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Dog Bite Law

California

California is a strict liability state, meaning that a dog owner is liable for injuries inflicted by his dog upon a human being, even if the owner was not negligent and the dog had never bitten anyone before.

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Liability based on the dog bite statute

California is one of the states that has a dog bite statute, meaning a law that repudiates in whole or part the common law's requirement of "scienter" (i.e., knowledge that the animal had previously injured a person in the same manner, such as by a bite). California Civil Code section 3342 provides as follows:

> 3342. (a) The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. A person is

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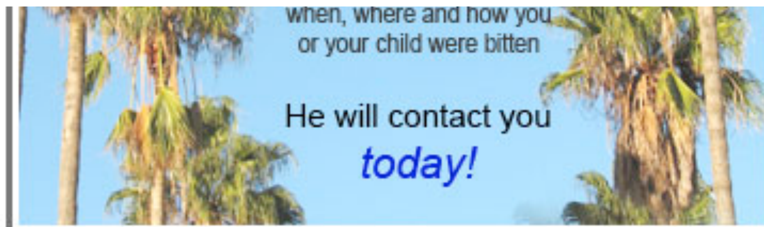
lawfully upon the private property of such owner within the meaning of this section when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon the invitation, express or implied, of the owner.



(b) Nothing in this section shall authorize the bringing of an action pursuant to subdivision (a) against any governmental agency using a dog in military or police work if the bite or bites occurred while the dog was defending itself from an annoying, harassing, or provoking act, or assisting an employee of the agency in any of the following:

(1) In the apprehension or holding of a suspect where the employee has a reasonable suspicion of the suspect's involvement in criminal activity.

(2) In the investigation of a crime or possible crime.

(3) In the execution of a warrant.

(4) In the defense of a peace officer or another person.

(c) Subdivision (b) shall not apply in any case where the victim of the bite or bites was not a party to, nor a participant in, nor suspected to be a party to or a participant in, the act or acts that prompted the use of the dog in the military or police work.

(d) Subdivision (b) shall apply only where a governmental agency using a dog in military or police work has adopted a written policy on the necessary and appropriate use of a dog for the police or military work enumerated in subdivision (b).

The statute is "designed...to prevent dogs from being a hazard to the community." Davis v. Glaschler (1992) 11 Cal.App.4th 1392, 1399. It does this by unequivocally placing the burden of dog bites upon those who choose to have dogs. Because "the owner is virtually an insurer of the dog's conduct" (Massey v. Colaric (1986) 151 Ariz. 65, 725 P.2d 1099, 1100, interpreting Arizona's identically worded dog bite statute), a responsible dog owner is expected to be vigilant in preventing

his dog from biting anyone.

The statute also benefits the public by reducing the conflict that otherwise could follow a dog attack. Because liability is automatic, the dog owner and the victim can maintain their personal relationship unharmed by the threat of litigation, accusations of wrongdoing, or a drawn out claims process. This is important because 75% of the time, the victim is a family member, neighbor or friend of the dog owner.

Liability based on the common law doctrine of scienter

Like all other American states, California has maintained the common law cause of action based on "scienter" or knowledge of a domestic animal's dangerousness. Hillman v. Garcia-Ruby, 44 Cal.2d 625, 626 (1955): "[T]he keeper of an animal of a species dangerous by nature, or of any animal which he knows, or has reason to know, to have dangerous propensities, is liable, without wrongful intent or negligence, for damage to others resulting from such a propensity."

In a scienter case, it is not required to prove negligence on the part of the dog owner. "[T]he gravamen of the action is knowledge of the owner that the beast was the possessor of vicious or mischievous propensities. Negligence or lack of care on the part of the owner in keeping or restraining the animal need not be shown." (Hicks v. Sullivan (1932) 122 Cal.App. 635, 637-638.) The wrongdoing in such a case is the decision to keep a dangerous animal. "[T]he gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case." (Hillman v. Garcia-Ruby (1955) 44 Cal.2d 625, 626.)

The two key elements of a scienter claim are prior dangerous behavior and knowledge of it on the part of the defendant. In a dog bite case, the prior behavior may consist of either a vicious bite or behavior that clearly demonstrated the vicious propensity to bite.

If the prior bite was fully justified then it would not qualify as vicious, and consequently would not satisfy the requirements of the scienter doctrine. For example, if the dog previously bit a child who was hitting it with stick, the dog's action probably would be regarded as justified and not as demonstrating a dangerous or vicious nature.

The victim of the prior bite must be a human being, not another animal. This is based upon the belief that a dog that fights other animals will not necessarily attack humans. For that reason, a claim of strict liability cannot be based on the sole fact that the attacking dog had previously fought with another dog or other animal. "Knowledge that a dog will fight with other animals does not impute notice that it will attack humans." Belli, 2 Modern Trials 2d.Ed., sec. 35.3, p. 70, citing Sink v. Moore (1966) 267 NC 344, 148 SE2d 265; Fowler v. Helck (1939) 278 Ky. 361, 128 SW2d 564.

However, there has been no study to prove that belief valid. In fact, the experience of Attorney Kenneth Phillips suggests that a significant percentage of bites to humans results from attacks by one dog upon another dog. For that reason, it is his opinion that a dog's propensity to attack other dogs clearly makes that dog dangerous to people. (See the relevant section of Dangerous and Vicious Dogs.)

The owner's or keeper's knowledge of a dog's vicious or dangerous propensities may be inferred by (1) the general reputation of the dog, (2) the size and breed of the dog, or (3) the fact that the dog is kept chained or muzzled. (Smith v. Royer (1919) 181 Cal. 165, 170; 1 California Torts (1994), "Strict Liability -- Animals," sec. 6.10[3], p. 6-10.)

