

**1391 LIABILITY OF OWNER OR KEEPER OF ANIMAL: COMMON LAW**

An owner (keeper) of a(n) (insert name of animal) is deemed to be aware of the natural traits and habits which are usual to a(n) (name of animal) and must use ordinary care to restrain and control the animal so that it will not in the exercise of its natural traits and habits cause injury or damage to the person or property of another.

In addition, if an owner (keeper) is aware or in the exercise of ordinary care should be aware that the animal possesses any unusual traits or habits that would be likely to result in injury or damage, then the owner (keeper) must use ordinary care to restrain the animal as necessary to prevent the injury or damage.

(A person is said to be a keeper of an animal if, even though not owning the animal, the person has possession and control of it or if the person permits another person who is a member of his or her family or household to maintain the animal on his or her premises.)

**SPECIAL VERDICT**

1. Did (defendant) own or keep (animal)?

Answer: \_\_\_\_\_

Yes or No

2. Did (animal) cause injury or damage to the person or the property of another?

Answer: \_\_\_\_\_

Yes or No

(Verdict continued on page 2)

If the answer to both question 1 and question 2 is "yes":

3. Was the injury or damage due to the animal's exercise of its natural traits and habits?

Answer: \_\_\_\_\_

Yes or No

If the answer to question 3 is "yes":

4. Did (defendant) use ordinary care to restrain and control the animal?

Answer: \_\_\_\_\_

Yes or No

#### COMMENT

This instruction and comment were approved by the Committee in 1974. The special verdict was added in 2016. The comment was updated in 1990, 1994, 1995, 2001, 2004, 2013, and 2015.

**Control of Animal.** This instruction sets forth the duty of the person who has control over the animal. White v. Leeder, 149 Wis.2d 948, 440 N.W.2d 557 (1989). It is not designed to set forth a duty as between the owner and keeper of an animal.

This instruction covers a claim based on common law negligence. The owner is also liable where the damage caused by the animal was caused by poor care and treatment of the animal. Denil v. Coppersmith, 117 Wis.2d 90, 343 N.W.2d 136 (Ct. App. 1983).

**Stallions; Bulls; Boars; Rams; Goats.** For liability of an owner or keeper for damage by a stallion over one year, a bull over six months, boar, ram, or billy goat over four months which runs at large, see Wis. Stat. § 172.01. The statute creates strict liability; no showing of fault by the owner is required. See also Leipske v. Guenther, 7 Wis.2d 86, 88, 95 N.W.2d 774 (1959).

For injuries caused by a horse on a highway, see Templeton v. Crull, 16 Wis.2d 416, 144 N.W.2d 843 (1962). For injuries caused by a muskie, see Ollhoff v. Peck, 177 Wis.2d 719, 503 N.W.2d 323 (Ct. App. 1993).

For the negligence of a riding or stable master, see Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1940).

Facts evidencing "unusual traits and habits likely to result in injury" are discussed in Denil v. Coppersmith, *supra*.

**Owners and Keepers.** The casual presence of a dog on someone's premises does not make that person an owner or keeper. Patterman v. Patterman, 173 Wis.2d 143, 496 N.W.2d 613 (Ct. App. 1992).

This instruction does not distinguish between domesticated and wild animals but rather instructs the jury to hold owners of animals to the appropriate standard of care given the nature of the animal involved. See Ollhoff v. Peck, 177 Wis.2d 719, 503 N.W.2d 323 (Ct. App. 1993)

The terms "owner" and "keeper" are defined in Koetting v. Conroy, 223 Wis. 550, 270 N.W. 625 (1937). See also White v. Leeder, *supra* at 957-58; Patterman v. Patterman, *supra*; Augsburger v. Homestead Mutual Ins. Co., 2014 WI 133, 359 Wis.2d 385, 856 N.W.2d 874. "Harboring" an animal lacks the proprietary aspect of keeping, Patterman, *supra*, at 149 n.4.

White v. Leeder, *supra*, contains the following discussion of the common law negligence rule with respect to animals.

. . . . At common law, the cases have established that the owner or keeper of a domesticated animal is held to anticipate the general propensities of the class to which the animal belongs, as well as any unusual traits or habits of the individual animal. See Leipske v. Guenther, 7 Wis.2d 86, 88, 95 N.W.2d 774, 96 N.W.2d 821 (1959).

The common-law rule first requires the owner or keeper to use ordinary care in controlling the characteristics normal to the animal's class. The owner or keeper of a bull is thus required to take greater precautions to keep it under effective control than would be required of the owner of a cow or steer. See Restatements, Second, Torts, sec. 518, comment g, p. 31 (1977).

The common-law rule further allows the plaintiff to show that the individual animal had vicious or mischievous propensities and that the owner or keeper knew or should have known of them. A vicious propensity is a tendency of an animal to do any act which might endanger the safety of persons or property in a given situation. See 3A C.J.S. Animals, sec. 180, p. 674 (1973).

**Contributory Negligence.** The doctrine of contributory negligence applies to plaintiff's actions. White v. Leeder, *supra* at 958.

**Expert Testimony.** In White v. Leeder, *supra*, the court agreed with the trial court that technical expert testimony was not required to establish causal negligence. The court said that the issues involving whether the matter in which the owner kept a bull negligently caused the plaintiff's injury was within the realm of comprehension.

**Damages.** A claim by an injured keeper against a dog's owner for common law negligence, is not governed by the damage provisions in the dog bite statute § 174.02. Malik v. American Family Ins. Co., *supra*, ¶ 31. The court concluded that the trial court correctly ruled that since the keeper's claim under § 174.02 was dismissed, she could not recover double damages under § 174.02(1)(b) even if she prevailed on the remaining common law negligence claim. Malik, 2001 WI App 82, ¶ 10.

**Liability of Landowner or Landlord.** In Smaxwell v. Bayard, 2004 WI 101, the court limited liability arising from injuries caused by dogs. The court held, on public policy grounds, that landowners and landlords can be held liable only if they are the owner or keeper of the dog in question:

"We hold, on public policy factors, that common law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury." Id. at par. 55.