

1390 INJURY BY DOG:

[Suggested Preliminary Instructions: Wis JI-Civil 100, 110, 115, 120, 125, 215, 145, and 200]

(Plaintiff) alleges that (Defendant) is liable for injuries caused (Plaintiff) by a dog, based on section 174.02, Wisconsin Statutes, which states in part, that the owner of a dog is liable for the full amount of damages caused by the dog injuring or causing injury to a person, domestic animal or property. Before you may find a person who owns a dog liable, you must first find that (Plaintiff) suffered an injury to (his) (her) person, domestic animal or property and that the dog caused injury.

Question No. 1 on the verdict asks whether (Defendant) "owned," "harbored," or "kept" the dog. (Defendant) claims that (he) (she) did not "own," "harbor," or "keep" the dog that injured (Plaintiff). You must decide whether (Defendant) "owned," "harbored," or "kept" the dog, and to do so you must look to all of the evidence presented. A person need not be the legal owner of a dog to keep or harbor the dog. A person keeps a dog if (he) (she) exercises a measure of care, custody, or control over the dog. A person's status as a keeper can change over time, with the focal point being the time of the injury. A person harbors a dog if (he) (she) shelters or gives refuge to a dog. Neither the casual presence of dogs on one's property, a meal of mercy to a stray dog, nor the mere ownership of the property on which the dog resides makes one a keeper or harborer. There must be evidence that (Defendant) furnished the dog with shelter, protection, or food or exercised some degree of control over the dog or the property where the dog resides.

Question No. 2 on the verdict asks whether the actions of (Defendant)'s dog were a cause of injury to (Plaintiff). This question does not ask about "the cause" but rather "a cause" because an injury may have more than one cause. The actions of a dog were a cause of injury if they were a substantial factor in producing the injury. An injury may be caused by the actions of a dog or by the negligence of a person or by the combined actions of a dog and the negligence of a person.

A person's injury by a dog may involve negligence on (his) (her) own part. Question No. 3 asks about that. You must determine the extent of (Plaintiff)'s negligence, if any, with respect to (his) (her) own safety, at or before the contact with (Defendant)'s dog. A person is negligent when (he) (she) fails to exercise ordinary care. Every person in all situations has a duty to exercise ordinary care for (his) (her) own safety. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent if the person does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoid injury to (himself) (herself).

If you answer question No. 3 on the verdict "yes," finding that (Plaintiff) was negligent with respect to (his) (her) own safety, then you will need to answer question No. 4. That question asks whether (Plaintiff)'s negligence was a cause of (his) (her) injury. Please note that this question does not ask about "the cause" but rather "a cause" because an injury may have more than one cause. Someone's negligence was a cause of (his) (her) injury if it was a substantial factor in producing the injury. An injury may be caused by the actions of a

dog, by the negligence of a person, or by the combined actions of a dog and the negligence of a person.

If, by your previous answers, you are required to answer question No. 5, you will determine how much and to what extent (Defendant)'s dog and (Plaintiff)'s negligence are to blame for causing the injury. You will decide the percentage (a portion of 100%) attributable to each party in causing the injury.

The burden of proof on these subdivisions is on the party who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

You must answer question No. 6, the damage question no matter how you answered any of the previous questions in the verdict. The amount of damages, if any, found by you should in no way be influenced or affected by any of your previous answers to questions in the verdict.

[I have answered question 6(a) because the parties have agreed on the amount to be inserted. You should not conclude from the fact I have answered this question as to the amount of damages that any party has admitted fault or that any party may be responsible for the amount inserted. Finally, you should not assume that because I have answered this question, that a party already has or necessarily will recover this amount. Parties, may, as here, agree on an amount of damages without admitting they are responsible for the damages.]

In answering the damage questions, completely disregard any percentages which you may have inserted as your answers to the subdivisions of question No. 5, the comparison question.

In answering the damage questions, be careful not to include or duplicate in any answer amounts included in another answer made by you or me.

Your answers to the damage questions should not be affected by sympathy or resentment or by the fact that one of the parties from whom damages are sought is an insurance corporation; nor should you make any deductions because of a doubt in your minds as to the liability of any party to this action.

In considering the amount to be inserted by you in answer to each damage question, the burden of proof rests upon each person claiming damages to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages with respect to the element or elements mentioned in the questions and the amount of the damages. The greater weight of the credible evidence means that the evidence in favor of an answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. The amount inserted by you should reasonably compensate the person for the damages from the incident.

