The majority of seriously injured dog bite victims in the United States are children. Representing them presents certain challenges, from countering accusations of provocation to ensuring witness testimony is reliable. These issues can make or break your case.

By Kenneth M. Phillips

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Children are the most common victims of serious dog bite injuries in the United States, making up one-third of all emergency room (ER) visits for dog bites. The cost of medical treatment ranges from several hundred dollars for an ER visit to an average of $18,200 for hospitalization. While one would expect dog owners and their liability insurers to pay the greater portion of these medical bills, government sources pay them almost half the time. In fact, of the 885,000 Americans who are treated for dog bite injuries annually, only about 16,000—a mere 2 percent—are compensated by liability insurance companies.

But you can shift more of the health care burden to dog owners and liability insurers. Here are strategies for tackling seven of the most challenging issues in a child dog bite case.

**Strict Liability and Bad Conduct**

Two-thirds of states have statutes imposing strict liability for dog bites to people. While this may be helpful at the negotiating table, it has mixed results at trial: Strict liability occasionally results in jurors declining to award full damages—even if the defendant takes full responsibility—because the verdict is independent of the defendant’s negligence or intent. To overcome this, look for bad conduct showing that the defendant was irresponsible, negligent, or reckless: for example, evidence that the defendant violated an animal control ordinance like a leash law. In a so-called “one bite state,” the statutory violation may be your client’s only basis for compensation because it constitutes evidence of negligence or—depending on the jurisdiction—a presumption of negligence.

**Subsequent Torts**

Another strategy is to plead a subsequent tort claim, if the circumstances fit. For example, I once represented a young
boy attacked by his neighbors’ off-leash dog. The child had to pass his neighbors’ house to get to school. After the attack, the dog owners retaliated for the anticipated lawsuit by letting their dog loose in the street during the times of day the child was likely to pass by their house, terrorizing the boy. My complaint included counts for the dog attack, as well as willful infliction of emotional distress with a demand for punitive damages. We settled quickly.

Suits Against Friends and Family
In the majority of cases, the owners of the dog that attacked the child are friends, family members, or neighbors. This can make jurors uncomfortable—people generally believe that families, friends, and neighbors shouldn’t sue each other.

Approached delicately, however, these defendants often help the case rather than hurt it. Many times, they willingly accept blame for the accident because they want the victim to be compensated. They might cry when describing the child’s agony and painful recovery. At their depositions, they frequently disclose important information about who saw the accident and what the witnesses will testify to.

In these cases, argue that the relationship created a greater moral obligation for the defendant to protect the child. Similarly, argue that the breach of this duty caused the child to sustain deep emotional harm.

Children as Witnesses
When a dog bites a child, often the only witnesses are other children. If possible, videotape the young witnesses giving a statement within days of the attack.
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attack. This record—in the children's own words—is critical. Child witnesses often forget the details of an event, or the defense may try to manipulate the child's testimony at trial.

In each video statement, meticulously establish the basics—that the child saw the attack, understands the difference between truths and falsehoods, is telling the truth, and was not told what to say. Also get the details of what a child witness did not see. Before testifying or giving a statement to the defense, each child should view his or her own video to ensure accuracy—children often repress painful memories.

Be sensitive when taking a child's testimony at deposition and trial. If the child is a defense witness, two questions you should always ask during his or her deposition are, “Tell me what your parents told you to say to me today,” followed by, “Do you remember it that way or are you saying it just because your parents told you to?” The responses often reveal that the child was manipulated or coached.

And don’t forget the obvious. In one dog bite case, the defense relied largely on a six-year-old girl who supposedly would testify that my client, Brandon, provoked the dog. I began the girl's deposition by establishing that she knew who Brandon was. Then I asked, “Do you remember that your dog bit Brandon?” With a big smile on her face, she answered, “No.” I then asked a few follow-up questions to confirm that she had no recollection about what happened—and quickly ended the deposition. No longer able to prove provocation, the defense eventually offered a very substantial settlement.

**Provocation**

One of the cleanest fact patterns is the sneak attack: The dog bursts through a gate and, for no discernible reason, attacks a child who was not trespassing. This scenario eliminates the defense of provocation, which can be the basis for comparative or contributory negligence—or, if the child is old enough, completely defeat your case. But when your young client has a history of being around the dog or was playing with the dog right before the attack, jurors might think the child provoked the animal. In these instances, find out whether the dog had a preexisting condition that increased the likelihood of an attack—for example, the dog owner if neighborhood children teased and treated the dog cruelly, even if your client was not involved. Bring a motion in limine to counter the prejudicial effect of such evidence.

