ARTICLES

THERE ARE NO BAD DOGS, ONLY BAD OWNERS: REPLACING STRICT LIABILITY WITH A NEGLIGENCE STANDARD IN DOG BITE CASES

By
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Should the law treat dogs as vicious animals or loving family companions? This article analyzes common law strict liability as applied to dog bite cases and the shift to modern strict liability statutes, focusing on the defense of provocation. It discusses the inconsistency in the modern law treatment of strict liability in dog bite cases. The article then resolves why negligence is the proper cause of action in dog bite cases. The Author draws comparisons among dog owner liability in dog bite cases, parental liability for a child's torts, and property owner liability for injuries caused by his property. The Author concludes by proposing a negligence standard to be applied in dog bite cases.

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I. INTRODUCTION

The majority of dog owners consider their dogs loving companions and members of their families.[1] Yet, under most dog bite laws, certain dogs are automatically presumed to be vicious animals.[2] The commonly held belief is that dogs are biting at epidemic proportions,[3] which necessitates imposing strict or absolute liability on dog owners.[4] Thus, a dog owner is liable by virtue of ownership, not fault. In reality, dog bites are not common occurrences. In 2001, there were sixty-eight million dogs in the United States, and the Centers for Disease Control and Prevention (CDC) reported that an estimated 368,245 dog bite victims were treated in emergency rooms.[5] Therefore, only .005% of dogs were involved in biting incidents which required emergency room care. Fatal dog injuries are extremely rare, with approximately twenty deaths per year resulting from a dog attack.[6] In comparison, in 2001, 519,424 people were treated in emergency rooms for bicycle related injuries, representing approximately .002% of the population.[7] Despite these statistics, legislatures have reacted to the perceived dog bite "problem" by enacting laws that essentially classify dogs as abnormally dangerous,[8] akin to other dangerous property, such as dynamite. The long held notion that dogs are characteristically gentle has been replaced by the current trend that dogs are characteristically dangerous.

The classification of dogs as dangerous for purposes of dog bite liability is in sharp contrast to the manner in which dogs are regarded in our society. In fact, even though dogs are still considered property in most jurisdictions, our society frequently "humanizes" dogs. For exam-

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[1] PEW Research Center, *Gauging Family Intimacy: Dogs Edge Cats (Dads Trail Both)* 1, http://pewresearch.org/assets/social/pdf/Pets.pdf (Mar. 7, 2006) (noting that eighty-five percent of dog owners consider their dog to be a member of their family).

[2] *See e.g.* Yakima Mun. Code (Wash.) § 6.18.020 (1987) (banning the ownership and possession of all Pit Bulls in the city of Yakima, Washington); Milwaukee Mun. Code (Wis.) § 78-22 (placing restrictions on the care and ownership of Pit Bulls and Rottweilers).

[3] Mark Derr, *It Takes Training and Genes to Make a Mean Dog Mean*, N.Y. Times F1 (Feb. 6, 2001) (reporting that the Humane Society of the United States and the Centers for Disease Control and Prevention consider dog bites to be at epidemic levels).

[4] *See e.g. Fandrey v. Am. Fam. Mut. Ins. Co.*, 680 N.W.2d 345, 350 (Wis. 2004) (reading Wis. Stat. § 174.02 to impose strict liability on dog owners for dog bites).

[5] CDC, *Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments — United States, 2001*, 52:26 Morbidity & Mortality Wkly. Rpt. 605, 605 (July 4, 2003) (available at http://www.cdc.gov/mmwr/PDF/wk/mm5226.pdf) [hereinafter *Nonfatal Dog Bite Injuries*].

[6] CDC, *Dog-Bite-Related Fatalities — United States 1995-1996*, 46:21 Morbidity & Mortality Wkly. Rpt. 463, 463 (May 30, 1997) (available at ftp://ftp.cdc.gov/pub/Publications/mmwr/wk/mm4621.pdf) (noting a total of 279 human deaths related to dog attacks between 1979 and 1994).

[7] Natl. Ctr. Injury Prevention & Control, *WISQARS Nonfatal Injury Reports*, http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html; *select* All intents; *select* Pedal Cyclist; *select* Year 2001; *select* Submit Request (last updated Sept. 19, 2006).

[8] *Supra* n. 2. **R**

ple, dogs are included in custody agreements and trusts, may receive sophisticated medical treatments, and are welcome guests at many hotels.[9] However, even as dogs have become members of our families, when a dog bites, the imposition of a strict liability standard totally disregards the canine-human relationship.

Historically, courts have imposed strict liability for wild or domesticated animals, such as dogs, known to have dangerous tendencies abnormal to their class.[10] However, about half of all jurisdictions currently impose strict liability for dog bites without the requirement that the owner have knowledge of the dog's dangerous propensities.[11] The defenses available are varied and applied inconsistently.[12] Most often, the only defense available to the dog owner is whether the dog bite was a result of the injured party provoking the dog. Thus, too often, dog bite cases hinge on, "What was the dog thinking?" This analysis leads to costly litigation (due to the parade of animal behaviorists necessary as expert witnesses) and inconsistent results. Ultimately, there is likely tremendous financial exposure for the dog owner, which may result in such a burden that it ultimately discourages dog ownership.

