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Who Let the Dogs Out!!! Man's Best Friend?

The Anatomy of the Dog Bite Case

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A. Introduction

In some other jurisdictions and prior to the enactment of Ohio's Dog Bite Strict Liability Statute, to prevail in a dog bite case one had to prove that the dog had bitten previously or otherwise had a propensity to act out toward humans and the owner knew it. Thus, the "One Free Bite" Rule.

"Under Ohio Common Law, a plaintiff suing for injuries inflicted by a dog must show that the Defendant owned or harbored the dog, the dog was vicious, that the defendant (dog owner) knew of the dog's viciousness, and that the defendant was negligent in keeping the dog. McIntosh v. Doddy, 81 Ohio App. 351, at 359, 77 N.E.2d 260 (1947). "One can negligently keep and harbor a vicious dog without owning the dog or the premises where the dog is kept." Hayes v. Smith, 62 Ohio St. 161, at 163, 56 N.E. 879, at 882 (1900).

Common Law

Cause of action other than statutory dog bite cause of action: (Note: One Bite Rule applies)

- One must actually prove that the dog owner acted negligently (i.e. must demonstrate with proof that there was a lack of ordinary care that a reasonably prudent person would exercise under similar circumstances).
- General negligence/recklessness – allowing or taking the dog into the foreseeability zone of danger exposing others.
- Case hinges on owner's knowledge and foreseeability of injury.

- Punitive damages are available if one can prove gross negligence or malice. McIntosh v. Doddy, 81 Ohio App. 351 (1947).
- Attorney fees are available.
- Precluded from recovery under Common Law theory if:
 - o You were a trespasser to the property where the bite occurred on the dog owner's property.
 - o Committing a crime on the dog owner's property.
 - o Teasing, tormenting or abusing the dog.

While under a Common Law claim you can be awarded punitive damages, you must have at least a two bite dog with owner's knowledge. Most Ohio insurance policies exclude coverage for punitive damages. Recovery of punitive damages is subject to the owner's, harborer's or keeper's ability to pay.

Some insurers exclude certain breeds of dogs from homeowners coverage.

Strict Liability Statute:

Ohio by Statute has "strict liability" or "absolute liability" for dog bites. A dog owner is liable for all bites, even the first bite.

Proof: The bitten person does not have to prove the dog owner did anything wrong. Ohio Revised Code §955.28(B).

The owner, keeper, or harborer of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless the injury, death or loss was caused to the person or property of an individual who, at the time, was committing or attempting to commit criminal trespass or another criminal offense other than a minor misdemeanor on the property of the owner, keeper, or harborer, or was committing to attempting to commit a criminal offense other than a minor misdemeanor against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harborer's property.

Section (A) Claims: (i.e. 955.28(A))

- Dog owners may be liable for dog that chases, threatens, harasses or injures a person or other animal (except a cat). It prohibits dogs from approaching someone in a "menacing fashion or apparent attitude of attack".

Simultaneous pursuit of Common Law claim and Statutory Strict Liability Claim. Yes. See Beckett v. Warren, 2010-Ohio-4, 124 Ohio St. 3d 256 (2010).

At common law, the keeper of a vicious dog could not be liable for personal injury caused by a dog unless the keeper knew of the dog's vicious propensities. Beckett v. Warren, 124 Ohio St. 3d, 2010-Ohio-4. The enactment of the Strict Liability Statute (O.R.C. 955.28(B)) eliminated the necessity of pleading and proving the keeper's knowledge of the dog's viciousness.

In a strict liability statutory case, one must only prove:

1. ownership, keepership, or harborship of the dog;
2. proximate cause;
3. damages.

The defendant's knowledge of the dog's viciousness is irrelevant and the defendant's negligence in keeping the dog is irrelevant in a strict liability statutory action.

Practice Pointer: Plead both Common Law and Strict Liability causes of actions, until you know and understand the totality of the evidence. Defense can limit evidence by way of motion-in-limine practice under Strict Liability cause of action. May eliminate evidence that will "aggravate" the jury causing a higher dollar value award.

Practice Pointer: If you choose to pursue both a Strict Liability and Common law claim to verdict you need explicit jury instructions and cautionary instructions regarding evidence of prior bites and punitive damages.

