

DOG BEHAVIOR & THE LAW

Published by
ANIMAL BEHAVIOR COUNSELING SERVICES, Inc.
Los Angeles, CA.

&
Richard H. Polsky, Ph.D.
Expert in Dog & Cat Behavior

Winter, 2001

Phone: 310-474-3776 Fax: 310-475-9659 e-mail: dr.polsky@verizon.net <http://www.dogexpert.com>

The Case of Diane Whipple

The grizzly killing of Diane Whipple in San Francisco last January by two Canary Island Fighting dogs left very few people in the Bay area unaware of this gruesome incident. In a recent survey, 71% of potential jurors surveyed felt that the defendants were guilty. Because of the enormous publicity the case has generated, both on the local and national level, the criminal phase of the trial has been moved from San Francisco to Los Angeles. It is scheduled to begin on January 22, 2002.

The case of Diane Whipple is fundamentally a case about dog behavior. Given this, the evidence and arguments at trial must be presented using a behavioral perspective. A behavioral perspective, which utilizes knowledge and principals from the science of animal behavior, is needed to evaluate and assess clearly the validity of the charges against the defendants. For example, obvious behavioral issues that will be raised at trial concern breed tendencies, dangerous propensities in a dog, provocation, proper handling of a dog, and one's knowledge concerning the predictability of dog behavior. These are issues about animal behavior and hence all have bearing on the criminal charges. Below, I will present my views on the case from the perspective of an animal behaviorist.

Background

The facts surrounding the incident, as we know them today, are as follows: Whipple was about to enter her apartment when she noticed the defendant, Marjorie Knoller, with her two Canary dogs on leash, some distance away in the hallway. Shortly thereafter, an encounter commenced between Whipple, Knoller, and the dogs. It is difficult to say exactly what happened at the start of the encounter. All that can be said with certainty is that at some point, the defendant lost control of both dogs, they charged Whipple, and started to attack her. It is believed that the 133 pound, 2 y.o. male, named Bane, attacked Whipple first by ripping at her clothes. Shortly thereafter, as the attack intensified, Bane started biting at her neck, and the other dog, a 110 pound, 2. y.o. reproductively intact female named Hera, joined in.

The attack on Whipple left her body mangled. Nearly all of her clothes were torn from her body. She was bitten hundreds of times, and her blood was found on the walls as high as six feet above ground. Whipple died about five hours later in the hospital. Those who rescued her described the scene as horrific and some required psychological counseling to help them cope with the graphic nature of their findings.

(Continued on page 5)



Richard Polsky, Ph.D. received his academic training at The Ohio State University (B.Sc.1970) and then at Leicester University in England where he earned the Ph.D. in animal behavior in 1976. After finishing his doctoral studies, he served for two years as a Research Associate in animal behavior at the University of Birmingham in England. From 1976 to 1981, he was a post-doctoral fellow at the Neuropsychiatric Institute, University of California, Los Angeles. During his five years at UCLA, Dr. Polsky devoted himself to further studies and research in animal behavior. Dr. Polsky is a member of the American Psychological Association, Division of Comparative Psychology. He is certified as an applied animal behaviorist through the Animal Behavior Society. Since 1981, Dr. Polsky's practice in Los Angeles has focused on the diagnosis and treatment of canine and feline behavior problems (<http://www.drpolksky.com>). He has published over 50 papers in veterinary and animal behavior journals. Dr. Polsky has served as an expert in animal behavior on many occasions for both plaintiff and defense attorneys in civil and criminal matters. His Vita can be downloaded at <http://www.dogexpert.com/resume.html>.

Dog Behavior & The Law is a newsletter for attorneys who have an interest in the law as it relates to personal injury caused by dogs. Topics covered will include summaries of past litigation involving dogs, articles that have bearing on the discovery process as it relates to the behavior of dogs, and articles about dog behavior that has relevance to issues of liability and damages in dog-related injury cases. All opinions expressed in the newsletter are solely those of Richard Polsky, Ph.D. They should not be interpreted as legally valid conclusions. *Dog Behavior & The Law* is published twice a year (Winter and Summer). Duplication of the material in the newsletter is prohibited under U.S. copyright laws. Inquires should be made directly to Richard Polsky, Ph.D., *Animal Behavior Counseling Services, Inc.*, 2288 Manning Ave., Los Angeles, CA. 90064-2002. Voice phone: 310-474-3776 or 800-605-2227. e-mail: dr.polsky@verizon.net. Website: www.dogexpert.com.

Recent Study Underscores the Potential Danger of Rottweilers and Pit bulls

Epidemiological studies indicate that approximately 15 people are killed each year in the United States as the direct result of attack by a dog. Since 1975, dogs belonging to at least 25 breeds have been involved in fatal attacks. Surprisingly, these include relatively non-aggressive breeds such as Dachshunds, Yorkshire Terriers, Labrador Retrievers and Pomeranians. Although the breeds have varied, it is important to realize that in a disproportionate number of instances the dogs involved belong to breeds more commonly known to be aggressive by nature, such as Rottweilers or Pit bulls.

