Are you liable? - Your dog Jack bites Rachael

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Facts:

Your friend Rachael has been training for her first triathlon. Sometimes she comes over when you're not at home to use your pool if her gym's pool is too crowded. After swimming some laps at your place last week while you were out, she spotted your adorable terrier sitting all alone. She couldn't resist playing with little Jack. Jack was feeling especially feisty that day and bit Rachael during their game of tug of war. She got a pretty nasty bite, followed by an infection. Now, she wants you to pay her medical bills. Will you be found liable? Tell us your thoughts...our answer will be posted Friday!

Our Simple Answer:

In my opinion, you will not be found liable for Rachael's injury.

Our Detailed Legal Answer:

California has a dog bite statute that holds owners of dogs liable no matter how carefully they guard or restrain their dogs but there are things that the plaintiff must prove in order to have a successful liability lawsuit.[1] Rachael, as first steps, must prove that you owned the dog, that your dog bit her while she was in a public place, or lawfully on private property.[2]

In our fact pattern, Rachael comes over to your house to use your pool when you are not there. She was not specifically invited by you…she just comes over whenever she wants to. **A jury facing this fact pattern would have to decide whether or not Rachael was lawfully on your private property at the time she was bitten by Jack.**

The jury instruction for the dog bite statute contains some additional language that is designed to explain whether or not a person is lawfully on private property. It reads:

> **"…[Name of plaintiff] was lawfully on private property of the owner if [he/she] was performing any duty required by law or was on the property at the invitation, express or implied, of the owner..."**

Here, the issue is whether Rachael was on your property at your invitation…the invitation can be expressly made (e.g. You say, "Rachael, feel free to come over and use my pool anytime you want, even if I am not there.") or the invitation can be implied

[1] California Civil Code Section 3342
[2] CACI 463 – Dog Bite Statute (Judicial Council of California Civil Injury Instructions)

from the facts (e.g. Rachael has "sometimes" come over and used your pool and you knew about the use of your pool, and you never told her not to do so, so she believed that the invitation to use the pool was implied).

So in this fact pattern, a jury must decide if invitation was either impliedly made or not made at all. **If no invitation, then Rachael is a trespasser barred from recovering anything.**

Some may argue that Rachael is a trespasser because: 1) you only knew that Rachael used your pool, so the invitation was for pool use only; 2) you did not know that Rachael would stop to play tug of war with Jack; and thus never provided express or implied permission to use any part of the property other than the pool; and 3) Rachael was not invited to play with your dog, i.e. your property, and when she did so she exceeded the scope of any permission you gave.

This is a tough call, but in my opinion, a jury would most likely find that Rachael was "impliedly" on your property at your invitation because: 1) she is your friend not an unknown person who was trespassing in the traditional sense; 2) you knew that she "sometimes" comes over when you were not there; 3) despite these prior visits, you never told her she should not come over when you were not there; and 4) you left Jack in place where she could access him (i.e. not behind a secured gated area or dog run).

Again, if a jury says Rachael is a trespasser, she gets nothing. **If an implied invitee, Rachael may acquire a monetary recovery subject to any other defense.**

The defenses of assumption of risk and contributory negligence may be asserted in cases brought under Civil Code Section 3342.[3] Participants in dangerous activities assume the risk inherent in the ordinary activity involved, provided that the injury was merely accidental, careless or negligent.[4] Likewise, If the plaintiff's own negligence contributed to his or her own harm, then plaintiff's damages may be reduced in proportion to his or her negligence.[5]

In our fact pattern, Rachael approached Jack and began playing a game of tug of war. During this game of tug of war, Rachael was bitten. Does the game of tug of war with a dog involve the inherent risk of scratches and bites to the human participant? I believe most people would say that it does. There are no facts here to suggest that Rachael did anything to protect herself from the harm that she chose to voluntarily encounter. She wore no gloves or protective gear in our fact pattern.

CONCLUSION:

There is a theory of liability to be pursued, but in the end, I believe there would be no liability for this loss.

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[3] See CACI 463 footnote reference to Johnson v. McMahan (1998) 68 Cal. App. 4th 173, 176

[4] CACI 408 – Primary Assumption of Risk (Judicial Council of California Civil Injury Instructions)

[5] CACI 405 – Comparative Fault of Plaintiff (Judicial Council of California Civil Injury Instructions)

If Rachael walked into my office, I would kindly advise that I would not be willing to pursue her case because the jury could find the following: 1) that she was a trespasser; 2) she assumed the risk of injury associated from a dog bite incidental to the game of tug of war; and 3) that her own negligence of not wearing gloves or other protective gear while playing with Jack could result in a finding of contributory/comparative negligence thereby reducing any recovery she may receive. I would recommend that Rachael consult another lawyer who may offer a different opinion.

The moral issues here should not be ignored. Rachael, your friend, sues you for injuries she sustains after she invites herself to your residence and plays with your dog without your permission or knowledge. I believe any jury would struggle with compensating Rachael….How is it fair for you to have to be liable for her choices?

Not every dog bite results in a winning injury case. Many people, and even many lawyers, believe that because there is a "strict liability dog bite statute" that there are no defenses to dog bite cases. This is simply not true. A reading of the case law suggests otherwise.

It should be noted, that homeowner's insurance policies contain medical payments coverage provisions that pay for guest medical expenses without regard to fault. The coverage is usually sold with the following limits available: $1,000 per person; $2,000 per person; $5,000 per person; or $10,000 per person. This could be a source for paying Rachael's medical expenses without regard to liability.

Our civil jury system provides specific instructions to the jury about what the law is for a given set of facts. The jury listens to the facts and comes to a conclusion, after deliberations, as to whether someone is negligent or liable.

Legal opinions regarding the outcome of a given fact pattern can and do vary. The legal opinions expressed herein are just one lawyer's opinion of the likely results of this fact pattern. They are based on California law only.

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