Handout 1  
Dog bite client—Illinois  
Pre-Writing Process

1. **Step One**: intake of client facts  
Client DJ was caring for a friend’s dog and the dog went into DJ’s neighbor’s yard and bit the neighbor. DJ thinks the neighbor will sue him.

2. **Step Two**: AI macro-law search (statute or case that lays out elements of IL dog bite law)  
Any search, including Google, comes up with 510 ILCS 5/1.

3. **Step Three**: break out required elements of macro-law
   i. Dog or other animal
   ii. Without provocation
   iii. Attacks, attempts to attack, or injures
   iv. Any person
   v. Peaceably conducting himself
   vi. In any place where he may awfully be
   b. Then
      i. owner is liable

4. **Step Four**: apply client’s facts to elements
   i. Dog or other animal—yes dog
   ii. Without provocation—yes (but check)
   iii. Attacks, attempts to attack, or injures—yes, bit neighbor—injured
   iv. Any person—yes, neighbor a person
   v. Peaceably conducting himself—yes, in own yard
   vi. In any place he may lawfully be—yes, in own yard
   vii. Then—owner (or custodian or harborer) liable; JC not legal owner but may be “custodian”

5. **Step Five**: identify any questionable element(s)
   i. Check on provocation—no
ii. How do IL courts define “custodian”?

6. **Step Six**: search IL case law for non-owner liability under 510 ILCS 5/1; synthesize and articulate Rule for owner/custodian

Westlaw search of “510 ILCS 5/1 and owner” turns up definition in statute itself and 48 cases and blurbs saying anyone who harbors or cares for a dog or who places himself in the position of an owner is liable even if not the legal owner. Not all 48 are relevant and would need to be filtered for similar facts—non-owner caring for dog that injures someone.

Filtered cases (about 6) can be sorted as to outcomes—court says yes an “owner” or no not an “owner” (see handout 2)

Difference between yes and no is whether a person voluntarily consents to care for the dog and provides some significant care for the dog

Rule: When applying the Illinois Animal Control statute, Illinois courts find that a person is an “owner” for purposes of liability under the statute if the person voluntarily and knowing agreed to care for the animal and provided some kind of care, such as feeding, even if the person is not the legal owner.

7. **Step Seven**: compare client’s facts to yes and no cases

DJ did not voluntarily agree to care for his friend’s dog; therefore she is probably not an “owner” under the law and therefore not liable.
Handout 2
Synthesizing a Rule from Relevant Cases and Statutory Definition

“Owner means any person having a right of property in an animal, or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premises occupied by him or her.”


Cases holding Yes on owner:

- **Beggs v. Griffiths:** “Definition of the term ‘owner’ under Animal Control Act section imposing liability on owner of animals who attacks or injures [sic] without provocation is broader than actual ownership of the animal but requires a position of some control like that an owner would maintain.”
- **Docherty v. Sadler:** “Plaintiff who is responsible for feeding and watering of animal, if injured while providing such care, is ‘owner’ for purposes of Animal Control Act, . . .”
- **VanPlew v. Riccio**, 739 N.E.2d 1023 (Ill. App. Ct. 2000): factually similar to Docherty, holding, essentially, that a professional dog sitter is an owner for the time that the dog is under the individual’s custody and control, no matter how brief.

Cases holding No on owner:

- **Frost v. Robave:** “[b]usiness was not a ‘keeper’ of dog and thus was not liable for dog attack that occurred off business premises and after business had closed for day when dog escaped from one of business owner apartment, even though dog escaped as business owner was leaving on work-related errand and owner occasionally took dog to work, where that business owner was only person from business who exercised custody or control over dog, owner took dog to work for his own convenience, and dog’s presence at work did not benefit business.”
- **Steinberg v. Petta**, 501 N.E.2d 1263 (Ill. 1986): ownership “involves some measure of care, custody, or control.” The Supreme Court of Illinois found that the landlord, who permitted his tenants to keep a dog on the property, was not an “owner” of the dog within the meaning of the relevant statute. Merely owning the land on which the animal is kept is not enough to make one an owner under the Act. The court noted that usually ownership is a question of fact for the trier of fact, but some evidence had to be present to suggest that a defendant actually harbored the dog. If none is present, as here, the court may decide as a matter of law. Interestingly, the court used a Black’s Law Dictionary definition of “harbor” to reach its decision.
- **Severson v. Ring**, 615 N.E.2d 1 (Ill. App. Ct. 1993): defendant homeowner was not the dog’s owner when the homeowner allowed another, the dog’s true owner, to tie his dog in the homeowner’s backyard on occasions when the true owner had to cut his grass. No evidence showed that the homeowner exercised any level of care, custody, or control
over the dog because the dog's true owner chained the dog to the tree at the homeowner's house, and “both homeowner and dog's owner testified that dog's owner gave dog food and water on date of attack and that homeowner did not take care of dog.” The court cited to the Steinberg court’s “degree of care” requirement and suggested that just giving food and water does not necessarily amount to care. The case includes an excellent definition of summary judgment; it also speaks to the provocation element, saying that “greeting or petting a dog does not generally constitute provocation.”

