

# DEFENDANT

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## THERE ARE NO BAD DOGS:

### Recent Ruling in Dog Bite Cases

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Be it pit bull or poodle, the First Department has recently ruled that a court may not take judicial notice of an animal's vicious propensities based solely on its breed. *Carter v. Metro North Associates*, 680 N.Y.S.2d 239 (1st Dept. 1998). Thus, it can be said that there are no bad dogs – at least not inherently and certainly not as a matter of law.

This Article will discuss the *Carter* case and other recent rulings in Dog Bite cases as well as the essential elements necessary to plead and prove such a case.

#### ELEMENTS AND BURDENS OF PROOF

In order for a plaintiff to recover under strict liability for an injury inflicted by a domestic animal, she must establish (1) that the animal had vicious propensities and (2) that the defendant knew or should have known of the animal's propensities *Carter*, supra; *Gibbs v. Grenadier Realty Corp.*, 173 A.D.2d 171 (1<sup>st</sup> Dept. 1991).

The term "vicious propensities" has been broadly interpreted by New York courts as "a propensity to do any act which might endanger another" *Lagoda v. Dorr*, 28 A.D.2d 208 (3rd Dept. 1967), quoting *Shuffian v. Garforla*, 9 A.D.2d 910 (2nd Dept. 1959). A defendant seeking summary judgment must establish that the defendant did not have actual or constructive notice of the dog's vicious propensities *Fazio v. Martin*, 227 A.D.2d 809 (3rd Dept. 1996); *Sorel v. Iacobucci*, 221 A.D.2d 852, 853 (3rd Dept. 1995). The burden then shifts back to plaintiff to come forward with admissible evidence creating a triable issue of fact that the defendant did have or should have had knowledge of its dog's vicious propensities *Rogers v. Travis*, 229 A.D.2d 879 (3rd Dept. 1996).

#### THE BARK MAY BE WORSE THAN THE BITE

At common law, the prevailing rule was that every dog was entitled to one free bite, meaning that a dog was not considered to be dangerous or vicious until it had actually bitten someone. However, this "one free bite" rule should not be taken literally,

as under New York law, a bite alone does not constitute vicious behavior, and on the flip side, a dog's actions do not need to rise to the level of a bite in order for it to be deemed a vicious animal.

In *Rogers v. Travis*, supra, a case brought by an infant against the owners of a dog that had bitten her, the Third Department reversed the trial court and granted the defendant dog owners' motion for summary judgment on the grounds that even assuming that the dog had earlier nipped its owner's granddaughter on her foot and caused a slight scratch, that incident did not put the owners on notice of the dog's vicious propensities so as to subject them to liability for the subsequent incident in which the dog bit another infant

on the cheek. The court reasoned that a dog nip is a "minor event" which cannot serve to establish a dog's vicious propensities as a matter of law or put the defendants on notice that the dog possessed such propensities. *Rogers*, supra, citing *Tessiero v. Conrad*, 186 A.D.2d 330 (3rd Dept. 1992).



Furthermore, in *Sorel v. Iacobucci*, supra, a case involving an alleged attack by a German Shepherd, the Third Department affirmed the lower court's order rendering

a verdict in favor of defendants, holding that (1) there is no authority for the proposition that judicial notice must be taken that German Shepherd dogs are as a breed vicious and (2) the evidence was sufficient to support the jury's conclusion that the dog was not vicious.



There had been testimony at trial which showed that the dog was known to bark

and sometimes lunge at defendants' fence or front door in response to the presence of strangers; however, there was no evidence contradicting defendant dog owner's testimony that the dog had never been known to attack, bite or harm people with whom he came into contact.



Therefore, the court reasoned that even though the dog exhibited "protective tendencies" there was suffi-

cient evidence to support the jury's conclusion that the dog was not vicious.

It should be noted that although there is no clear cut rule with respect to which activities rise to the level of viciousness, certain actions have been held sufficient so as to raise a question of fact regarding whether the subject dog was vicious or that the owners had or should have had knowledge of the dog's vicious propensities. Therefore, in *Coon v. Holmes*, 677 N.Y.S.2d 800 (2nd Dept. 1998) the Second Department held that genuine issues of fact as to whether the dog possessed vicious propensities existed in light of the fact that there was deposition testimony of the parties which indicated that there was at least one prior incident when the dog either nipped or scratched another child; there was a "Beware of Dog" sign on the property; the dog was regularly kept in a cage during the day; and the dog had chased a telephone repairman, regularly growled at landscapers and had previously escaped its choker collar.

