Insurance Law Podcast # 108

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John Czuba: Welcome to the "Insurance Law Podcast" brought to you by Best's Directory of Recommended Insurance Attorneys.

Welcome to the Insurance Law Podcast, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor for Best's Director of Recommended Insurance Attorneys.

We're pleased to have with us today attorney Jeff Baron. Jeff is the owner of the Baron Law Firm located in East Northport, New York on Long Island.

Jeff has practiced personal injury defense litigation since 1996. He started his current law firm in 2006, which focuses on personal injury law in downstate New York, throughout Long Island, and the five boroughs of New York City.

The firm represents landlords, building owners, laborers, arcticians, shopkeepers, commercial and residential vehicle owners and operators, medical and other professions, and insurance companies primarily in the area of personal injury defense litigation.

Jeff, we're very pleased to have you with us today.

Jeff Baron: Thanks, John. It's great to be here.

John: Jeff's primary area of practice is in premises and automobile liability, and today, we're going to discuss canine liability. Jeff, why is this becoming a big or growing area of law?

Jeff: John, first, let me say, it's an honor to be here. I'm very grateful to have the opportunity to speak with you today.

4.5 million people are bitten by dogs each year in the United States, and about 885,000 of them require medical attention. About half of those are children.

That's about 68 percent of US households that own a pet. Dog bites and dog-related injuries account for more than a third of all homeowners insurance liability claim dollars in 2014, more than half a billion dollars according to the Insurance Information Institute.

The actual number of claims nationwide is decreasing. It decreased 4.7 percent in 2014, but the average cost per claim is up 15 percent in the past year. The average cost paid for dog bite claims nationwide was over $32,000 in 2014 compared with about 27,000 in 2013.

This is due to increased medical costs and the increasing size of settlements, judgements, and jury awards. I practice in New York, which has the third highest number of claims in the country. Ohio is second. California is first.

New York actually has the highest average cost per claim. It's about $56,000 per claim. Don't forget. It's not just dog bites, but also, dogs knocking down children, cyclists, and the elderly.

John: Jeff, what is the basic rule governing liability in dog bite cases?

Jeff: Across the country, most of these cases are governed by ordinary common law rules of negligence. A lot of the states also have strict liability.

There's going to be statutory violations, as well. In New York, where I practice, there's rather a unique situation going on in so far as the courts do not allow a claim for negligence in any case where the injury is caused by dogs or other domestic pets.

New York only allows recovery under a theory of strict liability. The plaintiff must show that the owner or harborer of the animal had prior actual or constructive notice of the animal's harmful proclivities or vicious propensities.

If a plaintiff can't make out that showing, then, regardless of the negligence of the defendant, the plaintiff is out of luck. This was recently reaffirmed by the Court of Appeals just last month in the case of Doerr versus Goldsmith where the Court of Appeals said in no uncertain terms that they're simply not going to hold domestic pet owners liable for negligence.

John: Can you give us an example of a negligence claim as opposed to a strict liability claim?

Jeff: Yeah, these negligence claims, which are off the table in New York, a great example is the Doerr case I just mentioned. In that case, the dog owner is in a park and calls her dog from across the road, but she fails to see an oncoming bicyclist.

The dog, apparently, following the call of its owner, runs right into the path of the bicyclist, causing the bicyclist to fall and become seriously injured. In that case, the dog had no prior history of viciousness, so there could be no strict liability claim. It was just the negligent action of the owner, who failed to see what was there to be seen, that caused the biker's injury.

Negligence claims involving dogs are typically going to involve a claim that the owner failed to use reasonable care to prevent the dog from causing harm. Probably the most classic example is failing to use a leash in an area where a leash is required by law.

John: Jeff, why can't an owner be held liable under a theory of negligence in New York?

Jeff: The only reason is because the Court of Appeals says so. That's been the law in New York for about a hundred years.

What we've seen over the past few decades is the court trying to carve exceptions to this prohibition against negligence. One court successfully carved an exception for farm animals.

The Hastings case is a Court of Appeals case which stands for the proposition that if you negligently allow a farm animal to stray, like a bull or a pig, and that animal causes injury -- for instance, in Hastings a bull wandered into the roadway causing a car accident -- that's going to be a permissible negligence claim against the owner of the farm or the owner of that farm animal.