The correct standard for dog bite cases is a negligence standard. Instead of focusing on the dog's conduct, the focus should be on the dog owner's conduct. The potential for a dog to cause harm is often the greatest due to conditions created by the owner. For example, a dog owner who chooses to chain his dog greatly increases the chances that the dog will bite.[13] A dog chained and left alone is not properly supervised. Also, children are the victims in forty-two percent of all dog bite cases.[14] Thus logical judicial analysis must rest on determining whether the dog owner acted reasonably in controlling and monitoring his dog.

This article first analyzes common law strict liability as applied to dog bite cases. Next, the article discusses the shift from common law strict liability to modern strict liability statutes, focusing on the de-

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[9] *See generally* Gerry W. Beyer, *Pet Animals: What Happens When Humans Die?* 40 Santa Clara L. Rev. 617 (2000) (discussing the trend of humans leaving financial support in their wills to their companion animals).

[10] Dan Dobbs, *The Law of Torts* 947 (West 2001); Victor E. Schwartz et al., *Prosser, Wade, and Schwartz's Torts* 690–91 (11th ed., Found. Press 2005).

[11] *Restatement (Third) of Torts: Liability for Physical Harm* § 23 (2001); *see also* Ward Miller, *Modern Status of Rule of Absolute or Strict Liability for Dogbite*, 51 A.L.R.4th 446 §§ 2–5 (1987) (analyzing common law absolute and strict liability for dog bites).

[12] *See generally* Jay M. Zitter, *Intentional Provocation, Contributory or Comparative Negligence, or Assumption of Risk as Defense to Action for Injury by Dog*, 11 A.L.R.5th 127 (1993) (discussing defenses for personal injuries caused by dogs).

[13] Kids & Dogs Interactive Educ., *Statistics*, http://www.kidsanddogs.org/statistics.html (accessed Nov. 12, 2006); Kenneth Morgan Phillips, *Dog Bite Law: Why Dogs Bite People: Examples from Studies*, http://dogbitelaw.com/PAGES/whybite.html#otherreasons (accessed Nov. 12, 2006) [hereinafter *Dog Bite Law*].

[14] *Nonfatal Dog Bite Injuries*, *supra* n. 5, at 1. **R**

fense of provocation. The article then resolves why negligence is the proper cause of action in dog bite cases and draws comparisons among a dog owner's liability in dog bite cases, a parent's liability for his child's torts, and a property owner's liability for injuries caused by his property. Finally, the article will offer a negligence standard to be applied in dog bite cases.

II. COMMON LAW STRICT LIABILITY: A DOG OWNER FRIENDLY LAW

For centuries, dogs have been known as a companion to man.[15] As such, they were considered harmless; and if they did, in fact, possess dangerous characteristics, it was considered abnormal.[16] Consequently, the owner of a dog was not strictly liable for a dog bite, unless he had reason to know the dog was abnormally dangerous.[17] Being abnormally dangerous was often characterized as having a tendency to attack human beings, whether the attack was in anger or in play.[18] The owner's liability was in keeping a dog after gaining knowledge of its propensity for abnormally vicious behavior.[19] Thus, the requirement of scienter[20] was a hurdle plaintiffs needed to overcome in order to proceed with a lawsuit.[21] However, with the requirement of scienter, determining whether a dog's conduct prior to the biting incident was vicious and thus put the owner on notice, often proved difficult. Even more difficult was determining if the dog's vicious tendency was abnormal to its class. Most courts did not even try to make the distinction.

For example, the Supreme Court of Colorado, in *Barger v. Jimerson*, was confronted with making a determination of whether the owners of a German Shepherd had been put on notice as to their German Shepherd's vicious propensity and were thus liable for injuries to the plaintiff resulting from a bite.[22] Witness testimony indicated that the dog owners always kept their dog confined to a fenced backyard, and when the dog was outside the enclosure, it was leashed.[23] Witnesses also testified that whenever anyone would stroll by the fence, the dog would bark and lunge at the fence.[24] However, other witnesses testi-

15 *Restatement (Second) of Torts* § 509, cmt. f (1977).

16 *Id.*

17 *Id.*

18 *Id.* at cmt. c.

19 *Andrews v. Smith*, 188 A. 146, 148 (Pa. 1936).

20 Scienter is defined as "a degree of knowledge that makes an individual legally responsible for the consequences of his act; an allegation in a legal pleading of such knowledge on the part of the accused or defendant as is necessary to constitute his act as a crime or tort." Webster's Third New International Dictionary Unabridged 2032 (Philip Babcock Gove ed., Miriam Webster 1986).

21 *See e.g. Durden v. Barnett & Harris*, 7 Ala. 169, 170 (Ala. 1844) (noting that scienter must be alleged and proven in a dog bite case).

22 276 P.2d 744, 744 (Colo. 1954).