**Secondary Source**


“Once the threshold issues of animal and injury are dealt with, an attorney representing or defending a dog bite case under the Act must understand how the Act creates ‘ownership.’ Ownership does not refer to the legal owner of the dog. Instead, owner under the statute means ‘any person having a right of property in an animal, or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premises occupied by him or her.’20 This definition “has been consistently construed to involve some measure of care, custody, or control.”21

**Synthesized Rule for “owner”**

Illinois law establishes that an individual qualifies as an owner of an animal if he or she voluntarily assumes a measure of responsibility to care for an animal and has the responsibility to manage or exert his or her control over the animal in a manner that owners would generally be accustomed, regardless of the amount of time the animal is in the person’s care or the person’s previous interactions with the animal. Care consists of providing food, water, and letting the animal outside, which constitutes more than passive ownership of the animal. Steinberg v. Petta, 501 N.E.2d 1263, 1265 (Ill. 1986); Beggs v. Griffith, 913 N.E.2d 1230, 1235 (Ill. App. Ct. 2009); VanPlew v. Riccio, 739 N.E.2d 1023, 1024 (Ill.App. 2 Dist. 2000); Severson v. Ring, 615 N.E.2d 1, 4 (Ill.App. 3 Dist. 1993); Docherty, 689 N.E.2d at 334.
MEMORANDUM

To: Supervising Attorney

From: Associate

Date: October 5, 2019

Re: Jaime Castro’s liability under Illinois’s Animal Control Act

QUESTION PRESENTED

Under the Illinois Animal Control Act, is Jaime Castro liable for injuries Matt Bevers sustained when a friend’s dog, left on Castro’s property without her knowledge or explicit consent, bit Bevers’ hand?

BRIEF ANSWER

Probably no. Castro will not be liable for the injuries Bevers sustained. The Illinois Animal Control Act holds the owner of the animal liable in civil damages for any animal attacks or injuries as long as the 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. An owner is defined as someone who knowingly and voluntarily consents to care for an animal, even if not the legal owner. In this case, the dog attacked Bevers without provocation while Bevers peaceably conducted himself at the party to which Castro invited him. A court will likely hold, however, that Castro is not liable for Bevers’s injuries because she did not voluntarily assume responsibility to manage, care for, or control the dog in a manner that owners would generally be accustomed, regardless of the amount of time the dog had been in her care previously.
FACTS

Our client, Jaime Castro, anticipates that Matt Bevers will sue her. Bevers, a professional video gamer, claims he will sue for injuries sustained from a dog bite he received on Castro’s property.

Castro lives in a home with her housemate, Ilana Wexler. Their friend, Abbi Abrams, has a greyhound licensed in Abrams’s name. Oftentimes, Abrams would leave her dog at Castro’s and Wexler’s residence. Castro and Wexler kept dog treats for Abrams’s dog, indicating the frequency that Abrams would leave her dog there.

Castro planned to have a viewing party on August 5, 2019 for the Cubs-White Sox series. She left earlier in the day to the grocery store, and she returned home around 3 p.m. At home she found Abram’s dog alone in the backyard. She had not known that Abrams was going to leave the dog that day. She provided the dog with a treat and some water.

Because the party would be happening in her backyard, Castro kept the dog indoors and closed the doors to the house. She placed a sign on the front door that indicated to guests to go around the house to the back to enter the party.

Guests arrived at the party, and they all entered the backyard through the back of the house instead of through the front door. Bevers arrived with a plate of chicken, and unlike the other guests, he entered the home through the front door. As he exited the home to the backyard, the dog ran between his legs causing him to lose his balance and drop the chicken. The dog tried to eat the chicken but instead bit Bevers’s hand. From the bite, Bevers sustained an injury to his thumb and index finger causing an injury that required Bevers to receive seven stitches in his hand.
Bevers threatens to sue Castro for damages including his medical bills as well as the losses incurred from his inability to play videogames as a result from his injury.

**DISCUSSION**

The Illinois Animal Control Act seeks to encourage tighter control on animals to protect the public from harm. *Docherty v. Sadler*, 689 N.E.2d 332, 334 (Ill.App. 1997). The statute explains what qualifies as an animal attack:

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 for the injury proximately caused thereby.


A plaintiff must show that the animal attack occurred while he or she peaceably conducted himself, that he did not provoke the animal, and that he was in a place he could lawfully be. In the present case, the encounter between Bevers and the dog satisfies the elements that qualify an attack under the statute. Bevers peaceably conducted himself at the time of the incident. He entered the home through the front door and exited to the backyard through the back door in order to enter the party. Bevers did not provoke the dog when it bit him. He dropped a plate of chicken, and when he reached to pick it up, the dog bit his hand while attempting to eat the chicken. Castro invited Bevers to the party, so he lawfully could be there. Thus any person who qualifies as the dog’s owner is likely liable to Bevers.

