden, was injured not because they attacked her but because in blundering about they had knocked her down. It was argued that the plaintiff could not recover because her injuries were not the result of any vicious action on the part of the cattle. This argument was rejected by the Court of Appeal. Lord Goddard C.J.[17] pointed out that in many cases it would be impossible to say with certainty whether the injuries were caused by vice or playfulness or by mere accident.

It follows that, subject to any special defence, the defendants are liable for any injury done while the elephant was out of control. It does not follow (I say this because of a point that was raised in the argument) that if an elephant slips or stumbles, its keeper is responsible for the consequences. There must be a failure of control. But here there was such a failure, albeit a very temporary one. It follows also that the ordinary rule on remoteness of damage applies. It was not suggested that if an animal which is out of control knocks over a structure and injures a person the other side of it, that is not under the ordinary rule a consequence of the failure of control.

The third point taken by the defence is that the injuries were due to the plaintiffs' own fault. This defence is of a nature well recognized in this class of case and there are many cases in which liability has been successfully contested on the ground that the savage animal was teased or provoked by the plaintiff. I see no reason why the same sort of defence should not prevail where the fault of the plaintiff does not amount to recklessness of this sort, but is failure of due diligence to look after his own safety. The facts said to constitute the defence in this case are pleaded in paragraph 6A of the re-amended defence: " Further or in the " alternative the matters complained of were caused or contri- " buted to by the negligence of the plaintiffs and each of them " in that they permitted the said dog to be in or near to the said

[15] [1947] A.C. 156, 171.
[16] [1954] 1 Q.B. 614.
[17] Ibid. 625.

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"booth well knowing that dogs were not permitted upon the "circus premises and/or that dogs were likely to alarm or excite "the elephants." In my judgment, this plea breaks down completely upon the allegation that the plaintiffs permitted the dog to be in or near the booth. Even if I were to assume that the plaintiffs knew of the presence of the dog and to assume likewise the other allegations in the paragraph, there is nothing at all to sustain the allegation of permission. Whitehead was not in their employ and they had no power to control him in any way. Conceivably, it might be said that if the presence of the dog amounted to an obvious danger, anyone who knew of it, whether he had power to order it off or not, ought in the interests of his own safety to have reported it to someone who had the necessary authority. But no one puts the danger as high as that.

The fourth contention of the defence is a plea of volenti non fit injuria based on the allegation that the plaintiffs accepted any risk inherent in the passage of elephants past their booth. There is no evidence that either the plaintiffs or Whitehead knew or had any reason to suspect when the licence was granted that the elephants would come anywhere near their booth. Mr. Van Oss, however, submits that the time when the licence was entered into is not the decisive time, or not the only decisive time. He submits that when the plaintiffs discovered, as of course they did at the beginning, that the elephants passed the booth, their decision to remain amounted to an assumption of the risk. The situation at this later point of time raises quite different considerations. The plaintiffs had not then to decide, in the light of their knowledge of the conditions under which it would have to be exercised, whether they would acquire a right; but whether they would continue to exercise a right for which they had already paid. It is not per se a defence that the plaintiffs were engaged in exercising a right. The pursuit of one's own rights may sometimes be so foolhardy that the reasonable man should desist and seek another remedy. If a man is on the highway and he sees elephants approaching in procession, the law does not require him to elect between turning down a side street or accepting the risk of their misbehaviour if he goes on; but if he sees them stampeding and remains where he is because he considers that he has as much right to the highway as they have, he might fail to recover. I take the law on this point as that laid down in *Clayards* v. *Dethick and Davis.*[18] In that case the defendants made an open trench outside the plaintiff's stable and told him

[18] (1848) 12 Q.B. 439.

that he must put up with it. The plaintiff attempted to get his horse out by means of planks over the trench, and was advised by the defendants not to do so because it was dangerous. An accident occurred and the plaintiff was held entitled to recover. He was not bound to refrain from exercising his rights because there was some danger. As Patteson J. put it [19]: "The whole "question was, whether the danger was so obvious that the "plaintiff could not with common prudence make the attempt." The same principle has recently been considered in the Privy Council in *Reardon Smith Line Ltd.* v. *Australian Wheat Board.*[20] It cannot here be contended that the passing of the elephants created an obvious danger; indeed, the case as pleaded for the defence is that the risk was very small. This plea fails.

