SB

89

HOUSE COMMITTEE REPORT

(7)
Date Referred: February 8, 1989 FURTHER REFERRALS:

Date of Committee Action: 5-6-90

The JUDICIARY Committee considered: SB 89

SENATE BILL NO. 89 [LIABILITY OF ZOOS & ZOO OPERATORS]
"An Act relating to civil liability of zoos and zoo operators."

RECOMMENDS:

[X] replacing with HCS SB 89 (Jud) [ ] the same title
[ ] a new title
[ ] the attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):
[ ] fiscal impact
[X] zero fiscal note
[ ] zero with analysis

APPROVES PREVIOUS:
[ ] fiscal note(s) published:
_____
[X] zero fiscal notes(s) published:

SIGNING DO PASS:

M. J. Gruenberg Gruenberg

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

Peter Low no rec Goll
Clyde Davidson no rec DAVIDSON
Terry Martin no rec MARTIN
Michael Davis NO REC DAVIS

M. J. Gruenberg Peter Low
Chairman's signature

STATE OF ALASKA
1990 LEGISLATURE

BILL VERSION HCS SB 89 (Jud)
PUBLISH DATE 5/6/90

FISCAL NOTE

REQUEST:
Revision Date:
Title: Civil liability of zoos and zoo operators
Sponsor:

Affected Agency: Alaska Court System
BRU:
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 91	FY 92	FY93	FY 94	FY 95	FY 96
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	0.00	0.00	0.00	0.00	0.00	0.00
CAPITAL						
REVENUE						

FUNDING: (THOUSANDS OF DOLLARS)

General Fund						
Federal Fund						
Other						
TOTAL	0.00	0.00	0.00	0.00	0.00	0.00

POSITIONS:

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

Prepared By: Senator Jan Faiks, Chairman — Phone: 465-4523
Division: Senate Judiciary Committee — Date: 5/6/90

Approved By:
Agency: — Date:

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ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

SB89 in H Jud

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

April 24, 1989

COPY

MEMORANDUM

TO: Representative Peter Goll

FROM: Karen Oakley KO
Legislative Analyst

RE: **Liability of Zoo Operators**
Research Request 89.356

You asked whether any states had enacted laws similar to SB 89, which would limit the liability of zoo operators. You also asked whether governments operating zoos are liable for damages caused by animals in the zoo.

I found that no states have laws modifying the liability of zoo operators and that the case law on the liability of governments operating zoos is variable. Some governments have been held strictly liable while others have been held liable only on a showing of negligence.

Background

Alaska has one zoo, the Alaska Zoo, located in Anchorage. The zoo is relatively small, and most of the animals exhibited there are endemic to Alaska. (They do have a couple of elephants, however.) The zoo is owned and operated by a private, nonprofit group.

Several years ago, the Alaska Zoo was held strictly liable for injuries suffered by a man who was gored in the leg by a reindeer in the zoo. According to Sammye Seawell, current director of the Alaska Zoo, the zoo had sold one of their reindeer to someone in another state, and this man was hired by the owner of the reindeer to transport the reindeer to its new home. The zoo director told the man to wait for her at the reindeer cage while she got the paperwork ready. Failing to wait, the man entered the cage, approached the reindeer and was gored. The court that heard the resultant case held that the common law rule that the owners of wild animals are strictly liable for damages caused by the animals applied. As a result of this case, the zoo operators have had difficulty obtaining liability insurance, and they had to pay over $50,000 in annual premiums after the accident. The zoo currently pays about $25,000 per year for liability insurance.

After the finding in the reindeer case, the Alaska Zoo decided to seek a legislative solution. At their request, Senator Jan Faiks introduced a bill in the

15th legislature specifying that zoos operated by nonprofit organizations and governments were liable only upon a showing of negligence. This bill was passed by the senate but died in the house. In the 16th legislature, Senator Faiks has introduced a similar bill, SB 89, which is provided as Attachment A. The bill would amend the chapter of the code of civil procedure which specifies the limits on civil liability by adding a new section concerning the civil liability of zoos. The law would provide that a person could not recover damages from a zoo owned by the government or a nonprofit organization if the damages occurred as a result of the "inherent risk of attendance at a zoo." The zoo operators would be required to post signs within the zoo and at each entrance to the zoo stating that the zoo is not liable for injuries occurring as a result of dangers inherent in attending a zoo.

No Similar Laws in Other States

To the best of my knowledge, no states have laws similar to SB 89. Using Westlaw, a computerized legal database, I searched the statutes of 25 states and found no laws addressing the liability of zoos. In addition, I spoke with Brenda Trolin, of the National Conference of State Legislatures, who has been tracking insurance and liability issues nationwide for several years. She was not aware of any states passing laws concerning the liability of zoos. I also spoke with representatives of the American Association of Zookeepers, the American Association of Zoological Parks and Aquariums, and with the government affairs coordinator for the San Diego Zoo. None were aware of any state laws modifying the civil liability of zoo operators.

Government Liability from Operation of a Zoo

Under common law, owners of wild animals are generally considered strictly liable for damages caused by those animals.[1] The rule is that a wild animal is a dangerous instrumentality which subjects the public to an abnormal risk of harm. Thus, mere ownership is enough to impose liability, regardless of whether the animal escapes or causes injury as a result of the owner's negligence.

This general rule of strict liability has in some cases been applied to governments that operate zoos; more often, however, governments operating zoos have been held liable only upon a showing of negligence. Because there is no statutory law expressly addressing liability of government zoo operators, courts in different jurisdictions have been able to fashion rulings which give variable weight to the general rule of strict liability for the owners of wild animals and to the general rules of governmental tort immunity (which are currently undergoing change).

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[1]Common law imposes less stringent liability on the owners of domestic animals. Dogs, for example, are given "one free bite." See House Research Memorandum 887.246 for further information on liability for dog bites.

Attachment B is an American Law Reporter annotation summarizing cases involving government liability from operation of zoos. The authors stated:

> Many of the cases involving claims for personal injury against a governmental agency operating or maintaining a zoo have involved questions of governmental tort immunity. In several of these cases, such immunity has been denied either because of a general rejection of the rules of governmental tort immunity or because the defendant's activity in connection with the zoo was regarded as "proprietary" rather than "governmental." Other cases, however, have held that tort immunity applied to zoo-keeping activities.

They included this caution:

> In view of the unsettled state of the law as to the doctrine of governmental immunity, the authority of any of these zoo cases must be assessed in the light of the general law of the jurisdiction, including cases involving tort claims not concerning zoos.

I hope this information is helpful. If I can provide any further information, please let me know.

Attachments

ATTACHMENT A

Senate Bill 89 (1989)

Introduced: 1/9/89
Referred: Judiciary

IN THE SENATE BY FAIKS

SENATE BILL NO. 89

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to civil liability of zoos and zoo operators."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.17 is amended by adding a new section to read:

Sec. 09.17.100. CIVIL LIABILITY OF ZOOS. (a) A person may not recover damages for injury to person or property from a zoo or a zoo operator, if the damages occurred as a result of an inherent risk of attendance at a zoo, notice of the inherent risk was posted as required under (b) of this section, and the zoo operator exercised reasonable care to prevent the injury.

