

# Accidental / Unintentional Police Service Dog Bites & Their Relationship to Fourth Amendment Liability

By Terry Fleck

Recently, there has been a debate over accidental / unintentional police service dog bites and their relation to violation of a person's Fourth Amendment rights. I will look at five Federal cases that address this issue.

While evaluating these cases, please keep in mind that there are two separate issues regarding accidental / unintentional police service dog bites:

**1. Fourth Amendment Issue:**

Is the canine bite a violation of a person's Fourth Amendment right to be free from unreasonable seizure? The Federal courts are divided on this issue.

**2. Liability for Negligence in State Court:**

Even if the canine bite is not a violation of a person's Fourth Amendment rights, in most states there is 100% liability upon the agency in state court for negligence for an accidental / unintentional canine bite. This liability mandates an agency pre-plan to deal with an accidental / unintentional canine bite. This is commonly done by an in-field settlement.

## **ACTUAL ACCIDENTAL / UNINTENTIONAL BITES:**

### **MARQUEZ v ANDRADE**

79 F. 3d 1153 (1996) U. S. Court of Appeals, Ninth Circuit

In this case, the police dog was left in his patrol vehicle during a high risk vehicle stop. While the canine handler was trying to subdue the driver, his canine exited the patrol car, unbeknownst to the officer, and without receiving any commands from the handler to do so. Of his own volition, the dog proceeded to bite the heads of two minor females who had been passengers in the car.

The court ruled that the handler did not intend to seize the suspects with his police dog and thus, the dog's attack on the suspects did not violate their Fourth Amendment rights.

The court further ruled that the claim of excessive force had to be analyzed as an issue of reasonableness of seizure under the Fourth Amendment, using **Graham v Connor**, a U.S. Supreme Court case that **every** canine handler should know by memory and be able to articulate the elements in this case.

There was no violation of the females' civil rights as the handler / dog acted with **negligent conduct, not deliberate indifference**. The court concluded that this incident was unfortunate, however not every unfortunate incident amounts to a constitutional wrong.

### **DUNIGAN v NOBLE**

390 F. 3d 486 (2004) U.S. Court of Appeals, Sixth Circuit

Officers bring a police dog into the home of a fugitive's mother seeking to arrest the fugitive. The fugitive's mother is accidentally / unintentionally bitten by the dog.

The court ruled that the officer who brought the police dog into the home of fugitive's mother, seeking to arrest fugitive, did not seize mother through means **intentionally applied**. Therefore, the mother could not establish a Fourth Amendment claim against the officer after she was bit by the dog.

Instead of moving out of the officer's path, she made the decision to remain close by. She then stumbled into the dog's defensive perimeter, and the dog responded, as trained, by defending its handler.

### **DEPOLYMENT of a POLICE DOG as a USE of FORCE, RESULTING in an ACCIDENTAL / UNINTENTIONAL BITE:**

### **COCHRAN v CITY OF DEER PARK, TEXAS**

108 Fed. Appx. 129 (2004) U.S. Court of Appeals, Fifth Circuit

The history in this case is unclear. A police service dog team was conducting a building search and an innocent third party was bitten by the dog.

The court ruled there was not a constitutional violation under the Fourth Amendment. A Fourth Amendment seizure only occurs when there is a governmental termination of freedom of movement through means **intentionally applied**.

In this case, the canine handler did not intend to seize this third party with his police dog. A Fourth Amendment violation does not extend to conduct that is merely **negligent**.

### **VATHEKAN v PRINCE GEORGE'S COUNTY, MD.**

154 F. 3d 173 (1998) U.S. Court of Appeals, Fourth Circuit

A police service dog team was conducting a residential building search for a burglary suspect. An occupant, sleeping inside the house, was bitten by the dog.

The court ruled that a seizure occurs even when an **unintended** person is the object of the detention.

Plaintiff was “seized” when police dog, on command from police officer, found and bit plaintiff during search of house for possible burglar.

