

**110.00**  
**ANIMALS**

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**INTRODUCTION**

This chapter contains instructions for cases involving the special common law and statutory liability rules governing physical harm to persons or property caused by animals.

**“Wild” or Inherently Dangerous Nondomestic Animals: Common Law Strict Liability**

The owner or keeper of an animal which is not commonly domesticated is subject to common law strict liability for injuries caused by that animal. Restatement (Second) of Torts §507 (1977). The injury must be caused by a dangerous propensity which is characteristic of such an animal, or of which the possessor has reason to know. *Id.* §507(2).

Although liability is strict, certain defenses are available--for example, the fact that the plaintiff trespassed into the animal's presence (*id.* §511) or assumed the risk (*id.* §515), or when the possessor was required by law to keep or transport the animal (*id.* §517).

In Illinois, it is now unlawful to possess a “dangerous animal,” defined as a “lion, tiger, leopard, ocelot, jaguar, cheetah, margay, mountain lion, lynx, bobcat, jaguarundi, bear, hyena, wolf or coyote, or any poisonous or life-threatening reptile,” and the fact that an attempt was made to domesticate the animal is no defense. 720 ILCS 585/0.1-585/4 (1994). *See People v. Fabing*, 143 Ill.2d 48, 570 N.E.2d 329, 155 Ill.Dec. 816 (1991).

**Domestic Animals: Common Law Strict Liability**

Illinois follows the general common law rule that the owner or keeper of a domestic animal (most often dogs, cats, and horses or other livestock) is strictly liable for injuries caused by the animal only if the plaintiff can show that the animal had an uncommon “mischievous” or dangerous propensity to commit such an injury and that the owner had actual knowledge of that propensity. *Domm v. Hollenbeck*, 259 Ill. 382, 385; 102 N.E. 782, 783 (1913); *Forsyth v. Dugger*, 169 Ill.App.3d 362, 523 N.E.2d 704, 707, 119 Ill.Dec. 948, 951 (4th Dist.1988). *Accord*: Restatement (Second) of Torts §509 (1977).

**Domestic Animals: Statutory Strict Liability**

By statute, Illinois has broadened the strict liability of owners and keepers of animals. Section 16 of the Illinois Animal Control Act (510 ILCS 5/16 (1994)) provides:

If a dog or other animal,<sup>1</sup> without provocation, attacks or injures any person who

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<sup>1</sup> The statute, which originally applied only to dogs, was amended in 1973 to add the phrase “or other animal.” A different section of the Act defines the term “animal” as “any animal, other than

is peaceably conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained.

“Owner” is defined as “any person<sup>2</sup> having a right of property in a dog or other animal, or who keeps or harbors a dog or other animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog or other domestic animal to remain on or about any premise occupied by him.” 510 ILCS 5/2.16 (1994).

The statute thus eliminates the requirement that the “owner” have prior knowledge of the vicious or dangerous propensity of his animal. *Steinberg v. Petta*, 114 Ill.2d 496, 501 N.E.2d 1263, 103 Ill.Dec. 725 (1986). Under section 16, there are only four elements which the plaintiff must prove: (1) injury caused by an animal “owned” by the defendant; (2) lack of provocation; (3) peaceable conduct of the person injured; and (4) the presence of the injured person in a place where he has a right to be. *Robinson v. Meadows*, 203 Ill.App.3d 706, 710; 561 N.E.2d 111, 113; 148 Ill.Dec. 805, 807 (5th Dist.1990).

Common law strict liability and section 16 of the Animal Control Act are concurrent remedies; a plaintiff may seek recovery under either or both. *Steichman v. Hurst*, 2 Ill.App.3d 415, 275 N.E.2d 679 (1971); *Reeves v. Eckles*, 77 Ill.App.2d 408, 222 N.E.2d 530 (1966). While there may be situations in which the plaintiff will need to rely on the common law remedy, in most cases the statutory action will be preferred.