The last of the defendants' contentions is that they are freed from liability by the wrongful act of a third party. This point appears to be concluded against them by the decision of the Court of Appeal in *Baker* v. *Snell,*[21] in which it was held by a majority that the intervening act of a third party was no defence. But Mr. Brown, perhaps because he had his eye on a place where *Baker* v. *Snell* [22] would naught avail him, or perhaps because he feared that I might be deterred from following the decision by the volume of criticism that has since flowed over it, gave it no place in the van of his argument. Non tali auxilio, except, of course, in the alternative.

He preferred to rely on general principles, rather than on any specific authority, for his chief submission on this point. He submitted that the liability in respect of a savage animal was based on the rule in *Rylands* v. *Fletcher.*[23] That rule allows as a defence the act of a third party only if it is the act of a stranger; and a licensee is not, he submitted, to be regarded as a stranger. Whitehead was a licensee and, therefore, his intervention afforded no excuse.

There are in the authorities numerous dicta to suggest that the liability for savage animals is a branch of the rule in *Rylands* v. *Fletcher.*[23] Professor Glanville Williams (p. 352, note 4) has collected the cases. These dicta may have to be reconsidered in the light of what was said in *Read* v. *J. Lyons & Co. Ltd.*,[24] particularly *per* Viscount Simon.[25] Whether or not the two rules

[19] 12 Q.B. 439, 446.
[20] [1956] A.C. 266, 281–282; [1956] 1 All E.R. 456.
[21] [1908] 2 K.B. 825; 24 T.L.R. 811.
[22] [1908] 2 K.B. 825.
[23] (1868) L.R. 3 H.L. 330.
[24] [1947] A.C. 156.
[25] Ibid. 167.

stem from a common principle, it would no doubt be legitimate in formulating the exceptions, if any, to the liability for savage animals to look at exceptions that have already been established under other rules of strict liability. But, whether the process be one of analogy or one of derivation, it must be remembered that the underlying conditions for the two kinds of liability are different. One is based on the possession of an animal and the other on the occupation of land. If in relation to the former the holding of a licence is to have any materiality, it must refer to some licensed custodian of the animal, such as the potman in *Baker* v. *Snell*.[26] The fact that in this particular case the defendants not only were the keepers of the elephant but had also rented the premises on which the animal was at the time of the accident and licensed the third party to be on them is wholly irrelevant to any question of liability in the scienter action. If the defendants had granted a concession for the performance of the circus or the keeping of a menagerie as well as for the fun-fair, and, accordingly, the elephant had been kept by some other defendant, it could not possibly be relevant in an action against him to show that the defendant and a third party were both concessionaires or licensees of the same licensor. It cannot make any difference in principle if the keeper of the animal happens also to be the licensor. In my judgment, therefore, if the rule in *Rylands* v. *Fletcher*[27] is to be applied, Whitehead must be deemed for its purposes to be a stranger.

Mr. Brown relied upon *Hale* v. *Jennings Brothers*,[28] particularly the observations of Slesser L.J.[29] If in this case I were dealing with liability which arose out of the occupation of land, these dicta would be in point. For the reasons I have given, I think that they are here irrelevant in determining the status of Whitehead. I do not mean that the relationship of licensor and licensee is necessarily irrelevant on consequential issues of fact. Accepting Whitehead as a stranger, it would still be necessary for the defendants to show that they took all reasonable precautions to prevent him or any other stranger from interfering with their animals; and it might well be that reasonable precautions would include, since they happened incidentally to be licensors, using their powers under the licence, to control his conduct, for example by forbidding dogs. But that would raise another point which would go to an issue of negligence. That is an answer to the third party defence which could arise on the facts, and in

26 [1908] 2 K.B. 825.
27 L.R. 3 H.L. 330.
28 [1938] 1 All E.R. 579.
29 Ibid. 583.

that light I shall refer to it again, but, in my judgment, Whitehead's status as a licensee does not of itself dispose of that defence as a matter of law.