(b) A zoo operator shall post signs at prominent places within a zoo and at each zoo entrance. Each sign shall include a statement warning that the zoo is not liable for injuries to person or property occurring as a result of dangers or conditions inherent in attending the zoo.

(c) In this section

(1) "inherent risk of attendance" means the dangers or conditions that are an integral part of a zoo and the physical proximity of wild animals;

(2) "zoo" means a place where wild animals are kept for exhibition to the public that is

(A) owned by the state or a municipality; or

(B) owned and operated by a nonprofit organization.

ATTACHMENT B

92 ALR3d 832

Government Liability from Operation of

ANNOTATION

GOVERNMENTAL LIABILITY FROM OPERATION OF ZOO

by

William E. Shipley, J.D. and Sonja A. Soehnel, J.D.

TABLE OF JURISDICTIONS REPRESENTED

Consult POCKET PART in this volume for later cases

US: §§ 4[a]
Ala: §§ 3[a, b], 5, 7
Cal: §§ 3[b], 4[a], 6[b]
Colo: §§ 4[a], 6[a]
DC: §§ 4[a]
Kan: §§ 3[b], 4[a], 5, 6[b]
La: §§ 6[a]
Mich: §§ 3[a], 7
Miss: §§ 4[b], 6[a]
NJ: §§ 3[a], 4[b], 6[a]

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

4 Am Jur 2d, Animals §§ 80–84, 121–128; 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 680 et seq.; 57 Am Jur 2d, Municipal, School, and State Tort Liability §§ 149, 306 et seq.; 59 Am Jur 2d, Parks, Squares, and Playgrounds §§ 38–45, 49; 62 Am Jur 2d, Premises Liability § 116

1 Am Jur Pl & Pr Forms (Rev Ed), Animals, Forms 101–103; 18 Am Jur Pl & Pr Forms (Rev Ed), Municipal Tort Liability, Forms 1–14; 19 Am Jur Pl & Pr Forms (Rev Ed), Parks, Squares, and Playgrounds, Forms 1–15

1 Am Jur Proof of Facts 597, Animals, Proofs 3, 4

20 USCS §§ 81–85

US L Ed Digest, Animals §§ 5–7; Claims § 12; Counties § 22; Municipal Corporations §§ 80–82; States § 84

ALR Digests, Animals §§ 5, 21; Counties § 15; Municipal Corporations §§ 206, 215, 259; Parks, Squares, and Commons §§ 1, 4, 7

L Ed Index to Annos, Animals; Claims Against Government; Privileges and Immunities

ALR Quick Index, Governmental Immunity or Privilege; Zoos

Federal Quick Index, Animals; Privileges and Immunities; Zoological Park

Consult POCKET PART in this volume for later cases

NY: §§ 3[a, b], 4[a, b], 6[a, b]
Ohio: §§ 3[a], 4[b], 5, 6[a]
Okla: §§ 4[a, b], 5, 6[a]
Tex: §§ 3[a], 4[b]
Wis: §§ 6[b]

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§ 1. Introduction

[a] Scope

This annotation collects the cases in which an attempt was made to impose liability upon a governmental agency in its capacity as the operator or maintainer of a zoo, for personal injury[2] allegedly caused by such operation.[3]

[b] Related matters

Zoo as nuisance, 58 ALR3d 1126.

Owner's or keeper's liability for personal injury or death inflicted by wild animal, 21 ALR3d 603.

Liability for injury inflicted by horse, dog, or other domestic animal exhibited at show, 80 ALR2d 886.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability, 68 ALR2d 1437.

Nature and status of rule as to municipal immunity from liability for torts, 60 ALR2d 1198.

Liability for injury to property inflicted by wild animal, 57 ALR2d 242.

Rule of municipal immunity from liability for acts in performance of governmental functions as applicable to injury or death as result of nuisance, 56 ALR2d 1415.

§ 2. Summary and comment

[a] Generally

Many of the cases involving claims for personal injury against a governmental agency operating or maintaining a zoo have involved questions of governmental tort immunity. In several of these cases, such immunity has been denied either because of a general rejection of the rules of governmental tort immunity or because the defendant's activity in connection with the zoo was regarded as "proprietary" rather than "governmental."[4] Other cases, however, have held that tort immunity applied to zoo-keeping activities.[5]

At the other extreme of tort immunity, several of these cases have involved claims that the zoo operator should be held as an insurer against injuries caused by the zoo animals, under the doctrine, recognized in many jurisdictions, that one keeping wild animals is absolutely liable for

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1. Section 17 of the Annotation at 21 ALR3d 603 is hereby superseded.

2. While the discussion includes cases presenting claims for personal injury on the basis that the condition complained of constituted a nuisance, no attempt has been made to treat cases presenting the general claim that establishment or maintenance of a zoo constituted a nuisance interfering with plaintiff's enjoyment of property. That question is treated at 58 ALR3d 1120.

3. No attempt has been made to include cases where the cause of injury seemed to be connected in no way with the fact that a zoo rather than some other type of enterprise was involved.

4. § 3[a], infra.

5. § 3[b], infra. In view of the unsettled state of the law as to the doctrine of governmental immunity, the authority of any of these zoo cases must be assessed in the light of the general law of the jurisdiction, including cases involving tort claims not concerned with zoos. See 57 Am Jur 2d Municipal, School, and State Tort Liability §§ 65–68.

injury caused by them.[6] Several courts have refused to hold the governmental agency keeping a zoo absolutely liable, taking the view that to so hold would be inappropriate in view of the cultural and educational purposes for which the zoo was kept. This has been especially so where the defendant was charged by the legislature with the duty of keeping the zoo.[7] Some courts have, however, held the operator of the zoo to be an insurer, although in several of these cases the courts also used the language of negligence so that it is not altogether clear upon what theory liability was imposed.[8]

These various theories, and the ordinary rules of negligence, have been applied in a number of fact situations, resulting in the imposition or denial of liability in cases involving escaped zoo animals,[9] or caged or otherwise restrained animals.[10] A few cases have involved injury not caused by zoo animals, but by other alleged defects in the zoo property. Aside from questions of governmental immunity, the courts in these cases have looked to ordinary principles of premises liability in making their decisions.[11]

The few cases involving animal injuries to zoo employees indicate that they will have more difficulty in recovering than zoo visitors or patrons.[12]

[b] Practice pointers

As in any suit against a governmental entity or agency, counsel pressing a case concerning injury at a zoo should carefully research the appropriate law on the issue of governmental immunity and also the requirements for filing notice of claim, with particular attention to statutes of limitations.[13]

Counsel may wish to frame counts in his complaint on theories of absolute liability and nuisance as well as negligence.[14]

In jurisdictions where it is necessary to do so, plaintiff's complaint should also negative contributory negligence or assumption of risk, even as to the absolute liability claim, since there is some indication in the cases that the courts have looked to this as a defense.[15]

Where a fee is paid to enter the zoo or to use its facilities, recovery may be urged upon the claim that the defendant contracted to provide safe facilities.

