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ILLINOIS LAW MANUAL

CHAPTER IV
STATUTORY CAUSES OF ACTION

E. ANIMAL CONTROL ACT

1. Basic Law: Statutory Language

The Illinois legislature has broadened the common law liability of owners and keepers of animals. The liability of an owner of a dog or other animal attacking or injuring a person is as follows:

> If a dog or other animal, without provocation, attacks, attempts to attack, or injures any person who is peaceably conducting himself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby.

510 ILCS 5/16.

The Animal Control Act defines the term "owner" as follows:

> 'Owner' means any person having a right of property in an animal, or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premise occupied by him or her.

510 ILCS 5/2.16. See also, VanPlew v. Riccio, 317 Ill. App. 3d 179 (2d Dist. 2000).

The statute eliminates the common law requirement that the owner have prior knowledge of the animal's vicious or dangerous propensity. Steinberg v. Petta, 114 Ill. 2d 496 (1986). The

purpose of the Act is to encourage strict control over animals by imposing liability on their owners for injuries caused to individuals who are peaceably conducting themselves in a location where they have a right to be. Partipilo v. DiMaria, 211 Ill. App. 3d 813 (1991). It eliminates the "one-bite rule" which, at common law, required a plaintiff to plead and prove that the dog owner either knew or was negligent in not knowing the dog had a propensity to injure people. Docherty v. Sadler, 293 Ill.

App. 3d 892 (1997).

2. Burden of Proof

The elements of a cause of action under the Animal Control Act are as follows:

(1) an injury caused by the defendant's animal;
(2) lack of provocation;
(3) peaceable conduct of the person injured; and
(4) the presence of the injured person in a place where he or she had a right to be.

3. Analysis of Burden of Proof

a. Attack or Injury Caused by Animal

An attack is not necessary to fulfill the requirement of injury under the Animal Control Act. The animal only needs to cause the injury. The Act covers any action of an animal resulting in injury. Ennen V. White, 232 Ill. App. 3d 1061 (4th Dist. 1992). The Act may also apply where a dog runs in between a person's legs and causes that person to fall. See McEvoy v. Brown, 17 Ill. App. 2d 470 (1958). The purposes of the statute are to simplify the plaintiff's burden of proof and to hold an animal owner responsible for injuries his or her animal causes when the animal is acting under its own volition. Forsyth v. Dugger, 169 Ill. App. 3d 362, 366 (1988).

b. Persons Liable as an "Owner" or Keeper Under the Animal Control Act.

"Owner" is defined so as to include harborer or keeper. Frost v. Robrave, Inc., 296 Ill. App. 3d 528, 533 (1998). Courts have construed these terms to require some measure of care, custody or control. Id. The purpose of this requirement is to place the burden of controlling an animal on the party in the best position to prevent the injury. Id. When a person assumes the role of an "owner" due to his or her actions in caring for and taking custody or control over an animal, he or she loses the protections afforded by the Animal Control Act and cannot maintain an action against the actual owner for injuries caused by that animal. See Docherty v. Sadler, 293 Ill. App. 3d 892 (1997); VanPlew v. Riccio, 317 Ill. App. 3d 179 (2000) (holding that dog-sitter was considered owner for purposes of statute). In Hassell v. Wenglinski, 243 Ill. App. 3d 398 (1993), the plaintiff agreed to walk the defendants' dogs and was pulled forward and injured while doing so. Under the Animal Control Act, the plaintiff qualified as the dogs' "owner" and could not maintain an action against the actual owner. Id.

In Docherty v. Sadler, 293 Ill. App. 3d 892 (1997), the minor plaintiff could not maintain an action under the Act against the actual dog owner for injuries caused by the neighbor's dog, since she agreed to care for it temporarily and was therefore an "owner" under the Act. See also Eyrich v. Johnson, 279 Ill. App. 3d 1067 (1996). A rider who mounts a horse assumes control and responsibility for that horse and cannot bring a cause of action against the actual owner under the Animal Control Act. Ennen v. White, 232 Ill. App. 3d 1061 (1992).

