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Citation:

Amanda James, The First Bite Is No Longer Free: New Legislation Proposes Changes to a Dog Owner's Liability, 75 Advocate (Vancouver) 51, 54 (2017)

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Tue Sep 12 20:01:17 2017

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THE FIRST BITE IS NO LONGER FREE: NEW LEGISLATION PROPOSES CHANGES TO A DOG OWNER'S LIABILITY

By Amanda James

A dog bite can cause severe injuries and in rare cases death, especially when small children are involved. There are over 500,000 dog bites per year recorded in Canada and in 2011 Ontario recorded over 13,000 emergency room visits related to dog attacks, according to the Canadian Institute for Health Information ("CIHI").¹ Many claims related to dog bites are made under homeowners insurance policies. In the United States, close to one-third of all liability claims paid in 2009 (average claim \$24,840) were for dog bites and although the Insurance Bureau of Canada ("IBC") does not track dog bite statistics,² it has stated that similar statistics likely apply to Canada.³ Presently in British Columbia, as explained below, liability for dog bites can be loosely summarized with a tagline: the first bite is free.⁴ However, new proposed legislation in British Columbia⁵ would, if enacted, bring stark changes to the current law and bring British Columbia in line with other provinces that have legislated strict liability for dog bite injuries. The new *Animal Liability Act* would make it easier for plaintiffs to prove liability and receive compensation not only for dog bite injuries but also, more generally, for any injury caused by an animal.

Liability for dog bites in British Columbia has been traditionally based on the longstanding doctrine of scienter. The doctrine of scienter has its origins in traditional English common law, which draws a distinction between animals *ferae naturae* and animals *mansueate naturae*. Animals that fall into the category of *ferae naturae* (such as wolves and tigers) are considered by their nature to be dangerous to people while animals *mansueate naturae* (such as cats and dogs) are considered by their nature to be harmless to people.

At common law, then, dogs are classified as a harmless animal, *mansueate naturae*. An owner who keeps an animal *ferae nature* is presumed to

know that such animals are dangerous and strict liability is imposed for damage caused by these animals. An owner who keeps animals *mansueate naturae* is strictly liable only if the owner was aware of the animal's dangerous nature before it attacked someone. In application to dog bite cases, scienter imposes strict liability on the dog owner where the injured person can prove that the defendant was the owner of the dog, that the dog had a propensity to bite or cause the type of harm complained of, and lastly that the owner knew of such propensity.

Scienter was introduced in British Columbia by Chief Justice Begbie in *Nevill v. Laing*,⁶ and has formed the basis of liability in dog bite cases in British Columbia since that time, though a plaintiff may also establish liability against the dog owner in negligence or under the *Occupiers Liability Act*.⁷ The core element of scienter is knowledge, in that a successful plaintiff must show that the owner knew of a dog's propensity to cause damage before the injury. A dog that has no prior history of a violent temperament lacks the necessary propensity to result in liability on its owner. This has given rise to the euphemism of "one free bite" in describing the state of law on liability for dog bites in British Columbia.

Previous dog bite cases in British Columbia have turned on the knowledge component, as in order to be successful, a plaintiff has had to have reliable evidence to show not only that a dog had a propensity to bite and attack but also that the owner had actual knowledge about the propensity. These two components are most often where the plaintiff fails: *Janota-Bzowska v. Lewis*,⁸ *Levesque v. Miko*,⁹ *Carr v. Johnston*,¹⁰ *Lewis v. Robinson*,¹¹ *Taller v. Goldenshtein*,¹² and *Weeks v. Baloniak*.¹³

In *Janota-Bzowska v. Lewis*, the seminal case on dog liability in British Columbia, a plaintiff injured by a dog bite was awarded close to \$40,000 in damages for her injuries. On appeal, the Court of Appeal for British Columbia dismissed the case on the basis that the actions of the offending dog were unexpected and the knowledge component of scienter had not been established. In *Levesque v. Miko*, a plaintiff was left with a permanent scar on his face after a bite from a German Shepherd but was unable to succeed, as the dog was not known to be aggressive. Similarly, in *Carr v. Johnston*, a plaintiff was unable to succeed in a claim for damages caused to her car by a dog on the basis that there was no evidence establishing the temperament or past behaviour of the dog. In *Weeks v. Baloniak*, despite a dog's previous documented aggressive behavior to postal workers, the plaintiff mail carrier was unable to prove that the defendants had actual knowledge of the dog's prior behavior. The plaintiff successfully appealed in *Weeks*. In *Taller v. Goldenshtein*, a 9-year-old boy lost the sight in his eye when he was bitten

by a cocker spaniel but was unable to show that the owners had actual knowledge of the dog's violent nature.