B. Those Liable for Dog's Behavior

1. The owner – the person/entity that owns the dog.
2. A "Harborer" – a person who owns or controls a dog's home. (Example – other family members of the dog owner.) (Generally not landlords – except if bite occurs in common area or "shared property" between tenant and landlord), or you

can prove landlord still “possessed and controlled” the leased premises (example: family member as landlord).

3. A “Keeper” – a person with “temporary control” over a dog. If dog breaks free and bites, a keeper may be liable.

“Harborer”

“Harborer” defined as one who has possession and control of the premises where the dog lives, and silently acquiesces to the dog’s presence. Buettner v. Beasley, 2004-Ohio-1909 (8th Dist. No. 83271).

“Harborer” – the central focus “shifts from possession and control of dog to possession and control of premises where the dog lives.” Flint v. Holbrook, 80 Ohio App. 3d 21, 25 (2nd Dist. 1992). Must be owner of premises and acquiesce to the dog’s presence.

Veterinary’s Waiting Room – not a harborer. Dog held in Veterinary’s waiting room by owner. Veterinary is not a harborer.

Owner’s mere knowledge of dog brought to owner’s home: Jones v. Holmes, 2013-Ohio-448 (12th Dist. CA2012-07-133). Not a “harborer”. Dog brought to home while owner was sleeping. Owner “knew” of dog’s presence before going to work but did not see the dog nor care for it. Held not a harborer.

“Harborer” – must prove control of premises at the time of the dog bite. See Collins v. Bergman, 2010-Ohio-6213 (2nd Dist. No. 23961). Utility worker enters fenced yard when the utility easement is blocked by fencing installed by adjacent property owners. Owner of yard was not home at time of entry. Tenant’s dog bites utility worker – and utility worker falls while climbing fence to evade dog and is injured. Court held that utility worker did not make reasonable use of easement and that the home owner, not being at home at time of event, was not a “harborer” since at the time of the utility worker’s entry into the fenced yard the home owner did not control the yard and the homeowner was not given notice of the entry. Summary Judgment for homeowner was proper.

To “Harbor” – acquiescence is essential to harborship and requires some intent. Uhl v. McKoski, 2014-Ohio-479, (9th Dist. Summit No. 27066) quoting Jones v. Holmes, 2013-Ohio-448 (12th Dist. No. CA2012-07-133).

“Keeper”

“Keeper” – one can be a “keeper” even if owner is nearby and keeper’s time of control is only temporary. Marin v. Frick, 2004-Ohio-5642 (11th Dist. Geauga App. No. 2003-6-2531) – owner gives leash to another who holds leash and dog until owner steps in building to use bathroom. Keeper status established. Person was charged with possession and control of leash albeit for brief period of time. Short timeframe did not diminish his control and duty of control.

Khamis v. Everson, 88 Ohio App. 3d 220, 227, 623 N.E.2d 683 (2nd Dist. 1993) – a “keeper” is not within the class of people that the legislature intended to protect by enacting the strict liability provisions contained in O.R.C. §955.28(B).

Also: Buettner v. Beasley, 2004-Ohio-1909 (8th Dist. Cuyahoga No. 83271)

Bowman v. Stott, 2003-Ohio-7182 (9th Dist. Summit No. 21568)

Marin v. Frick, 2004-Ohio-564 (11th Dist. No. 2003-6-2531) – owner or keeper of dog is not protected under O.R.C. §955.28 and cannot sue to recover damages proximately caused by the dog.

Krzywicki v. Galletti, 2015-Ohio-312 (Ohio aApp. 8 Dist. 2015) – no error by Trial Court instructing the jury that injured person (who also was a “keeper” – girlfriend of owner) was not entitled to recovery if the jury determined she was the owner, keeper or harbinger of the dog. Court allowed special interrogatory to jury on this issue. Injured girlfriend argued “waiver” presumably on issue of failure to attack the validity of her cause of action in pre-trial motion. Trial Court ruled no waiver. It was appropriate to handle the issue with special interrogatory with jury, presumably on grounds of necessity for jury to consider factual issue on injured girlfriend’s legal status. “Keeper” is not statutorily defined – must look at common law for definition.

Many courts have used the elements of:

- Physical control, care and custody of the animal to determine if someone meets the requirements of a “keeper”.

