

WHEN DOGS ATTACK: A FEW WORDS ABOUT THE CIVIL AND CRIMINAL IMPLICATIONS
OF OWNING A DANGEROUS DOG THAT CAUSES SERIOUS PHYSICAL INJURY OR DEATH. 

Thomas P. Franczyk
Deputy for Legal Education
Assigned Counsel Program
July 21st, 2020

Unlike cats who can be stingy and selective with their affections, their canine counterparts are widely considered to be fiercely loyal and unconditionally loving to their owners and members of their household. People often treat (and sometimes dress) them like children, and unlike many children, dogs (assuming they've been reasonably well trained), almost always do as they're told and always seem to enjoy time spent with their "parents."

Dogs are generally so beloved as to have earned the title "man's best friend" (woman's as well), and have historically been depicted as heroes in literature and film (e.g. Lassie, Rin Tin Tin, Balto), and anthropomorphized in cartoons (e.g. Lady and the Tramp, 101 Dalmatians and The Fox and the Hound).

In addition to their appeal to humans as inherently lovable creatures (with some exceptions), dogs are also widely recognized and appreciated for a variety of valuable services that they provide whether as trained guide (seeing-eye) dogs, hearing dogs, service dogs, therapy dogs, search dogs, drug-sniffing/bomb detecting dogs for law enforcement and "war dogs" in service to the military.

And, while all dogs may or may not go to heaven, not all of them, whether because of breeding, training, neglect, abuse, anxiety and/or fear, are angelic, and some may strike out and attack (other animals or people) with devilish ferocity without warning or apparent provocation. When that occurs, legal recourse can be sought via civil lawsuit for money damages and/or by proceedings under Section 123 of the Agriculture and Markets (AML).

While the AML does provide for civil financial penalties (for negligence in allowing one's dog to bite and [seriously] injure a person), and for the imposition of strict liability (and fines) for medical costs resulting from injury caused by such animal, it is primarily concerned with ensuring public safety with remedies ranging from leashing and muzzling (upon a finding of dangerousness) to permanent confinement or euthanasia when there are aggravating circumstances.

The rule in New York State with respect to civil lawsuits arising from dog-inflicted injuries is that an owner will be held liable in money damages for such injuries when he/she knows or should have known of the animal's vicious propensities which resulted in the harm. (*Collier v Zambito* 1 NY3d 444 [2004], citing *Hosmer v Carney* 228 NY 73 [1920]). A vicious propensity is defined as a propensity to do any act that might endanger the safety of the person or property of others in a given situation. (*Dickson v McKay* 39 NY 400 [1868]).

While it is sometimes (inaccurately) described as the "one bite" rule, an owner's knowledge of his/her dog's violent predisposition can be gleaned from prior similar acts (which may or may not be a prior biting incident), of which the owner had notice (*Benoit v Troy Lansingburgh RR Co.* 154 NY 223 [1897]) (or should have been aware of), or from other prior acts of aggression such as growling, snapping or baring of the teeth. (*Hanke v Frederick* 140 NY 224 [1893]).

So, if an animal with a prior history of violent or aggressive behavior of which the owner was (or should have been) aware, attacks and injures a person or property of another, the dog owner is subject to STRICT LIABILITY for the harm caused by the animal's vicious propensities even though the owner may have otherwise taken care to confine or restrain the animal. (*Strunk v Zoltarski* 62 NY2d 572 [1984]). In this state, that appears to be the risk that dog owner's take (and sometimes the price they pay) when their dog who has an aggressive or violent past, attacks and injures someone.

In *Collier v Zambito* supra, the issue was whether there was sufficient evidence of dangerousness (or the lack thereof) to overcome the defendant's motion for summary judgment and/or to grant the plaintiff's cross motion for the same relief. The trial court denied both motions (ruling that there was a triable issue of fact whether the dog owner had knowledge of a dangerous propensity), but the Appellate Division (AD) reversed (3 to 2), finding no evidence of prior viciousness. The Court of Appeals (with a vigorous dissent), affirmed the AD'S decision.

In that case, the infant plaintiff, a 12-year-old boy, was playing at a neighbor's house when he went downstairs and was invited by the defendant (his friend's mother), to pet the dog "Cecil" whom he knew from prior visits (and described as always barking and acting "wild"). When the boy got within striking distance of the barking dog (which was on a leash), it jumped up and bit him in the face.

Noting the absence in the record of any evidence of prior incidents of threats, attacks or bites, the Court found that there was no triable issue of fact on vicious propensity. In the majority's view, barking and running around are normal canine behaviors and the owner's invitation for the child to pet the dog suggested no concern on her part over the dog's disposition.