The question remains whether Castro qualifies as an owner under the Illinois Animal Control Act. The statute provides a definition of an owner:

Owner means any person having a right of property in an animal, or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premises occupied by him or her.
Furthermore, Illinois courts have required more than passive involuntary care. Instead, for owner liability, they require that a person voluntarily care for the animal when an injury occurs and that the person actively demonstrate the care by an act such as feeding. Thus, a court will probably not hold Castro liable for the injuries Bevers sustained from the dog attack because she did not voluntarily assume responsibility to manage, control or care for the dog in a manner that owners would generally be accustomed.

A. Under the Illinois Animal Control Act, Jaime Castro does not qualify as an “owner” because she did not voluntarily care for the dog when the bite occurred.

Illinois case law establishes that an individual qualifies as an owner of an animal if he or she voluntarily assumes a measure of responsibility to care for an animal and has the responsibility to manage or exert his or her control over the animal in a manner that owners would generally be accustomed, regardless of the amount of time the animal is in the person’s care or the person’s previous interactions with the animal. Care consists of providing food, water, and letting the animal outside, which constitutes more than passive ownership of the animal. *Steinberg v. Petta*, 501 N.E.2d 1263, 1265 (Ill. 1986); *Beggs v. Griffith*, 913 N.E.2d 1230, 1235 (Ill. App. 2009); *VanPlew v. Riccio*, 739 N.E.2d 1023, 1024 (Ill.App. 2 Dist. 2000); *Severson v. Ring*, 615 N.E.2d 1, 4 (Ill.App. 1993); *Docherty*, 689 N.E.2d at 334.

Illinois courts require a measure of care and custodianship that demonstrates more than passive ownership of the animal in order to be the owner. *Steinberg*, 501 N.E.2d at 1266; *Severson*, 615 N.E.2d at 4. In *Steinberg*, the court held that the defendant did not qualify as an owner when he, an absentee landlord, allowed his tenants to keep a dog on the premises, and the dog bit the plaintiff. *Steinberg*, 501 N.E.2d at 1266. The court characterized the allowance of the dog on the premises as “passive ownership,” which did not satisfy the measure of care as dog owners customarily assume. *Id.* Similarly, in *Severson*, the court held that the defendant did not
qualify as an owner when she allowed a friend to chain his dog to a tree in her backyard, and it attacked a child on her property. Severson, 615 N.E.2d at 4. Though the defendant and her boyfriend checked the dog’s food and water, they did not need to for its care. Id at 3. The court reasoned that because the defendant did not need to provide food or water, nor do anything necessary for the care of the dog, she did not fulfill the measure of care for an owner. Id.

The measure of care pursuant to ownership includes feeding the animal, providing water, and letting the animal outside. VanPlew, 739 N.E.2d at 1026; Docherty, 689 N.E.2d at 335. In VanPlew, the court held that the plaintiff met the standard of care that made her an owner under the statute when she assumed the responsibilities of feeding the dog, giving it water, and letting it outside while its legal owner went on vacation. VanPlew, 739 N.E.2d at 1025. While fulfilling her responsibilities towards the dog, it bit her. Id. The court held that because she had the specific responsibilities of care towards the dog including providing it with food and water, and letting it outside, she provided necessary care, and undertook custody in a manner that owners would generally assume. Id. at 1026. Similarly, in Docherty, the court held that the plaintiff qualified as an owner when a dog belonging to his absent neighbor injured him while under the plaintiff’s care and control. 689 N.E.2d at 333. The court held that because he had the express responsibilities of feeding the dog, giving it water, and letting it out into the yard, he had the “status of owner.” Id. at 335.

To be an owner, Illinois courts include voluntariness as an element to an individual’s care, custody or control over the animal. VanPlew, 739 N.E.2d at 1026; Docherty, 689 N.E.2d at 335. The court in VanPlew held that the plaintiff qualified as the owner when she took the job to pet sit for the defendant while the defendant travelled. 739 N.E.2d at 1024. The court reasoned that because the plaintiff voluntarily placed herself in a position of control akin to an owner, she
had custody over the dog at the time of the injury. *Id.* at 1026. Similarly, the court in *Docherty* held that the plaintiff had ownership of the dog when he explicitly agreed to take on the responsibilities of care for the defendant’s dogs while the defendant travelled. 689 N.E.2d at 333. The court reasoned that because he voluntarily took control of the dogs, he had custody over them at the time of injury. *Id.* at 335.

Although no Illinois courts have ruled over a case in which a party had involuntary care or control over an animal, the defendant in *Rodriguez v. Cordasco*, a New Jersey case, did not expressly assume control over stray dogs on her property, and the court found that the defendant did not qualify as the owner under the New Jersey statute. The stray dogs merely remained on her property and she sporadically fed them, and, therefore, she did not “owe a duty of care to the public to protect against the action of those dogs.” 652 A.2d 1250, 1252. When the stray dogs ran from her property and chased the plaintiff, she did not have liability over them. *Id.* The court reasoned that the defendant’s sporadic feeding did not make her an owner or qualify her as a keeper of the dogs because she did not expressly assume management, care, or control over the dogs. *Id.* at 1253.