23 *Id.*

24 *Id.*

fied that children played in the backyard with the dog, it appeared friendly, and they did not consider the dog to be vicious or dangerous.[25] The defendants testified that the dog seemed to be protective of its property.[26] During a storm, the dog escaped from the yard and was gone for several days.[27] During that time, it attacked the plaintiff and bit her, causing injuries.[28]

The court affirmed the decision of the trial court in favor of the plaintiff and determined that the defendants were on notice that their dog had vicious propensities.[29] The court based its findings solely on the facts that the defendants kept the dog confined and the dog ran to the fence and barked when people passed by.[30] The court concluded that the dog's disposition was savage and ferocious, and thus the owners were on express notice that the dog would attack human beings.[31] The court stated that a vicious propensity includes "a natural fierceness or disposition to mischief" that may lead to an attack.[32]

Yet the natural qualities of the same breed of dog (German Shepherd) as in *Barger* were the reason an Alaskan court did not grant summary judgment to plaintiffs on a strict liability claim in a similar dog bite case.[33] In *Sinclair v. Okata*, a two-year-old plaintiff was bitten by defendant's German Shepherd, Anchor.[34] The evidence was undisputed that Anchor had been involved in at least four previous biting incidents.[35] Plaintiffs pointed to these biting episodes to establish that defendants had knowledge of their dog's dangerous propensities.[36] Defendants, through their expert witness, presented testimony that each of the biting incidents was the result of the dog's natural instincts and not due to any dangerous propensity.[37] The expert testified that the four biting incidents were the result of overstimulation, protective instincts, and chase instincts.[38] The plaintiffs failed to establish that Anchor's four previous biting incidents were abnormal, as opposed to normal behavioral responses common to all dogs.[39] The fact that a dog has a dangerous propensity is not enough.[40] Thus, the defendants

[25] *Id.* at 744–45.

[26] *Id.* at 745.

[27] *Id.*

[28] *Barger*, 276 P.2d at 745.

[29] *Id.* at 746.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 745–46.

[33] *Sinclair v. Okata*, 874 F. Supp. 1051, 1059 (D. Alaska 1994).

[34] *Id.* at 1053.

[35] *Id.* at 1054.

[36] *Id.* at 1055.

[37] *Id.*

[38] *Id.*

[39] *Sinclair*, 874 F. Supp. at 1059.

[40] *Id.* at 1058.

were not on notice of any abnormal characteristic, and the motion for summary judgment as to strict liability was denied.[41]

It is difficult to reconcile the *Barger* and *Sinclair* decisions. In *Barger*, the court did not determine whether the actions of the dog were abnormal.[42] In fact, the dog's natural fierceness should have led the court away from a strict liability standard. If the dog's response is natural, even if dangerous, it is not abnormal; that was the analysis properly applied in *Sinclair*.[43] Yet it is difficult to classify a vicious response by a dog as normal.

In fact, in order to place some objectivity in the vicious/abnormal debate, some courts and legislatures began referring to their dog bite laws as the "first bite" rule or the "one free bite" rule.[44] The premise was that if the dog had previously bitten, it was abnormally dangerous, and the owner had the requisite knowledge (scienter) about the danger.[45] Yet this terminology was a misnomer. Often, courts found that a previous bite did not indicate viciousness, or that other dangerous characteristics, in the absence of a previous bite, were sufficient to determine a dog's character and an owner's knowledge of that character.[46]

Due to the difficulty in proving scienter and the abnormal dangerousness of dogs, coupled with public pressure to create more victim friendly laws, courts and legislatures began to abandon common law strict liability and impose near absolute liability on dog owners.[47] The most efficient way to create victim friendly laws was to remove the requirement of scienter and the abnormally dangerous requirement in dog bite cases, leaving dog owners with limited defenses.[48] By eliminating these requirements, such laws have discarded a centuries-old determination that dogs are, by nature, companions, and have thus classified man's best friend as presumptively vicious.

III. MODERN DAY STRICT LIABILITY: A DOG VICTIM FRIENDLY LAW

About half of all states have eliminated the requirement of scienter in dog bite cases.[49] Recovery under dog bite statutes usually requires four elements: 1) injury caused by a dog owned by the

[41] *Id.* at 1059.

[42] *Barger*, 276 P.2d. at 745–46 (relying on evidence that defendants knew or had notice that their dog had exhibited vicious propensities).

[43] *Sinclair*, 874 F. Supp. at 1058.

[44] *See generally* Cindy Andrist, Student Author, *Is There (and Should There Be) Any "Bite" Left in Georgia's "First Bite" Rule?* 34 Ga. L. Rev. 1343, 1350 (2000) (discussing "first bite" rule as being the Georgia courts' rule of thumb).

[45] *Id.* at 1351-52.

[46] Schwartz, *supra* n. 10, at 690. **R**

[47] *Id.* at 691.

[48] *Id.* Possible defenses include the plaintiff's trespass and the posting of a warning sign.

[49] *Restatement (Third) of Torts* § 23 cmt. d.

defendant; 2) peaceable conduct of the person injured; 3) presence of the injured person in a place where he has the legal right to be; and 4) lack of provocation.[50] While many states allow comparative negligence defenses to their strict liability statutes,[51] proving or disproving provocation is often the determinative factor in many of theses cases.[52] Yet determining whether a dog was provoked necessarily leads to an analysis of the dog's intent and thought processes, resulting in inconsistent jury verdicts.

