Laws v Wright, 2000 ABQB 49

Date: 20000131
Action No. 9801-06992

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

JANE LAWS

Plaintiff

- and -

GILLIAN WRIGHT AND FRITZ BAEHRE AND
GISELA BAEHRE OPERATING UNDER THE TRADE NAME
TRAKEHNER GLEN AND LINDA HOWARD

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE R. T. G. McBAIN

APPEARANCES:

Blaine G. Schumacher, Esq.
for the Plaintiff

Chris Simard, Esq.
for the Defendant Linda Howard

Daniel A. Downe, Esq.
for the Defendants Gillian Wright, Fritz Baehre and Gisela Baehre

[1] This judgment is concerned only with respect to liability as the parties have agreed upon damages in the event that I should find liability.

[2] This action is founded on the admitted fact that the horse Salish, owned by Linda Howard, bit the thumb of the Plaintiff Jane Law when Salish was boarded at Trakehner Glen, a stable operated by Fritz Baehre and Gisela Baehre. The stable was managed by the Defendant Gillian Wright.

[3] It is as well to introduce this decision by giving the Statement of Agreed Facts presented to the Court.

> Pursuant to Rule 230, the parties set out herein agree for the purposes of the trial of this action, that the facts hereinafter set forth are true and the documents appended to this Statement are true copies of the original documents and may be accepted as evidence without proof of or production of the original thereof. The parties agree that the documents are to be admitted into evidence as to the truth of the facts or statements contained therein.
>
> Nothing in this agreement shall limit or restrict the evidence which may be called by any of the parties to the action at trial. The parties agree that no evidence shall be adduced contrary to the evidence in this Statement of Agreed Facts.
>
> The Statement of Agreed Facts shall be Exhibit 1 in these proceedings and the Agreed Facts are as follows:
>
> 1. The Plaintiff, Jane Laws, at all material times was the owner of a horse known as “Snort” and at all material times boarded that horse at Trakehner Glen.
>
> 2. The Defendant, Trakehner Glen, is owned and operated by the Defendants, Fritz Baehre and Gisela Baehre. Trakehner Glen’s business includes boarding horses and providing riding lessons.
>
> 3. The Defendant, Gillian Wright, at all material times was an employee of the Defendants, Fritz Baehre and Gisela Baehre, and both of them and was employed s their stable manager at Trakehner Glen.
>
> 4. The Defendant, Linda Howard, at all material times was the owner of the horse known as “Salish” which at all material times was boarded at Trakehner Glen.
>
> 5. On February 24, 1998, the Plaintiff’s right thumb was bitten by the horse Salish. At this time, the Plaintiff was a lawful entrant in the main barn on the Defendant Trakehner Glen’s premises.
>
> 6. The parties to this action have agreed on damages for the purposes of this trial.
>
> 7. The parties have agreed on the following documents being entered as Exhibits at trial:
>
> (a) Horse boarding contract with Jane Laws dated November 17, 1994;
>
> (b) Horse boarding contract with Lynda Howard dated September 17, 1996;

(c) Warning sign undated;

(d) Canadian Equestrian Federation Official Passport for Salish;

(e) Three photographs depicting a horse stall.

[4] I will now refer to the Defendant Gillian Wright simply as “Wright” and the Plaintiff Jane Laws I will refer to as “Laws” and the Defendant Linda Howard as “Howard”.

[5] Laws claims as against all of the Defendants on the basis that the Defendants were negligent in failing to take precautions to protect the users of the barn, including the Plaintiff, from attack by the horse “Salish” and that the Defendants negligently relocated the horse Salish to the stall adjacent to the Plaintiff’s horse “Snort” and that they failed to take adequate precautions to ensure that the Plaintiff was safe from the horse Salish, and that in relocating the horse Salish, the Defendants negligently required the Plaintiff to deal with the horse Salish and that the Defendants failed to warn the Plaintiff of the potential and real danger that the horse Salish posed. The Plaintiff pleads provisions of the ***Occupiers’ Liability Act***, R.S.A. 1980, c. O-3.

[6] The Defendant Howard denies that the horse Salish posed a hazard and says, “the said accident was caused wholly or in part by the negligence of the Plaintiff” in getting too close to the horse Salish and feeding carrots to the horse Salish. The Defendants Baehre and Wright say that the injury “was caused solely as a result of her own actions in an attempt to feed him ... being aware of Salish’s disposition and temperament, ... the Defendants having warned the Plaintiff on earlier occasions to stay away from this particular horse” and that “the Plaintiff willingly accepted the risks inherent with equine activities.”

[7] These Defendants plead the ***Contributory Negligence Act***, R.S.A. 1980, c. C-23, the ***Occupiers’ Liability Act*** *and the* **Tort-Feasors Act**. The foregoing is not meant to be in any way a complete statement or summary of the pleadings.

[8] Specifically, then, the claims made by the Plaintiff Laws against Fritz Baehre and Gisela Baehre, operating under the trade name of Trakehner Glen are made pursuant to the ***Occupiers’ Liability Act*** and pursuant to the legal doctrine of *scienter* and pursuant to the law of negligence. Respecting the Defendants Wright and Howard, the claim of the Plaintiff is founded on the law of negligence and the doctrine of *scienter*.

EXPERIENCE

[9] Fritz Baehre testified that he was involved with horses for over 15 years, that he was interested in dressage and that his father had bred horses.

[10] Gillian Wright, the stable manager, had been employed at Trakehner Glen for some 16 years. She was an instructor and trained horses. She described herself as an experienced

handler of horses. Wright described the Plaintiff Laws as “a knowledgeable horseperson” and she considered Laws to have “intermediate experience.”

[11] The Plaintiff Laws is a mature woman. She testified that when she was young she had a pony and that would be about between the ages of 10 to 15 or 16, and that she owned two horses from 1978 to 1982. She rode her horses and took care of them. She bought the horse Snort in 1994 in Vancouver and she said that Snort was trained for dressage. Laws took lessons in dressage from 1985 to 1994. She considered herself a novice in dressage and a novice with respect to horses. On cross-examination, Laws agreed that she was somewhat experienced with horses but that was “relative.”.

[12] Howard, the owner of the horse Salish, testified that she had been riding since she was five years old and that she had been trained in dressage. “I instructed for 20 years as a trainer and an instructor.” She is obviously a very experienced person with respect to horses. Fritz Baehre and Gillian Wright are also very experienced with respect to handling and care of horses.

[13] The Plaintiff Laws had many years of experience with horses commencing when she was quite young. She took care of her horses as well, of course, as riding them. I conclude that Laws is a knowledgeable horseperson with years of experience in the care and handling of horses.

FRITZ BAEHRE

[14] Fritz Baehre testified at this trial. He said that he and his wife, Gisela, were the proprietors of Trakehner Glen and that the business was the boarding of horses in a stable and pasture, the giving of dressage lessons and the production of hay and the breeding of horses. They own, apparently, some 430 acres close to the City of Calgary.

[15] Fritz Baehre testified that he had hired Gillian Wright, the stable manager, and that it was Gillian Wright who made the day to day decisions in the barn and that she reported to him. He said the owners of boarded horses had access to the barn from 10:00 a.m. to 10:00 p.m. and with respect to the owners of horses boarded there, he testified that they asked about the traits of the horse, “we talk to owners about the horse. We assess the horse in the barn.”

[16] Mr. Baehre said that he was aware of the lunging incident of the horse Salish. He had been informed by Gillian Wright and he believed that would have been before the incident in which Laws had her thumb injured. He testified that even if he had known of a Vancouver incident with respect to the horse Salish, they still would have taken the horse in for boarding.

THE BARN AND THE STALL

[17] In the barn there are stalls down each side and each stall is apparently some 10 feet by 12 feet.There is an opening or a hole for dry feeding in the front wall of the stall. [Photographs

of the stall were presented at trial as agreed exhibits]. Mr. Baehre said the staff did not hand feed the horses.

[18] Mr. Baehre said the alleyway down the middle between the stalls is some 12 ½ feet wide and the door is about 7 feet, the bottom part is 4 feet and the top part of the door with bars is 3 feet. Mr. Baehre said a horse could lunge out 3 feet (meaning of course out of the front of the stall and that that would be a maximum and, of course, that would be when the bars or top part of the door was down) . The top part of the door - that is to say, the part with the bars - can go up and down. Mr. Baehre said if the top part of the door was up, a horse could not “lunge” out The witness Anderson said a horse could reach out about 3 feet and that would be with the top part of the door down.

[19] The Plaintiff Laws said it was customary to use the middle aisle down between the stalls but that in going to a certain stall, you could be closer to one side or the other. Laws also testified that a horse could get its head out about 3 to 3 ½ feet into the aisle. Laws said that the bars at the top part of the door were customarily kept down and Mr. Baehre said that the common practice was to have the window down [meaning the top part of the door]. “We keep it open if possible. The horses get bored. We give them a chance to look down the aisle.” Mr. Baehre testified that you could go up and down the aisle without being bothered by horses and that there was no need to cut in front of the stalls. However, he agreed that you could walk close to a stall. He said it was foreseeable that a person could get too close to a stall.

[20] The witness, Sharon Neary, said that she boarded horses at this stable between March of 1994 and the end of December 1998. She testified that when she had any concerns about the management of her horses, that she would go to Gillian Wright. Sharon Neary testified that the gates in the barn were customarily down and that she had also observed that they were usually down also at the stables at Spruce Meadows. She continued that some barns kept them permanently up. Neary testified that it was easy to get too close to Salish in her stall at times and that she had to be sensitive to Salish. At times she would put Salish’s grill up when no one was around. Neary said at other barns the bars were kept down except for stallions at a particular time of year and that if a horse was “nippy” or bothering people, the grill could be raised.

[21] Howard recalled an incident when she was in the stall with her horse Salish and Snort was being playful and Salish was biting at Snort, and she had then raised the bars.

[22] The employee, Vern Anderson, testified that you could get to Snort’s stall without infringing on Salish in her stall [presumably by walking down the centre of the aisle and not turning in until one was opposite the stall - that is to say, by not cutting the corner].

[23] Wright testified that Salish was moved to the stall next to the horse Snort and that she had told Laws that if she had a problem with this, she should let her know. She said that Laws never complained to her about the move. The move was made because Salish did not get along with the horse in the stall next to her.Wright also testified that the window portions, that is to

say the top part of the stall doors, were usually down so that the horses could extend their heads out into the aisle to see what was going on. Wright said there was no hand feeding of Salish by the staff. Wright testified that the move of Salish to the stall next to Snort was because Salish did not get along with the horse alongside her in the other stall and the horses were kicking the walls. Laws testified that she never complained to "any of the staff at Trakehner Glen about Salish being moved.." and she never asked to have her horse moved from alongside the stall in which Salish was kept.

