IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Evans v. Anderson,*
2023 BCSC 143

Date: 20230201
Docket: S184075
Registry: Vancouver

Between:

Linda Evans

Plaintiff

And:

Erin Berry and Sophie Anderson

Defendants

Corrected Judgment: The text of the judgment was corrected on March 31, 2023.

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Plaintiff:	I. Kordic E. Emery
Counsel for the Defendants:	C. Manning M. Taylor
Place and Dates of Hearing:	Vancouver, B.C. October 25-29, 2021 November 1-2, 2021 February 14, 2022 May 9-13 2022 August 30-31, 2022
Place and Date of Judgment:	Vancouver, B.C. February 1, 2023

I. INTRODUCTION

[1] The plaintiff, Ms. Linda Evans, seeks damages against the defendants after the defendants' dog, Bones, bit her left forehead and cheek ("Injury"). The Injury occurred at the defendants' apartment on November 11, 2017, near the end of a dinner party hosted by the defendants.

[1] Both liability and damages are in dispute.

[2] The plaintiff claims *scienter*, negligence and occupier's liability. The defendants submit that, while the Injury was unfortunate, their dog did not have a propensity to cause the Injury and that they were not, in any event, aware of such a propensity. The defendants also submit they are not liable in negligence because the Injury was not reasonably foreseeable and, furthermore, they met the standard of care expected of an ordinary, reasonable and prudent person in the circumstances.

[3] The plaintiff seeks the following damages: non-pecuniary; past loss of earning capacity; future loss of earning capacity; loss of housekeeping capacity; cost of future care; and special damages. In addition to denying any liability on the bases claimed by the plaintiff, the defendants assert the plaintiff has not proved causation and, further, that the most of damages sought by the plaintiff are too remote. They submit that, should liability be found against the defendants, damages should be limited to non-pecuniary damages and special damages.

[4] I should note that, in the alternative, the defendants assert that the plaintiff was the author of her own misfortune. However, in light of my conclusions on the issue of the defendants' liability, I need not address the defences of *volenti non fit injuria* or contributory negligence. As well, given my conclusions, it is not necessary to address the issue of damages.

II. LIABILITY

A. Evidence

[5] The plaintiff began her case by calling the defendants to the stand. Accordingly, I will begin with a summary of their evidence.

[6] I found both defendants, Ms. Berry and Ms. Anderson, to be honest and forthright witnesses, as well as responsible and prudent friends who genuinely cared for the well-being of the plaintiff.

1. Ms. Erin Berry

[7] Ms. Berry is 37 years old and works as a customer support manager for a finance company. In 2017, she and Ms. Anderson were renting an apartment in Vancouver's West End, together with Ms. Anderson's then boyfriend, Mr. James Stripp. They decided they wanted a pet and, in the spring of 2017, the defendants adopted Bones from an organization that rescues dogs. Bones was originally from Thailand and was a mixed breed dog, on the "smaller side of medium." Bones had lost one of his front legs in some mishap in Thailand and the remaining front leg had also been injured in Thailand prior to being adopted by the defendants. He weighed about 30 pounds, "maybe less." Ms. Berry recalled that "no one else had applied" for him and that he was a year and a half at the time he was adopted.

[8] When Bones arrived home, Ms. Berry and Ms. Anderson promptly took him to a veterinarian for an examination and blood testing. Bones had received all his shots prior to the adoption. Bones lived with the defendants for seven months before the Injury.

[9] Ms. Berry testified that she had known Ms. Evans for about three years prior to the Injury. Under cross-examination, she agreed that she saw Ms. Evans at least once or twice a month both before and after Bones was adopted. When it was suggested to Ms. Berry that Bones was not present most of the time when she was with Ms. Evans, Ms. Berry did not agree. She explained that there was "at least a three day trip to Sechelt," as well as a number of other occasions, when Ms. Evans was around Bones.

[10] Ms. Berry acknowledged that Bones was nipping at people's ankles and legs during the trip to the Sunshine Coast, although she did not witness it. She understood this happened with Ms. Evans and another friend, Ms. Rachel Stewart, in the kitchen area of the cabin. Ms. Berry was not asked about whether Bones nipped Rachel's boyfriend.

[11] While questioning Ms. Berry, counsel for Ms. Evans clarified that when she referred to "nipping", she meant that the dog had opened its jaw and latched on to a person's leg or ankle but left no marks or blood.

[12] Ms. Berry saw Bones nipping at her friend's shoe at a softball game. Again, no skin was broken and no blood was drawn during these occasions. Ms. Berry also acknowledged that Bones was nipping at other dogs at the dog park; he drew no blood from the nipping. She also recalled that Bones bit another dog in the ear at a birthday party, which drew some blood.

[13] Ms. Berry and Ms. Anderson addressed this behaviour by seeking professional assistance. They took Bones to dog trainers to address the issue, and they stopped taking him to the dog park.

[14] Ms. Berry testified that they took Bones to two different trainers. The dog training began in August 2017. After two sessions with the first trainer, the defendants were of the view the training was ineffective. They found two other dog trainers, the Dog Dudes, and went to an additional "five or six" training sessions. Following this training, Ms. Berry testified she saw improvement in their dog's behaviour. She also learned dog training techniques to assist in caring for Bones.

[15] Ms. Berry described how the Dog Dudes taught Bones to greet other dogs. She explains that "the idea was to try and train him to be non-reactive towards other dogs." The Dog Dudes' training protocol required the dogs to be muzzled. However, Ms. Berry testified that "he never actually wore that muzzle during training, as the Dog Dudes didn't deem it necessary." Ms. Berry recalled no other biting or nipping situation with other dogs following this training.

[16] There was, however, an incident with Ms. Berry's father in October 2017. Ms. Berry testified that Bones "nipped" her father on the forearm while she was passing him a "cheese toasty" sandwich. Ms. Berry acknowledged that, according to counsel for Ms. Evans' distinction between "nip" and "bite", this incident was "more of a bite" as a tooth punctured the skin and drew some blood. Ms. Berry described this incident as happening very fast:

> Yes, it all happened, obviously, very quickly, but it seemed Bones and my father were both sort of going for the sandwich…

[17] Ms. Berry testified:

> … We believed it was food motivated because I had passed a cheese toasty sandwich, basically over him [Bones] to my father, and he [Bones] was not familiar with my father as he was visiting from Australia.

