

# When Man's Best Friend Bites (*Reprise*)

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Thirteen years ago, this author wrote an article about the state of Missouri law with respect to liability for injuries caused by domestic animals, particularly dog bites.<sup>2</sup> While the essential principles of this area of law have not changed, there have been some developments in recent years that warrant an updated analysis. This article will discuss the recent developments in, and current status of, Missouri law as it pertains to liability for dog bites and other injuries caused by animals.

## Overview

The general rule in Missouri remains that an owner<sup>3</sup> of a domestic animal is not liable for injuries, including bites, inflicted by the animal unless the owner knew or had reason to know that such injury was reasonably foreseeable.<sup>4</sup> There are four main theories of recovery for injuries inflicted by animals, each with their own elements or variations of familiar elements necessary to impose liability: (1) strict liability; (2) premises liability; (3) ordinary negligence; and (4) negligence per se. Based on relatively recent trends in the law, the degree of foreseeability required to impose liability seems to depend largely on where the injury occurred, and how the cause of action is pleaded.

## Strict Liability

Theoretically, strict liability is a relatively simple theory on which to prevail for a plaintiff. It, along with some versions of negligence per se, is one of the two theories in which the animal owner's exercise of due care is largely irrelevant. A plaintiff in a strict liability case need

only prove that the animal had "dangerous propensities abnormal to its class[.]"<sup>5</sup> that the owner had "actual or constructive knowledge" thereof, and that plaintiff was injured thereby.<sup>6</sup> Proof of the owner's negligence or failure to take precautions is not required; the fact that the animal's dangerous propensities were abnormal even for that class of animal is sufficient under the law to impose liability upon the owner.<sup>7</sup> Similarly, taking extra steps to provide warnings, such as "BEWARE OF DOG" signs, will not shield the owner from strict liability because the liability stems not from failing to warn, but from owning the dog in the first place.<sup>8</sup>

Although theoretically facile, actually prevailing under strict liability can prove challenging from a practical standpoint. The prior article discussed some of the practical concerns with the strict liability analysis, such as how to determine when an animal's dangerous propensities are abnormal, or what constitutes a "class," or how to classify mixed-breed dogs and old-fashioned mutts. The reader is referred to the prior article for a more detailed treatment of those potential issues.<sup>9</sup> While reaffirming the underlying principles of law, unfortunately none of the recent appellate cases has addressed those *practical* concerns. For example, in *Duren v. Kunkel*, a bull expert was used to explain the propensities of the limousin bull at issue in that case, in comparison with the normal propensities of the limousin breed of bull in general. However, neither *Duren* nor any of its progeny has specifically stated whether expert testimony is

actually required to educate the jury on the dangerous propensities of a particular owner's animal vis-à-vis the normal propensities of the class of animal to which the owner's animal belongs. Thus, while the underlying legal concepts have not changed in recent years, neither has there been any resolution to some of the lingering practical concerns with proceeding under a strict liability theory.

## Premises Liability

Utilizing premises liability as a theory of recovery in animal injury cases is nothing new, having first appeared in reported decisions in Missouri in 1939.<sup>10</sup> Recent cases in which recovery has been sought on this theory include *Wilson ex rel. Wilson v. Simmons*<sup>11</sup> and *Savory v. Hensick*.<sup>12</sup>

The rationale behind premises liability in animal injury cases is the same as in other premises liability cases: that there was a condition on the premises that caused the premises to be not reasonably safe, of which the landowner had some knowledge, and plaintiff was injured thereby. In a dog bite case, the "condition" on the premises is the presence of the dog with dangerous propensities. Thus, if a person is bitten by a dog while on the property of another, the landowner may be liable under a premises liability theory. Traditional premises liability analysis comes into play in that the first step is to ascertain the entrant's status on the property (invitee, licensee, trespasser). Once the status is determined, then the landowner's duty is established, as well as the degree of knowledge (actual versus constructive) necessary to impose liability.

Other factors, such as whether the owner took reasonable steps to warn, and the plaintiff's comparative fault, also come into play, as in almost any premises liability case.

