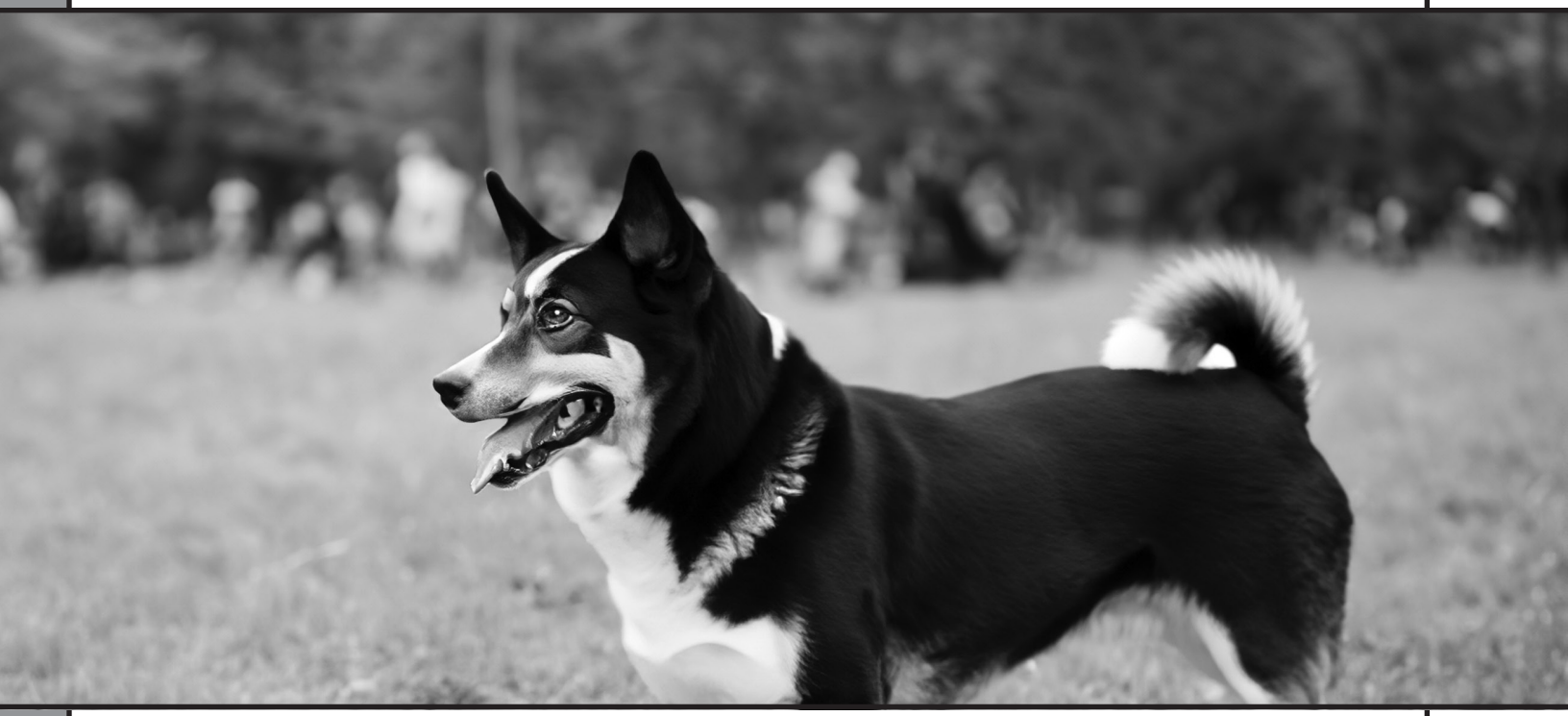

Can I Bring My Dog? Examining the Current State of New Hampshire's Dog Bite Law

by: Amanda M. Frederick, Esq.

I. Introduction

As the warmer months arrive, we are spending more time outside with friends and family. We of course want to bring along our furry friends, but are there legal implications with doing so? For instance, could a property owner be liable for injuries and damages caused by your dog simply by allowing it on their property for a summertime BBQ? New Hampshire law states that you, as the owner of your dog, are strictly liable for the injuries and/or damages caused by your dog. However, the law also imposes strict liability upon those deemed the "keeper" of the dog at the time the dog injures another. As the following discussion will demonstrate, the term "keeper" is not so easily defined and is determined by factual circumstances that establish a person's management, control, or care of a dog.

