

110.04 Liability Of Owner Or Keeper Of A Dog Or Other Animal--Statutory Strict Liability

The law provides that [the owner of an animal] [a person keeping an animal] [a person harboring an animal] [a person who knowingly permits an animal to remain on or about any premise occupied by that person] is liable in damages for injuries sustained from any attack or injury by the animal on a person peacefully conducting [himself] [herself] in a place where [he] [she] may lawfully be [unless that person (or another) provoked the animal] [or] [unless that person (or another) knew of the presence of the animal and of the unusual and dangerous nature of the animal and provoked it].

[The term “provoked” means any action or activity, whether intentional or unintentional, which would reasonably be expected (to cause a normal animal in similar circumstances to react in a manner similar to that shown by the evidence) (or) (to cause an animal with an unusual and dangerous nature to react in a manner similar to that shown by the evidence).]

Instruction revised June 2009.

Notes on Use

This instruction incorporates 510 ILCS 5/16 (1994). An action under this statute may be brought in the alternative with an action under the common law as embodied in IPI 110.02. *Steichman v. Hurst*, 2 Ill.App.3d 415, 275 N.E.2d 679 (2d Dist.1971); *Reeves v. Eckles*, 77 Ill.App.2d 408, 222 N.E.2d 530 (2d Dist.1966).

This instruction should be used in an action to recover for injuries caused by animals other than those inherently dangerous. It does not apply to actions for injuries or damages caused by a grazing animal which is beyond the control and supervision of its keeper. In such a case, the Domestic Animals Running At Large Act (*see* IPI 110.03) is an exception to liability under the Animal Control Act.

This instruction should be accompanied by appropriate issues and burden of proof instructions. The second paragraph, and the references to “provocation” in the first paragraph, should be used only in cases where provocation is an issue.

Comment

Attack or Injury. The statute states that the owner is liable when the animal “attacks **or injures**” any person. The courts have interpreted that language to mean that an “attack” (an aggressive violent action) by the animal is not required. Any action which results in injury is covered by the statute. *Chittum v. Evanston Fuel & Material Co.*, 92 Ill.App.3d 188, 416 N.E.2d 5, 48 Ill.Dec. 110 (1st Dist.1980) (horse bolted and ran into road, rider killed). The Animal Control Act is applicable when a dog is in the road and causes a wreck. *Kirchgessner v. Tazewell County*, 162 Ill.App.3d 510, 516 N.E.2d 379, 114 Ill.Dec. 224 (3d Dist.1987); *Taylor v. Hull*, 7 Ill.App.3d 218, 287 N.E.2d 167 (5th Dist.1972); *cf. Aldridge v. Jensen*, 124 Ill.App.2d 444, 259 N.E.2d 355 (3d Dist.1970) (dog owner subject to liability under Act when plaintiff injured in fall from bicycle while being chased by defendant's dog). In *Moore v. Roberts*, 193 Ill.App.3d 541, 549 N.E.2d

1277, 140 Ill.Dec. 405 (4th Dist.1990), an action under the Animal Control Act was allowed when a racehorse broke out of the track and ran through the crowd injuring the plaintiff. In *Ross v. Ross*, 104 F.R.D. 439 (N.D.Ill.1984), the court said that recovery was available when the defendant's poodle excitedly greeted the plaintiff, knocking her down and causing her injury. And in *McEvoy v. Brown*, 17 Ill.App.2d 470, 150 N.E.2d 652 (3d Dist.1958), a dog's owner was liable when the dog ran between the plaintiff's legs, causing her to fall.

However, when an animal is a passive causal force it cannot be the proximate cause of injuries if it stands or lies still or moves away from the plaintiff in a usual, predictable manner known to the plaintiff. *King v. Ohren*, 198 Ill.App.3d 1098, 556 N.E.2d 756, 145 Ill.Dec. 138 (1st Dist.1990). In *King*, the plaintiff (a domestic employee) was denied recovery for injuries sustained when she spilled boiling water as she stepped over defendant's dog which had been following her around the kitchen. In *Bailey v. Bly*, 87 Ill.App.2d 259, 231 N.E.2d 8 (4th Dist.1967), a dog owner was not liable for injuries sustained when the plaintiff tripped over the dog as it lay on the front porch steps. In *Partipilo v. DiMaria*, 211 Ill.App.3d 813, 570 N.E.2d 683, 156 Ill.Dec. 207 (1st Dist.1991), the plaintiff, who had fallen down a staircase after being frightened by defendants' dog, was denied recovery because it was "impossible for defendants' dog to attack or injure plaintiff" as the dog was in defendants' home, behind a locked gate, where it could not escape.