There are two principal differences between strict liability dog bite cases and premises liability dog bite cases. The first difference is the owner's negligence. In strict liability cases, the owner's negligence is a non-issue. If the owner knows the dog has dangerous propensities abnormal to its class, then the dog owner will be liable. In premises liability cases, though, proof

that the dog "has dangerous propensities abnormal to its class."<sup>13</sup> In premises liability cases, the dog's propensities to injure humans do not have to be abnormally dangerous; liability will be imposed if the dog's propensities are simply dangerous. The distinction is subtle, but significant: "abnormally dangerous propensities for its class" versus simply "dangerous propensities." So, if a German shepherd has been known to bite people in the past, that alone would not normally be sufficient to hold the owner strictly liable under the Supreme Court's analysis in *Duren*, because German shepherds bite; that is not something that is abnormal to that class of dog. However, if that German shepherd was allowed to run loose on the owner's property, and it bit an invitee on the property, then the owner would likely be held liable under a premises liability theory, because the premises, with that dog thereon, were not reasonably safe, and the owner had knowledge of the dog's (not necessarily abnormally) dangerous propensity to bite.

It is worthy of noting here that the dangerous propensities necessary to impose liability are not limited to a tendency of the animal to bite or attack. The cases of *Boosman v. Moudy*<sup>14</sup> and *Dansker v. Gelb*,<sup>15</sup> involving injuries caused by "playful dogs," were referenced in the prior article, and the reader is referred there for an analysis of those cases. *Savory v. Hensick*<sup>16</sup> is a more recent case involving neither a vicious dog nor a playful dog, but just dogs who were constantly underfoot. While constructing a deck on the dog owner's house, a contractor stepped down from a ladder and accidentally stepped on one of the dogs' paws. The contractor fell and was injured and brought suit against



of the landowner's negligence is not only relevant, but is a required element of the cause of action. The second principal difference involves the temperament of the dog. In strict liability cases, as set forth in the preceding section, it must be shown

the homeowner under a premises liability theory. The dogs' owner argued that there was no duty owed because the injury was not reasonably foreseeable. The dogs were gentle, friendly dogs; had never harmed anyone in the past; and in particular, had never before caused a problem for people on ladders. The contractor maintained that the dogs were always in the way, and the contractor had asked the dogs' owner several times to restrain the dogs to keep them out of the way. The court held that a dismissible case was made as to whether the premises, with the dogs present, were reasonably safe:

[N]egligence may be predicated on the characteristics of an animal that create a foreseeable risk of harm. "[A]n owner of a dog may be liable for injuries caused by the dog even if the animal is not vicious, if the plaintiff can prove that the owner's negligent handling of the animal caused the animal to injure the plaintiff."<sup>17</sup>

However, the dangerous propensities of an animal required to impose liability are limited to the animal's tendency to injure humans, not other animals. In *Crimmins v. Mirly*,<sup>18</sup> a 5-year-old girl was bitten by a neighbor's Labrador retriever, and filed suit against the owner. The girl's mother testified that, on numerous occasions, the Labrador entered their yard and engaged in fights with their dog over food, with the dogs growling and snapping at each other. The court held that plaintiff failed to make a dismissible case: "A dog fighting with another dog over food is a common occurrence and is more indicative of the general characteristics and instincts of dogs rather than the propensity to act viciously against people."<sup>19</sup>

## Ordinary Negligence

The theory of ordinary negligence is usually utilized when the dog bite occurs away from the dog owner's premises. Cases of this variety include instances where a dog breaks from a chain or leash, or even if,

while the dog is on a leash, the owner fails to properly restrain the dog from jumping on and/or biting someone. In *Like ex rel. Like v. Glaze*,<sup>20</sup> a dog chained in its owner's backyard broke free from its chain, chased a passing pedestrian, and bit him. There was no evidence the dog had ever acted aggressively before, so a strict liability claim was not viable. The incident did not occur on the dog owner's premises, so premises liability did not apply. The plaintiff in that case proceeded on an ordinary negligence theory. In analyzing the applicability of an ordinary negligence theory to dog bite cases, the court in *Like* stated:

There may be some circumstances, however, where it would be negligent to allow a dog to run at large. In these cases, there may be liability for negligence upon the same basis as in other negligence cases. Therefore, to succeed on his negligence claim, [plaintiff] must satisfy the elements of a negligence cause of action: (1) the existence of a duty on the part of [the dog owner] to protect [plaintiff] from injury, (2) breach of that duty and (3) proximate cause.<sup>21</sup>

Ultimately, the court in *Like* found that the owner had no duty to restrain the dog; although the dog would bark and jump up when a stranger approached, there was no evidence that it had ever bitten, attacked, or harmed anyone. "[Plaintiff] has not produced any evidence tending to show that it was foreseeable that the dog could cause harm if it were allowed to run at large."<sup>22</sup>

