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Should dog owners get one free bite? Usually, no

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Daily Record Columnist

Take a walk in any local park or on a residential street and the love affair people have with their dogs becomes obvious.

A number of recent high-profile incidents involving dog attacks and dog-related accidents highlight the need to understand potential liabilities dog ownership carries, and the rights of a person injured by the actions of a dog.

The New York State Court of Appeals has made clear the owner of a domestic animal who either knows or should have known of their animal's vicious propensities will be held liable for harm the animal causes, *Collier v. Zambito*, 1 NY3d 44 (2004). Vicious propensities include the "propensity to do any act that might endanger the safety of the persons and property of others in a given situation," *Id.*

Despite the requirement of proof that a defendant know or should know of an animal's vicious propensities, owners are not automatically entitled to one free bite or other dangerous act by their dog. A number of recent decisions hold that, although a dog has not committed a vicious act, its vicious nature ought to have been apparent to its owner, *Id.*

In an effort to promote dog safety, many municipalities use leash ordinances requiring owners to leash their dog in public places. In light of these, if a dog bites or attacks someone while not on a leash, can this be used as evidence of owner negligence? The Court of Appeals decision in *Young v. Wyman*, 76 NY2d 1009 (1990), holds that the mere presence of an unrestrained dog on the street does not give rise to a presumption of negligence on the part of its owner. Similarly, the Fourth Department has held that violation of a local leash law, standing alone, is insufficient to create requisite triable issues of fact concerning defendants' actual or constructive notice of a dog's alleged vicious propensities or interference with traffic, *Sinon v. Anastasi* (Fourth Dept. 1997); *Elmore v. Wukovits*, 288 AD2d 875 (Fourth Dept. 2001).

Some courts have found triable issues of fact on causes of action alleging an unrestrained dog (in violation of a local ordinance) was a proximate cause of a plaintiff's alleged

injuries.

In *Faller v. Schwartz*, 303 AD2d 624 (Second Dept. 2003), the plaintiff was injured when the defendant's dog ran into the street and collided with the motorcycle the plaintiff was operating. At the time, local regulations stated no dog was allowed to be "at large," which included

being unleashed on property owned by the public. The dog was unleashed and unattended after having escaped from the defendant's enclosed property. There also was evidence that the dog escaped on many prior occasions. The plaintiff alleged the defendant was negligent for failing to leash his dog or secure it on his property, in violation of the local ordinance. The defendant's motion for summary judgment was denied, as the court found a triable issue of fact as to whether the lack of a leash was the cause of the alleged

injuries.

Similarly, in *Clo v. McDermott*, 239 AD2d 4 (Third Dept. 1998), a bike rider brought an action to recover for injuries sustained in an accident resulting from a dog running in front of his bicycle. The record showed the owners never received any complaint about the dog, and the dog was not permitted outside unless accompanied by a member of defendants' family. The dog also did not have a habit of chasing cars. The court noted that, under common law, the rider could not recover for his injuries, but due to the local animal control ordinance, there was evidence to support a finding that, by permitting the dog to chase after the rider and run into the road, the owners' conduct fell within the proscriptions of that law. The court concluded a factual issue existed as to whether the owners violated the town's animal control ordinance, and the trier of fact was entitled to consider such violation, if found, to constitute some evidence of owners' negligence.

The *Clo* court also distinguished the Court of Appeals decision in *Young*, finding that the Court of Appeals did not consider the effect of the existing animal control ordinance, and carefully limited its holding to the proposition that "the mere presence of an unrestrained dog on the street does not

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give rise to a presumption of negligence on the part of its owner.”

The *Clo* court concluded it saw no persuasive argument that the general rule that a violation of an ordinance is some evidence of negligence, should not apply in cases involving unleashed dogs.

Based on the current law, dog owners should ensure they

are aware of any vicious propensities their dog may have, and use extra caution when having the dog in public. Owners also should be aware of leash ordinances, and the potential impact of a violating them.

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