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Civil Liability Law Section – August 2014

Update: Civil Liability for Use of Police Dogs and Force Against Private Dogs

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❖ Introduction

The very first issue of this publication, in January of 2007, included an article entitled Civil Liability for Use of Police Dogs, 2007 (1) AELE Mo. L. J. 101. The proper use of trained police dogs is highly useful to officer in a variety of circumstances. The original article focused on issues concerning civil liability for the use of police dogs, specifically the use of dogs as a use of force against suspects, and injuries police dogs may inflict on innocent third parties. Also covered were the question of whether deployment of police dogs against a suspect can constitute deadly force, the use of dogs against mentally ill suspects, liability for dog bites under state law, and a number of other miscellaneous issues.

While the original article and the principles presented in it remain fundamentally sound, there have been a number of important cases in the intervening seven years. The current three-part article constitutes both an update of and an expansion of the original article, and supersedes it.

A section has been added on legal issues that arise in the context of police use of force against private dogs which are encountered in the course of criminal investigation, community caretaking, search and seizure, and the making of arrests, as well as one on animal control issues. There is also a section containing some suggestions to consider, as well as, at the end of the third part of the article, a listing of useful and relevant resources and references, including some specimen policies.

❖ **Use of Dogs Against Suspects is Force and Must be Reasonable**

In [*Graham v. Connor*](#), #87-6571, 490 U.S. 386 (1989), the U.S. Supreme Court held that all claims that law enforcement officers have used excessive force – whether deadly or not – in the course of an arrest, investigatory stop, or other “seizure” of a free (non-incarcerated) individual should properly be analyzed under the Fourth Amendment’s “objective reasonableness” standard rather than under a substantive due process standard of the Fourteenth Amendment.

That “reasonableness” inquiry is whether the officers’ actions are “objectively reasonable” in light of the circumstances and facts confronting them, regardless of their underlying intent or motivation. The standard does, however judge the reasonableness by viewing the particular use of force from the perspective of a reasonable officer on the scene, based on what they then know, and makes allowance for officers frequently being compelled to make “split-second” decisions about the amount of force needed in a particular circumstance.

Subsequent case law makes it clear that the intentional use of a police dog to detain a suspect constitutes a “seizure” for purposes of the Fourth Amendment, and therefore must be judged under the “objective reasonableness” standard. [*Vathekan v. Prince George’s County*](#), #96-2246, 154 F.3d 173 (4th Cir. 1998).

As with any such use of force to apprehend or restrain a suspect, whether the force used is reasonable under the circumstances depends on a variety of factors, including the seriousness of the suspected offense, the question of whether or not the suspect is armed or suspected of being armed, and whether the suspect is cooperating and complying with the officers’ commands and instructions or is actively resisting arrest, or threatening the officers or others.

In [*Strickland v. Shotts*](#), #05-1050, 155 Fed. Appx. 908 (Unpub. 7th Cir. 2005), for instance, a federal appeals court ruled that an officer did not use excessive force by using a dog to subdue an arrestee who was resisting by kicking and thrashing his legs after having led officers in a car chase and then entered a private residence while under the influence of cocaine, cannabis, and alcohol.

Similarly, in [*Mendoza v. Block*](#), #92-56225, 27 F.3d 1357 (9th Cir.1994), the court found that use of a police dog was reasonable to apprehend and subdue a bank robber who failed to submit to arrest, and continued to struggle.

The severity of the offense factors into the reasonableness of the force used. Illustrating this, in [*Johnson v. Scott*](#), #08-3317, 576 F.3d 658 (7th Cir. 2009), the court held that the use of a police dog to bite a suspect's arm in order to subdue him was not an excessive use of force when the suspect was wanted for two serious crimes: a shooting and reckless flight from the police in a vehicle, and when the suspect was reasonably believed to be armed, and had used every method he had to attempt to evade capture.