Despite the particular outcome in *Like*, it is clear that ordinary negligence is a viable theory upon which to pursue a claim for animal liability, provided the required elements can be satisfied. In July of this year, a new MAI instruction on general negligence took effect that will likely govern ordinary negligence dog bite cases. Missouri Approved Instruction 31.00 lists the

required elements of "general negligence" as follows: "First, defendant (*here insert an act or omission consistent with the theory of general negligence*), and Second, defendant was thereby negligent, and Third, as a direct result of such negligence, plaintiff sustained damage."<sup>23</sup> Of course, traditional defenses available in ordinary negligence cases, such as comparative fault, will also be available in dog bites cases brought under this theory. Moreover, in ordinary negligence cases, as with strict liability and premises liability cases, the animal owner's knowledge of the animal's dangerous propensities is definitely a relevant factor, since it goes to the issue of foreseeability and the owner's duty. "A duty is established when a defendant is shown to have actual or constructive knowledge that there is some probability of injury sufficiently serious that an ordinary person would take precautions to avoid it."<sup>24</sup>

## Negligence Per Se

Violation of a statute or ordinance can give rise to civil liability in certain circumstances. Negligence per se—actionable negligence based on the violation of a statute or ordinance—occurs where

- (1) there was a violation ... of the [statute or] ordinance;
- (2) the injured party was within the class of persons intended to be protected by the [statute or] ordinance;
- (3) the injury [or harm] complained of was of [the] character the [statute or] ordinance was designed to prevent; and
- (4) the violation [of the statute or ordinance] was the proximate cause of the injury.<sup>25</sup>

As more and more communities began to enact leash laws and other ordinances pertaining to the ownership and maintenance of dogs, negligence per se gained some popularity as a theory of recovery in dog bite cases.

One of the first reported cases seeking to recover for a dog bite under a negligence per se theory was *Sayers v. Haushalter*,<sup>26</sup> where

a 3-year-old girl visiting her grandfather was attacked by his Alaskan Malamute. She ran onto the patio of his house and called out to the dog, who leapt at her and grabbed her head in its jaws. There was evidence that the dog had previously bitten the ear of a neighbor child, but there was no conclusive evidence of whether that prior bite was provoked. Plaintiff's case was submitted to the jury on three theories: common law negligence, and two submissions of negligence per se for violation of a county ordinance. With respect to the negligence per se claims, the court held that those claims were improperly submitted to the jury because the injury complained of was not of the type and character the ordinance was designed to prevent:

The obvious purpose of the ordinance is the prevention of the spread of rabies. Most of the ordinance deals with vaccination of dogs against that disease; apprehension, quarantine, and examination of animals suspected of having rabies; . . . It is in this context that the 'running at large' provision and the 'bad dog' provision must be viewed. . . . But even if a violation could be found, we are unable to say that the ordinance was aimed at this type of factual situation.<sup>27</sup>

Three years after *Sayers*, the Missouri Court of Appeals for the Western District took up the case of *Shobe v. Borders*.<sup>28</sup> The City of Independence ordinance in question in *Shobe* made it unlawful for the owner of a dog to let it run at large at any time within the city limits. "At large" was defined as "off the premises of the owner and not under the reasonable control of owner or member of the immediate family."<sup>29</sup> The definition of "not under reasonable control" included the circumstance "when such dog commits damage to the person or property of anyone other than its owner, except when the dog is in defense of its owner, his family or property."<sup>30</sup>


The dog in *Shobe* was being walked without a leash by its owner. As the plaintiff rode by on a motorcycle, the dog "ran from the sidewalk into the street. [The dog] grabbed the front wheel of the motorcycle causing the cycle to overturn, throwing [plaintiff] to the pavement."<sup>31</sup> The owner argued that the ordinance, by use of the phrases "at large," "reasonable control," and "not under reasonable control," was "unconstitutionally vague" and too confusing to impose civil liability for non-compliance.<sup>32</sup> The court disagreed, finding that the language of the ordinance was plain and straightforward. The dog owner also sought to argue that the plaintiff was not within the class of

persons intended to be protected by the ordinance, but the court determined that issue had not been preserved for appellate review, and declined to address it. Later, in *Jensen v. Feely*,<sup>33</sup> the Western District cleared up the issue by indicating that the Independence ordinance it was then considering, as with the predecessor ordinance considered by the *Shobe* court, was enacted to prevent the kind of injury (dog bite) being brought by plaintiff, and even "transcend[s] the usual public health preoccupation to prevent rabies."<sup>34</sup> The result in *Jensen* is to be contrasted with *Vandeven v. Seabaugh*,<sup>35</sup> where the court refused to allow § 578.009,<sup>36</sup> pertaining to animal neglect, to form the basis for negligence per se when an unrestrained dog bit plaintiff while plaintiff was riding her bicycle: ". . . [T]his court is not persuaded that the legislature intended either that plaintiff fall within the class of persons to be protected by the statute or that plaintiff's injury constitutes the type of harm the statute was designed to prevent."<sup>37</sup>