### **Provocation**

Under both common law strict liability and section 16 of the Animal Control Act, plaintiff's provocation of the animal will defeat liability. (At common law, provocation is a defense; under section 16, plaintiff must prove his lack of provocation.) *See* Comment to IPI 110.04, *infra*.

### **Statutory Liability: Domestic Animals Running At Large**

Another cause of action is created by the Domestic Animals Running At Large Act (DARAL) (510 ILCS 55/1-55/5.1 (1994)):

No person or owner of livestock<sup>3</sup> shall allow livestock to run at large in the State

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man, which may be affected by rabies.” 510 ILCS 5/2.02 (1994). However, no court so far has decided whether the term “animal” in section 16 is limited by this definition or whether it is all-inclusive.

<sup>2</sup>“Person” is defined to include any “person, firm, corporation, partnership, society, association or other legal entity, any public or private institution, the State of Illinois, municipal corporation or political subdivision of the State, or any other business unit.” 510 ILCS 5/2.17 (1994).

<sup>3</sup>“Livestock” is defined as “bison, cattle, swine, sheep, goats, equidae, or geese.” 510 ILCS

of Illinois. All owners of livestock shall provide the necessary restraints to prevent such livestock from so running at large and shall be liable in civil action for all damages occasioned by such animals running at large; Provided, that no owner or keeper of such animals shall be liable for damages in any civil suit for injury to the person or property of another caused by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large.

510 ILCS 55/1 (1994). This statute applies only when grazing livestock escape from confinement. *Moore v. Roberts*, 193 Ill.App.3d 541, 549 N.E.2d 1277, 140 Ill.Dec. 405 (4th Dist.1990). Plaintiff must prove that (1) the owner had knowledge of the animal's escape, and (2) the owner was negligent in constructing or maintaining the enclosure. *Abadie v. Royer*, 215 Ill.App.3d 444, 574 N.E.2d 1306, 1310; 158 Ill.Dec. 913, 917 (2d Dist.1991); *O'Gara v. Kane*, 38 Ill.App.3d 641, 348 N.E.2d 503 (5th Dist.1976); *Guay v. Neel*, 340 Ill.App. 111, 91 N.E.2d 151 (1st Dist.1950).

A typical case under this statute involves a horse or bovine that wanders onto a highway and is struck by the plaintiff's vehicle.

This statute is construed as an exception to section 16 of the Animal Control Act. If the DARAL applies, it is the exclusive remedy. *Abadie v. Royer*, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158 Ill.Dec. 913 (2d Dist.1991); *Zears v. Davison*, 154 Ill.App.3d 408, 506 N.E.2d 1041, 107 Ill.Dec. 150 (3d Dist.1987); *McQueen v. Erickson*, 61 Ill.App.3d 859, 378 N.E.2d 614, 19 Ill.Dec. 113 (2d Dist.1978).

### **Strict Liability: Animals Entering Fenced Enclosure**

A provision of the Fences Act (765 ILCS 130/1-130/21 (1994)) makes the owner of certain animals ("horse, mule, ass, or any neat cattle, hogs or sheep, or other domestic animals") strictly liable for all damages caused when the animals break into plaintiff's "inclosure, the fence being good and sufficient." 765 ILCS 130/20 (1994).

### **Common Law Negligence Liability**

Although it has been suggested that the foregoing remedies replace common law negligence liability for injuries caused by a domestic animal (*Forsyth v. Dugger*, 169 Ill.App.3d 362, 523 N.E.2d 704, 707; 119 Ill.Dec. 948, 951 (4th Dist.1988), *citing* *Beckert v. Risberg*, 50 Ill.App.2d 100, 199 N.E.2d 811 (1st Dist.1964), *rev'd on other grounds*, 33 Ill.2d 44, 210 N.E.2d 207 (1965)), such an assertion is probably too broad. *Forsyth* and *Beckert* merely hold that a common law negligence action requires an allegation that the owner had knowledge of the animal's vicious propensity. *Accord*: *Abadie v. Royer*, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158

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55/1.1 (1994). This provision has been interpreted literally; thus, turkeys (*McPherson v. James*, 69 Ill.App. 337 (3d Dist.1897)) and ducks (*Hamilton v. Green*, 44 Ill.App.3d 987, 358 N.E.2d 1250, 3 Ill.Dec. 565 (2d Dist.1976)) are not included.