Determining damages for pain and suffering cannot always be made exactly or with mathematical precision; you should award damages in an amount which will fairly compensate (Plaintiff) for (his) (her) injuries.

The amount you insert in answer to each damage question is for you to determine from the evidence. What the attorneys ask for in their arguments is not a measure of damages. The opinion or conclusions of counsel as to what damages should be awarded should not influence you unless it is sustained by the evidence. Examine the evidence—carefully and dispassionately—and determine your answers from the evidence in the case.

Question 6(a) asks what sum of money will fairly and reasonably compensate (Plaintiff) for past medical expenses. You will insert as your answer the sum of money you find has reasonably and necessarily been incurred from the date of the incident up to this time for the care of the injuries sustained by (Plaintiff) as a result of the incident.

Billing statements (which may include invoices) for health care services (Plaintiff) has received since the accident have been admitted into evidence.

[NOTE: Use the following paragraph if no evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff: These billing statements establish the value, reasonableness, and necessity of health care services provided to (Plaintiff). You must still determine whether the health care services were provided for the injuries sustained by (Plaintiff) as a result of the incident.]

[NOTE: Use the following paragraph if evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff: The party challenging the (value of) (reasonableness and necessity of) (Plaintiff)'s past health care services has the burden to prove they were not (reasonable in amount) (reasonably and necessarily provided to care for (Plaintiff)). Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the billing statements (were not reasonable in amount) (do not reflect health care services reasonably and necessarily

provided to care for (Plaintiff)), you must find (the billing statements reflect the reasonable value of the health care services) (the health care services reflected in the billing statements were reasonably and necessarily provided to care for (Plaintiff)). You must still determine whether the medical expenses were provided for the injuries sustained by (Plaintiff) as a result of the accident.]

Question 6(b) asks what sum of money will fairly and reasonably compensate (Plaintiff) for past pain, suffering, and disability. Your answer to this subdivision should be the amount of money that will fairly and reasonably compensate (Plaintiff) for the pain, suffering, and disability (he) (she) has suffered from the date of the incident up to this time as a result of the incident.

Pain, suffering, and disability includes any physical pain, humiliation, embarrassment, worry, and distress which (Plaintiff) has suffered in the past. You should consider to what extent (his) (her) injuries impaired (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life.

Question 6(c) asks what sum of money will fairly and reasonably compensate (Plaintiff) for future pain, suffering, disability.

If you are satisfied that (Plaintiff) will endure pain, suffering, and disability, in the future as a result of the incident, you will insert as your answer to this subdivision the sum of money you find will fairly and reasonably compensate (Plaintiff) for this future pain, suffering, and disability.

Pain, suffering, and disability includes:

- physical pain
- worry
- distress
- embarrassment
- humiliation

In answering this damage question, you should consider the following factors:

- the extent (Plaintiff)'s injuries have impaired and will impair (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life;
- the nature of (Plaintiff)'s injuries;

the effect the injuries are reasonably certain to produce in the future, bearing in mind (Plaintiff)'s age, prior mental and physical condition, and the probable duration of (his) (her) life.

In answering questions 7 and 8, you must determine whether (dog), prior to (date), bit a person without provocation and with sufficient force to break the skin and cause permanent scarring or disfigurement. If you are required to answer questions 9 and 10, you must decide whether (Defendant), knew or was notified that (dog), previously bit a person without provocation and with sufficient force to cause permanent scarring or disfigurement.

[Follow with Wis JI-Civil 1735, 180, and 190]

SPECIAL VERDICT

QUESTION NO. 1. Did (Defendant) own, harbor, or keep (dog) at the time of the injury to (Plaintiff)?

Answer: _____
Yes or No

QUESTION NO. 2. Was (Defendant)'s (dog) a cause of injury to (Plaintiff)?

Answer: _____
Yes or No

QUESTION NO. 3. At and before the contact with (Defendant)'s dog, was (Plaintiff) negligent with respect to (his) (her) own safety?

Answer: _____
Yes or No

If you answered question No. 3 "yes," answer this question:

QUESTION NO. 4. Was (Plaintiff)'s negligence a cause of injury to (him) (her)?

