DOG BITE LIABILITY LAW: ELECTION OF REMEDIES

Dogs love their friends and bite their enemies, quite unlike people, who are incapable of pure love and always have to mix love and hate.

-Sigmund Freud

Outside of a dog, a book is a man's best friend. And inside of a dog, it's too dark to read.

-Groucho Marx

If you pick up a starving dog and make him prosperous, he will not bite you. This is the principal difference between a dog and a man.

-Mark Twain

I. INTRODUCTION

Dr. Keith Burgess-Jackson, J.D., Ph.D., posits that animal rights remains a controversial topic in our society. This is not necessarily bad. John Stuart Mill (1806-1873) said that all great movements go through three stages: ridicule, discussion, and adoption. We're past the ridicule stage and into the discussion stage. Whether we get to the adoption stage remains to be seen.[1]

Recent Ohio cases confirm that the law on animal rights [that is, that animals have rights] is in the discussion stage, but not the adoption stage.[2] In Ohio, dogs are considered personalty.[3]

An informational flyer put out jointly by State Farm Insurance Co., Insurance Information Institute, and the American Veterinary Medicine Association,[4] shows five cute puppies, with the title: **Don't worry, they won't bite.** Dog bites are in fact a major liability concern for insurance companies. Within the broader context of animal rights, the legal aspects of liability for dog bites remain fairly stable. This article is not about animal rights, but rather, human legal rights versus other humans who own animals, and specifically, humans who own, keep or harbor dogs who bite.

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II. THE EXTENT OF THE DOG BITE PROBLEM

Biting is a key component of predatory behavior in dogs, despite several thousand years of domestication from their wolf-ly ancestors. After all, dogs don't have hands - they use their mouths in many situations where humans use their hands. Biting can also be an expression of the dog's dominance, territorial defense, food-competition, protection of young, pain-elicited aggression, or fear-elicited aggression.[5]

In 2003, dog bites accounted for about one quarter of all homeowner's insurance liability claims, costing roughly $321.6 million, down slightly from about $345.5 million the previous year. In 2002 (latest data available) the average dog bite claim cost $16,600. According to the Centers for Disease Control and Prevention, more than 4.5 million people are bitten by dogs annually, resulting in an estimated 800,000 injuries that require medical attention. With over 50 percent of the bites occurring on the dog owner's property, the issue is a major source of concern for insurers.[6]

Injury rates were highest among children aged 5—9 years.[7] Children in that age group are at face-level with many dogs, and have a 41.5% chance of being bitten in the head or neck. They generally are more at risk for a noticeable scar and infection. Younger children have an even greater chance, 64.5%, of being bitten in the head or neck.

Medical treatment is the first step when there is a serious dog bite. A ten-day quarantine of the dog, to check for rabies, is also required by statute in Ohio.[8]

III. LEGAL CAUSES OF ACTION FOR DAMAGES (COMMON LAW AND/OR STATUTORY)

At common law, the keeper of a vicious dog could not be liable for personal injury caused by the dog unless that person knew of the dog's "vicious propensities." *Hayes v. Smith* (1900), 62 Ohio St. 161, paragraph one of the syllabus. To remedy this limitation, the Ohio General Assembly enacted a statute which eliminated the necessity of pleading and proving the keeper's knowledge. *Kleybolte v. Buffon* (1913), 89 Ohio St. 61, 64. Presently in Ohio, a suit for damages resulting from dog bites can be instituted under both statutory and common law. *Warner v. Wolfe* (1964), 176 Ohio St. 389, 393. Generally, both are pleaded in the Complaint if the facts warrant, and a sample complaint may be found herein.[9]

The differences between the two causes of action are illustrated in the table contained herein.

IV. ELECTION OF REMEDIES?

Defense articles on liability for dog bites attempt to argue a requirement for a plaintiff to elect between the common law and the statutory theories if the case proceeds to trial,[15] relying on the rationale of an obscure unreported 1983 case out of Ottawa County, *Rodenberger v. Wadsworth*.[16] In that case, on

Bob Guehl practices in Columbiana County with emphasis on personal injury, complex general civil and probate litigation. His background includes a Fellowship in Forensic Medicine at the Armed Forces Institute of Pathology, and an LL.M. in Forensic Medicine at the National Law Center, George Washington University, Wash., D.C. His clients often refer to him as "bulldog", but he prefers his gentle Giant Schnauzer, Annie. His pro bono clients include the Salem Humane Society and Angels for Animals.

the morning of trial, defendant filed a motion *in limine* requesting that plaintiff be required to elect whether they were proceeding under R.C. 955.28, or upon a common law theory. The court allowed the ambush and granted the motion, and plaintiffs proceeded to trial on the statutory count only. While plaintiffs won the trial, they nevertheless appealed the decision on the motion.