§ 3. Governmental tort immunity as applied to zoos

[a] Held not applicable

Several cases involving injury claims against a governmental entity or agency in connection with its maintenance of a zoo have held that

6. See 4 Am Jur 2d, Animals § 80.

7. § 4[a], infra.

8. § 4[b], infra.

9. § 5, infra.

10. § 6, infra. Several of these cases have involved the situation where the injured party was attempting to feed the animal.

11. § 7, infra.

12. §§ 4[a], 6[b], infra.

13. As to notice of claim, see 56 Am Jur 2d Municipal Corporations, Counties, and Other Political Subdivisions § 680 et seq. As to the status of the doctrine of governmental immunity, see 57 Am Jur 2d Municipal, School, and State Tort Liability § 65 et seq. For relevant forms, see 18 Am Jur Pleading & Practice Forms (Rev ed) Municipal Tort Liability, Forms 1–14.

14. See § 4, infra.

15. See § 4, infra.

the doctrine of governmental tort immunity would not bar recovery.[16]

In Walker v Birmingham (1976, Ala) 342 So 2d 321, 92 ALR3d 827, the court held that the doctrine of municipal tort immunity (later abolished in the jurisdiction) did not apply to an injury sustained because of a defect in a zoo sidewalk, in view of a statute expressly providing that immunity did not cover injuries arising out of defects in highways.[17]

The court in Matthews v Detroit (1939) 291 Mich 161, 289 NW 115, divided equally on the issue whether the defendant was acting in a governmental or proprietary capacity in operating a miniature railroad in its zoological park, with the result that the jury verdict below for a woman injured when she fell in leaving the train was sustained.

The doctrine of state immunity from tort liability was abolished in Willis v Department of Conservation & Economic Development (1970) 55 NJ 534, 264 A2d 34, an action brought by a child whose arm was taken off by caged bears in a state recreational facility.

See also Hyde v Utica (1940) 259 App Div 477, 1057, 20 NYS2d 335, indicating, arguendo, that where a city kept a zoo under a legislative charter, it would not be liable for injury caused by one of the animals, absent negligence, but that if there were no such charter it would be absolutely liable.

Noting that there was no obligation upon defendant city to maintain the zoo, it was maintained largely for the comfort and convenience of the citizens, the city was indirectly compensated through growth and increased prosperity, these benefits incurred primarily to the city and its inhabitants, and fees were charged for use of the zoo, the court in Moloney v Columbus (1965) 2 Ohio St 2d 213, 31 Ohio Ops 2d 447, 208 NE2d 141, concluded that the city was acting in a proprietary capacity so that it could be sued for injuries to a child who, while attending the zoo, was bitten by a guanaco which was part of a barnyard exhibit.

Holding that maintenance by a city of a zoo in a public park was a proprietary function, since the zoo was kept primarily for the benefit of the city's own inhabitants, the court in Ft. Worth v Wiggins (1928, Tex Com App) 5 SW2d 761, held that it was error to sustain a demurrer to a complaint alleging that a vicious bear was maintained in a cage adjacent to a public walk in the zoo and that the cage was so defective that the bear could and did reach through a large

16. The doctrine of governmental tort immunity has been under attack in recent years and has been abolished or modified in many jurisdictions. See 57 Am Jur 2d Municipal, School, and State Tort Liability §§ 65–68. Zoo cases cited here on the matter should not be relied upon without checking the current state of the law in the jurisdiction in question, since their authority may be affected by non-zoo cases.

17. The abolition of governmental tort immunity presumably vitiates the authority of Smith v Birmingham (1960) 207 Ala 681, 121 So 2d 867, holding that defendant's demurrer was properly sustained since the face of the complaint showed that the employees were acting in a governmental rather than a corporate or ministerial capacity where a complaint alleged that city employees, acting within the scope of their authority, were transporting a deer owned by a private organization to a zoo which was maintained in a public park by the owner of the deer under contract with the city and that they negligently permitted the deer to escape and it injured plaintiff.

ng and injured plaintiff, who
ising the walk. The court indi-
that even if the city were re-
d as acting in its governmental
ity, it could be held liable on the
id that to maintain the bear in
circumstances amounted to a
nce.

eld applicable

overy for zoo-related injuries
een denied in several cases on
ground that the defendant en-
governmental immunity from
iability.[18]

intenance of a zoo was held to
governmental function in McK-
v San Francisco (1952) 109 Cal
2d 844, 241 P2d 1060, in view of
ducational and recreational pur-
it served. A statute waiving
nity as to injuries from defects
gently maintained was held not
applicable since the evidence
ed that the polar bear which
d plaintiff was maintained in a
r cage and that the accident
ned when plaintiff strained
gh a barrier and brought his
close to the bear's mouth.

oological garden maintained by
dant city as part of a park was
to be immune under the same
as parks in Hibbard v Wichita
i) 98 Kan 498, 159 P 399, the
sayir ; that the city was not
n to have received any profit
the operation which was main-
d for the pleasure and education
e entire public. Accordingly, a
ct for a child bitten by caged
es when she approached and
ed their cage was reversed.

ferring to a zoo as a part of a
c park being operated and main-
d for the benefit and welfare of the public generally and not primarily for the inhabitants of the city, the court in Grover v Manhattan (1967) 198 Kan 307, 424 P2d 256, held that the city was acting in a governmental and not a proprietary capacity in maintaining the zoo and that there could be no recovery by a child bitten by a coyote which had escaped from its cage and was running loose in the area frequented by visitors. The fact that under the state statute the city was only permitted and not required to maintain the zoo was held not to affect the question. And the further claim that the escaped coyote amounted to a nuisance to which the doctrine of municipal immunity did not apply was also rejected, the court saying that no nuisance was shown since the case involved only an isolated instance of a temporary nature.

In Gartland v New York Zoological Soc. (1909) 135 App Div 163, 120 NYS 24, although holding that the defendant was not a governmental agency, the court said, arguendo, that the city would be liable for its negligence in connection with maintenance of a zoo, since there is no governmental duty put upon the municipality to provide parks and pleasure grounds with wild animals or fish, except in the large sense that a great city may with propriety consider the aesthetic.

And see Hyde v Utica (1940) 259 App Div 477, 1057, 20 NYS2d 335, indicating that governmental immunity would apply where the zoo was maintained by the city under a legislative charter.

See also Smith v Birmingham (1960) 207 Ala 681, 121 So 2d 867, supra § 3[a], holding governmental immunity applicable.

