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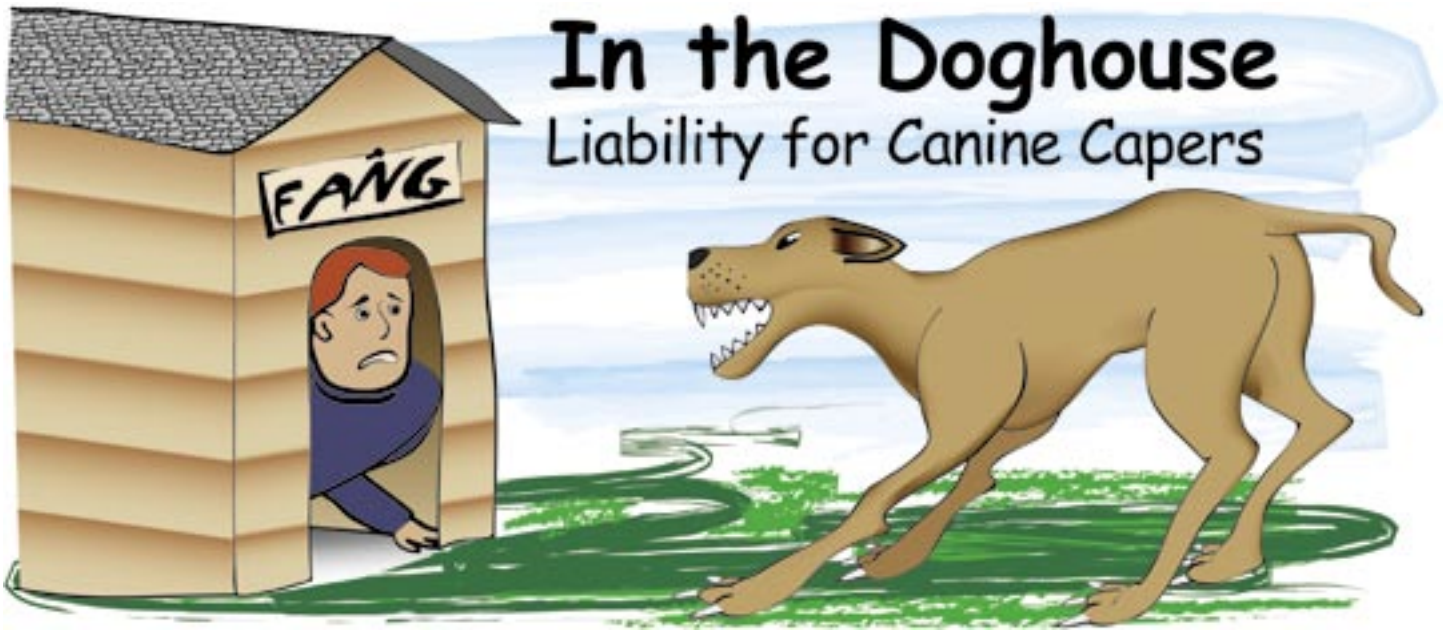

By Judon Fambrough

Incidents of personal injury, death and property damage caused by domestic animals, primarily dogs, are on the rise. Texas courts presently are expanding liability beyond pet owners and keepers to landlords and property owners' associations.

Common law (case law) does not include specific laws pertaining to dog-owner liability but includes them under the general rules regarding liability for domestic animals. Under common law, owners or keepers are strictly liable for personal injuries or death caused by a domesticated animal in their care when the following can be proven:

- The animal possessed a dangerous or vicious propensity abnormal to its class.
- The owner or keeper knew or should have known about the animal's dangerous propensity.
- The animal's dangerous propensity caused personal injury or death.

Case law is not clear on the definition of "dangerous or vicious propensity" or on when and how the owner or keeper acquires knowledge of this propensity. There is some truth to the old adage that "every dog has a free bite," meaning no liability for injury attaches to the owner until the animal demonstrates a dangerous tendency. However, growling, snarling or other aggressive behavior could indicate a vicious propensity without the dog actually biting or mauling someone.

The ruling in one case held that knowledge of an animal's habits can be shown through testimony regarding the animal's reputation for being vicious and its tendency to bite. In another case, the court ruled that an owner's awareness of a dog having killed a bird did not demonstrate knowledge of a vicious propensity to injure people.

Lewis v. Great Southwest Corporation involved a goat butting a child at a petting zoo. The parents sued. Because no evidence indicated any of the goats at the zoo had ever demonstrated a dangerous propensity, the amusement park avoided liability. In this case, the court classified the goats as "domesticated animals," not wild animals. There's a vast difference.

Owners or keepers of wild animals such as lions, tigers and wolves face a different standard for personal injuries. The law presumes that owners or keepers of wild animals know the animals have a vicious or dangerous propensity and, therefore, holds them liable for injuries or deaths caused by the animals. Proof of prior knowledge is irrelevant. In the *Lewis* case, had the courts viewed the goats as wild animals, the amusement park may have been liable.

Two Narrow Defenses

Strict liability, sometimes referred to as liability without fault, imposes a high standard of care on animal owners and keepers. The courts recognize two narrow defenses. The first involves the legal status of the injured party, the other the assumption of the risk.

Case law does not clearly describe what duty owners and keepers of wild and domestic animals have to protect trespassers. Generally, landowners owe no duty to trespassers except to avoid injuring them willfully, wantonly or through gross negligence. However, landowners may use force in self-defense and to protect property from criminal mischief at night.