Ill.Dec. 913 (2d Dist.1991); *see* *Domm v. Hollenbeck*, 259 Ill. 382, 385; 102 N.E. 782, 783 (1913). Given the presumption that domestic animals are inherently harmless to humans, this allegation will be essential to any negligence claim arising out of an animal's attack. *Lucas v. Kriska*, 168 Ill.App.3d 317, 522 N.E.2d 736, 119 Ill.Dec. 74 (1st Dist.1988). Therefore, with the addition of this limitation, one should be able to assert a negligence cause of action in addition to, or in lieu of, common law or statutory strict liability claims for violence by domestic animals. *Id.*

In addition, there is no apparent reason why a negligence claim could not be made with respect to other types of injuries that happen to involve animals. *See Ward v. Ondrejka*, 5 Ill.App.3d 1068, 284 N.E.2d 470 (1st Dist.1972) (plaintiffs injured when auto struck steer on highway; common law liability assumed, but no negligence proved); *Abadie v. Royer*, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158 Ill.Dec. 913 (2d Dist.1991) (auto struck horse on highway; plaintiff failed to show dangerous disposition of which defendant was aware); *Hamilton v. Green*, 44 Ill.App.3d 987, 990; 358 N.E.2d 1250, 1252; 3 Ill.Dec. 565, 567 (2d Dist.1976) (plaintiff injured chasing stray ducks; no liability).

### **110.01 Inherently Dangerous Or “Wild” Animal--Common Law Strict Liability**

One who [keeps] [owns] a [e.g., bear] is liable for injury caused by that animal [unless the person injured has deliberately provoked the animal] [, or] [unless the person injured, knowing of the animal's propensity to violence, voluntarily exposed himself to injury].

#### **Notes on Use**

This instruction does not apply to ordinary domestic animals.

This instruction should be accompanied by appropriate issues and burden of proof instructions.

#### **Comment**

Lions, tigers, bears and many other “wild” animals are inherently dangerous. The owner of these types of animals is strictly liable for their acts which result in personal injury, provided the injury results from the animal's inherently dangerous characteristic. Restatement (Second) of Torts §507 (1977); *Moss v. Pardridge*, 9 Ill.App. 490, 491 (1st Dist.1881) (dictum). Probably a person who provokes the injury cannot recover. *See* Comment to IPI 110.04 for a discussion of provocation.

Under the Dangerous Animals Act, 720 ILCS 585/0.1-585/4 (1994), a dangerous animal is defined as a “lion, tiger, leopard, ocelot, jaguar, cheetah, margay, mountain lion, lynx, bobcat, jaguarundi, bear, hyena, wolf or coyote, or any poisonous or life-threatening reptile.” “Life-threatening reptile” was held not to be unconstitutionally vague as to defendant's two 15-20 foot long Burmese Pythons and his alligator. But as to defendant's seven-foot-long boa constrictor, the court said that the statute was ambiguous and therefore unconstitutionally vague. *People v. Fabing*, 143 Ill.2d 48, 570 N.E.2d 329, 155 Ill.Dec. 816 (1991).

## 110.02 Domestic Animal--Common Law Strict Liability

One who [keeps] [owns] an animal which he knows is vicious or dangerous to people is liable to a person injured by the animal [unless the injured person did something a reasonable person should have known was likely to provoke an attack by the animal] [, or] [unless the injured person knew of an unusual characteristic of the animal and did something which a reasonable person could reasonably expect to provoke an attack by that particular animal] [, or] [unless the injured person voluntarily exposed himself to injury, either knowing the customary nature of the animal or knowing the peculiar nature of this specific animal].