Although a dog's prior actions and a dog owner's preventive measures, such as keeping a dog in a cage during the day, have been held to raise a question of fact as to the dog's vicious propensities, the actual nature and results of the attack do not create an issue of fact as to whether a defendant should have known of the dog's viciousness. In *Rodman v. Fuddrucker's*, 236 A.D.2d 249 (1st Dept. 1997) the First Judicial Department, New York County, Supreme Court, granted summary judgment to the defendants, the restaurant and landlord of the premises where the attack occurred, by rejecting the plaintiff's assertion that the nature and results of the attack alone created an issue of fact on whether the defendants should have known that the dog was vicious.

#### RECENT CHALLENGES

In an attempt to bypass the high burden of proof in dog bite cases, plaintiffs have sought other avenues by which to recover, including (1) attempting to assert intentional or negligent infliction of emotional distress as a cause of action; (2) requesting that the court take judicial notice that certain breeds are vicious, as in the *Carter* case; (3) asserting a cause of action in common law negligence against dog owners for their alleged failure to comply with local leash law ordinances.

#### A. Intentional/Negligent Infliction of Emotional Distress Not Recognized

In *Fairman v. Santos*, 174 Misc.2d 85, 663 N.Y.S.2d 779 (2nd Dept. 1997), the Second Judicial Department held that plaintiff was not allowed to amend her complaint to assert intentional and negligent infliction of emotional distress, which was based on her fear of contracting rabies. The court reasoned that the conduct alleged to have been committed by defendants, including falsely telling the plaintiff that the dog had been vaccinated at the time of the biting, is not conduct which is so extreme, outrageous or utterly rep-

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rehensible so as to transcend the bounds of decency as to be regarded as atrocious in a civilized society. Fairman, citing *Howell v. New York Post Corp.*, 81 N.Y.2d 115, 121-122 (Ct. of Appeals of NY 1993); *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143-144 (Ct. of Appeals of NY 1985); *Lauer v. City of New York* 240 A.D.2d 543, 659 N.Y.S.2d 57 (2nd Dept. 1997).

## B. Courts Will Not Take Judicial Notice of a Dog's Propensities

Furthermore, as previously discussed, in *Carter*, the First Department refused to take judicial notice that a pit bull is by its very nature a vicious breed, reasoning that there are alternative opinions on this subject which preclude the taking of judicial notice.

The Court noted that "[w]hile many sources, including the authorities relied on by the IAS court, assert the viciousness of pit bulls in general, numerous other experts suggest that, at most, pit bulls possess the potential to be trained to behave viciously."

The Court further stated that "scientific evidence more definitive than articles discussing the dogs' breeding history is necessary" before determining that pit bulls are vicious merely by their "genetic inheritance."

This reasoning is sound. The premise of judicial notice is that the trier of the facts will assume as true, for the purpose of the case before him, certain acts without requiring proof. The justification for this device being that the trier of the facts possesses, in common with the public, knowledge of facts of common occurrence and notoriety. *People v. French Bottling Works*, 259 N.Y. 4, 7 180 N.E. 537 (Ct. of Appeals of NY 1932); *People v. City of Buffalo v. Beck*, 205 Misc. 757, 130 N.Y.S.2d 354 (1954). Before judicial notice may be taken, every reasonable doubt upon the subject should be resolved promptly in the negative. *Brown v. Piper*, 91 U.S.37, 23 L.Ed. 200. Since, as the *Carter* decision points out, there are conflicting expert opinions regarding the nature of the various breeds of dogs, the First Department's decision was sound.

## C. Effect of the Violation of Local Leash Laws

In addition, in some instances plaintiffs assert an alternative cause of action sounding in common law negligence based upon the dog owner's failure to comply with a local leash law ordinance. However, it is difficult for a plaintiff to prevail on these grounds if the strict liability cause of action fails. In New York, the Courts have been reluctant to award damages to a plaintiff on the negligence cause of action if the trier of fact finds that the offending dog did not have, or if the owner did not/should not have known of its vicious propensities.

In *Yavosa v. Stiles*, 220 A.D.2d 363 (1st Dept. 1995), the First Department reversed the trial court's decision to set aside a jury verdict in favor of the dog owner, and held that an erroneous omission in plaintiff's negligence theory in the jury verdict sheet did not warrant a new trial since the only evidence of a breach of duty was a leash law violation, which is not dispositive for a finding of negligence against the owner. The Court reasoned as follows:

Even if it could be said that the trial court's granting of the motion to set aside was a sub silentio attempt to correct the unreserved error in the verdict sheet in the interest of justice, in our view, a new trial would

still not be warranted. With respect to the negligence theory, the only evidence of breach of duty was the Leash Law violation, which by itself is not necessarily dispositive (see PJI 2:29). Moreover, there was no evidence that the ordinance violation was the proximate cause of the biting incident. Under these circumstances, the unreserved verdict sheet omission did not fundamentally affect plaintiff's rights and the motion to set aside the verdict should not have been granted by the trial court. *Yavosa* at 363.