Injured girlfriend argued she had just a few encounters with the dog prior to the bite. Court concluded otherwise, injured girlfriend had a “significant” relationship with the dog.

“Significant” defined here as a substantial role in feeding, playing with and letting the dog out of the house for 30 days prior to the attack.

Also, girlfriend cared for owner’s prior dogs.

Court found injured girlfriend had exercised some degree of management, possession, care, custody or control of the dog and was thus a “keeper”.

“Pet groomer” – aiding pet store owner to bath dog was a “keeper”. Lewis v. Chovan, 2006-Ohio-3100 (10th Dist. Franklin 05AP – 1159).

C. Landlord Cases

Landlord’s Liability

It is well established that a lease transfers both possession and control of the leased premises to the tenant. Richeson v. Leist, 2007-Ohio-3610 (12th Dist. Warren No. CA 2006-11-138). A “Landlord cannot be a “harborer” of a dog that is kept on a premises that the tenant has sole control over”, quoting Jones v. Goodwin, 2006-Ohio-1377 (1st Dist. Hamilton No. C-050568).

In order to hold landlord liable plaintiff must prove that the landlord permitted or acquiesced in the tenant’s dog being kept in common areas or areas shared by the landlord and tenant. Stupar v. Young, 2002-Ohio-2327 (9th Dist. Summit No. 20900).

Pangallo v. Adkins, 2014-Ohio-3082 (12th Dist. Clermont 2014) – Tenant allows dog out 2nd floor apartment, dog bites cop and cop is shot by his partner at bottom of stair case. Landlord had shed on the property. Court held landlord not liable, stairway not a common area shared with landlord. Stairway under possession and control of tenant. Landlord not a harborer of the dog since landlord did not possess or control staircase. Staircase was solely used by second floor tenant.

“Control of area” comes down to right to admit or exclude admission to area of the property. Only tenant had the control of staircase. Landlord did not admit or exclude persons

from staircase. Summary Judgment in favor of landlord upheld. Dog event did not occur in area shared between tenant and landlord.

The Court rejected argument that landlord should be liable for allowing the dog to visit common yard to “do its business” and run on a zip line.

Generally a landlord out of possession is not a harbinger of a tenant’s dog for dog bite liability; however, an out of possession landlord can be found liable for injuries caused by a dog kept on leased premises by a tenant when the landlord has knowledge of the dangerousness or viciousness of the dog but fails to abate the hazard timely. Maggard v. Pemberton, 178 Ohio App. 3d 328, 2008-Ohio-4735 (2nd Dist.).

So, for a landlord to be liable:

1. Bite occurs in shared area between tenant dog owner and landlord.
2. Bite occurs in “common area”; or
3. Landlord new of dangerousness/viciousness but failed to timely “abate”.

Landlord’s Knowledge/Acquiescence:

1. Does lease allow dogs or exclude them?
2. Does landlord visit property and see dog without any warning to tenant?
3. Does landlord know of the dog’s existence?
4. Does lease exclude dogs but landlord lets the dog exist on premises?

Tenant’s yard: Single family home rental. Yard is under the possession and control of tenant. Not a common area. See Engwert-Lloyd v. Ramirez, 2006-Ohio-5468 (6th Dist. Lucas No. L-06-1084).

Landlord possessing keys but not entering without tenant’s permission – not a harbinger. Kovacks v. Lewis, 2010-Ohio-3230 (5th Dist. No. 2010 AP01 0001).

Landlord’s monthly visit to inspect but did not enter leased space – not a harbinger – Young v. Robson Foods, Inc., 2009-Ohio-2781 (9th Dist. No. 0-8 C.A. 009499).

Landlord's knowledge of dog's presence not enough to be harbinger – Hilty v. Topaz, 2004-Ohio-4859 (10th Dist. No. 04AP-13). Must have evidence of possession and control of place where dog bite occurred.

“Right of Access” language in lease. Emergency only?

Landlord's possession and control

A landlord is not in possession and control simply because he retained the right to inspect the rental. Guerra v. Kresser, 2005-Ohio-6524 (6th Dist. No. OT-05-016).

If landlord does not have possession or control, it is immaterial that landlord acquiesced to the dog's presence. Young v. Robson Foods, 2009-Ohio-2781 (9th Dist. CA No. 08CA009499).