Assumption of Risk. The Illinois Supreme Court has held that the statute does not apply to the ordinary risks inherent in horseback riding, of which an experienced rider is presumed to be aware. *Harris v. Walker*, 119 Ill.2d 542, 519 N.E.2d 917, 116 Ill.Dec. 702 (1988). This form of assumption of risk is sometimes referred to as the *primary* form of implied assumption of risk. *See* IPI 13.00. Other examples of such primary assumption of risk include *Malott v. Hart*, 167 Ill.App.3d 209, 521 N.E.2d 137, 138; 118 Ill.Dec. 69, 70 (3d Dist.1988) (experienced cattleman assumed known risk that cattle had normal propensity to trample people on occasion); *Clark v. Rogers*, 137 Ill.App.3d 591, 484 N.E.2d 867, 92 Ill.Dec. 136 (4th Dist.1985) (trained, experienced horsewoman assumed known risks of normal propensities of stallion); *Vanderlei v. Heideman*, 83 Ill.App.3d 158, 403 N.E.2d 756, 38 Ill.Dec. 525 (2d Dist.1980) (professional horseshoer assumed known risk of being kicked by horse being shod). However, in *Guthrie v. Zielinski*, 185 Ill.App.3d 266, 541 N.E.2d 178, 133 Ill.Dec. 341 (2d Dist.1989), the court, emphasizing the absence of a contractual or employment relationship between the parties, declined to apply the doctrine of implied assumption of risk to defendants' daughter who merely entered their home unannounced with knowledge of their dog's unfriendly attitude toward her.

Express assumption of risk is also an available defense under this statute. *Harris v. Walker*, 119 Ill.2d 542, 519 N.E.2d 917, 116 Ill.Dec. 702 (1988).

This instruction does not include either form of assumption of risk. If assumption of risk is an issue, a separate instruction will be necessary. As to implied assumption of risk, *see* IPI 13.00.

Provocation. The provocation element of the Animal Control Act is not an affirmative defense. The burden is on the plaintiff to prove that there was no provocation. *Stehl v. Dose*, 83 Ill.App.3d 440, 403 N.E.2d 1301, 38 Ill.Dec. 697 (3d Dist.1980); *Sobotta v. Carlson*, 65 Ill.App.3d 752, 382 N.E.2d 855, 22 Ill.Dec. 465 (3d Dist.1978).

Whether plaintiff has sustained his burden of proof on lack of provocation under the statute is a question of fact. In *Guthrie v. Zielinski*, 185 Ill.App.3d 266, 541 N.E.2d 178, 133 Ill.Dec. 341 (2d Dist.1989), the case was remanded for a factual determination of whether daughter's unannounced entry into her parents' home was provocation for the dog to attack her when it was known that the dog disliked her. In *Steichman v. Hurst*, 2 Ill.App.3d 415, 275 N.E.2d 679 (2d Dist.1971), it was not provocation for a 180 pound mail carrier to spray "Halt" at a ten pound dog that was advancing toward her. A jury found that the plaintiff did not sustain his burden of proof in *Stehl v. Dose*, 83 Ill.App.3d 440, 403 N.E.2d 1301, 38 Ill.Dec. 697 (3d Dist.1980), when he was attacked by a German Shepherd after entering the dog's territory and kneeling within the perimeter of its chain while it was eating. Other provocation cases include *McEvoy v. Brown*, 17 Ill.App.2d 470, 150 N.E.2d 652 (3d Dist.1958) (untying and feeding dog not provocation); *Messa v. Sullivan*, 61 Ill.App.2d 386, 209 N.E.2d 872 (1st Dist.1965) (stepping off elevator and walking toward apartment door not provocation); *Siewerth v. Charleston*, 89 Ill.App.2d 64, 231 N.E.2d 644 (1967) (boys pushing and kicking dog which is recuperating from an injury is provocation); and *Keightlinger v. Egan*, 65 Ill. 235, 238 (1872) (unjustifiably kicking a dog is provocation).

The prior version of this instruction provided that a plaintiff could not recover by reason of "provocation" if "that person knew of the presence of an animal and did something a reasonable person should have known would be likely to provoke" the animal. *Kirkham v. Will*, 311 Ill.App.3d 787, 724 N.E.2d 1062, 244 Ill.Dec. 174 (5th Dist.2000) noted that provocation is to be measured with respect to how a "normal" animal would react to an alleged act of provocation. *Kirkham* held that the prior version of this instruction did not correctly state the law in view of the absence of a definition of "provocation" which defined provocation with respect to the conduct of a "normal" animal. The *Kirkham* court further noted that the provoking act need not be intentional in character, as explained below. The prior version of the instruction has been modified to reflect the *Kirkham* opinion, and also to accommodate the factual possibility, discussed below, that someone other than the injured party may have committed the act of provocation.

The bracketed material referring to "an animal with an unusual and dangerous nature" is supported by Sections 509 and 515 of the Restatement of Torts, Second. Section 509 provides for liability on the part of a possessor of a domestic animal that the possessor "knows or has reason to know has dangerous propensities abnormal to its class." Section 515 states that in those situations, the general rule is that a plaintiff's contributory negligence is not a defense. Section 515 further provides that a plaintiff's contributory negligence "in knowingly and unreasonably subjecting himself to the risk that ... an abnormally dangerous domestic animal will do harm" is a defense to a strict liability claim. Although there are no known Illinois cases on this point, the bracketed material adapts "provocation" to a situation involving a domestic animal that is known to have an abnormally dangerous nature.

