

# Trial Practice Corner

## Dog Attacks: Taking a Bite Out of the First Bite Rule

By Michael L. Goldberg

The statistics on dog bite incidents are shocking. Every 40 seconds, someone in the United States seeks medical attention for a dog bite-related injury.<sup>1</sup> According to research performed by the Centers for Disease Control and Prevention (CDC), 4.7 million dog bites were reported in 1994 in the United States with nearly 800,000 people seeking some form of medical treatment.<sup>2</sup> Of the people receiving treatment, 332,000 went to the emergency room and 6,000 were hospitalized.<sup>3</sup> Children are the most frequent victims of dog bites. In 1997 and 1998, 27 Americans died from dog attacks and 19 of the 27 were younger than age 12.<sup>4</sup> Dog attacks account for one-third all liability claims on homeowner's insurance policies.<sup>5</sup> Given the rising number and severity of reported dog attacks, it is not surprising that the Georgia legislature and judiciary have been providing more protection dog bite victims and eroding away the common law rules that shielded dog owners from liability.

### **I. The Traditional First Bite Rule**

For over a hundred years, Georgia has followed the traditional common law theory of liability, often referred to as the first bite rule, in determining an owner's responsibility for a dog attack.<sup>6</sup> Under this common law doctrine, a dog owner cannot be held liable for a dog attack unless (1) the dog had exhibited the propensity to bite or attack prior to the incident and (2) the owner had knowledge of the dog's vicious propensity.<sup>7</sup> This rule is often referred to as the first bite rule since traditionally the dog was given one free bite before the owner could be held liable for the dog's actions.<sup>8</sup> The rationale behind the first bite rule is that the owner of a dog should not be found liable for an unforeseen and unforeseeable act of the dog simply because dog was not under the owner's direct control at the time the attack took place.<sup>9</sup> This common law rule has been codified at O.C.G.A. 51-2-7 which states in pertinent part: "A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured."<sup>10</sup>

### **II. Proof of Vicious Propensity**

Even though it is called the first bite rule, the dog is not required to have actually bitten a person in the past for the owner to be liable. Instead, the dog must have demonstrated the propensity to do the particular act that caused the injury to the complaining party in the present case.<sup>12</sup> The prior incident does not have to involve the exact same conduct and the exact same injury as the subsequent attack.<sup>13</sup> "This does not mean an incident involving the exact same conduct and the exact same injury must actually occur before the owner's knowledge may be inferred, as long as there is an incident or incidents which would put a prudent man on notice to anticipate the event which occurred."<sup>14</sup> The proof of vicious propensity must be proven even if the dog is a security or guard dogs. However, if the dog is part wolf or other type of wild animal, the owner is

strictly liable for any attack regardless of the animal's past history.<sup>16</sup> "When a person is injured by an animal fierce nature, such as a lion, tiger, bear, or ape, the owner's negligence is presumed."<sup>17</sup> Since a cat is a domestic animal, it is subject to the same rules as a dog.<sup>18</sup> A plaintiff cannot avoid the requirement of proving vicious propensity by alleging a premises liability theory such as that the dog was a hazardous condition on the property in violation of O.C.G.A §.51-3-1.<sup>19</sup>

Evidence as to the size and breed of the dog or the fact that the owner routinely kept the dog restrained not establish any inference that the dog was vicious.<sup>20</sup> Likewise, the fact that the dog had attacked other animals in the past,<sup>21</sup> or acted menacingly, growled or barked at passersby <sup>22</sup> does not put the owner on notice of the possibility of the dog attacking a person. Where a dog had chased people in the past, but had never chased a car or motorcycle, the owner could not be held liable for the dog chasing a motorcyclist and causing a wreck <sup>23</sup>, but could be held liable for an injury caused by a person falling after being chased by the dog.<sup>24</sup> A dog putting a paw on a child and pulling him down does not give the owner knowledge that the dog may bite.<sup>25</sup> Even a prior dog bite of a person does not demonstrate that the dog is vicious if the prior attack was provoked by the victim's actions. <sup>26</sup>