### Notes on Use

This instruction deals with common law strict liability for harm caused by domestic animals.

This cause of action may be combined with an action for strict liability under the Animal Control Act (IPI 110.04). If both theories are submitted to the jury, this instruction should be limited to a particular count.

The last bracketed phrase expresses the defense of primary assumption of risk. *See* Comment to IPI 110.04.

This instruction should be accompanied by appropriate issues and burden of proof instructions.

### Comment

**Knowledge of Animal's Dangerous Propensity.** At common law, domestic animals (dogs, cats, horses, cattle, sheep, etc.) are regarded as not inherently violent or dangerous to humans. Therefore, absent knowledge that a particular domestic animal has a vicious propensity, its owner is not liable for any injuries it may cause. However, once the owner has knowledge of the animal's dangerousness, the owner is thereafter strictly liable for harm caused by that propensity.

One is on notice that an animal is dangerous to others if that is a reasonable inference from the facts, notwithstanding the fact that the animal has yet to attack or bite anyone. *Gerulis v. Lunecki*, 284 Ill.App. 44, 45-47; 1 N.E.2d 440, 441 (1st Dist.1936) (an owner who bought a dog to watch her property and kept the dog chained during the daytime indicated by these acts awareness that it probably would bite humans); *Steichman v. Hurst*, 2 Ill.App.3d 415, 275 N.E.2d 679 (2d Dist.1971).

**Provocation.** Under common law strict liability, provocation is an affirmative defense. The case law concerning provocation has largely developed under the Animal Control Act, and therefore is discussed in that context. *See* Comment to IPI 110.04, *infra*.

**Persons Liable.** One who owns, possesses, or voluntarily assumes control of a domestic animal becomes responsible for its actions. *Ward v. Brown*, 64 Ill. 307 (1872).

### **110.03 Domestic Animals Running At Large--Statutory Liability**

An owner or keeper of an animal is liable in damages if his [e.g., horse] while running at large caused the injury or damage complained of, unless the owner or keeper did not know his animal was running at large and he used reasonable care in restraining it.

[A person is a “keeper” when he has the right to control the animal's movements or has knowingly and voluntarily undertaken to control the animal's movements.]

[An animal is “running at large” only if it strays from confinement or restraint and from the limits of the owner or keeper.]

#### **Notes on Use**

This instruction is based on a provision of the Domestic Animals Running At Large Act, 510 ILCS 55/1 (1994), which imposes liability for injuries and damages for allowing certain animals to run at large. Cities and villages may regulate the running at large of animals, 65 ILCS 5/11-20-9 (1994). Therefore, this source should be checked before this instruction is given.

This instruction should be used in an action to recover damages caused by animals grazing at pasture which are beyond the control and supervision of their keepers. *Moore v. Roberts*, 193 Ill.App.3d 541, 549 N.E.2d 1277, 140 Ill.Dec. 405 (4th Dist.1990); *Zears v. Davison*, 154 Ill.App.3d 408, 506 N.E.2d 1041, 107 Ill.Dec. 150 (3d Dist.1987). IPI 110.05 should be used when an animal breaks into an enclosure. IPI 110.02 (common law strict liability) and/or IPI 110.04 (statutory strict liability) applies when the animal is not grazing or is under the control of its owner or keeper. If, on the facts of the case, the Domestic Animals Running At Large Act (510 ILCS 55/1 (1994)) applies, then it is the exclusive remedy. *Abadie v. Royer*, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158 Ill.Dec. 913 (2d Dist.1991); *Zears v. Davison*, 154 Ill.App.3d 408, 506 N.E.2d 1041, 107 Ill.Dec. 150 (3d Dist.1987); *McQueen v. Erickson*, 61 Ill.App.3d 859, 378 N.E.2d 614, 19 Ill.Dec. 113 (2d Dist.1978).

