

# WILD ANIMALS AND STRICT LIABILITY

## The African Lion Safari Case

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### I. Introduction

In 1996 David Balac and Jennifer-Anne Cowles visited a drive-through safari park in southern Ontario known as African Lion Safari & Game Farm. The park was widely publicized and it hosted thousands of visitors each year. Within the confines of the park various kinds of exotic wild animals roamed freely within several fenced-in sections. The park's Mission Statement lauded the fact that the visitors were in cages (motor vehicles) while the animals were free.

When the vehicle carrying Balac and Cowles entered the tiger section of the park, the vehicle was attacked by a 7 year old female bengal tiger. Three other female tigers followed suit. At the time of the initial attack, all of the windows in the Balac vehicle were closed. The first tiger entered the vehicle through the front passenger window and attacked Balac and Cowles. Two of the other tigers managed to bite Balac's hand through the front driver window. Balac and Cowles were severely mauled by the tigers before escaping the tiger section.

Eight years later the events of that day and of the months and years which followed were recounted during a 6 week long trial in a Toronto court room. During the lengthy trial, testimony was provided by the victims, their families, representatives of the park, physicians, automotive engineers as well as experts in safari parks, vocational disabilities and actuarial science. In addition, testimony was provided by other visitors to the park who recounted similar instances of tiger attacks or aggressive animal behaviour.

Six weeks after closing arguments in the case, Madam Justice J. L. MacFarland released a 43 page decision on the case, holding African Lion Safari liable for the injuries sustained by Balac and Cowles. The decision may be found in its entirety on the Canlii website at [www.canlii.org/on/cas/onsc/2005/2005onsc10134.html](http://www.canlii.org/on/cas/onsc/2005/2005onsc10134.html). This decision has been the subject of reports and commentary in news reports and across the internet. However, apart from the names of the victims and the size of the monetary awards in the case, very little of what has been discussed to date could be characterized as informed or accurate. Indeed, most commentators had not even read the judgment of the court before offering their views on the matter. What follows is an explanation of some of the legal issues which were central to the proceedings, together with a few suggestions as to how this decision might affect other situations involving

wild or exotic animals.

## **II. Strict Liability - What it really means and how is it different from other kinds of claims?**

In the judgment of the court, African Lion Safari was liable to Balac and Cowles on several legal grounds. The principal basis for the judgment was something called “strict liability”. But the trial judge also found the defendant liable under the law of negligence and under statutory Occupiers’ Liability law. The distinctions between these grounds are quite significant because in some cases, the facts material to one cause of action may be quite immaterial to another. But strict liability is exceptional in several important ways. It is fair to say that without a proper understanding of the unique characteristics of this type of claim, the decision of the court might seem inconsistent with the “common sense” approach to this incident.

There is good reason for the public at large to be confused about claims based upon strict liability. This is because the most common kinds of lawsuits are based upon some kind of “fault”. For example, the two most common lawsuits involve breach of contract and negligence. The main difference between these two examples is that under contract law, an obligation is voluntarily assumed by the parties to the contract, whereas under negligence law, an obligation is imposed on one of the parties as a matter of law. Negligence law is part of a larger area of law known as Tort law. This area of law is commonly divided into intentional and unintentional torts, with negligence falling into the latter category. In the case of both intentional and unintentional torts, however, obligations are imposed on a party. But in the case of both contract and tort law, a defendant is generally without liability so long as he or she is without fault. In the public perception, therefore, liability is closely linked to fault. If liability is imposed without fault, there is a sense that some injustice has occurred.

However, fault is not the sole basis for imposing liability. For well over a century, courts in Canada, the United Kingdom and the United States of America have recognized that the concept of “harm” may provide a basis for the imposition of liability regardless of fault. The law has developed certain well-defined circumstances where, as a matter of public policy, defendants will be held legally responsible for the harm suffered by others. In earlier times, this liability was called “absolute liability”. However, this term was simply not an accurate description of the concept because notwithstanding the occurrence of the harm, defendants continued to have available to them carefully defined defences to the claims of the victim. Thus the concept found its current formulation in the law of “strict liability”. Strict liability comes under the general heading of tort law, as discussed above.