The scienter cause of action has limited application in California. Because this legal theory is the corollary of the one-bite rule, and because the fundamental purpose of the dog bite statute is to abolish the one-bite rule in most respects, there is no need to employ the scienter theory when the dog has bitten a person and the defendant is the dog owner. The doctrine may be indispensable, however, in a dog bite case that aims to establish liability on the part of someone who was not the owner of the dog.

Liability based on negligence and negligence per se

California permits a dog bite victim to recover from a person whose negligence causes the incident to occur.

Neglience can be based on mishandling a dog (Barnett v. La Mesa Post No. 282 (1940) 15 Cal.2d 191 [horse in a parade]), ineffectively controlling or failing to control a dog (Drake v. Dean (1993) 15 Cal.App.4th 915 [leaping dog], putting a dog in a situation that foreseeably can cause injury (Baley v. J.F. Hink & Son (1955) 133 Cal.App.2d 102 [small dog on a leash]), or violating an animal control law (Delfino v. Sloan (1994) 20 Cal.App.4th 1429 [violation of leash law]).

In Barnett v. La Mesa Post No. 282 (1940) 15 Cal.2d 191, a parade horse injured two bystanders. The horse had never before manifested a dangerous propensity. On that day, however, the horse was "rearing and whirling and backing around." 15 Cal.2d at 193. The court held that nonsuit was improper on the count that alleged negligent supervision and management of the horse. The case creates liability for mishandling a dog or any other animal.

In Drake v. Dean (1993) 15 Cal.App.4th 915, a dog knocked a woman to the ground. The court cited with approval the following general rule: "[A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury

could occur, and injury does proximately result from that negligence." 15 Cal.App.4th at 926."The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen." 15 Cal.App.4th at 926.

Liability for ineffective control does not rest on proving defendant's animal was dangerous. Restatement Second, section 518, comment (h), recognizes that "even ordinarily gentle animals are likely to be dangerous under particular circumstances." For that reason, an animal owner is required to (a) know the animal's normal tendencies, (b) know which normal tendencies are likely to be dangerous under particular circumstances, and (c) exercise reasonable care to prevent harm from those normal, but dangerous, tendencies. (Id.)

In Baley v. J.F. Hink & So, (1955) 133 Cal.App.2d 102 , liability was found when a small dog, on a leash, ran against plaintiff's leg, causing her fall. The court reasoned that, because the parties were in a department store, the dog owner should have exercised greater control. Baley thus holds that it is negligent to place a dog in a situation that foreseeably can result in injury. Restatement Second, section 518, comment (h), cautions that "even ordinarily gentle animals are likely to be dangerous under particular circumstances."

Delfino v. Sloan (1994) 20 Cal.App.4th 1429, holds that a local ordinance, penalizing an owner whose dog is allowed to roam public streets unleashed, is an animal control law enacted to protect public health and safety. For that reason, the violation of a leash law or other animal control law constitutes negligence per se. "And if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care." (Witkin, 6 Summary of California Law (9th Ed.), "Negligence Per Se," sec. 818, pp. 170 et seq.

The doctrine of negligence per se is codified in Evidence Code section 669, as follows:

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669. (a) The failure of a person to exercise due care is presumed
if:

  (1)  He violated a statute, ordinance, or regulation of a public
entity;

  (2)  The violation proximately caused death or injury to person
or property;

  (3)  The death or injury resulted from an occurrence of the
nature which the statute, ordinance, or regulation was designed to
prevent; and

  (4)  The person suffering the death or the injury to his person
or property was one of the class of persons for whose protection
the statute, ordinance, or regulation was adopted.
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(B) This presumption may be rebutted by proof that:

(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or

(2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

Dog owners frequently keep their dogs tied to benches, parking meters and other objects. This practice may violate local leash laws. which usually require a competent person at the other end of the leash. Furthermore, tying or chaining a dog is a crime under the laws of a growing number of cities. (See "Examples from studies" in Why Dogs Bite People.) Similarly, the California Penal Code makes it a misdemeanor to affix any animal to anything unless the animal can reach shelter, food and water:

597t. Every person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area. If the animal is restricted by a leash, rope, or chain, the leash, rope, or chain shall be affixed in such a manner that it will prevent the animal from becoming entangled or injured and permit the animal's access to adequate shelter, food, and water. Violation of this section constitutes a misdemeanor.

This section shall not apply to an animal which is in transit, in a vehicle, or in the immediate control of a person.

The local laws of the city or county may provide for broader liability than state law. Here is an example from the Beverly Hills Municipal Code:

Sec. 5-2.112. Liability for injury or damages.

(a) Any person owning, controlling, or having care or custody of any animal shall be liable for any injury caused by such animal, and for any damage caused to any public property, or to any private property.

(b) Any person owning, controlling or having care or custody of any animal shall take such reasonable and

necessary precautions as required to protect all persons from physical harm from such animal, and to protect the private property of any other person. (1962 Code §§ 5-1.108, 5-1.207)

Note the advantages of proceeding under the Beverly Hills code section:

- It is not restricted to just the owner of the dog
- It applies to any injury, not just dog bites
- It applies to property damage as well as personal injuries

Local laws also might provide other avenues of liability for dogs that cause injury. For example, a municipal code section might prohibit walking more than a certain number of dogs. Violation of such a provision could constitute negligence per se. For example, here is another section of the Beverly Hills code:

> Sec. 5-2.204. Walking dogs. It shall be unlawful for any person owning, controlling, or having in their care or custody, whether upon a leash or not, upon any public street, alley, or public place or upon any unenclosed land or property, four (4) or more dogs at any one time. (5-1.206 Amd.)