When a dog had bitten the owner's son on the leg in the past and the wife had told her husband to get rid of the because she thought something of the dog like that might happen again, a jury issue exists as to the dog's vicious propensity and the owner's knowledge of the dog's viciousness.<sup>27</sup> Evidence that the dog had jumped on children and knocked them to the ground on several occasions without biting them and that on the day of the attack the owner stated that he hoped the dog would get plaintiff is sufficient to show the dog's viciousness and the owner's knowledge of the dog's vicious propensity.<sup>28</sup> Where the dog on several occasions had grabbed or nipped people or falling ripped clothes without biting, there was evidence from which a jury could determine that the owner had been put on notice of the likelihood of a subsequent biting incident.<sup>29</sup> If the owner trains the dog to be vicious and purposefully tries to increase the dog's aggressiveness, the owner can be held liable for a dog attack regardless of the dog's prior history.<sup>30</sup>

Recent decisions have indicated that the traditional first bite rule has been replaced by the theory that the owner must take reasonable steps to protect the public from his dog if the owner has superior knowledge of the dog's vicious temperament even if the dog has never bitten in the past.<sup>31</sup> "Georgia has traditionally adhered to the first bite rule in deciding whether a dog owner has knowledge that his dog has the propensity to bite someone...There have, however, been some recent cases which look at whether the owner had prior knowledge of dog's tendency to attack humans and superior knowledge of his dog's temperament."<sup>32</sup> Under this standard, evidence that the dog had threatened a neighbor in the past with "bared fangs, vicious growls, and attack behavior" and may have attacked him but for the evasive actions of the neighbor that put him beyond the reach of dog creates a jury issue as to the dog's viciousness even though the dog had not actually attacked someone prior to the present incident.<sup>33</sup> Similarly, an incident where a person jumped onto the hood of a car for fear of the dog attacking him is sufficient to put the owner on notice of the possibility of the dog biting someone despite the fact that the dog did not actually bite or try to bite the person on the prior occasion.<sup>34</sup>

## **II. Leash Law Liability**

### **III.**

Faced with a situation where an owner's knowledge of the dog's vicious propensity could not be proven, plaintiffs attempted to utilize violations of a local leash law as evidence of negligence per se and thereby create another avenue of liability for the dog owner.<sup>35</sup> However, Georgia courts routinely held that a plaintiff could not circumvent the common law requirement of proving vicious propensity by showing that the owner had violated a leash law.<sup>36</sup> Realizing the inherent unfairness in allowing the dog owner to violate leash law ordinances adopted for the protection of the public without incurring any liability for a dog attack, the General Assembly in 1985 amended the dog liability statute to include the following provision: "In proving vicious propensity, it shall be sufficient to show that the animal was required to be at heel or on a leash by an

ordinance of a city, county or consolidated government, and the said animal was at the time of the occurrence not at heel or on a leash."<sup>37</sup> This statutory amendment abrogated the common law rule that the owner had to have knowledge of the dog's vicious propensity if there was evidence that the owner committed a violation of an applicable leash law. <sup>38</sup> As amended, O.C.G.A. § 51-2-7 allows cities and counties to afford a higher degree of protection to people by passing leash law ordinances than allowed at common law.<sup>39</sup>

The leash law portion of the animal liability statute not only encompasses ordinances that require the dog to be "at heel or on a leash" but also restrictive ordinances that require the owner to keep the dog confined to the property.<sup>40</sup> If an animal is running at large in violation of a local leash law ordinance when it bites someone, the owner's lack of knowledge of the dog's vicious propensity is immaterial to his liability since the violation of the leash law substitutes for the proof of vicious propensity.<sup>41</sup> A guilty plea to allowing the dog to run at large and keeping a vicious dog is sufficient evidence to establish a violation of a local leash law.<sup>42</sup> If the attack occurs on the owner's property, then the leash law will not provide a means of liability if the ordinance simply requires the owner to keep the dog on a leash or on his property.<sup>43</sup> However, if the leash law requires the dog not only to be on the property but also to be confined on the property, then the owner can be held liable when the dog runs out the front door and is loose in the front yard<sup>44</sup> or breaks free of a chain.<sup>45</sup> If the dog is unrestrained at the time of the attack and the incident takes place off of the owner's property, then there exists direct evidence of a violation of a leash law.<sup>46</sup> Courts have applied the leash law liability provision to the following county and city ordinances: Cobb County,<sup>47</sup> City of Roswell,<sup>48</sup> Glynn County,<sup>49</sup> and Camden County.<sup>50</sup>