In reality, strict liability is widely understood by the general public in some of its forms. For example, if an employee driving a delivery truck is involved in a motor vehicle accident where another motorist is injured, that motorist may sue not only the employee but the employer as well. The liability of the employee is based upon negligence law. As noted above, the basis for this type of liability is the fault of the employee. On the other hand, the employer was not

driving the motor vehicle. But the employer is vicariously liable for the acts of its employee. This liability is entirely based upon the employer-employee relationship. The employer cannot avoid liability by proving it was not negligent or that it was entirely without fault. Such evidence is irrelevant to a finding that the employer is liable. The employer is strictly liable for the harm suffered by the victim. The general public is not offended by the fact that the employer is liable for the wrongdoing of its employee. In all likelihood, however, this view exists because fault occurred at some level, i.e., on the part of the employee. The precise basis for the imposition of liability on the part of the employer is largely ignored in the circumstances.

The true basis for strict liability was discussed by the Supreme Court of Canada in two 1999 decisions known as *Bazley v. Curry* ([www.canlii.org/ca/cas/scc/1999/1999scc34.html](http://www.canlii.org/ca/cas/scc/1999/1999scc34.html)) and *Jacobi v. Boys' and Girls' Club of Vernon* ([www.canlii.org/ca/cas/scc/1999/1999scc35.html](http://www.canlii.org/ca/cas/scc/1999/1999scc35.html)). While these decisions were concerned with the employer's responsibility for the actions of an employee, consider the comments of the Supreme Court in the context of a safari park. In *Bazley*, the Supreme Court said that "where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong". The Court made reference to legal authorities which noted that this type of liability was concerned with public policy. In particular, public policy demanded (1) the provision of a just and practical remedy for the harm and (2) deterrence of future harm. The Court observed that the employer was often in the best position to spread the risk of loss through mechanisms like insurance and higher prices charged for its goods or services. The Court also agreed that the employer would be deterred from causing further harm if strict liability were imposed. For the Court, the key question in each case was whether there was a connection or nexus between the employment enterprise and the wrong that justified the imposition of strict liability. Where an entity which engages in a given enterprise (and often profits from it) brings the risk of harm to a community, it seems just that the enterprise should internalize the full costs of operations, including potential torts.

In summary, it is important to emphasize two aspects of strict liability. First, it applies to a limited number of circumstances which are either well established under long-standing jurisprudence or to new circumstances where public policy demands its application. Second, strict liability is concerned with harm instead of fault.

### **III. What is and is not a defence under the law of Strict Liability?**

It is understandably difficult for the public to surrender its deep rooted attachment to the concept of fault in favour of the more abstract concepts of harm and public policy. But even those who accept the logic of an alternative basis for liability often fail to understand the consequences of this alternative when we turn to the question of defences to strict liability claims. Nowhere is this more apparent than in cases where the plaintiff or victim is seen to be "at fault", in whole or in part, for his or her own injuries.

However, where the circumstances justify the imposition of strict liability, a disciplined

approach to the entire case makes it clear that contributory negligence or contributory fault on the part of the victim is not a valid consideration. In 1996 the Supreme Court of Canada stated this position clearly in a case called *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce* ([www.canlii.org/ca/cas/scc/1996/1996scc109.html](http://www.canlii.org/ca/cas/scc/1996/1996scc109.html)). In that case, the Court ruled that there could be no defence of contributory negligence to a strict liability tort. This is because strict liability is not concerned with fault, whether on the part of the victim or on the part of the defendant. Negligence law, on the other hand, is fully consumed with the determination of fault and the allocation of fault amongst all persons responsible for an injury. In that area of law, contributory negligence on the part of a victim may co-exist with negligence on the part of the defendant. Not so in strict liability. As stated by Madam Justice MacFarland in the *African Lion Safari* decision: “It seems to me contradictory to hold a defendant strictly liable - i.e. whether negligent or not - and then to consider a plaintiff’s ‘contributory’ negligence.”

