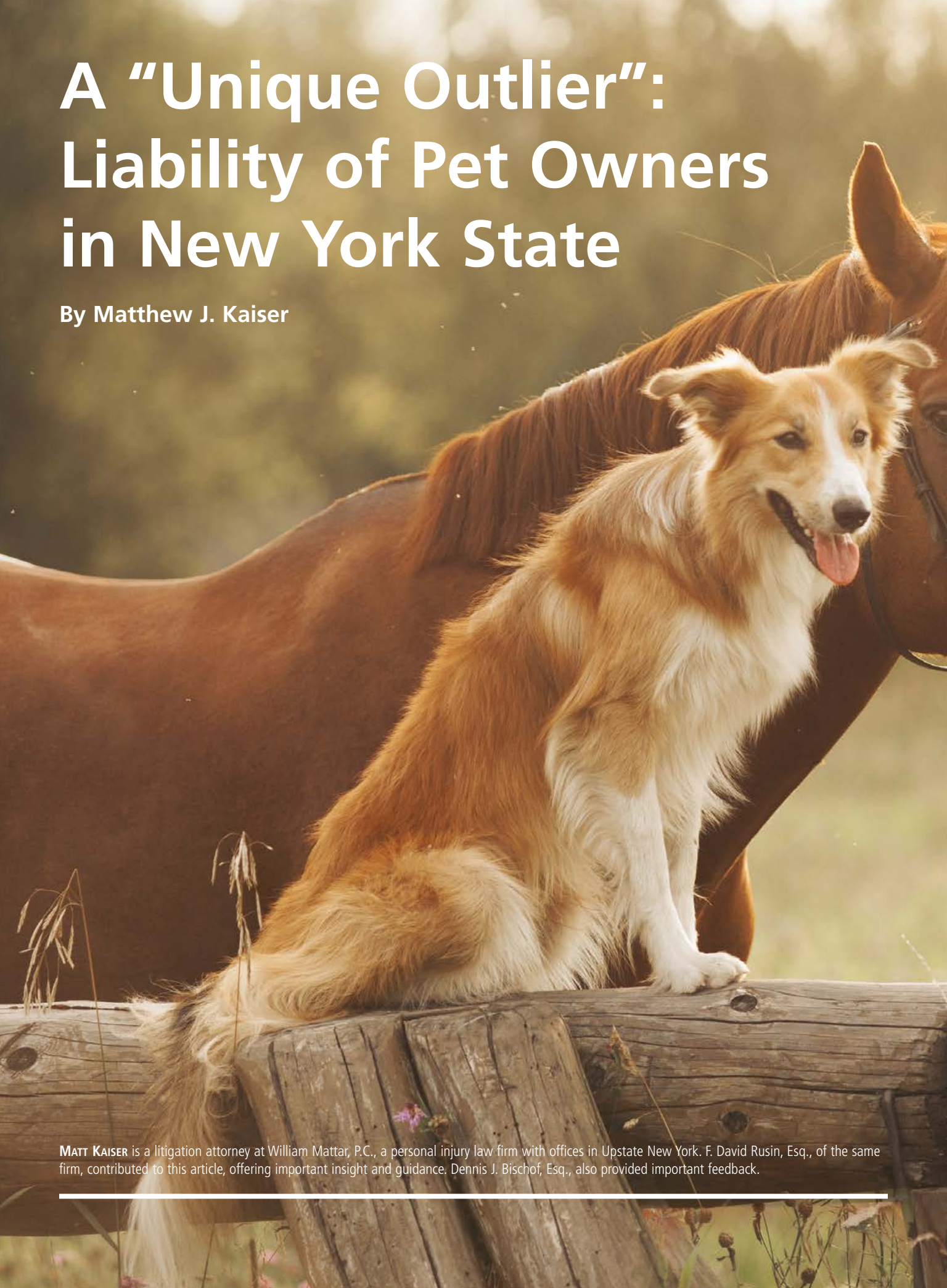
A "Unique Outlier": Liability of Pet Owners in New York State

By Matthew J. Kaiser



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Similar Hypotheticals; Divergent Outcomes

You are riding a bicycle down the road. You round the turn, and there is a horse in your lane. You try to evade the equine, but it's just too late. You drop the bike. You're injured.