A recent study examining dog bite related fatalities (noted in the literature as DBRF) confirms this belief. (Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998. J. Sachs, L. Sinclair, et. al. JAVMA, 2000, 217, 836-840). This study reviews and summarizes DBRF for a 20 year period between 1979 and 1998. The full text of this paper can be downloaded at <http://www.dogexpert.com/dogbites.html>.

Specifically, for this 20 year period, Rottweilers were involved in 16% of DBRF. Pit bull type dogs were involved in a substantially higher percentage, 37%. Together these two breeds accounted for more than 50% of DBRF. Other breeds involved in multiple instances included German Shepherds, Husky type dogs, Doberman Pinchers, Chows, Great Danes, and St. Bernards. Of the mixed breed dogs involved, a large percentage were wolf hybrids, or dogs mixed with German Shepherd or Pit bull. The authors note that for the most recent years surveyed, the period between 1997-1998, there were 27 deaths. Rottweilers were the breed most frequently involved (e.g. involvement in 10 of 27 deaths) and Pit bulls were next (involvement in 6 of 27 deaths). Since 1993, Rotweiler DBRF have outnumbered Pit bull DBRF. Prior to 1993, DBRF involving Rottweilers were uncommon. This dramatic change probably reflects the sharp increase in the popularity of the Rottweiler in recent years.

Evidence about the circumstances surrounding DBRF show that 24% involved unrestrained dogs off the owner's property, 58% involved unrestrained dogs on the owner's property, 17% involved restrained dogs on the owner's property and less than 1% involved restrained dogs off the owner's property. Clearly, an unrestrained Rottweiler or Pit bull in its own territory presents the greatest risk.

Based on these data, the authors conclude that fatal dog attacks are largely a breed-specific problem particular to Rottweilers and Pit bulls. DBRF involving these two breeds are markedly out of proportion, relative to what one would expect, based on their actual numbers

in the general population. The authors note that caution is needed in the interpretation of these data, however. To make an accurate determination of the relative risk a breed presents either for a fatal or nonfatal injury, one must divide known incidents of dog-bites involving a particular breed by the number of dogs of that breed within a given population. Calculating an accurate ratio such as this is fraught with practical difficulties, however. The difficulties include: (a) correctly identifying of the breed in question, (b) biased reporting implicating dogs by reputation rather than actual occurrence, and (c) lack of reliable data specifying the total number of individuals belonging to a breed within a given population (e.g. how would one accurately count all Rottweilers living in Los Angeles?).

Despite this limitation, reports of severe injury caused by Rottweilers or Pit bulls are often used to support legislation restricting or banning these breeds. Legislation like this raises serious constitutional questions concerning an owner's 14th amendment rights. For example, an owner's right to equal protection may be violated because any dog, despite their breed, can inflict injury onto a person. Any breed can become inherently aggressive if intentionally developed that way through irresponsible selective breeding. Hence, targeting one breed to the exclusion of others is underinclusive. Second, ordinances banning certain breeds are vague because, on occasion, it may be impossible to identify with certainty the breed of a dog.

In sum, legislators must realize that: (a) most dogs, regardless of breed, have the potential to become dangerous under certain conditions, and (b) No evidence exists which supports the belief that breed specific legislation is effective in preventing either fatal or nonfatal dog bite injuries.

Did You Know ?

✓ Patterns of attack and injury to humans inflicted by domestic dogs may differ from the kind of attack and injuries inflicted by wolves. In fatal dog attacks, the primary sites of injury tend to be the face and neck whereas in wolf attacks damage to the neck is not as great. Forensic techniques are available to match the dentation of a specific dog with the bite wounds on a victim to determine with reasonable certainty the individual animal involved.

✓ In the U.S. it is estimated that annually as many as 4.7 million people are bitten by a dog. Approximately 60% of the victims are children. Of these, approximately 800,000 require professional medical care, 332,000 are treated in emergency rooms and 6,000 are hospitalized.

✓ In 1996, State Farm Insurance Co. paid over \$80 million to settle dog-related personal injury claims. This amounted to 30% of all bodily injury and medical claims paid by the company that year. The insurance industry as a whole paid out over \$1 billion to settle such claims in 1996.

AVMA Position on the Dog-Bite Problem: Public Education

The position of the the American Veterinary Medical Association on the problem of injury to people caused by dogs was released in a recent report appearing in their monthly journal (*Journal of the American Veterinary Medical Association*, 2001, 218, 1732-1949). The AVMA is the foremost professional organization representing veterinarians in this country. As such, this organization probably felt the need to state it's position on this venerable issue: Estimates put the number of dog bites in this country at approximately 4-5 million annually. Medical costs to treat dog-related injuries are estimated to be least 1 billion dollars annually.