Since the defence of contributory negligence does not apply to a tort claim for strict liability, in what circumstances can the defendant protect itself from liability? If one understands that the underlying rationale for the imposition of strict liability is to redress the harm done to an unwilling victim, then the answer is clear. If the victim was a willing victim, strict liability will not apply. This is known as the defence of voluntary assumption of risk. The risk referred to, of course, is the risk of harm.

In the case of *Crocker v. Sundance* ([www.canlii.org/ca/cas/scc/1988/1988scc62.html](http://www.canlii.org/ca/cas/scc/1988/1988scc62.html)) in 1988, the Supreme Court of Canada observed that:

The defence of voluntary assumption of risk is based on the moral supposition that no wrong is done to one who consents. By agreeing to assume the risk the plaintiff absolves the defendant of all responsibility for it.

The Court noted that this defence only applies in situations where “the plaintiff has assumed both the physical and the legal risk involved in the activity”. Given the strictness of this defence, the Court noted that this defence would rarely be applicable. In the *Crocker* case, the victim was too drunk to meet this test, notwithstanding the fact that he previously signed a written waiver of liability in favour of the defendant. In other cases, especially those involving children, it is doubtful that many victims would have the legal capacity to give the necessary consent or the mental acuity to accept the physical and legal risk associated with a dangerous activity. In every case, the burden of proving voluntary assumption of risk is on the defendant at trial.

#### **IV. Applying Strict Liability to the African Lion Safari case**

Just as the law of strict liability has been well established for more than a hundred years, so too are many of the categories of cases where strict liability will apply. One of the oldest of these categories deals with wild animals.

Under our historical law, the animal kingdom was divided in to two distinct categories. The first category is of animals *ferae naturae* (wild animals) such as lions, tigers and bears. The second category is of animals *mansuetae naturae* (domesticated animals) like cows, dogs and horses. Some claim simply that the division was based upon animals which were or were not native to the United Kingdom, where our Canadian law originated. Regardless of the origins of the original classification, certain legal consequences flow from this division of the animal world.

The most important legal consequence of this division is that wild animals of all types are deemed to be dangerous to man. Any harm done by a wild animal will result in strict liability for its owner or keeper. The presumption of danger applies to the entirety of a species and is not limited to a specific individual animal.

On the other hand, domesticated animals are presumed to be harmless to man unless and until a specific animal “betrays its species” (in the language of some judges) by causing harm to man. After it is established that a particular domesticated animal is capable of causing injury, its owner and keeper will be held strictly liable for any further injury caused by that particular domesticated animal. Years ago, this aspect of the law accounted for the common belief that “every dog was entitled to one bite”. This “common law” provision was modified in the case of dogs by specific legislation. Under the Ontario Dog Owners’ Liability Act, a dog is effectively reclassified by statute as a wild animal, i.e., its owner and keeper will be strictly liable for harm caused by the dog whether or not the dog previously caused harm. Interestingly, however, the legislation specifically permits a court to consider the fault of the victim in cases of harm caused by dogs. This exception has never been extended by statute to other species of wild animals. It is the only known instance where the concept of fault is given a role in a case of strict liability.

Returning to the issue of wild animals, it is interesting to point out in passing that the question of whether an animal is wild or not is determined by either or both expert testimony or judicial precedent. From the previous discussion, however, it should be obvious that the classification of any given species could be critical to the outcome of a lawsuit. While cases involving wild animals can be prosecuted under either or both strict liability and negligence (as was the situation in the African Lion Safari case), cases involving domesticated animals can only be effectively prosecuted under negligence law.

In most cases, as in the case of tigers, however, the distinction is obvious and the discussion can move quickly to the next important issue. This is the issue of control. In earlier times, this issue was referred to as the issue of escape. Strict liability for wild animal attacks shares a common heritage with other strict liability claims, such as the “escape” of water dammed up on an neighbour’s property. But for our purposes, it is sufficient to note that a wild animal need not escape for its keeper or owner to be held strictly liable. Rather, all that need occur is that the wild animal must be found to be outside of the control of the owner or keeper at the time it caused harm.

The issue of loss of control is an essential element of strict liability. In cases involving a safari park, the entire underlying rationale of the park is that the animals are always beyond the control of the park’s staff. The point of the exhibit is to show animals in their natural setting.