Most statutes do not define provocation or give clear legislative intent as to its meaning in their dog bite statutes.[53] It is a well known axiom of statutory interpretation that in the absence of a statutory definition, terms should be given their plain meaning.[54] Thus, an Illinois Appellate Court cited the Webster's Dictionary definition of provocation as "an act or process of provoking, stimulation, or incitement."[55] Another Illinois court cited the Corpus Juris Secundum (C.J.S.) definition of provocation as "to excite [to] anger or passion . . . to irritate . . . to stimulate; to arouse."[56] Yet courts generally reject dictionary definitions as too expansive and presume that, if applied, they would too often result in a verdict for the dog owner, because almost any type of stimulus could provoke a dog.[57] In essence, the provocation defense could prove to be too dog owner friendly, contradicting the legislative purpose of these statutes, which is dog victim friendly.[58] Thus, without statutory guidance, and rejecting the plain meaning of provocation, courts proceed on a case-by-case basis and use the term provocation to further the statutory purpose—to lessen the burden on dog bite plaintiffs.[59] However, without clear guidance as to what constitutes provocation, most juries either apply a human interpretation as to what the

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[50] *Forsyth v. Dugger*, 523 N.E.2d 704, 706 (Ill. App. Ct. 1988) (citing Ill. Rev. Stat. 1985, ch. 8, par. 366).

[51] *See e.g.* Fla. Stat. § 767.04 (2005) (allowing any negligence on the part of the person bitten to reduce the liability of the dog owner).

[52] *See e.g Nelson v. Lewis*, 344 N.E.2d 268, 270 (Ill. App. Ct. 1976) (stating that the issue at trial was whether the plaintiff' intentional act constituted "provocation").

[53] *See generally id.* (discussing what the word "provoke" means within the Illinois statute).

[54] "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 197 n. 12 (1983) (quoting *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)).

[55] *Nelson*, 344 N.E.2d at 270 (citing *Webster's Third New International Dictionary* 1827 (Philip B. Gove ed., Merriam-Webster 1961)).

[56] *Robinson v. Meadows*, 561 N.E.2d 111, 114 (Ill. App. Ct. 1990) (citing 73 C.J.S. *Provoke* 324–25 (1983)).

[57] *Id.*

[58] *Id.*; *see also Stroop v. Day*, 896 P.2d 439, 441 (Mont. 1995) (discussing the plaintiff's claim that the defendant's interpretation of "provocation" overshadows the law).

[59] *Robinson*, 561 N.E.2d at 113.

term means to them or try and grapple with a parade of animal behavior experts who attempt to explain the psyche of the dog.[60]

For example, two cases with similar factual basis provide a dichotomy as to how the term provocation is interpreted by the jury. In *Brans v. Extrom*, the plaintiff accidentally stepped on the defendants' elderly Australian Shepherd.[61] The dog bit the plaintiff on the leg.[62] The jury found that the plaintiff's conduct in stepping on the dog, although unintentional, constituted provocation under the Michigan statute.[63] The court affirmed the jury verdict in favor of defendants.[64]

In contrast, in *Wade v. Rich*, an eighteen-month-old child unintentionally fell onto the back of a dog that was sleeping.[65] The dog bit the plaintiff on the head and face.[66] The court found that the dog was not provoked, because the reaction of the dog was out of proportion to the unintentional act by the child.[67] Thus, the court affirmed the jury verdict in favor of the plaintiffs.[68]

These two factually similar cases with differing results reflect a problem with trying to apply provocation in the context of dog bite cases. It appears that the cases can be reconciled by looking at the severity of the resultant injury. In *Wade*, the dog did not reach the appropriate level of provocation to justify a vicious reaction, even though the plaintiff fell onto the sleeping dog's back.[69] In *Brans*, the dog apparently did reach the appropriate level of provocation when his tail was stepped upon by the plaintiff.[70] The plaintiff in *Wade* was repeatedly bitten on the face and head.[71] In contrast, the plaintiff in *Brans* was bitten on the leg and received a far less severe injury.[72] Yet looking backward from the severity of the injury to determine provocation is misguided. It necessarily places the degree of damages before a determination of liability. It is also an attempt to interpret provocation in terms of a human reaction, not a canine reaction. At least one court has even characterized a dog's reaction as how a "reasonable" dog would react.[73]

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60 *See Chance v. Ringling Bros. Barnum & Bailey*, 478 P.2d 613, 618 (Or. 1970) (expert testimony allowed as to character and propensities of Boxer dogs and why they would attack if provoked); *see also Moura v. Randall*, 705 A.2d 334, 340 (Md. Spec. App. 1998) (expert testimony allowed to explain why dog would attack when provoked by agitation).

61 701 N.W.2d 163, 164 (Mich. App. 2005).

62 *Id.*

63 *Id.* at 165–66.

64 *Id.* at 167.

65 618 N.E.2d 1314, 1320 (Ill. App. 5th Dist. 1993).

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Brans*, 701 N.W.2d at 164.

71 *Wade*, 618 N.E.2d at 1320.

72 *Brans*, 701 N.W.2d at 164.

73 *Kirkham v. Will*, 724 N.E.2d 1062, 1066 (Ill. App. 5th Dist. 2000).