Answer: _____
Yes or No

If you have answered question No.'s 2 & 4 "yes," please answer the following question:

QUESTION NO. 5. Assuming the conduct of (Defendant)'s (dog) and (Plaintiff)'s negligence caused 100% of (Plaintiff)'s injuries, what percentage do you attribute to:

- | | | |
|-----|---------------------------------------|-------|
| (a) | (<u>Defendant</u>)'s (<u>dog</u>) | _____ |
| (b) | (<u>Plaintiff</u>) | _____ |
| | Total | 100% |

Answer the following question no matter how you answered the previous questions.

QUESTION NO. 6. What sum of money will fairly and reasonably compensate (Plaintiff) for (his) (her) injuries with respect to:

- | | | |
|----|-------------------------------------|----------|
| a. | Past Medical Expenses | \$ _____ |
| b. | Past Pain, Suffering & Disability | \$ _____ |
| c. | Future Pain, Suffering & Disability | \$ _____ |

QUESTION NO.7 Did (dog) bite (Plaintiff) with sufficient force to break the skin?

Answer: _____
Yes or No

If "Yes," then answer Question No. 8.

QUESTION NO. 8. Did the bite cause permanent physical scarring or disfigurement?

Answer: _____
Yes or No

If "Yes," then answer Question No. 9.

QUESTION NO. 9. Did (dog) prior to (date) and without provocation, bite a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement?

Answer: _____
Yes or No

If "Yes," then answer Question No. 10.

QUESTION NO. 10. Did (Defendant) know or was (he)(she) notified that (dog) had previously and without provocation bit a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement?

Answer: _____
Yes or No

Dated at _____, Wisconsin, this _____ day of _____, 20__.

Presiding Juror

Dissenting Juror(s) (if any): Questions or Subdivision to which Juror Dissents

COMMENT

This instruction has been completely re-created in light of 2015 Wisconsin Act 112 which changed Chapter 174 of the statutes as it relates to double damages. Effective November 13, 2015, the legislature removed "domestic animal" or "property" from the double damages provision under Wis. Stat. § 174.02(1)(b) and changed the "prior injury" standards. Only dog "bites" to a "person" are now eligible for double damages and that eligibility is further narrowed by the following conditions:

- A "person" injured by a dog is eligible for double damages only if;
1. The injury is from a "bite" that had sufficient force to break the skin, and
 2. The bite caused a "physical scar" or "disfigurement."

The Act also provides that the prior known "dog bite" had to be "without provocation," to a "person" (not a domestic animal or property) and had to be a bite that was of sufficient force to have broken the skin and left a scar or disfigurement. *See* § 174.02(1)(b). Prior to 15 Wis. Act 112, the plaintiff only had to prove that the owner was "notified" or knew that the dog had previously injured or caused injury to a person, domestic animal or property.

OLD DOUBLE DAMAGES

1. "injuring"
2. "causing injury"
3. "previously injured"
4. Person/domestic animal/property

NEW DOUBLE DAMAGES

- "biting" – sufficient force to break the skin
 cause scarring or disfigurement
 "without provocation bite"
 person

A claim for a dog injury *without notice* of prior injury (§174.02(1)(a)) is a jury claim as a claim for a dog's injury to one's person, property or domestic animal has long been known to exist in common law. The legislature is silent in §174.02, however, as to whether a statutory claim for a dog bite *after notice* is a jury claim. *See Wis JI-Civil 1 Right to a Jury Trial: Law Note for Trial Judges* for further discussion regarding the analysis of the constitutional right to a jury trial in statutory claims. Given our history of treating §174.02(1)(b) *after notice* dog bites as a jury issue, we recommend that Questions 7, 8, 9, and 10 continue to be answered by the jury.

Strict Liability. The dog injury statute, Wis. Stat. § 174.02(1)(a), imposes strict liability on the owner of a dog who injures another person, domestic animal, or property. *See Campenni v. Walrath*, 180 Wis. 2d 548, 509 N.W.2d 725 (1994); *Pattermann v. Pattermann*, 173 Wis. 2d 143, 496 N.W.2d 613 (Ct. App. 1992). While imposing strict liability, the statute does not impose absolute liability. Issues regarding causation and comparative negligence must still be examined. Questions 1 and 2 may often be answered as a matter of law. Questions 3 and 4 inquire about contributory negligence on the part of the Plaintiff and whether the Plaintiff's negligence was causal to (his) (her) injury. Question 5 asks the jury to compare the contributory negligence of the Plaintiff with the strict liability of the dog's owner. Such a comparison of negligence and strict liability is common in product liability actions. *See* Wis JI-Civil 3268 and 3290. Question 6 is a standard damages question. Questions 7-10 are to be given if there is a claim for double damages and evidence that such a prior injury occurred.

