

CHAPTER 13

ANIMALS

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13:1 DOMESTIC ANIMALS — DANGEROUS OR VICIOUS TENDENCIES — ELEMENTS OF LIABILITY

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* claim, you must find that all the following have been proved by a preponderance of the evidence:

1. The defendant (owned) (kept) (had [control] [custody] of) a *(insert description of kind or breed of animal or animals, e.g., cat, horse, Doberman pinscher, German shepherd, etc.)*;

2. The *(insert same description used in paragraph 1)* had vicious or dangerous tendencies;

3. The defendant knew or had notice that the *(insert same description used in paragraph 1)* had vicious or dangerous tendencies;

(4. The defendant was negligent in that *(he)* *(she)* did not use reasonable care to prevent injuries or damages that could have reasonably been anticipated to be caused by the dangerous or destructive tendencies of the *(insert same description used in paragraph 1)*);

5. The plaintiff had (injuries) (damages) (losses); and

6. The (defendant's negligence) (vicious or dangerous tendencies of *[insert same description used in paragraph 1]*) was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. This instruction should be given only if the court has determined that the defendant owed a duty of care to the plaintiff to protect against the alleged injury. **N.M. v. Trujillo**, 2017 CO 79, ¶ 46, 397 P.3d 370 (citing this Instruction 13:1 and its Notes on Use, and holding that dog owner did not owe a duty of care to plaintiff because there was no special relationship between the parties, the plaintiff was not directly injured by the dogs or on the dog owner's

property, the dogs remained confined and never left the property, and plaintiff's injuries resulted from being struck by car after jumping into street).

2. Whenever paragraph 4 of this instruction is given, Instruction 9:6, defining "negligence," and 9:8, defining "reasonable care," should also be given.

3. In dog-bite cases involving death or "serious bodily injury" under section 13-21-124, C.R.S., Instruction 13:3 should be used rather than this instruction. In cases where a dog bite does not result in death or "serious bodily injury" as defined by section 18-1-901(3)(p), C.R.S., then this instruction is applicable, but the claim is subject to the affirmative defenses set forth in section 13-21-124(5).

4. There is some uncertainty as to the elements necessary to establish liability for injuries caused by a domestic animal with dangerous or vicious propensities. Several older cases hold, in effect, that if a person who owns or keeps an animal knows or is on notice that the particular animal is dangerous or destructive, then that person is strictly liable for injuries proximately caused by a failure to keep the animal secured. In **Barger v. Jimerson**, 130 Colo. 459, 462, 276 P.2d 744, 745 (1954), for example, the court, in upholding a verdict against a dog's owners, stated that, "[i]t is quite evident that defendants did not at any time carelessly or intentionally allow the dog to run at large. Their liability was in keeping such a dog and they did so at their peril." In **Melsheimer v. Sullivan**, 1 Colo. App. 22, 28, 27 P. 17, 19 (1891), the court concluded that "the three allegations necessary to be made and proved in a case of this character — First, that the dog was vicious . . . ; second, that the defendant knew it; third, that [the dog] bit and injured the plaintiff without any neglect or fault on [plaintiff's] part" The **Melsheimer** case was cited with approval by the Colorado Supreme Court in **Barger** and in **Carlberg v. Willmott**, 87 Colo. 374, 287 P. 863 (1930). These cases conclude, in effect, that the keeping of an animal that the owner knows or should know has dangerous or vicious propensities is conclusively presumed to be negligent.

5. The Colorado Supreme Court, citing with approval the preceding notes 1 and 4 to this instruction, acknowledged that the earlier cases "appear to be premised on a theory of strict liability arising from injuries caused by dangerous or vicious animals." **Trujillo**, 2017 CO 79, ¶ 39, 397 P.3d at 375. The **Trujillo** Court did not settle the issue because the only question before it was whether the plaintiff properly pleaded a viable negligence claim. *Id.* at ¶¶ 41, 48. The **Trujillo** Court left open the possibility of a negligence action, stating, "even if [the earlier Colorado cases] could, in certain circumstances, support a viable negligence claim, notwithstanding the absence of a special relationship between the parties, this is not such a case[.]" *Id.* at ¶ 44, 397 P.3d at 376.

6. The same rationale underlines the rule that someone who keeps a wild animal is strictly liable for any injury or damages caused by that animal. *See Collins v. Otto*, 149 Colo. 489, 369 P.2d 564 (1962). There is an exception to this rule where the animal is being kept by public entity for the benefit of the public at large, as in a zoo. **City & Cty. of Denver v. Kennedy**, 29 Colo. App. 15, 476 P.2d 762 (1970). *See* Instruction 13:2.