See the caveat, § 3[a] supra, as to the doubtful status as authority of cases on the t.

§ 4. Absolute liability for wild animal injury; nuisance

[a] No absolute liability

In a number of jurisdictions, keepers or harborers of wild animals are held absolutely liable for injury caused by the animals. This is sometimes based upon the ground that the keeping of such animals amounts to maintenance of a nuisance.[19] This rule has often been advanced as a basis for liability in cases involving injury caused by zoo animals.

In several cases the courts have refused to impose absolute liability for animal-caused injuries upon governmental agencies maintaing zoos.[20]

The argument that maintenance of a caged polar bear gave rise to a nuisance per se as to which absolute liability should be imposed was rejected in McKinney v San Francisco (1952) 109 Cal App 2d 844, 241 P2d 1060, on evidence that the bear was properly caged and that the injury occurred when plaintiff strained against the barrier and brought his hand close to the bear's mouth in trying to feed it sugar.

The rule that one who harbors a wild animal is absolutely liable for injuries caused by the animal was held in Denver v Kennedy (1970) 29 Colo App 15, 476 P2d 762, later app 31 Colo App 561, 506 P2d 764, infra § 6[a], not to be applicable to the maintenance of wild animals in a public zoo, the court saying that the rationale for that rule was that the keeping of the animal is an unreasonable act done in defiance of the safety and desires of society, and that this reasoning did not apply to a municipal zoo maintained for the benefit of the public and in response to the public's obvious desires. The court accordingly held that in order to recover for injuries to a five-year-old girl bitten by a zoo zebra, negligence must be shown. The further basis of the wild animal rule that one who exposes the public to the risk of a very dangerous thing is absolutely responsible for resulting injuries was also held inapplicable, the court saying that in the context of today's society and present zoological techniques, it would be unrealistic to hold that operation of a municipal zoo exposes the public to inordinate risk.

A complaint alleging that defendant, superintendent of the National Zoological Park, was a keeper of a wild wolf which escaped from his custody and seriously injured plaintiff, was held subject to demurrer in Jackson v Baker (1904) 24 App DC 100. Noting the absence of any allegation of negligence on defendant's part, the court referred to the rule that keepers of a wild animal are ordinarily liable for injuries inflicted by it, even in the absence of fault, but noted that the National Zoological Park had been established by Congress and it was the duty of the defendant to receive and care for such animals as were sent to him by the properly constituted authority. The court said that the ordinary rule of absolute liability was not applicable where the keeping of the animal was not only lawful but obligatory.

In Grover v Manhattan (1967) 198

19. See 4 Am Jur 2d, Animals § 80.

20. The Restatement (Second) of Torts § 517 takes the view that rules as to strict liability for dangerous animals do not apply where the possession of the animal is pursuant to a duty imposed upon the possessor as a public officer or employee. In a caveat the Institute expresses no opinion as to the situation where possession is not required but merely authorized or sanctioned by legislation.

in 307, 424 P2d 256, an action for uries to a child bitten by a coyote nning loose in a part of the zoo :quented by visitors, the court re:ted the argument that the facts owed a nuisance to which the doc-ne of municipal immunity did not ply, holding that since only an iso-ted, temporary condition was own, no nuisance was involved.

Holding that since defendant main-ned the zoo and the caged bear erein under legislative authority for iblic educational and entertainment rposes, it could not be charged th a nuisance in keeping a wild imal, the court in Guzzi v New ork Zoological Soc. (1920) 192 App v 263, 182 NYS 257, affd 233 NY 1, 135 NE 897, held that her com-aint was properly dismissed since ere was no claim that defendant d been negligent.[21]

◆

Absolute liability has been held not apply in an action by a zoo em-oyee.

Instructions allowing recovery on e theory of absolute liability in an tion by a zoo employee who had en mauled by lions while cleaning eir cages were held error in Okla-oma City v Hudson (1965, Okla) 5 P2d 178, the court saying that e doctrine had no application to a se where the plaintiff was defen-nt's employee rather than a mem-r of the public.

[] Absolute liability imposed

A number of cases seem to have ld that the rule i...posing absolute bility upon the keeper of wild animals applies to a governmental agency maintaining a zoo.[22]

The rule making it the duty of a city to exercise reasonable care to make its parks reasonably safe places for visitors and making the city liable for negligence is the better rule, and it would not be wise to permit a city to fill its parks with dangerous animals without making it subject to a high degree of care, if not absolute liability, in keeping them safely confined, said the court in Byrnes v Jackson (1925) 140 Miss 656, 105 So 861, 42 ALR 254.

And see Byrnes v Jackson (1925) 140 Miss 656, 105 So 861, 42 ALR 254, where the court referred to the strict duty of keeping wild animals safely confined and said that a city maintaining a zoo would be held to that strict duty, but also said that it was the city's duty to exercise reasonable care and that it was negligent under the facts alleged in the complaint.

Absolute liability for keeping of caged bears was also alleged in Willis v Department of Conservation & Economic Development (1970) 55 NJ 534, 264 A2d 34, where a child's arm was taken off as she attempted to feed caged bears. The court, abolishing state tort immunity, recognized a cause of action.

In Hyde v Utica (1940) 259 App Div 477, 1057, 20 NYS2d 335, where a child at the zoo was bitten by a caged bear which he attempted to feed, although the complaint charged only negligence and not that the harboring of the bear constituted a nuisance, the court noted that the rule in New York is that one who keeps wild animals on his premises must see to it at his peril that they do no injury to others. While the rule is different where wild animals are kept for the education and entertainment of the public by an institution which holds a charter from the legislature for that purpose, said the court, the defendant city had no such charter and the maintenance of the zoo was purely a private undertaking so that the ordinary rule applied to it.[23]

In Moloney v Columbus (1965) 2 Ohio St 2d 213, 31 Ohio Ops 2d 447, 208 NE2d 141, allegations that defendant maintained wild animals in its zoo, the guanaco which bit plaintiff was part of a barnyard exhibit enclosed in a fence with large openings, there was nothing to keep patrons from feeding the animals, and plaintiff was bitten while attempting to do so were held to be sufficient to state a cause of action for absolute liability or nuisance.

In Tonkawa v Danielson (1933) 166 Okla 241, 27 P2d 348, affirming judgment for a child who was injured by defendant's bear, although the court spoke of the doctrine of absolute liability, it also said that the question of defendant's exercise of proper care and caution had properly been submitted to the jury.

In the later case of Mangum v Brownlee (1938) 181 Okla 515, 75 P2d 174, the court said that the doctrine of absolute liability had been established by the Tomkawa Case, supra. The court held that the doctrine of absolute liability for injury caused by wild animals was applicable in an action against a city for injury caused by a bear which had escaped from its cage, but apparently assumed also that contributory negligence would have been a defense.

And in Oklahoma City v Hudson (1965, Okla) 405 P2d 178, although holding the doctrine of absolute liability inapplicable in a case involving injury to a zoo employee, the court apparently assumed that it would have applied but for the employment relationship.