If someone voluntarily assumes control or management of an animal and does not exercise that ability to control or manage an animal to the degree an owner would be accustomed, he or she is liable as an owner. *Beggs*, 913 N.E.2d at 1237. In *Beggs*, the court held that the defendant had the status of owner when a prospective buyer of his property sustained injuries on his property from the defendant’s friend’s horses. *Id.* The defendant voluntarily gave his friend’s horses access to his land and barn for their care while still maintaining the ability to control when the horses could be on his property. *Id.* at 1236. The court reasoned that because he chose not to exercise his control over the horses by preventing them from having access to his
barn when the plaintiff visited, and because he facilitated the plaintiff’s visit, he qualified as an owner. *Id* at 1236-37. Conversely, in *Rodriguez*, the New Jersey court ruled that the defendant’s actions of feeding the stray dogs did not give her the duty to assume control over them to protect the public, so she did not have to exert control over the dogs as the plaintiff passed her house. 652 A.2d at 1252.

Castro’s care and custodianship of the dog could be characterized as passive ownership by Illinois courts. In *Steinberg*, the court held that the defendant was not an owner because he merely allowed his tenant’s dog to remain on the premises. 501 N.E.2d at 1266. Similarly, at the moment of the attack, Castro merely allowed the dog to remain on her property, so as in *Steinberg*, a court will likely hold that this level of care does not fulfill a measurement of care for the dog beyond passive. Bevers could argue that unlike the defendant in *Steinberg*, Castro did provide some care to the dog when she gave it a treat and water. However, Castro providing the dog with a treat and water does not provide a dog necessary care pursuant to ownership. Similarly, the court in *Severson* ruled that the defendant was not the owner because she did not need to provide food or water, nor do anything necessary for the care of the dog besides allow it to remain chained in her backyard. 615 N.E.2d at 4. A court will likely hold that Castro is not an owner because, like the defendant in *Severson*, she did not need to provide a treat and water to the dog for its care.

The level of care that Castro gave the dog does not fulfill the standard that Illinois courts established for an owner including feeding the animal, providing water to the animal, and letting the animal outside. The courts in *VanPlew* and *Docherty* ruled that the plaintiffs were both owners because they assumed the responsibilities of feeding the dogs, giving them water and letting them outside, so they fulfilled the standard of care necessary to be an owner *VanPlew*,

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739 N.E.2d at 1024; Docherty, 689 N.E.2d at 334. Conversely, Castro only provided the dog with water and a single treat. Bevers could argue that this constituted a level of care that an owner would be accustomed to giving. However, Castro did not let the dog out as in the cases of VanPlew and Docherty. Once she brought the dog inside the home, she did not let him out for his care. Also, it can be argued that a treat does not qualify as food akin to the substantive food provided to the dogs by the plaintiffs in VanPlew and Docherty. Courts would likely hold that she does not qualify as an owner because unlike the plaintiffs in VanPlew and Docherty, she did not fulfill all three elements of the measure of care pursuant to ownership.

Castro does not qualify as an owner of the dog because she did not voluntarily assume care, custody, or control over the dog. In both VanPlew and Docherty, the plaintiffs placed themselves in positions analogous to owners when they voluntarily assumed the roles as pet sitters while the legal owners were not home. VanPlew, 739 N.E.2d at 1024; Docherty, 689 N.E.2d at 334. The plaintiffs in these cases voluntarily took on these roles with express knowledge of their duties of care towards the dogs, so the courts found them both liable as owners under the statute VanPlew, 739 N.E.2d at 1024; Docherty, 689 N.E.2d at 334. In VanPlew, the plaintiff had an agreement to provide her services of care to the dog for money. VanPlew, 739 N.E.2d at 1024-23. Conversely, Castro did not give express agreement to care for the dog when she came home and found the dog in her backyard. Bevers could argue that Castro, unlike the plaintiffs in both Docherty and VanPlew, had cared for the dog on occasions previously, so she gave implicit consent for the care of the dog. Illinois courts have not considered a case involving involuntary care of a dog; in a New Jersey case, however, a court did not hold the defendant liable for dogs when they chased the plaintiff, although the defendant had a history of providing food for stray dogs on her property. Rodriguez, 652 A.2d at 1252. The
court in Rodriguez ruled that feeding the dogs when they would come on property did not constitute ownership. *Id.* at 1252. Similarly, Castro did provide care for the dog in the past, but she, like the defendant in Rodriguez, did not give express consent to the dog being on her property at the time of the attack, so Illinois courts may rule that she is not an owner.

