

10 Things That Make or Break a Child's Dog Bite Case

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When you evaluate a child's dog bite case, you of course have to consider the nature and extent of injury, and the past a future medical costs. For example, a little girl with facial scars will do better than a boy with facial scars. Another good case is that of the straight-A student who, after the accident, starts getting Cs and Ds because of medical treatment visits and emotional distress. But those are things we look for in any child's case.

In dog bite cases, there are 10 unique factors that can make a child's claim sparkle like a diamond or smell like newly poured asphalt. I learned about these things the hard way and want my colleagues to be aware of them. I have incorporated them into my Dog Bite Litigation Forms for Plaintiffs' Attorneys, especially the deposition outlines and interrogatories. But this article is where you will learn the reasoning behind asking some of my favorite questions, such as when I ask a dog owner, "What upset you the most about this incident?" (My favorite answer is, "I had to get rid of my dog!" Yes, referring to the dog that mauled the 10-year-old child!)

As you read the 10 factors, you will see that I give each of them a score from one to 10 points. The total score is a percentage that you should consider when determining how much the case should bring. For example, a score of 80 means that your client's case probably is worth only 80% of what you might have thought otherwise.

Culpability

In a dogbite case, the instrumentality of injury is the mouth of a dog, and therefore your client's claim for damages is based on something similar to vicarious liability or respondeat superior. A jury might have a tough time getting into that. The defendant may appear to have been barely blameworthy, which does not motivate the average juror to award full damages.

The worse case, in many ways, is one that is based on statutory strict liability, because there may be nothing at all to blame the defendant for, other than owning the dog. That makes for weak jury appeal.

Therefore it is always best to show how the defendant's conduct was irresponsible, negligent, reckless, or in violation of an animal control law such as the leash law. Do not rely on the dog bite statute because it gets you full liability but not necessarily full damages. You need to show that the defendant was irresponsible in every case no matter what your state's dog bite statute says, because a jury has to be motivated to award full damages.

This factor is not automatic, because if you are in a state with strict liability for dog owners, there is a good chance you can get the defendant's bad conduct into evidence. One defense mistake that lets you do this is their failure to admit liability, which allows you to present evidence of bad conduct that is related to other causes of action such as negligence, recklessness or the violation of an animal control law. Another way to get the evidence admitted is to bait the dog owner into opening the door through his own testimony. My deposition outline (contained in the Dog Bite Litigation Forms previously noted) contains a lot of questions that will set him up.

Low culpability results in a score of one, while high culpability is a 10.

The Monster Factor

A dog owner who cries uncontrollably when a child was bitten, gives him first aid, rushes him to the hospital, remains there until the child goes home, insists on paying all the medical bills, calls every day to find out how the child is doing, and otherwise shows great empathy makes a horrible defendant.

On the other hand, consider the behavior of the two San Francisco attorneys whose dogs killed Diane Whipple in 2001. They appeared unrepentant and worse: they accused her of causing her own death because she tried to fight off the dog that was killing her, and allegedly was wearing perfume that provoked the dog. The jurors hated dog owner Marjorie Knoller so much that they found her guilty of second degree murder. A plaintiff's attorney has a deep affection for a defendant like that, who acts or sounds like a monster. Juries make monsters pay.

So always look for a monster on the other side of the table. When deposing the defendant, give him the opportunity to turn into a werewolf. One of the best questions to

start a dog owner's deposition with is, "What upset you the most about this accident?" He often will reply, "Losing my dog." Change the subject and do not come back to that. You will have plenty of fun with his answer during mediation or trial.

A defendant who behaved in an empathetic and sincere manner gets a one. Someone who acted like a monster before, during or after the accident can score as high as 10.

Sanguinity

Three-quarters of the time, a dogbite victim is bitten by a dog that belongs to a friend, family member or neighbor. This does not help the victim one bit. Closely related people do not make good defendants, unless of course they are monsters. Your theme could be that the poor child relied on and deserved to be protected by this person. Rely on "family values" to paint a picture of a monster.

Juries are uncomfortable with suing friends and family members. Some people even believe that doing so violates their religion. If the defendant is the victim's grandfather, uncle, best friend or neighbor, the result is a one. A complete stranger can score as high as 10. If the defendant is a monster, add points.

Denial of Liability

The best thing that can happen in your case is for the defense attorney to contest liability. It is bad for settlement mind you, but great (for you) at trial.

Conversely, the worst thing that happens is when the defense attorney starts a trial by telling the jury that his client is very sorry, takes full responsibility for what happened, and just wants to make sure that the amount of compensation awarded to the victim is fair. Suddenly the child and his family become the villains who are pulling everyone's tails.

An admission of liability gets a one on this scale. Denial of liability gets at least 5, while an emphatic denial of liability can score 10. Add points if you are confident that, despite an admission of liability, you can get into evidence something that would make the defendant look irresponsible or like a monster.

Provocation

One of the best fact patterns is the sneak attack: the dog bursts through a gate and attacks the child for no discernable reason. Whenever the victim has had absolutely no prior contact with the dog, it's a great case.

On the other hand, when the victim has a history of being around the dog, or was playing with the dog right before getting injured, many jurors start thinking that the dog must have had a good reason for biting him.

Their suspicion is not entirely baseless. Even though there are at least 5 million dogbite victims in United States every year, there are tens of millions of interactions with dogs every day that do not result in injury, and so it is truly unusual for a person to get hurt or bitten by a dog. By the same token, however, a study by several of the most respected researchers in the field of canine aggression showed that despite all the accusations of provocation it occurs in less than 6% of dog bite cases.