Local ordiances might not contain animal control laws, but might adopt such laws from an overlapping or nearby jurisdiction. For example, a city within a county might adopt that county's animal control laws:

> City of West Hollywood Municipal Code sec. 9.48.010: Adoption of Animal Control Ordinance. Title 10, Animals, of the Los Angeles County Code, as amended and in effect on February 5, 1993, is hereby adopted by reference as the "Animal Control Ordinance" of the City of West Hollywood. A copy of the Animal Control Ordinance has been deposited in the office of the City Clerk and shall be at all times maintained by the Clerk for use and examination by the public.

When confronted with an adoption law, however, be sure to read it fully. The local municipal code might contain sections that repeal and replace some of the sections of the adopted law:

> City of West Hollywood Municipal Code sec. 9.48.040: Amendments and Repeals to the Los Angeles County Code, Title 10, Animals.
>
> a. Sections Repealed. Notwithstanding the provisions of Section 9.48.010 of this code, Los Angeles County Code Sections 10.48.030C, 10.48.030D, 10.48.030E, 10.48.030G, 10.48.030H, 10.48.030I, 10.48.030M, all of Chapter 10.52, Sections 10.56.020, 10.56.030, 10.56.040, 10.56.050, all of Chapter 10.60, Sections 10.64.050, 10.64.070, of Title 10, Division 2, Animal Health, and all of Chapter 10.76 and Section 10.90.010V, A.4 of Title 10, Division 3, "Miscellaneous Regulations," are hereby repealed.

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b.  Amendments to Los Angeles County Code Chapter 10.37.
Notwithstanding the provisions of Section 9.48.010, the Animal
Control Ordinance is amended by adding and amending Los Angeles
County Code Chapter 10.37 to read: [omitted].
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The negligence cause of action in California does not require proof of a dangerous propensity or knowledge thereof. "In a negligence action for personal injury caused by a dog, the plaintiff need not plead and prove that the injury was caused by some abnormal trait of the animal. The plaintiff need only prove that the defendant could reasonably have anticipated that the dog's conduct would cause injury and that the defendant did not exercise reasonable care to control the dog." (Levy, Golden, Sacks, 1 California Torts (1994), "Strict liability -- Animals," section 6.14, p. 6.26.)

The California rule of negligence in dog bite cases is similar to that observed by almost all American states, as established by the Restatement of Torts (2d), section 518, which provides, "Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if ... (b) he is negligent in failing to prevent the harm." (Cited in Drake v. Dean (1993) 15 Cal.App.4th 915, 924.)

There is a simple way to distinguish among the three most common varieties of liability for dog bites, which are statutory liability, common law strict liability, and negligence. Statutory liablity is based on mere ownership of the dog at the moment of injury, and the statute (Civil Code section 3342) is confined to the dog owner and a human victim. Common law strict liability is based on the owner or keeper's knowledge of the dog's dangerous propensity to inflict harm, and applies to any domestic animal, anyone who has custody or control of the animal, and any kind of harm inflicted. Under the doctrine of negligence, the unreasonable acts and omissions of any kind of defendant are the source of liability.

Liability based on other grounds

Liability for battery

Battery is defined as a harmful contact intentionally done. Ashcraft v. King (1991) 228 Cal.App.3d 604, 611. To constitute a battery, an act has to be unconsented to, not unlawful. Barouh v. Haberman (1994) 26 Cal.App.4th 40. In that case, the defendant slapped the plaintiff on the side of his head, without warning.

If the defendant intentionally caused the dog to attack the plaintiff, a cause of action for battery may be stated, with a request for punitive damages. Intent to cause harm may be proved several ways:

> "If the defendant acts with the intention of bringing about some type of harmful or offensive contact with plaintiff, he or she will be liable for any resulting injuries, even though he or she may not have intended the particular

> harm that resulted or any harm at all. Although the general definition of battery refers to 'intentional contact,' the authorities nevertheless indicate that an intent to cause an apprehension of harmful or offensive contact will suffice to create liability for resulting actual contact." Levy, Golden, Sacks, 3 California Torts (1994), "Assault and Battery," section 41.01[3][b], p. 41-8.

Liability for failure to vaccinate

A dog owner is required to vaccinate his or her dog with an anti rabies vaccine. Health and Safety Code section 1920, subdivision (b), provides in part that "[e]very dog owner, after his or her dog attains the age of four months, shall, at intervals of time not more often than once a year, as may be prescribed by the state department, procure its vaccination by a licensed veterinarian with a canine anti rabies vaccine ...." County ordinances frequently contain the same requirement.

A bite victim who has to submit to rabies treatment can base a cause of action on the fact that the attacking dog was over four months old when it bit plaintiff and had not been vaccinated against rabies. Davis v. Gaschler (1992) 11 Cal.App.4th 1392, 1399-1400.

Liability for injuries inflicted in ways other than a bite

The scienter cause of action can be used where the injuries were inflicted in ways other than a bite. The victim must prove the existence of a dangerous propensity that was known to the defendant.

A dangerous propensity can include dangerous playfulness and over-demonstrative affection:

> "[O]ne who keeps a large dog that he knows to be accustomed to fawn violently upon children and adults is liable under [section 509 of the Restatement] for harm done by its dangerous playfulness or over-demonstrative affection .... [Par.] ... [L]ikewise [i]f the possessor knows that his dog has the playful habit of jumping up on visitors, he will be liable without negligence when the dog jumps on a visitor, knocks him down and breaks his hip .... " (Restatement Second of Torts, sec. 509, comments (c) and (i), cited in Drake v. Dean, supra, 15 Cal.App.4th at p. 922.)

