

# Trial

by Michael Kaiser

Seattle Legal Research/Kaiser Legal Group

Michael.Kaiser@Kaiser-LegalGroup.org

While the majority of dog-bite cases never go to trial, the ones that do present some unique characteristics. Also, although I have not conducted a study on the issue, my sense is that insurance companies treat dog bite cases, and in fact the entire issue of dogs, a bit differently than certain other tort claims. Not only are insurance companies increasingly unwilling to indemnify in standard homeowners' policies against dog bites or certain types of dogs, but also my sense is that at a specific point in a case, insurance companies are more willing to take specific types of dog-bite cases to trial. Certain defenses and mitigating factors also are becoming more accepted.

## A. What Jurors Think: What Every Litigator Needs to Know

We live in a nation of pet owners, in general, and dog lovers more specifically. A 2001 Gallup poll revealed that roughly six in 10 Americans own either a cat or a dog.<sup>1</sup> By the substantial margin of 73 percent to 23 percent, Americans in the same poll found dogs to be a “better pet” than cats,<sup>2</sup> even though 42 percent of those surveyed in another 2001 Gallup poll said they had been bit by a dog.<sup>3</sup> A 2006 Gallup poll found that by a 70 percent to 20 percent margin, Americans describe themselves as “dog persons” rather

---

<sup>1</sup> David W. Moore, *Public: Dogs “Better Pets” Than Cats*, Gallup (March 7, 2001), <http://www.gallup.com/poll/1933/public-dogs-better-pets-than-cats.aspx> (last visited June 15, 2013).

<sup>2</sup> *Id.*

<sup>3</sup> Darren K. Carlson, *Half of Dog Owners Believe Their Dog Capable of Inflicting Serious Harm, if Provoked*, Gallup, March 29, 2001, <http://www.gallup.com/poll/1855/Half-Dog-Owners-Believe-Their-Dog-Capable-Inflicting-Serious-Har.aspx> (last visited June 16, 2013).

than “cat persons.”<sup>4</sup> Thus, a lawyer is going to probably have dog lovers on a jury, or at least those sympathetic to dogs, even in many instances when the jurors previously have been bit. A plaintiff’s lawyer must be careful how she characterizes dogs in general and the dog-at-issue. It is better to characterize the dog as poorly trained or poorly cared for than to label it, overtly or constructively, as an inherently “bad seed.” In fact, the perfect scenario is for a lawyer to have a jury that somewhat likes the dog, or at least has not been steered toward disliking the animal, while at the same time accepting that in the matter-at-issue something went wrong, something that, if at all possible, you have laid at the feet of its owner. This will enable the jury to give you what you want without causing them to internally condemn the animal. The idea of casting more blame on a dog’s upbringing or care is a very effective tool that animal rights supporters have used for years to excuse the higher proportion of serious dog attacks by pit bulls.

Another factor of relevance is that pet ownership declines with age. The 2006 Gallup poll referenced above found that 68 percent of those between 18-49 owned a pet, but that ownership declined to 57 percent for those between 50-64 and further declined to 43 percent for those older than 65.<sup>5</sup> The older the individual, the less chance they have a current or recent emotional attachment to an animal.

Fear of dogs is another issue that becomes more common with age. Watch people of age around dogs, especially dogs of any size. Older people often maintain a distance. When older people are only just knocked down by dogs, the injuries can be substantial. People of age are more aware of the harm a dog can cause. For example, some are aware of others who have fallen and broken hips as a result of encounters with dogs, and a broken hip for an older person can, at times, also eventually mean death. If you have older people on a jury, you often have people who are almost instinctually aware of the danger a dog poses. Ultimately, the fact that older people are less positively engaged on many levels with animals means that you have a more objective juror.

---

<sup>4</sup> Frank Newport, Jeffrey M. Jones, Lydia Saad, and Joseph Carroll, *Americans and Their Pets*, Gallup, (December 21, 2006), <http://www.gallup.com/poll/25969/Americans-Their-Pets.aspx> (last visited June 15, 2013)

<sup>5</sup> *Id.*

Another 2001 Gallup poll presented several other interesting findings. The poll found that 49 percent of dog owners believe their pet is capable of inflicting serious harm on a human *if the dog is provoked*.<sup>6</sup> However, 74 percent of those same owners were “not worried at all” about such a happenstance occurring.<sup>7</sup> Another 18 percent said that they were “not too worried.”<sup>8</sup> Only 7 percent said they have substantive concern that their dog could inflict harm.<sup>9</sup> Thus, half the dog-owning population do not believe their dogs are even capable of causing serious harm unless it is the fault of an instigator, and over 90 percent of those owners have a difficult time envisioning such a scenario ever occurring.