Landlord failed to “abate” vicious dog's presence. Maggard v. Pemberton, 2008-Ohio-4735 (Ohio App. 2 Dist. 2008) – landlord lived across street and knew of dog bite but failed to request that dog be removed or failed to evict tenant and dog.

D. Bar to Action and Affirmative Defenses

Statute of Limitations

Strict Liability

- 6 years to bring a lawsuit in the proper court.
- If the bitten person was a minor when bitten, the person has until his/her 24th birthday to file a proper lawsuit.

Common Law – Negligence

- 2 years for adult / 20th birthday for a minor

Affirmative Defenses under O.R.C. §955.28(B)

1. Trespassing
2. Committing a criminal offense
3. Teasing, tormenting or abusing the dog.

Bar to Recovery:

If the injured person is the owner, harbinger or keeper of the dog – this is a bar to recovery (i.e. not a recognized cause of action – not an affirmative defense).

Teasing and tormenting (O.R.C. 955.28(B)). No liability for dog owner, keeper or harbinger if injured person “teased, tormented or abused” the dog to activate the attack or bite.

Olmstead v. Forsthoefel, 2013-Ohio-220 (3rd Dist. Mercer No. 10-12-08). Young boy bitten by dog after “pulling it’s ears”. Boy mad at mom and took it out on dog. Court held dog owner not liable due to teasing/tormenting.

Definitions of teasing, tormenting or abusing:

“Teasing”: defined as “to annoy or to trouble or to worry persistently, to be troublesome, or to pester”.

“Tormenting”: is a greater annoyance and implies some torture or pain.

“Abusing”: includes some physical injury or pain to the dog. See, Quellos v. Quellos, 96 Ohio App. 3d 31, 40 (8th Dist. 1994); Ramsey v. King, 14 Ohio App. 3d 138, 140 (19th Dist. 1984).

Tender years defense to teasing/tormenting. Ramsey v. King Id. three year old held too young and was thus incapable of teasing/tormenting dog as matter of law.

Criminal Trespass – affirmative defense to strict liability. See Mota v. Gruszczynski, 2012-Ohio-275 (Ohio App. Dist. 8 2012) – “Bounty Hunter” is not “privileged” by his status of chasing subject to apprehend on arrest warrant. Bounty Hunter runs into third party’s home to arrest fugitive and is bit by dog. Dog owner not held strictly liable on criminal trespass by Bounty Hunter. Dog owner had dog in closed off screened porch after giving birth to puppies – not willful, wanton and reckless conduct by dog owner.

“Anticipated Trespasser” – The definition of “trespasser” does not include all persons who come upon your private property without express permission. For example, a mailman or door-to-door salesperson who comes to your front door to knock and sell – you must control your dog. It does not matter if the solicitor has not complied with a local requirement on permits or licenses.

E. Miscellaneous Provisions

“Dangerous Dogs” – A dog that has bitten or otherwise attacked or harmed a person must be registered as a “dangerous” dog and is subject to the following restrictions:

- Registered with the County Auditor
- Must always be kept leashed shorter than 6 feet (except when hunting)
- Kept in a locked cage or yard
- Must always wear a tag designating it as a “dangerous dog”.
- If sold, the former owner must tell the purchaser of the dog’s designation and inform the County Auditor within 10 days.

Penalties:

As an owner, if you are convicted of failing to control your dog 3 times, you are required to buy liability insurance to insure the dog against the risk of harm or injury to another.

If a dog bites and the owner has not adequately registered and restrained the dog, the dog owner is subjected to criminal prosecution for a misdemeanor. However, if an owner fails to follow all regulations on a dangerous dog and it bites and kills a person the owner can be convicted of a fourth degree felony (maximum 18 months of incarceration) and the dog can be “put down”. If the dangerous dog bites and seriously injures a person then the owner can be convicted of a misdemeanor in the first degree (maximum sentence 1 year) and the dog can be “put down”.

Other Ancillary Rules:

- It is illegal to “debark” or surgically silence the bark of a dangerous dog.
- Convicted felons are not allowed to own dangerous dogs.
- If your dog bites someone, the dog owner must quarantine the dog for 10 days before removing it from the County.