The dissent reasoned that the owner's habit of confining and restraining this excitable, seven-month-old yapping dog raised a question of fact as to a possible awareness of an aggressive nature, and the nature of the attack (unprovoked attack on a child in the owner's presence), suggested a violent disposition.

See also *Bard v Jahnke* 6 NY3d 592 (2006) where the Court of Appeals (with the same judge dissenting) applied the Collier rule (declining to employ a negligence analysis) to a situation where a carpenter who was working in a barn in a section on the defendant's dairy farm (unbeknownst to the farmer), was attacked and seriously injured by a stud bull ("Fred") who roamed that area freely (for available cows) and who, (according to an expert), was exerting his territorial, male dominance when he encountered the unwitting carpenter.

In granting the defendant's motion for summary judgment, Supreme Court held that while there may be an enhanced duty of care with respect to certain animals (e.g. a breeding bull), this particular bull had shown no prior inclination toward actual or threatened violence even though always unconfined, and the farm owner had no reason to believe that this carpenter (would be on the property) at that time.

The Appellate Division affirmed, noting that the bull was a domestic animal that showed no prior inclination toward violence. (16 AD3d 896 [3d dep't 2005]). The Court of Appeals, applying the strict liability standard set forth in *Collier* supra, affirmed the AD'S decision, and saw no reason to apply a negligence standard (as set forth in Section 518 Restatement of Torts), based on the failure to restrain certain breeds of animals that may be aggressive by nature.

The dissenting justice found this approach to be contrary to fairness and common sense, and urged adoption of a rule imposing liability for negligence in failing to prevent harm regardless of the owner's knowledge of any abnormal dangerousness.

AGRICULTURE AND MARKETS LAW:

Section 108(24) of the AML defines a DANGEROUS DOG as any dog which, (i) WITHOUT JUSTIFICATION, ATTACKS a person, companion animal (AML 350[5]): pet, (dog or cat), or any other domesticated animal normally maintained in or near the owner/caretaker's household), farm animal (AML 350[4]), or domestic animal (AML 108[7]), and CAUSES PHYSICAL INJURY OR DEATH; or (ii) BEHAVES IN A MANNER which a REASONABLE PERSON would believe poses a SERIOUS AND UNJUSTIFIED IMMINENT THREAT of serious physical injury or death to one or more persons, companion animals, farm animals or domestic animals or, (iii) WITHOUT JUSTIFICATION, ATTACKS a service dog, guide dog or hearing dog and causes PHYSICAL INJURY OR DEATH.

DANGEROUS DOG COMPLAINT AND PROCEEDINGS: AML 123

1. Any person who WITNESSES an attack or threatened attack (or parent of a minor witness), may file a complaint with a dog control officer (DCO/ AML 108[6]: any person appointed by a municipality to assist in the enforcement of the AML or any agent/employee of an incorporated humane society [e.g. ASPCA], or dog protection association under contract with a municipality to assist in enforcement), or with a POLICE OFFICER (PO) of the municipality who shall IMMEDIATELY INFORM the witness of his/her right to COMMENCE A PROCEEDING under AML 123(2), and if there is REASON TO BELIEVE the dog is DANGEROUS, the officer SHALL COMMENCE the proceeding him/herself.
2. A sworn complaint (whether brought by the witness or an officer), must be brought to a MUNICIPAL (i.e. city, town or village) JUDGE/JUSTICE who, in turn, shall IMMEDIATELY DETERMINE if there is PROBABLE CAUSE to believe the dog is DANGEROUS and, if so, shall ISSUE AN ORDER TO THE DCO/PO (or peace officer acting pursuant to his/her special duties), directing him/her to IMMEDIATELY SEIZE SUCH DOG and hold it pending judicial determination.

Whether or not the judge finds probable cause to seize the dog, he/she shall hold a HEARING within FIVE DAYS (giving the owner at least two days written notice), on the complaint.

At such hearing, the PETITIONER bears the BURDEN of proving DANGEROUSNESS by CLEAR and CONVINCING EVIDENCE (which replaced the former preponderance standard when the statute was amended in 2004. See Matter of Workman v DuMouchel 2019 NY Slip Op. 06248 (4th dep't 8/22/19), Troutman J., dissenting).

If the burden is met, the judge MUST ORDER that the dog be NEUTERED/SPAYED (presumably to reduce aggressiveness and ability or reproduce), and MICROCHIPPED (i.e. injection of a small computer chip with an identification number under the skin).