The treatise California Torts states:

> "The type of propensity necessary to hold a possessor strictly liable for injuries caused by a domestic animal need not necessarily be the type of malignancy exhibited by a biting dog, that is, a propensity to attack human beings. On the contrary, any propensity on the part of an animal that is likely to cause injury to human beings, under the circumstances in which the party controlling the animal places it, is a dangerous or vicious propensity within the meaning of the law. *** The tendency of a dog to jump on people has also been held to constitute a dangerous propensity." (1 California Torts (1994), "Strict Liability -- Animals," sec. 6.10[2][a], p. 6-7.)

However, it should be noted that evidence that an animal had infrequently jumped against persons

was held insufficient to support a verdict when plaintiff was knocked to the ground when the dog ran into the back of her legs. (Hagen v. Laursen (1953) 121 Cal.App.2d 379.)

Liability for a dog's wounding of other animals

California Civil Code section 3341 provides that the owner, possessor or harborer of a dog that wounds certain animals -- not including dogs and cats -- must pay damages and costs of suit:

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3341.  The owner, possessor, or harborer of any dog or other animal,
that shall, on the premises of any person other than the owner,
possessor, or harborer of such dog or other animal, kill, worry, or
wound any bovine animal, swine, horse, mule, burro, sheep, angora
goat, or cashmere goat, or poultry, shall be liable to the owner of
the same for the damages and costs of suit, to be recovered in any
court of competent jurisdiction:

   1. In the prosecution of actions under the provisions of this
chapter, it shall not be necessary for the plaintiff to show that the
owner, possessor, or harborer of such dog or other animal, had
knowledge of the fact that such dog or other animal would kill, wound
or worry bovine animals, swine, horses, mules, burros, sheep, goats,
or poultry. [ ... ]
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For cases involving the negligent injury to or killing of a dog, see What to Do If Your Dog Is Injured or Killed.

Landlord liability for dog bites inflicted by tenant's dog

Under some circumstances, a California landlord can be held liable when a dog belonging to a tenant bites a person. For example, the landlord might have been taking care of the dog, or might have failed to repair a gate or fence. In such cases, the liability of the landlord would be based upon negligence.

Liability might be established even where the accident happens off the landlord's property. For example, in Donchin v. Guerrero (1995) 34 Cal.App.4th 1832, a tenant's dogs attacked plaintiff four blocks away from where the dogs lived. The plaintiff sued the dog's owner and the owner's residential landlord. The court held that the landlord could be liable, explaining the law as follows: "If the dog is taken on a leash by its owner, off the premises, prevention of an attack by the dog may be beyond the landlord's control. But if the dog escapes the landlord's property because of defects in that property, the landlord is liable for the off-site injuries." In other words, a landlord can be held liable if a dog escapes as a result of broken or inadequate fencing.

There also are cases that hold that a landlord can be held liable for failure to eliminate a dangerous dog from the property. These cases basically are derived from the body of law pertaining to dangerous conditions of property, but are specific to instances of dog attacks.

In Portillo v. Aiassa (1994) 27 Cal.App.4th 1128, the court stated that: "We hold that a landlord has a duty to exercise reasonable care in the inspection of his commercial property and to remove a dangerous condition, which includes a dog, from the premises, if he knew, or in the exercise of

reasonable care would have known, the dog was dangerous and usually present on the premises." In that case, the plaintiff was bitten in a liquor store by a dog owned by the tenant who was operating the business. The court noted that it is reasonably foreseeable that guard dogs in commercial establishments open to the public will injure someone. The court also held that the landlord could not avoid liability by failing to inspect the premises and thereby claim that he had no knowledge of the dog.

In a residential landlord case, the court noted that the landlord with actual knowledge of the dangerous dog could be held liable, but that there was no duty to inspect the premises for such an animal:

> "[A] duty of care may not be imposed on a landlord without proof that he knew of the dog and its dangerous propensities. Because the harboring of pets is such an important part of our way of life and because the exclusive possession of rented premises normally is vested in the tenant, we believe that actual knowledge and not mere constructive knowledge is required. For this reason we hold that a landlord is under no duty to inspect the premises for the purpose of discovering the existence of a tenant's dangerous animal; only when the landlord has actual knowledge of the animal, coupled with the right to have it removed from the premises, does a duty of care arise." Uccello v. Laudenslayer (1975) 44 Cal.App.3d 504.

Defenses

Defense based on lack of ownership of dog

The California dog bite statute is limited, by its own terms, to the owner of the dog.

If the target defendant is not an owner, the victim must use the scienter cause of action. “[A] keeper, in contrast to an owner, is not an insurer of the good behavior of a dog, but must have scienter or knowledge of the vicious propensities of the animal before liability for injuries inflicted by such animal shall attach to him.” (Buffington v. Nicholson (1947) 78 Cal.App.2d 37, 42 [177 P.2d 51].)

Ownership of an animal can be proved a variety of ways. These include the animal control records, the written authority to euthanize, and circumstantial evidence such as where the dog commonly slept and who took the dog to the veterinarian. Exercising substantial control over a dog also is an indication of ownership.

In one case, the target defendant was able to avoid liability by proving that the victim had become the owner of the dog just minutes before the injury happened. In Menches v. Inglewood Humane Society (1942) 51 Cal. App. 2d 415, 418, the court held that the victim who purchased the dog from the local humane society only ten minutes before being bitten could not sue the former owner because "ownership became absolute upon delivery of the animal to plaintiffs and the payment by them of the impounding fee."

Defense based on injury caused by something other than a bite

By its own terms, the dog bite statute is limited to bites. Not all of the so called "dog bite statutes" mention bites, but California's does. When this type of law specifies that it applies to bites, then a defense can be based upon the contention that the injury was not by means of a bite. Did the dog bite or did it jump, frighten, trip, etc.?

It is not necessary that the skin be broken, however, in order for the statute to apply. (Johnson v. McMahan (1998) 68 Cal.App.4th 173, 176 [80 Cal.Rptr.2d 173].)