That's the exception to the general rule, which says that negligence claims are simply not allowed in the state of New York. The Court of Appeals justifies this by saying that it would create a landslide of new litigation. It would negatively affect the insurance industry.

Actually, I think most of all it's a textbook example of the power of stare decisis. The court just says, "This is the law. This is the law as it's been. This is the law as it should be. We see no reason for it to change."

John: How does New York law compare to other states?

Jeff: New York is, I believe, the only state in the union that does not allow recovery for negligence in these cases. Any other state is almost certainly going to be more friendly toward the plaintiffs. New Jersey, for instance, is considered a statutory strict liability state.

There, not only can you pursue a claim of negligence, but if it's an actual dog bite as opposed to a knock down or something, the prior viciousness of the dog is irrelevant. The owner is basically automatically liable, unless it's a trespasser. That may be the only exception. Connecticut is the same as Jersey.

Pennsylvania, they allow negligence claims. They also break it down, I think, based on the nature and severity of the attack. In the case of severe injury where there was no provocation by the victim, in Pennsylvania, the plaintiff would be eligible for the most recover, whereas someone who sustained a minor injury where the dog had no prior history, might only be able to recover medical expenses.

Every state deals with it in their own way. An attorney who handles one of these cases, whether it's as a plaintiff or a defendant, can't assume that common law negligence is going to carry the day.

Even though you might think that's the case, the attorney needs to consult the statutes, needs to determine the available legal theories, and needs to figure out what remedies are available to their clients.

John: Jeff, what does a plaintiff attorney need to do to prove that the owner has notice of the dog's harmful proclivities? What constitutes harmful proclivities?

Jeff: In New York, that's the question. Almost all dog bite or animal injury cases are going to turn on that issue, whether the owner had prior notice of the dog's viciousness. It's not just viciousness. It's any proclivity to cause harm.

If your dog, for instance, loves to jump on people, you're going to be held liable if that behavior ultimately causes an injury. The injury has to be related to the known propensity. If you know, for instance, that your golden retriever loves to chase bicyclist, that doesn't mean you're going to automatically be liable if your dog suddenly bites your aunt during Christmas dinner.

If that dog gets out of the house and does, indeed, run down a kid on a bicycle, you'll be held strictly liable under New York law. Similarly, if your dog had bitten someone in the past, theoretically, you'll be automatically liable if it happens again.

Sometimes, there's no evidence that the dog ever bit someone before, and still a plaintiff can demonstrate that the owner should have known the dog was vicious, for example, where the dog frequently lunged at people, bared its teeth, and growled aggressively.

There may be questions of fact, but at some point, if enough of these elements are present, a plaintiff can build a case that says, "Hey, this owner should have known that the dog was likely to injure someone, that the dog had a proclivity to engage in this type of aggressive or vicious behavior.

Another great example is you have something like a junkyard dog that is placed in front of a business with a big metal spiked collar and a big "beware of dog" sign. You walk past that dog, and it's straining on its leash and barking. Even though that dog may have never bitten anyone, at some point, a judge or a jury is going to say, "That owner had at least constructive notice of the viciousness of the dog."

In situations where these elements are not present, the plaintiff is not going to be able to make a case. If your kid is over at your neighbor's house and the neighbor's dog bites your kid, it might be tough to make a case in New York if that dog has no prior history. If you try to say, "Well, hey, you know, they kept that dog in a cage every night, so they must have known it was vicious," then, we need to start looking, "Well, why was this dog in a cage?"

If the owner says, "Well, we like to keep the dog in a cage, because he sleeps better in a cage and we don't want him walking around the house at night, because he keeps us up," the plaintiff's attorney is going to find him or herself with a very difficult case.

John: Under what circumstance is a landlord held liable if their tenant's dog attacks someone?

Jeff: The landlords are a bit more removed from liability. As property owners, they're technically the harborers of the dog, and they're liable if they had prior notice of the dangerous propensities of the dog, but in most of these cases, they don't even know of the existence of the dog, much less the dangerous propensities of the dog.