I turn to *Baker* v. *Snell*.[30] In that case the defendant was a publican who owned a dog known by him to be savage. It was the duty of his potman to let the dog out early in the morning and then chain it up again. On the occasion in question the potman brought the dog into the kitchen where the plaintiff, who was a housemaid in the employment of the defendant, was at breakfast and saying: "I will bet the dog will not bite anyone "in the room," let it go, saying: "Go it, Bob." The dog then flew at the plaintiff and bit her. In the county court the judge held that the act of the potman was an assault for which the defendant was not liable and he non-suited the plaintiff. The non-suit was attacked on two grounds. It was contended [31] that the defendant was liable as the keeper of the dog, and that the intervening act of the potman, even if he had been a stranger, would be no defence. Secondly, it was contended that, if the intervention did provide a good ground of defence, nevertheless since in this case the intervener was the defendant's servant and acting within the scope of his employment, the defendant must be liable on that ground. A new trial was ordered both in the Divisional Court [31] and on appeal by the Court of Appeal,[32] and in both courts the judges were unanimous. But they were not unanimous in their reasons. In the Court of Appeal, all three of the Lords Justices agreed that the question whether or not the potman was acting in the course of his employment was one of fact which ought to have been left to the jury, and that a new trial must be ordered on that score. But Cozens-Hardy M.R. and Farwell L.J. considered also, as had Sutton J. in the court below, that the defendant was liable as the keeper of the animal and that the intervention of the potman, even if not acting in the course of his employment, created no defence. Even on this view a new trial was necessary as it was not open to the Court of Appeal to assess the damages. On this point Kennedy L.J. disagreed, sharing the view expressed by Channell J. in the Divisional Court.

It is not, I think, disputed that if the reasoning of the Master of the Rolls and Farwell L.J. is binding upon me, I must dismiss without further inquiry a defence based on the act of Whitehead. Mr. Van Oss submits that the gist of the decision was the order

[30] [1908] 2 K.B. 825.
[31] [1908] 2 K.B. 352.
[32] Ibid. 825.

for a new trial on the grounds on which the Lords Justices were unanimous, and that the observations of Cozens-Hardy M.R. and Farwell L.J. on the other point should be treated as obiter. This question depends, I think, on the language used by the Master of the Rolls. It is well established that if a judge gives two reasons for his decision, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. But the practice of making judicial observations obiter is also well established. A judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is a matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course has been adopted from the language used and not by consulting his own preference.

Cozens-Hardy M.R. first dealt with the judgment of Channell J.,[33] and agreed with his view that the scope of the potman's employment ought to have been left to the jury. He said[34]: "I entirely adopt that view, and that, no doubt, is in "itself a sufficient reason for affirming the decision of the court "below, but as a matter of wider interest has been raised, and "as it has been dealt with by both Channell and Sutton JJ., "I think it right to state, shortly, my view on the point." If this passage had stood by itself, I think that I should have probably construed it as signifying that the Master of the Rolls did not wish—as would be quite natural in a case where there was a considerable conflict of judicial opinion—to give the force of precedent to views which were not necessary to the decision in the case. But after he had considered the other point and expressed his view about it, he said this[35]: "On these authori- "ties, and in accordance with what in my judgment is settled "law, I think that the matter ought to go down for a new trial, "not merely on the ground stated by Channell J., though I agree "that is sufficient, but also on the ground as to which he "expressed some doubt, but on which Sutton J. appears to have "based his decision." In this final sentence of his judgment I think that the Master of the Rolls was clearly basing his decision

[33] [1908] 2 K.B. 352, 353.
[34] Ibid. 825, 828.
[35] Ibid. 832, 833.

on the two grounds, and that it is not open to me to choose between them. I have said that this point depends upon the language of the Master of the Rolls, because I think that it is plain from the language used by Farwell L.J.[36] that he gave as the principal ground for his judgment that the wrongful act of a third person was no defence.

Accordingly, I hold this contention, that is the last of the defendants' contentions, to be concluded against the defendants by authority which binds me. The result is, therefore, that the rule of strict liability applies, and the defendants must compensate the plaintiffs for their injuries.

I have reached this conclusion on the law without having to go very deeply into the facts and, indeed, on the basis of facts which were almost all undisputed. There was, however, a good deal of dispute on other questions of fact which may become relevant if different conclusions are reached on the law. I shall, by way of an appendix to this judgment, set out my findings on these points in case they may be material hereafter. But before I do that I must deal with the assessment of damages, which also raises some difficult questions of fact and law.

