COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Evans v. Berry,*
2024 BCCA 103

Date: 20240315
Docket: CA48900

Between:

Linda Evans

Appellant
(Plaintiff)

And

Erin Berry and Sophie Anderson

Respondents
(Defendants)

Corrected Judgment: The text of the judgment was corrected in the summary on March 19, 2024.

Before: The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Grauer
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated February 1, 2023 (*Evans v. Anderson*, 2023 BCSC 143, Vancouver Docket S184075).

Counsel for the Appellant:	F.A.M. Harland
Counsel for the Respondents:	D.J.E. Bilkey, K.C. C. Manning
Place and Date of Hearing:	Vancouver, British Columbia March 7, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 15, 2024

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Grauer

Summary:

The appellant suffered injuries when she was bitten by a dog owned by the respondents while attending a dinner party at the respondents' home. She sued the respondents in *scienter*, negligence and occupiers' liability. The judge dismissed her claims.

Held: Appeal dismissed. The appellant failed to demonstrate that the judge erred in concluding that she had not established two elements of the *scienter* test: that the dog had manifested a propensity to cause the type of harm occasioned; and that the respondents knew of that propensity. Nor did the judge err in finding that the respondents had not breached the applicable standard of care.

Reasons for Judgment of the Honourable Justice Skolrood:

Introduction

[1] On November 11, 2017, the appellant, Linda Evans, suffered injuries when her face was bitten by a dog owned by the respondents Ms. Berry and Ms. Anderson. Ms. Evans brought an action for damages against Ms. Berry and Ms. Anderson. Her claim was grounded in *scienter*, negligence and occupiers' liability.

[2] The matter proceeded to trial before Justice Morellato of the Supreme Court of British Columbia, who issued reasons for judgment dated February 1, 2023 in which she dismissed Ms. Evans' claim (2023 BCSC 143).

[3] Ms. Evans now appeals to this Court. For the reasons that follow, I would dismiss the appeal.

Background

[4] Ms. Berry and Ms. Anderson are friends who were renting an apartment together in Vancouver in 2017. Ms. Evans was a friend with whom they socialized periodically.

[5] Ms. Berry and Ms. Anderson decided that they wanted a pet and, in the spring of 2017, they adopted a dog—"Bones"—from an organization that rescues dogs. Bones was a mixed breed dog originally from Thailand. He was described as on the "smaller side of medium" and weighed about 30 pounds. When he was adopted, Bones was missing one front leg and his other front leg was injured.

[6] When Ms. Berry and Ms. Anderson brought Bones home, they took him to a veterinarian for an examination. According to Ms. Anderson, they wanted to make sure that Bones was "okay by Canadian standards".

[7] Bones lived with Ms. Berry and Ms. Anderson for about seven months before the incident with Ms. Evans. During that time, they observed certain behavioural

issues with Bones. For example, on a trip to the Sunshine Coast with friends in August 2017, Bones "nipped" the ankles of three of the people who were present, including Ms. Evans. In her testimony, Ms. Berry agreed that "nipping" meant that Bones had opened his jaw and latched on to a person's leg or ankle, but without leaving a mark or drawing blood. There was no evidence that either Ms. Berry or Ms. Anderson witnessed these incidents.

[8] Ms. Berry also testified about another incident when Bones nipped at a friend's shoe during a softball game. Ms. Anderson testified that Bones was chasing fluorescent patches on the shoes that shone in the light.

[9] There was also evidence that Bones had difficulty with other dogs, for example when he encountered them at the dog park, he would growl and nip at the dogs. Ms. Berry testified as well about an incident at a party in their building when Bones bit the ear of another dog and drew blood.

[10] The most serious incident involving Bones, prior to the incident with Ms. Evans, occurred in October 2017 when Bones bit Ms. Berry's father on the arm, drawing blood. Ms. Berry described the incident in these terms:

> …He nipped my father on the forearm, but we believe that was – at the time we believed that was food motivated, because I had passed a cheese toasty sandwich, basically, over him to my father, and he was not familiar with my father, as he was visiting from Australia.