[24] Wright testified that she had never thought that Salish's window should be kept up and that no one ever said to her that they were threatened by Salish. (I note that the word window and grill are used, as is the word gate, and bars - all of these references are to the part of the stall door, that can be put up or down with that part of the door up, there is no real opportunity for a horse to lunge out, say 3 feet)

[25] Laws also said she had seen Salish put her head through the feeding opening and that she could get her head out some 6 to 8 inches.

THE HORSE SALISH

[26] The agreed fact is Paragraph 4: "The Defendant Linda Howard at all material times was the owner of the horse known as Salish which at all material times was boarded at Trakehner Glen."

[27] The horse Salish is a mare. Before being boarded at Trakehner Glen, the horse Salish has been boarded in Vancouver for some time at Howard's and then was boarded at another stable in Vancouver. Howard signed a horse boarding contract for the horse Salish, that contract being with Trakehner Glen and she signed it on September 17, 1996. Laws signed a horse boarding contract for her horse Snort with Trakehner Glen on November 17, 1994.

[28] Howard had bred Salish and the mare died minutes after the birth of Salish. Howard was looking for a place to board Salish and she said she was looking for experienced employees and she knew of the reputation of the Baehre's. Howard recalled that when her horse Salish arrived from Vancouver, the mare had lost weight and was restless.

[29] Howard also remembered that she had seen the horse Salish hand fed by children. She also stated that at times Salish was a nervous horse and that she was protective and irritable, and that when Salish's stomach bothered her, the horse could be irritable and "you would have to be more careful." Howard continued that there were still times when the horse Salish had stomach problems. Howard said that if Salish threatened her, that she would threaten her back to show the horse who was in charge.

[30] Howard recalled that the horse Salish had bitten her but she said that was when the horse was younger and it was not when she was feeding Salish. She recalled that Salish had lunged at other people. She said that she did not consider that Salish had a greater propensity

for nipping than other horses and said that Salish had never bitten her while she was feeding the horse. Howard testified that under normal circumstances, Salish was quite calm but irritable at times when handled by inexperienced people and that when the horse was in season she was sometimes irritable and sometimes not irritable. “When Salish has her difficulties she would want people to stay away.” Howard recalled that Wright, the barn manager, had made the decision to move Salish from her first stall and then Salish occupied a stall adjacent to the stall of Snort.

[31] Fritz Baehre testified that he did not know of Salish biting anyone prior to this incident. He said, “I didn’t consider Salish a danger to others.” He continued, “We assess the horse after it is at our place. We make our own assessment after the horse arrives.” He said that Gillian Wright was to thoroughly assess the horse.

[32] He testified, “Gillian told me of digestive problems.” “Yes, we knew the horse was temperamental - mood swings - not consistent behaviour.” He said he knew of difficulties when the horse was in season and difficulties if a person the horse did not know approached it. He recalled that a whip was kept on the door to Salish’s stall. Fritz Baehre said that he did not consider Salish dangerous to people in the barn if those people were cautious.

[33] The employee Anderson said, “If you didn’t know how to handle her [Salish] she could be a problem and if you were afraid she could be a problem, including putting on blankets, and she was not a problem being fed.” He continued, “she was a bit temperamental.” Anderson said he had to watch her, “for being nipped” and he said if he went into Salish’s stall, “I would take precautions”. Sometimes he would take a riding crop when going into her stall. Anderson continued that he would be concerned if someone approached Salish’s stall and that he would suggest to such a person that they stay away from the pen. He said he discussed with Wright how to handle Salish. “Everyone knew enough to stay away from that pen. That was common knowledge in the barn, including the owners of other horses.”

[34] Anderson said you had to watch Salish, “for being nipped” and that the horse had an attitude that had to be corrected. If he went into Salish’s stall he would take precautions and, “sometimes I’d take a riding crop into the stall.” He said he would be concerned if someone approached Salish’s stall and that he would suggest to that person to stay away from the pen. He said that Salish could be a problem if you did not know how to handle her and that the horse could be a problem when putting on blankets and also a problem with nipping. He said the horse was not a problem when being fed. He said the horse was a bit temperamental and that you had to watch her for being nipped and that the horse had an attitude that had to be corrected. If he went into the stall, he would take precautions and sometimes he would take a riding crop. He described the use of the riding crop and said if you waved it, you would scare the horse and Salish would know you had it.

[35] Sharon Neary kept her horse, Red, at the stable and said that to get to Red’s stall, she had to go past Salish and that she would exercise caution, “sometimes more caution than other times.” Neary recalled that Salish had lunged at her when the grill to Salish’s stall was down.

Neary described that once she had been too close to Salish's stall and that she heard a sound and Salish's head was close to her. She said she was frightened and she moved. She said the gate was down at the time and she yelled at the horse and Salish moved back. She said this incident was before the incident of February 24. Neary testified that it was easy to get too close to Salish. She also said that she had received no formal warning or advice respecting Salish. Neary said she mentioned this incident to the employee Vern Anderson and that it was "a warning to her to be heads up". She said she also discussed this incident with Laws, however, she thought that this was after the 24th of February.

[36] Neary said that she would go by Salish's stall "many times" and that at times she was careless and inattentive with Salish, She said that Howard advised her that "what she was doing was not a smart thing - she was walking too close to the stall." Neary also said that she could get to her horse, Red, by going down the middle of the aisle without interference from Salish.

INCIDENTS

[37] Howard, the owner of Salish, described to the Court an incident that occurred in Vancouver where the horse had apparently kicked a visitor to the premises. The visitor was a repair man and she said she had told him not to go near the horse and that he had replied, "I know how to handle horses." She said that as he was passing Salish the repair man made a noise and patted or hit the horse on the rump and that the repair man then was kicked. Howard testified that the man had come to do some work and she had told him to bring the horses out of the paddock. "He went behind Salish and patted her on the rear end and she kicked him and threw him back." Wright testified that Howard had told her of this Vancouver incident. However, she was told this after the date of the incident when Laws was bitten.

[38] Howard testified that Salish had nipped her or nipped at her in the past. "Now she knows that this is not acceptable and she won't bite me now." "Salish has never bitten me when I was feeding her. I have been bitten by other horses from time to time." She had never heard of Salish biting while being fed.

[39] Howard described another incident with Salish when another boarder was feeding Salish. Howard said this person did this regularly and she came down the aisle and Salish grabbed her by her jacket and pulled her but Salish did not bite her and as she passed, she stopped her by grabbing the jacket. Howard testified that she believed she had discussed this grabbing incident with Gillian Wright before February 24.

[40] The transport driver who had moved Salish from Vancouver to Calgary apparently also warned Wright to be careful with Salish as she nips.

[41] Howard testified that Sharon Neary would pass by Salish's stall and Salish would put her ears back and that Salish did this consistently with Sharon Neary. Howard said some people are move afraid of horses than others and Salish thinks she can intimidate people. There

was an incident when Salish lunged at Sharon Neary. Apparently Neary had passed too close to Salish's stall. Neary struck or attempted to strike Salish with a pail. Fritz Baehre was aware of this incident. Neary testified that her horse was in a stall close to Salish and that she would go by Salish's stall many time and that Gillian Wright joked with her that she "was invading Salish's territory." She also said that it was hard to remember to take care when passing the stall and that Howard had told her on a couple of occasions that she was doing something that made it difficult for Salish.

[42] Howard testified that Sharon Neary never complained about Salish and that she was not aware that Sharon Neary on one occasion had put the door up on Salish's stall. Howard said she hand fed Salish from time to time and that she puts a carrot on her hand and holds her hand flat, thumb to the side. She added, "to hold the hand up fingers spread is a threatening gesture." (In describing the biting incident, Laws testified that she had held her hand up.)

[43] Howard testified that Haley Van der Kloot had told her that she was feeding her own horse bran mash and that she got too close to Salish and that Salish lifted her up by the jacket. The horse had grabbed her by the jacket and pulled her. Wright was aware of this incident as was Linda Howard. The incident was prior to February 24, 1998. Laws was aware of this incident prior to February 24, 1998. Hayley Van der Kloot told Laws she had a ski jacket on and the horse had "picked me right up off the ground." Fritz Baehre testified that he had heard that Haley Van der Kloot went by Salish's stall and that she was too close. Wright testified that she was told Haley walked too close to the stall and was grabbed by the coat. Laws had heard of this incident.

[44] Stuart Perkins was an employee of the stable. There was apparently an incident with Perkins and Salish. Howard said that Perkins had ended up behind the horse and that he had been cornered. She had suggested that a whip be put on the stall door so he could show it to Salish and the horse would respect that. Vern Anderson, the employee, was outside the pen at this time. Fritz Baehre heard of this incident before February 24. Wright said she had heard of this incident where Perkins had been pinned to the wall but she did not know when this had occurred. Laws said she had heard of an incident where a stable person got pinned inside Salish's stall. She had heard of it prior to February 24, 1998.

[45] Fritz Baehre said that Wright had told him that after the horse Salish had arrived, a handler had told her to be careful because the horse could nip. Baehre said, "The horse was not an abnormal horse in behaviour."

WARNINGS

[46] This portion of my judgment will, in part, look at incidents or happenings that might be considered as warnings or cautions to the Plaintiff Laws, with respect to the horse Salish and knowledge of the characteristics of the horse Salish by Laws and others.

[47] Howard testified that she groomed her horse at Trakehner Glen and people could see how restless the horse was. She also stated that she spoke openly about her horse's problems. She recalled once in the grooming room, when Jane Laws was grooming her horse and Howard's horse, Salish, was mischievous. She said, "I told Jane of Salish's problems ... I was open about my horse's problems."

[48] Howard testified that prior to the incident with Salish biting Jane Laws, that Laws had been coming in with her horse Snort after riding and that Laws had told her that she was making friends with Salish and was bringing him a carrot. Howard said she told Laws that this was not a good idea, "I said if she was good one day it doesn't mean that she would be good the next." She added, "I was annoyed, I felt she wasn't listening to me." Howard said she remembered this because she was annoyed and that Laws seemed to be pleased to be feeding Salish. Howard considered that she had clearly voiced her disapproval.