7. In contrast to the cases cited above, several Colorado Court of Appeals decisions have stated, "In order to prove the owner of a domestic animal is negligent, a plaintiff must show: (1)

that the animal had vicious or dangerous tendencies; (2) that the owner had knowledge or notice thereof; and (3) that the owner did not exercise reasonable care to prevent injuries reasonably anticipated to result from such tendencies.” **Sandoval v. Birx**, 767 P.2d 759, 761 (Colo. App. 1988). In **Sandoval**, the court relied on **Dubois v. Myers**, 684 P.2d 940 (Colo. App. 1984), and the **Dubois** court relied on **Swerdfeger v. Krueger**, 145 Colo. 180, 358 P.2d 479 (1960). The court’s reliance on **Swerdfeger** appears to be misplaced, however, because in **Swerdfeger**, the supreme court simply concluded that a 13-year-old boy who was bitten by a dog was barred from recovering against the dog’s owner because the boy was contributorily negligent as a matter of law. Indeed, the court in **Swerdfeger** relied on both the **Melsheimer** and **Barger** cases to establish that contributory negligence was a defense. More recently, the court of appeals has held that it was appropriate to instruct the jury based on Instruction 13:1, including the element that: “The defendant was negligent in that [he] did not use reasonable care to prevent injuries or damages that could have reasonably been anticipated to be caused by the dangerous or destructive tendencies of the [animal].” **Fishman v. Kotts**, 179 P.3d 232, 236 (Colo. App. 2007) (citing **Sandoval**, 767 P.2d at 761, and **Dubois**, 684 P.2d at 942). However, **Fishman** “did not address the question of whether and when a duty arises.” **Trujillo**, 2017 CO 79, ¶ 47, 397 P.3d at 376.

8. Paragraph 4 of this instruction has been included as an element, but put in parentheses to highlight the uncertainty raised by the court of appeals decisions in **Sandoval** and **Dubois** as to the elements that must be proved to establish the liability or negligence of the owner of a domestic animal with vicious or dangerous propensities. Also, the first parenthesized phrase in numbered paragraph 6 should not be used if paragraph 4 is not included in the instruction.

9. In cases where recovery for personal injuries from the owner of a domestic animal is not predicated on the dangerous or vicious propensities of the animal, the instructions on negligence in Chapter 9 apply. *See, e.g.*, **Millard v. Smith**, 30 Colo. App. 466, 495 P.2d 234 (1972) (actionable claim stated in complaint alleging that plaintiff struck defendant’s cow on highway and that occurrence was proximately caused by defendant’s negligence); *see also* **Lui v. Barnhart**, 987 P.2d 942 (Colo. App. 1999) (doctrine of *res ipsa loquitur* not applicable in negligence action by motorist who collided with horse owned by defendant); *cf.* **De Witt v. Hill**, 143 Colo. 372, 352 P.2d 81 (1960) (negligence action by motorcyclist who hit cow on highway was properly dismissed because there was no proof that defendant owned or controlled cow). Contributory negligence and assumption of the risk were held to be defenses to a claim against an owner of domestic animal for injuries caused by that animal. **Davis v. Roberts**, 155 Colo. 387, 395 P.2d 13 (1964). *See* Instructions 9:22 and 9:23 as well as Introductory Note to Part C of Chapter 9.

Source and Authority

1. This instruction is supported by **Fishman**, 179 P.3d at 236 (approving Instruction 13:1 for use in case involving non-vicious dog that caused injury by running underneath a horse and rider). *See also* **Trujillo**, 2017 CO 79, ¶¶ 46-47 (citing this instruction and **Fishman**’s approval of the instruction).

2. For a discussion as to the definition of a “keeper” of an animal, see **Snow v. Brit**, 968 P.2d 177 (Colo. App. 1998).

3. For the statutory exemption from civil liability for injuries resulting from “equine activities” and “llama activities,” see section 13-21-119, C.R.S. *See also* **Clyncke v. Waneka**, 157 P.3d 1072 (Colo. 2007) (interpreting statute and discussing whether jury instruction correctly embodied statutory language).

4. For claims of strict liability for trespass by livestock, see **Robinson v. Kerr**, 144 Colo. 48, 355 P.2d 117 (1960); and **Mikes v. Burnett**, 2013 COA 97, ¶¶ 9-10, 411 P.3d 43.

5. In cases where the plaintiff is injured by an animal on the property of another, the Colorado Premises Liability Act, § 13-21-115, C.R.S. abrogates any common law claims against the landowner. *See* **Legro v. Robinson**, 2012 COA 182, ¶ 20, 328 P.3d 238, *aff’d on other grounds*, 2014 CO 40, 325 P.3d 1053; *see also* **Legro v. Robinson**, 2015 COA 183, 369 P.3d 785 (interlocutory appeal on remand).

13:2 WILD ANIMALS — ELEMENTS OF LIABILITY

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on **(his) (her) claim of strict liability, you must find that all the following have been proved by a preponderance of the evidence:**

1. The defendant (owned) (kept) (had [control] [custody] of) a *(insert description of wild animal, e.g., bear);*

2. The plaintiff had (injuries) (damages) (losses);

3. The *(insert same description used in paragraph 1)* **was a cause of the plaintiff's (injuries) (damages) (losses).**

If you find that any one or more of these *(numbers)* **statements has not been proved, then your verdict must be for the defendant.**

On the other hand, if you find that all of these *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

See the Notes on Use to Instruction 13:1.