Giving a human interpretation to a dog's reaction to provocation is at odds with what animal experts would conclude is reasonable dog behavior. Dogs are provoked to bite in seven distinct situations: (1) dominance aggression—directed to those who take something away from a dog; (2) defensive aggression—directed to those who approach a dog too quickly or too closely; (3) protective/territorial aggression—directed to small, quickly moving animals and children; (4) predatory aggression—directed to small, moving animals or children, especially with more than one dog involved; (5) pain-elicited aggression—directed to those who approach a dog when the dog is in pain; (6) punishment-elicited aggression—directed to those who kick, hit, or assault a dog; and (7) redirected aggression—directed to those who approach a dog when it is already in an aggressive state.[74]

It appears easiest to find provocation in the instance of punishment-elicited aggression, such as when the dog is physically abused by the victim.[75] Yet it is apparent that even the actions at issue in those cases finding no provocation may be easily categorized as aggressive-eliciting behavior. For example, a person screaming at a dog can result in aggression.[76] Children moving too quickly can result in predatory aggression.[77] However, most courts "humanize" a dog's reaction and thus find no provocation in these instances.[78] A human would not be justified in attacking another human as a reaction to a scream, therefore a dog should also not be justified in attacking in reaction to a scream. Yet a human who is physically assaulted is justified in attacking, based on the concept of self-defense.[79] However, comparing a human response to a canine response shows a misunderstanding of what provokes a dog.

Defendants have resorted to the use of expert testimony from dog behaviorists in order to help the jury understand canine behavior and to decide whether a dog's bite resulted from provocation.[80] In *Rodgers v. Dittman*, the appellate court upheld the trial court's allowance of expert testimony of a dog's behavior.[81] In *Rodgers*, a meter reader was

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[74] *Dog Bite Law*, *supra* n. 13, at http://dogbitelaw.com/PAGES/whybite.html.

[75] *See Paulsen v. Courtney*, 277 N.W.2d 233, 235 (Neb. 1979) (holding that a five-year-old boy provoked a dog when he repeatedly poked sticks and threw rocks at the dog prior to being bitten).

[76] *Dog Bite Law*, *supra* n. 13, at http://dogbitelaw.com/PAGES/whybite.html.

[77] *Id.*

[78] *See e.g. Robinson*, 561 N.E.2d at 116 (holding that plaintiff's scream was not provocation within the meaning of the dog bite statute); *Sand v. Gold*, 301 So. 2d 828, 829 (Fla. 3rd Dist. App. 1974) (holding that a nine-year-old child did not provoke a dog when he removed a bone out of the dog's feeding dish prior to being bitten).

[79] *See generally Restatement (Second) of Torts* § 63 (authorizing an actor to defend himself by use of reasonable force against unprivileged harmful or other offensive contact or other bodily harm); *id.* at § 65 (authorizing an actor to defend himself by use of force intended or likely to cause death or serious bodily injury).

[80] *See e.g. Rodgers v. Dittman*, 2002 Iowa App. LEXIS 285, 290-91 (Mar. 13, 2002) (expert testimony regarding dog behavior).

[81] *Id.* at 294-95.

injured when she fell after being chased by Ben, a Brittany Spaniel.[82] At trial, the court permitted the testimony of an animal expert, who reenacted the incident and concluded that, in his expert opinion, Ben's barking would not have resulted in biting.[83] The court also allowed testimony from a pest control inspector who had encountered Ben without incident.[84] The appellate court stated that evidence of Ben's propensities and behavior at times other than the date of the incident was relevant as to whether Ben had attempted to attack and bite the plaintiff.[85] The appellate court upheld the jury verdict in favor of the defendant.[86]

Although the use of animal experts is helpful to the jury in understanding canine provocation, the hiring of such an expert places yet another financial burden on dog owners. The better solution is to eliminate the provocation defense and any other defense that focuses on the conduct of the dog and necessitates proving the dog's character. Instead, the focus should shift to the responsibility of the owner and proving the owner's fault. The most efficient way to focus on the conduct of the owner is through a negligence cause of action.

IV. NEGLIGENCE: THE PROPER CAUSE OF ACTION IN DOG BITE CASES

Dog bite victims rarely rely solely on a negligence cause of action when pleading a dog bite case. Due to the ease with which a dog bite victim can recover for a dog bite under modern strict liability laws that eliminate the requirement of scienter, plaintiffs have no incentive to vigorously pursue a negligence claim.[87] In addition, many courts follow the *Restatement* and restrict a negligence cause of action to imposing a duty on a dog owner only if the owner fails to prevent the harm.[88] Since the comment to the *Restatement* states that dogs are unlikely to do substantial harm, and thus there is no general duty to keep them under constant control, it is difficult to base a negligence claim on a failure to supervise and/or control the dog.[89]

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[82] *Id.* at 287-88.

[83] *Id.* at 290.

[84] *Id.* at 295.

[85] *Id.* at 293–94; *but see Quellos v. Quellos*, 643 N.E.2d 1173, 1181 (Ohio App. 8th Dist. 1994) (holding that the dog bite strict liability statute does not allow evidence of a dog's gentle nature, since it imposes liability without regard to fault).

[86] *Rodgers*, 2002 Iowa App. LEXIS 285 at 298.

[87] *See generally Validity, Construction, and Effect of Statute Eliminating Scienter as a Condition of Liability for Injury by Dog or Other Animal*, 142 A.L.R. 436, 437–38 (1943) (discussing the elimination of scienter in dog bite cases).

[88] *Restatement (Second) of Torts* § 518 (1977).

[89] *Id.* at cmt. j. However, with municipalities enacting leash laws, courts bypass the *Restatement* view and apply *negligence per se* to dog owners whose unleashed dogs cause harm. *See e.g. Phiel v. Boston*, 586 S.E.2d 718, 721 (Ga. App. 2003) (noting that liability of a dog owner may be established by showing the animal was not on a leash as required by local ordinance); *Butler v. Frieden*, 158 S.E.2d 121, 123 (Va. 1967) (holding that violation of the Norfolk leash law ordinance constituted *negligence per se*).