F. Proof of Damages:

Before bite, after bite and after treatment photographs.

E. Miscellaneous

Recovery of Damages

Most homeowner's insurance policies cover "on property" dog bites and also "off property" dog bites since the owner's personal acts are covered under homeowners policies when the homeowner is away from his/her property.

Local Vicious Dog Ordinances:

BNL – Breed Specific legislation.

- Some communities have "banned" or restricted certain breeds of dogs or by ordinance declared them "vicious" or "dangerous".

Automobile Insurance:

Dog bites in car or lurches out of window of car – may be covered by automobile insurance coverage.

Bikes and Motorcycles:

Ohio's Strict Dog Liability Statute does not require a bite. Dog runs after bike/rider – never touches bike rider – bike rider crashes – dog owner can still be held liable.

Governmental Dog Pounds

No liability since the Political Subdivision Immunity Statute (O.R.C. §2744.02 et seq.) and the Strict Liability Dog Statute does not expressly create liability upon the political subdivision. Jamison v. Board of Stark County Commissioners, 2014-Ohio-4906 (5th Dist. 2014).

Equine Immunity Statute

O.R.C. §2305.321 immunizes horse stable owner when dog "spooks" horse that knocks down visitor. Equine Immunity Statute trumps dog Strict Liability Statute. Graham v. Shamrock Stables, 2014-Ohio-3977 (Ohio App. 9 Dist. 2014).

Dissent: Majority got it wrong. Must look at the well settled principle of statutory construction that if two statutes covering same subject matter, one of which is general and the other of which is specific, the specific prevails. (See O.R.C. §1.51). Dog Strict Liability Statute should trump general Equine Immunity Statute.

“Beware of Dog Sign” – is evidence of harboring a dog. Uhl v. McKoski, 2014-Ohio-479 (9th Dist. C.A. No. 27066). However, sign alone is not enough to raise question of fact to defeat summary judgment. No evidence of how long the sign was present nor that landlord saw or knew of the sign.

Restrictive Ordinances and Laws:

The Ohio Supreme Court in the case of City of Toledo v. Tellings, 114 Ohio St. 3d 278, 2007-Ohio-3724 (2007) reversed an Appeals Court to reinstate City of Toledo’s restriction on one pit bull per household and requiring liability insurance. The Ohio Supreme Court reversed the Appellate Court’s holding that restricting dog ownership (Pit Bulls) to one per household was unconstitutional. The Supreme Court held that the government has a legitimate and rational interest in protecting citizens from dangers of pit bulls.

955.28 Dog may be killed for certain acts - owner liable for damages.

(A) Subject to divisions (A)(2) and (3) of section 955.261 of the Revised Code, a dog that is chasing or approaching in a menacing fashion or apparent attitude of attack, that attempts to bite or otherwise endanger, or that kills or injures a person or a dog that chases, threatens, harasses, injures, or kills livestock, poultry, other domestic animal, or other animal, that is the property of another person, except a cat or another dog, can be killed at the time of that chasing, threatening, harassment, approaching, attempt, killing, or injury. If, in attempting to kill such a dog, a person wounds it, the person is not liable to prosecution under the penal laws that punish cruelty to animals. Nothing in this section precludes a law enforcement officer from killing a dog that attacks a police dog as defined in section 2921.321 of the Revised Code.

(B) The owner, keeper, or harbinger of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless the injury, death, or loss was caused to the person or property of an individual who, at the time, was committing or attempting to commit criminal trespass or another criminal offense other than a minor misdemeanor on the property of the owner, keeper, or harbinger, or was committing or attempting to commit a criminal offense other than a minor misdemeanor against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harbinger's property. Additionally, the owner, keeper, or harbinger of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog if the injury, death, or loss was caused to the person or property of an individual who, at the time of the injury, death, or loss, was on the property of the owner, keeper, or harbinger solely for the purpose of engaging in door-to-door sales or other solicitations regardless of whether the individual was in compliance with any requirement to obtain a permit or license to engage in door-to-door sales or other solicitations established by the political subdivision in which the property of the owner, keeper, or harbinger is located, provided that the person was not committing a criminal offense other than a minor misdemeanor or was not teasing, tormenting, or abusing the dog.

Effective Date: 07-10-1987; 2008 HB71 09-30-2008