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Civil Liability Law Section – September 2014

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

Part 1 (Last Month)

- **Introduction**
- **Use of Dogs Against Suspects is Force, and Must be Reasonable**
- **Warnings**
- **Excessive Force in Justified Arrests**
- **Intentional Conduct versus Mistake or Accident**
- **Supervisory or Municipal Liability**
 - *Training Requirements*

Part 2 (This Month)

- **Does the Use of Police Dogs Constitute Deadly Force?**
- **Use of Dogs Against Mentally Ill Suspects**
- **Liability for Dog Bites Under State or Federal Law**
- **Miscellaneous Issues**

Part 3 (October)

- **Use of Force Against Private Dogs**
- **Animal Control Issues**
- **Some Suggestions**
- **Resources and References**

This is Part 2 of a three-part article. To read Part 1, click [here](#).

❖ Does the Use of Police Dogs Constitute Deadly Force?

Does the use of police dogs against suspects constitute the use of “deadly force?” In a number of instances, suspects have argued that it does. A California appeals court decision rejected that possibility, at least as to properly trained police dogs. But another decision by a federal appeals court, in adopting the Model Penal Code’s definition of “deadly force,” found that it was an open question, which had to be determined based on the particular facts of the case. In most circumstances, the use of a police dog is not deadly force. And it should also be emphasized that police dogs often are, in fact, helpful in preventing officers from having to use deadly force or be threatened by it.

In [*Thompson v. Co. of Los Angeles*](#), #B174594, 142 Cal. App. 4th 154, 47 Cal. Rptr. 3d 702 (2nd App. Dist. 2006), deputies responding to a report of an attempted robbery and car theft call at a nearby convenience store saw a suspect run through an alley, and then climb over a wall, and called for backup. Several other deputies, one being a dog handler, were among those who responded, and they learned that the man sought was a car-jacking suspect on parole, and that he had a prior weapons-related offense, but they had no information that he was armed or had now injured anyone. They announced, over car loudspeakers and a helicopter that a dog would be deployed. The suspect was then under a car in a carport, hiding from them. Approximately 15 minutes later, they began using a search dog.

The dog found the suspect in the carport, and was deployed by a deputy into that area attached to a 60-foot leash. As the suspect complied with orders directing him to come out from under the car with his hands in the open, the dog bit his leg. The deputy saw the suspect fighting with the dog, trying to pull its muzzle off of his leg and punching the dog in the head. The dog continued to bite down on the suspect's leg and also bit his hand when he tried to remove the dog by grabbing and pulling on its jaw. Two officers yelled at the suspect to stop fighting the dog, but the suspect kept struggling with the dog, grabbing and twisting its collar, and choking the dog.

A deputy started striking the suspect with his flashlight to get him to stop fighting the dog. Another officer also hit the suspect once with his flashlight. The officers eventually pulled the dog off. One of the deputies allegedly kicked the suspect's upper body while pulling the dog away, and the two officers ultimately restrained the suspect, handcuffing him. He allegedly lost consciousness and was taken to a medical center for treatment of his injuries.

He sued the county and a number of deputies, claiming excessive use of force. Claims against the county were rejected, and a jury found in favor of the individual defendants, deciding that they did not use unreasonable force in making the arrest.

On appeal, the plaintiff claimed that the trial court improperly refused to instruct the jury with a definition of "deadly force" that included force creating a substantial risk of death or serious bodily injury, and that such force could be used in making an arrest only if the crime committed was a "forcible and atrocious one which threatens death or serious bodily harm." The trial court had reasoned that this was a definition of deadly force used for defining criminal liability in an assault, and not one which should determine the liability of law enforcement for violation of the Fourth Amendment. Instead, it told the jury to determine whether the force used was "unreasonable," and whether that unreasonable force caused the plaintiff's injuries. The trial court also told the jury that:

“Force is not excessive if it is reasonably necessary under the circumstances to make a lawful arrest. In deciding whether force is reasonably necessary or excessive, you should determine what force a reasonable law enforcement officer would have used under the same or similar circumstances. You should consider, among other factors, the following: A. The seriousness of the crime at issue; B. Whether Brett Thompson [the suspect] reasonably appeared to pose an immediate threat to the safety of the deputies or others; and C. Whether Brett Thompson was actively resisting arrest or attempting to avoid arrest. ... The use of a trained police dog to find and bite a fleeing or hiding criminal suspect [constitutes] a police use of force. Whether that force is reasonable or unreasonable depends upon the facts and the circumstances known to the officer at the time the force is used.”

The appeals court found no error in the giving of this instruction. It also stated that the “use of a trained police dog does not constitute deadly force. The trial court therefore properly instructed the jury that the use of force in this instance was to be analyzed under the reasonableness standard applied to claims of excessive force.” In this case, the court noted, the plaintiff suffered non-life threatening injuries that required medical attention, but which did not show the use of deadly force.