II. Background

RSA 466:19 — New Hampshire's "dog bite statute" — was originally enacted in 1851 and has not been amended substantively since. *Gagnon v. Martin*, 116 N.H. 336, 337 (1976). The statute establishes strict liability for owners or keepers of dogs absent trespass or other tort. The legislative intent of the statute "was to obviate the difficulty of showing the owner's knowledge of the vicious propensities of the dog as required at common law." *Allgeyer v. Lincoln*, 125 N.H. 503 (1984).

RSA 466:19 Liability of Owner or Keeper states as follows:

> *Any person to whom or to whose property, including sheep, lambs, fowl,*

or other domestic creatures, 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. A parent or guardian shall be liable under this section if the owner or keeper of the dog is a minor.

As the statute makes clear, strict liability under RSA 466:19 is not absolute. The statute carves out an exception for instances where the dog bite incident occurred while the victim was "engaged in the commission of a trespass or other tort." Although RSA 466:19 expressly states that a trespasser would not be entitled to damages if they are bitten while engaged in such an act, the New Hampshire Supreme Court has held that an individual entering onto a dog owner's property for a "lawful business mission" (such as delivering a package) is not "engaged in the commission of a trespass" pursuant to RSA 466:19. See *Frenette v. Gillis*, 106 N.H. 210 (1965).

Comparative negligence principles may also be applied to reduce a plaintiff's recovery as a consequence of their own "tortious" conduct, if any, at the time of the dog bite incident. The New Hampshire Supreme Court has expressly held that RSA 507:7-d, New Hampshire's comparative negligence statute, applies to all tort actions including those brought under RSA 466:19 and that courts should look to "comparative causation" in evaluating damages in strict liability cases. See *Bohan v. Ritzo*, 141 N.H. 210 (1996).

Strict liability under RSA 466:19 is also limited to those defendants who are the owner, keeper, or possessor of the dog at the time of the incident. The New Hampshire Supreme Court has provided some guidance in defining these terms.

III. Owner

RSA 466:19 imposes strict liability upon the owner of a dog at the time the dog injures another. Where dogs are considered a type of personal property, the owner of a dog can be determined by one who has legal title over the dog. Legal title can be determined by, among other things, the registered owner listed on a dog license, veterinarian records, or from records detailing when the dog was purchased or acquired. Ownership can also be established by one who exercises a "substantial number of incidents of ownership" such as the care, custody, and/or control of the dog. See *Glidden v. Szybiak*, 95 N.H. 318 (1949).

IV. Keeper

The legislature recognized that it was often a difficult matter to prove ownership of a dog and, in enacting RSA 466:19, intended to obviate this difficulty. See *Gagnon*, 116 N.H. at 337. Keepership is a legal concept determined, among

other things, by the level of control a person has over a dog. An individual's status as the "keeper" of a dog is slightly more difficult to establish. New Hampshire case law lends some clarity as to what it means to be a "keeper" of a dog; however, the reported cases are not entirely consistent. Three reported opinions have addressed what it means to "keep" a dog within the meaning of RSA 466:19. See *Raymond v. Bujold*, 89 N.H.380 (1938); *Gagnon v. Frank*, 83 N.H. 122 (1927); *Cummings v. Riley*, 52 N.H. 368 (1872).

The New Hampshire Supreme Court has explained, the word "keep" as used in the statute:

> *[I]mplies more than the mere harboring of a dog for a limited purpose or time. It implies rather* ***the exercise of a substantial number of incidents of ownership*** *by one who, though not the owner, assumes to act in his stead. One who permits the casual presence of a dog upon his premises cannot fairly be said to be its keeper; nor does he become such when he temporarily feeds or shelters it. One becomes the keeper of a dog only when he, either with or without the owner's permission,* ***undertakes to manage, control, or care*** *for it as dog owners in general are accustomed to do.*

Raymond, 89 N.H. at 382 (emphasis added).