#### **IV. Negligent Undertaking**

Even with the recent liberal interpretations of the animal liability statute, plaintiffs lawyers have still tried different theories to circumvent the statute and obviate any of its requirements. One of the new successful theories of liability is the concept of voluntary undertaking. Under the voluntary undertaking doctrine, a person is required to exercise due care in performing any voluntary undertaking once he decides to perform the act even if he had no duty to perform the act prior to its performance.<sup>51</sup> A person can be held responsible for negligently undertaking this voluntary activity even if independent of his agreement to perform the action, he had no duty to perform it "When one undertakes an act that he has no duty to perform and another person reasonably relies upon that undertaking, the act must generally be performed with ordinary or reasonable care...The person assuming such responsibility may be held liable for negligently performing the duties so assumed."<sup>52</sup> If the owner of a dog voluntarily agrees to restrain his dogs before a person comes onto his property, and the owner negligently fails to properly restrain the dogs, the owner can be held liable under a concept of negligent undertaking even though the dog exhibited no vicious propensities prior to the attack and the owner did not violate the leash law.<sup>53</sup>

#### **V. Ownership and Control over the Animal**

By its terms, the animal liability statute only applies to the person who "owns or keeps" the dog.<sup>54</sup> The plaintiff carries the burden of proving that the defendant owned the dog involved in the attack or otherwise was responsible for caring for and keeping the dog.<sup>55</sup> A landlord who relinquishes possession of the premises to a tenant is not responsible for a dog that the tenant brings onto property.<sup>56</sup> Likewise, a store owner cannot be held liable for an employee's dog that bit a customer when the owner had no knowledge that the employee was bringing the dog to the store, and the owner had not given the employee permission to bring the dog to the store.<sup>57</sup> On the other hand, a local chapter of a fraternity can be held responsible for the actions of its mascot kept at fraternity house even though the mascot was owned by an individual member since members of the fraternity often cared for and kept the dog.<sup>58</sup>

## VI. Assumption of the Risk

The defense of assumption of the risk may be used to avoid liability for a dog attack if the victim knew of the dog's vicious tendencies and approached the dog despite this knowledge.<sup>59</sup> If a person knows that the dog had bitten someone in the past and the dog had growled at the person before, he has knowledge of the dog's vicious propensities equal to that of the owner and cannot recover for sustaining a bite when he tries to pet the dog.<sup>60</sup> Veterinarians and others providing services for dogs are usually deemed to have assumed the risk of injury from a dog bite unless the owners of the dog mislead them about the dog's temperament. <sup>61</sup> "[I]n general, veterinary employees know that practically any dog will bite in certain circumstances and that particularly violent and aggressive breeds are more likely to bite and even to inflict severe wounds. Such employees are either trained to handle such cases, or being adults, may leave them alone. But there 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"<sup>62</sup> Under this line of reasoning, a kennel attendant who was bitten by boarded dog cannot recover against the dog's owner when the owner told the kennel that the dog may bite.<sup>63</sup>

## VII. Punitive Damages

Although victims of dog attacks are often maimed or permanently scarred, punitive damages are only warranted in the most extreme circumstances. In order for punitive damages to be authorized, the dog owner must have actually known of the dog attacking another individual in the past and taken no steps to protect the public from the dog.<sup>64</sup> If the dog has bitten in the past, a victim is not entitled to punitive damages if the owner tried to keep non-family members out of the house and kept the dog in a separate room when non-family members were in the house since the owner took some steps to protect the public from an attack.<sup>65</sup> On the contrary, an owner may be held liable for punitive damages if he allows his dog that had bitten several times in the past to run at large and makes no effort to keep the dog confined.<sup>66</sup>

## VIII. Conclusion

The number and severity of dog attacks has been increasing over the years with children being the main victims of dog bite-related incidents. In order to combat this trend, Georgia law has become more lenient in allowing victims to recover from dog owners and has modified the protections previously extended to dog owners under the traditional first bite rule. Dog bite victims can now hold an owner liable for any attack resulting from a violation of a leash law regardless of the dog's prior history. Even when the law requires the victim to prove the owner's knowledge of the dog's vicious propensity, the standards have been relaxed to allow cases to reach a jury when the dog has never attacked in the past but has shown a bad temperament and a proclivity towards aggressiveness towards people. There have been several bites taken out of the first bite rule over the past few years. While Georgia law has not yet reached the point of holding a dog owner strictly liable for any attack, that point may be the next step around the corner.