Additionally, there was no evidence in the case to suggest that the deputies intended to use the dog in an improper manner or that the dog was improperly trained. The evidence instead showed that the bulk of the plaintiff’s injuries occurred while he continued to fight the dog, despite the officers’ pleas that he stop doing so. Under these circumstances, there was no showing that the use of the dog to locate the plaintiff or to restrain him was deadly force, and no basis for the giving of any jury instructions on deadly force. Instead, the trial court properly told the jury to determine whether the deputies acted reasonably, or whether the force used under the circumstances was excessive.

In [*Smith v. City of Hemet*](#), #03-56445, 394 F.3d 689, (9th Cir. 2005), cert. denied, [*City of Hemet v. Thomas*](#), #04-1374, 545 U.S. 1128 (2005), the court found that an arrestee’s conviction for resisting an officer did not bar him from pursuing a federal civil rights lawsuit for alleged excessive use of force against him. The Ninth Circuit federal appeals court, overturning a prior ruling, adopted Model Penal Code definition of “deadly force,” but left it to trial court to decide whether the use of a police dog against the arrestee was deadly force in this case.

On the issue of the definition of deadly force--which the plaintiff arrestee claimed was used against him, the appeals court held that it means “force that creates a substantial risk of causing death or serious bodily injury,” a definition that “finds its origin in the Model Penal Code.”

“‘Deadly Force’ means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor’s purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force. Model Penal Code §3.11(2).”

The Ninth Circuit had, in previous litigation, [*Vera Cruz v. City of Escondido*](#), #95-56782, 139 F.3d 659 (9th Cir. 1998), another case involving the use of a dog, rejected this definition, concerned that the “or serious bodily injury” portion of the definition would blur the line between deadly force and lesser force.

In *Vera Cruz*, the appeals court ruled that the use of a police dog to subdue fleeing suspect was not the use of deadly force in absence of circumstances under which there was “more than a remote possibility of death.”

In now adopting this definition, and explicitly overturning *Vera Cruz*, it joined the seven other federal appeals court circuits that have explicitly addressed the issue of how to define deadly force in general. See, [*Gutierrez v. City of San Antonio*](#), #97-50082, 139 F.3d 441, 446 (5th Cir. 1998) (deadly force “creates a substantial risk of death or serious bodily injury”); [*Estate of Phillips v. City of Milwaukee*](#), #96-2628, 123 F.3d 586, 593 (7th Cir. 1997) (same); [*In re City of Philadelphia Litigation*](#), #97-1277, 49 F.3d 945, 966 (3rd Cir. 1995) (adopting the Model Penal Code definition); [*Ryder v. City of Topeka*](#), #85-2045, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987) (same); [*Robinette v. Barnes*](#), #86-6135, 854 F.2d 909, 912 (6th Cir. 1988) (same); [*Pruitt v. City of Montgomery*](#), #84-7571, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (same); [*Mattis v. Schnarr*](#), #75-1849, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976) (en banc), vacated as moot sub nom., *Ashcroft v. Mattis*, #76-1179, 431 U.S. 171, 52 L. Ed. 2d 219, 97 S. Ct. 1739 (1977) (same).

“A definition including “a substantial risk of serious bodily injury” is used by police in all fifty states, the District of Columbia, and Puerto Rico, and such use has not resulted in the difficulties we feared. Equally important for this case, it is the definition that California and the Hemet Police Department [the defendant Department] use. Adopting the common definition of deadly force should impose no more of a burden on law enforcement officials than already exists throughout the nation -- a burden that most law enforcement officials have voluntarily chosen to impose upon themselves.”

The police department's use of force policy classified the use of both pepper spray and a police dog as "intermediate" force, a lesser amount of force than "deadly force." The arrestee claimed that the officers pepper-sprayed him four times, one of which occurred after they had him pinned down, and sicced the police dog on him three times, with the dog's teeth puncturing the skin on various parts of his body, including his neck, arm, shoulder, back, and buttock, and the officers allegedly did not flush the pepper spray out of these wounds following the arrest.

This force was used, the appeals court majority found, despite the lack of a basis to believe that the arrestee was armed or posed an immediate threat to anyone's safety, and the defendants themselves conceded in their depositions that while the arrestee was initially uncooperative, he did not pose a significant threat of death or serious injury to anyone. Additionally, his alleged underlying offense of domestic abuse, while serious and reprehensible, was not "especially egregious" and did not involve the use of weapons, nor was it ongoing when the officers arrived.

Further, the arrestee did not attempt to flee, and his resistance only consisted of refusal to comply with the officers' orders, it did not involve an attack on the officers or their dog, or any threats against them. There was also expert witness testimony that suggested that the officers could and should have used control holds to complete the arrest rather than siccing the police dog on the arrestee once they had him restrained on the ground.