Consequently, if a vicious guard dog attacks a trespasser who has entered a property to injure the occupants or to steal their property at night, no liability arises. However, if a vicious dog bites a trespasser during the day within a fence designed to contain the animal, the court could find the owner liable for gross negligence. More definitive rules are needed in this area. So far, no Texas appellate cases have held the owner or keeper liable for attacks on trespassers within an enclosed area designed to contain the animal.

The other defense, the assumption of the risk, causes considerable confusion. The Texas Supreme Court ruled in 1974 that the assumption of the risk is no longer a valid defense to strict liability. However, subsequent appellate cases appeared to disregard the high court's decision. Eventually, the courts clarified the issue by recognizing two distinct types of assumption of risk, express and implied. Only one constitutes a valid defense to strict liability.

An express assumption of the risk occurs when a person consents orally or in writing to take responsibility for exposure to potential injury-causing conditions. These take on the form of save-and-hold-harmless agreements as consideration for entering property. This type of agreement is common to sporting activities — a person signs an assumption-of-risk agreement as a condition to participate in a sporting event. An express assumption of the risks is a valid defense to strict liability.

An implied assumption of the risks is not a valid defense. An implied assumption occurs when a person's willingness to take responsibility is indicated by his or her actions and conduct. For example, if a property owner posts a "Beware of Dog" sign at the entry to the property, anyone entering impliedly assumes the risk by his or her conduct.

Liability for Negligence

In 1974, the Texas Supreme Court ruled in *Marshall v. Ranne (511 SW2d 25)* that liability for domestic animals with a vicious propensity must be based on strict liability. The court did not address liability for domestic animals having no vicious propensity. Can the owner or keeper still be liable for negligence absent a vicious propensity?

In a 1994 case, a mail carrier was startled by a dog hiding in the bushes next to a house. The carrier tripped and hit his head. The dog did not attack and had no history of vicious behavior. Even so, the court held the owner liable for negligence.

The court's ruling stated that dog owners "may be liable for injuries caused by a dog even if the animal is not vicious, if the plaintiff can prove that the owner's negligent handling of the animal caused the animal to injure the plaintiff" *(Dunnings v. Castro, 881 SW2d 559).*

Contributory negligence can be raised as a defense to common law negligence. The plaintiff's recovery of damages is reduced by the degree (or percent) that he or she contributes to the injury. Suppose the mail carrier suffered $10,000 in damages from the fall. If the jury finds the carrier 30 percent responsible, the judgment would be reduced to $7,000. When the plaintiff's responsibility exceeds 50 percent, no recovery is allowed.

Common law liability for domestic animals now rests on two legal theories. If the animal has a history of dangerous behavior, the owner or keeper may be strictly liable for any personal injuries or deaths caused by that animal. If the animal has no vicious or dangerous propensities, the owner or keeper may still be liable for negligently failing to prevent foreseeable harm to an individual.

Landlord and POA Liability

In recent years, the courts have extended liability beyond the dog owner or keeper. A Harlingen man injured his knee when a dog darted in front of his bicycle. The man, thinking the dog was attacking, lost control and crashed. The knee had to be replaced. The dog had no history of a vicious or dangerous propensity.

The jury awarded the plaintiff $1.8 million. The judgment was split between the dog owner and the homeowners association overseeing the property where the owner resided. Evidently, the court felt that the homeowners association, by not enforcing its leash laws, contributed to the plaintiff's injuries. The case was not appealed.

Even if an animal has no vicious or dangerous propensities, the owner or keeper may still be liable for failing to prevent harm to an individual.

In 1994, the Houston Court of Appeals heard the case of *Baker v. Pennoak Property (874 SW2d 274).* The case involved an apartment complex that allowed tenants to walk their dogs in a common area. During such a walk, one tenant's dog bit another tenant. The victim sued the apartment complex for failing to keep the area safe. The dog was not leashed at the time, but dogs were not required to be leashed in the common area.

The appellate court ruled the landlord had a duty to keep the common area reasonably safe, including protecting tenants from dogs having known vicious propensities. To recover under these circumstances, the plaintiff must prove:

- the injury occurred in a common area under the landlord's control and
- the landlord knew or should have known the dog had a vicious propensity.

Although tenants had voiced concerns about dogs in general being walked in the common area, no reports had singled out this dog as being dangerous. The landlord avoided liability.

In a case of first impression, the Houston Court of Appeals ruled on a case involving a landlord who rented a single-family dwelling to a family with children (*Batra v. Clark [110 SW3d 126 2003]).* The rental agreement prohibited pets on the premises without the landlord's consent. The tenant's son, who did not reside on the premises, frequently visited his mother and brought his pit bull. The property was fenced.

Generally, the dog was chained on the side of the house during visits, but it was not chained on the day of the attack. A friend came over to play with Georgina, the tenant's daughter. Because the dog was loose, Georgina instructed her friend to distract the dog in front of the house so Georgina could safely exit through the back gate. The friend complied, but the agitated dog jumped the fence and bit the friend numerous times. The friend's parents sued both the tenant and the landlord.

At trial, evidence indicated the landlord, who was working on the roof at the time, heard the dog barking, but he did not see the dog nor have any knowledge of its dangerous character. Even so, the trial court held the landlord partially liable for negligence. On appeal, the landlord was exonerated.

A landlord of a single-family dwelling is liable for injuries to a third party when the landlord has actual knowledge of the animal's presence on the property

and its vicious propensity and has the ability to control the premises.

What is interesting about this case is that the appellate court required prior knowledge of the dog's vicious propensity even though the case was based on negligence, not strict liability. Evidently, prior knowledge is now required in instances in which landlords of single-family dwellings are sued for negligence.

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