"Owner" as defined under Wis. Stat. § 174.001(5). An issue that has caused significant controversy is who is considered to be a "owner," "harborer," or "keeper" of a dog. *See* Wis. Stat. § 174.001(5). In *Armstrong v. Milwaukee Mutual Insurance Co.*, 202 Wis. 2d 258, 549 N.W.2d 723 (1996), the court discussed

who is a "keeper" of a dog. The court said that upon review of earlier Wisconsin case law, it concluded that several factors are critical in determining who is a keeper and, therefore, an owner within the confines of ch. 174. First, the person in question must exercise some measure of custody, care, or control over the dog; however, a person's status as a keeper can change over time and the focal point for the jury is the time of the injury. The purpose of Wis. Stat. § 174.02 is to protect those people who are not in a position to control a dog, rather than to protect those persons who are statutorily defined as owners.

A person who is employed to care for a dog is a "keeper" of that dog within the statutory definition of Wis. Stat. § 174.001(5). An owner injured while in control of the dog may not use the statute to hold another owner liable. Where there is negligence by the owner, a keeper may pursue a common law negligence claim against the owner.

In Fifer v. Dix, 2000 WI App 66, 234 Wis. 2d 117, 608 N.W.2d 740, a dog's owner loaned his dog to another individual. While the dog was in the control of the individual, it bit the plaintiff. The plaintiff argued that the owner of the dog was strictly liable under Wis. Stat. § 174.02(1) for the injuries the plaintiff incurred as a result of the bite. The defendant-owner argued that under Armstrong, an owner who is not negligent and is not exercising control over his or her dog cannot be held liable under § 174.02 for injuries incurred by a third person. The court concluded that the plain language of the statute unambiguously imposes strict liability on a dog owner whose dog injures a person who is neither its owner nor its keeper, and nothing in the Armstrong decision precludes the defendant-owner from being found liable to the plaintiff under the statute.

In Fire Insurance Exchange v. Cincinnati Insurance Co., 2000 WI App 82, 234 Wis. 2d 314, 610 N.W.2d 98, the court concluded that an owner of a dog may sue a keeper for contribution when an innocent third party has been injured. The court said the statute imposes liability on anyone who owns, keeps, or harbors a dog who injures a third party. Reading the statute to allow both owners and keepers to be liable, the court said, comports with the statute's policy of assigning responsibility to those in a position to protect innocent third parties from dog bites. Once two parties are liable to the person whom the dog has bitten, they are joint tortfeasors to whom a right of contribution accrues where one pays more than that party's fair share of the damages caused. *Id.*, ¶17.

Wis. Stat. § 174.02 is inapplicable where a person trips over a sleeping dog. Alwin v. State Farm Fire & Cas. Co., 2000 WI App 92, ¶14, 234 Wis. 2d 441, 610 N.W.2d 218. The court found that to impose liability upon a dog owner for injuries arising solely from a person tripping over a sleeping dog would effectively result in a pure penalty for dog ownership. *Id.*

In Pawlowski v. American Family Mutual Insurance Co., 2009 WI 105, 322 Wis. 2d 21, 777 N.W.2d 67, the court considered whether a homeowner who allows a dog owned by someone else to reside in her home is a person who either "harbors" or "keeps" a dog. In Pawlowski, the unleashed dog injured a third party after the dog was allowed out of the house by its legal owner. The court concluded that the homeowner "harbored" the dog and was thus a statutory "owner" of the dog under Wis. Stat. § 174.02 at the time of the dog bite incident. The court found that the homeowner's status as a harbinger of the dog was not extinguished when the dog's legal owner took momentary control of the dog. *Id.*, ¶7.

In contrast, a landlord is not liable in negligence for injuries caused by a tenant's dog, unless the landlord is an owner or keeper of that dog. Ladewig v. Tremmel, 2011 WI App 111, 336 Wis. 2d 216, 802 N.W.2d 511. In Augsburger v. Homestead Mutual Insurance Co., 2014 WI 133, 359 Wis. 2d 385, 856 N.W.2d 874, the court concluded that mere ownership of the property on which a dog resides is not sufficient to establish that an individual is an owner of a dog under Wis. Stat. § 174.02. The totality of the circumstances determines whether the legal owner of the property has exercised the requisite control over the property to be considered a harbinger and thus an owner under the statute. *Id.*, ¶22.