The task force created to study the problem recommends implementing a proactive, educational approach at the community level. In particular, veterinarians and professionals in a variety of disciplines (e.g. family physicians, school-teachers) are encouraged to educate dog owners about the responsibility of ownership. This includes the need for proper socialization, obedience training, adequate containment and control of dogs, the value of early neutering and careful supervision of children around dogs. The report also recommends that politicians and community leaders take part in increasing the awareness of their constituents about the scope of the problem. The report discusses how a public relations campaign can be used to disseminate educational material to the community. In short, the task force calls for a multi-faceted approach at the community level to reduce the frequency of dog-bites.

The report makes clear that bans on particular breeds such as Pit bulls, besides being constitutionally questionable, are usually ineffective. They rightly argue that dogs of many different breeds bite humans - not just the so-called aggressive breeds. The report stresses that identifying a dog as dangerous needs to be done on a case-by-case basis using objective criteria. Guidelines needed to make this determination are provided in an appendix to the report.

The AVMA proposal is both ambitious and broad in scope. It's design allows implementation either in whole or part at the community level. The AVMA now needs to make communities across the country aware of the plan and encourage participation. Once it becomes implemented, then subsequent evaluation will have to be made to judge its effectiveness.

Since the AVMA plan essentially takes a multi-faceted educational approach - as opposed to curtailing or restricting ownership of certain breeds - it's hard to imagine why it would not have some positive effect in reducing the frequency of dog bites. The real challenge now comes in getting community leaders interested in bringing this issue to the forefront. Insurance carriers will no doubt welcome the recommendations. Insurance executives, in fact, comprised part of the task force. Unfortunately, despite the magnitude and severity of the dog-bite problem and the suffering it causes families, particularly when children are the victims, public interest in implementing the program probably will be tempered by more urgent issues currently facing our nation.

Breed Profile



Canary Island Fighting Dog

Origin and History: *Perro de Presa Canario*, better known as the Canary Island Fighting Dog, was originally developed in the Spanish Canary Islands in the mid- 1800's. The breed was developed from a cross between indigenous herding dogs on the Canary Islands and two breeds native to Great Britain: the English Mastiff and the English Bulldog. Although an early version of the breed might have been present in the 1500's for use by farmers to guard livestock, there's no doubt that for most of this breed's recent history it has been bred exclusively for dog fighting purposes and urban family protection. Dog fighting was banned in the Canary Islands in 1940's and with that the demise of the Canary dog quickly set in. It was near extinction in the 1960's. About that time, Dr. Carl Semencic, an American veterinarian, developed an interest in the breed. He is widely credited for reviving its numbers.

Characteristics: Canary dogs look like oversized Pit bulls. They are exceptionally well muscled and relatively large. The average weight ranges between 90 - 125 lbs. Ears are usually cropped. Color is brindle or fawn. Most Canary dogs stand approximately 21 - 25 inches at the withers. They have a head as wide as it is long. Descriptions include: "requires an experienced handler with good authoritarian skills excellent watchdogs temperament usually very hard and it can be unfriendly towards strangers a guard dog *par excellence* a reliable family protector among the most even tempered and all around working dogs you will find." Breeders note that there are two varieties of Canary dog: (1) A pure variety, and (2) a variety that was developed in Spain from a mixture with the *Fila Brasillero* dog. Fila dogs were used in South America for hunting jaguars. Some believe that the pure variety has a more stable temperament than the variety consisting of a Presa-Fila cross.

Current Status: Since the killing of Diane Whipple, there has been a surge in interest in this breed. Breeders report receiving calls requesting a dog "like the one that killed the lady in San Francisco." A rapid surge in this breed's popularity is likely to result in dogs of poor genetic stock with tendencies towards serious unprovoked attacks on people. The Mexican mafia supposedly uses Canary dogs to guard amphetamine labs in that country. The breed is recognized by the *Federation of International Canines*. It is not recognized by the A.K.C. Certified Canary dogs can be listed with the A.K.C. under their stock service program, however. At present, although not exactly known, the actual number of Canary dogs in the United States is probably less than 500.

