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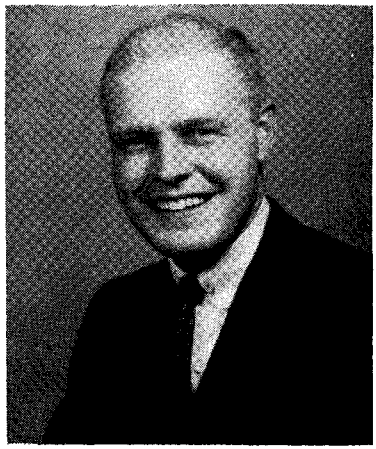

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Actual records trace the mammal *Carnivora*, family *Canidae*, back to the Egyptian tomb of Amten of the Fourth Dynasty — about 3500 B.C. Since that time the service, devotion and heroism of the dog have earned him recognition as "Man's Best Friend," a title enjoyed by no other member of the animal kingdom. Despite this praiseworthy heredity, man seems to be questioning the underlying friendliness of the dog. In the last century, dogs have been the object of increasing claim compensation. This new source of lawsuits is significant since there are an estimated 13,000,000 dogs in the United States — one dog for every ten persons.

In early legal history, the dog was protected by being allowed "one free bite." But courts have discarded that principle[1] for a new legal fiction of liability — a fiction spuriously called "vicious propensities." While the vicious propensity test appears universal in the legal literature, its application is variously handled.

Some jurisdictions using the vicious propensity test determine dog bite liability in terms of nuisance. While a dog is not a nuisance **per se**,[2] the courts which apply the nuisance theory investigate the disposition and conduct of the dog and the manner in which he has been kept in determining the nuisance question. Following this theory, it has been said that, "a person who keeps a dog which is dangerous to mankind with knowledge of its vicious propensities is liable on the theory of nuisance for injuries resulting therefrom to others, irrespective of the question of negligence on his part."[3]

Another line of authority establishes liability in terms of negligence. In these cases it is necessary for the plaintiff to establish the dog's vicious propensities in order to show negligence or fault on the part of the owner. The negligence or fault is established

[1] See, e. g., Andrews v. Smith, 324 Pa. 455, 188 Atl. 146 (1936).
[2] Smith v. Costello, 77 Idaho 205, 290 P.2d 742 (1955).
[3] Annot., 79 A.L.R. 1060, 1062 (1932).

upon showing that the owner did not take steps which would prevent injury or damage after he became aware of the dog's vicious nature.[4]

A third theory of dog bite liability is that which Colorado has recognized. It appears that the Colorado Supreme Court imposes strict liability on a dog owner who has prior knowledge of his dog's vicious propensities. In *Barger v. Jimerson*,[5] the court said, "It is quite evident that defendants did not at any time carelessly or intentionally allow the dog to run at large. Their liability was in keeping such a dog and they did so at their peril."[6]

Another form of strict liability is found in the statutes of Connecticut and Massachusetts. These identical statutes impose strict liability on the keeper of a dog for any damage which the dog does unless the damage was a result of trespass (or other tort), or of teasing, tormenting or abusing the dog.[7] Florida,[8] Iowa,[9] New Hampshire,[10] Ohio[11] and Rhode Island[12] have statutory provisions which are similar in wording and in effect.

Unless otherwise provided by statute, a necessary element of proof for establishing dog bite liability is proof of the vicious propensity of the dog. The test for vicious propensity appears to be universal. The plaintiff must show: (1) that the dog had exhibited certain tendences, (2) that the tendencies were of the nature to put prudent persons on guard against possible injury, and (3) that the tendencies were known to the owner prior to the injury for which redress is sought.[13]

The element of vicious propensity being essential in an action for dog bite regardless of the theory upon which liability is based, it is obvious that, unless otherwise provided by statute, simple proof of a dog bite and damage therefrom does not make out a *prima facie* case for the plantiff. It is in the area of proof of vicious propensity that many dog bite claimants fail. The authorities have set forth some important guide posts for such proof.

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[4] Woulfe v. D'Antoni, 158 So. 394 (La. App. 1935).
[5] Barger v. Jimerson, 130 Colo. 459, 276 P.2d 744 (1954).
[6] *Id.* at 462, 276 P.2d at 745.
[7] Conn. Gen. Stat. c. 151a, § 1842d (Supp. 1955); Mass. Ann.. Laws, c. 140, § 155 (1949).
[8] Fla. Stat. § 767.04 (1953).
[9] Iowa Code § 351.28 (1946).
[10] N. H. Rev. Stat. Ann. § 466.19 (1955).
[11] Ohio Rev. Code Ann. § 955.28 (1953).
[12] R. I. Gen. Laws Ann. c. 639, § 3 (1938).
[13] See note 5 *supra*.

