



## Dog bites

### WHAT YOU DON'T KNOW CAN TAKE A BIG BITE OUT OF YOUR CASE

Dog bites continue to be a growing problem in the U.S., both in the number of incidents and the seriousness of the victims' injuries. The U.S. Post Office has stated that there are approximately 4.5 million *reported* dog bites a year in the United States. Unreported bites have been estimated at three times that amount.

The American Veterinary Medical Association has stated that there are approximately 85 million dogs in the United States, living in roughly 69 million homes. According to the Insurance Information Institute, in 2019 more than one-third of insurer payouts under homeowners' liability policies were due to dog bites. The Institute claims that dog-bite claims and related medical costs, settlements and jury awards have risen 39% between 2012 and 2020.

Dog bites happen everywhere that dogs and people cohabitate and they happen for many different reasons. Dog aggression, while always understandable from the dog's point of view, is not always acceptable from a human point of view. For example, a girl who is a stranger to the dog is bitten in the face. Bad dog, right? But she was on her knees, directly in front of him, with her arms around his neck. All this as she moved her face to within a few inches of his face while attempting to kiss the dog on the top of his head. It's a horrible scenario but one that happens all too often. She was being friendly but, to the dog, she was a direct threat.

Another example: A rescue organization picks up a Labrador Retriever/German Shepherd mix living in the streets and finds it a home. The dog had likely been hit by its previous owner. As a result, whenever a strange man lifted his arm or reached out to the dog, it reacted as though it was about to be hit. A friend of the new owners came over for lunch and approached the dog. When he slowly reached out his hand to be smelled, his

friendly offering was seen as a threat because of the dog's earlier experiences, and he was bitten on the hand. Did he provoke the dog? Was the dog demonstrating fear aggression, protective aggression or territorial aggression?

In any dog-bite scenario, there are many questions that need to be answered. And although there are patterns in every dog-bite incident, no two incidents are the same. Each has its own mix of facts that carry their own weight in forming opinions about what actually happened and who is responsible.

#### The basics

Experienced trial attorneys know that important early steps when litigating a dog-bite case include getting the animal-control records (if the bite was reported) and the dog's veterinary records. The animal-control records should cover both the incident at hand as well as any former bites, animal-control complaints, barking issues or dog-at-large citations.

The dog's veterinary records are a treasure trove of information. The dog's breed (often a guess by the owner or veterinarian's staff), the dog's age and weight, and most importantly, the dog's behavioral history while at the vet. Often included in the dog's records are notes regarding any incidents of dog-on-human or dog-on-dog aggression that the owner reported to the veterinarian or the veterinary staff.

Although many trial attorneys know to subpoena the vet's records, they do not specifically ask for the doctor's hand-written notes, so they only get the computer records. Veterinarians sometimes hand-write notes like "be careful," "watch out," "will bite," often in red, as a precaution to staff who may need to interact with the dog. This information can be left off the computer records because it is for internal use only.

It is also important to get the veterinary records for all the dogs present

when the bite took place; often the dog that appears to be the victim has a history of aggression toward other dogs, which could be detrimental to the plaintiff's case. If the plaintiff was bitten during an attack on their dog by the defendant's dog, a portion of liability could rest with the plaintiff if his dog provoked the defendant's dog.

#### Bite wounds

Bite wounds are one of the two most important pieces of evidence in a dog-bite case. They are an actual, physical representation of exactly what happened. To an experienced and trained eye, they can often show, in multi-dog incidents, which dog bit the plaintiff, whether the dog was provoked or if the dog bit without provocation, whether it was a bite or a serious attack, etc. Was the bite inhibited or was it a full bite? Was it a full-thickness wound? Which teeth were involved? Was the plaintiff's injury even a bite at all, or was it a scratch?

Scratches usually follow certain patterns as described in the scientific literature, but there are cases where determining whether the injury was made by teeth or claws is not so easy. There are spatial relationships between the claws that do not exist between canine teeth or canines and incisors or molars. Measurements of the wounds are very helpful if they haven't healed yet. Hopefully, the treating physician was diligent and measured the length and thickness of the plaintiff's wounds as well as diagrammed the locations of the bite marks. Photos of the bite wounds after the plaintiff has been treated by emergency medical personnel often have only limited value because the actual wounds have typically been altered, in essence destroying valuable evidence. On the other hand, pre-treatment photos can tell a powerful story as they portray what actually happened.