The item in the claim for damages which gives rise to most difficulty, both on the facts and on the law, is the claim for loss of earnings. The husband and wife were paid jointly. The takings and expenses were all dealt with jointly, and no part of the net earnings was appropriated as the special property of one or the other. I cannot, however, give joint damages and it will be necessary for me to consider how far each of the two individually has suffered a financial loss as the result of his or her injuries respectively. It will also be necessary for me to consider whether the husband is entitled in law to recover for financial loss caused to him as a result of the injuries which his wife sustained. But before I do this, I think it would be convenient, in order to get at the true facts about the loss of earnings, to put these matters momentarily on one side and consider how far the accident affected their joint earning power.

[His Lordship referred to the facts relevant to this part of the case set out above, and continued:] On the evidence I have heard I do not think the act can really be regarded as a joint one, and I accept Mr. Van Oss's submission that the act was not a joint act, and that other diversions could be arranged for Mr. Behrens.

But I am also satisfied that it would not be reasonable to expect the male plaintiff to go touring or to go round fairgrounds

[36] [1908] 2 K.B. 833, 834.

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and exhibitions by himself and without the company of his wife. The two of them in the witness-box made it very manifest how exceptionally dependent they are upon each other, and he in particular upon her. It is very understandable that it should be so. They live in a strange world and the bond between them must be much stronger even than the ordinary tie of matrimony. This impression that I received of their interdependence was much fortified later by the evidence of Mrs. Lester when she went into the witness-box. She has long experience of working with midgets. She said that it was well known that "little "people" were devoted to each other, that he would not be much good without her, and that it was reasonable for him to say that he could not work alone, that in this respect midgets were different from ordinary people. She would not necessarily expect his wife to be on the stage while the male plaintiff was performing, but at any rate in the auditorium. It must be remembered, too, that, even if he felt at home with ordinary people, the male plaintiff could not when he was on tour mingle with them; if the public are to pay to see him, he must, except when on the stage or in the booth, keep out of sight. It is customary for the plaintiffs to go round in a caravan, which is parked as near as possible to his place of work, and in which they have to spend most of their time. It would not be reasonable to expect the male plaintiff to live there in solitude and with no one to look after him.

But was Mrs. Behrens unfit to accompany her husband and to play the sort of part I have indicated, looking after him, being with him, and perhaps doing a little on the stage? [His Lordship referred to the evidence, and continued:] In the face of the evidence that Mrs. Behrens was fit for light work in the middle of June, 1954, and in the absence of any evidence that she was unfit to go with her husband on tour, I find it impossible to say that the defendants' liability for loss of earnings can extend much beyond that date. I think that it is reasonable to feel that the offer of work in 1954 came rather before the plaintiffs could be expected to be ready for it, and that they were entitled to some period after recovery to look around for work; but if I fix the total period of incapacity at eight months, I think that that is as much as I can do. I assess the joint loss of earnings for that period at £360.

I must now proceed to consider in what proportion this special damage is recoverable as between the two plaintiffs, and whether the husband has a good cause of action in respect of the whole

of his proportion and what sums of general damage should be awarded to each plaintiff individually.

I shall take Mrs. Behrens first. She received half the benefit of the joint earnings and may therefore be taken to have been paid half. It is in my judgment nothing to the point to submit that as her part of the act was much smaller than that of her husband she was, commercially speaking, worth less than half. So long as the arrangement was a genuine one and husband and wife, rightly or wrongly, regarded their contributions as being of equal value, the loss to the wife is a loss of what she was getting and not of what she would have got if her husband had been disposed to drive a harder bargain. This approach to the subject affects Mrs. Behrens' general damage as well as her special, and in the case of the general damage it works for the advantage of the defendants. I am satisfied that in the future as in the past her husband will continue to rate the support he gets from her as being worth half the joint earnings; therefore so long as he is alive and working the wife's disablement will not cause her any professional loss. I think that her damages, both special and general, must be assessed on this basis. Accordingly, I award £180 as special damage to Mrs. Behrens.

Her general damage must be substantial. Her injuries were considerable and they have left some permanent effects of pain and discomfort. I have to take into account that the discomfort, if not pain, which the injuries continue to cause her may well make her work with her husband more arduous, and I have to assess her damages in the light of the arduous work which she has to do if by her support of her husband she is to earn her share of the joint takings. I have also to consider that her ability to earn her own living, if her husband should die has been diminished by her inability to perform a musical act on her own. I assess her general damage at £2,750.