Factors in determining whether the use of a police dog is reasonable under the circumstances can be the duration and extent of force of a police dog's bite, [*Watkins v. City of Oakland, Cal.*](#), #96-17239, 145 F.3d 1087 (9th Cir. 1998), and the question of whether or not a suspect receives a warning before the dog is released, in instances where it is practical to do so, [*Chatman v. City of Johnstown, Pennsylvania*](#), #04-3639, 131 Fed. Appx. 18 (Unpub. 3rd Cir. 2005). See [*Matthews v. Jones*](#), #93-5249, 35 F.3d 1046 (6th Cir. 1994) (fact that warning was given made deployment objectively reasonable)

Another case focusing on duration is [*Edwards v. Shanley*](#), #11-11512, 666 F.3d 128 (11th Cir. 2012), holding that police officers were not entitled to qualified immunity on a stopped motorist's claim that they allowed a police dog "to conduct a five-to seven-minute attack against a person who ran from his car after a traffic stop, where he is lying face down with his hands exposed, no longer resisting arrest, and repeatedly pleading with the officers to call off the dog because he surrenders." The motorist was stopped for allegedly going through a stop sign, and was driving with a suspended license. The initial decision to use the dog to track and subdue the motorist when he ran was not unlawful, but, if the facts were as the plaintiff claimed, they allowed the dog's attack to continue for too long.

❖ Warnings

In [*Szabla v. City of Brooklyn Park*](#), #04-2538, 429 F.3d 1168 (8th Cir. 2005), the court ruled that, because city policy possibly allowed the use of dogs to catch and bite suspects without verbal warnings, summary judgment was improper in an excessive force lawsuit

brought by a homeless man bitten by a dog while lying on the floor in a shelter for public toilets. A jury could properly find it objectively unreasonable to use a police dog trained in the “bite and hold” method without first giving the suspect a warning and opportunity for peaceful surrender, but the individual officer was found entitled to qualified immunity, since, at the time of the incident, August of 2000, the law on the subject was not yet clearly established, and at that time, where the suspect’s location was unknown, a reasonable officer could have concluded that a warning could place the officers at undue risk from a hiding suspect and that therefore no warning was required.

The case which established the principle, in the 8th Circuit, that it was “clearly established” law that officers should, if possible, provide a verbal warning to a suspect prior to using a dog against him, is [*Kuha v. City of Minnetonka*](#), #02-1081, 328 F.3d 427 (8th Cir. 2003). In that case, the court ruled that an officer’s conduct in allowing a dog to continue to bite an arrestee until the suspect raised his hands as the officer ordered did not constitute excessive force, despite the fact that the suspect was in his underwear. The suspect’s conduct in running away “inexplicably” from a minor traffic stop gave the officer reasons to be concerned for his and other officers’ safety.

The officers were entitled to qualified immunity on failure to give a verbal warning prior to using the dog, since the law on the subject was not previously clearly established but the appeals court does hold that they should have given a warning, and that claims against the city could be pursued for failure to require such warnings.

Warnings were also an issue in [*Trammell v. Thomason*](#), #08-13801, 335 Fed. Appx. 835, 2009 U.S. App. Lexis 13217 (Unpub. 11th Cir.). In that case, an officer was utilizing a police dog in a search for a 23-year-old African-American suspect. A 57-year-old Caucasian man, however, claimed that the dog attacked him. He further contended that there was no warning that the dog was being “sicked” on him, and that the officer failed to remove the dog once it was clear that he was not the suspect sought. The dog was allegedly only brought under control after the man’s friend made a threat to kill the dog.

The court rejected a claim based on failure to warn, finding no clear prior caselaw in the Circuit that releasing a dog without a warning violates constitutional rights, but there were factual issues as to whether the officer improperly failed to intervene once it became apparent that the person being attacked was not the suspect. Such a duty to intervene, the court noted, was clearly established.

❖ Excessive Force in Justified Arrests

The question of whether the force used in making an arrest is reasonable is often entirely separate from the question of whether the arrest was justified or whether the individual is guilty of the underlying offense. In [*Hooper v. Cty. of San Diego*](#), #09-55954, 629 F.3d 1127 (9th Cir. 2011), a deputy went to a store in response to a store security officer's detention of a suspected thief. He told the suspect he was giving her a citation to appear in court, and walked outside with her to search her car. After she gave him the keys, he found what he believed to be methamphetamine inside and arrested her. When she jerked away, a struggle ensued, and she ended up on the ground, lying on her stomach, with the deputy laying on her, calling for backup on a handheld radio.

The deputy summoned his dog, which was in his car, when she continued to struggle. The dog bit the woman's head twice and released its hold when backup arrived. The woman suffered injuries to her scalp and hair. Overturning summary judgment for the defendants in the woman's excessive force claim, a federal appeals court found that the trial court had ruled erroneously in ruling that success on that claim would necessarily imply the invalidity of her criminal conviction for resisting an officer, barring her claim. It was entirely possible to uphold her conviction for resisting the officer, while still finding that the use of the dog against her was an excessive use of force.