This holding is significant in that the First Department clearly set forth that even where there is a leash law violation, that by itself is not dispositive in finding a breach of duty on the part of the dog owner.

Furthermore, in *Arcara v. Whyas*, 219 A.D.2d 871 (4th Dept. 1995), a case brought by a meter reader who was bitten by a German shepherd, the Fourth Department reversed the trial court and held that the plaintiff failed to raise a genuine issue of fact regarding the dog's vicious propensities, citing the facts in the record which included that the dog had never before bitten anyone and it never growled or bared its teeth when someone approached.

The Court in *Arcara* further rejected plaintiff's contention that defendants' violation of the local leash law constituted evidence of negligence, reasoning as follows:

We reject the contention of plaintiff that defendants' violation of the Checktowaga Town Ordinance requiring the leashing of dogs is some evidence of negligence. It is uncontested that the dog was tethered in the yard and thus was restrained in compliance with the Town Ordinance. But even if the manner in which the dog was tethered violated the Town Ordinance, that would not affect the essential issue whether the dog was vicious and, if so, whether defendants had knowledge thereof. *Arcara* at 871 (Emphasis added.)

Therefore, the violation of a leash law not only does not rise to the level of *prima facie* evidence of negligence, but it is secondary to the essential issue of whether the dog had vicious propensities and if its owner should have knowledge of such propensities.

However, if there is a violation of the leash law and the unleashed dog interferes with bicycle traffic causing an injury to the cyclist, then, the Third Department states, the violation can constitute some evidence of negligence and the case should go to a jury.

In *Clo v. McDermott*, 239 A.D.2d 4 (3rd Dept. 1998), "Troubles," an aptly named cocker spaniel, ran out in front of a cyclist and the plaintiff was caused to catapult over the handlebars when he struck the dog with the front wheel of his bicycle.

The Court noted that "absent evidence that the defendant was aware of the animal's vicious propensities or of its habit of interfering with traffic," a plaintiff cannot recover for injuries resulting from the presence of a dog in the highway.

There was no evidence adduced on the summary judgment motion by defendant that defendants were aware of any such vicious propensities or habit of interfering with traffic, but the Court's inquiry did not stop there.

The Court, applying a straight negligence analysis rather than relying on whether there was notice of vicious propensities, determined that there was evidence in the record to support a finding that the leash law was violated and that such a violation could constitute some evidence of negligence. The evidence of negligence could not support a claim on whether the dog had "vicious propensities," but could support a common law negligence claim.

It would appear, *Clo* notwithstanding, the violation of the leash law would still not enable a plaintiff to bootstrap the violation onto a "vicious propensity" claim as one certainly has nothing to do with proving the other. Therefore, the reasoning of *Arcara, supra*, and *Yavosa, supra*, would still apply. But, in a similar fact pattern to that of "Troubles," the violation of the leash law could strengthen an otherwise weak or non-existent negligence claim.

Plaintiffs have also raised the issue of defendants' negligence in violating local leash laws in attempts to recover punitive damages in dog bite cases. These requests for punitive damages jury charges are largely denied.

In *Costa v. Olympia & York Properties, Inc.* (1<sup>st</sup> Dept. 1994), the First Department refused to charge the jury on punitive damages where the evidence on record included that the dog had been held on a leash and the evidence did not indicate that the dog had bitten anyone else prior to the underlying incident.

The Court in *Costa* denied plaintiff's request to charge the jury on punitive damages because it found that the defendants' conduct did not rise to the level of egregious conduct required for recovery of punitive damages. Furthermore, it found that the plaintiff did not sustain its burden of proving that the wrong complained of was morally culpable or was actuated by evil and reprehensible motives, and that such damages would be assessed not only to punish the defendants but to deter them, as well as others, from indulging in such conduct in the future.

Similarly, in *Amando v. Estrich*, 583 N.Y.S.2d 85 (4th Dept. 1993), the Fourth Department ruled that the owners' indifference to its dog's roaming, in violation of the local leash law, did not rise to the level of egregious conduct required for the recovery of punitive damages.

## FINAL NOTE

The current state of New York law with respect to dog bite cases is the same as it has been for the past several decades - in order for a plaintiff to recover under strict liability for an injury inflicted by a domestic animal, plaintiff must establish that the animal had vicious propensities and that the defendant knew or should have known of the animal's vicious propensities. A plaintiff must search into the dog's history, and/or the dog or premises' owner's preventive measures with respect to the dog, in order to present a question of fact to prevail over a defendant's motion for summary judgment. No short cuts are accepted, and as of today, there are no bad dogs in New York State.