[49] Laws testified that Howard told her that her horse was new to the barn and was not comfortable yet and that Salish was not an easy going horse and that "I should be careful." Laws continued that Howard had told her to be careful but that nothing was said about biting or kicking. Laws said, "My understanding was the horse was temperamental and to be careful." Laws said it was common knowledge to be careful with the horse. Laws admitted to prior nipping but not biting by the horse Salish.

[50] Howard continued that she did not feel that anyone should feed other peoples' horses. She observed that if the horses see you, they are looking to eat and they get "perky". Howard said that she did not hand feed on a regular basis and she knew this was not a good practice. She said that she had hand fed Salish at times and that she had hand fed other peoples horses.

[51] Laws was aware that hand feeding a horse could encourage" nipping-like behaviour". Laws also testified that hand feeding a horse would not necessarily encourage nipping and that she "didn't give it any thought." On discovery, when asked whether hand feeding a horse could encourage niiping, she said "Yes, I suppose so." Laws explained that a nip was to pull at a sleeve.

[52] Laws testified that once when Linda Howard was bringing in her horse, that she had approached Salish and Salish "shook her head, ears pinned back and kind of bared her teeth." She said that Howard told her the horse was new to the barn and not yet comfortable, she was not an easygoing horse and to be careful with her. Laws said that Howard said nothing about kicking or biting and that her understanding was that the horse was temperamental and to be careful. She said that she considered Salish dangerous "with ears pinned back and teeth bared."

[53] Fritz Baehre said that once they knew a horse was temperamental, they talked to the staff on how to handle the horse. He said boarders are informed to stay away from a horse and that this is done verbally. He said, "I spoke to a few boarders. I was satisfied that everyone in the barn knew about the horse and I told them when a horse can be temperamental, to stay

away." He continued: "We have rules in the barn. Boarders are to handle their own horses and not approach other horses." He said that it was the staff and himself that could feed the horses.

[54] Mr. Baehre made reference to a caution sign posted at the barn which was put in evidence as an exhibit. He said it was posted at eye level.

CAUTION

BE ADVISED THAT
EQUINE ACTIVITIES TAKE PLACE
ON THESE PREMISES AND THAT
ALL EQUINE ACTIVITIES INVOLVE
INHERENT RISKS

PROCEED AT YOUR OWN RISK

"Inherent risks of equine activities" shall mean those dangers or conditions which are an integral part of equine activities, including, but not limited to:

i) the propensity of an equine to behave in ways that may result in injury, harm or death to persons on or around them and/or damage to property in their vicinity.

ii) the unpredictability of an equine's reaction to such things as sounds, sudden movement and unfamiliar objects, persons or other animals;

iii) the equine's response to certain hazards such as surface and subsurface objects;

iv) collisions with other equines, animals, people and objects;

v) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the equine or to act within his or her ability.

[55] Baehre said that the sign was put up at the barn to make people aware that it was a horse barn. He said it was located on a wall at eye level and that it went back at least four or five years and that the sign was there prior to the incident with Laws. He said they blew up the sign and used it at dressage shows. The sign was posted on the wall at the front entrance to the barn on a bulletin board and had been there since 1994 or 1995. Laws said that she had not seen it before.

[56] I can only say that it seems to me somewhat doubtful that Laws had not seen this sign, having regard to area where it was posted and having regard to the frequency of her visits,

three or four times a week to see her horse at the barn. She must have seen this sign but perhaps she did not read it.

[57] Mr. Baehre stated that he had not warned Laws about Salish but that he knew she was aware of the horse's problems and he knew that Gillian Wright, the barn manager, had spoken to her about the horse.

[58] Gillian Wright testified that prior to February 24, she had told everyone to be cautious and stay away from the horse Salish. She said she had told the boarders, including Jane Laws. "I spoke to her when the horse arrived and when the horse was moved. I told her the horse was difficult and not to approach the horse and to stay clear." Wright testified that she had never seen Laws feeding Salish but that Laws was not permitted to feed Salish although she never specifically told her not to feed Salish.

[59] Wright was told that the horse would nip. She defined nip as being when a horse will grab with the teeth but not do any harm. "It can be an aggressive response." Wright continued, "I informed all the boarders to confine their feeding to their own horses. I don't recall if I specifically told Laws that." She continued that she had told every boarder about the stallion Indus and that she would let everyone know there was a stallion on the premises. On cross-examination she said, "I warned every single person about Salish, that she was temperamental." Wright continued on to say that she did not consider Salish to be a dangerous animal but that she could be more hazardous than a normal animal. She said she told Laws when the horse came into the barn to be careful and that "someone not thinking should not go near Salish."

[60] Laws testified that it was general knowledge that Salish was temperamental. The other boarders also knew the horse was temperamental and aggressive. Laws said that she would be extremely careful around Salish and Laws repeated that it was common knowledge that everyone should be careful with this horse but she was not aware that it had bitten anyone. Laws said, "I had seen the horse move; it was quite temperamental; I would be extremely careful around the horse." "The other boarders knew the horse was temperamental - that the horse had a very aggressive manner and that you need to be careful around the horse."

[61] On cross-examination, Laws agreed that the barn had not recommended hand feeding Salish and she was aware of this prior to February 24, 1998. She said she knew of two incidents prior to February 24. One was a nipping and the other was the pinning of a member of the staff in Salish's stall. Laws said that no one from Trakehner Glen knew that she was hand feeding Salish. Laws said nipping would not be an aggressive act by her horse but would be an aggressive act if done by Salish. Laws said that her horse Snort "used to pull at my jacket." Salish was a dangerous horse.

[62] I am satisfied on the evidence, on reviewing and considering all of the evidence with respect to the horse Salish, that all of the Defendants except Gisela Baehre had knowledge that Salish was a temperamental horse, a horse that could be easily irritated, a horse that could be

aggressive and, indeed, I will say a horse that could be dangerous. The Plaintiff Laws, prior to being bitten, knew the horse Salish was temperamental, aggressive, territorial, unpredictable and dangerous and she knew that the feeding of the horse by hand could lead to nipping or biting. I find that Salish was a dangerous horse.

THE INCIDENT

[63] Laws started to board her horse Snort at Trakehner Glen as she recalled in November of 1994. The horse Salish was not at the barn at that time. She recalled that Salish was moved from one stall in the barn to the stall adjacent to her horse Snort and that this was around January of 1997.

[64] Laws said that after Salish was moved to a stall alongside her horse Snort, that she had to deal with Salish every day when she went to see her horse. She said that she was extremely careful and that Salish was always “in my face.” [I took the expression “in my face” to mean that Salish would be in her way when she was going to see Snort and I would think that this would perhaps be because she was cutting across Salish’s stall.

[65] In short, it appears that Laws felt that Salish had to be dealt with or distracted so she could get to her horse. She said she would give Salish treats and Salish would move back and she could then get to her horse Snort. “I gave her something to distract her.” “I would feed Salish ... “ ”She would be in my face.” The gate would be down. She added that when she went to see her horse, Salish would start to nicker and Salish would have her ears forward and so she would give Salish a carrot. She said she went to see her horse Snort three or four times a week

[66] Laws testified that Linda Howard had told her it was not a good idea to feed Salish. “She only told me it was not a good idea to feed the horse.”

[67] She said that on February 24, 1998, she first went to feed her horse and on the way she picked up carrots and horse tastees and then she walked down the aisle of the barn towards her horse Snort. She remembers this was an emotional visit as she had decided to “retire” her horse. As she approached Snort, Laws said, “Salish was right there.” She fed Salish as usual. She gave him tastees with her right hand and she demonstrated in Court how she held her hand out, that is to say, flat with the hand with the thumb in. She fed Salish the tastees and then Salish withdrew back into his stall. She said Salish was looking for more and she held up her hand to show that she did not have anything in it. (Tastees are a horse biscuit.)

[68] Laws said that Salish laid her ears back and bit her. She remembered that she had held her hand up and Salish lunged at her and this was “30 seconds or so after I finished feeding the horse.” (Howard testified that holding a hand up with the fingers spread “is a threatening gesture”.) She said that was only an estimate as to the time. “She grabbed my thumb. I threw the carrot to my horse [as she had been reaching for a carrot]. She said she was in the same

position after she fed her and that Salish came back out and bit her. “I lost the tip of my thumb. I didn’t know how much damage was done.” She went eventually to the Rockyview Hospital.

[69] Howard had said that Salish had nipped at her when she was younger. Howard added that she had been bitten by Salish from time to time. Laws in cross examination admitted to prior nipping by Salish, but not to prior biting, prior meaning of course prior to her being bitten by Salish.

[70] Laws said that Salish’s behaviour to her had changed over time and because of the change, “I was less careful than I should have been.”

[71] Howard testified that in February of 1998, around the date of the incident, Salish was in season and that sometimes she had hormone problems and was more protective of herself in season and more irritable.

[72] Paragraph 5 of the Agreed Facts is as follows:

> “On February 24, 1998 the plaintiff’s right thumb was bitten by the horse Salish. At this time the plaintiff was a lawful entrant in the main barn on the defendant Trakehner Glen’s premises”.

[73] Laws said that no one from Trakehner Glen was aware that she was feeding Salish and that no one was around when she was feeding the horse.

[74] Fritz Baehre testified that he was not aware of anyone except his staff feeding Salish and he was not aware that Laws was feeding Salish. Wright, the stable manager, testified that she first became aware of the incident when Laws knocked at her door and that Laws was holding her hand and said she had been bitten. Wright dressed Laws wound and testified that Laws had said she was feeding Salish. Wright said she asked Laws why and Laws said, “I know I shouldn’t have been feeding her, it was my fault.” Laws also spoke to Howard after the incident: “She told me it was all her fault and that she shouldn’t have been feeding the horse.”

OCCUPIERS’ LIABILITY ACT

[75] Claim is made against Mr. and Mrs. Baehre, operating under the trade name Trakehner Glen, and so made pursuant to the ***Occupiers’ Liability Act***, RSA 1980, c. O-3. It is an agreed fact that the Baehres owned and operated Trakehner Glen and no issue was taken by Mr. Downe, counsel for Wright and the Baehres, as to whether the Baehres were occupiers of the premises. Clearly they were.