Verdicts & Settlements

Caption: *Wiggins v. Waite*, Case 271 817, Riverside Superior Court, Riverside, CA. **Attorneys:** G. Dordick, Beverly Hills CA., for plaintiff; L. Rookhuyzen of *Tucker and Ricks*, San Bernardino, CA., for defense. **Description of incident:** In June, 1995 plaintiff, a 55 year-old female, was walking past the defendant's horse property when, alleged by plaintiff, dogs owned by the defendant attacked her. Dogs involved were 3 Rottweilers and 1 Jack Russell terrier. **Liability and damages:** Injuries consisted of numerous wounds made by the dog's teeth or claws including at least two puncture wounds. Claim also made for exacerbation of a preexisting heart condition. Defense contended that dogs were nonaggressive by nature and non territorial, they did not leave the defendant's property and therefore were not involved in the attack on plaintiff as plaintiff claims. Defense argued that incident did not aggravate plaintiff's heart condition. **Outcome:** Jury trial in January, 1999 resulted in verdict for plaintiff of \$23,256.

Caption: *Confidential*, Orange Superior Court, Orange, CA. **Attorneys:** C. Driscoll of *Jonas and Driscoll*, Los Angeles, for plaintiff. K. Wanner of *Lawson, MacRae, et. al.*, Santa Ana, CA. for defendant. **Description of incident:** In October, 1997 the plaintiff, a two-year-old girl, was bitten in the face by the defendant's Akita in the defendant's home. **Liability and damages:** Defendant claimed strictly liable under the California dog bite statute. Initial emergency room treatment for plaintiff included reconstructive surgery to face and tear ducts. Plaintiff claimed additional laser surgery required to reduce residual facial scarring. Defense did not contest liability but contested the plaintiff's injuries considering that facial scarring was not readily visible. **Outcome:** Structured settlement for \$334,003 in February, 1999.

Caption: *Gussman v. Garrett*, Case SC 051 626, Los Angeles County Superior Court, Santa Monica, CA. **Attorneys:** L. Ring of Beverly Hills, CA. for plaintiff; M. Dybens of Early, Maslach, et. al., Los Angeles, CA. for defendant. **Description of incident:** Plaintiff, a 4 year old girl was visiting with her grandmother at defendant's home in Los Angeles. The plaintiff was outside with her grandmother and left her grandmother and entered the house where she was attacked by the defendant's adult Cocker Spaniel as she attempted to take cookies off a plate on the dining room table. **Liability and damages:** Plaintiff sued under the California dog bite statute. The plaintiff suffered lacerations and punctures to her face and severe emotional distress. Defense admitted liability but contested the plaintiff's injuries given that facial scarring was not noticeable. **Outcome:** Bench trial in February, 1999 resulted in a \$98,250 judgment for plaintiff.

Caption: *Freed v. Dematter, et. al.* Case EC 027 690, Los Angeles County Superior Court, Burbank, CA. **Attorneys:** K. Lipton of Van Nuys CA. for plaintiff. C. Nance of Van Nuys, CA. for defense. **Description of incident:** In August 1998, the plaintiff, a 33 year-old personal fitness trainer went to the defendant's home with her father. The plaintiff's father and defendant went inside the house while the plaintiff waited outside. At some point, the defendant's mixed breed dog attacked the plaintiff as she began to pet it. **Liability and damages:** The plaintiff was bitten on her hand, leg and buttock resulting in lacerations and tears on her leg and puncture wounds to her hand and loss of grip strength in her hand. Plaintiff claimed that the defendant was negligent in allowing the dog to contact the plaintiff since another person had problems with the dog on a previous occasion. Plaintiff argued that defendant should have known of the dog's propensities given the dog's past behavior around people. Defense argued plaintiff provoked the dog to attack. **Outcome:** Bench trial in May, 2000 resulted in a \$45,090 judgment for the plaintiff.

Caption: *Begley v Guevera, et. al.*, Case PC 021939Z, Los Angeles County Superior Court, San Fernando, CA. **Attorneys:** M. McConville, *Law Offices of Feinberg & Waller*, Encino, CA. for plaintiff. Lori Levin-Borcover of *Barry Bartholomew Associates* of Woodland Hills, CA. for defense. **Description of incident:** In August 1997, plaintiff was walking with wife in a residential area in the Northridge section of Los Angeles. As he was walking, he observed defendant's dogs, a Great Dane and Rhodesian Ridgeback in the defendant's front yard. The dog's began to growl and run towards him. In response, he began to run and he wound up running onto the defendant's drive and front lawn. The dogs backed him up against some shrubs and as they charged him. The Dane then bit him on the knee and he fell down a 15 ft. embankment. At the bottom of the embankment he hit his elbow on a retaining wall. **Liability and damages:** The plaintiffs contended negligence on part of the defendant since he allowed the dogs to get out his yard and roam freely, thus giving the dogs the opportunity to attack people. The plaintiff suffered soft tissue injury to his neck and back and ulnar nerve damage to his right arm. Defense contended that the owners did not know how the dogs got loose since they had never gone out before and had never previously attacked anyone. They further argued that the plaintiff's version of the incident was not plausible and that the injuries sustained by the plaintiff were exaggerated. **Outcome:** Jury trial resulted in verdict for the defense in August, 2000.