Accordingly, a "keeper" is someone who holds themselves out as the dog's owner and cares for the dog in the way that "dog owners in general are accustomed to do" by undertaking to manage, control, or care for the dog. *Id.* A "keeper" of a dog is someone who is not the legal owner of the dog but substitutes himself for the owner of the dog by exercising "a substantial number of incidents of ownership." *Id.* Recurring actions, such as housing the dog, feeding the dog, walking the dog, training the dog, taking the dog to the veterinarian, or registering the dog, could be considered "incidents of ownership" sufficient to deem one a "keeper." *Lorrain v. Branscombe*, No. 11-cv-145-JL, 2012 WL 256573, *5 (D.N.H. Jan. 30, 2012). The Supreme Court has also held that a property owner may be considered a "keeper" if the property owner has the "possession and control of a house or premises" and permits the dog to be kept on the property as a "member of the family." *Cummings v. Riley*, 52 N.H. 368 (1872).

Conversely, one is not considered a "keeper" for simply allowing a dog to temporarily remain on their property. See *Cummings v. Riley*, 52 N.H. 368 (1872) (holding that one who harbors a dog and permits it to remain temporarily upon his premises is not a keeper within the meaning of RSA 466:19). Further, one is not a "keeper" if the person "temporarily feeds or shelters" the dog. *Raymond*, 89 N.H. at 382.

V. Possessor

A "possessor," as used in RSA 466:19 is a term similar to that of a "keeper" and "implies the exercise of care, custody or control of the dog by one who though not the owner assumes to act in his stead." *Glidden v. Szybiak*, 95 N.H. 318 (1949). A "possessor" is one who retains the dog for a limited time and purpose and who exercises a level of control over a dog as is only essential to retain possession of it. See *Raymond*, 89 N.H. at 382 (holding that the plaintiff was a "possessor" where he retained the defendant's lost dog for a limited time and limited purpose of delivering the dog to the defendant and that such acts of dominion were only those reasonably necessary to effectuate that purpose and was therefore entitled to recover under RSA 466:19).

Significantly, RSA 466:19 expressly omits "possessors" from the class of those who are not entitled to bring a strict liability claim against a dog's owner or keeper and includes them in the class of those who may be held liable, indicating a legislative intent to distinguish between a "keeper" of a dog and one who merely has possession of the dog. *Id.* at 383.

VI. The Owner or the Keeper, but not Both

RSA 466:19 allows a person who is injured by a dog to assert a claim against the owner or the keeper of the dog – but not both.

Indeed, this very issue was discussed in *Gagnon v. Martin*, 116 N.H. 336 (N.H. 1976). In *Gagnon*, the Court examined the language of the statute and expressly held that that RSA 466:19 "was designed to give the injured party a remedy

against the person who owns or keeps the dog but not against both an owner *and* a keeper." See *Id.* at 337 (emphasis added).

The Court explained that, "[i]f it had been the intent of the legislature to allow recovery as against both [the owner and keeper of a dog], it would have chosen more specific words to accomplish such a result." *Id.* Instead, the intent of the legislature in enacting RSA 466:19 was to obviate the often-difficult task of proving dog ownership in cases of this type and therefore holds a person who harbors a dog responsible for the damage occasioned by the dog while in the person's custody or control. See *Id.*

VII. Inclusion of Vicious or Mischievous Acts

In addition to an actual bite or direct physical contact, New Hampshire courts have interpreted RSA 466:19 to include the application of strict liability for harm caused by a dog's "vicious or mischievous acts." *Allgeyer v. Lincoln*, 125 N.H. 503, 506 (1984). These acts can include anything which causes injury to a person including conduct that frightens a victim.

Such was the case in *Bohan v. Ritzo*, 141 N.H. 210 (1996). In *Bohan*, a dog owner was found liable for injuries sustained by a bicyclist after the dog "mischievously ran toward the bicyclist's leg as if to bite him," causing him to crash and sustain personal injuries.