Source and Authority

This instruction is supported by **Collins v. Otto**, 149 Colo. 489, 369 P.2d 564 (1962) (coyote); and **City & County of Denver v. Kennedy**, 29 Colo. App. 15, 476 P.2d 762 (1970) (in a case involving a zebra at a city-owned zoo, the court stated the rule of strict liability for harboring wild animals but held that an exception exists for public entities).

13:3 SERIOUS BODILY INJURY OR DEATH RESULTING FROM BEING BITTEN BY A DOG — ELEMENTS OF LIABILITY

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on **(his) (her)** claim for serious bodily injury, you must find that all the following have been proved by a preponderance of the evidence:

- 1. The defendant (owned) (kept) (had [control] [custody] of) a dog;**
- 2. The plaintiff was bitten by the defendant’s dog;**
- (3. When [he] [she] was bitten by the defendant’s dog, the plaintiff was lawfully on [the defendant’s] [(his) (her) own] [public] [another’s] property;)**
- 4. The plaintiff (had serious bodily injuries) (died); and**
- 5. The dog bite was a cause of plaintiff’s (serious bodily injury) (death).**

If you find that any one or more of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant’s affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff’s claim]*).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. See the Notes on Use to Instruction 13:1.
2. In cases where the plaintiff dies as a result of being bitten by a dog, this instruction should be used in conjunction with the instructions in Chapter 10 on wrongful death.
3. For instructions relating to claims under the Colorado Premises Liability Act, see Chapter 12.
4. It is unclear whether the “lawfully on public or private property” element in paragraph 3 of the instruction is an element of plaintiff’s case, as suggested by section 13-21-124(2), C.R.S., or whether it is an affirmative defense, as suggested by section 13-21-124(5)(a). However, at least one Colorado Court of Appeals case appeared to consider the language

“lawfully on public or private property” to be part of the plaintiff’s elements of proof. *See Legro v. Robinson*, 2015 COA 183, ¶ 34, 369 P.3d 785. In the absence of any definitive appellate decisions on this question, the Committee takes no position.

Source and Authority

1. This instruction is supported by section 13-21-124, and **Legro v. Robinson**, 2012 COA 182, ¶ 19, 328 P.3d 238, *aff’d on other grounds*, 2014 CO 40, 325 P.3d 1053. *See also Legro*, 2015 COA 183.

2. The “exclusions” from liability identified in section 13-21-124(5) are in the nature of affirmative defenses; the Colorado Court of Appeals stated that, under section 13-21-124, “a defendant may avoid liability by proving one of the statutory exclusions.” **Legro**, 2012 COA 182, ¶ 25.

3. The exclusion applicable to dog bites that occur “[w]hile the dog is working as a hunting dog, herding dog, farm or ranch dog, or predator control dog on the property of or under the control of the dog’s owner,” § 13-21-124(5)(f), applies “when a bite occurs on the dog owner’s property or when the dog is working under the control of the dog owner.” **Robinson v. Legro**, 2014 CO 40, ¶ 23, 325 P.3d 1053, 1059.

4. In cases where a plaintiff is bitten by a dog while on the property of another, the plaintiff may assert claims against the “landowner” of that property under both section 13-21-124 and under the Colorado Premises Liability Act, § 13-21-115, C.R.S. *See Legro*, 2012 COA 182, ¶¶ 25-27.

13:4 SERIOUS BODILY INJURY — DEFINED

“Serious bodily injury” means bodily injury that, either at the time of the actual injury or at a later time, involves:

- (a) A substantial risk of death; or**
- (b) A substantial risk of serious permanent disfigurement; or**
- (c) A substantial risk of protracted loss or impairment of the function of any part or organ of the body; or**
- (d) Breaks, fractures, or burns of the second or third degree.**

Notes on Use

This instruction should be given whenever Instruction 13:3 is given and there is a factual dispute as to whether the plaintiff sustained serious bodily injury.

Source and Authority

This instruction is supported by sections 18-1-901(3)(p), and 13-21-124(1)(d), C.R.S.

13:5 DAMAGES

Use Instruction 6:1, 6:1A, and 6:1B.

Note

1. See the Notes on Use and Source and Authority to Instruction 6:1.
2. In claims based on section 13-21-124(2), C.R.S., the statute provides for the recovery of “economic damages.” The Committee takes no position on whether pecuniary losses are the exclusive remedy pursuant to the statute.
3. In cases where a plaintiff asserts claims based on section 13-21-124 and the Colorado Premises Liability Act, § 13-21-115, C.R.S., the plaintiff may seek to recover economic damages under section 13-21-124 and “damages beyond economic damages” under section 13-21-115. **Legro v. Robinson**, 2012 COA 182, ¶ 25, 328 P.3d 238, *aff’d on other grounds*, 2014 CO 40, 325 P.3d 1053.