A very interesting twist on liability based on a leash law violation was addressed in *Egenreither v. Carter*.<sup>38</sup> The owner's dog escaped from the owner's fenced-in yard while the owner was not home, during which time the dog bit plaintiff. Plaintiff proceeded under a negligence per se theory based on a City of St. Louis ordinance

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that stated in pertinent part: “No owner of any dog shall permit such dog to be or found at large on the streets of the City of St. Louis . . . unless such dog is on a leash.”<sup>39</sup>The dog owner argued that she did not “permit” the dog to run at large; the dog escaped the fenced-in yard when the owner’s son accidentally left the gate open while the owner was away from home. The owner argued that the ordinance’s use of the word “permit” “implies that the owner must have knowledge [of] or affirmatively consent to the dog” running at large before a violation of the statute can be found.<sup>40</sup> The court disagreed. Referring to Webster’s Dictionary, the court noted that the word “permit” was defined therein to mean “to give permission; to authorize; to allow by silent consent, or by not prohibiting. . . .”<sup>41</sup> The court reasoned that “the ordinance imposes upon a dog owner the affirmative obligation to ensure that the dog [is restrained] ‘so as to effectively prevent [the dog] from biting any person or animal.’”<sup>42</sup>

The court also observed that, under the prior leash law cases – *Shobe* and *Jensen*, specifically – “the owner’s knowledge or acquiescence” was never a required showing to establish “negligence per se.”<sup>43</sup>

The dog owner in *Egenreither* also sought to submit a converse instruction of legal justification or excuse to explain her alleged failure to comply with the statute, i.e., that she was not at home at the time the dog escaped her yard. However, the court refused to allow the owner to submit a justification converse, because the owner’s reason for non-compliance did not constitute a legal excuse recognizable by law:

The fact that Defendant was not at home when the incident occurred did not relieve her of her affirmative obligation imposed by the statute to ensure that the dog either remained in her yard or was restrained on a leash by a

responsible person so as to prevent it from biting anyone. Compliance with the ordinance was not rendered impossible by any circumstance beyond Defendant’s control.<sup>44</sup>

Although not explicitly stated in the opinion, an analysis of *Egenreither* easily leads one to the conclusion that cases brought under a negligence per se theory are actually more “strict” than cases brought under a strict liability theory. At least in a strict liability dog bite case, the owner’s knowledge (actual or constructive) of the dog’s dangerous propensities is still a required element of proof. As can be gleaned from *Egenreither*, depending on the wording of the statute or ordinance in question, not only is a plaintiff not required to show the dog owner’s knowledge of the dog’s dangerous propensities, a plaintiff is not required to show that the dog even had dangerous propensities to begin with. Moreover, if a plaintiff is not required to

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establish the dog owner's knowledge that his or her dog is at large, and the owner is limited in presenting defenses for their non-compliance with these types of ordinances, liability will be imposed on dog owners more readily in negligence per se cases than in those brought under a strict liability theory.

## Conclusion

There are a number of options available for proceeding with an animal liability case, most of which are largely dictated by the particular circumstances present in each case (e.g., abnormally dangerous vs. dangerous propensities; on premises or off premises; applicability of an ordinance, etc.) Recent cases have not necessarily changed the law of animal liability in Missouri, but they have widened the aperture through which potential liability of animal owners may be viewed and analyzed. Nevertheless, the key element in the courts' opinions in these cases remains foreseeability, and the law will impose liability where it is reasonably foreseeable that an injury, under the given circumstances, could occur. Even in *Egenreither*, the court attempted to address the foreseeability element by noting that the owner could have placed her dog in a dog pen to restrain the dog whenever it was necessary to open the gate to the yard. As

aply stated by the court in *Like ex rel. Like v. Glaze*: "Foreseeability is the touchstone for the creation of a duty."<sup>45</sup>

## Endnotes

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2 Keith A. Cutler, *When Man's Best Friend Bites*, 54 J. Mo. B. 24 (1998).