Caption: *Korshak v. Bort*, Case SC041228, Los Angeles County Superior Court, Santa Monica, CA. **Attorneys:** Robert Kahn, *Law Offices of Robert Kahn*, Calabasas, CA. for plaintiff. Michael Thomas of *Thomas and Price*, Glendale, CA. for defendant. **Description:** Plaintiff was jogging on the sidewalk in a residential area when she was attacked by the defendant's 100 lb. German Shepherd dog. Plaintiff claims that she was knocked to the ground and bit. The dog was not on a leash at the time of the incident. **Liability and damages:** Plaintiff's argued defendant's liability based on: (a) violation of local leash law, (b) defendant's knowledge of his dog's dangerous propensities and (c) strict liability under the California dog bite statute. Claim for punitive damages was also filed. Defense argued that defendant's dog did not attack plaintiff in manner alleged. Defense contended no liability for punitive damages because the dog never attacked anyone prior to the incident with the plaintiff. Plaintiff's injuries consisted of dog bite to the upper lip and chronic pain caused by herniated cervical disks which required three surgeries with fusions. Defense countered that injuries plaintiff suffered to cervical area of spine were not the result of being knocked down by the dog. **Outcome:** Jury trial in November 1998 resulted in a reward of \$827,368 for plaintiff. Prior to closing arguments plaintiff agreed to waive punitive damages in exchange for additional admissions on the defendant's part.

Diane Whipple, con't.

When police arrived at the scene, Whipple was barely alive, crawling naked in the hallway. The two dogs were captured without incident and taken into custody. The defendant was not in the immediate area. Knoller states that she left the scene to search for her missing keys.

Whipple was an attractive 33 year-old lacrosse coach at a local college. She was a lesbian. This latter point, although not relevant to the behavioral issues discussed in this article, is significant because both Whipple's partner and her mother are seeking damages for wrongful death against the defendants and the owners of the apartment building where the defendants resided. This aspect of the case has generated considerable interest among lawmakers and those in San Francisco's gay community because the lesbian status of Whipple's partner may prevent her from collecting damages under California law.

The two dogs that killed Whipple belong to a relatively rare breed that was only recently introduced into this country. Their formal name is *Perro de Presa Canario*. This breed is profiled in this issue of the newsletter on page 3. Dogs of this breed are relatively large and muscular. They were originally developed from the mastiff line for working and guarding purposes and then for dog fighting in the Spanish Canary Islands. Temperamentally, the breed has been described as extremely pugnacious. Some have characterized Canary dogs as "pit bulls on steroids."

The two defendants are a married couple, both attorneys by profession. Forty-six year old Marjorie Knoller was the defendant with the dogs at the time of the incident. The co-defendant, 59 year old Robert Noel, was not present at the scene. Noel and Knoller each have been charged with two felony counts: involuntary manslaughter and the negligent keeping of a mischievous dog that killed someone. In addition, Knoller has been charged with second-degree murder.

Neither Noel or Knoller claims ownership of the dogs. Instead, Noel states that he was the trustee or keeper of the dogs and that ownership belonged to Paul "Cornfed" Schneider, a 46 year-old white-supremacist serving a life sentence for murder in California's Pelican Bay State Prison. Together, he and his cell-mate, Dale Bretches, another convicted murderer and white-supremacist, established in prison an internet business called Dog-O'-War. The business sought to breed and sell Canary dogs to provide financial support for their prison gang, Ayrans Brotherhood.

To sell the dogs, they needed a location where the dogs could be kept, bred, and maintained. To do this, they enlisted the outside help of Janet Coumbs. Coumbs resided on a farm in Trinity County, CA. Bane and Hera were two of about seven Canary dogs that lived on this farm. Hera was given to Noel and Knoller in May, 2000 and Bane was obtained by the defendants several months later. It is unclear how Noel and Knoller learned about the dogs on Coumbs' farm, but presumably the word came from Schneider. It is believed by some that she gave them away because she felt they were too aggressive and unmanageable. Supposedly, Bane and Hera tore down

the side of a barn and they may have killed a cat and livestock. The defendants deny that Coumbs ever told them anything negative about the dogs. Subsequently, some of Bane's pups were obtained by a person in southern California named Carolyn Murphy. Last summer, Murphy ran a classified advertisement in the *Los Angeles Times* offering the pups for sale for \$1200 apiece. In the advertisement, Murphy characterized the pups as being "bad to the bone".

The case becomes even more bizarre because of the connection between Schneider and the defendants. Schneider happens to be the legally adopted son of Noel and Knoller. However, this relationship is peculiar to say the least. For example, a search of Schneider's prison cell revealed nude photos of Knoller as well as a letter from Knoller describing acts of bestiality between Knoller, Noel and the male dog Bane. Further, recently it has even been alleged that Knoller and Noel provide support for the activities of the Ayrans Brotherhood, which Schneider supposedly heads.