[18] When pressed on whether Bones was going for her father's arm rather than the sandwich, Ms. Berry said that she could not say definitely one way or the other "because my dad was holding the plate", it happened very quickly, and she did not actually "lay eyes on it.

[19] Ms. Berry gave her father a Band-Aid and no medical treatment was necessary. Her father was due to board a flight back to Australia that evening and he did so. No medical treatment was necessary in Australia.

[20] After this incident with Ms. Berry's father, Ms. Berry and Ms. Anderson sought further professional assistance. Ms. Berry acknowledged this particular incident as "escalating" in that it was "more of a bite than a nip" because Bones "broke skin." Even though they understood this incident was food related, the defendants took Bones to their veterinarian to address the issue. The veterinarian recommended that Bones see a behaviourist for dogs. Ms. Berry explained that the appointment had been arranged and they were waiting to see the behaviorist when the Injury occurred.

[21] Ms. Berry testified that sometimes when they would be out for a walk, Bones would stop walking with them and lie down on the ground. Until they spoke to their veterinarian, the defendants thought his refusal to continue walking with them might

have been an obedience issue. When the defendants addressed this behaviour with their veterinarian, Ms. Berry learned "there was substantial lasting damage" to his remaining front leg and that his refusal to keeping walking could be pain related. Accordingly, she and Ms. Anderson booked an appointment for a surgical referral to see what might be done. The defendants also put Bones on medication to manage the pain in his remaining front leg, as advised by their veterinarian.

(a) The Evening of the Injury

[22] Ms. Berry was present when Ms. Evans was injured by Bones. She recalled this occurred at the end of the evening, when her guests were getting their coats to leave. She recalled that Bones was laying down on the ground. She agreed she recalled seeing Ms. Evans either kneeling or crouching on the ground by Bones, Bones was lying on his back, and Ms. Evans was giving him a "belly rub". While Ms. Evans was doing this, Ms. Berry recalled that Bones "moved up towards" Ms. Evans. There was no growling or barking immediately prior to the Injury, or anytime earlier that evening. Ms. Berry testified there were no warning signs.

[23] Ms. Berry recalled that Ms. Evans "was saying goodbye to Bones, and everything seemed fine":

> And from my point of view, as she maybe leaned in slightly with her hair – it obscured my view slightly because her hair was down. Then I saw him move up and then her pull back…

[24] Ms. Berry agreed that at the time of the bite, Ms. Evans' hair obscured Bones' face. She did not observe the point of "contact" and stated it was "very instant." She recalled Ms. Evans then put her hands to her face. She recalls there was blood on Ms. Evans' face. Bones was brought into another room immediately.

[25] Ms. Berry called an ambulance but, as she lived close to St. Paul's Hospital, the group decided to walk Ms. Evans to the hospital.

[26] Ms. Berry agreed on the evening of the Injury there were no other issues with the interaction between Bones or Ms. Evans, or between Bones and any other guest.

[27] When questioned, Ms. Berry responded that she did not recall "discouraging Ms. Evans or anyone else from petting or otherwise getting close to Bones that evening." She also acknowledged that before that evening she had not discouraged Ms. Evans from petting Bones.

[28] Ms. Berry testified that Bones was euthanized shortly after the Injury and agreed this decision was prompted because of the dog bite. Ms. Berry agreed with counsel for the plaintiff that she thought Bones could not be trusted after the dog bite. When re-examined by her counsel, Ms. Berry added

> … So initially, as I had called an ambulance, there was – animal control was involved, but they had closed their case, so there was – yeah, so Sophie [Ms. Anderson] had a phone conversation with Claudia Richter, the behaviourist, in regards to what to do, and as I mentioned – or as the plaintiff's lawyer mentioned earlier, she advised that, because of the incident, he would have to be basically muzzled or locked away for the rest of his life, and we also heard that, obviously after the incident, Linda [the plaintiff, Ms. Evans] was not doing well with the thought of Bones still being alive, so we also took that into consideration as well, as ultimately the decision whether to euthanize him or not was left up to us.
>
> So yeah, we made that decision.

[29] Ms. Berry added that she and Ms. Anderson also took Ms. Evans' mental health into consideration in the decision to euthanize Bones. The defendants and Ms. Evans continued to see each other regularly at that juncture in time.

2. Ms. Sophie Anderson

[30] Ms. Anderson appeared by video-conference. She is 36 years old and resides in Australia. She was also a forthright witness and her evidence was consistent with that of Ms. Berry.

[31] She confirmed that she and Ms. Berry adopted Bones in April 2017. She described him as a mixed breed and added that their veterinarian thought he looked like an Australian cattle dog. The nipping behaviour was thought to be related to his breed.

[32] Ms. Anderson confirmed that she took out a dog licence for Bones in her name with the City of Vancouver. She confirmed that the day after Bones arrived

from Thailand, she took him the veterinarian "to make sure he was OK by Canadian standards."

[33] Ms. Anderson confirmed on cross-examination that she and Ms. Berry observed that Bones had issues with obedience and became aware that he was reactive with other dogs after about two to three months of owning him, sometime in June or July 2017. She testified:

> We observed some aggression with dogs, and with humans we observed some strange behaviour involving some nipping.

[34] Ms. Anderson was asked to recount the particular occasion when Bones nipped another dog's ear, while at a friend's apartment. She explained that their apartment building was pet-friendly and one of their neighbours invited them, along with Bones, to their dog's birthday party. She acknowledged that another dog walked past Bones from behind and "Bones nipped him in the ear as he walked past." Ms. Anderson acknowledged that the other dog was not aggressive toward Bones.

[35] When questioned whether there were any issues between Ms. Evans and Bones prior to the Injury, Ms. Anderson responded that Ms. Evans had advised her that Bones "had nipped her on the ankle I believe", although she had not witnessed this. No skin was broken.

[36] Ms. Anderson also recalled Bones nipping at the fluorescent, reflective patches of her friend's shoe at a softball game. He did this a "couple of times on one day." She explained that "the best way I can describe it is if you've ever seen a herding dog, or a cattle-dog herd animals, they just nip at the animals' ankles." She added that "a nip lasts, like, point five of a second or something like that. Like, it's just a very quick thing."

[37] Ms. Anderson agreed, when it was put to her, that the displays of growling and nipping at other dogs occurred more than five times before the evening of the Injury. As a result, she and Ms. Berry took Bones to a dog trainer. She also agreed

that the dog training took place with two sets of trainers in the summer and early fall of 2017. She added that the training occurred over a period of weeks.