The court MAY ALSO DIRECT that the dog be:

- a) EVALUATED by a certified animal behaviorist (or other recognized expert), and be required to COMPLETE TRAINING or other treatment as the expert deems appropriate (and which the DOG OWNER MUST PAY FOR);
- b) SECURED IN HUMANE CONFINEMENT for a period of time and in a manner that the court deems appropriate and which, in all cases, 1. PREVENTS ESCAPE, 2. PROTECTS THE PUBLIC FROM UNAUTHORIZED CONTACT, 3. PROTECTS THE DOG FROM THE ELEMENTS and 4. DOES NOT INCLUDE LONG PERIODS OF TYING OR CHAINING;
- c) RESTRAINED on a leash by an adult (age 21) whenever on public premises;
- d) MUZZLED on public premises to prevent biting of any person or animal, provided it does not injure the dog or interfere with its vision or breathing;
- e) That the OWNER maintain a LIABILITY INSURANCE POLICY in an amount determined by the court (up to \$100,000.00) for personal injury or death resulting from an attack by such dangerous dog.

AGGRAVATING CIRCUMSTANCES

3. Upon a dangerous dog finding, the court MAY ORDER HUMANE EUTHANASIA (AML 108[8])(e.g. injection of a sedative such as Pentobarbital which stops the heart and brain function in one to two minutes), or PERMANENT CONFINEMENT if one or more AGGRAVATING CIRCUMSTANCES is established including that:

- a. WITHOUT JUSTIFICATION, THE DOG ATTACKED A PERSON CAUSING SERIOUS PHYSICAL INJURY (SPI) OR DEATH.

SERIOUS PHYSICAL INJURY is defined in AML 108(29) as physical injury (i.e. impairment of a physical condition or substantial pain, AML [28]), which creates a substantial risk of death or serious or protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ .

This definition is virtually identical to the definition of SPI in PL 10.00(10) except that the latter requires SERIOUS AND (as opposed to "or") PROTRACTED disfigurement.

In Matter of Workman v DuMouchel supra, the Fourth Department wrestled with the definition of serious injury (in particular, disfigurement), in a case involving an attack on a three-year-old girl who suffered multiple lacerations of her chest, lower leg and of her buttocks which required 30 stitches to close. The offending dog, Wally, broke free of his tether in a neighbor's yard and ran onto the victim's property and bit her until a neighbor managed to pull the animal away.

The lower court found the dog to be dangerous and directed that it be euthanized. The respondent/owner did not challenge the dangerous dog finding but took issue with aggravating circumstances, alleging that the injury (the laceration of the child's rear end) did not qualify as serious disfigurement considering its location on a regularly concealed area of the body.

The Appellate Division affirmed the lower court's order finding that the evidence (including testimony from the parents and photographs of the sutured injury taken shortly after the attack), were sufficient to support an inference of permanent disfigurement. (citing, inter alia, People v McKinnon 15 NY3d 311 [2010] and Town of Concord v Edbauer 161 AD2d 1528 [4th dep't 2018]).

The majority of the court noted that an injury is disfiguring when it negatively alters the beauty, symmetry or appearance of a person, and is seriously so when, taking into account its nature and location, a reasonable person would find it distressing or objectionable. (Fleming v Graham 10 NY3d 296 [2010].

The dissenting justice found that the photographs, taken so close in time to the attack when the injuries were obviously at their worst (instead of after a reasonable period of healing), were not a fair predictor of permanence, and a scar that appears on the buttocks (as opposed to a prominently visible location like the face), is not sufficient to support a finding of serious injury in this context. (citing, *inter alia* Smith v McDonald 101 AD3d 1789 [4th dep't 2012] and Koch v Richardson 144 AD3d 1638 [4th dept 2016].

The dissenter also found that the proceedings were prejudiced from the start by the lower court's summary rejection of a proposed resolution of the matter consisting of neutering and permanent confinement instead of euthanizing the animal. (The lower court judge reportedly said, "I'm going to have to order that this dog be put down"). In the dissenter's view, the judge got all caught up in an emotional response to a terrible attack on a young child and predetermined the outcome.

The dissenter also noted that the medical records showed that the child's condition was improving and the scar was "healing nicely" as of the two-week follow-up appointment.

In contrast, see Fitzgerald v Varney 2018 NY Slip Op. 28229 (Warren County Court 7/18/18) where County Court, on appeal, reversed the lower court's finding of serious disfigurement. In that case, a dog, Onyx, without apparent provocation, bit a 12-year-old boy who was sitting on his neighbor's couch, on the left side of his mouth. The boy testified that his lip was numb for a little while after which he felt pain on a scale of five out of ten. A physician's assistant reportedly told him that the scar "would fade away but never go way."