Thus, the people are “in cages”, as we observed previously. In the case of a professionally operated conventional zoo exhibit, however, the wild animals are usually kept behind bars and stand off barriers exist to keep the public a safe distance from the exhibit. In the case of a professionally operated conventional zoo, it would be rare for a court to find that an animal kept in these circumstances was ever outside of the effective control of its owner or keeper. When a visitor to a professionally operated conventional zoo is injured, it is usually the result of the visitor bypassing the stand off barrier and penetrating the primary enclosure. Only then can the captive animal cause the visitor harm. Such cases almost always turn on the question of negligence in the design and construction of the double barrier and the contributory negligence of the visitor.

In the case of African Lion Safari, the court found that there were wild animals present and under the ownership and ostensible control of the defendant. The court also found, to no one’s surprise, that these wild animals were not under the effective control of the defendant as they were free to roam about. Finally, the court found that some of these wild animals caused harm to Balac and Cowles. These were the three essential elements the victims had to prove to establish strict liability. The sole remaining issue was whether the defendant could establish that the victims voluntarily assumed the risk of harm to themselves.

## **V. The Evidence at Trial**

If one accepts the legal principles set out thus far in this discussion, then all that remains is to look at the facts to determine if either Balac or Cowles assumed both the physical and the legal risks involved in being attacked by a tiger while touring the safari park.

While it is understood that the law and the facts get in the way of a good story and a lot of indignation in the popular media, here is what was essential to the issue of voluntary assumption of risk.

Neither victim was asked to sign a waiver before entering the park. Given the commentary in the Crocker case, above, the existence of a waiver would not be decisive in any event.

The evidence of both victims, the park gatekeeper, and the cat driver in the tiger section all stated that the windows of the Balac vehicle were fully closed when that vehicle entered the tiger section.

Police photos and other evidence indicated clearly that there was no attempt by the victims to feed the tigers. Park staff contradicted one another on this point. No mention of any feeding activity was made in staff reports made shortly after the attack. The first mention of this alleged activity occurred in 2004, just weeks before the start of the trial. This allegation was denied by the victims and it was rejected by the trial judge based on photographic and other evidence found to be more credible and reliable. Unfortunately, the media is seldom around to hear an unfounded allegation put to rest.

The court found that the original attack on the Balac vehicle was possibly provoked by the actions of a park employee who had apparently just left the tiger section with a tiger cub perched on her shoulder. Evidence at trial clearly indicated that such activity would certainly excite the adult tigers at the park and create a hazardous situation for visitors.

The damage to the passenger door to the Balac vehicle was a clear indication that at the time of the initial attack, the first tiger could not access the passenger compartment of the vehicle because the window was closed.

The attack was of sufficient force and violence that Cowles jumped towards Balac and Balac stalled the car. The trial judge found that no-one in the vehicle intentionally opened a window. As noted in the decision, the sudden bang and rocking of the vehicle caused Balac's "foot to slip from the clutch and in my view probably at the same time, although David was unaware of it, caused his arm or some part of his body to come into contact with the window switches inadvertently, and thereby lower the windows on both sides of the vehicle which allowed the tigers access to the passengers".

The automotive engineering evidence on this point is significant. The windows on either side of the vehicle were power windows which measured 16 inches in height. The evidence was that each window opened fully in 4 seconds and that they moved at a constant rate. This equates with an opening rate of 4 inches per second, or 2 inches in a half second. Balac's evidence was that the first tiger had its paws on the top of the passenger window and opened it fully in less than a second. All that was needed for the declawed tiger to gain purchase on the window was an inadvertent touching of the window button for approximately a half second, at a time when the occupants were shocked by the sudden and violent attack of the first tiger.

On these facts, as found by the trial judge, could it be said that either of Balac or Cowles assumed both the physical and the legal risk involved in their activity? As noted by the trial judge, their "activity" was to drive through a safari park and photograph animals, as the defendant intended. In conclusion, the trial judge decided that the defendant had not established that the plaintiffs had voluntarily assumed the risk of harm by their actions that April day.