[38] In regard to the first trainer, Ms. Anderson agreed that the focus was on leash obedience and Bones not wanting to come when he was called. Ms. Anderson testified that she also attended six training sessions with the Dog Dudes. She also testified that she was asked to bring a muzzle for Bones but that it was not used. She explained the Dog Dude trainers observed Bones on the first training session and they advised it was not necessary for Bones to wear a muzzle. The training took place over several weeks.

[39] Ms. Anderson did not witness the "cheese toasty" incident with Ms. Berry's father. She confirmed that it was after this incident with Ms. Berry's father, and after the training sessions with the Dog Dudes, that they took Bones to their veterinarian.

[40] Ms. Anderson testified they consulted Bones' veterinarian about the incident with Ms. Berry's father and also about Bones' refusal to keep walking during their walks. The veterinarian advised that Bones' refusal to keep walking could be due to pain from his front leg and they explored how to address this issue. She also confirmed a specific dog behaviourist was recommended. The defendants followed up the next day to complete the in-take process with the dog behaviourist and confirmed an appointment.

[41] Like Ms. Berry, Ms. Anderson had also known Ms. Evans for about three years. She testified that she saw Ms. Evans regularly in the period prior to the Injury, and that Ms. Evans had interacted with Bones multiple times. Ms. Anderson did not witness Bones nipping at Ms. Evans' ankles during the Sechelt trip but recalled that Ms. Evans told her about it. She did not recall other occasions where Bones nipped Ms. Evans, nor did she recall any occasions when he barked or growled at Ms. Evans.

[42] Ms. Anderson recalled the moments leading to Ms. Evans' Injury. She testified that Ms. Evans was on her knees, rather than crouching, and that she was petting Bones. She recalled that Bones was on his side and that Ms. Evans was

leaning over Bones and stroking him, when Bones "reached his face up, almost like a sit-up." When questioned, she agreed that Bones was on his side, was being petted and then reached his head up towards Ms. Evans' face. Ms. Anderson added, "I think it happened very quickly."

[43] When asked whether she saw the contact between the dog's mouth and Ms. Evans face, Ms. Anderson explained the Ms. Evans' "hair was falling" over her face so she could not actually see her face. She said she thought the contact lasted "for under a second." Ms. Evans then "pulled back and made a sound of surprise."

[44] Ms. Anderson attended to Ms. Evans immediately after the bite and administered some first-aid, applying pressure and dressings. She described the injury to Ms. Evans' face as a "crescent shape on her forehead that went towards her brow, and she had a gash on her cheekbone." Ms. Anderson later explained that the wound on Ms. Evans' forehead "was deep" and also agreed with counsel's suggestion that there was a "significant amount of blood." She could not remember if the wound on Ms. Evans' cheek was also deep.

[45] Ms. Anderson testified that when she and Ms. Evans were sitting down and she was applying the dressings, Ms. Evans said, " 'Oh, don't worry. It is my fault.' Things along those lines." Ms. Anderson then accompanied Ms. Evans to St. Paul's Hospital's emergency department.

[46] It was put to Ms. Anderson that the options at that point were either that the dog was to be muzzled and kept away from other dogs and people, or that he should be euthanized. Ms. Anderson agreed.

3. Ms. Linda Marie Evans

[47] Ms. Evans is 40 years old. She lives in the West End of Vancouver on Beach Avenue and has lived there since July 2014. Ms. Evans was born and raised in Ireland and moved to Vancouver in July 2014 with her then boyfriend.

[48] Ms. Evans graduated from high school in 2000. After high school, she completed a four-year degree program at the University of Limerick. She testified

she completed a four-year LL.B., with electives in French and European studies. After this degree, she worked at an Irish bank while studying for eight exams, whose successful completion were required to qualify as a lawyer in Ireland. She completed the exams in early 2006 and got a training contract with a law firm in October 2007, which was also necessary to be qualified as a solicitor in Ireland. Ms. Evans completed her Law Society of Ireland professional practice course in 2009, qualified as a solicitor and was admitted to the Rolls of Solicitors of Ireland in 2010. She added that she was also admitted to the Rolls in England and Wales, as that was a simply a matter of paper work. After being qualified as a lawyer, Ms. Evans has worked consistently in various professional capacities in Ireland and Canada but has not practiced law in either country.

(a) Ms. Evans' Time in Vancouver Prior to the Injury

[49] Ms. Evans testified that she "settled in Vancouver very well" and "secured employment here in September 2014" at an IT consulting firm in a "contract specialist role." She was meeting new friends and enjoying herself. However, her partner had a different experience. It also became apparent the couple had different priorities. In February 2015, her partner moved back to Ireland.

[50] In January 2017, Ms. Evans was no longer satisfied with her job. She found her work repetitive and "having qualified as a solicitor back home in Ireland, I knew I was capable of more and so I was looking for a role where I would be challenged and really developing my skills again." In April 2017, Ms. Evans found a new job at Hootsuite as a "legal operations specialist" at $85,000 a year, responsible for "implementation of process and procedure." She was not hired as a lawyer, although she was part of a team that describes themselves as the "commercial legal team."

[51] Ms. Evans testified that she met the defendants in 2014 through mutual friends. She added that "we were all in the same social circle" and described Ms. Anderson and Ms. Berry as "very good friends", stating "we spent a lot of time together."

[52] Ms. Evans testified that she was familiar with Bones. She had met him the first week that the defendants adopted him in early April 2017 and had seen him "quite a few times" after that. She also remembers a number of times when she was with Ms. Anderson and Ms. Berry at the dog park with Bones. Ms. Evans also met Ms. Berry for walks with Bones. She testified that she would stop by and say hello while Bones was home.

[53] Ms. Evans recalled a "Friday to Monday" trip, during the August 2017 long weekend, when their group of friends travelled to the Sunshine Coast with Bones. She testified:

> He did nip me on that trip. It was one of the evenings and I was going to the kitchen to get something from the refrigerator, and so I opened the refrigerator and I felt something at my ankle. And I just kind of, like whipped around really quickly, and I chastised the dog. You know, I got firm and got angry with him. I knew he had also nipped someone else on the trip as well.

[54] Ms. Evans identified the "someone else" who had been nipped as Ms. Rachel Stewart.

[55] When asked what the nip felt like, Ms. Evans explained:

> It was very brief, enough to know he had made contact with my ankle. But there was no blood or no piercing marks or anything like that.