The second (bracketed) paragraph should be used if there is a fact issue as to whether the defendant qualifies as a “keeper” of the animal under the statutory definition added by P.A. 84-28, effective January 1, 1986 (510 ILCS 55/1.1 (1994)) as interpreted by the courts. The new statute defines an “owner” as “any person who (a) has a right of property in an animal, (b) keeps or harbors an animal, (c) has an animal in his care, or (d) acts as custodian of an animal.” Since the issue will usually arise in the context of a defendant who is not the actual owner of the animal, the Committee has retained the term “keeper” to describe such persons.

The third (bracketed) paragraph should be used if there is an issue as to whether the animal was restrained or confined when it escaped. P.A. 84-28, effective January 1, 1986, added this definition of “running at large.” 510 ILCS 55/1.1 (1994).

This instruction should be accompanied by appropriate issues and burden of proof instructions.

#### **Comment**

The statute upon which this instruction is based only prohibits certain kinds of animals

from running at large. Formerly, these were defined as “the species of horse, ass, mule, cattle, sheep, goat, swine, or geese.” P.A. 84-28, effective January 1, 1986, made the statute applicable to “livestock” and defined the term “livestock” as “bison, cattle, swine, sheep, goats, equidae, or geese.” (“Equidae” is the family of which “equus” is the only surviving genus. “Equus” comprises “horses, asses, zebras, and related ... animals . . . .” Webster's Third New International Dictionary 769 (1981).)

In defining the animals to which it applies, the statute has been literally construed. Thus, the statutory language does not encompass turkeys (*McPherson v. James*, 69 Ill.App. 337 (3d Dist.1897)) or ducks (*Hamilton v. Green*, 44 Ill.App.3d 987, 358 N.E.2d 1250, 3 Ill.Dec. 565 (2d Dist.1976)).

Keepers of horses or cows that escape their enclosure while grazing and wander into the road causing damage or injury are subject to liability under the statute. *McQueen v. Erickson*, 61 Ill.App.3d 859, 378 N.E.2d 614, 19 Ill.Dec. 113 (2d Dist.1978); *Zears v. Davison*, 154 Ill.App.3d 408, 506 N.E.2d 1041, 107 Ill.Dec. 150 (3d Dist.1987).

Plaintiff makes out a prima facie case by proving that a grazing animal escaped its enclosure and was running at large. Defendant can prevail only by showing that (1) he did not then know that the animal had escaped, and (2) he exercised reasonable care to keep it confined. While the prima facie case shifts the burden of going forward with the evidence to the defendant, the burden of proof on all elements remains on the plaintiff. *Abadie v. Royer*, 215 Ill.App.3d 444, 574 N.E.2d 1306, 1310; 158 Ill.Dec. 913, 917 (2d Dist.1991); *O'Gara v. Kane*, 38 Ill.App.3d 641, 348 N.E.2d 503 (5th Dist.1976); *Guay v. Neel*, 340 Ill.App. 111, 91 N.E.2d 151 (1st Dist.1950).

**Persons Liable.** A defendant who lived on rented property and boarded horses was considered a “keeper” of a horse that escaped and caused property damage when it was hit by a car. *Wakefield v. Kern*, 58 Ill.App.3d 837, 374 N.E.2d 1074, 16 Ill.Dec. 299 (2d Dist.1978).