Legal and Behavioral Issues

Second degree murder via implied malice

The second-degree murder charge against Knoller may be the most difficult charge to prosecute successfully. There's no precedent in California for upholding second degree murder involving a dog. In fact, there have been very few cases in this country where a person has been convicted of second-degree murder because of an attack by a dog. One happened in a well-publicized case in Kansas in 1998 in which a 10 year old boy on his way to school was killed by two previously attack-trained Rottweilers. In California, second-degree murder charges were brought against the defendant in the case of Cash Carson. However, here the defendant was vindicated because the dogs in question, attack-trained Pit bulls, had no history of prior attacks on people. This is noteworthy because in the Whipple killing there is no evidence to suggest that the dogs had been either trained to attack or that they had ever attacked anyone severely prior the attack on Whipple.

Where then does this leave the prosecution regarding this charge? Knoller can be convicted of second-degree murder if the jury believes she acted with implied malice at the time of the attack. This assumes that Knoller knew of the dangerous nature of Bane and Hera, and she willingly acted with wanton disregard for the life of others by exposing these dogs to people. Next, Knoller can be convicted of second-degree murder via an implied malice theory if the jury believes that she acted with wanton disregard after the attack on Whipple started. That is, once the attack started, she did nothing to stop it.

Knoller and Noel have repeatedly stated that both Bane and Hera were well-tempered, generally nonaggressive towards people and that they had never bitten or attacked anyone prior to the incident with Whipple. Knoller has characterized Hera as a "certified lick therapist." The burden will be on the prosecution to refute these claims by presenting

(Continued on page 6)

Diane Whipple, con't.

evidence to suggest that the dogs had previously acted aggressively towards people, or perhaps towards other animals. There is an indication that evidence of this nature will be forthcoming. However, will it be convincing enough to suggest that the dogs were dangerous and that Noel and Knoller knew of this danger? Direct and indirect behavioral evidence could be used to answer this question.

Direct behavioral evidence

There can be no dispute that the attack on Whipple was savage, particularly by Bane. The savage nature of his attack suggests that he might have had dangerous levels of aggression in his behavioral repertoire prior to his attack on Whipple. From a behavioral perspective, it probably would have been difficult for him to display a sustained and intense attack on Whipple if he was totally naive in the performance of aggressive-like behavior prior to the attack. Hence, his display of aggression towards Whipple could have been a reflection of what he was like temperamentally, and because of this the attack was something that probably did not happen out of the blue.

If there were previous displays of aggression, then did they happen frequently enough or with enough intensity to indicate that he was dangerous by nature and that he would attack a person with sufficient intensity and persistence to kill them? Moreover, if there were past displays, did these displays happen in a context similar to the context surrounding the attack on Whipple? Since aggression in dogs frequently only happens in certain contexts, it could be reasonably argued from a behavioral perspective that if he had previously acted aggressively in different or dissimilar contexts, then the aggression he displayed towards Whipple in the context of the apartment hallway was out of character and therefore not foreseeable.

Evidence that has bearing on an implied malice theory can also be gleaned from the behavioral examination which was conducted on Hera. Unfortunately, Bane could not be examined because he was destroyed shortly after the incident. Based partially on the findings from Hera's behavioral examination, she was declared dangerous and vicious and ordered destroyed at the city-run "doggy" hearing.

This decision needs to be questioned, however. One concern I have is that the behavioral exam was not conducted in the appropriate context. For example, it is likely that the exam on Hera was conducted in the 10 x 5 foot holding cage in which she was being kept at the city's animal facility, or at best in some other stressful condition within the same facility. Meaningful behavioral testing should have been done outside the shelter environment, preferably in a context which closely resembles the context where the attack on Whipple happened. In addition, one must also scrutinize the procedures and methods used in the behavioral testing. Were they scientifically valid? Were the criteria used to conclude that Hera was dangerous and vicious consistent with the criteria used in published animal behavior literature?

Indirect behavioral evidence

Indirect behavioral evidence which may be used to support implied malice might consist of the following: (a) Breed characteristics of the Canary Island Fighting Dog; (b) Previous displays of aggression which Noel and Knoller were told about or which they actually witnessed; (c) Complaints made to them or to others about the unruly nature of their dogs; (d) the negative opinions of others (e.g. veterinarians or neighbors) who had some familiarity with the dogs.

