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DOG BITES AND PET RELATED INJURIES: Keeping Your Dog Bite Case on a Short Leash

By Ron Berman

Dog bites and pet related injury claims to insurers have risen substantially over the years. The value of claims according to the Insurance Information Institute jumped from \$324 million in 2003 to \$571 million in 2015 showing a 76.2% increase. California accounted for the largest number of claims in the U.S. in 2015 at 1684 with a total value of \$75.8 million. State Farm Insurance has stated that one third of all homeowner's liability pay outs in 2014 were for dog bites and although actual claims decreased by 4.7 percent the average cost per claim was up by 15%. Plaintiff demands for \$1,000,000.00 or more are not uncommon in dog bite cases. A recent New Jersey case in which a 5-year old girl was bitten in the face by a dog up for adoption settled for a total of \$900,000 well before trial.

Despite strict liability statutes in most states which create liability in the absence of *scienter*, negligence or intentional behavior, it is still possible to successfully mount a solid defense and mitigate potential losses using in-depth forensic investigation as well as the science of canine behavior and bite wound evaluation. Without sufficient knowledge needed to fully understand important connections, patterns and subtleties in the fact pattern of

their case which often lay several layers beneath the surface, this can be hard to do. Add to that potentially missed discovery opportunities and defense errors by either not using an expert, choosing the wrong expert and/or not fully utilizing the expert they have. Even though strict liability may apply, issues of provocation can turn a case upside down and at times end with substantial comparative fault being given to the plaintiff at trial. Cases involving third party landlord/tenant issues or pet related injuries not involving dog bites such as knockdowns or fright cases present a whole host of other difficulties for an attorney without the level of understanding needed to give their defense the foundation it deserves.

This article attempts to shed light on specific issues commonly encountered by defense attorneys and insurance adjusters in dog bite and pet related injury cases. Although, not by any means complete, important information is offered that can be used as a guide, when appropriate, to insure that as much relevant evidence can be produced and accurately utilized, in defense of your case, as possible.

It is well known that even eye witness accounts of the very same incident are often inconsistent and that dog bites can happen in the "blink of an eye." Plaintiffs and defendants are not always clear about how the incident happened or why. Even when they seem to be clear, their descriptions of what happened are not always supported by the evidence, at least

on the surface. Defendants, in litigation, are not always truthful about the aggressive history of their dog and may state that their beloved pets have never even growled prior to this incident. Bite victims also have been known to misrepresent the facts and change their version of what happened in order to avoid questions about any potentially provocative behavior they may have displayed just prior to the bite.

Plaintiffs also sometimes over-dramatize their accounts of the incident by increasing such factors as the amount of time the attack lasted, the number of times they were bitten and the intensity with which the dog bit. Once litigation starts, it isn't unusual for a plaintiff who was bitten on the face while on their knees trying to kiss a dog he or she didn't know to change their account of the incident and testify that they were standing up and the dog jumped up and bit them for no apparent reason.

Statements that the dog shook the victim, a factor in predatory aggression, are often not consistent with the bite wounds which can sometimes also show that the plaintiff's wounds are not from a dog bite at all.

Although there are many good sources of evidence in a dog bite or pet related injury case that can be used to mount a solid defense, there are two in particular that often are the most reliable: the dog and the bite wounds.

THE DOG

There are three things about dogs that make them very important evidence:

1) Dogs are creatures of habit. 2) A dog's temperament doesn't change over time. 3) Dogs do not lie or change their behavior because they are involved in litigation.

Typically, a dog's behavior can change due to old age, illness or injury or if they have been trained or had their behavior modified after an incident but their temperament does not change over time. That is why a

professional forensic evaluation of a dog is valid even years after the incident. A non-aggressive friendly dog will always have a non-aggressive temperament. Also, if a dog is friendly at the door or towards strangers on its territory, that behavior will likely be ritualized with time and repetition, making the same behavior highly likely to show up in an evaluation whenever it is done as long as it is done properly.

Below are areas regarding the subject dog that deserve more than a superficial review as they may be very important in both establishing your defense

Breed- Many plaintiff attorneys litigating a dog bite case believe that if the defendant's dog is an "aggressive breed" such as an American Staffordshire Terrier or other breed commonly called a "pit bull" that their case is in the bag. However, this is may not help their case unless it is being tried in a state or county in which "pit bulls" have been declared a dangerous or vicious breed.

The defense should counter by focusing on the fact that every dog is an individual and that it's breed as only one factor out of many that may be important. A forensic investigation and evaluation can offer a jury a very different picture of your client's dog than the one the opposing attorney will try to paint. If opposing council has not done their homework, their attempt to lean on the dogs breed as an "ace in the hole," they may be surprised at the jury's response.