It seems that negligence causes of action are most often pled when a state's strict liability law requires the plaintiff to prove that the defendant knew or should have known the dog had vicious propensities, and the plaintiff is unable to meet that burden. However, the fact that the plaintiff is unable to prove the known dangerous propensities of the dog often dooms the negligence claim as well. In *Russell v. Rivera*, the plaintiff was bitten on the finger by the defendant's dog, a 12-year-old purebred Husky.[90] The incident occurred when the plaintiff placed his hands on top of a three-foot fence that surrounded the defendant's property.[91] The dog was kept behind this fence.[92] The lower court dismissed the strict liability claim, because the plaintiff failed to establish that the defendant had knowledge of the dangerous propensities of the dog.[93]

The plaintiff had also included in his complaint a common law negligence claim.[94] The plaintiff alleged that the dog owner was negligent, in that he had placed large cinder blocks next to the fence which allowed the dog to step up onto the blocks and reach the top of the fence, and ultimately bite the plaintiff.[95] Negligence claims are applicable in limited circumstances where there may be "a distinct, enhanced duty required by the particular circumstances."[96] However, the court found that no heightened duty was owed in this case, since the dog had exhibited no vicious tendencies in the past.[97] Thus, the defendant's placing of the cinder blocks—allowing the dog to reach the top of the fence—was not negligent, because there was no foreseeable risk, since the dog was previously well-behaved.[98] Therefore, the court dismissed the negligence claim.[99]

In contrast to *Russell*, *Drake v. Dean* illustrates a court's upholding of a negligence claim when the strict liability claim failed.[100] In *Drake*, the plaintiff, a member of Jehovah's Witnesses, was going from house to house to discuss the Bible with those who might be interested.[101] As the plaintiff was walking up the driveway of the defendant's home, the defendant's dog, Bandit (a Pit Bull), knocked the plaintiff to the ground, causing her to suffer a broken hip and lacerations to her head.[102] Bandit was leashed on a chain attached to a one-hundred-foot guy wire that gave him access to the driveway.[103] It was

90 780 N.Y.S.2d 699, 700 (N.Y. App. Div. 1st Dept. 2004).
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 *Russell*, 780 N.Y.S.2d at 701.
97 *Id.* at 701.
98 *Id.*
99 *Id.* at 700.
100 *Drake v. Dean*, 19 Cal. Rptr. 2d 325, 335 (Cal. App. 3d Dist. 1993).
101 *Id.* at 327.
102 *Id.*
103 *Id.*

disputed whether the defendant had previously stated that the dog had a habit of jumping on people, and several witnesses testified that Bandit was a well-behaved, gentle animal.[104] The jury was instructed on strict liability—specifically, whether the defendant knew of any vicious and dangerous propensities of his dog that were abnormal to its class.[105] The trial court refused to instruct the jury on standard negligence.[106] The jury returned a verdict in favor of the defendant on the strict liability claim.[107]

The appellate court held that the trial court had erred in refusing the instruction on negligence.[108] The court stated that negligence is based on foreseeability, and that a cause of action for negligence can be maintained if the owner could have reasonably anticipated his dog could cause harm, even in the absence of the dog possessing dangerous propensities abnormal to its class.[109] In *Drake*, even though the jury found that Bandit had no vicious or dangerous propensities, the jury's finding did not resolve the negligence issues.[110] Specifically, there were negligence issues as to whether Bandit posed a risk of harm to others; whether the risk was reasonably foreseeable; and, if so, whether the defendant had failed to exercise ordinary care by failing to control Bandit.[111]

The dissent in *Drake* was concerned that permitting a negligence claim would greatly expand the liability of dog owners, who could now be liable even in the absence of a finding that the dog was vicious or dangerous.[112] Like the court in *Russell,* the dissent believed that if a dog is characterized as docile, there is no duty on the owner to supervise or control the dog, and thus no issue of negligence for the jury.[113] The dissent followed the *Restatement*'s position that dogs do not have to be confined or kept under constant supervision, absent a finding that the dog's behavior is vicious or abnormal to its class.[114]

The *Drake* majority is more in line with the proper duty of care for dog owners in today's society. However, the *Drake* majority finds a negligence claim to be a fallback position to a failed strict liability claim.[115] The dissent in *Drake* and the *Russell* court seem to mistakenly assume that dogs should be free to roam unsupervised, because that is in conformity with their gentle nature.[116] Yet disallowing a negligence claim and eliminating the owner's duty to supervise leaves

104 *Id.*
105 *Id.* at 328.
106 *Drake*, 19 Cal. Rptr. 2d at 328.
107 *Id.*
108 *Id.* at 335.
109 *Id.*
110 *Id.*
111 *Id.*
112 *Drake*, 19 Cal. Rptr. 2d at 337.
113 *Id.*
114 *Id.*
115 *Id.* at 336.
116 *Id.* at 337; *Russell*, 780 N.Y.S.2d at 701.

courts with a choice of two varieties of strict liability claims. A court applying common law strict liability, with the scienter requirement and a determination of whether the dog is abnormally dangerous, often places too harsh a burden on dog bite victims. Conversely, a court removing the scienter and abnormally dangerous dog requirements results in almost absolute liability for the dog owner. In essence, a negligence cause of action is the fair compromise between extreme strict liability statutes and laws. Negligence shifts the focus away from the determination of whether a dog was dangerous or provoked, and instead puts the responsibility on dog owners to supervise and control their pets.