Unintentional provocation falls within the meaning of the statute. A Dalmatian scratched a child plaintiff in the eye after the plaintiff stepped on dog's tail while playing "Crack the Whip." The court said that the dog's act was not out of proportion to the unintentional act involved, and therefore defendant was not liable. *Nelson v. Lewis*, 36 Ill.App.3d 130, 344 N.E.2d 268 (5th Dist.1976). *See also* *Stehl v. Dose*, 83 Ill.App.3d 440, 403 N.E.2d 1301, 38 Ill.Dec. 697 (3d Dist.1980), discussed above. However, in *Robinson v. Meadows*, 203 Ill.App.3d 706, 561 N.E.2d 111, 148 Ill.Dec. 805 (5th Dist.1990), the court overturned a jury verdict for the defendants because

a child's screaming at the excited barking of a dog was not sufficient provocation for the brutal attack that resulted.

The injured party does not have to be the provocateur. In *Forsyth v. Dugger*, 169 Ill.App.3d 362, 523 N.E.2d 704, 119 Ill.Dec. 948 (4th Dist.1988), summary judgment for the defendant was upheld when the plaintiff was injured after defendant's pony bolted under a tree limb after a third party jumped onto its back. *See also* *Siewerth v. Charleston*, 89 Ill.App.2d 64, 231 N.E.2d 644 (1967) (plaintiff's playmate also kicked dog).

“Place Where He Has a Right to Be.” An owner of property who provides a path or walk from the public way to his door, without some indication (sign, posting of notice, or words) warning away those who seek lawful business with him extends a license to use the path or walk during the ordinary hours of the day. A person who uses the path or walk is a licensee, and therefore is in a “place where he may lawfully be” within the meaning of the statute. *Smith v. Pitchford*, 219 Ill.App.3d 152, 579 N.E.2d 24, 161 Ill.Dec. 767 (5th Dist.1991) (8-year-old child); *Dobrin v. Stebbins*, 122 Ill.App.2d 387, 259 N.E.2d 405 (1st Dist.1970) (17-year-old magazine salesman). *See also* *Messa v. Sullivan*, 61 Ill.App.2d 386, 209 N.E.2d 872 (1st Dist.1965) (dog warning sign inadequate). And where plaintiff had her own key and regularly visited her parents' home unannounced, she was held to be lawfully on the premises. *Guthrie v. Zielinski*, 185 Ill.App.3d 266, 541 N.E.2d 178, 133 Ill.Dec. 341 (2d Dist.1989).

However, the defendant may be able to prevail by showing that the plaintiff was in an area closed to the public, or that a warning (such as signs or the dog's presence) was given to the victim before the incident. *Frostin v. Radick*, 78 Ill.App.3d 352, 397 N.E.2d 208, 210, 33 Ill.Dec. 875, 877 (1st Dist.1979).

“Owner.” Although the statute places liability upon the animal's “owner,” that term is defined to include not only persons having a right of property in the animal but also one who “keeps” or “harbors” it, or who has it in his “care,” or acts as its “custodian,” or “knowingly permits [it] to remain on or about any premise occupied by him.” 510 ILCS 5/2.16 (1994).

A defendant is not a “harborer” of a dog when he is an absentee landlord who merely allows a tenant to keep a dog. *Steinberg v. Petta*, 114 Ill.2d 496, 501 N.E.2d 1263, 103 Ill.Dec. 725 (1986). However, a plaintiff who agreed to board and care for a dog could not recover when the dog attacked her because she fell within the definition of “owner” under the statute. *Wilcoxon v. Paige*, 174 Ill.App.3d 541, 528 N.E.2d 1104, 124 Ill.Dec. 213 (3d Dist.1988). In *Thompson v. Dawson*, 136 Ill.App.3d 695, 483 N.E.2d 1072, 91 Ill.Dec. 586 (4th Dist.1985), the appellate court sustained the trial court's factual determination that the act of feeding and watering a stray dog until it could be taken to the animal shelter or placed in a home did not make the defendants “owners” under the statute. However, in *Kirchgessner v. Tazewell County*, 162 Ill.App.3d 510, 516 N.E.2d 379, 114 Ill.Dec. 224 (3d Dist.1987), the court held that a county animal shelter acting as a “keeper” of a dog falls within the definition of an “owner.”

When the owner of a horse (or his employee) takes custody of the horse to ride it, the owner of the property on which the horse is being boarded is, during the time the employee has custody, no longer within the definition of “owner.” *Clark v. Rogers*, 137 Ill.App.3d 591, 484 N.E.2d 867,

92 Ill.Dec. 136 (4th Dist.1985).

See also the cases discussed in the Comment to IPI 110.03 (Domestic Animals Running At Large Act).