

INTEROFFICE MEMORANDUM

HOSS & BABBLE LLP

TO: JUNIOR ASSOCIATE

FROM: HELEN HOSS (SENIOR ATTORNEY)

RE: JENNIFER AND KENNY POWER; POTENTIAL DOG BITE CLAIM

DATE: SEPTEMBER 16, 2023

The firm recently received a call from Jennifer Power involving a dog bite incident. Mrs. Power's ten-year-old son, Kenny Power, was bitten by a dog while playing at a park in Lineville, Illinois on July 5, 2023. I interviewed Mrs. Power and Kenny, who provided their accounts of the events surrounding the dog bite. The underlying facts I have collected from my interviews are as follows:

Growing concerned that Kenny was playing too many videogames over the summer, Mrs. Power encouraged Kenny to get out of the house, get some exercise, and socialize with his friends by heading to the park. Kenny texted his friend Wade Leblanc to meet at the Lineville Community Recreation Area. Kenny lives three blocks east of the park; Wade lives 4 blocks south of the park. The boys met to play catch as they both had aspirations of trying out for the local premier little league team.

During the game of catch, Wade threw the ball over Kenny's head and he was unable to make the catch. The ball rolled a few feet away from a dog that was tied to a park bench. We have since learned the dog's name is Dingo. Kenny told me that the dog appeared to have belonged to someone as it was clean, well groomed, had a dog tag on his collar, and had a water and food bowl within reach.

Kenny moved toward Dingo to retrieve the ball and Dingo began to bark. Wade joined Kenny near Dingo, but the boys were beyond the reach of Dingo's leash. Kenny grabbed the ball, which was also beyond Dingo's reach, and ran back to Wade while Dingo continued to bark at the boys. Wade said, "That dog is a jerk!" and the boys began barking and shouting back at Dingo. The boys threw a few sticks toward Dingo, but did not hit him. They also lunged toward Dingo close to the perimeter of Dingo's reach, but made sure they stayed beyond Dingo's reach. All the while, Dingo continued to bark and pull against his leash to its fullest extent.

The boys got tired of Dingo and went back to playing catch; Dingo stopped barking and went to lie under a tree. Soon, Wade overthrew Kenny again. This time, the ball landed in Dingo's food bowl and scattered some kibble. Kenny and Wade ran back over to Dingo's area and Kenny ran to get the ball from the bowl. Kenny and Dingo arrived at the bowl at the same time. As Kenny reached into the bowl, Dingo bit his right hand and forearm several times creating two gashes which bled profusely. Kenny screamed and ran to safety as he held his

bleeding arm with his other hand. A nearby jogger witnessed the incident and called 911 and Mrs. Power.

Dingo's owner, who was attending a wedding in the park, arrived on the scene after the attack. The owner said that Dingo has never attacked anyone before or even displayed such behavior toward strangers.

Kenny required 25 stitches in his forearm as a result of the bite. His arm then became infected and he was forced to undergo more extensive medical treatment to help him fight the infection. Kenny still experiences pain and swelling in his arm and has acquired a rather grotesque scar. The Powers intend to have Kenny undergo cosmetic surgery on his arm, but they need to wait until Kenny's health improves.

Mrs. Power wants to know if she can pursue a cause of action against the owner of Dingo. Before we decide whether or not to file a complaint, I would like you to research the law pertaining to the issue and draft a memorandum analyzing Mrs. Power's likelihood of success should we file a suit. You should only rely on the facts provided in your analysis. We had a similar case some years back and I believe there is an Illinois statute under which an injured party can bring a claim. Please find that statute and analyze the Powers' claim under it. Specifically, your memorandum should only address whether Dingo attacked Kenny without provocation.

Other associates have been assigned to research other aspects of the case, so please just stick to potential liability under the Illinois statute and do not consider any potential common law claims. Further, do not consider compensatory or punitive damages or any other local ordinances that might apply.

Your memorandum should be 1,800 words or less and follow the formatting rules provided in the Associates' Writing Handbook. Please send me your first draft no later than 11:59 p.m. on October 1, 2023.