Where the actual owner does not have direct control over the animal, he or she still may be liable under the Act. In Carl v. Resnick, 306 Ill. App. 3d 453 (1999), the owner's horse, which was being ridden by another party, kicked the plaintiff, who was riding a second horse, in the

presence of the first horse's owner. Under the facts of that case, the court determined that an action under the Act could be maintained by the plaintiff against the actual owner of the first horse because she had legal ownership, she was present at the time of the accident, and she testified that she would never let anybody ride her horse without her being present.

Also, when an employee's dog is brought to work as a personal convenience to the employee, the employer does not contribute to the dog's care, and the dog's presence does not benefit the employer, the employer is not the "owner" and cannot be liable under the Animal Control Act. Frost v. Robove, Inc., 296 Ill. App. 3d 528 (1998). Merely allowing a dog to be temporarily on one's property does not automatically make a property owner the keeper or harborer of the animal. Where the dog owner is present and in control of the dog, the property owner cannot be considered an "owner" under the Animal Control Act. Goennenwein v. Rasof, 296 Ill. App. 3d 650 (1998). In Severson v. Ring, 244 Ill. App. 3d 453 (1993), a homeowner was not liable under the Act even when the actual owner left the dog at his home. The homeowner exerted no measure of care, custody, or control over the animal, and therefore did not come within the definition of an "owner" under the Act.

In Papesh v. Matesevac, 223 Ill. App. 3d 189 (1991), the son of a non-custodial parent owned a dog which injured another individual. Although the child and the dog had previously lived with the defendant, at the time of the incident the defendant had not seen the dog for months. Rather, the dog resided with the child's other parent. The defendant in Papesh did not physically care for the animal and the parent did not provide any payments for the dog's care. Under those circumstances, the defendant could not be held to be an "owner" under the Act. Id.

A landlord may not be held liable for the acts of an allegedly vicious dog where the tenant retains exclusive control over the leased premises. Klitzka v. Hellios, 348 Ill. App. 3d 594 (2nd Dist. 2004).

c. Lack of Provocation

Provocation is a question of whether the plaintiff's actions would provoke the dog, in the mind of the dog. Kirkham v. Will, 311 Ill. App. 3d 787 (2nd Dist. 2003). The burden is on the plaintiff to prove lack of provocation and not on the defendant to prove provocation as an affirmative defense. Therefore, the plaintiff must show that he or she did nothing that would provoke the dog in the eyes of the dog. For example, playfully waving a stick in front of a dog may not be provocation in the mind of a reasonable person. However, a court will instruct a jury that if the person knew of the presence of an animal and did something a reasonable person should know would be likely to

provoke an animal to attack, liability will not attach. I.P.I. 110.04.

In Stehl v. Dose, 83 Ill. App. 3d 440 (1980), a jury found that the plaintiff provoked a German Shepherd where the plaintiff, after entering the dog's territory, knelt within the perimeter of the dog's chain while the dog was eating. On the other hand, it was self-defense and not provocation for a mail carrier to spray mace or pepper spray at a small dog that was advancing toward her. Steichman v. Hurst, 2 Ill. App. 3d 415 (1971). Also, a child that stepped on a dog's tail was found to have unintentionally provoked the dog and therefore could not recover for injuries sustained when the dog bit her. See Nelson v. Lewis, 36 Ill. App. 3d 130 (1976).

When the response of the animal is not proportionate to the provocation, however, the Act may allow the injured party to recover against the "owner." The reasonableness of the dog's response, rather than the view of the person provoking the dog, is the controlling factor in

determining whether the dog was provoked, so that the owner is not liable under the Animal Control Act for injuries caused by the dog. Kirkham v. Will, 311 Ill. App. 3d 787 (2000). In Vonbehren v. Bradley, 266 Ill. App. 3d 446 (1994), a dog's attack was found to be proportional to the provocation. The provocation was that the minor plaintiff struck the dog several times, pulled its tail and ears, and attempted to retrieve a bird from its mouth. There was no evidence that the dog bit the plaintiff more than once in response to those acts. Id. On the other hand, when an 18month-old child fell into a dog who was sleeping in the sun and the dog's response was to repeatedly bite the plaintiff, causing seven lacerations which required 23 stitches, the court determined that the dog's response was out of proportion to the plaintiff's unintentional act. The defendant owner was found liable. Wade v. Rich, 249 Ill. App. 3d 581 (1993).