On the other hand, in *Blakley v. Glass*, 342 Ill.App. 90, 95 N.E.2d 128 (1st Dist.1950) (abstract decision), the court held that a horse pastured in a host's enclosure during a social visit did not make the host a keeper. In *McEvoy v. Brown*, 17 Ill.App.2d 470, 150 N.E.2d 652 (3d Dist.1958), the court held that releasing and feeding a dog staked on a host's premises by guests did not make the host a keeper. In *Gahm v. Cave*, 194 Ill.App.3d 954, 551 N.E.2d 779, 141 Ill.Dec. 592 (3d Dist.1990), a calf escaped onto the defendant's property while being unloaded from the owner's trailer. The court held that the defendant was not a keeper under the statute because control and ownership of the calf remained with the calf owner during the unloading process. *Accord*, *Ward v. Ondrejka*, 5 Ill.App.3d 1068, 284 N.E.2d 470 (1st Dist.1972). In *Smith v. Gleason*, 152 Ill.App.3d 346, 504 N.E.2d 240, 105 Ill.Dec. 371 (2d Dist.1987), the court held that a complaint against a landowner under the statute was properly dismissed because he was not an owner or keeper of the animal. The landowner merely rented property to another who boarded horses as a business. Similarly, the owner of premises leased to another for pasture was not a “keeper” under the Act. *Heyen v. Willis*, 94 Ill.App.2d 290, 236 N.E.2d 580 (4th Dist.1968).



The statute did not apply when a horse broke through a racetrack enclosure at a county fair and ran through the crowd injuring plaintiff. *Moore v. Roberts*, 193 Ill.App.3d 541, 549 N.E.2d 1277, 140 Ill.Dec. 405 (4th Dist.1990). Nor did the statute apply when plaintiff, while riding defendant's horse, was killed by a cement truck when plaintiff lost control of the horse and it ran into the road. *Chittum v. Evanston Fuel & Material Co.*, 92 Ill.App.3d 188, 416 N.E.2d 5, 48 Ill.Dec. 110 (1st Dist.1980). However, the court in *Abadie v. Royer*, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158 Ill.Dec. 913 (2d Dist.1991), using language rejecting *Chittum*, held that the statute applied when the defendants' horse escaped from the barn and ran into the path of the plaintiff's car.

## **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 defendant's dog, was denied recovery because it was "impossible for defendant's dog to attack or injure plaintiff" as the dog was in defendant's 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 defendant's 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).

### **110.05 Animals Breaking Into A Fenced Enclosure--Statutory Strict Liability**

At the time of this occurrence there was in force in the State of Illinois a statute which provides if a [e.g., cow] breaks into any person's inclosure, the fence being good and sufficient, the [e.g., cow]'s owner is liable to the [owner] [occupier] of the property for all damages caused by the entry.

#### **Notes on Use**

This instruction is based on a provision of the Fence Act, 765 ILCS 130/20 (1994). It is distinguished from IPI 110.03 (Domestic Animals Running At Large Act) in that this instruction may be used when a domesticated animal breaks into an enclosure separated by a division fence. Under the DARAL, no such breaking is necessary, but there are other requirements.

This instruction should be accompanied by appropriate issues and burden of proof instructions.

#### **Comment**

In *Hart v. Meredith*, 196 Ill.App.3d 367, 553 N.E.2d 782, 784; 143 Ill.Dec. 75, 77 (3d Dist.1990), the court held that “a livestock owner is strictly liable under the Fence Law if his livestock enters a landowner's property enclosed with a good and sufficient fence.” The Fence Act specifically provides that it does not require a landowner to construct a fence in order to maintain an action for injuries done by animals running at large. Therefore, if the landowner chooses not to construct a fence, the animal's owner may still be liable if the landowner can prove the requirements of the Domestic Animals Running At Large Act (*see* IPI 110.03). But if the landowner does have a fence, then the Fence Act provides a broader remedy.

The Fence Act has no application to outside fences; it is applicable only between the owners of adjoining lands. *McKee v. Trisler*, 311 Ill. 536, 143 N.E. 69 (1924); *Smith v. Gleason*, 152 Ill.App.3d 346, 504 N.E.2d 240, 105 Ill.Dec. 371 (2d Dist.1987). The Fence Act imposes a duty to erect a division line fence by adjoining owners. *Id.*