Thank You,
Helen Hoss

Power Dog Bite Case

FIRST DRAFT DUE: October 1 before 11:59 pm

Issue: Does Mrs. Power have a case against Dingo's owner for biting Kenny

- ➔ Specifically, I need to research whether or not Kenny and Wade provoked Dingo before Dingo attacked Kenny
- ➔ What does it mean to provoke?
- ➔ What is provocation?

Events:

- Wade overthrew the ball
- Kenny went to get it
- Dingo barked at the boys
- Boys barked and screamed
- Boys threw sticks
- Boys lunged toward Dingo
- Did not enter his area

- Boys left and Dingo went to lay down

- Ball landed in Dingo's food bowl
- Kenny reached in to get it
- Dingo bit Kenny
- Kenny's arm was pretty badly injured

- Dingo's owner says he has never done this before

What do I need to do:

- Find the Illinois statute about dog bites
- Research case law that relates to dog bite cases and the statute
- Write a memo analyzing Mrs. Power's likelihood of success if she sues Dingo's owner
 - Outline Argument
 - Rough Draft

Avoid:

- Common law claims (only use the statute)
- Discussing Damages
- Local ordinances

Source	Facts	Holding	Rationale/Rule
510 Ill. Comp. Stat. Ann. 5/16 (West 2006) AKA <i>Animal Control Act</i>	N/A	(510 ILCS 5/16) (from Ch. 8, par. 366) Sec. 16. Animal attacks or injuries. If a dog or other animal, without provocation, attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby.	
<i>Nelson v. Lewis</i> , 344 N.E.2d 268, 270 (Ill. App. Ct. 1976).	<p>2 ½ year old girl fell or stepped on the dog's tail while the dog was chewing a bone</p> <p>Dog reacted by scratching the girl's eye causing injury</p> <p>No evidence that the girl or anyone else had aggravated or teased the dog</p> <p>Dog had no history of vicious behavior</p>	Yes, the dog was provoked even though there was no intention on the part of the child to provoke the dog	<p>➔ Under this statute there are four elements that must be proved: injury caused by a dog owned or harbored by the defendant; lack of provocation; peaceable conduct of the person injured; and the presence of the person injured in a place where he has a legal right to be.</p> <p>➔ Provocation is defined as an act or process of provoking, stimulation, or incitement</p> <p>➔ "Provocation" within the meaning of the instant statute means either intentional or unintentional provocation</p>
<i>Kirkham v. Will</i> , 724 N.E.2d 1062, 1066 (Ill. App. Ct. 2000)	<p>Facts are not really important on this one, but the court lays out a good explanation of other cases that it considered when proposing a new rule/jury instruction for "provocation"</p> <p>Woman walked down D's driveway to get to her friend's driveway. D and Friend are neighbors. The</p>	<p>There are other issues discussed and the court doesn't specifically say whether there was provocation, but the court reviews the law and states a definition of provocation.</p> <p>The jury found that D was not liable, but there are not a lot of details about what happened between the woman and the dog.</p>	<p>➔ When the case does NOT involve a dog known to be vicious, provocation should mean: Any action or activity, whether intentional or unintentional, which would be reasonably expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence. 1067</p> <p>➔ A reasonable dog is one that is not overly aggressive or overly docile</p>