d. Peaceable Conduct of Person Injured

The Act provides that the owner of an animal is liable for damages for injuries sustained from any attack or injury caused by the animal on a person peaceably conducting himself. 510 ILCS 5/16. In Dobrin v. Stebbins, 122 Ill. App. 2d 387, 390 (1970), the court held that where a property owner provides a path or walk from the public way to his door, he extends a license to use the path or walk during ordinary hours of the day. Therefore, where a man using a pathway to a person's house was attacked by a dog, the man was in a place where he may lawfully be, and he was peaceably conducting himself. Id. at 390.

e. A Place Where He or She had a Right to Be

A trespasser is one who is not in a place where he or she has a right to be under the Act. See Dobrin v. Stebbins, 122 Ill. App. 2d 387 (1970). One purpose of posting warning signs of a potentially dangerous dog is to notify a passerby that he or she does not have a legal right to be in the area. A defendant may prevail by showing that the plaintiff was in an area closed to the public

or that the owner posted signs warning of the dog's presence. Frostin v. Radick, 78 Ill. App. 3d 352 (1979).

In Guthrie v. Zielinski, 185 Ill. App. 3d 266 (1989), a plaintiff was injured when she was visiting her parents' home and a dog for which the parents were caring attacked her. The plaintiff was an adult who resided elsewhere. She visited her parents on a regular basis. She had a key to the defendants' home, and it was her practice to use the key to enter through the garage. It was not her practice to knock or announce her entry. Her parents, the defendants, had never asked her to conduct herself in any other manner. Under those facts, the Guthrie court held that the plaintiff was in a place where she had a legal right to be and was lawfully on the premises at the time the dog attacked her. Guthrie, 185 Ill. App. 3d at 270.

4. Analysis

The Animal Control Act encourages tight control over animals. Partipilo v. DiMaria, 211 Ill. App. 3d 813, 816 (1991). While the language of the Act appears to be absolute, the statute was not intended to and does not impose strict liability on animal owners. Id. As defined in this article, "owner" also includes a harborer or keeper. The courts have construed the terms "owner," "harborer," or "keeper" to require some exercise of care, custody, or control. Papesh v. Matesevac, 223 Ill. App. 3d 189, 191 (1991).

5. Defenses

The best defense to an Animal Control Act claim is typically the absence of one or more of the required elements of the cause of action. In addition, the defendant can sometimes assert assumption of the risk. The two types of assumptions of risk are express and implied. Generally, an express assumption of risk is where one signs an exculpatory agreement indicating that he or she understands and accepts the risks involved in an activity. See Harris v. Walker, 119 Ill. 2d

542, 547-48 (1988). An implied assumption of risk is where a person is experienced in the activity that causes injury and was also warned through postings or other literature of the risks involved. In Harris, the plaintiff was injured when he fell off of a horse rented from the defendant's stables. The plaintiff signed and fully understood an exculpatory agreement which stated:

> Your signature below indicates that you have read the posted rules and you abide by them. Also, your signature shall release Ky-Wa Acres and employees of any liabilities you may incur while on the premises or for any injury which may result from horseback riding. If your signature is not reliable, please do not sign or ride.

In addition, the court found that the stables had prominently posted rules stating that riders rode at their own risk. The plaintiff admitted in his deposition that he was an experienced rider and that he understood the release he signed. Harris, 119 Ill. 2d at 542.

The court found that the plaintiff had expressly assumed the risk of using a horse. The court also suggested that he may have impliedly assumed the risks as he was an experienced rider and the stable had posted the appropriate rules. Id. The court concluded that the purpose of the Animal Control Act was not to protect those who were familiar with the risks involved with riding a horse or other animal. Instead, the purpose was to reduce the burden on plaintiffs by eliminating the common law requirement that a plaintiff prove that an animal had a propensity to injure. Harris, 119 Ill. 2d at 546-47.

In Mallot v. Hart, 167 Ill. App. 3d 209 (1988), the court determined that the plaintiff, an experienced cattleman, assumed the risk of being trampled when he volunteered to help a neighbor round up a herd of cattle. The defendant testified that he was aware of the normal propensities of the cattle and knew the risk of being trampled.