The court of appeals seemed concerned that proof of the differing elements of the causes of action should not or could not be admissible if both theories proceeded at the same time. Relying on the 1913 Supreme Court case of *Kleybolte v. Buffon*[17], the court extracted this language from the decision:

> "Evidence tending to show that the dog had bitten another person prior to the time that the plaintiff was bitten, and that defendant had knowledge thereof, is inad-missible."

With no explicit rationale given for the inadmissibility, the court of appeals took the mental leap from the inadmissibility (or rather irrelevancy?) of such evidence under the statute, to the unwarranted conclusion that, therefore, both causes of action could not proceed together:

> Thus, if a plaintiff were allowed to proceed under both theories of liability, evidence needed to establish the element of viciousness necessary under the common law theory would be inadmissible if the theory of statutory liability was also being pursued. Assuming that the plaintiff introduced evidence of the dog's viciousness or the owner's negligence, but could not prove all the elements under the common law, a judgment in favor of such plaintiff under statutory liability would prejudice defendant and be subject to reversal due to the introduction of inadmissible evidence...

The court did not state how strict liability under the statute would prejudice the defendant, if all the elements under the statute were proven, other than the fact of the judgment itself. The conclusion is not inescapable that one or the other must be dismissed simply because some evidence that is relevant or material in the one cause of action is not so in the other. *Kleybolte* predicated the inadmissibility of the evidence on the failure of the Complaint to allege *scienter, i.e.*, that the owner knew the dog was vicious, or any other reason for imposing punitive damages[18].

A 1924 Supreme Court case, *Lisk v. Hora*[19] was also misinterpreted in *Rodenberger*. The *Lisk* Court held:

> 1. The right to maintain an action at common law for damages resulting from injuries, which by his negligence the owner of a dog suffers such animal to commit, has not been abrogated by statute and such suit may be maintained either under the statute or at common law.
> 2. Where such suit is based on Section 5838, General Code [predecessor statute to ORC 955.28], it is not essential to aver and prove the known vicious character of the dog or negligence of the owner.

Lisk and *Kleybolte* involved claims that proceeded under the statute only. The Court held the evidence that the owner knew the dog had bitten another person was inadmissible, for the simple reason that such evidence was not relevant to any issue alleged in the complaint. *Rodenberger* misinterprets both cases by backing into a requirement of election of remedies, rather than recognizing that the cases did not have both statutory and common law causes of action before them.

Rather than treat evidence of viciousness or negligence as surplusage if the common law action cannot be proven completely, the *Rodenberger* court, and recent defense forays, have contorted the differing elements of proof into a requirement to choose:

> To allow a plaintiff to proceed under both causes of action runs the risk of introducing evidence to one cause of action that would be inadmissible in the other.[20]

The *Rodenberger* rationalization gives no indication how the admissibility of different evidence on alternative causes of action is prejudicial to anyone. Evidence that might be irrelevant to one cause of action should not, and does not, disqualify the party from pursuing both causes of action.

Rodenberger did recognize the general legal principle that a party may pursue alternative causes of action in one lawsuit, but immediately distinguished the case before it as a unique factual situation:

> While we agree...that Civ.R. 8 allows a party to plead multiple and/or inconsistent theories and that the common law doctrine of election of remedies is generally not applicable under the rules of civil procedure, the case at bar presents a fact situation which is unique.

Civil Rule 8 (A), General rules of pleading, clarifies matters:

> (A) Claims for relief
> A pleading that sets forth a claim

ELEMENT	C/L NEGLIGENCE	STATUTE ORC 955.28
ELEMENTS OF PROOF	1. Owner or keeper of dog 2. Dog was vicious[10] 3. Defendant had knowledge of viciousness 4. Defendant kept dog in negligent manner[11] 5. Proximate cause of injury 6. Damages	1. Owner, keeper or harborer[12] of dog 2. Dog proximately caused injury (strict liability) 3. Damage
S.O.L.	2 years ORC 2305.10	6 years ORC 2305.07[13]
DAMAGES RECOVERABLE	Compensatory ORC 2315.21: Exemplary	Compensatory only
DEFENSES	Comparative Negligence	Injured party trespassed Injured party engaged in criminal conduct Injured party teased, tormented orabused dog on defendant's property[14]