The horse made its way from pasture to asphalt because its owner failed to mend a gap in a perimeter fence. This particular horse had never previously strayed from the farm, but you are able to show that the owner was negligent in failing to fix the fence, resulting in the escape and your injuries.

A jury will hear your case.

Now change the facts just a bit. You round that turn again. Fortunately, this time, instead of straddling the centerline, the horse is standing vacuously in a field gnawing on grass. This time the owner's loyal mutt is standing squarely in your lane of travel. The evasive maneuver proves futile. You flip over. Again, you're injured.

You investigate. There is a leash law violation, but no showing that the mutt had a habit of interfering with traffic or otherwise showed "vicious propensities"– that is, "the propensity to do any act that might endanger the safety of the persons and property of others in a given situation."[1]

It was, however, reasonably foreseeable that this free-roaming mutt could enter the roadway and harm a passing bicyclist. The animal had previously, on numerous occasions, escaped the property and run toward the road.

A jury will *not* hear your case.[2]

Separate Classes, and a Categorical Distinction

A decade ago, in *Bard v. Jahnke*, the Court of Appeals resolved an Appellate Division split on the question of whether someone injured by a domestic animal could assert a negligence cause of action against its owner.[3] Departing from earlier precedent suggesting it remained a viable cause of action, a bare majority of the Court held that only a strict liability cause of action, hinging on knowledge of the animal's "vicious propensities," would lie.[4]

But there are two classes of domestic animals: the long list of farm animals in Agriculture and Markets Law § 108(7), and domestic pets – "a dog or cat" – referred to in Agriculture and Markets Law § 370.

Would the *Bard* rule apply to both classes of domestic animals?

Short answer: No. The Court of Appeals, in *Hastings v. Sauve*, carved an exception for wandering farm animals – finding that a contrary rule would "immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property" – but two years later, in *Doerr v. Goldsmith*, refused to extend this policy objective to owners of household pets.[5]

The owner of a household pet owes no duty of care to prevent foreseeable injuries. It is only where that owner "knows or has reason to know" that the pet "has dangerous propensities abnormal to its class" that he or she can be held strictly liable.[6] This is a normative question that hinges on whether or not the behavior of the animal is "normal or typical."[7] Alternatively, if the behavior of the animal "would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at harm," liability will obtain – but "only when [that] proclivity results in the injury giving rise to the lawsuit."[8] Where the owner, with or without justification, "lack[s] actual or constructive knowledge" of these tendencies, there is no liability.[9]

Is there truly a "fundamental distinct[ion]" between the failure of a pet owner to prevent his or her animal from behaving dangerously and a farm owner's decision to allow his or her farm animals to wander freely onto a public road?[10]

Yes, pets pose "different risks" than farm animals: They are generally smaller and more susceptible to training.[11] But these "different risks" are nevertheless risks. Pets are very much a part of our lives. It is estimated that more than 36 percent of households own a dog, as opposed to less than 2 percent owning a horse.[12] While dogs and cats enrich our lives, some of their behaviors – often unwitting – carry the potential to inflict grievous bodily harm. According to the Centers for Disease Control and Prevention, approximately 4.5 million dog bites occur each year in the United States, nearly 20 percent causing infection.[13] In 2015, dog bites necessitated more than 28,000 reconstructive surgeries.[14]

Tort law aims to deter conduct that is harmful to society. If pets are omnipresent, and their behavior is a function of "domestication and training," we should set a public policy that encourages responsible domestication and training.[15] Our strict liability regimen alone may not achieve this objective and, on occasion, may even actively undermine it.

Bad Policy?

Proof that a pet was previously confined or restrained can be seen as circumstantial proof of the owner's knowledge of vicious propensities – providing a potential basis for liability. Thus, in *Felgemacher v. Rung*, testimony that the defendant "chained [his] dog at his place of business to prevent the dog from 'jumping on cars'" served as a predicate for liability,[16] while proof in *Gammon v. Curley* that the defendants "did not restrain the dog to keep it away from guests in their home" helped establish judgment as a matter of law.[17]

The posting of a "Beware of Dog" sign, warning passersby of the animal's presence, can, in conjunction with other factors, militate toward a finding of vicious propensities. This sort of signage, together with other circumstances, raised jury questions in cases like *Kidder v. Moore* and *Frantz by Frantz v. McGonagle*.[18]

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What can be seen as a deviation from reasonable care in a negligence analysis suddenly becomes a basis for summary judgment under a strict liability paradigm. But there can be no negligence analysis where there is no viable negligence cause of action. The responsible confinement and restraint of pets, and warning of their presence, are socially beneficial behaviors. A pet owner who does neither should not receive a windfall.