In Ft. Worth v Wiggins (1928, Tex Com App) 5 SW2d 761, the court indicated, as one of the grounds upon which a city could be held liable for injury by a caged bear which reached through holes in the cage and seized a child on the adjacent walk, that keeping the bear under such circumstances amounted to a nuisance for which a city would be liable even if it were acting in a governmental capacity in maintaining the zoo.

§ 5. Injury caused by escaped animal

In some cases where injury to a visitor at a zoo was caused by an escaped animal, the courts have indicated that the governmental agency operating the zoo could be held liable.

Where an elephant being used to give zoo patrons, for a fee, rides on the zoo grounds escaped from the control of its keeper and, in attempting to return to its elephant house, scraped the howdah which carried the passengers from its back, injuring them, and there was evidence that the keeper in charge of the elephant at the time had little experience with such animals and was unable to control it when it started to escape, it was held in Newman v Cleveland Museum of Natural History (1944) 143 Ohio

21. See, however, Hyde v Utica (1940) 259 App Div 477, 1057, 20 NYS2d 335, infra § 4[b], indicating that absolute liability would be imposed where the zoo was not kept under charter.

22. The courts in several of the cases so holding have also used language indicating reliance upon negligence theories, or indicated that contributory negligence might have been considered, so that there may be some question as to how "absolute" the liability imposed actually was.

23. See Guzzi v New York Zoological Soc. (1920) 192 App Div 263, 182 NYS 257, affd 233 NY 511, 135 NE 897, refusing to find absolute liability where the zoo was kept under legislative charter.

St 369, 28 Ohio Ops 321, 55 NE2d 575, that the trial court properly found that the defendant was negligent in selecting the agents and servants to have charge of the elephant in that they were not trained or qualified to control the elephant nor to deal with it if it became nervous, excited, or uncontrollable.

Where a bear had escaped from its pit, the only entry to which was through the nearby swimming pool bathhouse, and a visitor to the zoo who captured the bear was leading it back through the bathhouse when it attacked plaintiff, a patron of the swimming pool, it was held in Mangum v Brownlee (1938) 181 Okla 515, 75 P2d 174, that judgment was properly found for plaintiff. Stating that the owner or keeper of a dangerous animal such as a bear is an insurer against injury caused by it, the court rejected the contention that the act of the third party in leading the bear into the bathhouse was an intervening act for which defendant was not responsible, since that act was one which the city had a duty to perform. There was held to be no evidence of contributory negligence.

But it has been held that a zoo employee injured by an escaping animal cannot recover absent negligence.

Plaintiff in Oklahoma City v Hudson (1965, Okla) 405 P2d 178, was an employee engaged in cleaning a lion pit who was attacked by the lions when they escaped from an adjacent restraining cage. It was held error to submit the case on the doctrine of absolute liability of one harboring a wild animal. The court noted that the complaint alleged negligence in failing to provide proper locks on the cage door, but also noted that, from plaintiff's testimony, there was some doubt whether he had properly latched the door.

In a few cases involving escaping zoo animals, recovery was been denied because of governmental tort immunity.

See Smith v Birmingham (1960) 270 Ala 681, 121 So 2d 867 (deer being transported by city employees to a zoo escaped); and Grover v Manhattan (1967) 198 Kan 307, 424 P2d 256 (child at the zoo bitten by a coyote which had escaped) both sup a § 3[b].

§ 6. Injury by caged or restrained animal

[a] Recovery justified

In several cases where a zoo visitor was injured by a caged or otherwise restrained animal, the courts have indicated that recovery would be justified, usually under circumstances indicating that the defendant could be found guilty of negligence.

Recovery could be had for injuries suffered by a five-year-old girl when her hand was bitten by a zebra at the defendant's zoo only on a showing of negligence, said the court in Denver v Kennedy (1970) 29 Colo App 15, 476 P2d 762, later app 31 Colo App 561, 506 P2d 764, holding further that in view of her age, the child could not have been guilty of contributory negligence and was not barred by any negligence of her parents. On later appeal, in Kennedy v Denver (1972) 31 Colo App 561, 506 P2d 764, it was held error for the trial court to rule that no prima facie case of negligence had been shown, where there was testimony that the zebras were kept in a pit with a low retaining wall so constructed that children could reach over the wall and feed the zebras directly, hand to mouth; other children were feeding the animals as plaintiff approached, and plaintiff was

able to do so by lying on the wall with her mother holding her skirt; and a zebra gripped one of her fingers in its teeth and bit it off when the mother attempted to free her. There was further expert testimony that zebras are wild and dangerous animals, their propensity to do harm is greater in captivity, and they never should be allowed to come in contact with untrained persons.

On evidence that (1) a chimpanzee was housed in a cage constructed for a lion from which he could reach out for a distance of from two and one-half to three feet, (2) the animal had a few weeks before bitten off the thumb of an employee who was feeding him and had gotten excited and enraged on other occasions when he was teased, and (3) members of the public frequently climbed the protective fence and went to the cages and fed him, it was held in Brown v Alexandria (1969, La App) 225 So 2d 157, mod (La App) 226 So 2d 600, application den 254 La 844, 227 So 2d 591, that the defendant was properly held liable for injuries to a boy who approached the cage to feed the animal and was bitten. The court said that the city was negligent in failing to provide wire mesh on the sides of the cage and in failing to provide a fence which would effectively restrain the public from approaching the cage. The boy's father was held not negligent in leaving his 9-year-old son at the park, and the boy was held not contributorily negligent in climbing over the fence.

On allegations that plaintiff, who was attacked by a wild bear, came to defendant's zoo and attempted to feed the bear which had been removed from its cage and chained to a stake or tree by a 6-to-10 foot chain, and that although the defendant knew of the bear's dangerous propensities there were no warning signs or barriers to protect visitors to the zoo, it was held in Byrnes v Jackson (1925) 140 Miss 656, 105 So 861, 42 ALR 254, that it was error to sustain the defendant's demurrer, which was based on the claim that the city was acting in its governmental capacity in conducting the zoo. Noting the general rule imposing absolute liability upon keepers of dangerous animals, the court said that while the city might be maintaining the zoo for educational purposes, it was under no mandate to keep the zoo; that when it undertook to do so, it would be held to the strict duty of keeping the animals safely; and that it was negligence to keep the zoo in the manner described.

In Willis v Department of Conservation & Economic Development (1970) 55 NJ 534, 264 A2d 34, where the doctrine of state immunity from tort liability was abolished for New Jersey, the complaint alleged that the arm of a three-year old child was traumatically amputated when she attempted to feed sugar to a caged bear at a state recreational facility. Liability was alleged both on the theory of absolute liability and negligence in failing to maintain suitable screens and barriers around the cage.