[56] When asked if she was aware of any behavioural issues with Bones, Ms. Evans responded that she was and added that she was aware that Bones "was having difficulties with socializing with other dogs in dog parks" and that he was no longer going to dog parks as a result. She added:

> I was also aware of the fact that they were struggling to know what to do next with him, is the best way to describe it, because they were – they were seeking training. I didn't know if they had done the training, but I know they were looking at getting trainers. So, I knew there were issues.

[57] Ms. Evans also recalled a conversation in October 2017, at Ms. Berry's birthday celebration, where Ms. Anderson was talking about "potential surgeries that Bones might have to have and it would be very expensive and they didn't know how they were going to pay for surgeries."

[58] Ms. Evans agreed that if, for any reason, she felt she did not want Bones in the same room with her, she would feel free to say so to the defendants. She added, “I could have, but I didn’t feel any reason to.”

[59] Ms. Evans testified that she knew from her experience at the Sunshine Coast that Bones had nipped herself and others. She agreed she did not take issue with Bones being loose in the cabin that weekend, and she did not ask that he be contained.

[60] Ms. Evans also agreed that in regard to humans, she was not aware of any incident “that broke skin” before her Injury; however, she added that she become aware of the “cheese toasty” incident after her Injury.

[61] Ms. Evans agreed she was not aware of any incident where Bones’ behaviour necessitated medical treatment, other than when she was bitten.

[62] Ms. Evans acknowledged on cross-examination that Ms. Berry and Ms. Anderson were actively taking steps to address Bones’ behavioural issues. Ms. Evans testified that their close friend, Ms. Jackie O’Brien, who also had dogs, found the Dog Dudes trainers to be “very successful” with her dogs.

(b) The Injury

[63] Ms. Evans recalled that, on the evening of her Injury, six of her core group of friends were having dinner at the defendants’ apartment, and Bones was also there. She remembered that their friend, Ms. O’Brien, was holding Bones in her arms at one point during the evening. Ms. Evans also recalled that their other friend, Adrian Hawes, was sitting on Bones’ dog bed:

> Bones was just kind of wandering around. I think he was interacting with Adrian while Adrian was sitting on his dog bed.

[64] In addition, Ms. Evans recalled that during the evening of the Injury, Bones jumped up onto the sofa beside her, although she stated that Bones “wasn’t interacting” with her and she was not “cuddling” with him. She acknowledged that she did not get up or move away from him, or ask the defendants to move Bones.

She agreed that during dinner, Bones was laying on his dog bed and there were no issues with his behaviour.

[65] Ms. Evans recalled that she and her friends had finished dinner and they were all "getting ready to go" at around 11:30 p.m. She had put her jacket on and was waiting for two of her friends, as they had planned to walk home together. Ms. Evans had already "said goodbye" to her hosts, and so she went over to where Bones was laying down, just a few feet from the general area where her friends had congregated. She testified:

> … I kneeled down to pet him and to say goodbye to him, and that seemed fine. And I remember when I was, you know, kneeling down and rubbing him, that he turned over on his back exposing his belly, so that to me was a good indication that he was enjoying himself, and so I was – I was petting him on the belly.
>
> And I recall Erin saying, "oh that's so lovely. He loves rubs from his Aunty Linda." It was almost like seconds after that that, you know, that he jumped straight at my face.

[66] When asked what happened next, Ms. Evans responded:

> I just – I just jerked backwards, like, really quickly. I just put my hands right up to my face…There was, like, the feeling of blood and then I kind of took them down to look, and that's when I knew this was bad.
>
> Someone came straight over to me. I don't know who. There was a lot of commotion and, you know, panic and chaos…

[67] Ms. Evans did not feel that her life was threatened and she did not feel threatened by Bones before the Injury. She explained she did not have any worry or concerns that Bones would bite her that night.

[68] Ms. Evans testified there was one bite on the left side of her face. She did not remember any conversation that took place immediately after the dog bite about what had just happened. She did, however, recall suggesting that they walk to the hospital that was three blocks away, instead of waiting for the ambulance. Her friends inquired if she was sure she could walk there; she said she was because she wanted to get to the hospital as soon as possible.

[69] At the emergency ward, Ms. Evans received a number of injections and numerous stitches on both her forehead and cheek. The Emergency Discharge Summary documenting Ms. Evans' injury reads as follows:

> a 3-inch C-shaped laceration to the forehead and 2-inch laceration to L. [left side] of face in line with tragus. Muscle visible with each wound. No numbness to face. EOM N. No tissue loss.

[70] Ms. Evans recalled that, when she was released from the hospital at approximately 3:00 a.m., she went to the washroom at the hospital and it was there that she first saw her face for the first time after the Injury. She started crying at the sight of the congealed blood, stitches and swelling. Her friend, Ms. O'Brien, who was with her at the hospital, went home with Ms. Evans and stayed with her at her apartment that night.

[71] The day after the injury, Ms. Evans and Ms. Anderson communicated by text messaging, and in person. In a text message, Ms. Anderson expressed how sorry she was over what happened. Ms. Evans responded by text, stating in part:

> …I know you are so sorry and I know this isn't your fault at all. It's one of those things and I honestly don't blame anyone for this. I take full responsibility for my actions…

[72] The next evening, after the Injury, was a Sunday night. Ms. Berry and Ms. Anderson came over to visit Ms. Evans and brought food with them. Ms. Evans returned to work the following Thursday or Friday after the Injury; she thinks she may have worked from home "online." She received her full pay for that week.

[73] There were no infections from the bite and Ms. Evans' wounds healed well, although she was left with two facial scars on her forehead and cheek. Over time, Ms. Evans had two cosmetic day-surgeries that diminished her scars.

[74] I note that by the time of trial, the scars had faded considerably. Ms. Evans was not left disfigured.

4. Ms. Jackie O'Brien

[75] Ms. O'Brien appeared by video-conference from Mayo, Ireland. She had lived in Vancouver for ten years and was living in the West End of Vancouver, near Ms. Evans, around the time the Injury occurred. She has known Ms. Evans since childhood; their parents were friends.

[76] She describes herself and Ms. Evans as "good friends for a long time", who would see each other "multiple times a week." Ms. O'Brien also regarded Ms. Berry and Ms. Anderson as "close friends."

[77] Ms. O'Brien testified that she saw Bones often, explaining she had two dogs who would go on dog walks and "play-dates together." Ms. O'Brien described Bones as "a good boy with [her] girls."