Often, a mention of bite marks on a medical record relates to one bite with several teeth involved but is mistakenly

interpreted as multiple bites. The number, depth and placement of the bites says a lot about the dog's state and intention. This can provide insight into whether there was provocation (a defensive bite) or a vicious unprovoked attack. Bites to the stomach or chest or anywhere to the center of mass are more concerning than bites to an arm or leg from an expert's point of view. These areas of the body have little protection and house vital organs filled with blood. Dog bites are essentially "crush injuries." Wounds to these areas of the body can lead to fatalities. Domesticated dogs do not commonly bite humans in these parts of the body.

All of this information is extremely important when investigating a dog bite and determining the evidence that supports or conflicts with a plaintiff's account of the incident. The defendant may call it a "nip," but the photos will tell the tale. Dr. Ian Dunbar has created a bite-wound scale on which each bite can be measured. Rating the plaintiff's wounds according to this scale can help a jury to get a deeper understanding of what actually happened during the incident and the plaintiff's experience.

Each detail carries its own weight and adds to the total weight of the evidence. The details in dog-bite incidents often follow patterns. Understanding the patterns involved in your case will help to both tell a cohesive story to the jury and to neutralize attempts by the defense to shift blame onto the plaintiff. Patterns are formed by many different facts and layers of facts, each of which supports the others both individually and as a group. This type of detailed forensic analysis is very hard to defend against.

### **Defensive bites vs. vicious attacks**

If a dog bites a stranger who was trying to kiss it in the face, it is a defensive bite. Typically, in this situation the dog will bite once and release immediately. The dog just wants to create distance between the perceived threat and itself. If the plaintiff is bitten in the leg, the upper

arm, the hand and the buttocks by one or two dogs that ran out from a garage as he walked by, it is a serious attack. These are comprised of one or more of the following: multiple wounds, often to multiple parts of the body, shaking the victim, the dog not breaking off the attack on its own. This is also a "vicious" attack because the dog(s) are attacking without provocation. Plaintiffs who have survived these attacks are often left with serious mental and physical injuries, requiring longer and costlier hospitalizations. On occasion, the attack is fatal.

### **Witnesses**

Witnesses, whether to the incident itself or to the dog's or plaintiff's behavior before the incident, can be invaluable. Many witnesses do not offer their testimony but have to be found and questioned. It is important to note that, although professional investigators can be excellent at their job, they can also carry a formality and affect that can cause potential witnesses to want to back away from participation. The witnesses may have important information but don't want to be dragged into the case, which is often against their neighbors. Also, even if the investigator gets a statement, that statement will be hearsay.

If you retain an expert and the expert seeks to use that statement as evidence for their opinion, it will be secondhand hearsay, twice removed from its original source. If your expert is first contact, it is much more likely that the witness will feel more comfortable talking to them and will often take the opportunity to get free information by asking a few questions about their own dog. The important thing is that your expert gets to ask the correct questions, in the correct order, at the correct time. Your investigator will likely lack the background and experience to do that and a vital first encounter with a potential witness may be left mostly unusable.

Witnesses to the same incident will often describe completely different scenarios based on their physical position and their interpretation of events. Often,

two witnesses can describe the same event differently, causing confusion about what actually happened. Your expert, once contact is made, can often connect the dots in seemingly different stories that are not actually different at all but different parts of the same incident.

### **Expert evaluation of the dog**

It is always important to have the dog evaluated and inspected by your expert if the dog is alive and available, as an evaluation video can simply win your case for you.

It has been my experience that it is getting harder to get the defense to agree to a behavior evaluation by your expert. You may have to seek a court order, but that can be a good thing. The more the defense fights a behavior evaluation, the more likely it is because they are worried about the outcome. When the dog is a sweetheart, you want the other side to see how friendly the dog is. When the dog is not so sweet, they are more likely to blow a defense attorney's whole case.

It is best to first make a demand for preserving the dog as evidence as soon as you get the case. You might be surprised to know how many dogs disappear, die or are given to a stranger with no address or telephone number after an incident. Then, rather early in the case, consider making a demand for production of the dog for behavioral evaluation and physical inspection. Taking a video of this encounter is often done by the expert, but you should bring a camera as well for a two-angle view. Or, if you want to go all out, you can hire a professional videographer.