The appeals court majority, therefore, concluded that there was a basis from which a jury could find that the force used was excessive, barring summary judgment for the defendants. Having adopted the Model Penal Code definition of deadly force, it declined to decide whether the officers used deadly force in the circumstances of the case, leaving to the trial court "the first opportunity to apply the concept to the facts of this case." It further noted that, while in the circumstances of prior cases it had factually found that the use of a police dog did not constitute deadly force, it had never stated that the use of a dog could not, in some circumstances, constitute deadly force.

In [*Thomson v. Salt Lake County, Utah*](#), #06-4304, 584 F.3d 1304 (10th Cir. 2009), a deputy responding, with other officers, to a call reporting that a man with a gun was threatening his wife, released a police dog to locate the husband in the neighborhood, and then shot and killed the husband when he refused to obey orders to put down his weapon, instead aiming the gun at the officers. The use of the dog, under these circumstances, was neither a use of deadly force nor excessive. Shooting the husband was justified, as it was reasonable to think that he posed an immediate threat to the officers and others. The deputy was entitled to qualified immunity, and the county was not liable on a theory of alleged inadequate training.

❖ Use of Dogs Against Mentally Ill Suspects

Use of police dogs against known mentally ill or disturbed persons may raise special concerns. Courts may hold that force should only be used when it is reasonably believed necessary, such as when they pose a threat to someone, rather than simply because the individual is non-compliant or their behavior seems bizarre.

In [*Gander v. Wood*](#), #05-6229, 457 F.Supp. 2d 1152 (D. Ore. 2006), for instance, the court ruled that officers who allegedly used a police dog to subdue an unarmed mentally ill suspect trespassing on a neighbor's property, and who broke a window, were not entitled to summary judgment in a federal civil rights lawsuit claiming that this was an unreasonable use of force. The court noted that it was unable to determine, from the record in the case, whether the officers used the dog because they reasonably thought the suspect was a threat to their physical safety after he allegedly engaged in what they characterized as "lunging" activity, or whether the dog was used simply because the man was non-compliant with their requests. The court did, however, grant summary judgment to the officers on a state law negligence claim.

❖ Liability for Dog Bites Under State or Federal Law

Under [statutes or common law decisions](#) in various states, dog owners are liable, whether on the basis of negligence and known "vicious" or "violent" propensities of a particular animal, or, under some circumstances, strictly liable, for bites or other injuries inflicted on a person.

The issue of whether such statutes or decisions apply in the context of the use of police dogs is a question of state law. Whether or not they apply, there may be defenses, such as justification or various immunities, which vitiate liability.

In [*Hyatt v. Anoka Police Department*](#), #A03-1707, 700 N.W.2d 502 (Minn. App. 2005), the court held that while a city was not entitled to statutory immunity from liability under a Minnesota dog-bite statute for injuries arrestee suffered when bitten by police dog, since dog-bite strict liability statute did apply to a municipality which owned the dog, the officer's decision to release the dog in order to make the arrest was discretionary, entitling the officer and city to official immunity.

See also, [*Weekly v. City of Mesa*](#), #1-CA-CV-93-0109, 888 P.2d 1346 (Ariz App. 1995), in which an appeals court held that an Arizona trial court erred in dismissing lawsuit against a city for an officer's use of dog in restraining arrestee. While a later amendment to a strict

liability dog bite statute did not apply retroactively to bar claim against a city, the city had possible defense if force used was deemed reasonably needed to effect the arrest.

In one state law case, a California jury awarded \$400,000 to a boy for suffering an unprovoked attack at age three by a police dog running loose, rather than intentionally used against him. *Quiroz v. City of Richmond*, # C98-00553 c/w C98-02454 (Contra Costa Co., Calif. Super. Ct.), June 29, 2001, reported in *The National Law Journal*, p. B3 (Sept. 3, 2001).

There have been some cases in which damages have been awarded for dog bites under federal law, sometimes to unintended victims of an attack by a police dog. In [*Rogers v. City of Kennewick*](#), #07-35645, 2008 U.S. App. Lexis 27469, 304 Fed. Appx. 599 (Unpub. 9th Cir.), for example, a federal appeals court upheld a \$1.5 million award to a man bitten by a police K-9 dog. The court stated that the amount of the award was not “grossly excessive or monstrous.” Four officers allegedly allowed the dog to enter the fenced backyard of a house where the man was sleeping outside. The plaintiff was not the suspect the officers sought, but was attacked when the dog saw him. A total of almost \$1.1 million in compensatory and punitive damages was awarded to the plaintiff and his wife by a jury, and the trial judge added an award of \$516,000 in attorneys’ fees and costs

Also see [*Trammell v. Thomason*](#), #08-13801, 335 Fed. Appx. 835, 2009 U.S. App. Lexis 13217 (11th Cir. 2009). While officers were attempting to catch a fleeing suspect, their police dog bit a man who was in a friend’s backyard. The officer controlling the dog allegedly failed to immediately call off the dog, even though the man, who was an older white male, had no resemblance to the young black suspect being pursued. While the city was entitled to summary judgment on municipal liability claims, the appeals court found that a material dispute of fact existed as to whether officer failed to remove the police dog promptly after discovering that it had bitten the wrong person.