[78] Ms. O'Brien testified that she had never been bitten or nipped by Bones. Although she saw Bones often, she had never witnessed anyone else being nipped or bitten by Bones, "until the night of the event [Injury]." When asked whether she had made any observations about Bones' behaviour during the evening prior to the Injury, Ms. O'Brien responded:

> He was a perfect angel. I was sitting in his dog bed earlier in the night on in the night. Adrian was holding Bones like a baby. He was so good. There was nothing concerning about his behaviour.

[79] Ms. O'Brien witnessed the Injury. She confirmed that present that evening were not only the defendants, Ms. Evans and herself, but also James Stripp and her then boyfriend Adrian Hawes. Ms. O'Brien testified:

> Linda [Ms. Evans] was sitting on the ground or kneeling beside Bones, and she was petting him. Bones was very relaxed. He did not seem distressed in any way. I have two dogs, so I would be familiar with dog behaviours.
>
> Linda was telling Bones that he was a good boy, and she was petting him, and Bones, without any warning or any signs, he did jump—I didn't see the bite, like, because it all happened so fast and I was getting ready to leave….

[80] Ms. O'Brien accompanied Ms. Evans to the hospital and escorted her back to her apartment by taxi when she was released a few hours later.

5. Ms. Rachel Stewart

[81] Ms. Stewart is currently 31 years old and works as a "contract administrator". She testified that she met Ms. Evans when she moved to Vancouver in January 2017; she saw her "very frequently," approximately twice a week, before the Injury.

[82] While Ms. Stewart did not witness the Injury in November 2017, she had met Bones and was part of the group that travelled to the Sunshine Coast in early August 2017. She testified that Bones jumped up, unprovoked, and bit her leg but then added "it wasn't serious". Of note, Ms. Stewart's description of this incident with Bones would be defined as a "nip" rather than a "bite," according to the definitions of each provided by counsel for Ms. Evans. Ms. Stewart also stated that "something similar happened to her boyfriend" with Bones that weekend.

[83] On cross-examination, Ms. Stewart admitted that Bones did not draw blood or leave a puncture wound, although she said she developed a bruise the next day. She agreed that she never felt the need to ask the defendants to put Bones on a leash or in another room.

6. Mr. Adrian Hawes

[84] Mr. Hawes is 37 years old and works as a painter in the construction industry. He has known Ms. Evans for seven years. He was at the defendants' apartment on the night of the Injury but was in another room when it occurred.

[85] Mr. Hawes recalled the incident at the private house party where Bones bit another dog's ear. He also described an incident at a dog park where Bones "grabbed another dog by the neck" until James Stripp pulled Bones away; he testified there was no actual bite or blood drawn. Mr. Hawes confirmed that the defendants were not present at the dog park on this occasion. Mr. Hawes did not say whether the defendants were told about the incident at the dog park.

[86] Mr. Hawes confirmed that he had interacted with Bones about eight times prior to the evening in November 2017 when Ms. Evans was injured. He testified he

had never observed Bones display signs of aggression toward humans prior this evening.

[87] Mr. Hawes acknowledged that prior to Ms. Evans' Injury, the defendants had not told him or the other guest not to touch, pet or get close to Bones. He also testified that he did not have any concerns about being around Bones. Mr. Hawes confirmed he did not ever express any concerns about Bones' behaviour to the defendants.

[88] Mr. Hawes testified that he was the one who had recommended the Dog Dudes to the defendants. He also testified that the defendants sought training assistance from the Dog Dudes after the incidents at the private birthday party and the park.

B. Legal Analysis on Liability

[89] As noted earlier in these reasons, the plaintiff claims that the defendants are liable under the doctrine of *scienter*. In the alternative, they submit that if *scienter* is not established, the defendants are liable in negligence and under the *Occupiers Liability Act,* [RSBC 1996] Chapter 337.

1. *Scienter*

[90] The doctrine of *scienter* presumes that domesticated animals, such as dogs, are harmless, and liability requires proof that a defendant actually knew, prior to the events underlying a claim, that the animal in question had the propensity to cause the type of damage that it did to the plaintiff: see Erika Chamberlain & Stephen Pitel, eds, *Fridman's The Law of Torts in Canada*, 4th ed (Toronto: Carswell, 2022) at p. 247 and 277; *Janota-Bzowska v. Lewis* (1997), 96 B.C.A. C. 70 (C.A.) at paras. 8-12.

[91] In *Janota-Bzowska,* the British Columbia Court of Appeal cites a passage from the seminal decision of Chief Justice Begbie in *May v. Burdett* (1846), 9 Q.B.101 (Eng. Q.B.), where Chief Justice Begbie affirms the presumption:

> [12] Whoever keeps an animal accustomed to attack and bite mankind, with the knowledge that it is so accustomed is liable for any injury it may inflict, without any averment of negligence in the securing of it. Negligence is presumed without any express averment*.... But a dog is not such an animal. On the contrary the law presumes that, until the contrary is shown, a dog is not accustomed to bite mankind ... the mere keeping of an animal known to be dangerous is actionable rather implies that the mere keeping of an animal not known to be dangerous is not actionable.*
>
> [Emphasis added]

[92] In the same vein, at para. 11 of *Janota-Bzowska,* our Court of Appeal cites the following passage in John G. Fleming's *The Law of Torts*, 7th ed (Sydney: The Law Book Company Ltd., 1987), which speaks to the requisite elements of proof, in cases of an animal that is ordinarily harmless, like a dog:

> [11] As to the doctrine of scienter, Fleming in The Law of Torts, describes the doctrine of scienter as follows at p. 332:
>
> > *When an animal of the harmless species [animals mansuetae naturae] betrays its own kind by perpetrating damage, its keeper will not be held to strict liability unless actually aware of its dangerous disposition.* This proof is known technically as "the scienter" which derives from the old style declaration, charging the defendant with knowingly keeping a dangerous animal. *The requisite knowledge must relate to the particular propensity that caused the damage.*
>
> [Emphasis added]

[93] Knowledge on the part of the dog owner is key; the Court in *Janota-Bzowska* affirms that knowledge of the "propensity to cause the type of harm occasioned" is an essential aspect of the *scienter* doctrine. The Court cites its prior decision in *Kirk v. Trerise*, [1981] 4 W.W.R. 677, which stated that "the owners must not know that their dog was or is of a vicious or mischievous nature, or was accustomed to do acts causing injury."