	driveways were connected. D's dog attacked P.		
<i>Robinson v. Meadows</i> , 561 N.E.2d 111, 115 (Ill. App. Ct. 1990).	Knock on the door caused dogs to start to bark, which caused the victim/plaintiff (a 4-year-old girl) to scream In reaction to the scream, one of the dogs attacked the little girl. The dog tore plaintiff's lip and inflicted puncture wounds and scratches on her face, neck and throat.	No Provocation because the dog's response to the stimulant was not reasonable.	<p>➔ Provocation requires that the dog responds in a reasonable way.</p> <p>➔ If we used the literal definition of provocation, anything <i>causing</i> an attack would be provocation and that is not the standard we want to set because it would basically make the statute meaningless (no one would ever recover unless a dog completely spontaneously attacked someone).</p> <p>➔ While the attack here was caused by the girl screaming, the dog's response was not what a reasonable dog would do, so there is no provocation.</p>
<i>Siewerth v. Charleston</i> , 231 N.E.2d 644 (Ill. App. Ct. 1967).	Two children (P was 7, the other age not specified, but called "a playmate") kicked and pushed a dog before the dog bit the P	Yes provocation	<p>Inquire about intent, be we now know that intent does not need to be proven</p> <p>➔ But here, kicking and pushing a dog are provocation; this is the sort of provocation that the statute intends to bar recovery (people to attack a dog first should not be allowed to recover if the dog responds reasonably to the attack)</p> <p>➔ We could extrapolate a rule: person physically attacking a dog is provocation and use this case as an example of that</p>
<i>Stehl v. Dose</i> , 403 N.E.2d 1301 (Ill. App. Ct. 1980)	Guy entered into a dog's perimeter (dog was on a chain) while it was eating and it bit him. He was being friendly to the dog the whole time.	YES, provocation is reasonable here. Court does not come to a specific answer on provocation; but they say it was reasonable to find that the dog was provoked in this case.	<p>➔ The question of what conduct constitutes provocation is primarily a question of whether plaintiff's actions would be provocative to the dog</p>

		Jury concluded that D is not liable, AKA provocation. Court notes entering the dog's perimeter and that the dog was eating.	
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JD Logic

Kenny Power Discussion Section Outline

Issue: Did Kenny and Wade provoke Dingo when they barked and shouted at Dingo, threw sticks toward Dingo, ran toward Dingo close to his perimeter, and Kenny reached into Dingo's food bowl?

Rules: (Broad/General to specific)

- ➔ When an animal attacks, a person can recover from a animal's owner if the animal was not provoked. *510 Ill. Comp. Stat. Ann. 5/16*
- ➔ Under this statute there are four elements that must be proved: injury caused by a dog owned or harbored by the defendant; lack of provocation; peaceable conduct of the person injured; and the presence of the person injured in a place where he has a legal right to be. *Nelson.*
- ➔ Provocation is defined as an act or process of provoking, stimulation, or incitement. *Nelson.*
- ➔ "Provocation" within the meaning of the instant statute means either intentional or unintentional provocation. *Nelson.*
- ➔ When the case does NOT involve a dog known to be vicious, provocation should mean: Any action or activity, whether intentional or unintentional, which would be reasonably expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence. *Kirkham.*
- ➔ A reasonable dog is one that is not overly aggressive or overly docile. *Kirkham.*
- ➔ The question of what conduct constitutes provocation is primarily a question of whether plaintiff's actions would be provocative to the dog. *Stehl*
 - Stepping on a dog's tail is provocation. *Nelson.*
 - Screaming alone is not provocation. *Robinson.*
 - Kicking and pushing a dog is provocation. *Siewerth.*
 - Entering the dog's perimeter with food present can be provocation. *Stehl.*
- ➔ Synthesized Rule: The more physical contact or physical threat between the victim and the dog, the more likely a reasonable dog would attack and provocation will be established.

Explanation: Case Illustrations.

- I want to compare Kenny and Wade's behavior to similar behavior in other cases, so I want to illustrate cases that contain similar behaviors.
- *Robinson v. Meadows*: this case talks about screaming (which Kenny and Wade also did). The court said this was NOT provocation. Kenny and Wade's screaming and kicking probably did not constitute provocation.
- *Siewerth v. Charleston*: this case discusses two kids that physically hit and kicked a dog and provocation was established. Kenny and Wade never actually physically struck Dingo, but throwing stick and running toward Dingo might enough of a physical threat to establish provocation.
- *Stehl v. Dose*: In this case a guy was completely peaceful, but the court found that it was reasonable to find provocation because the man was inside the dog's perimeter while it was eating, which from the dog's perspective reasonable incited an attack.

Application:

- The screaming is probably not provocation, but the combination of physically threatening Dingo and entering his perimeter and food bowl, will probably amount to provocation. A reasonable dog, given all the circumstances, would probably attack in this instance.
- Compare to *Robinson*: screaming alone is probably not enough
- Compare to *Siewerth*: Kenny and Wade did not go as far as to hit Dingo, but the combined physical threat felt by Dingo as a result of throwing stick and lunging at him, would probably lean toward provocation.
- Compare to *Stehl*: Kenny physically entering Dingo's territory, where his food is and actually reaching into the food bowl itself, likely provocation.