Placing a duty to supervise and control those in the care of others is not a novel concept. One has only to look to the obligation placed on parents to supervise and control their children to find a valid analogy to dog owners. However, because dogs are classified as property in most jurisdictions, it is also helpful to compare dog owner liability with property owner liability.[117]

V. DOGS AS CHILDREN OR PROPERTY: THE APPLICATION OF A NEGLIGENCE STANDARD IN COMPARABLE INJURY CASES

Although dogs are classified as property in most jurisdictions,[118] they are considered by many to be deserving of certain human rights.[119] As such, in determining liability, dogs are more akin to children than to pieces of furniture. Therefore, it is appropriate to look at the duty imposed on parents for the injuries caused by their children, as the parent-child relationship is comparable to the owner-dog relationship in today's society.

Under common law, parents are generally not liable for the torts of their children under a theory of vicarious liability.[120] Therefore, parents do not assume the responsibility of their children's torts due to the parent-child relationship. However, parents may become liable for their own inaction in failing to prevent their children from harming others.[121] The *Restatement*'s position is that parents have a duty to

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[117] *See* Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. Envtl. L.J. 531, 537 (1998) (discussing the common law tradition in treating animals as property).

[118] *Id.*

[119] *See generally* Assn. Veterinarians Animal Rights, *AVAR's Mission Statement*, http://avar.org/ (accessed Nov. 12, 2006) (stating that their mission is creating rights for all non-human animals); PETA, *About PETA: General FAQs,* http://www.peta.org/about/faq.asp; *scroll to* "What rights should animals have?" (accessed Nov. 12, 2006) (discussing the relevance of certain human rights to animals).

[120] *See generally* Andrew C. Gratz, Student Author, *Increasing the Price of Parenthood: When Should Parents Be Held Civilly Liable for the Torts of Their Children?* 39 Hous. L. Rev. 169 (2002) (discussing the common law tradition of enforcing civil liabilities against parents for tortious acts of their children only in limited situations).

[121] *Restatement (Second) of Torts* § 316, cmt. a.

exercise reasonable care to control their minor children in order to prevent them from causing harm to others, if the parent knows he has the ability to control his child and knows of the necessity and opportunity for exercising such control.[122]

Linder v. Bidner follows the *Restatement*'s view in imposing parental liability for the torts of children.[123] In *Linder*, the plaintiffs alleged that the defendants' son had assaulted their child.[124] More specifically, the plaintiffs alleged that the defendants' son had a habit of "mauling, pummeling, assaulting, and mistreating smaller children" and that the defendants knew of their son's conduct, but still allowed the behavior to continue.[125] The court denied a motion to dismiss on behalf of the defendants and held that they could stand trial for negligent supervision.[126] The court held that the plaintiffs had clearly stated a negligence cause of action.[127] The court found that the allegations in the complaint, taken as true, showed notice to the defendants of their son's dangerous propensity, and that the defendants' had failed to control their son when it could be reasonably anticipated that the son could cause harm to others.[128]

Linder could well have been a dog bite case. In fact, allegations of mauling and assaulting are similar to allegations made in dog bite cases.[129] Therefore, it is not surprising that the *Restatement*'s test for parental liability is similar to the *Restatement*'s test for negligent dog owner liability. Both tests focus on the obligation to prevent harm from known dangerous behavior.[130] If *Linder* had involved a dog biting incident, the result would likely have been the same if applying the negligence test for dog owner liability.

Since dogs are most often classified as property,[131] it is also instructive to compare dog owner liability in a dog bite case with property owner liability for injuries caused on or by the owner's property. A property owner is liable for injury on his property when he knows or has reason to know of a condition giving rise to an unreasonable risk of harm and fails to warn of the condition or to make it safe.[132]

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122 *Id.* at § 316.

123 270 N.Y.S.2d 427, 430 (N.Y. App. Div. 1966).

124 *Id.*

125 *Id.* at 428-29.

126 *Id.* at 428.

127 *Id.* at 430.

128 *Id.* at 429.

129 *See e.g. Cahill v. Wilmot*, 1995 WL 387576 at *2 (Conn. Super. June 26, 1995) (stating that the dog "attack[ed] and otherwise maul[ed] and repeatedly bit[ ] the plaintiff"); *McDonald v. Burgess*, 255 A. 2d 299, 299 (Md. 1969) (alleging that defendants allowed their dog to "severely bite and maul the minor Plaintiff"); *Feldman v. Sellig*, 110 Ill. App. 130, 132 (Ill. App. Ct. 1st Dist. 1903) (alleging that the dog "was accustomed to attack[ing], assault[ing,] and bit[ing] mankind").

130 *Restatement (Second) of Torts* §§ 316, 509 (1977).

131 *Id.* at § 509.

132 *Id.* at § 342.