Defense based on trespass

The dog bite statute protects a victim "while in a public place or lawfully in a private place, including the property of the owner of the dog." This prevents trespassers from obtaining recovery. (Fullerton v. Conan (1948) 87 Cal.App.2d 354, 358 [197 P.2d 59].) Note, however, that a trespasser still can base a claim on strict liability for a dangerous propensity, or negligence. There is no Judicial Council jury instruction on this point, but BAJI Jury Instruction 6.67 (Dog Bite Statute) confirms that recovery is possible, in that it states:

> "One who is not lawfully on the property of a dog owner is a trespasser thereon, and if the trespasser is bitten by the dog, the question of liability must be determined in accordance with the rules of law now to be stated."

A person is considered to be lawfully on private property if he is there in furtherance of a duty required by law (i.e., a police officer or a mail carrier), or was there as a result of an express or impled invitation. See Judicial Council of California Civil Jury Instructions, Instruction 463 (Dog Bite Statute), which states:

> [Name of plaintiff] was lawfully on private property of the owner if [he/she] was performing any duty required by law or was on the property at the invitation, express or implied, of the owner.

It has been held that the reference to trespass in the dog bite statute means a technical trespass, not a criminal trespass. In Bauman v. Beaujean (1966) 244 Cal.App.2d 384, the defendant's dog bit a young child who was playing the defendant's backyard. The issue was whether the defendant expressly or impliedly invited the victim there. The Court first held that the plaintiff had to prove an express or implied invitation. (244 Cal.App.2d at pp. 387-388.) Finding that there was substantial evidence to support the jury's finding that there was no invitation, the Court turned to the issue of trespass. The New York rule was adopted:

> The correct rule is thus stated in Heller v. New York, N. H. & H. R. Co., 265 F. 192, 194: "Every unauthorized entry on another's property is a trespass and any person who makes such an entry is a trespasser. A trespasser is one who goes upon the premises of another without invitation, express or implied, and does so out of curiosity, or for his own purposes or convenience, and not in the performance of any duty to such owner. It is not necessary that one making such an entry should have any unlawful intent. ... A child, even of tender years, may be a trespasser. [Citing cases.]"

In Fullerton v. Conan (1948) 87 Cal.App.2d 354, the trial court found that a five- year-old child, who was lawfully on the premises, became a trespasser because he went into the backyard after being told not to.

Nevertheless, the invitation may be implied from the circumstances. In Smythe v. Schacht (1949) 93 Cal.App.2d 315 , the court found that there was sufficient evidence to sustain the inferential finding of the jury that there was at least an implied invitation to play in that portion of the yard where the assault by the dog took place.

Defense based on provocation, comparative negligence and assumption of the risk

Although Civil Code section 3342 appears to impose strict liability in all instances where the victim is not a trespasser and the dog was not on duty for the military or the police, California courts have denied recovery to victims who (a) provoked the dog, (b) negligently caused the attack, or (c) assumed the risk of a dog attack. Burden v. Globerson (1967) 252 Cal.App.2d 468, 471.

The court decisions are directly opposed to the wording of the statute, and yet, California courts have always permitted these defenses. See Johnson v. McMahon (1998) 68 Cal.App. 4th 173, 176, "[t]he defenses of assumption of the risk and contributory negligence may still be asserted" (citing Witkin, 6 Summary of Cal. Law, Torts, sec. 1225, p. 659 (9th Ed. 1998).)

Provocation, comparative negligence and assumption of the risk are for the trier of fact to decide. (Burden, supra.) These defenses are discussed together because the court opinions frequently mix the concepts.

The cases provide some guidance as to what conduct of the plaintiff may, or may not, constitute provocation, comparative negligence, and assumption of the risk:

Recovery permitted

- Walking toward a dog did not constitute provocation. Chandler v. Vaccaro (1959) 167 Cal.App.2d 786.
- Holding packages, walking toward a dog and its owner, and addressing the owner did not constitute contributory negligence. Eigner v. Race (1942) 43 Cal.App.2d 506.
- Where the plaintiff was seated in front of the dog, rising up and turning to face the dog did not constitute provocation. Westwater v. Southern Pacific Co. (1940) 38 Cal.App.2d 369.
- Reaching toward a dog to pet him did not constitute contributory negligence. Ellsworth v. Elite Dry Cleaners, etc., Inc. (1954) 127 Cal.App.2d 479.
- Playing with a dog and patting his head did not constitute assumption of the risk. Smythe v. Schacht (1949) 93 Cal.App.2d 315.

- Feeding a dog did not constitute assumption of the risk. Burden v. Globerson (1967) 252 Cal.App.2d 468.
- Helping to wrap and transport an injured dog did not constitute assumption of the risk. Davis v. Gaschler (1992) 11 Cal.App.4th 1392.
- In Burden v. Globerson (1967) 252 Cal.App.2d 468 the court ruled that regardless of the dog's breed, one does not assume the risk of being bitten simply by choosing to initiate interaction with a dog.
- Recovery is permitted in circumstances where the dog had a history of biting and the owner neglected to reveal it, because this type of case falls within common law strict liability or because of the additional element of mispresentation.

Recovery denied

- Where plaintiff saw a dog barking with hostility inside a fenced yard, and plaintiff opened the gate to the yard and went inside, plaintiff was deemed to have assumed the risk of being bitten. Gomes v. Byrne (1959) 51 Cal.2d 418.
- "The elements of the defense of assumption of risk are a person's knowledge and appreciation of the danger involved and his voluntary acceptance of the risk. Thus if plaintiff recognized the danger that the dog would bite him, his knowledge was sufficient although he did not know whether the dog had a history of viciousness." Gomes v. Byrne (1959) 51 Cal.2d 418.
- A trainer of commercial guard dogs was held to have assumed the risk of being bitten. Reynolds v. Lancaster County Prison (1999) 325 N.J. Super. 298, 739 A.2d 413.