Based on my experience, aggressive, dangerous and/or vicious dogs almost always act aggressively in evaluations. Even unprovoked, they are either temperamentally or habituated to act aggressively in certain situations, one of which was likely what occurred at the time of the incident. In my 30-years' experience only two dogs out of many hundreds, that were clearly overly aggressive, did not show it during the evaluation. The fact that the defense cannot control

the dog's behavior during the evaluation has led to quite a few settlements. A famous actor's Italian Mastiff bit his manager in the crotch. The dog weighed around 150 pounds. The actor wouldn't allow an evaluation and kept putting it off for one reason after another. Finally, the judge determined that the evaluation would go forward. Two days later a settlement offer was made by the actor's attorney.

### Would a juror feel unsafe?

Dog evaluations are always worth doing because they provide a visual experience of the dog to the other side and to a potential jury. If the jury members decide that they would feel unsafe with the dog, your case may already be won. It's the closest thing to bringing the dog into the courtroom, but with complete safety. Another thing to remember is that dogs do what dogs do. They don't change their behavior because they are in litigation. Their owner may attempt to distort the facts, but their dog will show you the truth every time.

Finally, canine temperament doesn't change with age. It's the way a dog is wired. If a male Akita responded to stress with aggression when he was 11 months old, he will likely still respond the same way at 5 or 7 years old, if not more so. Aggression is known to escalate if left unchecked. More and more experiences lead to habitual reactions that are consistently displayed in similar situations.

Any dog-behavior evaluation should be planned carefully so as not to give the opposing counsel opportunities to attack the results. Time of day, place, people present, distractions and many other things need to be controlled, so the environment is not too far removed from the actual incident. An evaluation is not to replay the incident, but to create a similar situation and observe the dog's reaction.

### Breeds as a predictor of aggression?

All dogs are individuals within a breed and breed alone is not a clear

predictor of aggression. The American dog-loving public has changed since the early 1980s, when Pit bulls were found mostly in the inner city. Pit bulls and their mixes are everywhere today, running off leash in an alley or walking with a jeweled leash in Beverly Hills.

A dog-bite case that went to trial in Oklahoma saw the whole Pit bull question turned upside down. The defendant's dog was a Pit bull mix and the dog was aggressive, as shown in the evaluation video footage. The plaintiff's attorneys were jubilant as every aspect of the trial had gone as they had hoped. They were all shocked, as was the judge and other attendees, when the jury found for the defendant; it was somehow missed by the plaintiff's attorneys that each member of the jury owned a Pit bull or Pit bull mix.

Pit bulls, when not aggressive to other dogs or to people, can be fantastic pets. However, they have been shown in peer-reviewed scientific studies to bite more often, to inflict more wounds and more serious wounds, and to cause more expensive medical treatment and longer hospital stays. They have also been shown to be involved in more incidents requiring amputations and more fatal incidents. American Pit Bull Terriers are listed as "dog aggressive" in their standard by the United Kennel Association, the only U.S. kennel association that registers them.

It is always important to focus on the individual dog with evidence based on previous behavior. Breed, size, age, sex, exercise and socialization, to name a few, are merely factors, each carrying minimal weight on its own but telling a convincing story as part of a whole.

### "Owner denial"

As a forensic expert on dogs, I can attest to certain patterns that one sees over and over again in the owners of aggressive, dangerous and/or vicious dogs. One, is what can be called "owner denial." Owner denial describes an emotional state where the owner is either unable or unwilling to see their dog as it really is. Instead, they create reasons or excuses for the dog's aggressive behavior,

usually explaining it away as a normal response.

I have had two dog-training clients whose dogs had bitten or attacked 16 people before they contacted a canine professional. One was a successful real estate attorney and the other a legendary rock star. It seemed that 16 was the number that finally tipped the scale. They each had very detailed reasons why each bite their dog delivered was reasonable under the circumstances.

The attorney hit the wall when her dog bit her husband in the face as he bent down to pick up some food that had fallen on the floor. The rock star reached his limit when his German Shepherd bit the drummer of his band in the backside just as they were starting rehearsals for their world tour. The drummer couldn't drum standing up and the dog situation had to finally be addressed. Surprisingly, neither were ever sued, especially since they both were very wealthy.