Conclusion:

- The combination of behavior, especially physically threatening, entering the perimeter, and reaching into the food bowl, would likely establish that Kenny provoked Dingo's attack.

Parts of the CREAC addressing “provocation” below:

C: Conclusion

R: Rules

E: Explanation (case illustrations)

A: Application/Analysis

C: Conclusion

DISCUSSION

Mrs. Power’s ability to establish liability for Dingo’s owner is governed by Illinois statute – the Illinois Animal Control Act. The statute states, "If a dog . . . without provocation, attacks, attempts to attack, or injures any person . . . the owner of such dog . . . is liable in civil damages to such person." 510 Ill. Comp. Stat. Ann. 5/16 (West 2006). The following four elements must be proven under this statute in order for an attack victim to recover from an animal’s owner: (1) injury caused by a dog owned or harbored by the defendant; (2) lack of provocation; (3) peaceable conduct of the person injured; and (4) the presence of the person injured in a place where he has a legal right to be. *Nelson v. Lewis*, 344 N.E.2d 268, 270 (Ill. App. Ct. 1976).

This memorandum only explores the topic of provocation. If a court is to find that Kenny and Wade provoked Dingo, Mrs. Powell will likely be barred from asserting liability upon Dingo’s owner for the damages caused by the attack.

A court would likely find that Kenny provoked Dingo. When the case does not involve a dog known to be vicious, provocation means any action or activity, whether intentional or unintentional, which would be reasonably expected to cause a normal dog in similar

circumstances to reasonably react in a manner similar to that shown by the evidence. *Kirkham v. Will*, 724 N.E.2d 1062, 1067 (Ill. App. Ct. 2000). This is a case-by-case analysis that requires the court to ask from the dog's perspective, how an average dog would respond to the actions of the victim. *Id.* The more physical contact, threat conveyed, or imposition into the dog's space by the victim, the more likely the dog's response will be reasonable and the more likely provocation will be established. *See id.* at 1065-67.

In *Robinson v. Meadows*, 561 N.E.2d 111 (Ill. App. Ct. 1990), the Illinois Court of Appeals held that a dog attack in response to a child's scream was not reasonable and thus the child's scream was not provocation. In *Robinson*, a knock at the door caused two dogs to begin barking. *Id.* at 112. The barking startled a young girl (nearly four-years-old) causing her to scream. *Id.* In response to the scream, one of the dogs viciously attacked the girl causing injuries to her face and neck. *Id.* The court held that while the dog's attack was certainly in response to the girl's scream, the scream did not provoke the attack because the dog's response was not reasonable; an average dog would not respond to a scream by attacking in the same manner. *Id.* at 114.

In *Siewerth v. Charleston*, 231 N.E.2d 644 (Ill. App. Ct. 1967), provocation was found when the victim physically attacked the dog. In *Siewert*, two boys admitted to kicking and pushing a dog while they were playing on a porch. *Id.* at 645. After the boys kicked and pushed the dog, the dog growled and bit one of the boys on the head after a delay of roughly two minutes. *Id.* The court held that the pushing and kicking of a dog is precisely the type of provocation the legislature envisioned when writing the statute; the intent was to bar from recovery those victims of dog bites those who invite the attack by prodding the dog. *Id.* at 646.

In making its ruling, the court held that this dog's response was reasonable given the circumstances and thus the victim had provoked the attack. *Id.*

Stehl v. Dose, 403 N.E.2d 1301 (Ill. App. Ct. 1980), is another case in which the Illinois Court of Appeals found that the facts supported a finding of provocation. In *Stehl*, a man was attacked by a dog after entering the dog's perimeter while the dog was eating. *Id.* at 1302. The man was supposed to retrieve the dog from a farm where the dog was tied up with a twenty-five-foot chain. *Id.* The man entered the perimeter of the dog's chain and gave the dog food. *Id.* While still in the perimeter and while the dog was eating, the man turned his head and the dog attacked by biting the man's forearm causing serious injury. *Id.* The court held that these facts supported a finding that the dog's response was reasonable and that the man had provoked the dog by occupying the dog's territory with food present. *Id.* at 1303.