Castro did not voluntarily assume control over the dog, but she did exercise her ability to control the dog in order to protect her guests, so she should not be liable as an owner of the dog at the time of the attack. In Beggs, the court held that the defendant was an owner because he did not exercise his control over the horses on his property to prevent them from accessing his barn when he knew the plaintiff would be on his property. *Beggs*, 913 N.E.2d at 1236. In addition, the defendant solicited the plaintiff as a potential buyer of his property, so he placed her on in the same location as the horses that harmed her. *Id* at 1236-37. Similarly, Castro invited Bevers to her party, but unlike the defendant in Beggs, Castro did not assume control voluntarily, and she did exercise her ability to control the dog to protect her guests. Castro controlled the dog by keeping him inside the house to prevent interaction between the dog and the guests attending the party in the backyard. In addition to her control over the dog’s location, Castro placed a sign on the front door indicating to guests to enter the party through the back of the house, supporting her intention to keep the dog away from the guests. It can be argued that Castro did not have a duty to control the dog, and she provided a public service by trying to control the dog. The court in Rodriguez held that the defendant had no duty to protect the public by assuming control over the stray dogs. Similarly, Castro found the dog on her property upon returning home, and she had no duty to protect her guests from it. Illinois court will likely hold that Castro does not qualify as an owner because she did not voluntarily assume control over the animal, so she did not have the duty to control the dog.
CONCLUSION

The Illinois Animal Control Act holds animal and dog owners liable to civil damages if the animal attacks another person. Castro can concede that the dog attacked Bevers without provocation while Bevers peaceably conducted himself in a place that he could lawfully be. She will probably be able to establish that she is not the legal owner of the dog under the Animal Control Act even though the dog was on her property. She can establish that she did not provide adequate care in a manner that would generally be assumed by an owner. She can argue that the dog was there without her consent so she involuntarily cared for it. Finally, Castro did not voluntarily assume control over the dog, but did attempt to control it by keeping it indoors. She intended to keep the dog away from the guests by keeping the dog indoors and by placing a sign on the front door to keep the guests from entering the home. For these reasons, Castro was not the legal owner of the dog at the time the attack occurred, and she should not be held liable under the Illinois Animal Control Act.
MEMORANDUM

To: Supervising Attorney
From: Summer Intern
Date: October 19, 2019
Re: Tom Evans’ immunity from liability under Washington’s recreational use statute; latent condition; conspicuous sign

QUESTION PRESENTED
Under the Washington recreational use statute, is Tom Evans immune from liability for injuries Daniel Jones suffered when Jones fell through a defective railing on a fifteen-foot observation tower on Evans’ land after Evans had used two strips of duct tape to repair the railing and additional duct tape to write “LOOSE” on the floor of the tower in twelve-inch high letters?

BRIEF ANSWER
Probably yes. Evans will be immune and thus will not be liable for Jones’ injuries. The Washington recreational use statute immunizes landowners who open their land to the public without charging a fee unless the user sustains injuries from a known, dangerous, artificial, and latent condition for which conspicuous warning signs were not posted. In this case, the loose railing was undisputedly a known, dangerous, and artificial condition. A court is likely to hold, however, that the condition was not latent because the duct tape made it readily apparent to the general class of recreational users. In addition, a court is likely to find that Evans' warning sign was conspicuously posted because it was
visible at the time Jones fell and imparted critical information to tower users about the risk of falling.

FACTS

Our client, Tom Evans, anticipates that Daniel Jones’ parents will sue him. Jones, eleven, fell from an observation tower on Evans’ property and was injured. Evans inherited a 100-acre plot of land in Granite Falls, Washington, from his grandmother five years ago. Evans allows the public to use his property free of charge. The property is undeveloped except for a log cabin, which Evans uses infrequently because he lives in Olympia, Washington.

Local Boy Scout troop leaders approached Evans three years ago and asked for permission to build a fifteen-foot observation tower on Evans’ property. Evans granted the request. He did not pay the Scouts to construct the tower nor did he require the Scouts to pay him for using his land.

In November 2012, during one of his visits to the log cabin, Evans inspected the observation tower. While on the deck of the tower, he noticed that part of the railing was loose and secured it with two fourteen-inch strips of grey duct tape. He used the same duct tape to write the word “LOOSE” in twelve-inch letters directly in front of the loose railing on the floor of the deck. Satisfied with this warning, Evans left the property and has not returned.

On May 18, 2013, children from the local library used the property for a field trip under the supervision of an adult volunteer. While they were on the observation tower, the taped railing gave way, and four of the children fell to the ground. Three children were unharmed, but Jones fractured his vertebrae and was
hospitalized. His doctors believe that paralysis is possible, and his parents intend
to sue Evans for damages. Evans has come to this firm because he wants to know
if he will be legally responsible for Jones’ injuries.

DISCUSSION

I. Under the Washington recreational use statute, Evans is likely immune
from liability for Jones’ injuries.

A Washington state recreational use statute immunizes landowners who
open their land to the public from negligence suits if people using the land are
encourage landowners to allow public use of private land, and it thus limits the
liability of landowners who make their land available to the public for recreational
purposes without charge. Van Dinter v. City of Kennewick, 846 P.2d 522, 524
(Wash. 1993). Under the Washington statute, Evans can only be held liable for
Daniel Jones’ injuries if certain exceptional conditions exist. The statute applies to
Evans’ situation, and all the exceptions are not met. He will, therefore, not be
liable for the injuries that Daniel Jones incurred when he fell from the observation
tower on Evans’ land.