I turn now to the male plaintiff's claim. Can he be compensated for the loss of half the joint earnings? That raises one question of law and another is raised in the assessment of the general damage. I shall take the latter first. The real claim presented by Mr. Brown is for fright. An elephant coming over the top of a booth would be a terrifying thing even for an ordinary man, and although the male plaintiff asserts that he was not frightened, I am satisfied that the shock must have been considerable. I should like to award him a substantial sum under this head, but I am satisfied that I cannot do so except to the extremely limited extent that the shock resulted in physical

or mental harm. I think that that is clearly the effect of the authorities. When the word "shock" is used in them, it is not in the sense of a mental reaction but in a medical sense as the equivalent of nervous shock; MacKinnon L.J. in *Owens* v. *Liverpool Corporation* [37] refers to it as being "ascertainable by "the physician" and as "the form of ill-health which is known as "shock." I appreciate that it is now becoming increasingly difficult to define the boundaries of mental ill-health. But without infringing the general principle embedded in the common law that mental suffering caused by grief, fear, anguish and the like is not assessable, *Owens* v. *Liverpool Corporation* [37] goes as far as any court can go and I cannot accept Mr. Brown's invitation to attempt an extension of what is there said.

The medical history in relation to the male plaintiff is almost negligible. He went to hospital with his wife after the accident, but was not admitted; and in fact the first time he was seen by a doctor was nearly three years later for the purposes of this action. He returned to Olympia the day after the accident in order to look for his cat. He was then obviously very distressed and upset, but that may well have been largely due to his feeling for his wife. It is said in the medical report that thereafter he went to bed for a week. I think it would not be unreasonable if I were to treat that as some form of nervous prostration which amounted to ill-health. He was thus unable to earn money during that period, though that would probably have been impossible anyway owing to the destruction of the booth; the defendants were not, however, concerned to explore this minutely. I assess the damage under this head at £25.

The other form of ill-health that is relied on is some detrimental effect on an existing chest condition. It does not appear that his chest was ever examined, but his statement that before the accident he suffered from minor chest trouble and that since the accident he has been more prone to chronic bronchitis is accepted in the medical report; and the opinion is expressed that it is probable that the shock had some detrimental effect on his chest condition. Apart from shock, I should have thought it likely that in the case of a man over 60 minor chest troubles might begin in any event to get slightly worse. But here again the defendants have not been disposed to niggle, and I assess the damage under this head at £50.

There is, therefore, left only the male plaintiff's claim for loss of half the joint earnings. I take £10 of this loss as being

[37] [1939] 1 K.B. 394, 400; 55 T.L.R. 246; [1938] 4 All E.R. 727.

included in the figure of £25 which I have already awarded in respect of his own physical incapacity. The balance of £170 depends on whether he is entitled to compensation in respect of the period when he was fit to work and his wife was not. If the male plaintiff's loss consisted simply of the fact that the loss of his wife's musical talent made the joint act less valuable to him, I should hold that he could not recover. I decided that way in *Burgess* v. *Florence Nightingale Hospital for Gentlewomen* [38] where a similar point arose under the Fatal Accidents Acts. But that is not the point here: I have found as a fact that the male plaintiff has proved no loss under that head. His loss lies in the fact that Mrs. Behrens would, if her husband had gone on tour, have been unable to give him the society and domestic help which only she as a wife could give. In *Burgess* v. *Florence Nightingale Hospital for Gentlewomen* [38] it was not suggested that the arrangement between the parties in that case depended in any way on the relationship of husband and wife.

If Mr. Behrens during his wife's incapacity had gone on tour, he might have had to have paid someone to take his wife's place on the stage and he would also have had to have paid someone to look after him in the caravan. The first payment he could not have recovered from the defendants; on the facts he would have sustained no loss, since he would not have had to have paid his wife her share of the earnings and she would have her own independent claim for the loss of that share; in law the loss, if he had sustained it, would not be recoverable. But the second payment he could have recovered, and, I think, have added to it a claim for compensation for the loss of his wife's society which no substitute domestic help could give. If she could not be with him in her customary place, it would not to my mind matter that that place was a caravan and not the ordinary matrimonial home. It would not be merely an impairment of the consortium, but a total, though temporary, loss of it.