Insofar as strict liability is concerned, it would appear that the critical flaw in the situation of any safari park is that by caging the visitors instead of the wild animals, the park is abandoning its duty to control the animals. Whether or not the park can control its visitors is quite irrelevant to the issue at hand so long as the behaviour of the visitors does not amount to the rarely applicable voluntary assumption of risk. One cannot help but question the wisdom of a business organization which owns animals which are clearly wild, displays them in an intentionally out of control setting, risks that a visitor will suffer harm, then places its entire position on the rarely accepted defence of voluntary assumption of risk.

Then again, as the Supreme Court noted in the Bazley decision, the defendant does have the ability to insure against such losses and to raise its price of admission, and thereby redistribute the cost of the harm across multiple contributors. The real issue is whether these contributors will continue to voluntarily contribute to a situation where strict liability readily applies and the risk of harm is so demonstrably present.

## **VI. Negligence**

The purpose of this paper is to present an analysis of the law of strict liability in relation to wild animal exhibitors. However, a great deal of the evidence at trial was dedicated towards establishing the alternative claim for negligence and Occupiers' Liability. Much of the burden of proving negligence fell to Mr. L. Craig Brown, a partner in the Toronto law firm of Thomson, Rogers, counsel to Ms Cowles. Paragraphs 151 through 175 of the court's judgment summarize numerous instances of negligence on the part of African Lion Safari and its employees. The centre-piece of this aspect of the case was the expert testimony of Mr. Bob Lawrence, Head Warden of the West Midlands Safari Park in England. The court found that the evidence marshaled by Mr. Brown established that had the court not found strict liability, it would have still found African Lion Safari negligent and liable under the Occupiers' Liability Act to the full extent of the plaintiffs' losses, without any contributory negligence on their part. Ms Cowles proof of damages was also prepared by Mr. Brown. Bruce Haines, Q.C. assumed the substantial tasks of securing an order striking out the jury due to a number of judicially recognized reasons and for presenting the complex case on damages for Mr. Balac. Contrary to what you may have read, Mr. Balac was not awarded \$1.7 million because he could no longer play the accordion. Mr. Balac was a student at the time of the attack. Since his vocation was not established prior to his injuries and his future earning potential had to be quantified, evidence was called to establish the estimated earning capacity of someone with Mr. Balac's record up to the date of the attack. We recommend that you access the decision in this case and come to your own conclusions about the issues of liability and damages.

## **VII. Strict Liability in Other Circumstances**

In the course of this discussion, we have considered the circumstances of a professionally operated traditional zoo and a safari park. The former will seldom suffer a finding of strict liability while the latter seems fully exposed to this form of tort action. But the exhibition of wild animals is not confined to these two examples. It may be useful and informative to take some other examples of ways in which the public interact with wild animals to further illustrate the principles of strict liability.

For example, consider a traditional zoo with special interactive programmes where visitors are permitted to interact directly with the wild animals in the absence of a double or even a single barrier. Clearly, the first issue is whether or not we are dealing with wild animals. Our example assumes this to be the case. Therefore, we already know that the owner and keeper of the animal in question are deemed to know that their animal is dangerous and that they are under a duty to keep the animal under control.

The next issue is control. The focus here, for all practical purposes, must be on control of the animal. Control of the visitor is necessary but not particularly relevant to the question of liability. Thus, one cannot elect to control the visitor instead of the animal. Control of both is preferable. Control of the animal is mandatory.