The Washington recreational use statute provides:

(1) Except as otherwise provided in subsection (4) of this section, any public or private landowners or others in lawful possession and control of any lands . . . who allow members of the public to use them for the purposes of outdoor recreation . . . without charging a fee of any kind therefor [sic], shall not be liable for unintentional injuries to such users. . . .

(4) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.

For the Washington recreational use statute to apply to this case, a landowner must satisfy three initial criteria. Specifically, a landowner must (1) have lawful possession of land, (2) make that land available to the public for recreational purposes, and (3) not charge a fee of any kind for use of the land. *Id.* If landowners satisfy these criteria, the statute will provide them with immunity from liability unless the condition that caused the injury to the user of the land was known, dangerous, artificial, and latent. *Id.* Even if these four conditions are met, a landowner will escape liability if he has conspicuously posted warning signs. *Id.*

The three initial criteria for the statute’s applicability are met: first, Evans had lawful possession of the land because he inherited it from his grandmother; second, he allowed the public to use the land recreationally; and third, members of the public can use the property without paying him. Because Evans lawfully possessed the land and allowed others to use his land without charging a fee, the recreational use statute will apply to Jones’ injury and should protect Evans from liability.

Additionally, the circumstances surrounding Jones’ injury do not fit all the exceptions listed in subsection (4) of the recreational use statute: a “known, dangerous, artificial, latent condition.” *See id.* The statute requires that all four exceptional conditions be present for liability, and “latent” probably is not met in this case. Here the injury-causing condition was undisputedly known, in that Evans knew about the loose railing. *See Nauroth v. Spokane Cnty.*, 88 P.3d 996,
997 (Wash. Ct. App. 2004) (holding that actual knowledge of a particular condition is paramount in determining whether an injury-causing condition is “known”). It was also dangerous, in that it caused harm. See Cultee v. City of Tacoma, 977 P.2d 15, 23 (Wash. Ct. App. 1999) (holding that “dangerous means a condition that can pose an unreasonable risk of harm). It was artificial, in that the Boy Scouts built the tower. See Davis v. State, 30 P.2d 460, 462 (Wash. 2001) (holding that “artificial” means “contrived through human art or effort”).

Two elements, however, require further analysis: whether the loose railing was latent and whether Evans posted a conspicuous sign. The loose railing was not latent because it was readily apparent to the general class of users. See Ravenscroft v. Wash. Water Power Co., 969 P.2d 75, 82 (Wash. 1998); Widman v. Johnson, 912 P.2d 1095, 1098 (Wash. Ct. App. 1996); Tennyson v. Plum Creek Timber Co., 872 P.2d 524, 527 (Wash. Ct. App. 1994). People using the tower could readily see the broken railing. On this basis alone, Evans should not be liable. Moreover, Evans is further protected in that he posted a conspicuous warning sign because the duct tape warning “LOOSE” was legible, discernible, and imparted the critical information not to approach the railing. See Goodwin v. Georgian Hotel Co., 84 P.2d 681, 684-85 (Wash. 1938); United States v. Bichsel, 395 F.3d 1053, 1055 (9th Cir. 2005); Bilbao v. Pac. Power & Light Co., 479 P.2d 226, 228-29 (Or. 1971).
A. The loose railing was not latent because it was readily apparent to the general class of recreational users in that Evans marked it with duct tape.

A condition is latent if it is not readily apparent to the general class of recreational users; what a particular user who examines the condition as a whole sees or does not see is immaterial. See Ravenscroft, 969 P.2d at 82; Widman, 912 P.2d at 1098; Tennyson, 872 P.2d at 527.

What a general recreational user easily can see determines whether a condition is latent, whether or not the injured individual actually saw it. Ravenscroft, 969 P.2d at 82-83; Widman, 912 P.2d at 1097. In Ravenscroft, the plaintiff was riding in a boat on a human-made reservoir that the defendant created and maintained, when the boat hit a submerged tree stump. 969 P.2d at 77-78. The boat driver testified that he did not see the submerged stumps, and witnesses stated that other boats had also hit the stumps, indicating that the stumps were not readily apparent. Id. at 83. Because the stumps were not obvious or readily apparent, the court held that submerged stumps could constitute a latent condition for purposes of the recreational use statute, finding that summary judgment declaring the condition not latent was inappropriate. Id.