Another interesting aspect of this poll is that it was conducted between February 19-21 of 2001, right after, arguably, the most recognized dog-mauling case in American history. On January 26, 2001, in San Francisco, noted lacrosse player and coach Diane Whipple was killed by two Perro de Presa Canarios in the hallway of the apartment building where she lived. The couple who owned the dogs, both lawyers, was sentenced to prison. One still is incarcerated. Clearly, even stark evidence of a dog’s dangerousness did not change the minds of many, if any, of those polled who were aware of the San Francisco incident, at least with regard to how the owners perceived their own dog’s dangerousness.

On a more general note, western societies, and especially in some parts of America, are currently much more willing than in the past to entertain, and in fact advance, the perspectives of animals. This means you will have jurors more willing to lay some, or all, of the blame for a dog-bite incident on humans, including the victim.

---

<sup>6</sup> Carlson, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

## B. Questions You Never Thought to Ask Potential Jurors

1) **What are their feelings about breed-specific legislation?** (ie. Legislation that bans certain types of dogs, such as pit bulls)

Breed-specific legislation currently is a very hot issue, especially amongst animal-rights supporters. I regularly attend “animal law” conferences, which really, for the most part, are de facto animal-rights conferences, with the most common reference to the law occurring within the context of how a law can advance the interests of animals. I do not recall a conference in the past five years that has not had a panel debating, or actually advocating against, breed specific legislation. In fact, the issue has become so partisan that several years ago, at the most recognized annual animal law conference in the world, a very credentialed speaker called on the audience to proclaim in their communities that pit bulls are “America’s dog.” The hoped-for effect being that communities considering banning pit bulls might have a change of heart.

A potential juror’s feelings about breed-specific legislation can be quite telling. I rarely, if ever, come across people who are against breed-specific legislation who are not also activist, at least intellectually, with regard to their support of animals. You much more often are going to have to convince such a juror that the fault largely lies with the owner, and to a lesser extent with the dog-at-issue. Those who support breed specific legislation are jurors you want, all things being even. Also, by asking this question during voir dire, you have the opportunity to plant in the minds of prospective jurors the idea that there are people and communities who believe that certain dogs can be inherently dangerous, at least under certain conditions.

People’s feelings about breed-specific legislation also break down by age. An April 2013 poll conducted by Leger Marketing for Postmedia News asked citizens of Calgary, Alberta, about their feelings regarding breed-specific legislation. Of those polled who were over 70 years of age, 64 percent supported breed bans, while only 19

percent of those between 18-29 supported breed bans.<sup>10</sup> Overall, 40 percent of those polled backed breed bans and 48 percent were against breed bans or were neutral.<sup>11</sup>

## **2) What are their feelings about legal personhood for animals or allowing animal advocates to go to court to argue on behalf of animals' interests?**

For simplicity sake, I will define legal personhood as a more expansive version of standing. This is another issue gaining traction and is destined to gain much more traction perhaps as early as this year. This issue is being spearheaded most notably by the Nonhuman Rights Project<sup>12</sup>, a group formed by acclaimed animal-rights attorney and scholar Steven Wise. The project seeks to file in 2013 a state case or cases seeking legal personhood for animals.<sup>13</sup> The project involves the participation of many scholars, students, and lawyers from across the globe. I also have contributed services. Press attention is growing and there also are further plans for major media outreach.

Jurors' answers to this question are going to provide deep insight into their feelings about animals. Furthermore, if you have a juror who supports legal personhood for animals, you have a juror fairly far to the edge of current societal opinion regarding the rights of animals. This is a juror who is going to be looking for ways to cast blame not with the animal but elsewhere. To most supporters of legal personhood, animals are, overall, victims of many human actions, and thus, as an extension, need the ability to go to court and fight against certain humans.

