Don't get bitten by your dog-bite case

Avoiding eight common mistakes in discovery can keep your case out of the doghouse.

By Ron Berman

We Americans love our dogs, all 68 million of them. Living with a dog has been shown to benefit children, adults and senior citizens both physically and emotionally. At the same time, according to the Center for Disease Control and Prevention, more than 4.7 million people are bitten by dogs each year, with 800,000 requiring medical attention.

The latest numbers show that dog bites are an increasing problem for insurance carriers.

According to the Insurance Information Institute, claims related to dog bites cost the insurance industry $317 million in 2005 and $356.2 million in 2007, a significant increase.

The reaction by insurers has been to hike premiums and, in many cases, exclude specific breeds like Rottweilers, German Shepherds and "pit bulls" from coverage altogether. Thirty-two states, including California, have instituted a dog-bite statute that makes the owner "strictly" liable for any injury or property damage their dog causes.

In California, there are two clear defenses to the dog bite statute (See Civ. Code, § 3342.) The defense has to show either that the victim was trespassing on the dog owner's property or that the defendant was not the dog's owner or caretaker. (See *Smythe v. Schacht* (1949) 93 Cal.App.2d 315 [209 P. 2d 116].) The defense may also seek to establish comparative fault by showing that the plaintiff provoked the dog.

When liability is not accepted by the carrier, the plaintiff often will face a motion of summary judgment. Here it is imperative that the plaintiff's attorney show that the defendant was the owner/caretaker of the dog(s) involved at the time of the incident and there is a triable issue of fact for the jury to decide on.

If the case is one in which the plaintiff is suing the landlord of the property where the dog owner lived (a more difficult cause of action to maintain often based upon the common law cause of action "scienter" or knowledge of a domestic animal's dangerousness (*Hillman v. Garcia-Ruby*, (1955) 44 Cal.2d 625, 626), the plaintiff must show that the landlord had either actual knowledge of the dog's dangerous propensities or "must have known" of those propensities. This can be especially difficult for the plaintiff if there appears to be no evidence supporting previous aggression by the dog. As it is rare for a landlord to actually admit personal knowledge that the dog was dangerous, the plaintiff's attorney cannot miss any evidence that will help his client avoid a summary judgment for the defense.

Aside from strict liability and "scienter," there are other negligence theories of dog bite liability but this article is not intended as a thorough review of California dog bite law; instead, it will offer insight into the discovery process in dog bites by examining eight common mistakes made by plaintiffs' attorneys that can have a profound effect on the outcome of their cases.

Mistake 1: Not evaluating the dog

The choice "not" to evaluate the defendant's dog, especially if the dog is alive and available, can easily backfire. If you have retained an expert, not evaluating the dog can be used to show that not only did the expert not do a complete investigation but that their opinions are based on second-hand information. It is often the case that the plaintiff's expert doesn't do an evaluation but the defendant's expert does. This can be very problematic because if the defense expert actually saw and evaluated the dog, his testimony will likely carry more weight.

It is important that the evaluation be set up correctly and that no opportunity to view and record the dog's unprovoked behavior in multiple settings and situations is missed. There are many questions that have to be answered and planned for when setting up the format for an evaluation. Was another dog involved? Did the incident happen on the defendant's property or somewhere the dog would relate to as neutral territory? Has the defendant made any statements that could be tested during the evaluation? Which testing protocol should be used? The goal is to set up as foolproof and professional an evaluation as possible soon after the incident.

Immediacy is a prime factor as so often the dog is given away, disappears or dies for any of a myriad of reasons and

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the opportunity to evaluate the animal is gone and with it a possible turning point in the plaintiff's case. Fortunately, a solid presentation can be conducted even if the dog is no longer available, but no other evidence sums it up quite as well or intensely.

Mistake 2: Not making a video presentation of the dog

In many cases, the only witness that will tell the whole truth is the dog. They are truly independent witnesses in the sense that they have no desire to control the outcome.

In a well-planned, executed evaluation, an aggressive dog almost always acts aggressively and a friendly dog will almost always act friendly.

A video presentation of the defendant's dog is possibly the most powerful evidence a plaintiff can offer a jury. If the dog is aggressive or even vicious, each member of the jury gets to fully experience that behavior and get a real sense of what the plaintiff was dealing with at the time of the incident. The same video also can help to attack the credibility of a defendant who has previously said that their dog is not aggressive and that the plaintiff provoked the dog.

Mistake 3: Failure to inspect the attack scene and the dog's home

If a dog was kept at the defendant's home, it is important to inspect the home. Chewed door or window frames, scratches on the door, smashed window blinds, the dog's bed or lack of one, where the dog slept, photos of dogs on the wall… all give you a sense of how the dog was treated and how it acted in the house. A plethora of dog toys in every room gives a lot of information about whether the defendants were indulgent with their dog.

Inspecting leashes, collars, chains, dog houses, food bowls, kennels, yards, toys etc. also provides a wealth of information about the dog to an expert who understands the human/canine companion bond and how it influences behavior. Do they use a choke or prong collar? Is their leash extendable to 15 or 20 feet? Is the drinking water in the bowl dirty? Does the fence meet the standard for containing a dog of this size? Is there any evidence that the dog was aggressive at the fence and/or property boundaries?