> 1 In this Act
>
> (a) “common duty of care” means the duty of care of an occupier of premises to his visitors provided for in section 5;

(b) "entrant as of right" means a person who is empowered or permitted by law to enter premises without the permission of the occupier of those premises;
(c) "occupier" means
(i) a person who is in physical possession of premises, or
(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,
...
(e) "visitor" means
(i) an entrant as of right,
(ii) a person who is lawfully present on premises by virtue of an express or implied term of a contract,
(iii) any other person whose presence on premises is lawful, or
(iv) a person whose presence on premises becomes unlawful after his entry on those premises and who is taking reasonable steps to leave those premises.

[76] Laws was an entrant as of right. She boarded her horse at the stable pursuant to a written agreement.

[77] The ***Act*** provides:

5 An occupier of premises owes a duty to every visitor on his premises to take such are as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there.

6 The common duty of care applies in relation to
(a) the condition of the premises,
(b) activities on the premises, and
(c) the conduct of third parties on the premises.

7 An occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor as his.

9 A warning, without more, shall not be treated as absolving an occupier from discharging the common duty of care to his visitor unless in all the circumstances the warning is enough to enable the visitor to be reasonably safe.

> 15(1) When the occupier does not discharge the common duty of care to a visitor and the visitor suffers damage partly as a result of the fault of the occupier and partly as a result of his own fault, the *Contributory Negligence Act* applies.

[78] Mr. Downe, counsel for Wright and the Baehres, points me to section 5 and the words "in using the premises for the purpose for which he is invited or permitted by the occupier to be there." He submits that on the facts the occupiers did not owe a duty of care to the plaintiff in the circumstances when, in fact, "the plaintiff was engaged in hand feeding of the horse Salish. This was not an activity that she was invited or permitted to do on the premises."

[79] He refers me to the case of ***Slaferek v TCG International Inc. et al.*** reported at 207 A.R. 113. I will first quote the headnote summary:

> The plaintiff, Darin Slaferek, was rendered a paraplegic when an inner tube he was riding on down a ski hill collided with a lift shack at the base of the hill. The plaintiff commenced an action against several defendants seeking damages. At the time of trial the actions against all defendants were discontinued or settled except for the action against the company which leased and managed the ski hill (Calido Recreation Management Inc.). Quantum was not in issue.
>
> The Alberta Court of Queen's Bench dismissed the plaintiff's action.

at pages 128 and 129:

> (73) In the present case, a duty would be owed to the plaintiff if Calido expressly or impliedly permitted him to be on the premises to engage in inner tubing activities. Although there is no evidence that Calido expressly permitted the plaintiff to participate in inner tube activities, the plaintiff argued that he had Calido's implied permission to do so, based on the events of the afternoon and evening of December 21st, the fact that Calido had previously permitted tobogganing parties and the foreseeability of persons attending a chalet party being tempted to use the hill for that purpose.
>
> (74) As Moir, J.A. pointed out in *Nasser v. Rumford and Rumford* (1977), 7 A.A. 459; 5 Alta.L.R.(2d) 84 (C.A.) at p. 89, hindsight should not be confused with foreseeability:
>
> > "We must not test the question of foreseeability by looking at the unfortunate injury to the respondent and then say it was foreseeable merely because it happened. That is not the test in law.

> "The classic case in setting out the proper test is Lord Atkin's statement in *M'Alister (Donoghue) v. Stevenson*, [1932] A.C. 562 (H.L.), where he stated at p. 580:
>
> > 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.'"
>
> ...
> (76) I am of the view that the plaintiff's accident and injuries were not reasonably foreseeable. No officer or employee of TCG alerted Calido to the intended use of the ski hill for inner tubing. It was only in the late evening of December 21st, when tubing activities were either just starting or already underway, that an employee of Calido became aware of the activities and promptly notified Mr. Weissenborn. He, in turn, promptly left his bartender duties and endeavoured to reach the hill, albeit not in time to prevent the plaintiff's accident.

at pages 130 - 132:

> (83) In contrast to these cases, the activity in the present case which created a risk of injury, namely tobogganing or tubing, was a rare occurrence at the ski resort during operating hours and after-hours when the lights were on and had in the past been pre-empted by Calido personnel, unless expressly authorized. Mr. Weissenborn had no prior knowledge of the hill being used for tobogganing in other circumstances after hours. In sum, the plaintiff's tubing activities were neither known to Calido, or within its experience. Nor was it Calido's experience that persons attending the chalet for private functions would be attracted to the hill and engage in tobogganing or tubing.
> ...
> (87) In the context of s. 5 of the Act, Calido owed a duty to visitors at its premises to take reasonable care to see that they will be reasonably safe in using the premises for the purposes for which they were invited or permitted by it to be there, in this case for afternoon skiing and a chalet party. when the party began, the lift lines were closed and the hill lights were off.
>
> (88) G.H.L. Fridman, in *The Law of Torts in Canada*, Vol 2 (Toronto: Carswell 1990), noted the following at p. 63:
>
> > "Alberta also provides that the premises must be made reasonably safe for the purposes for which a visitor is invited or permitted by the occupier or the law to be on the premises, i.e., the intended purpose. This, in Alberta, would appear to qualify the duty of care, since premises might be reasonably safe for a particular purpose although not reasonably safe for any and every

> purpose. The latter would seem to be the applicable test in jurisdictions other than Alberta."
>
> "In the absence of any discussion between TCG and Calido personnel about tubing activity or of a pattern of such activity being condoned in the past unless prior express permission had been received and in the absence of any awareness on the part of Calido personnel of Mr. Fulbrook's brief announcement about tubing, I cannot find on the evidence that Calido expressly or impliedly permitted the plaintiff to carry on tubing activities at the resort premises."

[80] The feeding of the horse Salish by any person other than its owner was clearly not allowed. It was in fact specifically prohibited. Laws knew this. She had been warned [s. 9] and the warnings she received were "in all of the circumstances ... enough to enable the visitor [Laws] to be reasonably safe." Laws presence in the barn was for all such activities pertaining to her keeping her horse in the barn, reasonable activities pertaining to her horse Snort and did not include feeding the horse Salish owned by Howard. She was not to feed Salish, it was prohibited and she knew this. Laws was not " using the premises for purposes for which he (she) is invited or permitted." There was no duty upon the occupiers to see that Laws was reasonably safe from the danger or consequences of her feeding another boarder's horse - Salish.

[81] I have also been referred to the case of ***Epp v. Ridgetop Builders Ltd. and Norris (Third Party)***, reported at 8 Alta.L.R.(2d) at page 195. I will quote the headnote to allow for a clearer understanding of the quotations to which I will in due course refer.

> The plaintiff was a surveyor engaged in surveying a building on the defendants' premise. He was working during a high wind, and a partially finished wall of the building fell on him. He sued for damages for his injuries.
>
> *Held*, the claim was dismissed. There was no defence of volenti non fit injuria, as there was no evidence to infer the existence of an agreement between the plaintiff and the defendants to the effect that the plaintiff would bear the legal risk of the defendants' failure to take steps to add to the support of the walls when the wind rose to abnormal levels. However, the plaintiff was aware of the dangers and decided to "take a chance". He was the author of his own misfortune, and the defendants were entitled to assume that persons who were familiar with construction sites and practices would recognize and avoid danger. The degree of care to be expected of the visitors of the type ordinarily conversant with construction sites is one of the "circumstances" to be considered in determining whether the occupier of the construction site has discharged his duty of care, and the defendant had done so.

at page 196:

> The plaintiff, Darryl Epp, claims damages, agreed by the parties to be $4,760, for injuries sustained on 27th January 1976, when a wall in a partially completed residential duplex was blown onto him by a high wind. The defendant, Ridgetop, and the third party, Ken Norris, were respectively the owner-builder of the duplex and the subcontractor engaged to do the rough framing of the structure. Mr. Epp was an employee of a survey company which had been engaged by Ridgetop to provide the survey certificate required by builders to obtain mortgage financing.
>
> Before construction commenced, the survey company had established and marked the boundaries of the property. Once the foundation and basement were constructed, the surveyor was required to make the further measurements needed to certify that the structure complied with municipal set-back requirements. These final measurements on the site in question were among the assignments which Mr. Epp received from his employer as the work to be done by him on 27th January 1976.
>
> Early on the morning of 27th January 1976 a strong chinook wind commenced to blow from the west. By 8:00 a.m. this wind was sufficiently strong that Mr. Norris and his crew did not go to work ("because of the wind"), and no other person was present at the building site. The evidence of a meteorologist from Environment Canada shows that the wind increased in intensity during the morning. At 11:30 a.m. it reached its peak intensity for the day of 128 km/h (79.8 m.p.h.).

at page 197:

> Mr. Epp arrived at the building site at approximately 10:30 a.m. He observed that he was the only person present. He found that the original boundary markers had become displaced during the course of the construction work. He therefore worked for an hour or a little more to re-establish the boundaries. Thus, just after 11:30 a.m., when the wind would have been nearly at its peak velocity, he commenced to survey the location of the structure. He completed his measurements of the north, west, and south wall, working on the ground beside each wall. The foundation on which each wall stood was some four feet out of the ground, and the walls were eight feet tall. As he walked beside the east wall, which was broadside to the wind, it blew down on him without any prior indication of failure, causing his injuries.
>
> Mr. Epp was a frank and forthright witness. He says he was aware of the wind problem and indeed was surprised that the walls were holding up in such a wind, which he estimated was blowing at 80 m.p.h. Though there had been no

particular request that the survey be completed that day, he wished to complete it. There was no evidence whatsoever of any pressure on Mr. Epp, economic or otherwise, to complete the assignment in hazardous conditions.

Mr. Epp decided that he could complete his measurements of the east wall, which was bearing the full force of the wind, in only two or three minutes, and, in words put to him in cross-examination, with which he agreed, he decided "to take a chance". During the two or three minutes while he took this chance, his injuries occurred.

at page 198:

The essential question in this action, in my opinion, is the effect to be given to the awareness of Mr. Epp of the danger he faced and to his decision in spite of that "to take a chance" by going under the east wall.

at pages 199 and 200:

The duty of care owed by Ridgetop is specified in the Act as follows:

"5. An occupier of premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there.

"6. The common duty of care applies in relation to
"(a) the condition of the premises, ...
"7. An occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor as his ....

"15.(1) where the occupier does not discharge the common duty of care to a visitor and the visitor suffers damage partly as a result of the fault of the occupier and partly as a result of his own fault, *The Contributory Negligence Act* applies."