[94] In this light, the Court in *Janota-Bzowska* summarizes the requisite elements of the legal test of *scienter* as follows:

> [20] The law with respect to the doctrine of *scienter* is relatively clear. The owner of a dog which bites another will not be liable simply for being the owner. Liability will only attach under the doctrine if the three conditions set

> forth in the *Neville* decision have been satisfied. In other words, the plaintiff (not the defendant) must establish:
>
> i) that the defendant was the owner of the dog;
>
> ii) that the dog had manifested a propensity to cause the type of harm occasioned; and
>
> iii) that the owner knew of that propensity.

[95] As to the onus of proof, *Janota-Bzowska* explains that the *Animals Act*, R.S.B.C. 1979, c. 16 had reversed the common law onus of proof, thereby requiring owners to show they did not know or have the means to know their dog "was or is vicious…or accustomed to causing injury". However, the *Animals Act* was repealed and the common law onus of proving strict liability under the doctrine of *scienter* shifted from the dog owner back to the plaintiff: see paras. 14-17 of *Janota-Bzowska.* Accordingly, Ms. Evans bears the onus of establishing that the three branches of the *scienter* test have been satisfied on a balance of probabilities.

[96] Following a careful consideration of the legal test and the facts of this case as a whole, I am not satisfied that the plaintiff has met her burden of proof. The first branch of the test is clearly satisfied: the defendants were Bones' owners. However, I find that the evidence before me does not satisfy the second or third branch of the legal test. That is, the plaintiff has not established that Bones had manifested a propensity, prior to the Injury, to cause the type of harm occasioned. Further, I find that the defendants did not have the requisite knowledge of any such propensity.

[97] I address the second and third branch of the *scienter* test more specifically below.

2. Was there a manifested propensity to cause the type of harm occasioned?

[98] In assessing this branch of the legal test, it is instructive to carefully consider what is meant by "propensity." The Oxford English Dictionary defines propensity as "an inclination or tendency." Black's Law Dictionary similarly defines propensity as:

> a natural tendency to behave in a particular way; esp., the fact that a person is prone to a specific type of bad behaviour.

[99] In *Kirk v. Trerise*, our Court of Appeal had the following to say about the use of the word “propensity” within the *scienter* analytic framework:

> [26] The generality of the phraseology of Lord Holt has become somewhat more specific in later cases and "vicious," "mischievous," "fierce," "ferocious," "cross," "savage," and "dangerous" have all been used. Sometimes a phrase has been adopted and "a particular mischievous propensity", "a propensity, through vice or playfulness", "some peculiarity which renders it dangerous" and "a particular propensity" appear in the cases.

[100] The Court of Appeal in *Kirk* appears to draw a link between propensity and the *known* source of such a propensity or habit:

> [27] But the language must not be permitted to obscure the legal principle. That point was made by Lord Guthrie in *Milligan v. Henderson,* [1915] S.C. 1030 at 1046, where, referring to wild animals and domestic animals, he said:
>
> > The former are kept at the owner's or custodian's risk; while for injury to human beings by the latter there is no liability, unless the animal was known by its owner or custodian to have previously acted so as to be a source of danger. When I say a source of danger, I do so advisedly instead of using such expressions as "vicious" or "mischievous." It may well be that an owner who knew that his dog, although neither vicious nor mischievous, was in the habit of rushing at and after carriages and cyclists, would be liable if an accident occurred, directly or indirectly, through the action of a dog with such *known habits.*
> >
> > [emphasis added]

[101] The evidence before me shows that Bones exhibited nipping behaviour at the ankles or legs. There were also some instances of Bones being aggressive toward other dogs. However, Ms. Berry testified that after his training with the Dog Dudes, Bones’ behaviour did improve; there was no evidence of aggression toward other dogs or incidents of nipping them following this training.

[102] Counsel for the plaintiff underscore that the “cheese toasty” incident with Ms. Berry’s father occurred after Bones’ training with the Dog Dudes, and submit this is evidence of a continued “manifest propensity” as envisioned in *Janota-Bzowska.* Having carefully considered the matter, I have concluded that this incident involving Ms. Berry’s father, in the context of the evidence as a whole, does not establish that Bones was a source of danger, or that he had a manifested propensity to bite or cause harm, or that he was “accustomed” or in the habit of doing so. Clearly, while

this incident bears careful scrutiny, it cannot be considered in isolation without reference to the evidence in its totality.

[103] Context is particularly important in this case, and I have considered a number of factors. First, it is not clear, on the evidence before me, that Bones was "going for" Ms. Berry's father's arm as counsel for Ms. Berry submit, rather than "going for" the cheese toasty. Ms. Berry's evidence was that the incident happened very quickly while she was passing the plate of food over Bones to her father, and she did not see exactly what happened. I found Ms. Berry to be a forthright and reliable witness. It is simply not clear that this was an act of aggression on Bones' part towards Ms. Berry's father.

[104] The Dog Dudes, who are professional dog trainers, expressly advised the defendants that it was not necessary for Bones to wear a muzzle during his training. It is reasonable to infer that if they had assessed Bones as having aggressive tendencies, or a disposition or propensity to harm or bite, they would have required him to wear a muzzle. It is instructive that they did not.

[105] Ms. O'Brien, who regarded each of the plaintiffs and defendants as "close friends", and who I found to also be a forthright and reliable witness, testified that she saw Bones often and that her dogs and Bones went on play-dates together. She described Bones as "a good boy with [her] girls." Even though Ms. O'Brien was with Bones on numerous occasions, she had never been nipped or bitten by Bones.

[106] While Ms. Stewart described being bitten by Bones while at the cabin on the Sunshine Coast, I did not find her evidence in this regard particularly cogent or persuasive. In any event, she stated that the incident was "not serious", and on cross-examination acknowledged Bones did not puncture her skin. I find Bones did not bite Ms. Stewart and that his behaviour was more in the nature of nipping, which was behaviour that was later addressed by the Dog Dudes. Notably, counsel for the plaintiff did not submit that this incident with Ms. Stewart as constituted a bite.

[107] Mr. Hawes testified he had interacted with Bones about eight times before Ms. Evans suffered her Injury at their dinner party. He confirmed he had never

observed Bones display signs of aggression towards humans prior Ms. Evans' injury, and he confirmed he did not have any concerns about being around Bones.