3 For convenience, this article refers to "owners" throughout, although the laws and principles discussed herein also apply to "possessors" of animals as well.

4 See *Wilson ex rel. Wilson v. Simmons*, 103 S.W.3d 211 (Mo. App. W.D. 2003).

5 *Duren v. Kunkel*, 814 S.W.2d 935, 937 (Mo. banc 1991). Missouri courts have used a number of terms to describe an animal's characteristics, the knowledge of which will trigger liability: "dangerous tendencies," "vicious propensities," "vicious tendencies," "tendency to injure humans," etc. The most often-used phrase is "dangerous propensities," which is the term used throughout this article.

6 *Duren* at 837.

7 See RESTATEMENT (SECOND) OF TORTS § 509(1) (1977).

8 See *Lavin v. Carroll*, 871 S.W.2d 465 (Mo. App. E.D. 1994).

9 Keith A. Cutler, *When Man's Best Friend Bites*, 54 J. Mo. B. 24 (1998).

10 *Alexander v. Crockett*, 124 S.W.2d 534 (Mo. App. W.D. 1939).

11 103 S.W.3d 211 (Mo. App. W.D. 2003).

12 143 S.W.3d 712 (Mo. App. E.D. 2004).

13 RESTATEMENT (SECOND) OF TORTS § 509(1) (1977).

14 488 S.W.2d 917 (Mo. App. W.D. 1972).

15 352 S.W.2d 12 (Mo. 1961).

16 143 S.W.3d 712 (Mo. App. E.D. 2004).

17 *Id.* at 718 (citations omitted).

18 675 S.W.2d 663 (Mo. App. E.D. 1984).

19 *Id.* at 664-65

20 126 S.W.3d 783 (Mo. App. E.D. 2004).

21 *Id.* at 785.

22 *Id.*

23 MAI 31.00 [2011 New] (emphasis in original).

24 *Id.*

25 *Purdy v. Foreman*, 547 S.W.2d 889, 892 (Mo. App. S.D. 1977).

26 493 S.W.2d 406 (Mo. App. E.D. 1973).

27 *Id.* at 409-410.

28 539 S.W.2d 330 (Mo. App. W.D. 1976).

29 *Id.* at 331.

30 *Id.*

31 *Id.* The court's opinion does not state exactly how the dog grabbed the front wheel of the motorcycle, whether by use of teeth, paws, or both.

32 539 S.W.2d at 331.

33 691 S.W.2d 926 (Mo. App. W.D. 1985).

34 *Id.* at 928.

35 753 S.W.2d 46 (Mo. App. E.D. 1988).

36 *Id.*, citing § 578.009, RSMo (1986).

37 *Id.* at 48.

38 23 S.W.3d 641 (Mo. App. E.D. 2000).

39 *Id.* at 643.

40 *Id.* at 644.

41 *Id.* (citing WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1336 (2d ed. 1983) (emphasis added)).

42 *Id.*

43 *Egenreither* at 645.

44 *Id.* at 646.

45 126 S.W.3d 783, 785 (Mo. App. E.D. 2004).

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Re: "When Man's Best Friend Bites (*Reprise*)" published in the July/August 2011 issue of the *Journal of The Missouri Bar*.

Dear Editor:

The July-August 2011 issue of THE JOURNAL OF THE MISSOURI BAR contained an article which I authored entitled, *When Man's Best Friend Bites (Reprise)*, discussing the status of the law surrounding liability for animal attacks in general, and dog bites in particular. With respect to dog bites, the article did not include reference to a relatively new statute, §273.036 RSMo. Enacted in 2009, this statute imposes strict liability on the "owner or possessor of any dog that bites, without provocation, any person while such person is on public property, or lawfully on private property, including the property of the owner or possessor of the dog." Under the statute, strict liability is imposed regardless of the former viciousness of the dog, or of the owner's or possessor's prior knowledge thereof. However, an injured party's damages will be reduced by any percentage that the injured party's fault contributed to cause the incident. A person found liable under this statute is also subject to a fine not to exceed \$1,000.

The statute does not apply to all animal attacks. By the language of the statute, it only applies to dogs; it only applies to injuries caused by actual bites; and it only applies to dogs that bite without provocation. Readers are encouraged to consult the statute in conjunction with the other authorities cited in the article for a more complete analysis of the law.

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