The application of the Contributory Negligence Act, R.S.A. 1970, c. 65, involves a finding, firstly, that the occupier has not discharged the common duty of care. For the plaintiff, it is said that s.7 merely keeps in force in Alberta, in occupiers' liability cases, the common law defence of volenti non fit injuria. It is then said that, apart from the defence of volenti non fit injuria and apart from the provision in s.15 for the application of contributory negligence, the statute,

unlike the common law, does not impose on the visitor any duty to have regard for his own safety.

The common law position is derived from the classic statement of Wills J. in *Indermaur v. Dames* (1867), L.R. 1 C.P. 274 at 288, affirmed L.R. 2 C.P. 311 (Ex.Ct.):

> "And, with respect to such a visitor, at least, we consider it settled law, that he, *using reasonable care on his part for his own safety*, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know, and that, where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

I agree with the contention that s.7 was intended to preserve the volenti defence, but I do not agree with the balance of the contention, that the visitor's disregard for his own safety cannot be one of the "circumstances" referred to in s.5. It is, or can be, one of those circumstances that an occupier is entitled to assume that a visitor will exercise reasonable care for his own safety in the light of his own knowledge. That assumption is one factor in fixing the standard by which it is to be judged whether the occupier has taken "such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe".

[82] With respect to the word "circumstances" as used in section 5, I agree with Laycraft J., as he then was, that: "an occupier is entitled to assume that a visitor will exercise reasonable care for his own safety in light of his own knowledge."

[83] At page 202 of the judgment of Laycraft J.'s judgment, ***Epp v. Ridgetop Builders Ltd., supra***, it states:

> "'It is submitted that the key to an understanding of the true scope of the *volens* maxim lies in drawing a distinction between what may be called physical and legal risk. Physical risk is the risk of damage in fact; legal risk is the risk of damage in fact for which there will be no redress in law ...
>
> "'To put this in general terms, the defence of *volens* does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or

> implied bargain between the parties whereby the plaintiff gave up his right of action for negligence.'"
>
> The same passage was again applied in *Eid v. Dumas*, [1969] S.C.R. 688, 1 N.B.R.(2d) 445, 5 D.L.R.(3d) 561.
>
> In this case, the evidence uses the same language as in the quoted passage with respect to the plaintiff's conduct. He decided "to take a chance", but nothing in his conduct shows the further element of agreement necessary to constitute the defence of volenti non fit injuria.
>
> I am, however, of the opinion that the plaintiff was the author of his own misfortune. He was aware of the danger of going under the wall even for a short interval. A warning of the danger or even an express prohibition against going under the wall would in no way have increased the plaintiff's knowledge of the risk he ran. He already had all the knowledge a warning could have given him, however prominent or vehemently expressed it was. Whatever would have been the position of the defendant had a child or a less knowledgeable person than the plaintiff been injured, the defendant was entitled to assume that persons, such as the plaintiff, who were familiar with construction pratises would recognize and avoid the danger. The degree of care to be expected of the visitors of the type ordinarily coming to a construction site is one of the relevant "circumstances" to be considered in determining whether the occupier of a construction site has discharged the common duty of care defined by s. 5 of the Occupiers' Liability Act. I find that the defendant discharged the common duty of care he owed the plaintiff.

[84] As stated by Laycraft J. in ***Epp v. Ridgetop, supra***, a visitor's disregard for their safety can be one of the circumstances referred to in s.5. Laws was the author of her own misfortune and the doctrine of *volenti* applies independently of the circumstances referred to in s.5. She willingly accepted the risk (s.7). No valid claim has been made out pursuant to this Act.

[85] The duty of care, of course, applies in relation to section 6, (a) the condition of the premises and (b) activities on the premises. I am satisfied that the stable was in a reasonable condition as such and was reasonably safe for the activities customarily carried on in the stable and for the activities allowed in the stable.

[86] Mr. Schumacher argues that the warning was not specific enough. I do not agree. I find that Laws had been clearly warned and that under all of the circumstances, I find the warnings were enough to enable the visitor (Laws) to be reasonably safe (sec. 9). Laws was clearly the author of her own misfortune. She voluntarily assumed the risk of feeding a dangerous horse. The degree of care to be exercised is one of the circumstances to be considered in considering a discharge of the duty of care of the occupiers.

1. She was an experienced, mature horsewoman

2. She had been told by the owner Howard of the Salish's problems.

3. She was told by Howard that the feeding Salish was not a good idea. "Howard said this was not a good idea." "If she was good one day that didn't mean that she would be good the next." "She is not an easygoing horse, you should be careful." Howard "clearly voiced her disapproval." Laws said, "my understanding was that the horse was temperamental." "It was common knowledge to be careful with her horse."

4. Laws was aware that hand feeding could involve a risk of biting/nipping..

5. Wright told everyone to be cautious and to stay away from the horse Salish. Wright told Laws that the horse was difficult and not to approach the horse and stay clear.

6. Laws knew the feeding of horses other than one's own horse was not allowed.

7. Laws spoke to Wright after losing the tip of her thumb. When Laws was asked why she was feeding Salish she said: "I knew I shouldn't have been feeding her - it was my fault." "She told me it was all her fault and she shouldn't have been feeding the horse." She also admitted fault to Howard.

8. She knew that Salish was quite temperamental. Laws: "I would be extremely careful around that horse."

9. Laws had heard of the Haley jacket grabbing incident and of the incident with the stable person being pinned in Salish's stall.

10. Laws said that Salish was always "in her face" and she had to deal with Salish on almost every visit when she went to see her horse Snort.

11. Laws: "if a horse was nippy or bothering, the grill could be raised."

12. She never complained that Salish was in a stall next to her horse, Snort.

13. She knew that if she got too close, Salish could nip her. (That is to say, when she got too close to Salish's stall that Salish could nip her.)

14. She knew that in the barn it was not recommended to hand feed Salish.

15. She knew Salish was temperamental, aggressive and territorial.

16. Laws said,"Salish's behaviour changed over time and because of the change I was less careful than I should have been."

17. Salish had nipped at her "had nipped at me yeah." (Also in Re-Direct, Laws said that "Salish didn't try to nip me before.")

[87] I am quite satisfied that the doctrine of *volenti* does here apply. The Plaintiff knowingly assumed the risk. Indeed, the Plaintiff had very extensive knowledge and understanding of the risk that she took when she fed the horse Salish.

[88] I find in all of the circumstances that the Defendants Baehre have discharged the common duty of care that they owed to the Plaintiff Laws. I find no liability upon the Baehres pursuant to this ***Act***.

SCIENTER

[89] The Plaintiff advances a claim against the Baehres and also against Wright and Howard pursuant to the legal doctrine of "Scienter."

[90] ***The Law of Torts in Canada***, Fridman 1989 - Vol. 1, pp. 211-12:

> 3. The *Scienter* Doctrine
> (a) Common Law
> (i) *The Doctrine Stated*
>
> Where harm is caused by the behaviour of an animal, whether on the property of the defendant or elsewhere, this kind of liability depends upon the type of animal concerned. The law distinguishes between wild animals, i.e. animals *ferae naturae*; and tame or domestic animals, i.e. animals *mansuetae naturae* or *domitae naturae*. For damage resulting from the act of a wild animal, the defendant is strictly liable, without proof of negligence or other wrongful conduct, and without the necessity of proving that the defendant was aware of the dangerous character of the particular animal that caused the harm, or of the class of animals to which it belonged. If the animal is *mansuetae naturae*, that is, one which ordinarily did not cause the kind of harm that is involved, the common law requires that the particular animal concerned have the dangerous or mischievous propensity to commit the harm or damages that it inflicted, and that the defendant knew of such propensity or characteristic of the individual animal. To keep such an animal with knowledge of its potential for causing harm is not in itself negligence, or indeed wrongful in any other way (any more than to keep a wild animal is *per se* unlawful or negligent). Indeed, despite some judicial discussion that appears to introduce elements of negligence into liability for animals, at common law there is no need to prove negligence in the way in which the animal in question was controlled or kept in order to establish

> liability, as long as the requisite elements of dangerous propensity or character and knowledge are present.

[91] I have found that the horse Salish was a dangerous horse and I will now add to those words that it had a "dangerous propensity". The Baehres, as proprietors of Trakehner Glen, were well aware of this propensity of the horse Salish as was their stable manager, Gillian Wright. These Defendants were aware that Salish was a dangerous horse, although they may not have chosen the word dangerous.

[92] Mr. Downe, counsel for the Defendants, refers me to the decision of ***Acheson v. Dory***, a decision of Picard J. of this Court, (1993) 8 Alta. L.R.(3d) at p. 128. Mr. Downe submits that "it's my position that the scienter doctrine is no longer the case in law in Alberta." Picard, J. at page 135:

> 16 The plaintiff submits that the defendant is liable on the basis of scienter, or alternately, negligence. In order to prove scienter, the plaintiff must show that the stallion had mischievous or vicious propensities, and that these were known to the defendant.
>
> 17 Scienter liability is strict liability. Finding liability without fault is becoming the exception in tort law. Professor Klar in his text *Tort Law* (1991), said at pp. 391-92:
>
> > "Strict liability, as a basis of liability, is relatively insignificant in contemporary tort law. It is clearly somewhat at odds with the values and objectives of fault-based compensation to hold a person liable for faultless behaviour. Different goals and values, other than the traditional ones associated with tort law, such as deterrence, education, and the punishment of wrongdoers, the creation of acceptable standards of conduct, and the assertion of the moral principle of the accountability of wrongdoers, must be advanced in support of strict liability ..."
> >
> > "There has been little room, and less need, for the development of strict liability torts. Most accidentally caused injuries which merit compensation have been comfortably encompassed by the welcoming arms of negligence law."

> 18 It is reasonable and appropriate that in 1992 a claim, such as that advanced by the plaintiff, be resolved within the more modern and flexible parameters of negligence law.

[93] The learned trial judge does not say that the doctrine is "dead". She expresses only a preference to proceed to dispose of this claim "within the more modern and flexible parameters of negligence law." It appears to me that in many cases where scienter is advanced the claim also could be properly disposed of under negligence law. But the doctrine of scienter is a doctrine different from the law of negligence as such. I have been given no authority that spells the end of the legal doctrine of scienter in Alberta courts or, indeed, elsewhere, and scienter continues to be considered subsequent to the decision in ***Acheson v. Dory, supra***, a decision made in February of 1993. See ***Bennet v. Morgan*** (1993) 138 A.R. 75; ***Gulash v Meier*** (1997) 207 A.R. 202; ***Fisher v. Liptak*** (1996) A.J. No. 30.