---

<sup>10</sup> Bryan Weismiller, *Younger Calgarians Oppose Dangerous Breed Bans—Poll Shows Support Grows With Age*, Calgary Herald (April 22, 2013), <http://www.calgaryherald.com/life/Younger+Calgarians+oppose+dangerous+breed+bans/8274875/story.html>, (last visited June 18, 2013).

<sup>11</sup> *Id.*

<sup>12</sup> Nonhuman Rights Project, <http://www.nonhumanrightsproject.org/>, (last visited June 18, 2013).

<sup>13</sup> *Id.*

### 3) **Are the prospective jurors involved in animal rescue activities?**

The six-person jury impaneled for the second-degree murder trial in Florida of George Zimmerman for the controversial 2012 shooting death of Trayvon Martin contained two ladies who stated that one of their hobbies was rescuing animals. If the George Zimmerman trial had been a dog-bite trial, I would have been on notice. Obviously the jurors have a soft spot for animals that, in addition, has taken an activist form.

Rescuers believe that the animals in their possession have been victims of humans. In the case of a feral cat, for example, it is felt by rescuers that lack of spaying and neutering, as well as abandonment, are the issues. Vicious dogs also are victims, and pit bulls are a cause célèbre with many rescuers. To those rescuers, pit bulls are victims, on a micro level, of poor breeding and care, and on a macro level, of societal prejudices and mistaken beliefs. These jurors would not want to hear that certain breeds can, at times, be inherently problematic, unless it all comes back to a human cause.

In addition, many rescuers see themselves as experts of some type, and because their opinions often are not grounded in formal learning that has exposed them to a spectrum of viewpoints, their opinions can be tightly held. In fact, rescuers, at times, will also resent formally trained and experienced experts, thus causing the rescuers to shut out the message, especially if it conflicts with their own beliefs. Many rescuers also would have no problem spending as much time as necessary to convince a group of people, such as fellow jurors, of a belief deeply held.

### C. Photographs and Effective Exhibits

Effective photographs and exhibits should focus on several areas. To begin with, and to immediately dissuade the trier-of-fact from the line of thought that the case concerns another loveable example of man's best friend, the plaintiff should place in front of the trier-of-fact graphic pictures of the damage caused. The pictures should remain up the entire trial. The goal is for the trier-of-fact to recognize no later than the end of the trial that the matter-at-issue does not involve man's best friend, but rather an

animal that turned wild and engaged in savage behavior. Fortunately, dog attacks often leave wounds that can be quite visually jarring.

Photographs of how the animal was kept also can be helpful when an attorney is arguing that the manner in which the dog was kept or cared for contributed to the attack. For example, if you have photographs of a small, cement-bottomed cage or pen, perhaps containing animal excrement or stains from such, it can cause one to consider that the dog may have had a good reason for being angry or vicious, thus laying responsibility back on the owner. Furthermore, it has been argued that animals kept in pens can be more aggressive when they are given the opportunity to exit their keep. It also has been argued that dogs kept tethered or muzzled most of the time tend to be more fearful. It is felt that they do not feel as free to defend themselves. This purportedly leads to aggressive responses by the dogs to perceived danger or intrusions.

Photographs of a fence with bite and scratch marks lend credence to the argument the dog had aggressive tendencies. Photographs showing damage caused by the dog to the interior of the home also can be effective in helping to define the character of the dog and what the owner knew.

One type of exhibit that can be very effective, if the court allows it, is a mock video-reenactment of the plaintiff's version of the incident. The video can show the victim being mauled and the dog as essentially savage. While one might think the costs to create such an exhibit are high, the reality is that many of you have kids who probably could do much of it on your home computer, as could you if you have the expertise.

Another effective exhibit can be a video of the dog's aggressive tendencies when being examined by a behaviorist. Such an examination is a good idea anyway if it can be afforded. However, do not show a video from which the trier-of-fact might conclude that only instigation causes the dog's aggressiveness unless the instigation clearly is something that will be considered benign.

#### D. Direct and Cross Examination of Witnesses

There are only two issues I wish to touch on regarding examination of witnesses; the issue of neighbors of the defendant testifying and the issue of children testifying. There are several things for which you need to be prepared.