Methods of control are as numerous as one's imagination permits. At one extreme, there is the prospect of only permitting interactions when the animal is sedated and relatively inert. At the other extreme, we have seen examples of people simply letting themselves into cages without any precautions whatsoever. More frequently, the handler relies on the behaviour of a particular animal or on some restraining device. However, in virtually any case where a visitor is encouraged to come into close proximity to a wild animal, the handler will be hard pressed to show that the animal was under full control if some harm occurs. By merely walking close to a wild animal, it is unlikely that a visitor may be said to have voluntarily assumed the risk unless to have done so was in circumstances of unreasonable disregard of obvious danger, in the words of one legal scholar. (Fleming, J., "The Law of Torts", (9<sup>th</sup> ed) p. 405). Teasing an animal or approaching an animal to touch it are examples of circumstances where the victim is seen to have brought the injury upon himself. Thus, in cases where a visitor is invited by an animal handler to approach a wild animal or to touch it in some fashion and some harm results, it would be difficult to suggest that the victim disregarded an obvious danger. Rather, the victim relied on the expertise of the handler and did not consent to risk harm. Similarly, if a visitor was invited to enter into a caged area unescorted by professional staff, a court would probably find that the visitor reasonably relied on the animal handler or zoo operator in deciding that it was safe to enter that area. If a wild animal in that area caused harm to the visitor, strict liability would probably be imposed. Bearing in mind that where wild animals are concerned, the fact that a particular animal never attacked a visitor in the past is quite irrelevant to the question of liability. In virtually all cases of interactive programmes, if a visitor is harmed, the exhibitor would be liable for both strict liability and negligence.

Some interaction between people and wild animals can be quite unintended, as is the case when a wild animal escapes from a traditional zoo. The strict liability analysis outlined above would raise the following questions. First, is the animal a wild animal? Second, who is the owner or keeper of the wild animal? Third, did the owner or keeper lose control over the wild animal? Fourth, did the animal do harm while on the loose? Finally, did the victim consent to being harmed? With the answers to these basic questions, it is relatively easy to see why strict liability will be imposed in the case of an escaping animal. Interestingly, there is some judicial authority to the effect that anyone who captures a wild animal may retain the animal, even as against the original owner.

Another instance of interaction between people and wild animals concerns the situation where an enclosure is wholly inadequate to keep people and wild animals apart. For example, where there is no stand off barrier and a wild animal is kept in some form of pen with easily-penetrated barrier fencing. In such cases, if an adult or child reached through the fence and suffered an injury because of an animal bite, the jurisprudence indicates that the owner will not likely be found to have lost control over the animal. In such cases, strict liability is often bypassed in favour of claims of negligence.

Another example is where individuals keep exotic animals as pets. Again, in virtually any situation where someone suffers harm as a consequence of an animal attack by a wild animal, the pet owner or handler will be held strictly liable. The fact that harm occurred at all is strong evidence that the animal was not under control. In these circumstances strict liability

would also apply.

The interaction of different areas of the law make any answer on this subject somewhat difficult. For example, say that someone in a residential neighbourhood keeps a wolf in his yard. The yard is fenced in sufficiently to keep the wolf in the yard. Assume that a warning sign is also posted by the owner. Under the law of trespass, the traits of the victim might play a significant role in the findings of a court. An adult who jumped over the fence to pet the wolf might find that he is said to have willingly assumed the risk of harm and the owner may not be liable. But if a child saw the wolf and was sufficiently excited by its presence to ignore the warning sign and climb the fence, the owner might possibly be strictly liable as it might not be said that a child willingly assumed the risk of harm with full knowledge of the physical and legal consequences of his actions. However, it is more likely that a court would find that the owner did not fail to control the animal and that the law of negligence was more appropriate in the circumstances.

Examples where a wild animal on a leash is permitted to attack persons keeping a reasonable distance from the animal will likely result in a finding of strict liability, based on the obvious failure of the handler to restrain the animal.

Finally, there are situations where the public is admitted to a restricted venue where animals are displayed for entertainment purposes. A typical example would be a circus performance. If a domesticated animal such as a horse came into close proximity to the audience and bit a guest, that guest would be limited to an action in negligence unless it was established that the particular horse in question had a previous history of attacking people. On the other hand, a wild animal, like a monkey, which exhibited the exact same activity as the horse, would cause the owner and exhibitor to suffer strict liability without proof of that animal's past history.

As with the zoo cases, if a circus animal were caged or confined to an enclosure such that loss of control could not be an issue, then a person reaching into the cage or enclosure who was injured would have to take their chances with the law of negligence and contributory negligence.

Given the court's willingness to address the harm to victims of wild animal attacks through the imposition of strict liability and its willingness to effectively redistribute the costs of that harm to insurers and consumers who profit from and enjoy the exhibition of wild animals, it would appear that the responsibility for deterring future harm will fall to the insurance industry. The question is whether or not the insurance industry will respond to the challenge.

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