"Pitbulls" are no longer a dog for inner city neighborhoods and gang members as they once were. Now, they can be seen being walked in Beverly Hills and other enclaves of the rich and famous. America both loves and hates "pit bull" terriers and an "attack" on the breeds that make up this group can

meet just as much resistance as it does support.

Sex - Intact (un-neutered) male dogs are involved in 70-76% of reported dog bite incidents (Wright J.C., Canine Aggression toward people: bite scenarios and prevention. Vet Clin North Am Sm Ani Pract 1991;21(2):299-314).

Age/Health - Certain breeds see males become much more aggressive between 1-3 years of age. Also, older dogs often become aggressive due to painful physical issues like hip dysplasia or eye issues like glaucoma. Claims that older dogs, in poor health, ran up to the victim and jumped up on them typically meet with strong resistance from the defense. A recent serious injury case went up in smoke when the victim testified about how her neighbors Siberian Husky ran full speed down the driveway and leaped at her causing her to fall. Veterinary records, witnesses and expert testimony presented to the jury led to a defense verdict when it was revealed that the dog was partially crippled and nearly 20 years old at the time of the incident. The average lifespan of a Siberian Husky is 12-15 years at the most. The plaintiff's attorney did not seem to be aware of this when his client's deposition was taken.

Size - Large breeds can cause more damage especially when the incident involves a child. Check the dog's veterinary records at the date closest to the incident for the dog's weight. In dog on dog aggression cases where a person is bitten, the facts about each dog including size and weight, the dynamics of how the incident happened and which one was the aggressor can be important. Sometimes, even though the defendant's dog is the larger dog, they can have the most benign temperament and no previous aggression in their history.

Behavioral History - Individual behavior history is extremely important as each dog is an individual within of a breed and may not present all or any of the characteristics commonly attributed to that breed. An in-depth investigation into the defendant's dog's temperament and previous behavior is a must.

If your client swears to you that their beloved pet is a complete sweetheart and wouldn't hurt a fly, do an evaluation and find out for yourself. Owner denial, in spite of clear evidence to the contrary, is common and a prime factor in many bite incidents. It is best to find out early, before the plaintiff hires their own expert and demands production of the dog for their own evaluation. If that is the case, remember that not all experts are ethical and an unscrupulous opposing expert can attempt to provoke your client's dog into an aggressive display. Do not, under any circumstances, produce your clients dog unless you have your own expert present and the ability to record the entire evaluation from as many angles as possible.

Types of aggression previously displayed - There are numerous types of canine aggression such as dominance aggression, territorial aggression, protective aggression, maternal aggression, etc. Even if a dog has demonstrated aggression in the past, it can be problematic when used as support for the plaintiff's case unless it directly relates to the incident being litigated. For example, dog on dog aggression does not relate to dog on human aggression. Having evidence that the defendant's dog has attacked their dogs or animals in the past will not carry much weight if the plaintiff's case is strictly dog on human aggression and he or she did not have a dog with him or her at the time of the incident.

If there is evidence that the defendant's dog bit someone who was trying to take their food away, that evidence will only have weight if the plaintiff was bitten in the presence of food. If he or she was attacked while walking down the street or riding a bicycle, showing a history of food aggression may not support their case. In fact, a dog that is food aggressive may not be aggressive in any other situation. Also, previous incidents the opposing attorney is hanging their hat on, may not be as valuable as they think due to the fact that the dog was provoked. An bite in a defensive manner. A dog is only "vicious" if it attacks without provocation.

When looking at previous incidents reported or unreported, Interviews of witnesses regarding all incidents should be done by your expert as investigators typically do not have the knowledge needed to ask the right follow up questions or to clarify specific terms regarding dogs often misused by the general public. Also your experts can rely on "hearsay" evidence even if, after their one and only interview, the person suddenly decides they no longer want to be involved, moves to another state or simply disappears.

Socialization - Dogs that are not well socialized, especially as puppies, have a higher likelihood of aggression. This should be explored early in the case.

Inside/Outside - Dogs that are kept outside and not allowed into the home are typically poorly socialized and more likely to demonstrate aggression towards strange people and dogs. However, your client's outside dog might be an exception to the rule and be a total sweetheart. Here is another reason to capture the dog's friendly nature in an evaluation video which can be shown at trial with behavioral commentary by your expert.

Chaining - Dogs that have been chained for long periods of time have been shown to be 3 times more likely to bite. (PETA.org) Typically, the victims of chained dogs are children. Also some states like California have laws against chaining a dog for more than 3 hours at a time. Again, even if a dog has been chained, it doesn't mean for a fact that it is dangerous or vicious but it does need to be explored early on.