[94] Where a Plaintiff chooses to have several arrows in a legal quiver and each is legally available to the litigant, I think I should proceed to consider and deal with each legal basis for a possible finding of liability.

[95] The first requirement then is that of a dangerous or mischievous propensity. I have said that Salish was a dangerous animal, however, it is not sufficient simply to establish that the animal is dangerous or mischievous.

[96] Mr. Downe in argument asks me to consider the case of ***Gill v. McDonald***, 80 D.L.R. 21 at 22. (I have added to the quotation to which he referred) at pages 22 and 23.

> Where damage is caused by an animal which belongs to the domestic classification, liability against the owner or keeper may be held if, (a) the damage was due to a mischievous propensity, known to the owner or keeper which is termed *scienter*, or (b) on ordinary grounds of negligence.
>
> > "Thus liability for a harmless animal's acts only arise if it has an abnormal dangerous characteristic which must be known to its keeper, and in the absence of these circumstances liability will depend upon the ordinary law of negligence."
>
> Halsbury's Laws of England, 4th ed., vol. 2, p. 200, para. 425.
>
> In dealing with *scienter* counsel for the plaintiff alleged that such a rule, if it may be termed as such, puts upon the defendants the onus of satisfying the Court that they had no knowledge of the vicious or mischievous nature of the horse and he cited the case of *Dowler et al. v. Bravender et al.*(1968), 67 D.L.R.(2d) 734, in support of his contention. I do not feel that this is a correct statement of the law. In order for the plaintiff to please *scienter he* must establish that the defendants were aware of the vicious or mischievous

characteristics of the horse: *Draper et al. v. Hodder*, [1972] 2 All E.R. 210 (C.A.); *Rosenthal v. Hess*, [1927] 1 D.L.R. 493, [1927] 1 W.W.R. 15 (Sask.C.A.).

IN *Rands v. McNeill*, [1955] 1 Q.B. 253, [1954] 3 @.L.R. 905, Denning, L.J., said at p. 257:

> "In order to impose strict liability even to the public it is essential to prove not only knowledge of the dangerous propensity of the animal, but also to prove that it escaped and did harm."

In *Rosenthal v. Hess*, Martin, J.A., stated at pp. 496-7 D.L.R., pp. 18-9 W.W.R.:

> "Where an animal is of a kind known to be vicious - known to be liable to attack mankind - an action will lie without proof of negligence in the keeping. The foundation of this liability is, that the keeping of a dangerous animal imposes a duty to keep it safely, and the breach of that duty constitutes actionable, negligence. (*May v. Burdett* (1846), 9 Q.B. 101, 115 E.R. 1213.)
>
> The same rule applies in the case of any animal which is ordinarily harmless, but which has to the knowledge of the owner shown itself vicious by doing harm to any person (*Jackson v. Smithson* (1846), 15 M.& W. 563, 153 E.R. 973; *Street v. Craig* (1920), 56 D.L.R. 105, 48 O.L.R. 324). The knowledge however, to render the owner liable, must be of a disposition to do the thing which is complained of. The keeping of a domestic animal, however, does not impose the same onerous duty as rests upon the owner of an animal of a kind known to be vicious. The owner of domestic animals must take reasonable care, and there is a liability to answer for such damage as may be reasonably expected to flow from a breach of the duty to take reasonable care. Ignorance of the true character of a domestic animal frees the owner from responsibility; but an honest belief in the harmless nature of an animal not falling within the class of animals not ordinarily dangerous, and the fact that it has not previously shown itself to be vicious, does not relieve an owner from his liability (*Filburn v. People's Place & Aquarium Co.* (1890), 25 Q.B.D. 258)."

As stated, the horse would fall into the classification of domestic animals or animals not ordinarily dangerous and there is no responsibility on the defendants, under the *scienter* rule, unless the plaintiff can prove that the

> defendants knew of the animal's vicious character to do the thing which is complained of.

[97] It is this last paragraph which is emphasized by Mr. Downe and in particular the words "unless the plaintiff can prove that the defendants knew of the animal's vicious character to do the thing which is complained of". Mr. Down says it is the thing which is being complained of the biting, that has to be brought home to the Defendants. How particular then must the evidence be in this regard. The Defendants knew that Salish was a dangerous horse, no doubt, but did they know of its propensity for biting or only nipping?

[98] In argument it was submitted that there was a difference between "biting" and "nipping" and that prior experience or warning of a horse nipping may not be a warning that a horse bites. I was given dictionary references. The first was ***Webster's Third New International Dictionary*** at page 1529, as follows:

> nip\'nip\ *vt* nipped *or archaic* nipt; nipped *or archaic* nipt; nipping; nips [ME *nippen*; akin to MD *nipen* to nip, ON *knippa* to prod, Gk *knips*, an insect, *skniptein* to nip, *konis* dust - more at INCINERATE] *vt* 1 a : to catch hold of and squeeze slightly between two surfaces, edges, or points; compress esp. by pinching or biting;

[99] Reference may also be made to ***Merriam Webster's Collegiate Dictionary*** at page 117:

> **bit** ... *n* [ME *bitt*, fr. OE *bite* act of biting; akin to OE *bitan*]
>
> **bite** *v* ... a: to seize esp. with teeth or jaws so as to enter, grip, or wound b: to wound, pierce, or sting exp. with a fang or a proboscis 2: to cut or pierce with or as if with an edged weapon 4 : to take hold of ...
>
> **bite** *n* ... 1: the act or manner of biting ...

[100] I am satisfied that a nip is but a gentle bite. If one were forewarned of nipping then surely that would be an adequate forewarning of biting. A warning, in effect that the same horse that nips may also bite.

[101] Gillian Wright knew the horse Salish was dangerous. She told Laws to stay clear of Salish. Wright was told that the horse would nip - "it can be an aggressive animal". Wright testified, "I informed all of the boarders to confine their feeding to their own horses". Wright knew of the Haley Van der Kloot incident, "where she walked too close and was grabbed by the coat ... the horse picked her up by the jacket." Surely then, this was an incident of a horse biting for it would only be a bite that would allow the horse to pick up Haley by the jacket; a nip would not be sufficient. Gillian Wright therefore knew that Salish was a dangerous horse and posed a danger of biting. Fritz Baehre was also aware of the Haley Van der Kloot incident. The knowledge of Gillian Wright must surely also come to rest upon the proprietors of the

barn, that is to say the Baehres, who operated Trakehner Glen, for she was employed as the manager of the barn operated by the Baehres. Also, Mr. Baehre was told by Wright that a handler had told her that the horse could nip.

[102] The Baehres and Wright were well aware not only for Salish's propensity for nipping but also a propensity for biting (the Haley Van der Kloot incident, where Haley was lifted by the jacket). Reasonable specificity, of course, may well be required to bring home to the keepers knowledge of an animal's propensity but it cannot go so far as to attempt to distinguish between a bite and a nip. Howard was aware of her horse's propensity for nipping or biting.

[103] The doctrine of *volenti non fit injura* is a defence that may be held to be applicable where liability is sought under the doctrine of *scienter*. Did the Plaintiff Laws voluntarily assume the risk of being injured by the horse, the risk of being injured while feeding a horse other than her own?

1. Laws was an experienced, mature horsewoman

2. Laws had been told by the owner Howard of the Salish's problems.

3. She was told by Howard that the feeding Salish was not a good idea. "Howard said this was not a good idea." "If she was good one day that didn't mean that she would be good the next." "She is not an easygoing horse, you should be careful." Howard "clearly voiced her disapproval." Laws said, "my understanding was that the horse was temperamental." "It was common knowledge to be careful with her horse."

4. Laws was aware that hand feeding could involve a risk of biting or nipping.

5. Wright told everyone to be cautious and to stay away from the horse Salish. Wright told Laws that the horse was difficult and not to approach the horse and stay clear.

6. Laws knew the feeding of horses other than one's own horse was not allowed.

7. Laws spoke to Wright after losing the tip of her thumb. When Laws was asked why she was feeding Salish she said: "I knew I shouldn't have been feeding her - it was my fault." "She told me it was all her fault and she shouldn't have been feeding the horse." She also admitted fault in feeding Salish to Howard.

8. She knew that Salish was quite temperamental. Laws: "I would be extremely careful around that horse."

9. Laws had heard of the Haley jacket grabbing incident and of the incident with the stable person being pinned in Salish's stall.

10. Laws said that Salish was always "in her face" and she had to deal with Salish on almost every visit when she went to see her horse Snort.

11. Laws: "if a horse was nippy or bothering, the grill could be raised."

12. She never complained that Salish was in a stall next to her horse, Snort.

13. She knew that if she got too close, Salish could nip her. (That is to say, when she got too close to Salish's stall that Salish could nip her.)

14. She knew that in the barn it was not recommended to hand feed Salish.

15. She knew Salish was temperamental, aggressive and territorial.

16. Laws said,"Salish's behaviour changed over time and because of the change I was less careful than I should have been."

17. Salish had nipped at her "had nipped at me yeah. (Also in Re-Direct, Laws said that "Salish didn't try to nip me before.")

[104] I am quite satisfied that the doctrine of *volenti* does here apply. The Plaintiff knowingly assumed the risk. Indeed, the Plaintiff had very extensive knowledge and understanding of the risk that she took when she fed the horse Salish. This claim based on scienter and against the Defendants Wright, Howard and the Baehres fails.

NEGLIGENCE

[105] The Plaintiff founds a claim as against the Baehres, Wright and Howard on Tort Law of Negligence. Negligence is the omission to do something which a reasonable man, guided upon the considerations which ordinarily regulate the conduct of human affair would do, or doing something which a prudent and reasonable man would not do.