New York municipalities are empowered to pass leash laws that require dogs and cats to be restrained in public areas.[19] While, as a general rule, the violation of an ordinance may support a finding of negligence,[20] a pet owner can violate the leash law with impunity from civil liability.[21]

In the words of the Court of Appeals:

> Violation of the leash law [is] irrelevant because such a violation constitute[s] only some evidence of negligence, and negligence is not a basis for imposing liability . . .[22]

Apparently, in order for the leash law to have any teeth, we must rely on prosecutorial discretion and the prospect of a trivial fine. This "easy-to-apply bright-line rule" can lead to some pretty anomalous results.[23]

The above examples are not outliers. Under a strict liability regimen, a showing of vicious propensities is, of course, not enough. "[T]he additional requisite issue of fact" is whether the defendant "knew or should have known of [the vicious propensities]."[24] For this reason, it is often the conscientious owner (aware of the pet's behavior) who is held liable, while the absentee owner (ignorant of such behavior) is entitled to judgment as a matter of law.

Consider the decision in *Perry v. Mikolajczk*, where a seven-year-old boy was bitten by a dog that was run-

ning loose in the neighborhood.[25] The boy grabbed the animal's chain to return it to its owner's yard.[26] Once re-chained, "without provocation," the 13-year-old husky-shepherd mix "then suddenly attacked" the young boy, "causing injuries . . . that required his hospitalization."[27] The complaint was summarily dismissed. While there was an "an issue of fact whether the dog had vicious propensities," there was no showing its owner "knew or should have known of them."[28]

Consider also *Dobinski v. Lockhart*, where the plaintiff and her husband were riding bicycles down a country road.[29] The defendant released two German Shepherds from her house, who barked and ran into the road, in the direction of the plaintiff.[30] About 10 seconds later, the plaintiff struck one of them, causing her to flip over the front of her bicycle and suffer severe injuries.[31] While the defendants acknowledged that two of their *other dogs* had run into the road and been struck by a car,[32] this was irrelevant "as those dogs' propensities [could not] demonstrate that the entirely different dogs at issue . . . had a tendency to harm others."[33] More importantly, the defendants "did not have any prior familiarity with the dogs [involved in the collision] or their propensities."[34] The complaint was dismissed.

Again, under a strict-liability-only system, pet owners who "lack[] actual or constructive knowledge" of the tendencies of the animal – dangerous or otherwise – are absolved from liability,[35] while owners familiar with the behavior of the animal can be held strictly liable – regardless of that owner's "exercise[] [of] the utmost care to prevent [the animal] from doing harm."[36] For the pet owner defending an action sounding only in strict liability, ignorance is bliss.

Since "household pets," by nature, tend to spend most of their time in the household, it is often the owner, and witnesses close to or sympathetic with that owner, who have exclusive knowledge of the behavior of the animal. As observed in the pages of the *New York Law Journal*:

> Since a plaintiff may be forced to rely on the defendant's testimony in proving a case, and the court will not consider the defendant's negligence or violation of law as relevant, New York is the "ruff"-est jurisdiction in the nation for a victim of an animal attack to find relief.[37]

One more hypothetical. You rescue a Pitbull from a shelter. You know nothing about the animal's history, and you make no effort to find anything out. Before you take the animal home, you stop off at the park, where you see a sign stating in no uncertain terms that dogs must remain leashed. You unleash your new dog, and it bites someone.