Obviously, one main thrust of the prosecution will be to focus on the supposedly dangerous nature of the Canary dog. The prosecution will undoubtedly argue that dogs belonging to this breed are inherently aggressive. The validity of this argument needs to be seriously questioned, however. For example, conclusions about the aggressive nature of any individual dog cannot not be made solely on the basis of general breed tendencies. The science of animal behavior clearly tells us that the past experiences unique to any individual dog must also be taken into account in the formulation of opinions about temperament. In short, both breed tendencies, as well as past experience, determine a dog's aggressive behavioral reactivity in any given context. This view is consistent with case law in California which states that the breed of a dog in and of itself should not be sufficient to put someone on notice of the dog's dangerous nature (*Lundy v. California Realty* 1985 170 Cal. App 3d 813, 216 Cal. Rptr. 575).

The prosecution's burden will be to demonstrate that the defendants should have known about the dangerous nature of Bane and Hera because other people complained about them or advised the defendants of their aggressive nature. In addition, the prosecution may elect to present testimony from an animal behavior expert which addresses issues such as training and proper socialization or lack thereof, and how this impacts aggressive propensities. In order for the defense to prevail on an implied malice theory, the evidence must show that Bane and Hera were well-behaved and generally non-aggressive, that they were properly maintained and cared for, that their non-aggressive demeanor was consistent with the impressions others had formed about them, and that Knoller acted appropriately after the attack started.

Did Knoller act appropriately?

Did Knoller take adequate action to stop the attack by the dogs once it started? This becomes a question as to whether she had the physical capability of doing so. It could be reasonably argued that because of the size and strength of the dogs and the motivational state the dogs were in as a working pair, no one could have physically done this. In fact, there have been many documented accounts involving other muscular and aggressive breeds where the attack was only stopped with gunshot. On the other hand, an argument like this might be counter-productive for the defense. For example, as noted, the heightened aggressive arousal of the dogs when they attacked Whipple suggests that they were truly dangerous, and if this be the case, then Knoller should have known about this through their past aggressive displays.

(Continued page 7)

Diane Whipple, con't.

Involuntary manslaughter

Another question that will be tested at trial is whether the defendant's negligent actions were the proximate cause for the attack. On the day of the incident, were the leash and collar adequate for dogs of this size given that they might encounter frightening or threatening circumstances? Were the defendants negligent because they did not obedience train or socialize the dogs properly? Were they negligent because they maintained these kind of dogs in an apartment approximately 800 square feet in size? These kinds of behavioral questions are best answered through expert testimony from an animal behaviorist.

Next, issues of negligence have to be viewed in a perspective that takes into account the chain of events which immediately preceded the start of the attack. Moments before the incident, Knoller states that she had the dogs on leash in the hallway some distance from Whipple who was about to enter her apartment. She claims that Whipple stood there and began staring at the dogs for over a minute. At this point, Knoller says she lost control of dogs - they broke from her, charged towards Whipple, and started to attack by first jumping on Whipple and pulling at her clothes.

If this account is believed, then questions need to be raised about the role Whipple played in instigating the attack. Specifically, could Whipple's staring behavior or some other form of hostile behavior on Whipple's part, be regarded as provocative? There is no straightforward answer to this question. Other factors, besides the proximate behavior of the victim have to be taken into account. For example, the temperament of the dogs, their past behavior in the context in which the attack happened, and the prior interactions the dogs had with Whipple, all have to be weighed collectively when considering the issue of provocation.

Possession of a mischievous animal

Besides the manslaughter and second-degree murder charges, the other felony complaint against the defendants is possessing a mischievous dog that killed someone. If the defendants are found to be the legal owners of the dog, then the burden for the prosecution becomes one of proving that these dogs were "mischievous", that the defendants knew this, and that the defendants did not act with ordinary care, given their knowledge about the mischievous nature of the dogs. The kind of behavioral evidence needed to support or refute these arguments is similar to the evidence needed to either acquit or convict on the charges of second-degree murder.

In sum, the Whipple case illustrates an interesting interplay between dog behavior and the law. This is the kind of case that requires input from a behavioral perspective. As such, justice stands a greater chance of being served if the evidence is presented to the jury with a perspective that fully utilizes the scientific basis of animal behavior.

Are Pit Bulls Different?

Media accounts of savage attacks by Pit bull terriers on people have probably engendered in the minds of many that there may very well be something unique about this breed of dog. As a result, municipalities throughout the country have enacted controversial laws banning Pit bulls or imposing restrictions on how these dogs may be kept. Despite the controversy, there has been little written from a scientific perspective addressing the question of Pit bull uniqueness. Do Pit bulls have unique behavioral qualities, particularly with reference to their aggressive tendencies? The only noteworthy paper on this issue appeared a number of years ago (Are pit bulls different? R. Lockwood and K. Rindy, *Anthrozoos*, 1988, Vol.1, pp. 2-8.) The ideas presented in this paper are still consistent with current scientific thinking.

