

EXAMINER'S ANALYSIS OF QUESTION NO. 7

The question raised three issues: (1) Jane's liability under state statute, (2) Jane's liability under common law, and (3) whether the city is immune from Jane's suit.

A. Statutory Dog Bite Liability

Jane may be liable when her dog bites a person on public property. Pursuant to MCL 287.351(1):

If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

Christian was bitten while on public property, and under the statute it does not matter that Fido had not previously bitten anyone. Therefore, unless Fido was provoked by Christian into biting him, Jane will be liable for any injuries Christian suffered. It can be argued that Christian did provoke Fido, as Christian yelled at Fido to catch him even while Fido was already doing so and barking. One could reasonably conclude that Fido might not have continued as he did had Christian not egged Fido on. On the other hand, nothing shows that Christian hit Fido or did anything that would have caused Fido to do anything other than chase him. The better argument is that Christian did not provoke Fido, and Jane would be liable under the statute.

B. Common Law Dog Bite Liability

The existence of statutory law does not foreclose a common law claim for a dog bite. MCL 287.288. For Christian to prove his common-law negligence dog-bite claim, he must prove

"[A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen." [*Trager v Thor*, 445 Mich 95, 106 (1994) (citation omitted).]

"To make a prima facie showing of negligence, a plaintiff need only establish that the defendant failed to exercise ordinary care under the circumstances to control or restrain the animal." *Hiner v Mojica*, 271 Mich App 604, 613 (2006).

Christian will have a harder time proving his negligence claim, as it will be difficult to prove that Jane did not exercise ordinary care in controlling Fido. The evidence shows that Fido has never previously bitten anyone, and nothing in the facts suggest that Fido was acting like he would bite anyone prior to Christian being bitten. The fact that Fido was barking as he was chasing Christian is not necessarily evidence of Fido being out of control, as dogs frequently bark without biting. Likewise, there is no evidence that Jane knew or had reason to know that Fido had dangerous propensities. Therefore, there is no support for a claim for common law strict liability. *Trager*, 445 Mich at 99; *Hiner*, 271 Mich App at 609.

C. City's Immunity

It is well-settled in Michigan that governmental entities that are engaged in a governmental function are immune from tort liability unless an exception to that immunity exists. MCL 691.1407(1); *Odom v Wayne Co*, 482 Mich 459, 478-479 (2008). Here, making use of its land to provide a park for members of the public is a governmental function. *Nash v Duncan Park Comm'n*, 304 Mich App 599, 631 (2014), vacated in part on other grounds, 497 Mich 1016 (2015). Additionally, none of the statutory exceptions to the broad immunity granted against tort claims applies in these circumstances. Thus, Christian will not be successful in suing the city of Canine, as it is immune from suit.