You are entitled to summary judgment. "[A] plaintiff cannot recover for injuries caused by a dog that has not demonstrated vicious propensities, even when the injuries are proximately caused by the owner's negligent conduct in controlling or failing to control [a] dog."[38]

It would seemingly behoove litigation-conscious pet shoppers to avoid inquiry about prior aggression. It would also benefit current owners to turn a blind eye to such signs. Where there is no "actual or constructive knowledge," the risks of pet ownership, including the possibility of unexpected attack, will be borne not by the owner, but instead the innocent victim. This is looking more and more like "an archaic, rigid rule, contrary to fairness and common sense."[39]

Obliviousness as to the behavior of your pet, and its potential to harm others, should not be a shortcut to summary judgment. The availability of a negligence cause of action – which contemplates liability "from failing to do an act which a reasonably prudent person would have done under the same circumstances" – would eliminate any incentive to engage in this sort of willful blindness.[40]

A "Unique Outlier"

Which brings us to the other goal of tort law: making injured parties "whole." Where a domestic animal owner deviates from his or her duty of care, causing foreseeable injury to an innocent person, should it matter whether the instrument of harm is a horse or dog?

Yes, the former is defined by Agriculture and Markets Law § 108(7), and latter implied by Agriculture and Markets Law § 370, but the statutory classification of the offending domestic animal will probably ring hollow for that innocent person.

The American Law Institute has rejected this sort of rigid typology. The Restatement rule is that someone injured by a domestic pet can bring a negligence action against the owner.[41] Thirty-six states follow this rule.[42] New York is the only state whose court of last resort has expressly rejected it.[43]

Given this landscape, there must be a compelling policy reason for the Empire State's place as a "unique outlier."[44] It is true that the strict liability system is, at its essence, a "rule of notice" that allows New Yorkers to manage their affairs based on known risks.[45] The same public policy, however, would be furthered under a system that requires owners to exercise reasonable care – which hinges on the type of risk involved and the likelihood of danger stemming from the activity.[46]

The degree of care owed is, after all, a function of reasonable foresight: An owner with actual knowledge that his or her pet has acted in a way that might endanger others would obviously be held to a higher degree of care than an owner with no such knowledge.[47] For this reason, in most cases, strict liability and negligence causes of action would rise or fall together. In other cases, the availability of a negligence cause of action would fill the interstices of a body of case law that, regardless of the nonfeasance or misfeasance of the pet owner, presupposed non-liability.

In the wise words of Judge Fahey (joined by Judge Pigott):

> We should return to the basic principle that the owner of an animal may be liable for failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.[48]

Consider the recent decision of the First Department in *Scavetta v. Wechsler*, where the defendant tied his 35-pound dog to an unsecured, five-pound bicycle rack.[49] The dog escaped, bicycle rack in tow, running "[v]ery fast."[50] The animal, "still dragging the rack," ran toward the plaintiff, causing his leg to become caught in the rack's crossbar, spinning him around, and ultimately causing him to land on his back.[51] The plaintiff and his wife alleged that the defendant was negligent in tying his dog to the unsecured bicycle rack, but disavowed any cause of action sounding in strict liability.[52]

A unanimous First Department panel, "constrained by Court of Appeals precedent," affirmed an order granting the defendant summary judgment.[53] At the same time, Judge Acosta, joined by his colleagues, observed that the current state of the law "may be neither prudent law nor prudent policy."[54] The First Department proposed – without adopting – another exception, to be placed alongside the *Hastings* exception for wandering farm animals:

> [T]he recognition of the following exception would be appropriate: A dog owner who attaches his or her dog to an unsecured, dangerous object, allowing the dog to drag the object through the streets and cause injury to others, may be held liable in negligence. . . . New Yorkers certainly do not expect to find those dogs running on public roads towing large metal objects behind them. A dog owner who, without observing a reasonable standard of care, attaches his or her dog to an object that could foreseeably become weaponized if the dog is able to drag the object through public areas should not be immune from liability when that conduct causes injury.[55]

It is hard to believe that this scenario – the strapping of an object to a canine, which becomes weaponized – would be framed as a potential exception to the rule that pet owners owe no duty of care. Perhaps acknowledging the impracticability of periodically propping up *ad hoc* exceptions based on notions of "societal expectations," the First Department advocated for a more sweeping change:

> Moreover, as a matter of public policy, we agree with Judge Fahey's dissent in *Doerr* that New York should join the overwhelming majority of states that follow the Restatement (Second) of Torts § 518. Under the current rule articulated by the Court of Appeals, it appears that pet owners would be permitted to act in any number of objectively unreasonable ways when supervising their nonvicious pets, because New York law does not place upon them a duty to observe any standard of care. The potential for unjust outcomes is manifest. Although "the Restatement rule . . . does not treat a domestic pet's untrammeled wanderings as actionable negligence" in all cases, the Restatement does recognize that "[t]here may . . . be circumstances under which it w[ould] be negligent to permit an animal to run at large, even though it is of a kind that customarily is allowed to do so [e.g., a dog] and under other circumstances there would be no negligence." It seems, however, that under the law of New York at present, permitting a domestic pet that has not displayed vicious propensities to run at large under any circumstances – even when doing so would be clearly dangerous – would never give rise to a claim sounding in negligence. We find this to be most unsatisfactory as a matter of public policy and would recognize a cause of action for negligence in appropriate circumstances.[56]

Recognition of a negligence cause of action would encourage responsible pet domestication and training, and ameliorate some of the harsh idiosyncrasies in our strict-liability-only case law.

Recognition of a negligence cause of action would encourage responsible pet domestication and training, and ameliorate some of the harsh idiosyncrasies in our strict-liability-only case law. This expansion would augment – not undermine – the dual interests of managing "societal expectations" and "keep[ing] liability within manageable limits,"[57] departing from a rule that "immunizes careless supervision of domestic animals by their owners and leaves those harmed in the State of New York without recourse."[58] ■

1. *Collier v. Zambito*, 1 N.Y.3d 444, 446 (2004).

2. *See generally Potter v. Zimber*, 309 A.D.2d 1276 (4th Dep't 2003) ("a plaintiff cannot recover for injuries resulting from the presence of a dog in the highway absent evidence that the defendant was aware of the animal's vicious propensities or of its habit of interfering with traffic."); *accord Smith v. Reilly*, 17 N.Y.3d 895, 896 (2011) ("Testimony that the dog . . . escaped defendant's control, barked and ran towards the road is insufficient to establish a triable issue of material fact.").

3. 6 N.Y.3d 592 (2006).

4. *Id.* at 599 ("In sum, when harm is caused by a domestic animal, its owner's liability is determined solely by application of the [strict liability rule]."); *cf. Dickson v. McCoy*, 39 N.Y. 400, 401 (1868) ("It is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence.") *and Hyland v. Cobb*, 252 N.Y. 325, 326–27 (1929) ("negligence by an owner, even without knowledge concerning a domestic animal's evil propensity, may create liability.").

5. *Compare Hasting v. Sauve*, 21 N.Y.3d 122, 125 (2013) (recognizing negligence cause of action with respect to farm animals) *with Doerr v. Goldsmith*, 25 N.Y.3d 1114 (2015) (rejecting negligence cause of action with respect to domestic pets).

6. *Bard*, 6 N.Y.3d at 603, n. 2, *quoting* Restatement (Second) of Torts 509(1).

7. *Bloomer v. Shauger*, 21 N.Y.3d 917 (2013) ("The Appellate Division correctly held that a vicious propensity cannot consist of behavior that is normal or typical for the particular type of animal in question") (internal quotations omitted).

8. *Collier v. Zambito*, 1 N.Y.3d 444, 444.

9. *Hargo v. Ross*, 134 A.D.3d 1461 (4th Dep't 2015).

10. *See Hastings*, 21 N.Y.3d at 125.

11. *Doerr*, 25 N.Y.3d. at 1129.

12. U.S. Pet Ownership Statistics, https://www.avma.org/KB/.

13. Preventing Dog Bites, Centers for Disease Control and Prevention (2015), https://www.cdc.gov/features/dog-bite-prevention.

14. 2015 Plastic Surgery Statistics Report, www.plasticsurgery.org, https://www.plasticsurgery.org/news/plastic-surgery-statistics?sub=2015.

15. *Doerr*, 25 N.Y.3d at 1129.

16. 28 A.D.3d 1088, 1088–89 (4th Dep't 2006) (defendant "testified that he chained the dog at his place of business to prevent the dog from 'jumping on cars'"); *see also Berry v. Whitney*, 288 A.D.2d 857 (4th Dep't 2001) ("Defendant . . . submitted portions of his examination before trial wherein he testified that he did not trust the dog and would not allow his grandson to be 'out near the dog, anywhere near the dog.' He further testified that the dog was always kept chained.").