Getting and preparing neighbors of the defendant to testify can be problematic, and yet neighbors quite often are going to be your most important witnesses addressing how the dog normally behaved and how it was cared for. To begin with, you must get to the neighbors right after the incident. Even if a defendant has been a chronic problem for the neighborhood, once the shock of, what typically is, a serious dog-bite incident has worn off, neighbors start to take other things into consideration, such as the fact they still have to live near the defendant long after any trial is over. However, if the victim is also a member of the neighborhood, the neighbors may stay emotionally invested in “justice” a bit longer than otherwise.

Furthermore, you must record or videotape the neighbors’ statements or, at the minimum, get them to sign a statement. Neighbors not only will forget things over time, but also begin to weigh the benefits and negatives to themselves of their potential testimony. One way to enlist the neighbors is simply to say, “I know accidents can happen, even involving good people and good animals, but we want to make sure this does not happen to someone else.” This also will reinforce for the neighbors that they could be the next “someone else.”

Serious dog bite cases also frequently involve children, and thus also involve the challenges that come with children’s involvement in cases. You will need to be prepared to argue for the admission of hearsay. Children often are afraid of testifying and thus, essentially, do not testify, whether this lack of testimony be overt or constructive. Also, often times children are too young to testify in any substantive way. That still does not mean there were not, for example, excited utterances after the incident. You also need to be prepared for potential objections related to your “leading questions,” with such questions almost a necessity when examining children. However, typically you will be given a bit more leeway by the defense, if only for show.



## E. Expert Testimony About Dog Breed Characteristics

Here is the inside scoop from someone who has been heavily involved in various animal and animal law matters for years. Many “animal experts” have no idea what they are talking about, and all it takes is a good question to get them into a position where they are forced to concede, or it becomes obvious, that your query calls into question the very foundation of their premise. I especially see this at animal law conferences, and at times precipitate it myself, and I am not that bright.

Many expert witnesses also are pursuing an animal rights agenda masquerading as some serious discipline. Often times these types, but not only these types, will attempt, and then be allowed to get away with, explaining animal behavior by using human behavior as the baseline. Comparing animal behavior with children’s behavior also is not uncommon. Ninety-nine percent of the time the explaining of animal behavior by using human behavior as a baseline, or reference point, has no foundational legitimacy. Furthermore, once you let a witness start down that path, the trier-of-fact is going to be, inherently, accepting of the testimony. The testimony allows for much less mental exertion on the part of the trier-of-fact and is much less likely to challenge a trier-of-fact’s perspective on the world.

So do not let your fear of a difficult issue—what makes an animal tick—crowd out the fact that if the topic is difficult for you to relate to, even as an attorney immersed in the issue, you can be certain the overwhelming majority of citizens are further removed than you from any substantive baseline wisdom upon which to juxtapose such testimony. In fact, if someone testifies as an expert that the natural state of a pit bull is to be caring for area kittens, but that this has not occurred because pit bulls, as a breed, have been improperly socialized by humans or poorly bred, many people would accept the statement outright. In fact, it is quite possible your main challenge with regard to experts in a dog-bite case will be to limit the testimony of certain experts. Of course this all cuts both ways. You can find someone who will say anything about an animal for purposes of your case.

There is one caveat to all of this, and that is if you are dealing with veterinarians as witnesses. A veterinarian is going to come across as very credible and also be very difficult to break down unless he is rather new to testifying. Veterinarians are discussing animals, already a mystery to many people, and using very technical medical terminology to do it, which can be a difficult combination to penetrate. Furthermore, the public thinks very highly of veterinarians.<sup>14</sup>

Ultimately, *general* breed characteristics are only going to be relevant to a point. The most important factors a trier-of-fact is going to be interested in are how the purported characteristics of the breed intersect with both the behavior of the owner and behavior specific to the dog-at-issue.

---

<sup>14</sup> Lydia Saad, *Nurses Top List of Most Honest and Ethical Professions*, Gallup, (December 14, 2006), <http://www.gallup.com/poll/25888/Nurses-Top-List-Most-Honest-Ethical-Professions.aspx> (last visited July 20, 2013)(veterinarians are rated third for ethics and honesty among professions, ranking higher than clergy, policemen, and human doctors among others).