Conversely, in Widman, the plaintiff was driving on the defendant’s logging road that intersected with a state highway. 912 P.2d at 1098. The plaintiff did not see the intersection, drove directly across the highway, and collided with a truck on the highway. Id. The court found that the intersection was not latent because it was readily apparent to a general class of users, even though the individual plaintiff did not see the intersection. Id. at 1097.
In determining whether a condition is readily apparent to users, courts also consider the perspective of users who examine the condition as a whole. See *Tennyson*, 872 P.2d at 527. An individual user’s failure to discover a condition has no bearing on whether the condition was latent. *Id.* In *Tennyson*, the plaintiff fell from his motorcycle on a gravel mound where one side was excavated. *Id.* The court found that the excavation was not latent because it was in plain view and readily apparent to anyone who examined the gravel mound as a whole, even if the plaintiff himself did not see the excavation. *Id.* at 526-28.

In Evans’ case, the loose railing was probably not latent because it was readily apparent to the general class of recreational users. The gray tape that was wrapped around the rail contrasted with the wood. This one rail differed from all the other rails because it had duct tape at its junction with the tower. The duct-taped railing is similar to the condition in *Widman* because duct tape wrapped around a wood railing is readily apparent to general users just as an intersection with a state highway is readily apparent. See *Widman*, 912 P.2d at 1098. Although a duct-taped railing is less obvious than an intersection with a state highway since a railing is smaller and not as visible from a distance, nonetheless the duct-taped railing was apparent to any user who examined the condition as a whole, unlike the submerged tree stumps in *Ravenscroft*, which no one could see. See *Ravenscroft*, 969 P.2d at 83. Even if Jones failed to see the obvious duct-taped railing, just as the plaintiff in *Widman* failed to observe the intersection, 912 P.2d at 1098, the duct taped-railing was still not latent, as general users of the tower would have noticed it.
That no other users were injured on the tower before Jones’ accident also supports the conclusion that the duct-taped railing was not likely a latent condition. Unlike the situation in Ravenscroft, when numerous other boaters hit the submerged stumps before the plaintiff’s accident, no one else was injured on the observation tower before Jones fell. The railing had been broken for five months, but as far as Evans knows, no other users were injured. Because the general class of users has never been injured from using the tower, the defect in the loose railing was most likely obvious to the users.

Most users who examined the observation tower as a whole would have noticed the duct-taped railing, thereby further supporting that the railing was not a latent condition. Like the excavation in Tennyson that was readily apparent to anyone who examined the gravel mound as a whole, 872 P.2d at 527, the loose railing was readily apparent to anyone who examined the tower as whole because that particular railing was bound with duct tape. None of the other railings on the tower was taped. As a result, the loose railing was not latent, and a court will likely find that Evans is immune from liability because Jones cannot prove every element of the exception to the recreational use statute. Furthermore, even if a court found that the condition was latent, Evans should still avoid liability because he posted a conspicuous warning sign.

B. A court is likely to find that Evans’ warning sign was conspicuously posted because it was visible at the time Jones fell, and it imparted critical information about the risk of falling to a general class of recreational users.

Washington courts have not directly ruled on the meaning of conspicuously posted warning signs in the context of the recreational use statute.
See Ravenscroft, 969 P.2d at 82. In dicta, however, the Ravenscroft court addressed the issue of warning by referring to the legislature’s intent to encourage landowners to make their land available for recreational users:

[w]here such a [dangerous, artificial, latent] condition exists and the landowner knows of its existence, the Legislature intended the landowner have a duty to warn of the dangerous condition. We do not view this as an onerous duty. The duty to warn does not require a landowner to post a sign on every stump.

Id. (emphasis added). The court suggested that the placement of buoys in the area near the submerged tree stumps would have been a sufficient warning. Id. The court required a general notification of the danger so as to prevent injury but did not require the duty to warn to be so onerous as to limit landowners’ desire to open their lands to the public. Id.

Given the absence of specific rulings on the meaning of conspicuous in the Washington recreational use statute, Washington decisions on the meaning of conspicuous in other contexts and decisions from other jurisdictions that have dealt with warning signs are instructive. Signs are conspicuously posted when they are legible, readily discernible, and calculated to impart the necessary information. See Goodwin, 84 P.2d at 684-85; Bichsel, 395 F.3d at 1055; Bilbao, 479 P.2d at 228-29.

A conspicuous posting is one that imparts the necessary information in a readily discernible manner. Goodwin, 84 P.2d at 684-85. In Goodwin, the court applied a Washington statute that capped a hotel’s damages for items left in a safe if the hotel had posted signs in conspicuous places indicating the limited liability. Id. at 683-84. In that case, the hotel placed a sign indicating the limited liability
on a wall approximately four and a half feet behind the registration desk. *Id.* at 683. The Supreme Court of Washington established that to be conspicuous, the notice had to be “readily discernible, legible and calculated to impart the necessary information.” *Id.* at 684-85. The court found that the sign behind the desk was conspicuous and no different from signs that might be placed in a showcase or behind a railing, noting that such signs were not insufficient merely because the guest could not stand directly next to the sign. *Id.*

Under the Washington recreational use statute, the duty to conspicuously post a warning sign entails giving such warning as may be reasonably necessary for protection under the circumstances. *See Bilbao,* 479 P.2d at 228-29. In *Bilbao,* the plaintiff tripped on a metal cable near a public picnic area in Washington. *Id.* at 228. The landowner made no effort to mark the cable or place signs warning of its presence. *Id.* The parties agreed that the Washington recreational use statute applied. *Id.* at 227. The Oregon Supreme Court noted that conspicuously posting a warning sign entails giving such warning as may be reasonably necessary for protection under the circumstances. *Id.* at 228-29.