> for relief... shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled...**Relief in the alternative or of several different types may be demanded.** [emphasis added]

Rodenberger can thus be seen as an aberration or, at worst, limited to its unique factual situation.While it is important that the remedies sought be identified prior to trial, Civil Rule 8(A) permits the plaintiff to seek alternative forms of relief in a single action. Because Civil Rule 8(A) is procedural in nature, it would supersede common law doctrines regarding the election of remedies.[21] Civil Rule 8(A) requires that the relief sought be clearly set forth so that the defendant may effectively defend against it. The defendant's recourse for a poorly drafted pleading is to file a motion for dismissal or clarification under Civil Rule 12(B)(6) or Civil Rule 12(E).

Clear pleading of alternative causes of action is important, to clarify the issues for both the court and a jury. "The [plaintiffs] filed a complaint alleging three claims sounding in negligence, strict liability, and loss of consortium... However... counsel address[ed] only one theory of recovery strict liability...Charging the jury extensively on general negligence with only a passing reference to strict liability and then refusing to give a curative instruction was an abuse of discretion." *Koruschak v. Smotrilla.*[22]

Any attempt by the defense to require an election of remedies in a dog bite case can only be seen as an unjustified restriction on plaintiff's right to pursue alternative theories of relief under the Civil Rules. The case law and Civil Rules do not support an interpretation of either to mean that only one cause of action or the other can be pursued. The language relied on by defense counsel arose in cases where the defense was arguing the abrogation of the common law cause of action by the statutory action, in pursuit of the defense objective of minimizing damages by precluding punitive damages.[23] The courts indicated, however, that the common law was not abrogated, such that plaintiffs may proceed either under common law or under the statute. The defense bar has attempted to impose a veneer on that language (either...or...but not both) to unjustifiably require an election of remedies at trial. The correct statement of the law is set out in *McIntosh v. Doddy,*[24] another case cited in *Rodenberger* but ignored on this issue. *McIntosh* reviewed the holdings of the Ohio Supreme Court, including the decisions in *Kleybolte* and *Lisk*, and concluded that a plaintiff may proceed under both the statute and the common law:

> We deduce the following:
> (4) That in an action in which only the bare essentials of an action for recovery under the statute are alleged, evidence of the vicious nature of the dog, the knowledge of the owner of its vicious nature, and of the care or lack of care in keeping the dog is irrelevant and inadmissible to augment the damage beyond compensation.
> (5) In an action in which the additional elements necessary to state a common-law action for negligently harboring a vicious dog after knowledge of its vicious nature are alleged, such evidence is not only competent but essential in order to prove all the elements of the cause of action.

McIntosh explicitly recognized that the reason a plaintiff would seek to impose liability under both the common law and the statute is to enhance compensation to the injured party, that is, that punitive damages may be recovered under the common law that otherwise would not be recoverable under the statute.[25]

V. CONCLUSION -

It is apparent that the popularity of dogs as companion animals greatly outweighs the harm done by the occasional bite, on a societal scale. As Andy Rooney says: The average dog is a nicer person than the average person. On an individual scale, however, the damage done in a particular case, particularly to minors, can be devastating. Such situations justify the strict liability under Ohio's dog bite statute, and the availability of punitive damages in appropriate cases.

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[1] http://animalethics.blogspot.com/; See also, Michigan State University College of Law : Animal Legal & Historical Web Center , http://www.animallaw.info/ and specifically http://www.animallaw.info/statutes/statestatutes/stusohset.htm on Ohio laws. See also, www.dogbitelaw.com/

[2] *See, e.g.,Oberschlake v. Veterinary Assoc. Animal Hosp.*(2003);151 Ohio App.3d 741 *[A*...the story of "Poopi," a dog who tried to sue for emotional distress and failed]; *"Boomer" Pacher v. Invisible Fence of Dayton* (2003), 03 LW 3929 (2nd) {&22} AWithout in any way discounting the bonds between humans and animals, we must continue to reject recovery for non economic damages for loss or injury to animals. This is the position that the vast majority of jurisdictions take. See,e.g., *Koester v. VCA Animal Hosp.*(2000), 244 Mich. App. 173, 176, 624 N.W.2d 209, *211,Rabideau v. City of Racine*(2001), 243 Wis. 2d 486, 627 N.W.2d 795, 798, and *Harabes v. Barkery*, Inc.(2001), 348 N.J. Super. 366, 371, 791 A.2d 1142,1145... this is also the view our legislature and courts have taken, by choosing to classify dogs as personal property... But see, When Pets Die at the Vet, Grieving Owners Call Lawyers, USA Today, March 15, 2005, for reference to court cases in Kentucky and California that have awarded damages to pet owners for loss of companionship, emotional distress and other factors that go beyond the way courts have long assessed animals' worth: by their market value.