In another case, while the plaintiff claimed that a police dog gratuitously bit him, the court credited the officers’ far different version, and found the use of the dog to be reasonable. The plaintiff claimed that while he was sleeping on the ground outside, two police officers came upon him and caused their K-9 dog to bite him in the face, arm, and leg. He further claimed that one of the officers used a Taser on him until he was unconscious.

The officers said that the plaintiff fled from a traffic stop in his vehicle, and fled his vehicle after colliding with a tree, running in the woods where officers with a K-9 dog found him, and the dog released him when an officer told him to stop fighting with the dog. The officers denied using a Taser during the incident, and the plaintiff did not mention Taser use when receiving medical attention for wounds from the dog. He claimed that a later

medical record supported a subjective complaint of a Taser injury, but a nurse's assessment attributed his injuries to dog bites.

A federal magistrate recommended that claims against four defendants, including a supervisor, be dismissed because they had no personal involvement in the incident. The magistrate also recommended rejection of claims concerning the supposed use of a Taser, as the plaintiff's injuries were due to dog bites. The magistrate also recommended that claims relating to the use of the dog be rejected, as using the dog was reasonable under the circumstances, so there was no constitutional violation. The trial judge subsequently adopted the magistrate's recommendations and report as its opinion. [*Clark v. Miller*](#), #1:12cv216, 2014 U.S. Dist. Lexis 71140 (S.D. Miss.). [*Clark v. Miller*](#), #1:12cv216, 2014 U.S. Dist. Lexis 71139 (S.D. Miss.).

❖ Miscellaneous Issues

There are a number of [state statutes](#) which define police dogs as law enforcement personnel or otherwise protect them against assault by suspects. Despite this, in a case in which a suspect was allegedly injured by a police dog, a federal appeals court ruled that the dog itself is not a "person" who can be sued for violation of civil rights under color of state law, as required for liability under 42 U.S.C. Sec. 1983. In the same case, the federal appeals court upheld the enforceability of a release agreement the plaintiff had previously entered into, which barred any lawsuit against the officer involved in the incident. [*Dye v. Wargo*](#), #00-3250, 253 F.3d 296 (7th Cir. 2001).

In an interesting case concerning the use of a police dog to subdue an auto theft suspect, the appeals court ruled that the plaintiff was not entitled to an explicit jury instruction concerning "alternative courses of action" supposedly available to the officer (other than the use of the dog), or the officer's alleged "lack of probable cause" to believe that the suspect was armed. [*Brewer v. City of Napa*](#), #98-16460, 210 F.3d 1093 (9th Cir. 2000).

Litigants in civil liability cases involving police dogs, of course, are subject to all the substantive and procedural requirements imposed in other civil rights cases. In [*Zocaras v. Castro*](#), #05-16982, 465 F.2d 479 (11th Cir. 2006), cert. denied, #06-8465, 549 U.S. 1228 (2007), for instance, the court ruled that the plaintiff's utilization of a false name to file his lawsuit alleging that the use of police dogs to subdue him was excessive use of force was sufficient grounds for the dismissal of his lawsuit without prejudice. The use of the false name prejudiced the defendant police officers, the court found, by denying them access to any additional information that might be available under the arrestee's true name, and that true name was not disclosed until his testimony at trial.

Similarly, a federal appeals court in [*Chavez v. City of Albuquerque*](#), #03-2195, 402 F.3d 1039 (10th Cir. 2005) ruled that the trial court properly set aside a jury's award of \$1 in nominal damages to a man bitten twice by a police dog during an attempt to apprehend him. In that case, his persistent insistence during the discovery process that he was not the suspect that the police were seeking at the time, until he admitted during cross-examination at trial that he was, constituted perjury for which the denial of the jury's award was a proper sanction.

Since the reasonableness of force depends on whether the force used was objectively reasonable under the totality of the circumstances, including the severity of the crime and whether the suspect posed a threat to the officers, the plaintiff's lies were relevant to the determination of whether the force used was reasonable, and material to the "determination of the central issue in the case."

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- ★ This article was reviewed by Ken Wallentine, Esq., author of the [K9 Officer's Legal Handbook \(2nd Ed.\) with CD ROM](#), a recommended sourcebook. He served as an expert witness in two of the cases discussed in this article. [View his bio.](#)
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