

ANIMALS--COMMON LAW (STRICT)<sup>1</sup> LIABILITY OF OWNER FOR WRONGFULLY  
KEEPING VICIOUS DOMESTIC<sup>2</sup> ANIMALS.

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged] by a vicious animal wrongfully [owned] [kept] by the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, five things:<sup>3</sup>

First, that the defendant [owned] [kept] the (*describe animal*).<sup>4</sup>

Second, that the (*describe animal*), because of its nature, size or character, was dangerous, ferocious, mischievous or vicious, or had vicious tendencies. (An animal is vicious if

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<sup>1</sup>North Carolina decisions treat the liability of owners and keepers of domestic animals with known or reasonably suspected vicious propensities as a strict liability matter. *Swain v. Tillett*, 269 N.C. 46, 51, 152 S.E.2d 297, 301 (1967). "The gravamen of the cause of action is not negligence but the wrongful keeping of an animal with knowledge of its viciousness...." *Id.* (quoting *Barber v. Hochstrasser*, 136 N.J. 75, 79, 54 A.2d 458, 460 (1947)). However, knowledge is not essential to a recovery; an action will also lie for negligence if, in the ownership or keeping of a domestic animal, the defendant otherwise fails to use ordinary care. See *Williams v. Tysinger*, 328 N.C. 55, 59, 399 S.E.2d 108, 111 (1991) and *Lloyd v. Bowen*, 170 N.C. 216, 221, 86 S.E. 797, 799 (1915); *Griner v. Smith*, 43 N.C. App. 400, 407, 259 S.E.2d 383, 388 (1979).

<sup>2</sup>"Certain animals *ferae naturae* may be domesticated to such an extent as to be classed in respect of liability of the owner for injuries they commit, with tame or domestic animals." *Swain*, 269 N.C. at 51, 152 S.E.2d at 301 (quoting 4 Am.Jr.2d *Animals* § 91 (1955)).

<sup>3</sup>*Swain*, 269 N.C. at 51, 152 S.E.2d at 301; *Sink v. Moore*, 267 N.C. 344, 349, 148 S.E.2d 265, 269 (1966); *Miller v. Snipes*, 12 N.C. App. 342, 343, 183 S.E.2d 270, 271, cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971); *Patterson v. Reid*, 10 N.C. App. 22, 28-29, 178 S.E.2d 1, 5 (1970).

<sup>4</sup>"The owner of the animal is the person to whom the animal belongs. The keeper is one who, with or without the owner's permission undertakes to manage, control, or care for the animal as owners are accustomed to do." *Swain*, 269 N.C. at 51, 152 S.E.2d at 302.

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its actions or habits are likely to cause harm.) (An animal has a vicious tendency if it is naturally disposed toward acting viciously.) (An animal can be vicious or have a vicious tendency without ever having inflicted injury in the past or intending to do harm. If an animal's actions, habits or tendencies are likely to cause harm, it does not matter that the animal is playing.<sup>5</sup>)

Third, that the defendant knew or, in the exercise of ordinary care, should have known that the (*describe animal*) was dangerous, ferocious, mischievous or vicious, or had vicious tendencies. A person "knows" something when he has actual knowledge of it. A person "should have known" something when, in the exercise of ordinary care, he should have acquired knowledge of it under the same or similar circumstances. In determining whether the defendant should have know the (*describe*

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<sup>5</sup>*Hill v. Mosely*, 220 N.C. 485, 489, 17 S.E.2d 676, 678 (1941); *Sink*, 267 N.C. at 350, 148 S.E.2d at 269-70. Evidence of viciousness must be unequivocal. *Hill*, 220 N.C. at 489, 17 S.E.2d at 678. The general rules as to the competency and relevancy of evidence apply in determining the admissibility of evidence concerning the character of the animal causing the injury. Evidence of specific instances of viciousness is admissible as is evidence of the disposition and temperament of the animal both before and after the occurrence in question. Evidence that the animal subsequently manifested a similar disposition is competent to prove that its previous conduct was not accidental or unusual but the result of a fixed habit, provided such evidence is not too remote in point of time. *Pharo v. Pearson*, 28 N.C. App. 171, 173, 220 S.E.2d 359, 360 (1975). Evidence of the animal's reputation is competent to show knowledge by its owner but is not sufficient alone to establish a vicious propensity. *Hill*, 220 N.C. at 488, 17 S.E.2d at 678. "Canine courage is a contest for the championship of the neighborhood, together with determination to remain in possession of the field of battle 'whence all but him had fled' is not evidence of a vicious character...." *Sink*, 267 N.C. at 348, 148 S.E.2d at 269.

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animal) was vicious at the time of the injury,<sup>6</sup> you may consider all the circumstances then existing, including the nature, size and character of the (*describe animal*).

Fourth, that the (*describe animal*) [injured] [damaged] the plaintiff.

Fifth, that such [injury] [damage] was of a type likely to result from the (*describe animal's*) dangerousness, ferocity, mischievousness, viciousness or vicious tendencies.<sup>7</sup>

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was [injured] [damaged] by a vicious animal wrongfully [owned] [kept] by the defendant, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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<sup>6</sup>*Sink*, 267 N.C. at 350, 148 S.E.2d at 270; *Griner*, 43 N.C. App. at 405, 259 S.E.2d at 387; *Sanders v. Davis*, 25 N.C. App. 186, 188, 212 S.E.2d 544, 556 (1975). The knowledge of one joint keeper is imputed to all other joint keepers. *Swain*, 269 N.C. at 52, 152 S.E.2d at 303. The knowledge of a spouse or other responsible family member is also imputable to one who is the owner or keeper of the animal. *Id.*; *Hunt v. Hunt*, 86 N.C. App. 323, 326, 357 S.E.2d 444, 446, *aff'd*, 321 N.C. 294, 362 S.E.2d 161 (1987). Similarly, the knowledge of an agent of the owner or keeper is also imputable if it is acquired in the course and scope of such agency. *Swain*, 269 N.C. at 53, 152 S.E.2d at 303.

<sup>7</sup>*Cokerham v. Nixon*, 33 N.C. 269, 271 (1850).