Mistake 4: Using the wrong interviewer

Witnesses' statements are often taken by people trained in interviewing techniques but who have little experience in animal behavior. As a result, the evidence they discover leaves openings that can be explored by the defense. What if a witness gives a statement that the dog was "aggressive" and it "scared" them. That sounds solid, but what does it really say? Aggressive is a general term that can mean many things. In one case, the witness who labeled the dog "aggressive" meant that he had a lot of energy and played really hard or "aggressively." The statement that the dog "scared them" is based only on their perception of the dog, which has little meaning unless the dog actually demonstrated behaviors which were clearly threatening. A dog that barks at people passing the property may scare some people, but barking alone is not considered an aggressive behavior.

Barking versus growling and snarling

In one case, the plaintiff was facing a motion for summary judgment by the defense. The plaintiff and one of her daughters had been interviewed and deposed and each had said that the dog "barked" at the fence a lot and had scared them on many occasions. Following the deposition, plaintiff's attorney hired an expert who visited the plaintiff at her home.

The dog that the plaintiff and her daughter described sounded really aggressive. Knowing that dogs which attack people rarely only bark at people, the expert took the interview process a few steps further and also asked the plaintiff for the names of anyone they knew who had come into contact with the dog.

While waiting for the plaintiff to make a list of names, the expert went next door where the dog had previously lived. The house was for sale and the gates were open. Upon examining the wooden gate to the backyard, it was clear that a large dog had been jumping high enough to leave scratch marks on the very top of the six-foot wooden gate/fence. It was clear that the dog was highly motivated and had jumped at the fence very often.

The expert decided to follow a hunch. The plaintiff was Vietnamese and so were her daughters. Maybe there was a language barrier? When the expert asked the plaintiff to re-create the sound she heard on the other side of the fence, the plaintiff laughed at first.

She said she couldn't bark like a dog, but the expert insisted. When she finally did so, she made a low, guttural sound more reminiscent of a growl than a bark. She explained later that, to her, all sounds dogs make are a bark. She only had one word in English, "bark," for that sound. It would have been hard for the plaintiff to prevail against the defense's summary judgment motion based on testimony that the dog "barked" because barking is not considered aggressive behavior, but growling clearly is an aggressive act.

The plaintiff's gardener and handyman, as well as the her daughters, none of whom were in the room during their mother's interview, all confirmed that the dog did jump at the fence, growling, on a regular basis and sometimes snarled and growled while making direct eye contact, which is even more aggressive. In the end, the plaintiff won their opposition to summary judgment and the case was settled early.

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Mistake 5: Missing important discovery documents

The laundry list of discovery documents needed in a dog-bite case or pet-related injury is well known: The veterinarian records, animal control records; police report; paramedic records if any; the names of any trainers and or groomers the dog has had; names of independent witnesses who are familiar with the dog including neighbors, friends, employees, visitors to the the home or business, regular deliverymen; etc. Other related documents that may prove helpful are AKC registration certificates, breeding documents if the dog was imported as a puppy or as a trained dog, and diplomas from any training schools the defendant claims the dog has attended.

Mistake 6: Depending on documents alone

Receipt of a veterinarian's records doesn't insure that you have all the information contained on them. A lot of veterinary clinics respond to subpoenas for records with digitized or computer printouts. As most veterinarians still write initial reports in hand, it is important to get the handwritten notes and the computerized print out, if even to help decipher the doctor's handwriting. In more than a few cases, notes containing the words "reactive" or "tried to bite" were written in the top corner of some records but were not transferred to the computer version. Also, it is always good to talk to the veterinarian; they are a great source of information and there are always things they don't put on the charts.

Mistake 7: Not properly evaluating wounds and photos

If a plaintiff claims that a Rottweiler bit her arm and held it in his mouth for over two minutes while knocking her down and shaking his head, the wounds are direct physical evidence of the attack. An expert, court-qualified in wound evaluation, can give a strong opinion based on photos of the wounds as well as specific information to support the plaintiff's version.

Victims of dog attacks are often not clear about every detail of the incident, but their wounds tell a complete story in a way that is hard to challenge. If there is too much disparity between the plaintiff's version and their actual wounds, it can lead to a serious credibility issue.

Mistake 8: Picking an expert with the wrong qualifications

It is imperative that a thorough examination of the expert's qualifications is made. For example, an expert with a Ph.D. in Animal Behavior sounds great, but not if the animals that he or she studied weren't dogs and were in a laboratory instead of a human environment.

Veterinarians who have not had special training in the behavior of companion animals can also be problematic especially if their experience is only in the veterinary clinic and the incident happened somewhere else. People in the dog business, like trainers or kennel managers, can be very knowledgeable about dogs but may not have the personality or experience to handle attacks on their professionalism and credibility in a courtroom.

The right expert should have a solid animal behavior background specific to dogs and dog training. If they have testified in prior cases, be certain that testimony does not conflict with what they are going to say in your case.

Has the expert qualified in every court they have agreed to appear in? If they offer attorney references, make sure that they actually testified for that attorney. A great question to ask prospective experts is for the names of two attorneys, one for whom they testified and one who has cross-examined them.

Conclusion

By avoiding these eight common mistakes you will enjoy a more productive discovery, beat defendant's motion for summary judgment and be on your way towards resolving your dog-bite case.

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