[3] ORC' 955.03 Dogs are personalty. Any dog which has been registered under sections 955.01 and 955.04of the Revised Code and any dog not required to be registered under such sections shall be considered as personal property and have all the rights and privileges and be subject to like restraints as other livestock.

The measure of damages for loss or destruction of a dog is the reasonable market value of the personalty immediately before its destruction. *Ramey V. Collins*(2000), 00 LW 2542 (4th).

As to the value of the dog, the issue of damages is problematical. For most people, dog ownership is a liability rather than an asset to be valued. The worth of a family pet falls into that category of personal property which has little or no market value. See the discussion in 30 Ohio Jurisprudence 3rd, Damages, Section 72. And no cause of action is recognized for damages to a pet owner for humiliation, abandonment, and the infliction of emotional distress. *Id.*

[4] As to the various organizations, see www.statefarm.com, www.iii.org, www.avma.org

Lockwood, Randall, 1995, The Etiology and Epidemiology of Canine Aggression. extract from James Serpell (ed.) The Domestic Dog: Its Evolution, Behaviour & Interactions with People. (Cambridge, U.K.:Cambridge University Press), pp. 132-138. Reprinted in Animal Law and Behavior.

[6] Insurance Information Institute, www.iii.org/media/hottopics/insurance/dogbite/ (Jan. 2005)

[7] Center for Disease Control website, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5226a1.htm

[8] 955.261 Duties after dog bites person; quarantine.

[9] A sample complaint follows these endnotes.

[10] O.R.C. 955.11(A) As used in this section:
(1)(a) "**Dangerous dog**" means a dog that, without provocation, and subject to division (A)(1)(b) of this section, has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person, while that dog is off the premises of its owner, keeper, or harborer and not under the reasonable control of its owner, keeper, harborer, or some other responsible person, or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top.
(4)(a) defines:"**Vicious dog**" means a dog that, without provocation and subject to division (A)(4)(b) of this section, meets any of the following:
(i) Has killed or caused serious injury to any person;
(ii) Has caused injury, other than killing or serious injury, to any person, or has killed another dog.
(iii) Belongs to a breed that is commonly known as a pit bull dog. The ownership, keeping, or harboring of such a breed of dog shall be prima facie evidence of the ownership, keeping, or harboring of a vicious dog.

[11] O.R.C. 955.22 details a list of requirements for control of dogs by owners, keepers, or harborers, violation of which may constitute negligence per se.

[12] As to landlord liability as harborer, see: *Samas v. Holliman* (Ohio App. 10 Dist.)2003 WL 1700646; *Flint v. v. Holbrook* (2d Dist.1992), 80 Ohio App.3d 21; *Burgess v. Tackas* (1998), 125 Ohio App.3d 294; *Thompson v. Irwin* (12th Dist 1997), Butler App. No. CA97 05 101, unreported, 1997 WL 666079.

[13] *Bora v. Kerchelich* (1983), 2 Ohio St. 3d 146.

[14] *Ramsey v. King* (1984), 14 Ohio App. 3d 138 [3-year-old child incapable of teasing, tormenting, or abusing a dog.]

[15] See, e.g., Terrence J. Kenneally, Dogged Liability - Determining liability in dog bite cases, Ohio Lawyer, Nov./Dec. 1999, pp. 15: "However, if the case goes to trial, the plaintiff must elect to proceed under one or the other, but not both. [citing *Rodenberger v. Wadsworth,* Case No. 20989,

CA Ottawa County (Nov. 25, 1983, unreported.) 83-LW-4072]."

[16] *Rodenberger v. Wadsworth* Case No. 20989, CA Ottawa County (Nov. 25, 1983, unreported.) 83-LW-4072

[17] *Kleybolte v. Buffon* (1913), 89 Ohio St. 61

[18] *Id.*, at 66.