The court, citing People v Jurnov 65 AD3d 363 (4th dep't 2009), noted that there was no evidence offered as to the size of the wound or the number of stitches needed to close it. The court also indicated that there was no basis to conclude that the injury met the objective standard of being pitiable or inviting scorn. (citing Zulawski v Zulawski 170 AD2d 979 [4th dep't 1991]). The court observed that while the likelihood of adverse affects on future appearance, functionality or health may satisfy the definition of serious injury, the mere possibility of such consequences does not. (Citing People v Rosado 88 AD3d 454[1st dep't 2011]: broken nose and chipped teeth did not qualify as serious injury).

See also People v Trombly 97 AD3d 903 [3d dep't 2012]: two lip lacerations not enough; Town of Concord v Edinburgh supra: 36 interior and exterior stitches to repair dog bite to the face was sufficient to meet the SPI threshold.

AGGRAVATING CIRCUMSTANCES may also be found to exist where:

(b) a dog has a KNOWN VIOLENT PROPENSITY as shown by a PREVIOUS UNJUSTIFIED ATTACK on a person which caused SPI or death; or

(c) the dog, without justification, causes SPI or death to a companion, domestic or farm animal, and has, IN THE PAST TWO YEARS, caused unjustified physical injury or death to a companion, domestic or farm animal as evidenced by a PRIOR DANGEROUS DOG FINDING UNDER THIS ARTICLE.

If the court, after a hearing, orders that the dangerous dog be euthanized, the order will AUTOMATICALLY BE STAYED for thirty days unless the owner informs the court in writing that he/she does not intend to appeal, and thereby waives such right. If the owner pursues an appeal, the stay of execution will remain in effect until all appeals have been decided. (See subdivisions 5[a] and [b] below).

EXCEPTIONS TO A FINDING OF DANGEROUSNESS (JUSTIFICATION):

4. A dog SHALL NOT be declared dangerous if the court finds that its conduct:

- a. WAS JUSTIFIED because the threat, injury or damage was sustained by a person who, at the time (of the attack) was COMMITTING A CRIME or offense upon the PERSON OR PROPERTY of the DOG'S OWNER/CUSTODIAN; or
- b. WAS JUSTIFIED because the threatened/injured/killed person was TORMENTING, ABUSING, ASSAULTING OR PHYSICALLY THREATENING the DOG or its OFFSPRING. (i.e. "You grab the pit bull by the ears, you may just get bitten"); or
- c. WAS JUSTIFIED because the dog was RESPONDING to PAIN or INJURY, or was PROTECTING ITSELF, ITS OWNER/CUSTODIAN (or member of his/her household), or ITS KENNEL or ITS OFFSPRING, or was justified because the injured threatened/killed companion, farm or domestic animal was ATTACKING (or threatening to attack) the dog or its offspring.

Testimony of a CERTIFIED APPLIED BEHAVIORIST, BOARD CERTIFIED VETERINARIAN (or other recognized expert), SHALL BE RELEVANT TO THE COURT'S DETERMINATION as to whether the dog's behavior was JUSTIFIED.

RIGHT TO APPEAL:

5(a) The owner of a dog found to be dangerous may appeal such determination and/or an order of disposition to the court with jurisdiction over civil appeals (e.g. County Court), in the county where the finding was made. The owner shall commence an appeal by FILING A NOTICE OF APPEAL with the appropriate court WITHIN 30 DAYS of the final order. (Court rules governing civil appeals in the appropriate jurisdiction shall determine the appeal).

b. The filing of a notice of appeal from an order of HUMANE EUTHANASIA shall AUTOMATICALLY STAY such order pending determination of the appeal. For all other dispositions , the dog owner MUST APPLY for a STAY of DISPOSITION.

NEGLIGENCE:

6. A dog owner who, through any act or omission, NEGLIGENTLY PERMITS his/her dog to BITE a person, or service, guide or hearing dog, causing PHYSICAL INJURY SHALL BE SUBJECT to a CIVIL PENALTY up to \$400.00 (in addition to any other authorized penalties).

It is worth noting that unlike the standard in a civil lawsuit (knowledge of dangerous propensities which cause injury whether or not the owner used due care under the circumstances), this section imposes a civil penalty only if the owner was negligent.

The AML does not define negligence, so the usual, civil law definition applies. (see Christensen v Lundsten 2008 NY Slip Op. 28320 [Suffolk County Dist. Ct 9/08]).

7. If the owner negligently permits his/her dog to bite another person or service, guide or hearing dog, causing SPI, the owner is subject to a CIVIL PENALTY up to \$1500.00.

Any such penalty may be REDUCED by any amount which the dog owner has paid as RESTITUTION to the injured person (or owner of the injured animal), or as COMPENSATION FOR UNREIMBURSED MEDICAL EXPENSES, lost earnings and other damages for such injury.