But in fact he did not go on tour. He preferred to stay at home and accept the loss of earnings; and in the very peculiar circumstances of this case I have held that his choice was a reasonable one. Can he then recover his loss of earnings as damages? To hold that he can may be breaking new ground in this type of action, but I can see no reason in principle why he should not be thus compensated. The assessment of damage must be governed by those principles which apply generally in the law of tort and, provided he acts reasonably, he must be put

[38] [1955] 1 Q.B. 349; [1955] 1 All E.R. 511.

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in as good a position, so far as money can do it, as if the wrong had not been done to him. I repeat that on the facts this is a most exceptional case, turning on the exceptional need which this husband had for the support of his wife as a wife. Because of that I think that he is entitled to recover.

The result is that there will be judgment for the male plaintiff for sums totalling £480, and for the female plaintiff for £2,930.

I shall now deal with issues of fact, whose determination is not necessary for my judgment but may be material hereafter. Evidence was called on both sides about the behaviour of elephants. There was evidence to show how elephants behave in Burma and how they behave in circuses in England. I admitted this evidence de bene esse at the request of both sides, but in this court it is immaterial, since I am bound by the decision in *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[39]; "it is "not competent to the courts to reconsider the classification of "former times," *per* Neville J. in *Heath's Garage Ltd.* v. *Hodges.*[40] If, however, it was open to me to answer the question as one of fact, I should answer it on the evidence before me by saying that some elephants are dangerous and some are not and that this one is not.

The next issue is an allegation of negligence against the defendants. That would arise for consideration either as an alternative cause of action, if I am wrong in holding that the rule of strict liability applies; alternatively, as a possible answer to a defence based upon the act of a third party, if I am wrong in holding that such a defence is not arguable at all in law.

The negligence alleged falls under three heads, namely, (1) that no sufficient precautions were taken to exclude dogs from Olympia; (2) that the elephants in their passage to and from the circus ring were not properly controlled; and (3) that there were no posts or fencing on either side of the route which the elephants took to the circus ring. The first of these charges raised an issue on which much evidence was called and which I must deal with in some detail. The second and third can be disposed of shortly and I shall take them first.

It was not argued that the elephants should not have been in the funfair at all, though it may seem at first sight a dangerous manoeuvre to lead a procession of elephants along a route, 13 feet wide, which may be thronged by the public, and which has booths on either side which an elephant would very easily knock down

[39] 25 Q.B.D. 258.

[40] [1916] 2 K.B. 370, 383; 32 T.L.R. 570.

if it deviated. But in fact that manoeuvre happens many hundreds of times every season in which the defendants hold their circus, and I dare say the same sort of manoeuvre happens many hundreds of times elsewhere, and I accept the evidence that it happens without incident. Subject to strict precautions being taken to see that there is nothing on the route that is likely to startle the elephants, I find that there is no lack of proper care in this. Mr. Brown submitted that the elephant ought to be controlled, either by a man riding on her with a goad or else leading her by a rope attached by a hook to her ear, as is apparently the practice in Burma. It is not, however, the practice with circus elephants who, manifestly, if they are trained to a higher standard of obedience for circus tricks must also be trained to be more obedient than traction elephants. I find that there was no lack of proper control. I was in fact very much impressed by the trainer in the witness-box; and also by the way in which the elephants were brought so speedily under control after the accident. On the other point, namely, the allegation that there should have been posts or a fence, I was not offered any evidence from people experienced in the handling of elephants, but Mr. Brown invited me to conclude that such a precaution was a matter of common sense. I cannot draw that conclusion. It seems to me that, granted that the route was a proper one, any posts and fence which it would be reasonable to erect, bearing in mind that the public cannot be fenced off from access to the booths, would be quite useless.

[The following is a summary of the further findings of fact made by his Lordship: The defendants gave strict instructions to all their employees on the premises, and particularly to those stationed at the main entrance, that among other things dogs and other animals were not to be admitted and those instructions were reasonably well executed. Although there was some evidence to suggest that the defendants were resigned to the possibility of small animals occasionally getting into the fun-fair, a standard of care, reasonable in the circumstances, was employed to lay down and enforce instruction for those who guarded the public entrance. The omission to put up any notice at the public entrance was not in itself sufficient evidence of negligence.