Stevens v. Dovre is instructive on the liability of a property owner for injuries caused on his property.[133] In *Stevens*, the plaintiff fell and was injured on a concrete slab on the defendant homeowner's walkway.[134] The walkway consisted of two steps set on a concrete slab, which was about four and one half inches higher than the concrete walkway leading from the house to the driveway.[135] The walkway was not as high as the concrete slab, and the plaintiff fell when stepping from the slab onto the walkway.[136] The appellate court upheld the trial court's directed verdict in favor of the homeowner.[137] The structure of the walkway did not constitute a dangerous condition, and the structure of the entire area involved no peculiarity which would constitute a hidden danger.[138] Therefore, there was no duty on the homeowner to correct the walkway or warn of its condition.[139]

Stevens is a helpful analogy to dog bite cases. If a dog were compared to a piece of concrete on a walkway, liability should only be imposed if the dog poses an unreasonable risk of harm to others, and the owner is aware of this unreasonable risk. If someone is injured by tripping on a concrete walkway, or an individual trips over a dog and the dog bites, both circumstances should require a negligence analysis, not a strict liability analysis.

VI. CRAFTING A NEGLIGENCE STANDARD FOR DOG BITE CASES

Analogies involving children and property are helpful in determining the scope of liability for a dog owner. Parents and dog owners both have a responsibility to control and supervise those in their care. Similarly, property owners have a responsibility to make their premises safe for others. Yet neither parents nor property owners are strictly liable for damage or injury.[140] Therefore, a proper duty imposes a negligence standard that encompasses the property-child characteristics of dog ownership.

The *Restatement*'s position on negligence for dog bites is a good start at crafting a negligence standard of care.[141] The *Restatement*'s negligence standard is used as an alternative to strict liability when the dog has not been classified as abnormally dangerous and therefore subject to strict liability.[142] The *Restatement* finds negligent liability when the owner is negligent in failing to prevent the harm.[143] The neg-

133 234 A.2d 596, 596-97 (Md. 1967).
134 *Id.* at 598.
135 *Id.*
136 *Id.*
137 *Id.* at 599.
138 *Id.* at 598.
139 *Stevens*, 234 A.2d at 598.
140 *Restatement (Second) of Torts* §§ 316, 518.
141 *See id.* at § 518 (discussing the liability for harm done by domestic animals).
142 *Id.*
143 *Id.*

ligence standard should incorporate the *Restatement*'s requirement that the owner know the habits and tendencies of the dog and prevent an unreasonable risk of harm. However, in addition to the *Restatement*'s position, the negligence standard should incorporate principles from parental and property owner liability. Thus, dog owners should have an affirmative duty to supervise and control their dogs and make conditions safe for those in the company of the dog. Strict liability should be abandoned in dog bite cases. Instead, courts should follow the negligence standard, which would not classify dogs as abnormally dangerous or focus on claims or defenses that seek to interpret the dog's thought processes to determine issues such as provocation.

Courts and legislatures should define the duty imposed under the negligence standard in dog bite cases in the following manner:

A person who harbors or possesses a domestic animal, such as a dog, has a duty to prevent an unreasonable risk of harm to others. Preventing a risk of harm includes controlling and supervising the dog in order to make conditions safe for those with whom the dog comes into contact.

The duty imposed under a negligence standard should not prove more burdensome for either dog owners or dog bite victims. Dog bite victims would have to plead and prove the elements of negligence and establish fault on the defendant dog owner through breach of a duty of care. No longer would mere dog ownership result in a presumption of liability. Dog owners would also be entitled to all defenses commonly used in negligence cases.

Yet dog owners would have an affirmative duty to supervise and control their dogs. The duty to supervise becomes paramount as dog bite cases are frequently occurring outside the home. Dogs are increasingly accompanying their owners to many places outside the home and are subjected to new and different environments. As dogs are given more access to public facilities, supervision requirements should become more stringent. A duty to supervise is equally important in the home. The majority of dog bites occur at the owner's home or in a familiar place, with children most often the victims.[144] In fact, a large percentage of fatal dog attacks are the result of owners failing to restrain their dogs on their property.[145]

A duty to supervise would impose liability on negligent dog owners who chain their dogs outside or leave them unattended with children. The proof would require an owner's knowledge that his dog could

[144] *Nonfatal Dog Bite Injuries, supra* n. 5 at 608 (the majority—eighty percent—of dog bites incurred against persons under eighteen years old are inflicted by the family dog or a neighbor's dog); *Statistics*, *supra* n. 13 (stating that seventy percent of dog bite victims are children and sixty-one percent of dog bites occur at home or in a familiar place). R R

[145] Am. Humane Assn., *Fact Sheets: Dog Bites*, http://www.americanhumane.org/site/PageServer?pagename=nr_fact_sheets_animal_dog_bite (accessed Nov. 12, 2006) (stating that fifty-eight percent of human deaths due to dog bites involve unrestrained dogs on their owner's property).

cause harm, not a classification of the dog as abnormally dangerous or showing a lack of provocation.

VII. CONCLUSION

Dogs are presumptively companions, not abnormally dangerous animals. Therefore, courts and legislatures should abandon strict liability laws in dog bite cases and apply a negligence standard. Unlike the current state of most strict liability statutes, in which claims and defenses rest on the psyche of the dog, a negligence standard would encompass an evaluation of the owner-dog relationship. Courts would focus on the owner's knowledge concerning his dog's behavior and consider whether, in light of that knowledge, the owner's supervision and control of his dog was reasonable. In essence, the jury would ultimately decide whether there is a bad *owner*, not a bad *dog*.