In dog bite law, "provocation" is a specific "breed" of comparative negligence. Legal provocation is not unlike self-defense; the proper test is whether the violent action of the dog was a justifiable response to something that the victim was in the process of doing to the dog. For example, a lengthy mauling, consisting of repeated bites, or a bite that was accompanied by shark-like shaking intended to deeply lacerate, would hardly ever be a justifiable response to accidental, even painful, conduct by a person.

Application of the doctrine of assumption of the risk requires appreciation of the danger involved. (Gomes v. Byrne (1959) 51 Cal.2d 418.) In dog bite cases, the defense has a heavy burden to prove, because dogs are commonly regarded as "man's best friend." There is a well-established legal presumption that, absent provocation, "a domestic animal is presumed not to have vicious tendencies." See Drake v. Dean (1993) 15 Cal.App.4th 915, 921 ("Harming a human being is regarded as contrary to a dog's nature"); see also Restatement 2nd of Torts, section 509, comments d and f ("[Because][t]he great majority of dogs are harmless... the possession of characteristics dangerous to mankind... is properly regarded as abnormal to them.")

Defense to claims by veterinarians and dog handlers

The California Supreme Court has ruled that all persons who handle dogs as part of their occupation are deemed to have assumed the risk of being bitten while the dogs are in their custody. Priebe v. Nelson (2006) 140 P.3d 848, 39 Cal.4th 1112, 47 Cal.Rptr.3d 553. The court expanded the "veterinarian's rule" -- a rule that prevents veterinarians from recovering compensation for dog bites -- to cover all persons who work with dogs. (See Neighbarger v. Irwin Industries, Inc. (1994) 8 Cal.4th 532.)

The court also stated, however, that the veterinarian's rule is not absolute, in that it will not protect a dog owner from the scienter cause of action or misleading the canine worker about the dog's viciousness. For example, a dog owner might mislead a veterinary technician about a dog, or might fail to warn; the technician, who would not be expecting to encounter a "demon dog" unless clearly warned, should not be held to assume the risk of doing so. ("[T]here may come a case where, for example, veterinary employees have never dealt with a particular dog and are actively misled by an owner about its tendencies, or there may be a case involving a "demon dog" ... whose propensities for violence extend far beyond any risk such employees may ever be deemed to assume in their employment." Griffiths v. Schafer (1996) 223 Ga. App. 560, 478 SE2d 625.) Nelson v. Hall (supra) stated in a footnote that a dog owner would not be protected by the assumption of risk doctrine if the owner knew the dog was vicious and concealed this fact from the veterinarian. (Nelson, footnote 4; cited with approval in Priebe v. Nelson.)

The "veterinarian's rule" also does not apply when the defendant dog owner has not contracted for the services of the plaintiff. In Davis v. Gaschler (1992) 11 Cal.App.4th 1392, 14 Cal.Rptr.2d 679 (cited with approval in Priebe) a dog owner sought to avoid liability for a dog bite on the ground that plaintiff was a professional breeder and handler of dogs. But because the plaintiff had encountered the dog not in her capacity as a breeder, but as a Good Samaritan who took over the handling of the injured dog, there was no relationship between the parties that justified exonerating the defendant from the usual standard of care. The court wrote:

> "The absence of duty is established by the nature of the activity and the relationship of the parties. Thus, [in the case of firefighters and veterinarians] the plaintiff is employed and compensated for work that carries with it certain hazards. Here, plaintiff was not employed or otherwise compensated for helping injured dogs. Nor was there an employment relationship or any relationship between plaintiff and defendants. Defendants cite no cases applying the firefighter's rule or veterinarian's rule where there was no relationship between the plaintiff and defendant...." (Id. at p. 1401, 14 Cal.Rptr.2d 679.)

Prays v. Perryman (1989) 213 Cal.App.3d 1133, 262 Cal.Rptr. 180 (cited with approval in Priebe) held that a dog groomer who has not yet decided whether to accept a skittish animal for grooming does not assume the risk of a dog bite. In Prays, the dog owner was holding the dog on leash, at the groomer's place of business, when the dog suddenly leaped forward and bit the groomer. The court reasoned:

> "A trier of fact could find that the beast remained at all times under the exclusive control of defendant, who had uncaged it and was holding it on a leash. When defendant

> brought a growling dog into her shop, plaintiff was not required, to avoid assuming the risk of bloodshed, either to summarily eject the customer or to take flight." (213 Cal.App.3d at p. 1138.)

The California Supreme Court now applies the veterinarian's rule to the entire range of people who work with dogs -- daytime dog walking services, dog groomers, employees of pet shops, persons handling dogs in transport, paid house sitters, dog obedience trainers, and trainers of guide dogs and other service dogs. This could affect a large number of people; the number of people who were bitten by dogs in a work setting (meaning canine workers as well as other kinds such as plumbers, utility workers, etc.) was 16,526 in the most recent year studied. ("Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments - United States, 2001," Centers for Disease Control MMWR Weekly, 52(26); 605-610 (July 4, 2003).)