What types of prior tendencies amount to vicious propensities? Following the rationale of the early "one free bite" principle, a prior attack on a human has been held sufficient to prove vicious propensities.[14] Evidence that a trained watchdog snarled and showed his teeth when petted by guests at the dog owner's hotel was also considered sufficient proof.[15] The ferocious and violent nature of a dog as evidenced by his barking, running to and lunging upon a fence when humans came near the fence has been held, by the Colorado Supreme Court, to be adequate proof of vicious propensities.[16] However, the Pennsylvania court has said that the mere fact that the person bitten was afraid of the dog prior to the bite does not prove the dog was vicious.[17]

What constitutes adequate owner knowledge of vicious propensities? The United States Court of Appeals for the Third Circuit has held that keeping and training a dog as a watchdog warrants the inference that the owner has knowledge of the dog's vicious propensities.[18] However, the Pennsylvania court has held that the mere keeping of a German shepherd to protect property against intruders is not sufficient to show that vicious propensities were known to the owner.[19] Constant owner admissions that the dog was "bad," made after the injury but prior to the trial, were held to constitute proof that the admitting owner had knowledge of the dog's vicious propensities.[20] The Colorado court has held that a dog owner had knowledge of his dog's viciousness upon a showing that he kept the animal confined because it was inclined to jump at approaching humans.[21] Furthermore, the owner must have had personal knowledge of the vicious propensities. Thus it has been held that the knowledge of a neighbor or of the owner's yardman is not imputed to the owner.[22] However, the knowledge of a servant who has control of the dog may be imputed.[23] In Colorado, an owner who knows or should know that his animal has been exposed to rabies is charged with that knowledge and is liable for the consequences of an injury inflicted while his dog is rabid.[24]

One might conclude, without consulting the authorities, that a trespasser has no cause of action for dog bite. However, this position is not supported by the courts. The New Jersey Supreme Court has held that, as a matter of law, the mere fact that the injured person was a trespasser at the time of an attack by a "vicious" animal does not defeat his action.[25] The theory supporting this decision was aptly stated in a leading case involving trespassing persons who are injured by animals found to have vicious propensities. Thus in *Marble v. Ross*,[26] the Massachusetts court reasoned

[14] See, e. g., Peyronnin v. Riley, 15 La. App. 393, 132 So. 235 (1931).
[15] Zarek v. Fredericks, 138 F.2d 689 (3d Cir. 1943).
[16] See note 5 *supra*.
[17] Fink v. Miller, 330 Pa. 193, 198 Atl. 666 (1938).
[18] See note 15 *supra*.
[19] Andrews v. Smith, 324 Pa. 455, 188 Atl. 146 (1936).
[20] Moore v. Smith, 6 So. 2d 803 (La. App. 1942).
[21] See note 5 *supra*.
[22] See note 4 *supra*.
[23] Benko v. Stepp, 199 Okla. 119, 184 P.2d 615 (1947); *accord*, Young v. Estep, 178 Wash. 561, 35 P.2d 80 (1934) (chimpanzee).
[24] Carlberg v. Willmott, 87 Colo. 374, 287 Pac. 863 (1930).
[25] Eberling v. Mutillod, 90 N. J. L. 478, 101 Atl. 519 (1917).
[26] Marble v. Ross, 124 Mass. 44 (1878).

that if a trespasser is injured by an animal which has vicious propensities known to the owner, the owner vicariously inflicts injury on the trespasser in a wanton manner. The court supported its position by citing the time-honored principle that a landowner may not inflict a wilful and wanton injury on a trespasser—a position analagous to the spring gun cases so frequently found in texts.

Children are particularly protected aginst the defense of trespass. In a 1934 Pennsylvania case,[27] an owner who kept a dog with known vicious propensities was held liable to an injured three year old, notwithstanding the defendant's allegation of trespass. A Louisiana court imposed liability on an owner of a known vicious dog without considering the owner's allegation that the twelve year old victim was a trespasser.[28]

In spite of the principle that trespassers are protected against vicious dogs, it does not follow that trained watchdogs are legal booby-traps. The determining question in an action by a trespasser injured by a trained watchdog is the care with which the watchdog owner has kept his dog. The New York appellate division has held that a dog known to be vicious can be kept to protect one's property provided the owner uses caution to confine the dog so that it may move only in the area where premises are to be protected.[29] The owner who meets the standard of caution calculated to avoid wilful injury to the innocent trespasser need not give the trespasser notice of the dog's vicious propensity.[30]

An interesting sidelight on dog bite liability is presented in cases where business invitees are bitten by dogs. Apparently, invitee status does not alter the vicious propensity test nor does it alter the application of the test. In *Zarek v. Fredericks*,[31] a federal court of appeals established that the plaintiff was a business invitee and then stated, "The question, so far as it concerns liability, is limited to the sufficiency of proof that the dog was vicious and the defendant knew or had reason to know that fact."[32] Similarly, in *Splaine v. Eastern Dog Club, Inc.*,[33] the Supreme Judicial Court of Massachusetts granted "business visitor" status to the plaintiff and added that the defendant dog club owed the plaintiff a duty to use reasonable care to keep the plaintiff, a dog exhibitor, free of harm from other dogs at the dog show. However the court concluded that, notwithstanding this duty, there was no proof of the offending dog's vicious propensity prior to its biting the plaintiff and therefore the defendant was not liable.

Common law liability for dog bite continues in most jurisdictions, with the qualifications above mentioned, unless changed by statute or replaced by new legal fictions. If there is any significant trend discernable, it is the extending of the definition of vicious propensity to include less offensive kinds of canine conduct.

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[27] Darbly v. Clare Food and Relish Co., 111 Pa. Super. 537, 170 Atl. 387 (1934).
[28] See note 20 *supra*.
[29] Woodbridge v. Marks, 17 App. Div. 139, 45 N. Y. Supp. 156 (3d Dep't 1897).
[30] *Ibid.*
[31] 138 F.2d 689 (3d Cir. 1943).
[32] *Id.* at 690.
[33] 306 Mass. 381, 28 N. E. 2d 450 (1940).