In a number of important ways, some Pit bulls probably possess behavioral traits not found in most other dog breeds. First, in some breeding lines, individuals have been strongly selected for a willingness and propensity to fight other dogs. This is a behavioral trait known as "gameness". Gameness refers to a readiness and willingness to fight and the tendency to be unyielding in combat. This trait can manifest itself in several ways, such as reduced inhibition for attack, a tendency to attack with minimal provocation, and the tendency to fight until complete exhaustion or even death. Gameness also causes a Pit bull to have lower sensitivity to pain. For example, during combat, a Pit bull may show no outward signs of distress despite severe injury. Pit bulls bred from fighting stock may also be insensitive to the communication signals from other dogs (particularly submissive signals) and they often do not signal their intentions to fight via way of a warning with a growl or other facial communication. Pit bulls have been known to disembowel another dog, despite the presentation of the other dog's efforts at submissive signaling. Further, when compared with the attacks by other breeds, Pit bull attacks are often more severe, and they frequently result in greater injury to the victim. As noted elsewhere in this newsletter (see article on page 2), Pit bulls are involved in fatal attacks on people disproportionately more often than most other breeds. In addition, data reported elsewhere in the animal behavior literature indicate that Pit bulls are more likely to attack while restrained (e.g. being chained or caged), or after breaking out of some restraint.

Notwithstanding these exceptional behavioral features, it must be recognized that every Pit bull is an individual. Hence, it would be incorrect to assume that the above traits characterize every Pit bull terrier. The importance of previous socialization and obedience training, owner responsibility, and the encouragement of desirable traits have as much to do in determining a Pit bull's tendency for aggression as, for example, the possible influence of the inherited trait of gameness. This conclusion must be taken into account in litigation and legislation involving Pit bulls, or for that matter any of the other so-called dangerous breeds. Specifically, breed specific ordinances banning or restricting Pit bulls are unfair because they do not account for the great individual differences that exist between individuals. Breed characteristics are important; however, they must be viewed in conjunction with other meaningful biological variables specific to the individual.

News and Notes

Attorneys handling dog and cat personal injury cases might have wondered on occasion why bite injuries to the victim have taken so long to heal. The answer could lie in the fact that there may be bacteria in these kind of wounds that have not been previously recognized. For example, medical researchers have identified a variety of new bacteria believed to play a role in causing infections in people who have been bitten by dogs and cats. The investigation in question comes from the School of Medicine at UCLA (*New England Journal of Medicine* (1999, Vol. 340, pp- 85 - 92). The study examined the cultures of infected dog and cat bites in 107 people. Results showed that there were 152 kinds of bacteria involved, including 10 not previously known to infect people. The study concludes that infected bites from dogs and cats have a complex microbiologic mix that may include organisms not routinely identified and not previously recognized as bite wound pathogens. The clinical implication from these findings is that traditional penicillian-type drugs may not be the most appropriate treatment, and that for some victims other non-penicillian antibiotics may provide better therapy.

The Wisconsin Supreme Court recently ruled (*State of Wisconsin v. Bodoh* 220 Wis.2d 102,582 N.W.2d 440) that a dog can be regarded as a dangerous weapon if it were instrumentally used or intended to be used to cause death or great bodily harm to a person. In the case under review, the defendant's two Rottweiler dogs savagely attacked a 14 year

old boy riding a bicycle. Evidence indicated that the defendant used his Rottweilers as watchdogs and that the dogs displayed unprovoked aggression on previous occasions to other people and dogs. Testimony by experts suggested that the defendant should have known of the dangerous nature of his dogs. The court concluded that the defendant handled his dogs in a criminally negligent manner, thus affirming his culpability and the validity of the interpretation of the applicable Wisconsin statute in this manner.

Recently formulated guidelines from the *American Veterinary Medical Association* make it clear that in absence of other significant information, a dog's breed should not be used as *prima facie* evidence to deem a dog "dangerous". Rather, emphasis is placed on individual factors such as the severity of the dog's aggression or if the dog were provoked to attack. The AVMA defines a dangerous dog as "any dog which without justification attacks a person or domestic animal causing physical injury or death, or behaves in a manner that a reasonable person would believe poses an unjustifiable imminent threat of serious injury or death to a person or animal." Exclusions are also noted, however. For example, no dog may be declared dangerous if the following conditions are met: (a) if the dog were protecting and defending a person from an attack or assault; (b) if the person attacked was teasing, tormenting, abusing, or harrassing the dog; (c) if the dog were responding to pain or injury, or (d) if the dog were protecting itself or its offspring.

DOG BEHAVIOR & THE LAW

A Newsletter for Attorneys Litigating Dog-Related Injury Cases

© 2001 **Richard H. Polsky, Ph.D.**

Winter, 2001



ANIMAL
BEHAVIOR
COUNSELING
SERVICES, Inc.

2288 Manning Avenue Los Angeles, CA. 90064-2002 Address Correction Requested
(310) 474-3776 Fax (310) 475-9659 e-mail: dr.polsky@verizon.net