There are four specific circumstances in which speculation about this issue can really hurt your case:

1. Juries have been known to reduce the victim's award because *other* people provoked the dog. Even though the victim may have never had contact with the dog, a dog that was constantly teased and treated cruelly by neighborhood children can arouse sympathy for itself and therefore for its owner in a dogbite case.

2. The assumption that the defendant's dog was one of man's best friends can lead to injustice when there are *no witnesses* other than the victim; once again people begin to wonder why a dog would do such a thing, and it's easy for them to conclude that your client must have deserved it in some way. Watch out for states that seem to require a witness to prove that he was not provoking the dog. An insurance company tried this against me once, when the child had been knocked unconscious by the dog that then proceeded to scalp him and rip off both sides of his face. I was able to get a trial court ruling that since the defendant's conduct resulted in the child being unconscious, it would be unfair to keep the burden of proof on the child. However, it's a risk factor that you have to watch out for.

3. If someone was using *alcohol* around the dog, there are adjusters who will propose that the dog was provoked.

4. If the victim was trying to *rescue or protect* his own dog from slaughter by the attacking dog, defense attorneys might try to call it comparative negligence, assumption of the risk, or actual provocation.

For all these reasons, a victim who had absolutely nothing to do with the dog and was surprised by the attack will score 10. Anyone else unfortunately could score as little as one without having actually done anything wrong.

Parental Supervision

You need to show not only what the dog and the victim were doing in the minutes before the attack, but where the child's parents were and what they were paying attention to. Essentially you have to justify their decision to allow the child to be near the dog, and show it was reasonable for the parents to be too distant or occupied to prevent the injury from happening.

Juries often are skeptical of parents in cases where child is injured. They may think that the parents are trying to make money for themselves. In fact, that is nearly impossible nowadays. The courts are quite vigilant in keeping an injured child's money away from his mom and dad. Juries don't know this, however.

You need to show that the parents were supervising the child in a normal manner, that they were distracted in a reasonable manner, or had reasonably given permission for the child to be where he was (assuming that it was reasonable to give that permission). Watch out for parents who allow their child to go anywhere and do anything, because that might be seen as an invitation for the child to be injured, which could backfire on the child even though he was blameless.

You need to learn whether the parents of the injured child had reason to know that the particular dog was dangerous. A common nightmare for plaintiffs' lawyers in these cases is the parent who has been telling anyone who would listen (including the dog owner's insurance adjuster) that the dog was a well-known demon animal that had bitten numerous people and was commonly recognized as being a danger to the entire neighborhood. For some reason many parents do a good deal of talking about all of the prior accidents before they retain you, making your job very difficult because it looks as though the parents themselves were at fault for allowing their child to get near the dog that eventually inflicted injury. Clients need to be muzzled too, sometimes.

Obviously you must find out whether the dog owners previously warned the parents of the injured child that the dog was not good around kids. You also must learn whether the parents knew that the dog previously bit another child. In one of my cases, a father kept bringing his kids over to the house where one of the boys had been bitten by a dog, so that (in this father's mind) the kids would not be afraid of dogs. Soon enough the dog attacked the father.

You also must consider whether the parents had reason to suspect that the particular situation was one in which allowing a dog and child to be together would probably result in injury to the latter. For example, a dog should not be allowed to be loose at a pool party where children are splashing water, running around shouting, and shooting each other with water guns. A jury might feel that the parents should have prevented their kids from participating in such an activity, and might cut down the compensation in such a case.

When the parents should have known, should have been watching closer, or otherwise failed in their duty to supervise their own child, give the plaintiff just the one in this category. When the parents are completely blameless, give the victim 10.

Fiduciary

The best defendants are babysitters and daycare operators whose dogs attack the children they are supposed to be watching. No parent wants a day at the babysitter's house to end with their kid on the operating table. Anybody who is charged with taking care of a child is going to look terrible to a jury if that person's dog was the instrumentality of injury. In babysitter and similar cases, give the plaintiff a 10.

House of Horrors

Even if you are not a babysitter or daycare owner, when you invite a child into your home you are expected to supervise what goes on and to put away all of the shiny, sharp objects (including the teeth of your dog). One of the best defendants is someone who invites a child for a play date or sleep over, and then doesn't pay attention. Anything that happens inside that person's house comes back on the defendant. When your client is injured in someone's house on a play date, see if you can present it as a house of horrors and, if so, score 10.

Tender Years

The younger the child, the more sympathy. Infants score 10, but take away one point for every year over 8. The worst clients are teenagers. I can legitimately rail against the punk rocker and the Gothic dresser with the tattoos and body piercing, because they don't stand a chance in a courtroom. A 17-year-old boy who is bitten in the middle of the night while in the bedroom of an underage girl is not going to garner sympathy even if he ends up with significant facial scars. So the very young child scores a 10, while the older teenager scores as low as a one.

Nice Kid From A Nice Family

If the victim is a nice kid from a good family, he will be rewarded. If he is the kind of child that all the jurors can identify with or wanted for their own, he's going to do well. Give him a 10 for this gift of birth to the right parents. Give him as little as a one if his family deviates too much from whatever picture Americans currently think a family should fit.

Conclusion

Add them up like I do, and then put a percent sign after the result. If you score, say, 80 points, then multiply your case value by 80 percent and consider the possibility of settling in that range, because these are very powerful factors.

*More tips and tricks for handling dog bite cases, as well as the forms and templates to develop a great, strong case are available for immediately downloading and use by clicking these links: [Dog Bite Litigation Forms for Plaintiffs' Attorneys](#), and [Anatomy of a Dog Bite Case](#) (seminar that plays on your computer, accompanied by the speaker's script and two important chapters from the author's upcoming book, *Handling Dog Bite Cases*).*