17. *Gammon v. Curley*, 147 A.D.3d 727 (2d Dep't 2017) (summary judgment warranted where "[t]he defendants did not restrain the dog to keep it away from guests in their home.").

18. *See, e.g., Kidder v. Moore*, 77 A.D.3d 1303, 1303–04 (4th Dep't 2010) ("Beware of Dog" sign on the front of the house); *Frantz by Frantz v. McGonagle*, 242 A.D.2d 888 (4th Dep't 1997) ("[P]laintiff submitted evidence that 'Beware of Dog' signs were posted on the property owned by defendant, of which defendant was aware.").

19. Agriculture and Markets Law § 121.

20. *See* Pattern Jury Instructions 2.29; *Elliott v. New York*, 95 N.Y.2d 730 (2001); *Barnes v. Stone-Quinn*, 195 A.D.2d 12 (4th Dep't 1993).

21. *See Petrone v. Fernandez*, 12 N.Y.3d 546 (2009) (violation of leash law irrelevant inasmuch as such violation was merely evidence of negligence and negligence was not a basis for imposing liability).

22. *Id*. at 549–50; *see also Young v. Wyman*, 76 N.Y.2d 1009, 1011 (1990) (Kaye, J., dissenting) (". . . current statement of public policy on the question [of applicability of leash law as a predicate for civil liability] is surely entitled to some recognition by the courts, yet none is given.").

23. *See Doerr*, 25 N.Y.3d at 1135.

24. *Perry v. Mikolajczyk*, 259 A.D.2d 987 (4th Dep't 1999).

25. *Id*.

26. *Id*.

27. *Id*.

28. *Id*.

29. 25 N.Y.3d at 1120.

30. *Id*.

31. *Id*.

32. *Id*.

33. *Id*. at 1140.

34. *Id*.

35. *Hagro v. Ross*, 134 A.D.3d 1461, 1462 (4th Dep't 2015).

36. *Bard v. Jahnke*, 6 N.Y.3d 592, 603 fn 2 *quoting* Restatement (Second) of Torts 509(1).

37. Marc Miner, *When Animals Attack in New York*, 247 N.Y.L.J. 38, p. 4 (Feb. 28, 2012).

38. *Scavetta v. Wechsler*, 149 A.D.3d 202, 203 (1st Dep't 2017).

39. *Bard*, 6 N.Y.3d at 99 (R.S. Smith, J., dissenting).

40. Pattern Jury Instructions 2:10.

41. Restatement (Second) of Torts § 518.

42. *See generally Doerr*, 25 N.Y.3d at 1149–50 (Fahey, J., dissenting).

43. *Doerr*, 25 N.Y.3d at 1148–49; *see also Bloomer v. Shaugher*, 94 A.D.3d 1273, 1277 (3d Dep't 2012) (Garry, J. dissenting) (New York is "the only state in the nation that rejects the rule set forth in the Restatement [Second] of Torts regarding an owner's negligence as a ground for liability arising from the dangerous acts of animals") (internal quotations omitted), *aff'd*, 21 N.Y.3d 917 (2013).

44. *Id*. at 1149.

45. *Id*. at 1137.

46. *Mikula v. Duliba*, 94 A.D.2d 503, 506 (4th Dep't 1983) ("the care required to be exercised must be commensurate with the known dangers and risks reasonably to be foreseen").

47. *See generally Di Ponzio v. Riordan*, 89 N.Y.2d 578 (1997) ("Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated.").

48. *Doerr*, 25 N.Y.3d at 1142–43 (Fahey, J., dissenting).

49. 149 A.D.3d 202.

50. *Id*. at 204.

51. *Id*.

52. *Id*.

53. *Id*. at 210.

54. *Id*. at 202.

55. *Id*. at 211 (internal citations omitted).

56. *Id*. at 211–212 (internal citations omitted).

57. *Doerr v. Goldsmith*, 25 N.Y.3d at 1137.

58. *Scavetta*, 149 A.D.3d at 203.