[11] Ms. Berry agreed that this incident involved a bite, rather than a nip, because it broke the skin and drew blood. She also said:

> ….it all happened, obviously, very quickly, but it seemed that Bones and my father were both sort of going for the sandwich, so it did – it did end up that he had, yes, nipped – sorry, correction – bitten my dad on his forearm…

[12] A number of other people testified, who were part of the same group of friends with Ms. Berry, Ms. Anderson and Ms. Evans. One of the witnesses testified that Bones had "nipped" her during the group trip to the Sunshine Coast in August 2017. Another testified that he had seen Bones grab another dog by the neck at a park, however he confirmed that neither Ms. Berry nor Ms. Anderson was

present at the time and there is no evidence that they were made aware of the incident.

[13] Ms. Berry and Ms. Anderson attempted to address Bones' behavioural issues by taking him to dog trainers. They tried two trainers, beginning in August 2017. After two sessions with the first trainer, they decided that the training was ineffective so they switched to the "Dog Dudes" and had a further five or six sessions. The focus of the training was largely on how Bones interacted with other dogs.

[14] They also made arrangements to see a dog behaviourist, but the appointment was scheduled for a date after the date of the incident involving Ms. Evans.

[15] That incident occurred on November 11, 2017. Ms. Evans was one of a group of friends who gathered for dinner at Ms. Berry and Ms. Anderson's home. Towards the end of the evening when people were getting ready to leave, Ms. Evans approached Bones who was lying on the floor. 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 onto 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, you know, that he jumped straight at my face.
>
> 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.

[16] As a result of Bones' bite, Ms. Evans suffered a three-inch laceration to her forehead and a two-inch laceration to the left side of her face which required numerous stitches.

[17] One other fact of some note, although it does not directly impact the analysis, Bones was subsequently euthanized, which was largely prompted by the incident with Ms. Evans (RFJ at paras. 28–29).

The Judge's Reasons

[18] The judge first addressed Ms. Evans' claim in *scienter* and cited this Court's decision in *Janota-Bzowska v. Lewis* (1997), 96 B.C.A.C. 70 at para. 20 where the elements of the doctrine were described:

> [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:
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> i) that the defendant was the owner of the dog;
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> ii) that the dog had manifested a propensity to cause the type of harm occasioned; and
>
> iii) that the owner knew of that propensity.

[19] The onus is on the person seeking to impose liability on an animal owner to establish all three elements of the *scienter* test: *Janota-Bzowska* at para. 17.

[20] As the judge noted, the first element of the test was not in issue, however she found that Ms. Evans had failed to establish the second and third elements (RFJ at para. 96). As to whether Bones had manifested a propensity to cause the type of harm occasioned by the incident in issue, the judge noted that Bones had exhibited nipping behaviour at peoples' ankles and legs and some aggression towards other dogs (RFJ at para. 101). The judge also considered the incident involving Ms. Berry's father, which Ms. Evans argues was evidence of a manifest propensity. Given the circumstances of that incident, the judge found that "it is simply not clear that this was an act of aggression on Bones' part towards Ms. Berry's father" (RFJ at para. 103).

[21] The judge concluded on this element:

> [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.

[22] Given this finding, the judge noted that it was not necessary to consider the third element of the test—whether Ms. Evans and Ms. Anderson knew of Bones' propensity. However, the judge found that this element was similarly not established:

> [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.

[23] The judge then went on to consider Ms. Evans' claim in negligence. She found, and indeed Ms. Berry and Ms. Anderson acknowledged, that they owed Ms. Evans a duty of care. As to whether they breached the requisite standard of care, the judge found that Ms. Berry and Ms. Anderson acted prudently when they first adopted Bones by having him examined by a veterinarian. They continued to do so by attempting to address his behavioural issues through dog training.

[24] Considering the evidence as a whole, the judge found that Bones' actions on the night Ms. Evans was injured were "out of character, unexpected and 'contrary to his usual habits'" (RFJ at para. 129). She found that Ms. Berry and Ms. Anderson did

not fail to take reasonable care to prevent Ms. Evans' injury and as such did not breach the standard of care.

[25] These findings were also sufficient to dispose of Ms. Evans' claim under the *Occupiers Liability Act*, RSBC 1996, c. 337 (RFJ at para. 121).

Issues on Appeal

[26] While Ms. Evans raises a number of alleged errors, they can be conveniently addressed under two general issues:

a) Did the judge err in her application of the law of *scienter*? and

b) Did the judge err in determining that Ms. Berry and Ms. Anderson met the requisite standard of care?