[19] (1924),109 Ohio St 519

[20] Kenneally, supra, at 15.

[21] See *Jacobs v. Shelly & Sands, Inc.* (1976), 51 Ohio App.2d 44.

[22] 01 LW 3323 (7th) (CASE NO. 99 CA 320, 7th District Court of Appeals, Mahoning County, Decided July 16, 2001)

[23] See, *Warner V. Wolfe* (1964), 176 Ohio St. 389.

[24] *McIntosh v. Doddy* (1947), 81 Ohio Appl. 351, appeal dismissed, (1948) 149 Ohio St. 426.

[25] *Id.*, at 347.

SAMPLE COMPLAINT

Now come Plaintiffs, by and through counsel, and for their Complaint against Defendants herein state as follows:

1. On or about [date], Plaintiff, [NAME], was severely attacked and bitten by a dog while on the property located at [address], Ohio as a guest. The dog was kept and/or harbored on the property adjacent, at [address], Ohio as a guest.

2. At all times material herein, the said dog was owned, kept, and/or harbored by Defendants, [names, jane doe etc], individually and/or collectively, and/or as agents for the other at [address], Ohio, and failed to muzzle, supervise or confine or restrain the dog.

3. At all times material herein, Defendants, [names] were the owners of the property located at [addresses] Ohio, and allowed the dog to be harbored at [address], Ohio, with knowledge of its dangerous and vicious propensity, and failed to remove the hazard or warn thereof.

4. At all times material herein, Plaintiff, [name], was a minor having date of birth of [date], and her parents and next friends were [names].

COUNT ONE - STRICT LIABILITY UNDER § 955.28(B)

5. Plaintiffs restate the allegations contained in Paragraphs 1- 4 as if fully rewritten herein to the extent necessary for the claim herein.

6. As a direct and proximate result of being bitten by the said dog, Plaintiff, [name], has sustained serious physical injuries, pain and suffering, severe emotional distress, loss of enjoyment of life and has incurred medical expenses and other consequential monetary damages.

7. The said injuries and damages suffered by Plaintiff [name], are permanent/continuing in nature, and as a result, Plaintiff will suffer future pain and suffering, emotional distress, loss of enjoyment of life and medical expenses.

8. Pursuant to '955.28(B) of the Ohio Revised Code, Defendants are strictly liable to Plaintiff for her aforementioned injuries and damages.

COUNT TWO B NEGLIGENCE

9. Plaintiffs restate the allegations con-tained in Count One as if fully rewritten here-in to the extent necessary for the claim herein.

10. At all times material herein, said dog was dangerous and vicious.

11. At all times material herein, Defendants had knowledge of the said dog's dangerousness and viciousness.

12. At all times material herein, Defendants were negligent in keeping the said dog and/or allowing the dog to remain at the premises where it was harbored, and/or in failing to remove the hazard.

13. The said conduct of Defendants was outrageous, and said Defendants acted with reckless disregard for the safety of others including Plaintiff, [name].

14. As a direct and proximate result of Defendants' conduct, Plaintiff, [name], has suffered and will suffer in the future the injuries and damages set forth hereinabove.

COUNT THREE - LOSS OF CONSORTIUM

15. Plaintiffs restate the allegations contained in Counts One and Two as if fully rewritten herein to the extent necessary for the claim herein.

16. As a direct and proximate result of Defendants' conduct and dog bite to Plaintiff, [NAME], Plaintiffs, [PARENTS' NAMES], have been deprived of the society, companionship, affection, and comfort of their daughter, [NAME], and have incurred medical expenses and other consequential monetary damages of her behalf.

17. As said injuries and damages suffered by Plaintiff [NAME], are permanent/continuing in nature, Plaintiffs, [PARENTS' NAMES], will suffer the future loss of society, companionship, affection, and comfort of their daughter, [NAME], and will incur medical expenses and other consequential money damages on her behalf.

WHEREFORE Plaintiffs demand judgment as follows:

a. For compensatory damages against the Defendants, jointly and severally, in an amount exceeding One Hundred Thousand Dollars ($100,000.00) which will fully and fairly compensate Plaintiffs for their damages; and
b. punitive damages in an amount exceeding Twenty-Five Thousand Dollars ($25,000.00); and
c. prejudgment and post judgment interest and costs; and
d. their attorney fees; and
e. such other relief at law or in equity to which they are entitled.