If the child was bitten while protecting his or her own dog from an attacking dog, defense attorneys often argue assumption of the risk and provocation. Counter this by arguing that because of the bond between them, your client could not stand idly by while another dog tried to harm his or her pet. If the victim was very young, add that he or she did not understand how dangerous it could be to intervene.

**Parental Supervision**

The parents of a bitten child occasionally face a counterclaim for inadequate supervision. In my experience, this defense tactic has never worked. To overcome it, show that the parents exercised the same degree of supervision that other parents would have.

Nevertheless, it is critical to establish whether the parents knew there was an increased risk of a dog bite injury. At the initial interview, ask the child’s parents whether the dog bit anyone before—and, if so, whether they knew this information before or after the attack. If the
incident happened on private property, take photographs to establish that no warning signs, such as “Beware of Dog,” were posted. Finally, ask if anyone verbally warned the child or his or her parents that the dog was “bad with kids.”

Also consider whether the parents should have known that the particular situation would possibly result in an attack. For example, if the dog bite occurred at a pool party—where children are splashing water, running around, and shouting—a jury or insurance adjuster might blame the parents for not pulling their child out of the fray.

### Third-Party Caretakers

If a child is injured by a third party’s dog while in the care of that person, assert a negligence claim based on §44 of The Restatement (Third) of Torts: “An actor who, despite no duty to do so, takes charge of another who reasonably appears to be . . . helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor’s charge.”

A duty to protect children under one’s care is established in the case law of most states, whether or not it has adopted the restatement.

Argue that the defendant was doubly at fault—both as the dog owner and the person charged with caring for the child. As a caretaker, this creates a special relationship and a heightened duty of care. Assert that when an adult hosts a playdate or sleepover but fails to pay attention, he or she is liable for any resulting injuries to the child.

When representing children with dog bite injuries, it’s important to recognize the intricacies of what can harm or help your case. Knowing how to overcome these obstacles will help your vulnerable clients and hold dog owners and handlers responsible.

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### Notes

1. Children are more likely than adults to receive medical attention for dog bites and, among the very young, the majority of injuries are to the head, neck, and face. Ctrs. for Disease Control, Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments—United States, 2001, 52 Morbidity & Mortality Wkly. Rep. 605, 606 (July 4, 2003). www.cdc.gov/mmwr/PDF/wk/mm5226.pdf; see also Laurel Holmquist & Anne Elixhauser, Emergency Department Visits and Inpatient Stays Involving Dog Bites, 2008, Agency for Healthcare Research & Quality (Statistical Brief #110, at 2, 12 fig. 3 (Nov. 2010). www.hcup.us.ahrq.gov/reports/statbriefs/sb110.pdf.

2. See Holmquist & Elixhauser, supra note 1, at 2, 9 tbl. 2.


6. See Kenneth M. Phillips, Statutory Strict Liability States, Dog Bite Law, dogbittenlaw. com/3ua (listing the statutory strict liability states).

7. A leash law is a state statute or municipal or county ordinance that requires a dog, when off its owner’s property, to be under restraint by a competent person, usually holding one end of the dog’s leash but in some jurisdictions controlling the dog by voice. Always find out whether the leash was retractable—almost all leash laws prohibit a physical leash greater than six feet in length. See Kenneth M. Phillips, Negligence Per Se for Violating a Leash Law or Other Animal Control Law, Dog Bite Law, dogbittenlaw.com/legal-rights-of-dog-bite-victims-in-usa/negligence-per-se-for-violating-a-leash-law-or-other-animal-control-law.


10. Trespass is a good defense when the case is built on statutory liability because the wording of these laws usually makes them inapplicable to trespassers. See, e.g., N.H. Rev. Stat. Ann. §466:19 (2016) (“Any person to whom . . . damage may be occasioned by a dog not owned or kept by such person shall be entitled to recover damages from the person who owns, keeps, or possesses the dog, unless the damage was occasioned to a person who was engaged in the commission of a trespass or other tort.”).

11. The provocation defense may be found in a state’s dog bite statute. See, e.g., Minn. Stat. Ann. §347.22 (West 2016) (“If a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained.”). Case law establishes that the defense also might be based on conduct that is intentional or unintentional. See, e.g., VonBehren v. Bradley, 640 N.E.2d 664 (III. App. Ct. 1994) (intentional conduct); Brans v. Extrom, 701 NW.2d 163 (Mich. Ct. App. 2005) (per curiam) (unintentional conduct).