Stray or rescue - Many stray dogs or rescue dogs are wonderful pets but there are a fair percentage with behavior issues which may be the reason they were on the street or put up for adoption. Previous owners sometimes don't tell the rescue organization about aggression issues because they are afraid the dog will be euthanized. Time bombs can often be found either in rescue organization or shelter records or through utilizing them to discover further evidence. It is best that this avenue be explored early in litigation as well.

Training - If the defendant's dog has been professionally trained, previous aggression may be one of the main reasons why. The trainer can be an excellent percipient witness regarding the dog's prior behavior and what the defendant knew about their dog prior to the day of the incident. If the dog had aggression issues, you need to know, if not, they can give a statement or deposition on your client's behalf.

Leash - Most cities have leash laws but a lot of them also require a dog to be restrained on a leash not over 6 feet long. If your client's dog was being walked on a retractable leash that was extended over 6 feet it might be important in establishing owner/handler negligence. A lot of incidents happen when dogs are off leash either illegally or legally in a dog park where dog owners typically have to have voice control over their dogs. Does your client have off

leash voice control over their dog? If they claim that they do, they need to prove it.

Exercise - Dogs that are under exercised can build up tension that can either fuel or intensify aggression.

Aggressive behavior - Canine aggression involves growling, snarling, lunging, snapping and biting. Barking is not necessarily aggressive but based on tonality and other exhibited behaviors it may be construed as such. It is important to clarify the dog's tone, body language etc. in order to determine if aggression was actually what was being displayed. For example, what many people would call a snarl (showing teeth) which is an aggressive behavior might actually be a "greeting grin" which looks similar but is the opposite of aggressive.

BITE WOUNDS

It is very important that the plaintiff's bite wounds support their account of the incident. Typically, the main issues in a dog bite are a) Are the plaintiff's wounds from a dog bite; 2) Is the defendant's dog the dog that bit the plaintiff; 3) Did the attack happen as the plaintiff describes; and 4) Did the plaintiff provoke the dog into biting him or her.

Bite wounds are an actual physical representation of the incident. They stand alone as evidence even if the plaintiff was the only witness and the dog has been euthanized. If the wounds are not consistent with the plaintiff's account or in some cases with a dog bite at all, his or her credibility should be questioned in great detail.

Dog bites typically present as punctures, lacerations, avulsions and abrasions. As bites are by nature crush injuries, deeper wounds often are accompanied by

contusions (often cited as ecchymosis in the victim's medical records) otherwise known as bruises caused by broken blood vessels around the central wound.

DOG BITE OR DOG ATTACK

Although all dog bites are serious from a medical standpoint and even by an emotional standpoint due to the potential long term damage they can do to the victim...there is a motivational difference between offensive and defensive aggression that shows up in the dynamics of the attack as well as the type, depth, location and number of bite wounds. All bites are an aggressive display but a dog that is provoked into defending itself and responds with a quick inhibited bite is qualitatively a different dog than one who runs up to and attacks with multiple deep punctures over different parts of the victim's anatomy and has to be pulled off the victim by the owner/handler. Plaintiff attorneys often use the word attack in their settlement demands and complaints. If the evidence does not support this claim, your expert should be able to neutralize the emotional power that such words inherently convey to a jury.

Defensive Aggression

Dogs that bite defensively as a reaction to pain or to "avoid" a threat from a person who has provoked them. This could be by stepping on their tail or paw or by putting their face very close to a strange dog's face in an attempt to kiss or hug them will often receive one inhibited bite. Inhibited bites are where the dog controls its severity. In these cases, the dog is simply trying to remove a threat. One quick bite usually succeeds in creating enough distance between the dog and the threat and no further aggression is displayed. They also tend to produce only lacerations and abrasions and occasionally contusions

caused by blunt force trauma as a result of the direct contact of the dog with the victim. Medical records can also be confusing if one doctor states that a wound is a puncture and the next cites it as a laceration. Clarity about the wounds is imperative.

Offensive Aggression

Offensive attacks, typically but not always, involve multiple bites and often to different parts of the body. They can be provoked, based on the specifics of the incident and whether or not the dogs level of aggression was grossly out of proportion to the actions of the victim. However, most they are unprovoked, meaning the victim's actions just prior to the incident would not be considered something that is likely to cause a dog to bite. A particular dog, due to one or a combination of factors such as poor socialization and fear aggression may interpret an outstretched hand as a threat and bite it but in the eyes of the law a friendly and common gesture such as reaching out to pet a dog is not provocation. (*Ellsworth v. Elite Dry Cleaners, etc., Inc.* (1954) 127 Cal.App.2d 479) and walking toward a dog does not constitute provocation. (*Chandler v. Vaccaro* (1959) 167 Cal.App. 2d 786.) (dogbitelaw.com)

Attack Dynamics

There are often reasonable explanations why a particular wound pattern does not seem to add up but these answers are typically only available to attorneys through expert opinion after a thorough analysis. For example, where a stranger trying to kiss or hug a dog would clearly be provocative, the same person who is very familiar with the dog and who has kissed and hugged the dog on numerous occasions previously (with no warnings or aggressive response) may not meet the

criteria of provocation due to their history with the dog accepting the behavior. Still an explanation why the dog bit on this occasion and not on others should be investigated as other actions by the plaintiff may have caused this seemingly "abnormal" reaction.