The new *Animal Liability Act* proposes to make scienter inapplicable in cases of injuries caused by animals. The legislation was introduced in the spring of 2016 in the legislature in response to a vicious dog attack in Saanich, British Columbia. Section 9 of the *Animal Liability Act* would abolish scienter and impose strict liability on the owner of a dog or any animal regardless of whether the owner is aware of a dog's propensity to cause damage. The *Animal Liability Act* would define an animal as "any creature that is not human" and consequently the liability for injuries and damage extends not only to dogs, but also to any exotic pet that causes injury or damage. Additionally, where a dog bite occurs at the owner's house, the *Animal Liability Act* would determine liability in place of the *Occupiers Liability Act*. If the legislation is enacted, the first bite will no longer be free.

The proposed *Animal Liability Act* is fashioned after similar animal liability legislation in place in Manitoba, Newfoundland and Ontario. Ontario's *Dog Owner's Liability Act*¹⁴ and Newfoundland's legislation¹⁵ have been in place since 1990, followed by Manitoba's *Animal Liability Act*¹⁶ in 1998. Ontario's legislation has arguably made it far easier to prove liability in dog bite cases. In *Rai v. Flowers*,¹⁷ a recent Ontario decision, Mr. Justice Emery held that under the *Dog Owner's Liability Act* once ownership of a dog has been established, liability for all damage from the dog follows. In Manitoba, a similar interpretation has emerged.¹⁸

A plaintiff in provinces that have strict liability for animal attacks in place only needs to demonstrate that the defendant was the owner of the dog that caused harm before liability is imposed. Had the *Animal Liability Act* been in place in British Columbia at the time the earlier-noted B.C. cases were tried, they would likely have all been decided in the plaintiff's favour. If the *Act* is passed, evidence of an offending dog's prior violent history and the owner's knowledge of that history would no longer be required. To be successful a plaintiff would simply have to establish ownership of the dog that caused harm to impose liability and consequently recoup damages for his or her injuries.

Although a person injured by a dog bite in British Columbia would no longer be required to prove propensity and knowledge under the *Animal Liability Act*, these elements are still necessary in order to make out an action in negligence. This was most recently stated by Mr. Justice Turcotte of the Queen's Bench for Saskatchewan in *Kwok v. Jennings*,¹⁹ where the court affirmed that knowledge of a dog's propensity elevates the standard of care to be applied in assessing the extent of a dog owner's liability for

acts or injuries committed by the dog causing damage to a third party's property.

The *Animal Liability Act* would significantly change the law related to the liability of pet owners in British Columbia. The *Act* arguably would provide greater protection to potential plaintiffs than the corresponding legislation in Ontario and Newfoundland in that it applies to not only dogs, but also all other animals, including exotic pets. If the *Act* comes into force, all dog and exotic pet owners should ensure that they have the appropriate insurance coverage in place in order to avoid personally paying out an expensive claim for injuries attributable to their pets.

ENDNOTES

1. "Responsible Dog Ownership Prevents Injuries and Saves Lives" (January 2014), online: <<https://canadasafetycouncil.org/safety-canada-online/article/responsible-dog-ownership-prevents-injuries-and-saves-lives>>.
2. "Dog Bites Get Chunk of Insurance Payouts", *CBC News* (22 September 2010), online: <<http://www.cbc.ca/news/dog-bites-get-chunk-of-insurance-payouts-1.867930>>.
3. *Ibid.*
4. *Woods v Standish*, (1991) 58 BCLR (2d) 302 (SC).
5. *Animal Liability Act*, 2016, Bill M212. First reading occurred on April 6, 2016.
6. (1892), 2 BCR 101 (SC).
7. 1996 RSBC, c 337.
8. 1997 CanLII 3258 (BCCA).
9. 2001 BCPC 96.
10. 2016 BCPC 181.
11. 2002 BCCA 280.
12. 1990 CanLII 2234 (BCSC).
13. 2003 BCSC 1684, appeal allowed and matter remitted for a new trial: 2005 BCCA 193.
14. RSO 1990, c D16.
15. Formerly the *Dog Act*, RSNL 1990, c D26, now the *Animal Health and Protection Act*, SNL 2010, c A-9.1, s 34.
16. CCSM, c A95.
17. 2014 ONSC 3792.
18. *Lofstrom v Hydramaka*, 2013 MBQB 220.
19. *Kwok v Jennings*, 2016 SKQB 170.



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