It should be noted that courts outside the State of California have treated this issue differently. See, for example, Cole v. Hubanks, 681 N.W.2d 147 (Wis. 2004), holding that the firefighters' rule — a form of assumption of risk, and the basis for the veterinarian's rule — does not apply in case where police officer, duty-bound to enforce the leash law, was bitten by a stray as she tried to capture it, and sued the dog's owner for negligence at common law and for violation of a statute creating tort liability for dog bites. Mulcahy v. Damron (1991 Ariz. Civ. App.) 169 Ariz. 11, 816 P.2d 270 held that the Arizona strict liability statute, which is virtually identical to California Civil Code section 3342, imposes liability on a dog owner whose dog injured a dog groomer who performed grooming services to dogs boarded at a kennel; the court noted that the strict liability statute made the owner "virtually an insurer of the dog's conduct," citing Massey v. Colaric (1986) 151 Ariz. 65, 66, 725 P.2d 1099, 1100-1101. Hass V. Money (Okla. Civ. App. 1993) found that the state's dog bite statute, which was the same as California's in its strict liability effect, imposes liability on the owner of a dog whose dog bit a dog walker working for a clinic where the dog was boarded. Dicta in Reynolds v. Lancaster County Prison (1999) 325 N.J. Super. 298, 739 A.2d 413 provides an exception if the dog had a history of biting people and the owner neglected to reveal it.

Defense to claims by police officers

Ferocious pit bull attacks have required the intervention of police officers for the protection of the victim. Intervening to protect a victim exposes the officer to the danger of an attack. If an officer were attacked by a dog while attempting to protect a victim from the dog, the dog owner (or the insurance company) might argue that the "firefighter's rule" precludes suit by the officer. If the officer's injuries occurred under other circumstances, however, the "firefighter's rule" probably would not prevent recovery.

A special rule has emerged in the law of torts, which limits the duty of care that the public owes to firefighters and police officers. The so-called "firefighter's rule" precludes recovery for injuries suffered as a direct consequence of responding to calls in the line of duty. (Calatayud v. State of California (1998) 18 Cal.4th 1057, 1061-1062.) Stated in its most traditional terms, the firefighter's rule "is that which negates liability to firemen by one whose negligence causes or contributes to the fire which in turn causes the death or injury of the fireman." (Giorgi v. Pacific Gas & Elec. Co. (1968) 266 Cal.App.2d 355, 357 [72 Cal.Rptr. 119].) Although the doctrine first gained currency in American common law more than a century ago (see, e.g., Gibson v. Leonard (1892) 143 Ill. 182 [32 N.E. 182], overruled on other grounds in Dini v. Naiditch (1960) 20 Ill.2d 406 [170 N.E.2d 881,

886, 86 A.L.R.2d 1184]), it was not adopted in California until 1968. (Giorgi v. Pacific Gas & Elec. Co., supra, 266 Cal.App.2d 355.) Subsequently, in Walters v. Sloan, supra, 20 Cal.3d 199, the California Supreme Court not only gave its imprimatur but extended the rule to police officers. (Id. at p. 202.)

The undergirding legal principle of the rule is assumption of the risk, i.e., the "legal conclusion that the person who starts a fire owes no duty of care to the firefighter who is called to respond to the fire. [Citations.]" (Neighbarger v. Irwin Industries, Inc. (1994) 8 Cal.4th 532, 541 [34 Cal.Rptr.2d 630, 882 P.2d 347]; Knight v. Jewett (1992) 3 Cal.4th 296, 309-310, fn. 5 [11 Cal.Rptr.2d 2, 834 P.2d 696]; see Walters, supra, 20 Cal.3d at p. 204.) " 'In terms of duty, it may be said there is none owed the fireman to exercise care so as not to require the special services for which he is trained and paid.' " (Walters, supra, 20 Cal.3d at p. 205, quoting Krauth v. Geller (1960) 31 N.J. 270 [157 A.2d 129, 131].) This is referred to as "primary" assumption of the risk, meaning that the dog owner has no duty to protect the police officer, firefighter, veterinarian or canine worker. This form of the doctrine should be contrasted with "secondary" assumption of the risk, which applies when, for instance, two karate students are sparring as part of their training; in the latter case, there is a duty from one to the other, but they have voluntarily waived it, accepting the risk of being hurt during their match.

Like most legal principles, the firefighter's rule is not without its exceptions. "The firefighter does not assume every risk of his or her occupation. [Citation.] The rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and it does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene. [Citations.]" (Neighbarger, supra, 8 Cal.4th at p. 538; see also Krauth v. Geller, supra, 157 A.2d at pp. 131-132.) "In Walters, the majority [also] recognized that the fireman's rule does not preclude recovery when the defendant has violated a statute and the officer ' "suffering ... the injury ... was one of the class of persons for whose protection the statute ... was adopted." ' (20 Cal.3d at pp. 206-207, quoting Evid. Code, § 669, subd. (a)(4).)" Calatayud v. State of California, 18 Cal.4th at p. 1063. The exception at issue in Calatayud is contained in the Civil Code. Subdivision (a)(1) of Civil Code section 1714.9 provides that "[n]otwithstanding statutory or decisional law to the contrary, any person is responsible not only for the results of that person's willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but also for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person, in any of the following situations: [¶] (1) Where the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel." The Court held, however, that a police officer who was injured by another officer while effecting an arrest cannot sue the other officer. Farnam v. State of California (2000) 84 Cal.App.4th 1448 specifically applied the "firefighter's rule" to prevent an officer from recovering compensation for dog-inflicted injuries, where the dog was a police dog and the defendant was a fellow officer who was using the dog to effect an arrest.

It is undecided in California whether the "firefighter's rule" would apply to a dog attack, where the victim is a police officer (except where the defendant is another police officer who was effecting an arrest, as in Farnam). It is reasonable to speculate that some circumstances would result in liability, while others would not. For example, if the officer responded to a report that a dog was attacking a pedestrian, and the officer was injured while trying to save the pedestrian from further injuries, the officer probably would not be permitted to recover against the dog owner. However, the officer

might be able to recover if he or she was attacked while writing a speeding ticket, by a dog that was owned by someone other than the people in the car, and was off-leash in a city that had a leash law.

in other states, courts have refused to apply the "fireman's rule" to police officers. See, for example, Cole v. Hubanks, 681 N.W.2d 147 (Wis. 2004), holding that the firefighters' rule does not apply in case where police officer, duty-bound to enforce the leash law, was bitten by a stray as she tried to capture it, and sued dog's owner for negligence at common law and for violation of a statute creating tort liability for dog bites.