❖ Intentional Conduct versus Mistake or Accident

It should be clear that liability under federal civil rights law for use of police dogs is for intentional conduct, and also that there must be a showing of some actual injury in order to recover damages. In [*Matheny v. Boatright*](#), #CV295-170, 970 F. Supp. 1039 (S.D. Ga. 1997), for instance, a federal trial court easily reached the conclusion that the mere presence of a drug sniffing dog in a children's bedroom during the execution of an arrest warrant for their mother did not, without more, violate the children's rights, since the dogs did not even sniff the children or exhibit any aggressive behavior towards them.

Further illustrating this requirement of intentional use of a dog for civil rights liability is the case of [*Cardona v. Connolly*](#), #3:03CV1838, 361 F. Supp. 2d 25 (D. Conn. 2005), in which the court found that a police dog bite of a handcuffed vehicle passenger at the scene of a traffic stop was not a Fourth Amendment seizure, because the police officer did not intentionally use the dog to seize the passenger or direct the dog to bite him.

In [*Cochran v. City of Deer Park, Tex.*](#), #04-20044, 108 Fed. Appx. 129, 2004 U.S. App. Lexis 16221 (Unpub. 5th Cir.), a man who claimed that he was injured by a police dog because police officers were negligent in failing to control the dog and in allowing it to

roam without a leash during a search for suspects could not recover damages in a federal civil rights lawsuit. Recovery for such injuries under [42 U.S.C. Sec. 1983](#) cannot be based on merely negligent conduct, the court stated, and the plaintiff, who was not the suspect sought, did not claim that the officers intended to have the dog attack him.

A case involving mistake is [Forrester v. Stanley](#), #10-12003, 394 Fed. Appx. 673, 2010 U.S. App. Lexis 18122 (Unpub. 11th Cir.), in which, following a traffic stop, and during investigative detention of the occupants of the vehicle, one passenger laying prone on the sidewalk in compliance with the officers' orders was mistakenly bitten by a K-9 police dog. An officer had ordered the dog to bite or apprehend one of the other passengers. The appeals court, upholding the dismissal of the bitten passenger's federal civil rights lawsuit, found no clearly established law that a Fourteenth Amendment affirmative duty of protection applied to those detained during a *Terry*-style investigative detention.

Similarly, when a bystander is injured by a police dog, despite the officer's lack of any intention to use the dog against them, there will be no liability under federal civil rights law. In [Dunigan v. Noble](#), #03-1304, 390 F.3d 486 (6th Cir. 2004), an officer was entitled to qualified immunity for police dog's biting of woman who insisted on remaining in the middle of a volatile situation when police and the dog entered her house to arrest her son.

Also see, [Roddy v. Canine Officer](#), #02-0547, 293 F. Supp. 2d 906 (S.D. Ind. 2003), in which a police dog's biting of a bystander rather than the pursued car theft suspect was not the result of any municipal policy or custom. No liability was found for city for alleged violation of bystander's federal civil rights.

Another interesting case grappling with unintended consequences is [Melgar v. Greene](#), #08-2393, 593 F.3d 348 (4th Cir. 2010), in which police searched for a 13-year-old boy who wandered off and got lost after getting drunk at a party. The boy was last seen lightly clad in the cold night sleeping under a bush by a couple who called 911. Officers were unable to find the boy until an officer brought a patrol dog that found the boy under a bush, but who also bit his leg. The boy's father sued the officer for excessive use of force.

A federal appeals court found that the dog bite constituted a seizure. It also stated that the officer might have violated the boy's rights by failing to muzzle the dog, but that it believed that it was also possible that the dog may have been unable to pick up the boy's scent if muzzled. In light of that, and the fact that finding the boy may well have saved his life, the court concluded that the officer was entitled to qualified immunity from liability.

Other cases on the reasonableness of use of police dogs include:

- [Holeman v. City of New London](#), #04-5031, 425 F.3d 184 (2nd Cir. 2005), holding that there were disputed factual issues as to whether the use of a police dog against a suspect

after the officer shot him was reasonable, in light of questions about whether the suspect was actually armed with a gun and continued to pose a threat after he was shot.