On evidence that the seven-year-old plaintiff, at a city zoo, attempted to feed a caged bear with grass and, while his hand was two to three inches from the cage, the bear thrust his nose through a hole in the cage and bit the plaintiff's finger, and that there was no fence or guard rail around the cage, no sign or warning notifying visitors of the danger of approaching the cage, and two or three spectators were feeding him at the time plaintiff approached, no keeper or guard being present, the

court in Hyde v Utica (1940) 259 App Div 477, 20 NYS2d 335, held that it was error to enter a nonsuit at the close of plaintiff's case, since the defendant could have been found to be negligent and the plaintiff not to have been contributorily negligent under the circumstances.

Allegations that defendant city maintained a large collection of animals on exhibit in its zoo, the animal which bit plaintiff was enclosed by a wire fence having large openings, members of the public were permitted to feed the animals, and there were no guards or signs to keep them from doing so were held in Moloney v Columbus (1965) 2 Ohio St 2d 213, 31 Ohio Ops 2d 447, 208 NE2d 141, to show a cause of action either on the theory of absolute liability for injuries inflicted by wild animals, or on the theories of negligence or nuisance. The absence of specific allegations that defendant knew or should have known that the public would feed the animal, that it was dangerous, or that feeding it was hazardous were said to be immaterial, since defendant, in maintaining the wild animal, was presumed to know its vicious nature.

In Tonkawa v Danielson (1933) 166 Okla 241, 27 P2d 348, it appeared that defendant city owned a young grizzly bear which was kept caged on a vacant lot in the business section of the town. The 14-year-old plaintiff, playing near the bear's cage, was injured when the bear reached through the bars and seized her foot. The defense was that the animal was not vicious, having been in captivity since very young, and that plaintiff was contributorily negligent. Affirming judgment for plaintiff, the court said that the city was charged with general knowledge that a bear by nature is a dangerous and vicious animal, and that children would be attracted to the vicinity of the cage, and that the question whether it was negligent under the circumstances had properly been submitted to the jury as had the issue of plaintiff's contributory negligence.

[b] Recovery denied

In some cases of injury to a zoo visitor by a caged or restrained animal, the courts have indicated that there could be no recovery, on evidence showing no negligence on defendant's part and that plaintiff had been contributorily negligent or had assumed the risk of injury.

Upon evidence that a polar bear in defendant's zoo was kept in a cage with bars three inches apart, a four-foot fence was maintained three-feet and eleven inches outside the cage, and above this at the same distance were three strands of galvanized wire seven inches apart, and that the bear could move his paws sideways through the bars to less than six inches outside the cage and its claws were nonretractile so that it could not use them to draw anything into the cage, the court in McKinney v San Francisco (1952) 109 Cal App 2d 844, 241 P2d 1060, held that verdict was properly directed against plaintiff who claimed that, in feeding sugar to the bear, he leaned over one of the protective wires with his right hand near the cage and the bear grabbed his arm with its paw and swept his hand into its mouth. Stating that it was doubtful whether the accident could have happened in the manner described by plaintiff if plaintiff did not bring his hand within direct reach of the bear's mouth, the court said that even accepting plaintiff's version of the accident, there was no liability in view of a statute which waived immunity only as to injuries from

dangerous or defective conditions of which the city or its agents had knowledge or notice and failed to take reasonable steps to correct. Noting evidence that the bear had been kept in the same cage under the same condition for six years, during which the zoo had been visited by an average of 50,000 persons a week without injury, and that it was impossible for a person not straining against the fence to reach the dangerous zone, the court said that no intrusion of visitors into the danger zone was reasonably to be anticipated even though the defendant permitted visitors to feed the bears by throwing food in the direction of the cage. Maintenance of the zoo was held to be a governmental function in view of its instructional and recreational purpose. The claim for recovery on the basis of absolute liability for maintaining a public nuisance was also rejected, the court noting that there was no allegation in the complaint to support such a claim and saying that in any event no public nuisance was shown in view of the careful manner in which the bear was kept and the public service which the zoo offered.

Guzzi v New York Zoological Soc. (1920) 192 App Div 263, 182 NYS 257, affd 233 NY 511, 135 NE 897, was an action for injuries to a 13-year-old girl who, playing ball near a bear cage at the defendant's zoo, climbed through a fence designed to keep the public away from the cages and, in attempting to retrieve the ball which had rolled under the cage, brought her head near the cage and was mauled by the bear. Recovery was sought on the ground that defendant, in harboring a wild animal, was maintaining a nuisance, but the court rejected this claim on the basis that defendant was keeping the zoo under a legislative charter for purposes of public education and entertainment. The court further indicated that there was nothing to show that defendant was negligent under the facts alleged and, while expressly stating that it did not base its decision upon this ground, pointed out that the evidence showed that plaintiff unnecessarily and voluntarily, with full knowledge of the danger to her, placed herself in a position where the bear was able to reach her.

And see Hibbard v Wichita (1916) 98 Kan 498, 159 P 399, reversing a judgment for damages for a child bitten by caged coyotes, the court holding that the city was immune from tort liability since a governmental function was involved.

◆

Assumption of risk has been held to bar recovery by a zoo employee injured, in the course of his employment, by a confined animal.

A zoo employee who was attacked by deer when he entered their enclosure in the course of his duties was held in Boremann v Milwaukee (1896) 93 Wis 522, 67 NW 924, not to be entitled to recover against the city, the court saying that in undertaking the employment he was assumed to have known of the possibly dangerous nature of the work and to have assumed the risk thereof.

§ 7. Injury not caused by animal

In the few cases which have involved claims of negligence in connection with injuries to zoo visitors other than from animals, the courts have indicated that recovery might be had on facts showing negligence.

Allegations that plaintiff, after purchasing an admission ticket to defendant's municipal zoo, fell in a hole in the walkway maintained therein, was held in Walker v Birmingham (1976, Ala) 342 So 2d 321, 92 ALR3d 827,

92 ALR3d 807–814

92 ALR3d 807 § 1[b] [p. 808]

Attorneys at law: fee collection practice as ground for disciplinary action. 91 ALR3d 583.

Attorney's failure to report promptly receipt of money or property belonging to client as ground for disciplinary action. 91 ALR3d 975.

Conduct of attorney in connection with settlement of client's case as ground for disciplinary action. 92 ALR3d 288.

Conduct of attorney in capacity of executor or administrator of decedent's estate as ground for disciplinary action. 92 ALR3d 655.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 4 ALR4th 436.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 30 ALR4th 1020.

Sexual misconduct as ground for disciplining attorney or judge. 43 ALR4th 1062.

Defending lawyers in disciplinary proceedings. 31 AM JUR TRIALS 633.

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92 ALR3d 822–826

Conduct of attorney in connection with settlement of client's case as ground for disciplinary action. 92 ALR3d 288.

Damages recoverable for real-estate mortgagee's refusal to discharge mortgage or give partial release therefrom. 8 ALR4th 853.

Usury in connection with loan calling for variable interest rate. 18 ALR4th 1068.