In affirming the lower court's denial of the defendant's motion to dismiss, the New Hampshire Supreme Court rejected the defendant's arguments that a simple encounter with a dog is insufficient to support a claim under RSA 466:19 and requires more than the "mere presence" of a dog, such as an actual bite or other direct physical contact. See *Id.* at 213. After construing the plain language of RSA 466:19, the Court held that, "[n]othing in the plain language of RSA 466:19 limits its application to situations where there is an actual bite or other direct physical contact." See *Id.* at 214.

The Court explained that "[t]he statute simply makes dog owners strictly liable to any person to whom damage may be occasioned by a dog not owned or kept by him, and if the legislature intended to limit strict liability to cases where a dog's vicious or mischievous acts include an actual dog bite or direct physical contact, it could easily have drafted the statute to do so." See *Id.* (citations omitted).

The *Bohan* court's holding that RSA 466:19 applies to a dog's vicious or mischievous acts is not without its limits. Indeed, in *Noyes v. Labreque*, 106 N.H. 357 (1965), the New Hampshire Supreme Court affirmed the dismissal of a district court action and held that plaintiffs could not recover under RSA 466:19 for injuries suffered when the defendants' dog ran out into the street in front of their motorcycle, because the dog's act of running out into the street was not a "vicious or mischievous act." In affirming the dismissal, the Court observed that the statute "does not confer a right of action on all persons indiscriminately," but "is to be given a reasonable interpretation." *Id.* at 358-59.

VIII. "Not Owned or Kept by Such Person"

The imposition of strict liability under RSA 466:19 "does not confer a right of action on all persons indiscriminately." See *Gagnon v. Frank*, 83 N.H. 122, 123 (1927). In construing the language of RSA 466:19, the New Hampshire Supreme Court has expressly held that, "the right of action [under RSA 466:19] does not inure to the owner or keeper of the dog." *Gagnon*, 83 N.H. at 123.

Consequently, a popular defense to a strict liability action brought against a dog's owner, is that the injured party was a "keeper" of the subject dog at the time of the bite, and, therefore, is barred from asserting a strict liability claim under RSA 466:19. Indeed, the Supreme Court of New Hampshire has held that a "dog-sitter" or other individual engaged to take care of a dog is a "keeper" within the meaning of RSA 466:19. See *Gagnon v. Frank*, 83 N.H. 122, 123 (1927) (holding that the plaintiff was a "keeper" within the meaning of RSA 466:19 and precluded from recovering under the statute where the plaintiff was hired to "take charge of the house and care for the dogs" and where "the dog was in her possession and under her control" at the time of the incident and therefore the dog was "kept" by the plaintiff "within the ordinary definition the word"); *Rich v. Shevett*, No. 2007-0165, 2007 WL 9619506, at *1 (N.H. Oct. 4, 2007) (affirming trial court's finding that plaintiff was a "keeper" of the dog in question where the plaintiff's "knowledge of the dog's characteristics and behavior was typical of an owner").

IX. Conclusion

Based on the foregoing, it is unlikely that a property owner would be found strictly liable for damage or injury caused by a dog allowed on their property temporarily during a summertime BBQ. Similarly, one who temporarily feeds or houses a dog will unlikely be deemed its keeper. However, if an injured party can establish evidence that someone performed a "substantial number of incidents of ownership" such as housing the dog, feeding the dog, walking the dog, training the dog, taking the dog to the veterinarian, or registering the dog, an individual could be considered a keeper and subject to strict liability under RSA 466:19. Furthermore, one engaged to care for a dog such as a dog-sitter will likely be deemed a "keeper" within the meaning of RSA 466:19, the determinants of which are based upon the extent of one's undertaking to manage, control, or care for the dog in the manner a dog's owner would be accustomed to assume.

As the foregoing discussion makes clear, it can be difficult navigating this seemingly straightforward yet deceptively complex area of the law. If you or a client is involved in a dog bite incident, it is highly recommended to consult with an experienced personal injury attorney well-versed in this area of law.

AMANDA M. FREDERICK is an attorney at Parker Scheer LLP in Portsmouth, New Hampshire. Her practice focuses on representing plaintiffs in medical malpractice, personal injury, and product liability litigation. In addition to statewide New Hampshire practice, Attorney Frederick is also licensed to practice in Massachusetts and Maine.