As noted in subdivision 12, nothing in this section shall limit or abrogate (eliminate) any claim or cause of action that any person who is injured by a dog with a vicious disposition/propensity may have under the common law or by statute. The provisions of this section SHALL BE IN ADDITION TO SUCH COMMON LAW AND OTHER STATUTORY REMEDIES.

It would appear then that if a party brings a civil action for damages and also initiates dangerous dog proceedings under the AML, any civil penalty would be subject to reduction by any amounts the owner has already paid for any of the above-mentioned expenses. Conversely, any damage award in a civil case could be offset by any amounts the owner may have paid either as restitution or compensation.

CRIMINAL LIABILITY:

8. A dog owner who, through any act/omission, NEGIGENTLY PERMITS his/her dog (WHICH HAS PREVIOUSLY BEEN DETERMINED UNDER THIS SECTION TO BE A DANGEROUS DOG), to BITE A PERSON CAUSING SPI SHALL BE GUILTY OF A MISDEMEANOR PUNISHABLE BY A FINE UP TO \$3000.00 AND/OR UP TO 90 DAYS IN JAIL.

Any such fine may be REDUCED by any amount which the owner has paid as restitution to the person suffering SPI as compensation for unreimbursed medical expenses, lost earnings and other damages resulting from the injury.

9. IF ANY DOG, PREVIOUSLY DETERMINED BY A JUDGE/JUSTICE TO BE A DANGEROUS DOG PURSUANT TO THIS SECTION, SHALL, WITHOUT JUSTIFICATION, KILL OR CAUSE THE DEATH OF ANY PERSON WHO IS PEACEABLY CONDUCTING HIM/HERSELF IN ANY PLACE WHERE HE/SHE MAY LAWFULLY BE, REGARDLESS OF WHETHER SUCH DOG ESCAPES WITHOUT FAULT OF THE OWNER, THE OWNER SHALL BE GUILTY OF A CLASS A MISDEMEANOR. (As such, he/she would be subject to punishment up to one year in jail, three years of probation and/or a \$1000.00 fine).

So, if a person owns a dog who has previously been declared by a judge to be dangerous (and presumably subject to restraint or confinement as described above), escapes and causes the unjustified death of a person who is minding his/her own business at a place where he/she has the right to be, such owner can be charged with a Class A Misdemeanor whether or not he/she was responsible for the dog's escape.

Of course, if an owner deliberately sics his/her dog on another person (not in self-defense) with the intent that the dog kill or seriously injure that person, and the person dies or suffers serious injury, the owner could conceivably be charged with murder, manslaughter or assault by means of a dangerous instrument under PL 10.00(13). (see People v Mateo 77 AD3d 1374 [4th dep't 2010], People v Bacon 2018 NY Slip Op. 03258 [4th dep't 5/4/18]).

STRICT LIABILITY:

10. The owner/lawful custodian of any dog SHALL (except as per subd. 4 (Justified Attack) or subd. 11 (Coming to the Aid of Victims of Designated Felonies), BE STRICTLY LIABLE FOR MEDICAL COSTS RESULTING FROM INJURY CAUSED BY SUCH DOG TO A PERSON or companion/domestic/farm animal.

11. The owner SHALL NOT be liable under subdivisions 6,7,8,9 or 10 of this section if the dog was COMING TO THE AID/DEFENSE OF A PERSON DURING THE COMMISSION (OR ATTEMPTED COMMISSION) of a MURDER, ROBBERY, BURGLARY, ARSON, RAPE 1ST DEGREE, CRIMINAL SEX ACT 1ST DEGREE OR KIDNAPPING WITHIN THE DWELLING OR UPON THE REAL PROPERTY OF THE DOG OWNER, AND THE DOG INJURED OR KILLED THE PERSON COMMITTING SUCH CRIMINAL ACT.

12. See above.

13. Nothing in this section shall restrict the rights/powers derived from Title IV of Article 21 of the Public Health Law with respect to rabies and any rule adopted pursuant thereto.

14. Persons owning, possessing or harboring (providing food and shelter, AML 108[8]), a dangerous dog SHALL REPORT THE PRESENCE OF SUCH DOG PER SECTION 2099 [c] of the General Municipal Law.

As is evident, while dogs can bring comfort and joy to the lives of their owners, they can also be a source of anxiety (and sometimes civil and even criminal liability), when they have known vicious tendencies (or of which the owner should be aware), and cause harm to others. Under such circumstances, the phrase "BEWARE OF DOG" may well apply to owners as much as to unsuspecting victims.