A sign is conspicuously posted if it reasonably imparts the necessary information contained on the sign. *Bichsel,* 395 F.3d at 1055. In *Bichsel,* the defendant chained himself to the federal courthouse to protest the impending Iraq war. *Id.* at 1054. The defendant ignored a police officer’s order to unchain himself. *Id.* A sandwich board was usually posted outside the courthouse indicating that people must comply with police officers’ orders and that these regulations apply outside the entrance, but the defendant had chained himself to
the door of the courthouse before the sign was placed outside for the day. *Id.* at 1054, 1056. The court found that a sign is conspicuously posted if it is “reasonably calculated to impart the information in question.” *Id.* at 1055. The sign in that case was not conspicuously posted because it was not outside where the defendant had chained himself. *Id.* at 1056.

Here, a court will likely find that the warning sign was conspicuously posted. Evans used twelve-inch-tall letters to indicate that the railing was loose. He placed the letters, made of grey duct tape, directly in front of the railing. The twelve-inch grey letters provided a contrast with the rest of the observation tower. The location of the warning was sufficient because users could not approach the broken railing without also approaching the “LOOSE” sign on the floor in front of the railing. While the court in *Goodwin* found that a sign that was at least four and a half feet away from guests was conspicuously posted, 84 P.2d at 685, here users of the observation tower could not have approached the broken railing without standing right in front of the “LOOSE” sign. Therefore, the sign was likely conspicuously posted.

Furthermore, the warning was designed to impart the necessary information to provide protection for recreational users and was thus conspicuously posted. By stating “LOOSE” in the same duct tape that was wrapped around the railing, the warning was clear to a recreational user that the railing directly above the letters was not secure. The warning was readily discernible, legible, and calculated to impart the necessary information: the railing was loose. *See Goodwin*, 84 P.2d at 684. Evans provided more warning for users
that the landowner in *Bilbao*, who did not provide any warning sign. See *Bilbao*, 479 P.2d at 228. Evans’ sign provided protection for users because it put them on notice of the railing’s unstable condition.

That the sign was not at the entrance of the tower where users would have to pass the sign before climbing up the tower does not render the warning insufficient. Unlike the defendant in *Bichsel* who was arrested outside the courthouse before ever passing the sign, 395 F.3d at 1054, 1056, users of Evans’ land could not reach the broken railing without first walking in front of the warning sign.

If landowners were required to place an excessive number of signs to impart a sufficient warning, the purpose of the Washington recreational use statute would be defeated. The *Ravenscroft* court suggested that the placement of buoys around the submerged tree stumps would be a sufficient warning. 969 P.2d at 82. Here, Evans went even further than a general notification akin to the placement of buoys: he wrote out in duct tape the specific danger. Because the warning of “LOOSE” was legible, discernible, and imparted the relevant information necessary to provide protection for the user, a court is likely to find that the duct-taped sign constituted a conspicuous warning.

**CONCLUSION**

The Washington recreational use statute provides immunity to landowners who allow the public to use their land, subject to limited exceptions. Evans could concede that the loose railing was known, dangerous, and artificial, but he can likely show that it was not latent as it was readily apparent to the general class of
users. Evans would probably also be able to demonstrate that his warning sign was conspicuously posted because it was legible, discernible, and imparted the relevant information necessary to provide protection for the general class of recreational users. Because the railing was not latent and the sign conspicuous, Evans should not be liable for Jones’s injury.
Handout 5
Structure of an Office Memo

**Question Presented:** Under [governing law], is [answer to client’s question] when [key facts that occurred; i.e facts on which case turns]

**Brief Answer:** [answer to client’s question indicating degree of probability] [legal standard] [key facts applied to legal standard]

**Facts:** [context] [relevant facts in chronological order in past tense] [exception for ongoing conditions]

**Analysis:** Umbrella:
- [conclusion and context for governing law; can be intent of governing law]
- [relevant part of governing law quoted]
- [explanation of governing law—elements/structure pulled out]
- [facts applied to elements]
- [dismissing uncontested elements with facts]
- [pulling out contested element(s)—sub-issues]

Subsection(s) on contested element(s)
- [conclusion of client’s facts on sub-issues]
- [synthesized rule for sub-issue]
- Rule divided into topics and [discussion of cases from which rule was synthesized: holding, key facts, court’s reasoning—organized pro and con] under each topic
- [client’s facts analogized and distinguished from cases] using same topics
- [conclusion of sub-issue]

**Conclusion:** [answer to client’s question, pulling together sub-issues’ conclusions]