Analysis

Scienter

[27] Ms. Evans submits that the judge failed to give effect to the central principle underlying the doctrine of *scienter* that "every dog is entitled to one bite". That principle was referred to in *Janota-Bzowska*:

> [18] In another more recent British Columbia decision, ***Woods v. Standish*** (1991), 58 B.C.L.R. (2d) 307 (B.C.S.C.), the Court summed up the essence of the doctrine of *scienter* at p.306:
>
> > In short the adage that "every dog is entitled to one bite" seems to sum up the law reasonably accurately.
>
> [19] While the adage quoted in the ***Woods*** decision may be a reasonably accurate statement of the law it should be pointed out that a dog need not have caused the specific type of harm on a prior occasion for the doctrine to apply. It would be enough if the owner knew that the dog had a propensity or manifested a trait to do that kind of harm even if it had not actually caused that particular harm.

[28] Ms. Evans submits that Bones' "one bite" occurred when he bit Ms. Berry's father as a result of which they were aware of Bones' propensity. Accordingly, when

Bones again bit a house guest approximately one month later, strict liability should be imposed under the doctrine of *scienter*.

[29] Respectfully, I do not agree for two reasons. First, I do not agree that the adage "every dog gets one bite" forms part of the *scienter* doctrine. While the Court in *Janota-Bzowska* described it as "a reasonably accurate statement of the law", it is an overreach to say that the Court endorsed the adage as a principle of law. Indeed, elsewhere in that decision, at para. 20, the Court set out the three essential elements of the legal test (see para. 18 above) and it is those three elements that must guide the analysis.

[30] Second, the judge made a number of findings of fact about Bones' behaviour, including that the incident with Ms. Berry's father did not establish that Bones was a source of danger or that he had manifested a propensity to bite or cause harm (RFJ at para. 102). Such findings of fact are entitled to considerable deference—an appellate court will only intervene when it is demonstrated that the judge below made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.

[31] Ms. Evans also submits that the judge failed to address relevant jurisprudence, specifically a number of cases in which liability pursuant to the doctrine of *scienter* was found in similar circumstances: see for example *Kerby (Guardian of) v. Visco*, 1994 CanLII 553 (BC SC); *Laws v. Wright*, 2000 ABQB 49; *Kwok v. Jennings*, 2016 SKQB 170; *Weeks v. Baloniak*, 2003 BCSC 1684; and *Gallant v. Slootweg*, 2014 BCSC 1579. Ms. Evans argues that the decision of the judge here is an outlier in the sense that it may be the only authority in which there is clear evidence of a previous dog bite yet the owner is not found liable in *scienter* for a subsequent bite: Appellant's Factum at para. 60.

[32] I am unable to accede to this argument. The *scienter* analysis is intensely fact based and context-dependant. It thus involves an application of the evidence in the case to each of the three elements of the test. That is the exercise that the judge engaged in here. As noted, she made a number of key findings of fact leading to her

conclusion that Ms. Evans had not established the second and third elements of the doctrine of *scienter*. In my view, her conclusion is entitled to deference.

[33] For the same reason, I am unable to accept the additional arguments advanced by Ms. Evans that the judge relied on irrelevant contextual factors, ignored relevant contextual factors and misapprehended the evidence, specifically the fact that Bones continued to exhibit behavioural problems after the training sessions with the Dog Dudes.

[34] In advancing these arguments, Ms. Evans is effectively asking this Court to reweigh the evidence. For example, Ms. Evans submits that the judge drew an improper distinction between Bones' "nipping" behaviour and actual biting. Ms. Evans argues that this is a meaningless distinction.

[35] I do not agree that the distinction is meaningless and, in any event, it was open to the judge to draw such a distinction on the evidence before her. Of particular note, the witnesses who testified that they had observed or experienced Bones' nipping behaviour, all testified that they had no concerns with being around him. Ms. Evans herself testified that she did not feel threatened by Bones nor did she have any worry or concern that he would bite her.