Each of Kenny's actions toward Dingo must be considered to make a determination about provocation. Here, Kenny's acts of screaming and barking at Dingo will probably not, alone, rise to the level of provocation. The victim in *Robinson* simply screamed, which caused the dog to bite her, but the court found a lack of provocation in that a bite response was not a reasonable response based on a scream alone. Applying the same logic as the *Robinson* court, Kenny's screaming and barking are likely not provocation. Kenny's acts of throwing sticks and lunging toward Dingo are more likely to be a basis for provocation. While Kenny's actions did not result in actual physical harm or even contact with Dingo, which distinguishes his actions from those of the boys in *Siewerth* who kicked and pushed a dog, a court would likely find that Kenny's acts of physically threatening Dingo would incite a bite response from a reasonable dog. Finally, Kenny's act of entering Dingo's physical perimeter and reaching into his dog bowl likely establish provocation. Similar to the victim in *Stehl*, who was attacked when he physically

entered a dog's perimeter while it was eating, a court would likely find that Kenny's acts of entering Dingo's space and reaching into his food bowl would incite a bite response from a reasonable dog. The combination of Kenny's physically threatening Dingo, entering his space, and reaching into his food bowl would likely be deemed provocation in Illinois.



JD Logic

MEMORANDUM

To: Helen Hoss
From: Junior Associate (Student)
Date: October 1, 2023
Re: Client, Jennifer Power; Potential Dog Bite Claim

QUESTION PRESENTED

Under Illinois statutory and common law, which allows animal attack victims to recover when the animal was not provoked, is provocation established when the victim yelled at, lunged toward, threw sticks at, and reach into the food bowl of a dog?

BRIEF ANSWER

Likely yes, a court will likely find that the actions of the victim will constitute provocation. Under Illinois common law, provocation is established when the acts of the victim are such that a reasonable dog would respond to acts with proportionate force. Under Illinois statutory law, a victim is barred from recovery if provocation is present. As is the case here, where Kenny yelled at, lunged toward, threw sticks at, and reached into the food bowl of a dog, provocation will likely be established. Thus, the victim will likely be precluded from recovering for the damages caused by the dog bite.

STATEMENT OF FACTS

Kenny Power, a ten-year-old boy, and his best friend, Wade Leblanc, met at a local park in Lineville, Illinois to play catch on July 5th, 2023. Fifteen minutes into their game of catch, Wade overthrew the ball and it landed near a dog named Dingo, who was tethered with a leash to a park bench.

When Kenny approached the dog to recover the ball, Dingo began to bark at the boys. Wade remarked, "That dog is a jerk!" to Kenny. The boys began barking and yelling at Dingo eliciting a response of even greater barking from the dog. Kenny admitted that he and Wade each threw sticks at the dog, but they did not strike him. Kenny then lunged toward Dingo making sure to stay beyond the perimeter of the dog's tether. The dog continued to bark at the boys and strived toward them to the fullest extent of his leash. The boys became tired of this activity and went back to playing; Dingo stopped barking and began to lie down under a tree near the bench to which he was tethered.

Kenny and Wade resumed their game of catch, but Wade again overthrew the ball. This time the ball landed within the perimeter of Dingo's tether and, in fact, landed in Dingo's food bowl. Kenny ran to get the ball and arrived at the food bowl at the same moment as the dog; the ball was within the reach of Dingo's mouth. As Kenny reached into the food bowl to retrieve the ball, Dingo bit Kenny's right forearm and hand several times. The bite resulted in two open wounds on Kenny's forearm. The owner of the dog stated that Dingo has no prior history of exhibiting behavior consistent with the attack on Kenny.

A bystander called 9-1-1 and the victim's mother, Jennifer Power. Kenny's injuries resulted in him receiving twenty-five stitches. His wounds later became infected and required more extensive medical treatment. Kenny currently experiences continued pain and swelling in his right arm. Kenny is expected to receive cosmetic surgery in the future to remove the scars on his arm.

Jennifer Power is considering filing a lawsuit against Dingo's owner to recover for the damages to her son that resulted from the attack.