The rule prohibiting animals was not merely one made by the defendants for their circus but was made also by Olympia Ltd. and applied to the whole building at all times, and instructions were given to their gatekeepers; there was no evidence to show

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in what way those instructions were carried out. There was no prohibitive notice at the staff and standholders' entrance, and a standholder might quite properly have thought that there would be no objection to his bringing a pet animal into his booth provided he kept it under control when he got there. The clause purporting to prohibit animals contained in Whitehead's licence would, even if it had been correctly printed, have been insufficient notice to the standholder of the prohibition, for it was not in a place where the standholder's attention might reasonably have been expected to be caught by it, and, as against a third party, reasonable steps had not been taken to notify the standholder of the prohibition. His Lordship was not satisfied on the evidence that the defendants took all reasonable steps to see that small animals were not brought into the funfair by a standholder such as Whitehead. Whitehead did, however, know of the prohibition. His Lordship continued:]

The next issue relates to a contention, based on the fact that I have just found, that Whitehead's act was wrongful. The term "wrongful" is taken for this purpose because it is the widest of the many epithets (others are malicious, criminal, deliberate, voluntary, conscious) that are to be found in the authorities as characterizing the sort of intervention by a third party which (if the minority view in *Baker* v. *Snell* [41] was right) would afford a ground of defence. This is largely a question of law; but, as it raises some questions of fact, I shall deal with it.

If Whitehead was right in thinking that he was forbidden to bring a dog into Olympia, his introduction of it was a trespass. But was he in fact forbidden? That depends on the terms of his licence. If he had erroneously thought that he was permitted to bring in a dog when in fact his licence forbade it, it would be no answer for him to say that he had not read or had misconstrued his licence. But if the licence erroneously contains no prohibition, and perhaps by implication a permission, does it avail the defendants to say that Whitehead, not having read the licence, thought that there was a prohibition, which was in fact what they intended? I can leave that point for argument, if necessary, elsewhere, and also the question whether a trespass is a wrongful act within the meaning of the principle. Mr. Van Oss rested his submission that the act was wrongful chiefly on the contention that the introduction of the dog was wrongful, not as being deliberate or malicious (there is no evidence of that) but as being reckless or negligent. Whitehead denied that he

[41] [1908] 2 K.B. 825.

appreciated the danger, and I can find no sufficient reason either for rejecting his denial or for holding that he ought to have appreciated it. Most people probably know that a small dog may disturb cattle, but I do not believe that there is the same general knowledge about elephants. A man might reasonably think that an elephant would ignore so small an irritation and that, at least if the dog was securely tied up, it would be no danger.

The last issue of fact that I have to determine is whether the plaintiffs or either of them knew that the dog was there.

[His Lordship having considered the evidence on this issue, said that he was not satisfied that the plaintiffs knew of the presence of the dog in the funfair.]

Judgment for the plaintiffs.

Solicitors: *Chalton Hubbard & Co. for Marsh & Ferriman, Worthing; William Charles Crocker.*

J. F. L.

METLISS *v.* NATIONAL BANK OF GREECE AND ATHENS S.A.

[1955 M. No. 4083.]

C. A.
1957
Feb. 12, 13, 14; *Mar.* 18.
Denning, Romer and Parker L.JJ.

Conflict of Laws — Succession — Corporation — Foreign legislation — Comity—Universal succession—Foreign bank liable on English debt —Obligations on debt suspended in foreign bank's State of origin by moratorium—Legislation by foreign State merging debtor bank with another bank in State of origin—New amalgamated bank decreed "universal successor" to former banks—Recognition of universal succession by English courts—Right of creditor to sue new bank in England—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 208.
Conflict of Laws—Foreign legislation.

In 1927 a Greek bank issued sterling mortgage bonds, repayable as to principal in 1957 with interest thereon meanwhile. A term of the bonds provided that questions arising should be settled in accordance with English law. The bonds were guaranteed as to principal and interest unconditionally by another Greek bank.

In 1941 payment of interest ceased and no further interest was paid thereafter. In 1949 the Government of Greece declared a moratorium (which continued in force at all material times) on all obligations on the bonds, including any right of action. In 1953 by an Act of the Government of Greece and by royal decree the