Validity and effect of "wrap-around" mortgages whereby purchaser incorporates into agreed payments to grantor latter's obligation on initial mortgage. 36 ALR4th 144.

Validity and enforceability of due-on-sale real-est te mortgage provisions. 61 ALR4th 1070.

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Mortgagee's relinquishment of its right to exercise due-on-sale clause in exchange for increased interest rate, although it could not be excercised until property was sold or conveyed, constituted adequate consideration for modification of mortgage agreement. Frets v Capitol Federal Sav & Loan Assoc. (1986) 238 Kan 614, 712 P2d 1270.

Defendant bank could not withhold its consent to sale of real property on which it held mortgage lien and declare it due unless purchaser agreed to pay increased rate of interest on unpaid balance of mortgage, where defendant had agreed that plaintiff would have right to sell property subject to mortgage, upon condition that defendant approve of purchaser and defendant agreed that it would not unreasonably withhold such approval, and where it appeared that economic status of proposed purchaser was unobjectionable to bank and that bank wanted increased interest rate solely to upgrade interest to current mortgage interest rates. Silver v Rochester Savings Bank (1980) 73 App Div 2d 81, 424 NYS2d 945.

Optional acceleration clause in deed of trust which conditioned approval of transfer by lender on transferee's agreement to increase in interest rate, and which provided for exercise of optional acceleration clause if transferee did not agree was not inherently evil, unreasonable, or oppressive, and served valid business purpose, and thus was valid and enforceable. Sonny Arnold, Inc. v Sentry Sav. Asso. (1982, Tex) 633 SW2d 811.

Neither due-on-sale clause in mortgage nor mortgagee's requirement of increase in interest rate as condition of not accelerating under clause constituted unreasonable restraint on alienation. Casey v Business Men's Assur. Co. (1983, CA5 Tex) 706 F2d 559 (applying Tex law).

Purchaser's 1979 agreement to assume primary personal liability for remaining principal balance of 1975 purchase money mortgage at increased interest rate of 12½ percent per annum, which agreement relieved former property owners of primary liability, acknowledged existence of due-on-sale clause in original 1975 mortgage, and provided for monthly payments to mortgagee-loan association in lieu of exercise of due-on-sale clause, did not violate Wisconsin usury statute prohibiting interest rate exceeding 12 percent per annum where assumption agreement involved "forbearance" by mortgagee of enforcement of due-on-sale clause within meaning of 1978 statute excepting certain loans or forbearances in amount of $150,000 or more if made after May 26, 1978; further, due-on-sale clause permitting mortgagee to increase interest rate in event mortgagor transfers property is not inequitable. Weickhardt v Wauwatosa Sav. & Loan Asso. (1981, App) 103 Wis 2d 608, 309 NW2d 865.

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92 ALR3d 832–844

92 ALR3d 832 § 1[b] [p. 833]

State's liability for personal injuries from criminal attack in state park. 59 ALR4th 1236.

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92 ALR3d 832 § 3[a] [p. 834]

Board of commissioners of park district which voluntarily owns and operates zoological park primarily for benefit and accommodation of those citizens who might be interested in that activity does so in exercise of proprietary function and is answerable for its tortious conduct. Schenkolewski v Cleveland Metroparks System (1981) 67 Ohio St 2d 31, 21 Ohio Ops 3d 19, 426 NE2d 784.

92 ALR3d 832 § 3[b] [p. 836]

In view of facts that constitutional, statutory, and city charter provisions authorized maintenance and operation of zoo, so that city was engaged in governmental function in operating zoo, that ostrich pit in zoological park was not a building within building exception of state's governmental tort liability act, and that fees collected from zoo only represented portion of zoo's operating cost, so that zoological park was not operated primarily for pecuniary profit and thus was not proprietary in nature, city was entitled to governmental immunity in action arising out of fall of two-year-old boy into ostrich pit. O'Keefe v Detroit (1985, ED Mich) 616 F Supp 162 (applying Mich law).

92 ALR3d 832 § 4[b] [p. 838]

In action alleging both negligence and strict liability for injuries from bite of tiger owned by defendant city, it was reversible error to refuse instruction on assumption of risk as requested by plaintiff, since contributory negligence is defense to claim of negligence but not to claim of strict liability and since assumption of risk is defense to claim of strict liability but is not available as separate defense in negligence case if contributory negligence is available, since court did not limit application of defense of contributory negligence to plaintiff's negligence

division, did not clearly state that jury could consider strict liability without regard to contributory negligence, instructed jury that if it found contributory negligence "your verdict will be for the defendant," and since court's one-sentence reference to "knowingly" placing oneself in position of danger did not adequately or correctly define its terms. Franken v Sioux Center (1978, Iowa) 272 NW2d 422.

92 ALR3d 832 § 6[a] [p. 840]

In action by two-year-old boy and his mother against zoo director and zoo employee who had responsibility to prevent animals from harming people, based on negligence, and against city on basis, inter alia, of indemnity for negligence of zoo director and zoo employee, general verdict for plaintiffs against all three defendants was proper where there was evidence that either zoo director or employee or both were negligent in not fulfilling their duty to make all reasonable inspections to discover possible defective or dangerous conditions so as to assure safety of visitors to zoo, especially to that part of zoo housing wild and ferocious animals, which required their taking precautions equal to "coiled spring danger" that lurked within cage, and that such negligence was proximate cause of boy's injury and of his mother's medical expenses. Blanchard v Bridgeport (1983) 190 Conn 798, 463 A2d 553.

92 ALR3d 832 § 6[b] [p. 842]

City park commission was not liable for damages sustained by two-year-old child who was bitten by caged ape at zoo, where, although commission employee had originally returned to zoo with mother and child to perform employment task, his conduct in taking child beyond guard rail into close proximity of wild animals was such significant and unpredictable deviation and departure from his duties and so unrelated to service of employer as to remove his conduct from scope of his employment. Thus, commission exculpated itself from liability under code by showing that harm was caused by fault of third persons, employee and mother, and that commission was not responsible for fault of either. Normand v New Orleans (1978, La App) 363 So 2d 1220, cert den (La) 366 So 2d 573.

92 ALR3d 832 § 7 [p. 843]

In action to recover for injury sustained by 12-year-old girl who collided with support column in zoo's nocturnal exhibit building which had reserved lighting to create illusion of nighttime, city operating zoo was liable where ease with which support columns could have been made visible to even unwary by lighting or reflectors, or padded to eliminate risk of injury, without affecting utility of nocturnal nature of exhibit supported conclusion that failure to take such precautions constituted breach of city's duty to zoo patrons, and where, since possibility that child would act carelessly or thoughtlessly was within foreseen risks encompassed by duty, city could not be relieved of liability by pleading contributory negligence on part of child. Berry v Monroe (1983, La) 443 So 2d 597.

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92 ALR3d 866–889

92 ALR3d 866 § 1[b] [p. 868]

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts. 94 ALR3d 257.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR4th 283.

Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial. 3 ALR4th 601.

Entrapment defense in sex offense prosecutions. 12 ALR4th 413.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 ALR4th 120.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 ALR4th 879.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 ALR4th 310.

92 ALR3d 866 § 3 [p. 870]

Also supporting view that it is improper to instruct jury that charge is easy to make and difficult to disprove and that they should view complainant's testimony with caution:

US—United States v Vik (1981, CA8 Mo) 655 F2d 878.

Alaska—Burke v State (1980, Alaska) 624 P2d 1240.

Fla—Marr v State (1985, Fla App D1) 470 So 2d 703, 10 FLW 1505, review dismd (Fla) 475 So 2d 696.

Mont—State v Liddell (1984, Mont) 685 P2d

Alaska State Legislature

Chairman
(907) 465-4523

Jan Faiks
Post Office Box V
Juneau, Alaska 99811

Senate Judiciary Committee

April 12, 1989

MEMORANDUM

TO: Representative Max Gruenberg, Co-Chairman
Representative Peter Goll, Co-Chairman
House Judiciary Committee

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: SB 89 "An Act relating to civil liability of zoos and zoo operators."

SB 89 has been heard once by the House Judiciary Committee, and is currently awaiting a second hearing. This memo will address questions that have been raised about the bill, and provide additional information that the committee may find useful in its deliberation.

1. Should the bill specifically require the installation of protective devices to safeguard visitors from the animals?

   This is not necessary. Under the legislation, zoos would be liable for acts of negligence. The failure to provide adequate safety devices would constitute negligence, and whether a plaintiff's injury resulted from such a failure would be a question for the jury.

   It is not necessary to require that protective devices, such as barriers, be specifically designed to protect children, since the common law of negligence requires a defendant to take the plaintiff as he finds him; that is, a zoo is obligated to provide safeguards adequate to protect any type of person who may reasonably be expected to visit, whether that person be a child, an adult, or handicapped in some way. If it does not, and a person is injured, the zoo's failure is considered negligent.

2. Should the bill define the "reasonable care" which it requires zoo operators to exercise?

   "Reasonable care" is a term of art which the common law has defined. Essentially, it involves the level of prudence which an ordinary person would exercise under the same circumstances. A jury would determine if the injury to a zoo visitor was caused by an action or inaction of the zoo operator that a person of ordinary prudence under the same circumstances would have avoided.

3. Does current law subject zoos to strict liability only for the acts of wild animals, or also to strict liability for the defective design or construction of cages?

   The common law imposes strict liability for injuries caused by wild animals, whether those injuries were the result of an improperly designed cage or barrier (such as a barrier too close to the cage bars), a careless act by the plaintiff, or a defective cage that allows an animal to escape.

   A review of the case law shows that most often, injuries at zoos are caused by careless acts of a plaintiff. If such an act was accompanied by negligence on the part of the zoo, such as designing a barrier that allowed children to walk underneath or adults to be reached by an animal in the cage, the plaintiff could still recover under SB 89.

A review of various sources indicates that no model legislation in this area has been prepared in at least the last fifteen years.

If you have any additional questions or comments, please feel free to contact my office.

Thank you.

HOUSE COMMITTEE REPORT

(7)

Date Referred: January 25, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 2/7/89

The LABOR & COMMERCE Committee recommends that:

SENATE BILL NO. 89 [LIABILITY OF ZOOS & ZOO OPERATORS]
"An Act relating to civil liability of zoos and zoo operators."

[ ] be replaced with _____ [ ] the same title [ ] a new title

[ ] have attached amendment(s)

[✓] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[✓] zero fiscal note
[ ] zero with analysis

APPROVES PREVIOUS:

[ ] fiscal note(s) published:

_____

[ ] zero fiscal notes(s) published:

_____

SIGNING DO PASS:

Dave Donley
[illegible]
[illegible]
[illegible]
Brent D Leman
D.C. Parker

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

Dave Donley
Chairman's signature

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

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Mary Van Nimwegen

HOUSE Labor & Commerce CmTE

February 7, 1989 3:00 pm

SB 89

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 89
PUBLISH DATE: 1/20/89

FISCAL NOTE

REQUEST:

REVISION DATE:
TITLE: Civil liability of zoos and zoo operators
SPONSOR: Faiks
REQUESTOR: Senate Judiciary Cmte

AGENCY: Alaska Court System
BRU: Trial Courts
COMPONENTS:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERS. SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND/BUILD.						
GRANTS/CLAIMS						
MISCELLANEOUS						
TOTAL	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUNDS	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS:

PREPARED BY: Jan C. Faiks
Senator Jan Faiks, Chairman
Senate Judiciary Committee

DATE: 1/19/89
PHONE NO.: 465-4523

Introduced: 1/9/89
Referred: Judiciary

6-0156A

IN THE SENATE BY FAIKS

SENATE BILL NO. 89

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to civil liability of zoos and zoo operators."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.17 is amended by adding a new section to read:

Sec. 09.17.100. CIVIL LIABILITY OF ZOOS. (a) A person may not recover damages for injury to person or property from a zoo or a zoo operator, if the damages occurred as a result of an inherent risk of attendance at a zoo, notice of the inherent risk was posted as required under (b) of this section, and the zoo operator exercised reasonable care to prevent the injury.

(b) A zoo operator shall post signs at prominent places within a zoo and at each zoo entrance. Each sign shall include a statement warning that the zoo is not liable for injuries to person or property occurring as a result of dangers or conditions inherent in attending the zoo.

(c) In this section

(1) "inherent risk of attendance" means the dangers or conditions that are an integral part of a zoo and the physical proximity of wild animals;

(2) "zoo" means a place where wild animals are kept for exhibition to the public that is

(A) owned by the state or a municipality; or

(B) owned and operated by a nonprofit organization.

Original sponsor(s): SEN. FAIKS

IN THE SENATE BY THE JUDICIARY COMMITTEE

HOUSE CS FOR SENATE BILL NO. 89 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil liability of zoos and zoo operators."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.17 is amended by adding a new section to read:

Sec. 09.17.100. CIVIL LIABILITY OF ZOOS. (a) Except as provided in (b) of this section, a person who owns or operates a zoo is strictly liable for injury to a person or property if the injury is caused by an animal owned by or in the custody of the zoo.

(b) A person who owns or operates a zoo is not strictly liable as provided in (a) of this section if

(1) the animal that caused the injury was within the animal's normal place of confinement at the time the injury occurred;

(2) the zoo owner or operator had posted signs at prominent places within the zoo, including at each entrance, warning that the liability of the zoo for injuries caused by animals within their normal place of confinement is limited by law; and

(3) the enclosure within which the animal was confined at the time of the injury was constructed and maintained in a manner that prevents a person who exercises ordinary care customary for a person of similar age, intelligence, and experience from contacting the animal or entering the enclosure.