DISCUSSION

Mrs. Power's ability to establish liability for Dingo's owner is governed by an Illinois statute – the Illinois Animal Control Act. The statute states, "If a dog . . . without provocation, attacks, attempts to attack, or injures any person . . . the owner of such dog . . . is liable in civil damages to such person." 510 Ill. Comp. Stat. Ann. 5/16 (West 2006). The following four elements must be proven under this statute in order for an attack victim to recover from an animal's owner: (1) injury caused by an animal owned or harbored by the defendant; (2) lack of provocation; (3) peaceable conduct of the person injured; and (4) the presence of the person injured in a place where he has a legal right to be. *Nelson v. Lewis*, 344 N.E.2d 268, 270 (Ill. App. Ct. 1976).

This memorandum only explores the topic of provocation. If a court is to find that Kenny and Wade provoked Dingo, Mrs. Power will likely be barred from asserting liability upon Dingo's owner for the damages caused by the attack.

A court would likely find that Kenny provoked Dingo. When the case does not involve a dog known to be vicious, provocation means any action or activity, whether intentional or unintentional, which would be reasonably expected to cause a normal dog in similar circumstances to reasonably react in a manner similar to that shown by the evidence. *Kirkham v. Will*, 724 N.E.2d 1062, 1067 (Ill. App. Ct. 2000). This is a case-by-case analysis that requires the court to ask from the dog's perspective, how an average dog would respond to the actions of the victim. *Id.* The more physical contact, threat conveyed, or imposition into the dog's space by the victim, the more likely the dog's response will be reasonable and the more likely provocation will be established. *See id.* at 1065-67.

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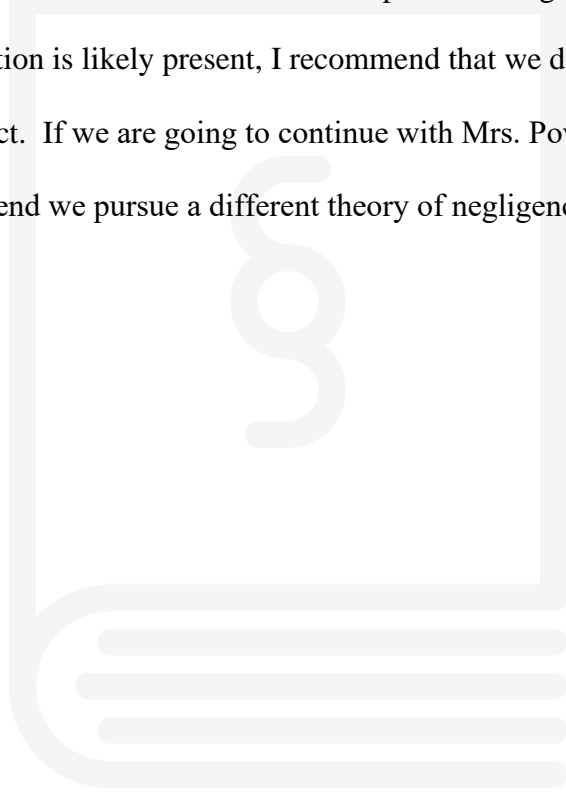
While still in the perimeter and while the dog was eating, the man turned his head and the dog attacked by biting the man's forearm causing serious injury. *Id.* The court held that these facts supported a finding that the dog's response was reasonable and that the man had provoked the dog by occupying the dog's territory with food present. *Id.* at 1303.

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CONCLUSION

Mrs. Jennifer Power will likely not be able to establish that her son, Kenny Power, was attacked by Dingo the dog without provocation. If a jury considered Kenny's actions (yelling,

throwing sticks, lunging at Dingo, entering Dingo's perimeter, and reaching into Dingo's food bowl) in their totality, they are likely to find that Kenny's acts constitute provocation. If a jury were to find provocation, the Powers will be precluded from recovering for Kenny's injuries under the Illinois Animal Control Act and common law precedent regarding liability for animal attacks. Because provocation is likely present, I recommend that we do not file a claim under the Illinois Animal Control Act. If we are going to continue with Mrs. Power's claim against Dingo's owner, I recommend we pursue a different theory of negligence.



JD Logic