[36] With respect to the alleged misapprehension of evidence, Ms. Evans submits that the judge erred in finding that Bones' behaviour improved after the training with the Dog Dudes (RFJ at para. 101). Ms. Evans argues that the judge failed to account for the evidence that Ms. Berry and Ms. Anderson stopped taking Bones to the dog park and stopped letting him off leash because they were concerned that he was a threat to other dogs. Thus, while there were no further incidents of Bones nipping at other dogs, it was not because his behaviour had improved, rather it was because the opportunity for him to do so had been eliminated.

[37] I am not satisfied that the judge erred in finding that Bones' behaviour had improved. Ms. Berry testified that she did not recall any further nipping incidents

after the training. Thus, it was open to the judge to find that Bones' behaviour had in fact improved.

[38] However, even if the judge misapprehended the evidence on this point, I am not satisfied that it materially impacted her analysis or the result she arrived at: *Van Mol v. Ashmore*, 1999 BCCA 6 at para. 12. Specifically, it did not affect her assessment of the incident involving Ms. Berry's father, which was central to Ms. Evans' claim in *scienter*.

[39] Ms. Evans argues that the judge failed to attach sufficient weight to that incident, which, given that it also involved Bones biting a house guest, was a significant contextual factor. However, as I have already touched on, the judge made a number of findings of fact that led her to find that this incident did not amount to a manifest propensity on Bones' part. Again, Ms. Evans has not demonstrated any error on the part of the judge in reaching this conclusion.

[40] An additional argument advanced by Ms. Evans is that the judge erroneously relied on testimony from Ms. Berry and Ms. Anderson that the dog trainers, the Dog Dudes, advised them that it was unnecessary for Bones to wear a muzzle (RFJ at para. 104). The judge found that it was "instructive" that the Dog Dudes did not require a muzzle. Ms. Evans submits that that this amounts to impermissible expert opinion evidence from an expert who was not qualified, who did not testify and whose evidence was not tested by cross-examination.

[41] Ms. Berry and Ms. Anderson note that Ms. Evans did not object to this evidence before the judge and they argue that such an objection should not be raised on appeal. In my view, the judge admitted this evidence not for the truth of its content but rather as information that Ms. Berry and Ms. Anderson were given that informed their state of mind concerning Bones' behaviour. Regardless, the judge's findings were based on the evidence as a whole and I do not consider that this particular piece of evidence materially affected the outcome.

[42] Finally, as submitted by Ms. Berry and Ms. Anderson, Ms. Evans' arguments focus solely on the issue of manifest propensity, which is but one part of the *scienter* test. She does not address the third element—knowledge of that propensity on the part of Ms. Berry and Ms. Anderson. While not strictly required to do so given her conclusion on the second element, the judge found that Ms. Berry and Ms. Anderson lacked the requisite knowledge. Ms. Evans has demonstrated no error on the part of the judge in so finding.

[43] In summary on this point, I find that the judge did not err in holding that Ms. Evans had failed to establish the requisite elements of the doctrine of *scienter.*

Negligence–Standard of Care

[44] Ms. Evans' submissions on the negligence issue largely duplicate her arguments on *scienter*. For example, Ms. Evans submits at para. 101 of her factum that "[t]he same evidentiary errors that the trial judge made with respect to scienter also weakened her analysis on negligence". I reject these arguments for the reasons I have given in respect of the *scienter* claim.

[45] Ms. Evans does advance one additional argument in support of her negligence claim. She submits that the judge erred in failing to consider whether the standard of care included a duty on the part of Ms. Berry and Ms. Anderson to warn guests, including Ms. Evans, that Bones had recently bitten someone i.e., Ms. Berry's father.

[46] I do not agree that the judge erred in this respect. A duty to warn would only arise if it were established that Bones had a propensity to bite people and cause harm and that Ms. Berry and Ms. Anderson knew of that propensity, such that the type of harm suffered by Ms. Evans was reasonably foreseeable. The judge found to the contrary on each of these elements.

[47] In the circumstances, the judge did nor err in failing to consider, or find, a duty to warn.

[48] Finally, Ms. Berry and Ms. Anderson submit that if they are found liable for Bones biting Ms. Evans, the defences of contributory negligence and *volenti non fit injuria* apply. The judge did not consider these defences, given her finding on liability, and it is similarly unnecessary for this Court to address them.

Conclusion

[49] For the reasons given, I would dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Grauer"