[106] Mr. Schumacher for the Plaintiff has asked me to consider the case of ***Bates v. Horkoff et al.***, 119 A.R. 270, a decision of Conrad J. as she then was. At page 271:

> Torts - Topic 264
>
> Negligence - Animals - Dangerous - Knowledge of - Liability of owner - The Alberta Court of Queen's Bench stated that "at common law ... an owner of a dog is strictly liable for injuries caused by it if the animal was mischievous or vicious and the owner knew of these propensities" - The court stated that where

> evidence fell short of establishing knowledge of vicious propensities (i.e., scienter) the dog owner could still be liable in negligence - See paragraph 17.

at page 272:

> [3] The plaintiff Shawna Bates was three years old and had been attending Marlborough Day Nursery for a few months prior to the accident which occurred on April 9th 1986. She was in a class comprised of three and four year olds, with a ratio of eight children to one instructor. That ratio met the provincial guidelines. On the fateful day in question, Ms. Racine and Ms. Sallenback took twelve children, including Shawna, on an excursion to a local playground adjacent to the property owned by the defendant Horkoff at 5422 Marlborough Place N.E. Her mother was aware that the class went on such outings.

at page 273-274:

> [8] The only divider between the backyard of Mr. Horkoff and the playground was a metal fence with offsetting panels which completely enclosed the property. The fence built in 1975, consisted of posts eight feet apart, with a rod across the top and across the bottom. Vertical slats were then put on and clamped with a screw at the bottom and the top. the panels were seven inches wide and five feet high and placed alternatively one on the outside of the rail and one on the inside in an offsetting manner, thereby creating a natural gap large enough to easily reach through. Mr. Horkoff acknowledged that the panels would shift from time to time and there would be a gap in the fence requiring adjustment. He did not recall the last time they had been adjusted.
>
> [9] The dog was kept in the backyard and was not restrained in any manner other than by the fence. the Horkoffs would depart for work in the morning, leaving the dog alone in the backyard. He was not on a leash nor was he placed in a dog run. Although Mr. Horkoff owned a dog run, he did not believe that this dog needed to be in one. There was no sign warning of a dog on the premises.
>
> [10] Ms. Racine said that during the incident in question the dog’s nose protruded through the fence into the playground. She could see the entire snout of the dog through the fence. Ms. Sallenback said there was a gap and she pushed it even further apart to allow Ms. Racine to kick the dog and free the child. Shawna was then taken for treatment to her injuries.
>
> [11] Constable McCoubrey investigated the dog attack on April 9th 1986. His evidence was that the fence was in need of repair and that there were large gaps in it. He took photographs, which were entered in evidence, indicating there were gaps in the fence at that time. He also gave evidence that while he was

there the dog ran at the fence and was able to come part way through the fence up to its shoulders. His evidence was that the fence was in very poor condition; some panels had half a screw, some had a whole screw.

[12] With respect to the temperament of the dog, the owner gave evidence that he was unaware of any previous dog bit perpetrated by the dog. He said the dog was playful, and when it saw children in the park it would bark at them. The dog had never escaped from the yard. He was aware that children played on the playground equipment in the adjoining playground. The dog weighed approximately 120 pounds and was approximately 5 ½ feet high. He acknowledged that the day following the accident there was a gap in the fence six to seven inches wide, large enough for the dog's head to go through. A child could, even without the gap, put an arm through the fence between the offsetting panels.

...

[17] It is well established at common law that an owner of a dog is strictly liable for injuries caused by it if the animal was mischievous or vicious and the owner knew of these propensities. For example, see *Standford v. Robertson*, [1946] 3 W.W.R. 767; *Lupu v. Rabinovitch*, [1975] 5 W.W.R. 1 (Man.Q.B.); *Dirks v. Binning*, [1975] 1 W.W.R. 73. The owner, based on his scienter (knowledge), is absolutely liable for any damage caused by the dog, notwithstanding that generally the common law recognizes that it is not in the ordinary nature of a dog to injure mankind (*Raisbeck v. Desabrais*, [1971] 1 W.W.R. 678 (Alta.S.C.A.D.). In this case the evidence falls short of establishing knowledge of vicious propensities, such as would impose strict liability.

[18] However, the liability of a dog owner for damages caused by his dog does not necessarily have to be founded on the rule of strict liability for dangerous animals. Rather, such liability may be established in a negligence action. See *Caine Fur Farms Ltd. v. Kokolsky*, [1963] S.C.R. 315; *Raisbeck v. Desabrais*, (supra); *Draper v. Hodder*, [1972] 2 All E.R. 210 (C.A.); *Sgro v. Verbeek* (1980), 111 D.L.R.(3d) 479 (Ont.H.Ct.): *Gill v. Macdonald et al.* (1977), 14 Nfld. & P.E.I.R. 438; 33 A.P.R. 438; 2 C.C.L.T. 249 (P.E.I.S.C.); *Thordarson v. Zastre* (1968), 65 W.W.R. (N.S.) 555 (Alta.S.C.A.D.); *Nasser v. Rumford* (1977), 7 A.R. 459; 5 Alta. L.R.(2d) 84.

at pages 274-275:

[19] Martland, J. in the case of ***Caine Fur Farms Ltd. v. Kokolsky***, supra, sets out the requirements for the negligence action as follows, at p. 317:

> "The liability of a dog owner for damage caused by his dog did not necessarily have to be founded on the rule of strict liability relating to the keeping of dangerous animals. It might be established in negligence

> if, in the circumstances, a duty to take care in relation to the dog existed and there had been a breach of it. This proposition was recognized by the House of Lords in *Fardon v. Harcourt-Rivington*, [(1932), 146 L.T. 391], and it is stated by Lord Atkin in that case, at p. 392, as follows:
>
> > 'but it is also true that, quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour - the ordinary duty to take care in the cases put upon negligence.'"

This decision was later followed in Alberta by McDermid, J.A., in *Raisbeck v. Desabrais*, supra."

[20} The negligence action was also the subject of extensive and helpful comment in the British case of *Draper v. Hodder*, supra. In that case, Davies, L.J., refers to the existence of the negligence action, at p. 214:

> "... certain modern authorities show clearly that an owner or keeper of an animal may quite apart from the scienter rule be liable for damage done by that animal if the owner or keeper puts it or allows it to be in such a position that it is reasonably foreseeable that damage may result."

Davies, L.J. then goes on, at p. 214-215, to refer to *Sycamore v. Ley* (1932), 147 L.T. 342, where Greer, L.J., said at pp. 344-345:

> "Liability for damage caused by the bite of a dog is not, in my judgment, confined to the cases where it has to be made out that a dog had, by reason of its ferocious character known to the defendant, to be taken out of the class of tame animals and put into the class of wild animals. ...
>
> "... that is not the end of his liability. He may, in my judgment, be liable for the conduct of a dog which has not been taken out of the category of tame animals if he puts it in such a position and in such circumstances as render it likely that the dog will get excited, will lose its temper, and will cause damage to people lawfully passing along the highway; ..."

Davies, L.J., then, at p. 215, refers to *Searle v. Wallbank*, [19478] 1 All E.R. 12, where Lord du Parcq places two qualifications upon a claim in negligence, at p. 21:

> "... first, that where no such special circumstances exist negligence cannot be established merely by proof that a defendant has failed to

> provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature, and secondly, that, even if a defendant's omission to control or secure an animal is negligent, nothing done by the animal which is contrary to its ordinary nature can be regarded, in the absence of special circumstances, as being directly caused by such negligence."

[21] The decision of Edmund Davies, L.J., in *Draper v. Hodder*, supra, at p. 219 states it as follows:

> "... The defendant's knowledge of 'the nature of the beast' which is basic to 'scienter' liability is also directly relevant both to the question of whether he was negligent at all and furthermore, if he was, whether he ought reasonably to have foreseen the damage which in fact resulted therefrom. That is not, of course, the same as saying that proof of 'scienter' is indispensable in an action for negligence. As Pearson, L.J., put it in *Ellis v. Johnstone,* [[1963] 1 All E.R. 286, at p. 297]:
>
> > 'For the action of negligence, it is sufficient if the defendant knew, or ought to have known, of the existence of the danger, which does not necessarily arise from a vicious propensity of the animal, although perhaps some special propensity is required.'"

[22] In *Sgro v. Verbeek*, supra, Craig, J., cites with approval the explanation by Davies, L.J., that the "special propensity" or "special circumstances" will depend upon the facts of each individual case. Similarly, in the case of *Gill v. MacDonald*, supra, MacDonald, J., confirms *Draper v. Hodder*, supra, and then goes on to say, at p. 254:

> "... For the action of negligence, all that is necessary to prove is that the owner knew, or ought to have known, of the existence of the danger, which need not arise from the vicious propensity of the animal although, as stated in *Draper*, perhaps some 'special propensity' or 'special circumstances' are required, and, as indicated there, the answer to that question must depend on the particular facts of each individual case."

[23] In summary, could the owner of the particular animal, with its particular characteristics, in the particular circumstances, have reasonably foreseen the danger that could result in damage.

[24] What then are the particular facts in the case at bar? For one, the yard was situated next to a playground. Mr. Horkoff knew that numerous children frequented the playground, and that many of these children were not familiar to the dog. While the dog had previously been allowed to play with neighbourhood

children without event, Mr. Horkoff was never able to witness the dog's behaviour towards strange children because, except for walks with Mrs. Horkoff, the dog was kept in the backyard. Testimony from Mr. Horkoff's neighbour was to the effect that the dog would get excited and bark at people in the playground and occasionally stood up against the fence while doing so. Indeed Mr. Sabb's evidence was that the dog played "a little rough" with his and the Horkoff children. the constable gave evidence that the dog was very aggressive, although that behaviour was after the incident. I am satisfied that the dog was very excitable. While perhaps there had been no prior incident sufficient to take the animal out of the category of tame animal and impose strict liability, the evidence established an excitable temperament.

[25] The dog was a German Shepherd, a breed characterized by substantial physical size. Mr. Horkoff's dog was certainly no exception. It was contained only by a fence which was in a state of disrepair so that the dog was able to stick its head through the fence. Indeed, even if not in disrepair a child could put its hand through the fence.

[26] I am mindful that a defendant need not guard against "fantastic possibilities". See *Nasser v. Rumford* (1977), 7 A.A. 459; 5 Alta.L.R.(2d) 84 (Alta.S.C.A.D.); *Draper v. Hodder*, supra, at p. 221. However, a defendant must be mindful of risks that are "real", that is, of risks that "a reasonable person would not brush aside as far-fetched or fanciful". See Fleming, *The Law of Torts* (6th Ed. 1983), p. 109. The risk here was real.

at page 276-277:

[27] It should be recalled that the actual injury need not be anticipated. See *Draper v. Hodder*, supra, at p. 220, where Edmund Davies, L.J., says:

> "... the proper test in negligence is not whether the particular type of physical harm actually suffered ought reasonably to have been anticipated, but whether broadly speaking it was within the range of likely consequences."