House occupants have a right to be free from excessive force when a seizure brought about by a police dog that was deployed **without** a verbal warning while plaintiff was asleep in her home.

**It is clearly established that it is unreasonable for a police officer to fail to give a verbal warning before releasing a police dog to seize someone.**

### **ROGERS v CITY OF KENNEWICK**

2006 WL 2244514 / 2006 WL 3147414 / 2007 WL 91472 (2006 / 2007)

U.S. Court of Appeals, Ninth Circuit

A police service dog team was conducting a track / area search in a backyard of a house. The dog located and bit a person, who was sleeping in his daughter’s backyard, and then turns out not to be the suspect, he was just an innocent third party.

The court again used **Graham v Connor** in evaluating the reasonableness of the canine bite.

The court ruled **that failing to give a warning before releasing a police dog to bite and hold is unreasonable.**

**If a police officer had control over a dog when it bit a victim, and the officer had effectively ordered the dog to find and bite the individual he was tracking, it was of no legal consequence whether the officer and his fellow officers intended to restrain the victim specifically, or merely intended to restrain an unidentified person the officers were tracking.**

### **SUMMARY:**

#### **ACTUAL ACCIDENTAL / UNINTENTIONAL CANINE BITES:**

Both Federal cases state there is no Fourth Amendment violation.

#### **DEPOLYMENT of a POLICE DOG as a USE of FORCE, RESULTING in an ACCIDENTAL / UNINTENTIONAL CANINE BITE:**

One Federal case states there is no Fourth Amendment violation, however, two Federal cases state there is a Fourth Amendment violation. The U.S. Courts of Appeals are divided on this issue.

## **LIABILITY for NEGLIGENCE for an ACCIDENTAL / UNINTENTIONAL CANINE BITE:**

In most states there is 100% liability upon the agency in state court for negligence for any accidental / unintentional canine bite. This liability mandates an agency pre-plan to deal with an accidental canine bite. This is commonly done by an in-field settlement.

A major issue in the Fourth Amendment violation cases was the **failure to give a verbal canine warning which affords a suspect, or third party, an opportunity for peaceful surrender**. Canine warnings **should** be made prior to using the dog in all three canine search conditions, a building search, an area search and on a track.

I believe that the use of a police dog as a locating tool is greatly under utilized. I further believe that police dogs should be used as a locating tool to locate anyone, regardless of the severity of the crime. The issue here is the dog as a use of force, the dog bite, **not** the use of a police dog as a locating tool.

If you are going to use the dog as a locating tool on a non-severe crime, conservative tactics must be used:

1. The dog should be under "positive control", on-lead;
2. The dog should be on a very short lead;
3. The second the handler or an officer sees behavioral change(s) in the dog that the dog is in human odor, the handler should restrain the dog and let back-up officers continue the search and make **additional warnings to the suspect, or third party, to surrender**.

In addition, your agency must have a pre-plan for dealing with an accidental / unintentional bite. Accidental / unintentional bites are part of doing police canine business. As an analogy, we use patrol vehicles routinely. We are also involved in many at-fault vehicle accidents. Yet, we still use patrol vehicles.

Accidental unintentional canine bites are no different. They are the cost of doing canine business. We, as canine handlers, must use these dogs to maximum efficiency. However, we, as handlers, must also develop techniques and proper use of equipment, to keep these dogs under direct control of the handler.

As one Federal case, **Kerr v City of West Palm Beach**, stated, "...the handler must have complete control over the actions of the dog. With such control, the handler can recall and restrain the dog before a bite occurs. Alternately, the handler can quickly remove the dog from the apprehended suspect".

I realize that the issue of the use of a police dog as a locating tool is controversial. I strongly suggest that the agency canine unit and the agency staff develop a policy regarding both the utilization of the police dog as a locating tool,

and, if it occurs, the handling of an in-field settlement of an accidental / unintentional bite.

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