Provocation can be intentional like kicking or hitting a dog or unintentional such as a person not very familiar with the dog initiating rough play. Certainly, the victim of the bite is not intending to threaten or hurt the dog but nevertheless their actions can be viewed as likely to cause a dog to feel threatened and bite. Dog bite incidents often are the culmination of a complex interaction that on the surface can appear confusing at best. Each dog, victim and incident is unique. All the facts should be reviewed and interpreted before a decision on whether the victim provoked the dog or not can be accurately made. In most cases this requires an expert opinion after a complete forensic investigation and evaluation of all relevant discovery.

Experts

There are only a handful of self-titled dog experts in the United States who have more than a very limited amount of experience in court. Many more would like to act in an expert capacity and offer their services without the background needed to insure that the attorney who hires them gets the high level of service they expect. Your expert should know exactly what documents you need and what actions need to be taken in order to maximize all discovery options. Also, they need to know how and where to find evidence that is not readily available through normal channels. Lastly, they need to know how to complete those tasks in a professional manner that does not create impeachment opportunities when facing an aggressive cross examination. Experts that only review what

is sent to them by attorneys and do not do their own independent investigation can appear to be nothing but “hired guns.”

Dog experts come in all shapes and sizes and their experience and training vary greatly. Some offer opinions on dogs trained in aggression such as police dogs and guard dogs but have no actual experience training dogs in Schutzhund, developed in Germany in which nearly all police dogs are trained and in some cases have no experience in aggression training at all. In one case, a plaintiff’s expert testified regarding a bite incident that happened during a training class when a specific training exercise was taking place. His opinion was that the exercise was dangerous to do and should never have been used. His testimony fell apart when it was revealed that his doctorate had nothing to do with dogs and that he had never taught a dog training class. Even worse, he had no experience teaching the specific exercise to which he so strongly objected. The case did settle but for a great deal less than the defense had expected to pay.

That all experts need to be carefully vetted is well known but rarely done. In cases involving dog bites and pet related injuries, it is vital to go over each and every area of the litigation that the expert might be asked about. He or she must have expert qualifications in every area. Just calling yourself a dog expert does not make you an all-purpose expert. Has the expert now offering opinions on dog bite wound evaluation been published on that topic? Unlike construction defect cases or slip and fall cases involving specific gradients...people know dogs or at least believe they do. Every juror will have had some experience with dogs at some time in their life. Many will have been bitten. More than anything they need to be educated in what they don’t know and confirmed in

what they do know. Most importantly, dogs are basic and real. Your expert’s testimony must reflect that with their tone and language.

It is a good idea to “cross examine” your own expert before their deposition. He or she is only as good as their ability to apply their knowledge and experience to the matter at hand and then communicate their opinions, under enemy fire, in a deposition or courtroom. If they can’t thoroughly convince you, they likely won’t convince an adjuster or a jury.

Hopefully, the information presented here will be helpful in clarifying important issues encountered in dog bites and pet related injury cases as well as beneficial during all phases of the litigation process.

Summary

Despite years of litigation experience many adjusters and defense attorneys do not possess enough in-depth knowledge regarding the complexities of canine behavior, forensic dog bite investigation and bite wound evaluation and analysis to provide the best possible defense against exorbitant and false claims made by plaintiff attorneys. This article, although by no means complete, seeks to offer specific information which can be used to more accurately assess their client’s case as well as to organize and present the best defense during settlement negotiations and if necessary to a jury. It is imperative that the expert be properly vetted and used to their full potential. Not retaining a qualified and highly experienced expert, especially early on and before depositions of parties are taken, can often result in problems which diminish the ability of the defense to both substantially attack the plaintiff’s credibility and neutralize any false or misleading claims.

Ron Berman is an expert in the forensic investigation and litigation of dog bites and pet related injuries who has appeared in Municipal, Civil, Criminal and Federal courts as well as local dangerous dog hearings nationwide. He has testified in deposition and trial on over 260 occasions. He is an Approved Expert for the Superior Court of Los Angeles, a Certified Forensic Expert and a Licensed Animal Evaluator. His web site is www.dogbite-expert.com. He can be reached at 310-376-0620 and emailed at ropaulber@earthlink.net

The AADC thanks Ron Berman for writing this article.

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