[28] Considering all the factors together, Mr. Horkoff breached the duty of care he owed to the plaintiff. A reasonable person would have reasonably foreseen this dog could inflict serious injuries upon children playing nearby if it was not properly restrained. This is especially so when one considers the size and the excitable nature of the dog, the frequent and likely presence of very small children in the playground, and the poor state of repair of the fence, the only barrier preventing the dog from gaining access to the playground. Mr. Horkoff should have foreseen the very real risk his dog presented to children playing in the playground and maintained his fence in a state that would prevent access to

> small children and otherwise restrain the dog. Therefore, an injury to a child as a result of contact with the dog was reasonably foreseeable. A dog bit was within the range of likely consequences.

[107] I have quoted from this decision no doubt at excessive length principally because of its exposition of the law of negligence and application of the law of negligence.

[108] In the case of ***Lee and Another v. Walker***, The Law Times, vol 162, 89, at page 90:

> In the circumstances of this case, there is no doubt, on the evidence, that the child brought this accident upon himself by what he did. He went to a dog which was eating its food under a table, put his arm round it, and finally, when it had, as the child thought, finished its meal, kissed it. He was trying to induce the dog to play. It seems quite clear that the accident was due, not to the fact of the dog's not being kept under control, but to the fact that it was interfered with and that the child brought this trouble on himself. The matter can be put in another way: had this dog been, as the courts always regard dogs, an animal of a mild, even of the mildest, nature, it could not have been expected to tolerate the treatment which it received from this little boy - treatment which involved its being interfered with when eating under the table, the child trying to induce it to play when it apparently preferred to eat. Accordingly, the accident did not flow from any failure to control the animal but really from quite a different cause, because no control, either of a mild or of a fierce animal, could have prevented this accident in the circumstances.

[109] In order to prove negligence the Plaintiff must establish that the Defendants owed the Plaintiff a duty of care, that the Defendants were aware of a "special propensity" of the horse Salish, that damages were reasonably foreseeable and that the Defendants breached this duty.

[110] Were the Defendants aware of the special propensity of Salish, the danger of biting or nipping? Howard, the owner, certainly knew. The evidence is clear on that point. She had a long association with her horse. She warned others about the propensities, the danger posed by Salish. The horse had nipped her in the past and Howard knew of the incident where her horse had lifted a person up by their jacket and she knew of an incident when her horse had kicked a repairman in Vancouver. Howard told Laws to be careful: "she is not an easy horse, you should be careful." Howard: "I was open about my horse problems." On the evidence I am quite satisfied that Howard may not have regarded her horse as dangerous, however I regard and find Salish to be a dangerous horse.

[111] Fritz Baehre and Gisela Baehre operated the stable. Fritz Baehre acted as the overall manager and the manager of the barn was Gillian Wright. He said it was foreseeable that a person could get too close to a stall. He said the boarders had been informed to stay away from Salish. He spoke to a few boarders. He was satisfied that everyone in the barn knew about the horse. He knew of the Van der Kloot jacket biting incident. I am satisfied that Fritz Baehre

knew danger that could be anticipated from the horse Salish. The knowledge of Fritz Baehre is the knowledge of his wife as they operated under the trade name of Trakehner Glen.

[112] Mr. Baehre said he knew that Gillian Wright had spoken to Laws about the horse's problems. Gillian Wright had told everyone to be cautious and stay away from the horse Salish. She told Laws to stay clear of Salish. Wright was told the horse could nip and she was aware of the Haley Van der Kloot incident. Wright was aware of the dangers posed by the horse Salish and her knowledge must also come to rest on the Baehres, the proprietors of Trakehner Glen.

[113] All of the Defendants knew of the danger posed by the horse Salish. The danger posed was the result of Salish being, an aggressive horse, a territorial horse, a horse given to nipping/biting.

[114] Was a duty of care owed to the plaintiff Laws? The Baehres operated the barn and it was managed by Wright. Various persons boarded their horses there. Howard had a contract with the stable to board her horse Salish there. The boarders, including the Plaintiff, had access to the stable to see, deal with and ride their horses. The Plaintiff had a right to be in the stable for proper purposes pertaining to her horse.

[115] All of the Defendants each owed a duty to the Plaintiff and that duty was to take reasonable steps to make sure thatLaws was safe from consequences which were reasonably foreseeable.

[116] Laws had been warned of the horse Salish. Boarders were to feed only their own horses. Laws was to feed only her own horse. Laws knew this, nevertheless, she fed Salish in spite of warnings not to do so.

[117] The law indicates that the duty owed is "to take care that the animal is not put to such use as it may injure someone. In ***Nasser v. Rumford*** (1977), 4 C.C.L.T. 49 (Alta.C.A.) at 53-57, Moir J.A. for the Court stated at 54-55:

> The House of Lords made it clear that the duty owed in respect of an animal is, as far as negligence is concerned, to take care that the animal is not put to such a use as it may injure someone. It is clearly a case of foreseeability - to guard against probabilities but not to anticipate fantastic possibilities.
>
> ... to determine whether the premises are reasonably safe one must apply the test as to whether or not the danger was foreseeable. The learned trial judge found that it was foreseeable. With the greatest respect for the learned trial judge's opinion I am ... unable to agree.... There was nothing in Trudy's past behavior that would require that she be locked up, muzzled or restrained. In my opinion what occurred here was most unusual and simply was not foreseeable. We must not test the question of foreseeability by looking at the unfortunate injury to the

> respondent and then say it was foreseeable merely because it happened. That is not the test in law.

[118] In this matter the claim must be that the Defendants should have foreseen that the boarder Laws may be bitten by another boarder's horse, Salish and that such a bite was reasonably foreseeable. Laws had clearly been warned and Laws knew she was breaking the rules by feeding Salish. The biting of Laws while feeding another boarder's horse, Salish, was not reasonably foreseeable. It was not reasonably foreseeable that Laws would do what was specifically forbidden, and an activity that she knew exposed her to a risk of being bitten/nipped.

[119] I will now consider the defence of *volenti non fit injuria*.

[120] Where a plaintiff knows of the danger posed - a plaintiff is advised with respect to a certain animal of the danger - and voluntarily takes such risk, the law is that a complete defence to an action framed in negligence. ***Montreal Stock Yards Co. v Poulin***, [1941] 3 D.L.R. 646 (S.C.C.) at 649-50; ***Acheson v. Dory***, supra, at 139 (Q.B.).

[121] In ***Hall v. Sorley*** (1980), 23 B.C.L.R. 281, the British Columbia Supreme Court found that the defendants could not be liable because of the knowledge and conduct of the plaintiff. There, Taylor, J. found, at 284, that the defendants had knowledge of their dog's propensity to bite people, however, they were not liable because the plaintiff had the same knowledge. Taylor, J. stated at 285:

> What then the knowledge of the plaintiff? Did [she] know that Barney might bite her? Was she "meddling" in approaching the dog and trying to pat him?
>
> I am satisfied that [the Plaintiff] knew, before the day on which she was bitten, that Barney was a potentially dangerous dog, and that he might bite. She knew it because of what [a non party] told her, because she had seen a copy of the "multiple listing" [which contained a warning as to the subject dog] and also the notice in the window, and because her husband had told her that the dog lunged at him on an earlier visit. She knew the dog's function was to keep strangers away from the house. It was with this knowledge that [the Plaintiff], although a complete stranger to the dog, decided while standing out of its range in the back yard that she would like to approach Barney and touch him. She turned to [the Defendant] and asked if she could "go and pet Barney". [The Plaintiff] knew there was a risk involved and was deciding whether or not to expose herself to it. She knew that Barney was a dog who might bite people, but she says she has a great affection for animals. I think she wanted to show herself that she could establish some rapport with this rather fearsome guard dog.

[122] Laws was:

1. An experienced, mature horsewoman

2. She had been told by the owner Howard of the Salish's problems.

3. She was told by Howard that the feeding Salish was not a good idea. "Howard said this was not a good idea." "If she was good one day that didn't mean that she would be good the next." "She is not an easygoing horse, you should be careful." Howard "clearly voiced her disapproval." Laws said, "my understanding was that the horse was temperamental." "It was common knowledge to be careful with her horse."

4. Laws was aware that hand feeding could involve a risk of nipping/biting.

5. Wright told everyone to be cautious and to stay away from the horse Salish. Wright told Laws that the horse was difficult and not to approach the horse and stay clear.

6. Laws knew the feeding of horses other than one's own horse was not allowed.

7. Laws spoke to Wright after losing the tip of her thumb. When Laws was asked why she was feeding Salish she said: "I knew I shouldn't have been feeding her - it was my fault." "She told me it was all her fault and she shouldn't have been feeding the horse." She also admitted her fault in feeding Salish to Howard.

8. She knew that Salish was quite temperamental. Laws: "I would be extremely careful around that horse."

9. Laws had heard of the Haley jacket grabbing incident and of the incident with the stable person being pinned in Salish's stall.

10. Laws said that Salish was always "in her face" and she had to deal with Salish on almost every visit when she went to see her horse Snort.

11. Laws: "if a horse was nippy or bothering, the grill could be raised."

12. She never complained that Salish was in a stall next to her horse, Snort.

13. She knew that if she got too close, Salish could nip her. (That is to say, when she got too close to Salish's stall that Salish could nip her.)

14. She knew that in the barn it was not recommended to hand feed Salish.

15. She knew Salish was temperamental, aggressive and territorial.

16. Laws said,“Salish’s behaviour changed over time and because of the change I was less careful than I should have been.”

17. Salish had nipped at her “had nipped at me yeah. (Also in Re-Direct, Laws said that “Salish didn’t try to nip me before.”)

[123] I am quite satisfied that the doctrine of *volenti* does here apply. The Plaintiff knowingly assumed the risk. Indeed, the Plaintiff had very extensive knowledge and understanding of the risk that she took when she fed the horse Salish. This claim framed in negligence fails as against the Defendants Wright, Howard and the Baehres.

DECISION

[124] I have found no liability rests on any of the Defendants pursuant to scienter, pursuant to the ***Occupiers’ Liability Act***, or pursuant to negligence. This action fails.

[125] Costs will go to the Defendants. Damages were claimed in the amount of $25,000.00.As the parties had agreed on the quantification of damages in the event that I should find liability and I have not so found, damages were not before me. I believe therefore that I should hear representations from counsel as to the appropriate Column for costs and any other representations they wish to make with respect to costs. Counsel should make an appointment with me and I will then hear their submissions.

HEARD on the 29th day of November, 1999.

DATED at Calgary, Alberta this 31st day of January, 2000.

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J.C.Q.B.A.