Are the defenses of comparative negligence and provocation fair to the victim?

A few states that have strict liability dog bite statutes do not allow the defense to raise the issue of comparative negligence.

> "Some states impose liability upon an individual without regard to fault. The ones most frequently encountered are 'dog bite' statutes... [Par.] In cases brought under 'dog bite' statutes, the authority is split, with some courts holding that comparative negligence is applicable while others hold it is not to be applied." (Clark Boardman Callaghan, Comparative Negligence Manual (3rd Ed.), sec. 5.34, pp. 5-51.)

The courts apply concepts of comparative negligence, provocation, assumption of the risk, and consent in a manner that cannot always be predicted -- and, some would say, is completely arbitrary. For example, Illinois holds that an 18-moth-old baby who fell on a dog and got mauled did not provoke the dog because its reaction was out of proportion to the provocation itself. (Wade v. Rich (1993, 5th Dist.) 249 Ill.App.3d 581.) Is the court using a "reasonable dog" standard? Not really. It is trying to temper other Illinois cases that hold that 2-year-olds can provoke dogs. (See, i.e., Von Behren v. Bradley (1994 Ill.App. 4th Dist.) 203 Ill. Dec 744, 640 NE2d 664.) Clearly the Wade court is using the doctrine of provocation for the convenience of the court.

Special rules where the victim is a child

Under the age of five

Minors under the age of five are, as a matter of law, deemed incapable of negligent acts, i.e., failing to exercise reasonable care under the circumstances, and this has been specifically applied in a dog bite case. In People v Berry (1991) 1 CA 4th 778, the defendant's dog killed the young child, the defendant dog owner was charged with keeping a mischievous animal that caused death (a felony per California Penal Code section 399), and the defense was that there was no proof that the child acted with due care. The court held that no such proof was required where the child is a minor under age five, because children that young are not legally capable of acting with reasonable care toward a dog.

Because minors under age five are legally incapable of negligence toward a dog, it seems clear

that they also are legally incapable of provoking a dog. "The proposition that 'An infant may be so very young that no negligence may legally be imputed to him' [citation], is predicated on the principle that a child of very early years is 'incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is the essential capacity of mind to create liability for negligence.' [Citation.]" Christian v. Goodwin (1961) 188 Cal.App.2d 650, 652- 654, as quoted in People v Berry (1991) 1 CA 4th 778. Also see Greene v Watts (1962) 210 CA2d 103 (young child may not be capable of assumption of risk or contributory negligence in dog bite case); People v Berry, supra,1 CA 4th 778 (minor under age five held not legally capable of acting with reasonable care toward dog). See also Witkin, 6 Summary of California Law (9th Ed.), "Children -- Duty Owed by Child," sec. 806, pp. 160 et seq.

Obeying the directions of parent

Minors acting in obedience to parents' directions are, as a matter of law, deemed incapable of being found negligent.

Proving negligence when the minor is too young to testify

When there is a substantial probability that a defendant's negligence was a cause of the injury, and when such negligence makes it impossible as a practical matter for the plaintiff to prove proximate causation conclusively, it is appropriate to shift the burden to the defendant to prove its negligence was not a cause of the injury (i.e., in those circumstances, the burden is more appropriately borne by the party with greater access to information). Haft v. Lone Palm Hotel (1970) 3 Cal.3d 756, 774, ftn. 19. In Haft, the decedents were found dead in the bottom of a hotel pool. Nobody had witnessed them drown, but the hotel operators had failed to comply with several safety regulations regarding pools.

Liability of day care center

Every year, a substantial number of children are bitten by dogs at day care centers across the country. Some jurisdictions forbid dogs from being in day care centers. Even if it is not forbidden, it seems clear that is negligent to permit a dog to freely wander among children of tender years. Some day care centers have required parents to sign a release that purports to exculpate the center from its own negligence. (See Gavin v. YMCA (2003) 131 Cal.Rptr.2d 168.) The Gavin court held that such agreements are void as against public policy.

When liability of minor is imputed to parent

Minors who commit intentional torts may be held civilly liable for the resulting damages based on the usual principles of law. In some cases, the minor's parents also may be held liable up to a certain monetary limit. Civil Code section 1714.1 provides:

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1714.1.  (a) Any act of willful misconduct of a minor which
results in injury or death to another person or in any injury to
the property of another shall be imputed to the parent or guardian
having custody and control of the minor for all purposes of civil
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> damages, and the parent or guardian having custody and control shall be jointly and severally liable with the minor for any damages resulting from the willful misconduct.
>
> Subject to the provisions of subdivision (c), the joint and several liability of the parent or guardian having custody and control of a minor under this subdivision shall not exceed twenty-five thousand dollars ($25,000) for each tort of the minor, and in the case of injury to a person, imputed liability shall be further limited to medical, dental and hospital expenses incurred by the injured person, not to exceed twenty-five thousand dollars ($25,000). The liability imposed by this section is in addition to any liability now imposed by law

The limit is adjusted upwards every two years. In 2001, for example, the limit was $28,844.00. (See the calculation by the Judicial Council.)

When liability is imputed to the parents and does not result from a willful act on the part of an insured person, an insurer may have to pay on the parents' behalf, but not more than $10,000.00:

> (e) Nothing in this section shall impose liability on an insurer for a loss caused by the willful act of the insured for purposes of Section 533 of the Insurance Code. An insurer shall not be liable for the conduct imputed to a parent or guardian by this section for any amount in excess of ten thousand dollars ($10,000).

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