[108] On November 17, 2017, during the dinner party and up until the end of the evening when Ms. Evans suffered her Injury, the evidence from Ms. Evans, Ms. O'Brien, Ms. Berry, Ms. Anderson, and Mr. Hawes was consistent and clear: Bones exhibited no acts of aggression towards any the guests that evening. Ms. O'Brien describes Bones as "a perfect angel"; she sat with him on his dog bed and petted him. She observed Mr. Hawes holding Bones "like a baby", noting he "was so good" and there was "nothing concerning about his behaviour."

[109] I agree with counsel for Ms. Evans that a dog need not have caused a specific type of harm on a prior occasion for the doctrine of *scienter* to apply: see *Janota-Bzowska,* at para. 19; see also *Gallant v. Slootweg*, 2014 BCSC 1579 at para. 24; *Sparvier v. MacMillan,* [1990] S.J. No. 124 (Sask. Q.B.) at para. 10. In proving *scienter*, it is not necessary that the animal had actually done the particular kind of harm on a previous occasion; it is sufficient if, to the defendant's knowledge, it had manifested a trait, inclination or propensity to do that type of harm. Nevertheless, considering the evidence in its entirety, I am simply unable to conclude that Bones had manifested "a propensity to cause harm of the type occasioned" on the night of Ms. Evans' Injury. Even broadly defined as a propensity to bite or harm, the evidence does not establish, on a balance or probabilities, that Bones had that propensity, inclination, trait or habit.

3. Did the defendants know of the propensity?

[110] Having found Bones did not have a propensity to cause the type of harm contemplated by the second branch of the *scienter* test, I need not necessarily address the question of whether the defendants knew of that propensity. Nevertheless, there is merit in confirming that after assessing the evidence on this issue, I find that this branch of the legal test was also not satisfied. I find the defendants were not aware of any such propensity.

[111] There are several factors, along with the evidence of the defendants themselves, which inform my analysis and which support my conclusion that the defendants did not know Bones "had a propensity to cause the type of harm occasioned." During Bones' dog training with the Dog Dudes, the defendants were told that Bones did not need to wear a muzzle. Bones nipping behaviour had improved and there were no incidents of nipping other dogs after the dog training was complete. Further, I have already found that the evidence before me does not establish that Bones deliberately bit Ms. Berry's father during the "cheese toasty" incident; that is, the evidence does not establish on a balance of probabilities that this behaviour was an act of aggression rather than an accident. In addition, when the defendants took Bones to their veterinarian, after the cheese toasty incident with Ms. Berry's father, there in no evidence that their veterinarian suggested or advised them that Bones should be muzzled or kept apart from others. It is also instructive that those witnesses, who were familiar with Bones and also present the night of the Injury, testified that they were not afraid of Bones, nor did they relay any concern to the defendants to that effect. On the night of the dinner party, prior to the Injury, Bones was described as an "angel" and those in attendance were clearly at ease around him. Furthermore, the defendants certainly did not suggest or indicate at trial that they knew Bones had a propensity to cause the type of harm occasioned.

[112] My finding that the defendants did not have the requisite knowledge is reinforced by Ms. Evans' own evidence. Ms. Evans testified that while she was petting Bones just before she was Injured, Ms. Berry remarked: "Oh, that's so lovely. He [Bones] loves rubs from his Aunty Linda." I find that Ms. Berry would not have expressed this sentiment if she was aware of any propensity Bones had to cause the type or kind of harm that was occasioned that night. The evidence as a whole also does not support the conclusion that Ms. Anderson knew Bones had a such a propensity.

[113] Accordingly, for all these reasons, I find that the second and third branches of the legal test, necessary to establish *scienter,* have not been established on the evidence before me.

C. Negligence

[114] As affirmed by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd*., [2008] SCC 27 at para. 3, a successful action in negligence requires that the plaintiff demonstrate that:

1) the defendants owed a duty of care;
2) the defendants breached the standard of care;
3) the plaintiff sustained damage; and
4) the damage was caused, in fact and in law, by the defendant's breach.

[115] The facts are clear that Ms. Evans sustained an injury. Accordingly, I will address the remaining criteria that inform the issue of negligence in this case.

1. Duty of Care

[116] As noted by the Court in *Mustapha,* at para. 4, the question of whether a duty of care exists "focuses on the relationship between the parties" and "asks whether this relationship is so close that one my reasonably be said to owe the other a duty to take care not to injure the other." Similarly, in *Stewart v. Pettie*, [1995] 1 S.C.R. 131 at para. 32 the court reasoned that "the question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct."

[117] The defendants concede that they owed a duty of care to Ms. Evans. I agree. The defendants had a duty, both at common law and under the *Occupiers Liabilities Act*, to take reasonable care to see that Ms. Evans, who was a guest in their home, would be reasonably safe from injury: *Waldick v. Malcolm,* [1991] 2 S.C.R. 456 at 472; s. 3(1) the *Occupiers Liability Act*; *Chamberlain v. Jodoin,* 2012 BCCA 108; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643. There was a relationship of sufficient proximity between the defendants and Ms. Evans such that it was in the defendants' reasonable contemplation that carelessness on their part might cause damage to Ms. Evans: see also *Stewart v. Pettie*, [1995] 1 S.C.R. 131 at paras. 24-25.

2. Standard of Care

[118] At common law, the plaintiff bears the onus of establishing that the defendant breached the standard of care by some act or omission: *Agar v. Weber*, 2014

BCCA 297 at para. 29. In *Agar*, the Court affirms that the standard of care requires defendants to protect others from an objectively reasonable risk of harm:

> [30] The standard of care under the *[Occupiers Liability Act]* and at common law for negligence is the same: it is to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact.

[119] Clearly, the question of whether the standard of care has been breached turns on the particular facts before the Court. This Court must assess whether the defendants took reasonable care in the circumstances to make their home safe for Ms. Evans.

[120] *In Voje v. Teck Developments Ltd*, 2022 BCSC 503, at para. 101, the court reasoned that the standard of care is not one of perfection. Further, it is not necessary that the defendants remove every possibility of danger:

> [101] … A number of cases have explained that the standard is not perfection. An occupier is not an insurer against every eventuality that may occur on a premise, and the duty of care does not require a defendant to remove every possibility of danger. See, for example, *Fulber v. Browns Social House Ltd.*, 2013 BCSC 1760; *Lavalee v. Bristol Management*, 2005 BCSC 1666 at para. 29; *Gervais v. Do, et al*, 2000 BCSC 1271 at para. 26.