- [*Marquez v. City of Albuquerque*](#), #02-2294, 399 F.3d 1216 (10th Cir. 2005), ruling that a jury could reasonably find that officer's use of police dog to detain a suspect following a high-speed pursuit of a car was proper when he believed that she was a burglary suspect and was attempting to flee arrest. In that case, the court also ruled that exclusion of the testimony of expert witness was not an abuse of discretion when his testimony would be irrelevant to whether the officer acted in a reasonable manner.
- [*Tilson v. City of Elkhart, Indiana*](#), #3:01cv732, 317 F. Supp. 2d 861 (N.D. Ind. 2003), finding that a police officer's use of police dog to stop and subdue motorist who fled on foot after resisting arrest while driving under the influence of alcohol was not excessive force under the circumstances.
- [*Miller v. Clark County*](#), #02-35558, 340 F.3d 959 (9th Cir. 2003). A deputy's use of a police dog to "bite and hold" an arrestee's arm for approximately one minute did not constitute the use of deadly force and it was not excessive force when suspect was wanted for a felony offense of fleeing from police by driving a car in "willful disregard" for the lives of others.
- [*Moore v. Winer*](#), #00-3218, 190 F. Supp. 2d 804 (D. Maryland 2002), holding that officers acted objectively reasonably in forcing a diabetic motorist to a stop and forcibly removing him from his truck through the use of pepper spray, baton blows, and bites from a police dog when his erratic driving was serious enough that people might have been killed, and he refused to comply with lawful orders once he was stopped.

❖Supervisory or Municipal Liability

In addition to direct liability for officers personally involved in the use of police dogs, in instances of improper or excessive use, it is possible for supervisory personnel or police departments to be held liable for inadequate training or unconstitutional policies related to the use of dogs.

In [*Rosenberg v. Vangelo*](#), #02-2176, 93 Fed. Appx. 373 (Unpub. 3rd Cir. 2004), the court ruled that police supervisors were not entitled to summary judgment on the basis of qualified immunity on an arrestee's claim that his rights were violated when he was injured by a police dog while fleeing from an allegedly stolen car. The supervisors could be held liable if they were deliberately indifferent to the risk of harm to suspects from improper dog attacks, based on knowledge of past incidents, and their failure to correct the problem through effective training or discipline.

Plaintiffs making such claims, of course, must show specifically how supposed inadequate training or unconstitutional policies caused the harm they suffered. In [*Viehmeyer v. City of Santa Ana*](#), #02-56157, 67 Fed. Appx. 470 (Unpub. 9th Cir. 2003), the court ruled that an arrestee allegedly bitten by police dog while he was handcuffed and in custody did not sufficiently state a claim against the city or police department for inadequate training of its canine handlers when he failed to explain what training would have avoided his injuries. Additionally, it was undisputed that the individual defendant trainer of police canine handlers did not instruct them that they could use the force of a police dog biting a handcuffed suspect.

A claim of inadequate training must show that the policy-maker was deliberately indifferent to a known risk of harm. In [*Holiday v. City of Kalamazoo*](#), #4:01-CV-161, 255 F. Supp. 2d 732 (W.D. Mich. 2003), the court found that a city's policy of providing training on the most likely situations and problems that could arise in the use of police dogs against arrestees was adequate, and not a basis for imposing liability on the city for injuries arrestee suffered from being bitten by dog.

Similarly, in [*Collins v. City of Manchester*](#), # 01-409, 208 F. Supp. 2d 123 (D.N.H. 2002), the court held that mere "conclusory" allegations that the city had a policy of not adequately training officers in the use of dogs could not be the basis for federal civil rights liability for the city, in the absence of any evidence.

— *Training Requirements*

Failure to adequately train a police dog can be a basis for liability. In [*Campbell v. City of Springboro*](#), #11-3589, 700 F.3d 779 (6th Cir. 2012), a man and woman were attacked and bitten by the same canine unit police dog in separate incidents. A federal appeals court upheld the denial of summary judgment to the dog's handler, the chief of police, and the city on excessive force, failure to supervise, and failure to properly train claims. There was evidence that the dog was involved in biting incidents with growing frequency and that his certifications had lapsed.

The handler had told supervisors that he had been unable to keep up with maintenance training of the dog and asked repeatedly for time to attend training sessions, only to have those requests denied. The handler was also not entitled to qualified immunity, since there was evidence which could be interpreted as showing that he violated clearly established law by using an inadequately trained dog to attempt to apprehend two non-fleeing suspects, and did so without giving any warnings. There were disputed facts suggesting that the police chief failed to create a needed training policy and ignored complaints about the dog.

Summary judgment was also properly denied on state law assault and battery claims since there was evidence to suggest that the handler used the dog with a malicious purpose.

★ This article was reviewed by Ken Wallentine, Esq., author of the [K9 Officer's Legal Handbook \(2nd ed.\) with CD ROM](#), a recommended sourcebook. [View his bio](#).

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