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(Endnotes)

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- 2 Quinlan KP, Sacks JJ. Hospitalizations for Dog Bite Injuries. *JAMA* 1999; 281: 232-233.
- 3 Quinlan KP, Sacks JJ. Hospitalizations for Dog Bite Injuries. *JAMA* 1999; 281: 232-233.
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- 5 Sacks JJ, Kresnow, M, Houston B. Dog bites: how big a problem? *Injury Prevention* 1996; 2: 52-4.
- 6 *Clark v. Joiner*, 242 Ga. App. 421, 422, 530 S.E.2d 45 (2000).
- 7 *Hamilton v. Walker*, 235 Ga. App. 635, 636, 510 S.E.2d 120 (1999); *Rowlette v. Paul*, 219 Ga. App. 597, 599, 466 S.E.2d 37 (1995).
- 8 *Clark v. Joiner*, 242 Ga. App. 421, 422, 530 S.E.2d 45 (2000).
- 9 *Smith v. Culver*, 172 Ga. App. 183, 184, 322 S.E.2d 294 (1984).
- 10 O.c.GA § 51-2-7.
- 11 *Fitzpatrick v. Henley*, 154 Ga. App. 555, 556, 269 S.E.2d 60 (1980).
- 12 *Wells v. Beach*, 169 Ga. App. 736, 737, 315 S.E.2d 23 (1984) ("The weight of authority compels the conclusion that a dog's owner's liability must be predicated solely upon his knowledge that the errant animal has the propensity to cause the specific type of harm from which the ('HIS!> of rldion rlrrips")
- 13 *Torrance v. Brennan*, 209 Ga. App. 65, 432 S.E.2d 658 (1993).
- 14 *Id.* at 67-68.
- 15 *McCree v. Burks*, 129 Ga. App. 678, 200 S.E.2d 491 (1973); *Wade v. American National Insurance Co.*, 246 Ga. App. 458, 540 S.E.2d 671 (2000).
- 16 *Candler v. Smith*, 50 Ga. App. 667, 179 S.E. 395 (1935); *Harper v. Robinson*, 3 FCDR 3196, 589 S.E.2d 295.
- 17 *Harper* at 296.
- 18 *Fellers v. Carson*, 182 Ga. App. 658, 356 S.E.2d 658 (1987).
- 19 *Stanger v. Cato*, 182 Ga. App. 498, 499, 356 S.E.2d 97 (1987); *Pickard v. Cook*, 223 Ga. App. 595,596,478 S.E.2d 432 (1996). See O.c.GA § 51-3-1 which states "Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe."
- 20 *Stanger* at 498; *Freeman v. Farr*, 184 Ga. App. 830,363 S.E.2d 48 (1987); *Eason v. Miller*, 153 Ga. App. 420, 265 S.E.2d 340 (1980).
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- 22 *Phiel v. Boston*, 262 Ga. App. 814, 816-817, 586 S.E.2d 718 (2003); *Gilbert v. Hudspeth*, 182 Ga. App. 898, 899, 357 S.E.2d 601 (1987). *Freeman v. Farr*, 184 Ga. App. 830, 363 S.E.2d 48 (1987); *Hamilton v. Walker*, 235 Ga. App. 635, 636,510 S.E.2d 120 (1999).
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- 27 *Johnson v. Kvasny*, 230 Ga. App. 162, 163, 495 S.E.2d 651 (1998).
- 28 *McBride v. Wasik*, 179 Ga. App. 244, 245, 345 S.E.2d 921 (1986).
- 29 *Torrance v. Brennan*, 209 Ga. App. 65, 67, 432 S.E.2d 658 (1993).
- 30 *Sanders v. Bowen*, 196 Ga. App. 644, 646, 396 S.E.2d 908 (1990).
- 31 *Clark v. Joiner*, 242 Ga. App. 421, 422-423, 530 S.E.2d 45 (2000).
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- 33 *Suppan v. Griffin*, 238 Ga. App. 404, 406, 519 S.E.2d 22 (1999).



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