[121] Having carefully reviewed and considered the surrounding circumstances of this case, I am satisfied the defendants met the requisite standard of care as contemplated by the common law of negligence and under the *Occupiers Liability Act.*

[122] From the start, the defendants acted prudently and they continued to do so. When Bones was first adopted, they took him to a veterinarian to be examined to make sure he was physically sound and "OK by Canadian standards." They ensured he had all his shots. Later, the defendants took Bones to dog trainers to address his behavioural issues, which including his nipping behaviour. At the Dog Dudes training sessions, the defendants were told that they did not have to muzzle Bones. After the Dog Dudes training, Bones' behaviour improved. There were no other subsequent incidents of nipping or biting other dogs. Ms. O'Brien spent

considerable time with Bones and her dogs and she testified he was a “good boy with [her] girls.” Bones had never nipped or bit her.

[123] After the “cheese toasty” incident with Ms. Berry’s father, the defendants did not ignore the incident. Although the incident was minor in nature and involved food, they did not ignore it; they acknowledged it was more of a “bite than a nip” Accordingly, they took Bones to the veterinarian who recommended a dog behaviourist. Again, the defendants acted prudently by taking Bones to their veterinarian.t. Furthermore, there is no evidence before me that the veterinarian, nor the dog trainers, were of the view that Bones ought to be muzzled or separated from others. None of the witnesses who had contact with Bones ever took the position that Bones should be muzzled or separated from them. Seeking the assistance of a dog behaviourist was also prudent These circumstances, as a whole, inform the objective, reasonable standard of care and have led me to the conclusion that it was met.

[124] The conclusion that the defendants did not breach their standard of care and were not negligent is aligned with the analytical framework set out in *Janota-Bzowska,* where the Court stated:

> [23] To succeed in an action based on negligence against Holtzman [the dog owner], the plaintiff must prove, on a balance of probabilities, that:
>
> (a) Holtzman knew, or ought to have known, that Boomer [the dog] was likely to create a risk of injury to third persons, including the plaintiff; and
>
> (b) Holtzman failed to take reasonable care to prevent such injury. See: *Draper v. Hodder*, *supra*, at 217-219, and *Shelvey v. Bicknell* (27 May 1994), Vancouver Registry, No. C923654 (B.C.S.C.), (1 May 1996), Vancouver Registry, No. A0190069 (B.C.C.A.) at 9.

[125] Of note, the reasons in *Janota-Bzowska* also affirm that the question of whether the defendants knew or ought to have known that a dog is likely to create a risk of injury, is an objective test, which is distinguishable from the subjective test in the third branch of the *scienter d*octrine. The phrase “or ought to have known” makes this clear: see also *Rankin (Rankin’s Garage and Sales) v. J.J.*, 2018 SCC 19 at para. 53.

[126] In its final analysis, the Court of Appeal in *Janota-Bzowska* found that neither the owner of the dog, nor the owners of the home at which the plaintiff was injured, were liable in negligence (or *scienter*). In that case, the dog jumped on the plaintiff, and "attacked and knocked down the plaintiff causing her the injury to her right ring finger". In concluding that the "accident and resulting injury" caused by Mr. Holtzman's dog were not reasonably foreseeable, the Court, at para. 24, relied on the decision of the Court of Appeal in *Shelvey v. Bicknell*, [1996], B.C.J. No. 1179, and reasoned:

> [24] …In my view, the evidence established that the dog's actions were unexpected and out of character. In this regard the judgment of Mr. Goldie in the *Shelvey v. Bicknell* [cite omitted] case is applicable here. There he said:
>
> > …the *findings of fact preclude negligence on the part of the owner in the absence of a known propensity on the part of the animal to behave in a manner requiring precautions*. No such propensity on the part of this animal was established…
> >
> > [Emphasis added]

[127] In concluding that the owners of the home at which the plaintiff was injured were not liable in negligence, the Court in *Janota-Bzowska* reasoned:

> [25] As to the Lewises, there is no evidence to support a finding of negligence against them. Although the Lewises had a duty to take reasonable care to see that the plaintiff, who may be regarded as their guest, would be reasonably safe from injury, *liability cannot attach to them in the circumstances of this case absent a finding that it was foreseeable that Holtzman's dog would cause the type of harm it did.* Lewis, based on his knowledge of the dog, had no reason to believe that the dog would act in the manner in which it did. In these circumstances, it cannot be said that it was negligent for the Lewises to have the dog in their home. *An occupier cannot be liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the dog in question either under the common law or the Occupiers Liability Act.*
>
> [Emphasis added]

[128] These reasons of the Court in *Janota-Bzowska* reflect those in prior cases regarding both the duty of care, as discussed above, as well as the standard of care. In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at paras 28, the Supreme Court provided the following guidance regarding the standard of care:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be

> expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[129] Like the circumstances in *Janota-Bzowska*, Bones' actions on the night Ms. Evans was injured were out of character, unexpected and "contrary to his usual habits". Broadly speaking, and applying an objective test of foreseeability, I also find the harm caused was not within the range of likely consequences, in light of the facts of this case: see *Taller (Guardian ad litem of) v. Goldenshtein*, (1992) 87 B.C.L.R. (2d) 249 at para. 20, quoting *Draper v. Hodder*, [1972] 2 Q.B. 556 (C.A.) at p. 220.

[130] In any event, I have found that the defendants took a number of prudent steps and did not fail to take reasonable care to prevent Ms. Evans' injury. Accordingly, the second branch of the negligence test regarding breach of the requisite standard of care has not been established on the facts before me.

3. Was the damage caused, in fact and in law, by the defendant's breach?

[131] While it is not disputed that the plaintiff sustained an Injury, the defendants assert most of the damages claimed by the plaintiff are too remote.

[132] In *Mustapha*, the Court reasons as follows:

> [12] The remoteness inquiry asks whether *"the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable*" (Linden and Feldthusen, at p. 360). Since *The Wagon Mound* (No. 1), the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).
>
> [Emphasis added]

[133] Since I have concluded there was no wrongful act or negligence on the part of the defendants, the issue or remoteness does not arise and I need not address it.

III. DISPOSITION

[134] For the reasons set out above the plaintiff's claim in dismissed. If the parties are unable to reach an agreement on costs, they may exchange and file their submissions within 60 days of the date of this judgment.

"MORELLATO J."