The funny thing is the landlord is often the target of this type of litigation, because they're the ones who carry the insurance whereas the tenant who owns the dog doesn't. The plaintiff's attorneys will often try to come after the landlord, but it's very difficult. At least in New York, how do you prove that the landlord knew of the viciousness of the dog?

There's an added wrinkle for plaintiffs, because even if they can demonstrate the landlord had notice of the viciousness of the dog, they also have to prove the landlord had "sufficient control" over the premises so that he or she could have removed or confined the animal but that they failed to do so.

John: Jeff, how do the courts define sufficient control?

Jeff: Usually, you look to the lease. If the lease is silent on dogs, and let's say, the lease carries a year-long term, then really, there's nothing the landlord can do to remedy this dangerous condition on the premises. Under that circumstance, the landlord would not be deemed to have sufficient control.

On the other hand, if the lease forbids dogs, then, once a landlord becomes aware of a dangerous dog, they now have a duty to take reasonable measures to enforce the lease. Similarly, if there's no lease, which is frequently the case, then it's a month-to-month tenancy.

The landlord, once they become aware of a dangerous dog on the property, there's now a duty to take reasonable measures to remedy that condition. Under those circumstances, the landlord can't just ignore the fact that there's a dangerous dog on their property. If they do ignore it and that dog bites someone, you've got landlord liability.

John: Is there any statutory law in New York, or is it all considered common law?

Jeff: There is some statutory law. It's the agriculture and market law, but it's not going to apply to your typical pain and suffering claims.

It's primarily concerned with licensing and identification, things like that. There is Section 123, which concerns dangerous dogs, and there are provisions that require reimbursement of medical expenses. That's regardless of prior notice.

There are civil penalties and fines against the owners of the dogs. It could be up to $3,000. It could also include jail time up to 90 days for repeat offenders who are negligent in serious cases. Also, dogs can be euthanized in serious cases.

John: Jeff, what do insurance carriers need to keep in mind?

Jeff: If an insurance carrier is going to write canine liability insurance, then New York is the place to do it, especially, since the recent Doerr decision.

Insurance carriers should be getting their representations from their applications to ensure that there's no history of aggressive incidents. Theoretically, as long as there's no such history, there's basically no circumstance where liability is going to attach to dog owner.

In New York, if your dog has always been a gentle animal, then, you won't be held liable if that dog decides to fly off the handle and attach someone. It doesn't matter if the attack is totally unprovoked, if it's incredibly violent, if the victim is a very young child, if the dog is in a park off a leash in violation of leash laws.

None of that matters. You're not going to be held liable under the current New York law absence of showing of prior notice of vicious propensities. The New York State Insurance Department permits insurers to include a dog bite exclusion in their homeowner's policies.

They can refuse to cover injuries caused by dogs who have a history of attacking, which is documented by claims records or public safety, law enforcement, or regulatory records. Insurers can also exclude certain breeds like pit bulls, dobermans, Rottweilers, chows, also, dogs that have been trained as attack dogs, guard dogs, fighting dogs.

These types of exclusions will protect the insurance carrier to some extent, but theoretically it won't protect them in cases where the dog growled a lot at passing neighbors or engaged in questionable contact in the past.

These facts could create a finding of prior notice that would result in liability against the owner. It's important for the insurer to get all the information they can regarding prior bites, other aggressive behavior, et cetera, from the applicant.

There are also other ways to reduce risk. That's with solid underwriting guidelines, limitations on the number dogs permitted at the premises, a requirement that dogs be examined by a vet and be in good health, and a requirement that all covered dogs be listed individually on the application.

Finally, a non-renewal clause triggered by a certain number of incidents, two or more for instance.

John: Any other comments today, Jeff?

Jeff: If there's anyone listening who has any questions, please feel free to reach out to me. Our website is Baronlawfirm.net.

There's a lot of additional information there about canine liability. If anyone has any other questions, I'll be happy to speak with them. You can email me or give me a call. Otherwise, I would just say thank you very much. This has been a real privilege.

John: It's our privilege having you. That was Jeff Baron, owner of the Baron Law Firm located in East Northport, New York on Long Island. Special thanks to today's producer, Brian Cohen. Thank you all for joining us for the Insurance Law Podcast.

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