The above are obviously extremes, but not very far from so many dog owners I have run into. The signs are clearly there, but they don't get the message. Recently I heard from a man who wanted my help with his dog, a recently rescued Saint Bernard, who had bitten his teenage daughter twice and wasn't good with toddlers. He said he didn't want to give up on his dog and that until things could be sorted out, his daughter and the dog were separated in the house.

The fact that his very large dog had bitten his 18-year-old daughter on two occasions, unprovoked, and was aggressive to young children didn't dawn on him as a dangerous situation. I doubt that anyone reading this, even those without an 18-year-old daughter or young children, isn't terrified thinking of this dog near their children, but this gentleman was in denial and hell bent on keeping his daughter in a very dangerous situation while he took care of his dog. These people often call themselves, "dog lovers."

People's relationships with their dogs can be deeply emotional and they often project their innocent, vulnerable "inner

child” onto them. They can find it hard to believe and very uncomfortable to even consider that their beloved pet is dangerous, let alone vicious. They want to protect their “fur babies” and so they make excuses and go into denial so that they can avoid the whole subject... until the next incident.

### Police K9 excessive force

Police K9s are trained to bite hard, using all their teeth. As a result, it is rare that an attack by a police K9 does not leave severe wounds. Suspects have been killed during these attacks. I recently served on a case in which the plaintiff, a 19-year-old girl, hiding behind a bush, received a full bite across her face from a police K9. Although these dogs are trained differently based on the specific departmental standards for that agency, in the cases I have investigated, the dog did not consistently release on a verbal command from his handler, despite intense training to do so. As a result, the suspect (plaintiff) received far greater wounds than they should have.

At times, these dogs do not follow handler commands or will attack anyone in the vicinity when released. Police officers know how dangerous it is to be in front of a police K9 when it is sent out. It has not been trained to distinguish police officers from suspects, and so everyone is fair game.

In cases involving police excessive force, the officers typically had similar stories. In one case, five officers from five different departments all gave the same story. However, their story was not supported by the bite wounds, which

showed unequivocally that the incident happened as the suspect had described in his deposition. The case settled after the expert report was released.

Always get the dog’s training records as incidents where the dog does not follow commands in the future were notice that the dog was a danger in the street before the incident at hand took place. Police departments are used to lawsuits and are very good at defending themselves. An expert can be very beneficial in these cases.

### Medical records

It is imperative that the plaintiff’s attorney or one of their staff go through the medical records carefully. Plaintiffs have been known to give different narratives about the incident, based on where they were and when they said it. On more than a few cases, while going through a tedious amount of medical records I found doctor’s notes stating that the patient himself had told the doctor a completely different story regarding how the incident happened, one that clearly showed that the plaintiff had provoked the dog. It was especially embarrassing because I was retained two years after the plaintiff’s attorney got the case and the attorney had no idea his client had gifted the other side with a detailed confession.

### Third-party landlord/tenant cases

Here it is up to the plaintiff’s attorney to show a triable issue of fact when the defense, as they always do, files a motion for summary judgment. In the end, it usually comes down to showing a pattern of behavior where no pattern

seems to exist. Each detail, no matter how minor, adds color and depth to the potential pattern until it suddenly presents itself clearly enough to give the judge pause and to see that there are factual issues for the jury to decide.

Actual knowledge, if you can prove it, is a slam dunk. However, “the landlord must have known,” is, in California, a different ball game. All the behavioral dots have to be connected to prove this one. The landlord, in my experience, has only once accepted responsibility for knowing the dog was dangerous. In the 250 or so other cases, they flatly denied knowledge. Here an expert is usually necessary.

### Summary

Like any complex case, dog bites, dog knockdowns and all the many other ways dogs are involved in human injuries require knowledge and expertise to litigate well. Most plaintiffs’ attorneys have told me they do one to two dog-bite cases every five years. That is not enough to become an expert in handling them. Hopefully, this article will give you a deeper view of some of the issues and information you will need to be successful in dog-bite cases.

*Ron Berman is a dog trainer, canine-behavioral consultant and forensic expert with over 30-years’ experience. He has been qualified as an expert in courts nationwide on over 90 occasions. He has consulted on cases in Japan, Canada, England, Australia, and Sweden. His website is [www.dogbite-expert.com](http://www.dogbite-expert.com)*

