SUPREME COURT OF NOVA SCOTIA
Citation: *Peterson v. Anderson*, 2025 NSSC 186

Date: 20250606
Docket: HFX No. 496653
Registry: Halifax

Between:

Ryley Peterson

Plaintiff

v.

Ashton Anderson and Sydney Kenney

Defendants

Judge: The Honourable Justice Ann E. Smith

Heard: November 12, 18, 19, 20, 21, 22, 25, 2024, in Halifax, Nova Scotia

Counsel: Jeff Mitchell, Benjamin Tallon and Kallen Heenan, for the Plaintiff
Christine Nault and Sarah Flanagan, for the Defendant, Sydney Kenney
Self Represented Defendant, Ashton Anderson

By the Court:

Introduction

[1] This decision considers whether a social host owes a duty of care to their co-tenant for injuries he suffered when he fell down a set of stairs in the host's home, allegedly as a result of the actions of a party guest.

[2] For the reasons set out below, I find that based on the facts found by this Court and the law, no such duty of care was owed.

Background

[3] The host, the injured tenant and the guests were all Dalhousie University (Dalhousie) students at the time, with one exception.

[4] These events took place at a party (the party) in a three-storey house (the house) located in the south end Halifax, which was owned, but not occupied, but the host's parents. The host, the Defendant Sydney Kenney (SK) rented and occupied the house with six other tenants, including the Plaintiff, Ryley Peterson (RP).

[5] Nearly all the 75 or more guests at this party were varsity athletes from men's and women's sports teams at Dalhousie. SK was a member of the women's varsity

soccer team. The Defendant Ashton Anderson (AA) was a member of the men's varsity hockey team. RP was not a varsity athlete. The party took place on the evening and into the early morning hours of December 1 and 2, 2019.

[6] The party started around 8 p.m. and ended in police involvement at some point after midnight. By that point there had been a fist fight in the house and some partygoers were physically fighting in the middle of Oxford Street.

[7] Importantly, for this case, RP had fallen backwards down a staircase in the house following an interaction with AA. RP says that SK and AA are each liable for the injuries he suffered.

[8] RP says that SK was negligent in not foreseeing that having a party with so many attendees who had unmonitored alcohol consumption could result in personal injury to him. RP and AA suggest that SK should have had rules in place in advance of the party to control the behaviour of guests. RP notes that his fall down the staircase came after a fistfight in the hallway, and that at the point of the fistfight, SK should have been well aware that the party was out of control and taken steps to shut it down. If she had done so, RP says that his fall and injuries would not have taken place.

[9] RP says that the personal injuries he suffered were reasonably foreseeable to SK for a variety of reasons, including that he and other tenants expressed their concerns to her in advance of the party as to the number of attendees and the possibility of damage to property. In that regard, he relies upon a handwritten document which he and other tenants put to SK a few days before the party. SK signed her name on the document the day before or the day of the party. RP relies upon this document not as a contract between him and SK, but as evidence that it was foreseeable to SK before the party that harm and danger could occur.

[10] AA admits that RP fell down the staircase, but he says that he did not actively push or kick him, at best giving him a "light push". In that regard, AA says that it was reasonable for him to take the defensive move of holding his leg out to stop RP from getting nearer to him as he advanced up the staircase yelling.

[11] RP was not a partygoer and was studying in his private bedroom on the second floor of the house. His bedroom door was closed and he was wearing noise cancelling head phones when the party started. At some point thereafter RP left his room and went down a staircase (the staircase) near the front door of the house which led to the first floor of the house to get a glass of water. He observed that the party was in full swing, but he saw nothing which caused him any concern. After getting his water, RP returned to his upstairs' bedroom and remained there studying with

headphones on until some point around midnight. He was disturbed at that time by loud noises coming from the main floor of the house. He took his headphones off and left his bedroom. Shortly after he opened the bedroom door, he saw the defendant SK, go quickly by his door.

[12] RP observed SK reach the top of the set of stairs between the second floor of the house and the main floor. He saw her stumble or slip and fall down the last three steps, landing on top of partygoers who were amassed in the hallway, some of whom had fallen onto the stairs.

[13] RP came down the stairs after SK and pulled her dress down to cover her underwear which had been exposed as a result of her fall. He observed a fistfight underway between two male partygoers in the hallway, with numerous others attempting to either break up the fight or exit through the hallway to the front door of the house onto Oxford Street.

[14] RP tried to get the mass of individuals crammed into the hallway out the front door of the house. People were falling onto each other as they tried to exit. RP's efforts were largely successful in getting many people out of the house and onto the front lawn area. He then returned to the house, observing that there were still a few party goers inside. Soon after he did so, he observed two males, neither of which he

knew, standing at or near the top of the staircase. He yelled to them to get out of his house. One of these individuals was the defendant AA; the first name of the other was Campbell. AA responded, “Or what?”.

[15] RP then started up the stair case and reached the second or third step. He stood there stationary at that point, telling AA and Campbell that they needed to get out of the house. According to RP, without warning, AA held his left leg out horizontally and kicked him, hitting him in the collar-bone area. RP was unable to save himself from falling and tumbled down the entire staircase landing in the hallway below lying in his stomach. Depending on whose evidence I accept, AA’s extended foot was a defensive move to protect himself from RP, as AA contends, or he not only extended his foot, he kicked or pushed RP down the staircase, as RP contends.

[16] RP claims that he suffered injury and loss as a result of the fall and sues SK in negligence and pursuant to the Nova Scotia *Occupiers’ Liability Act*, RSNS 1996 c 27 (the OLA). RP also claims against AA alleging that AA intentionally kicked him in the head, causing the fall and that AA in doing so acted with an intent to cause injury and loss to him.

[17] SK defends the action, pleading that she did not cause or contribute to any loss suffered by RP and denies that she owed RP any duty of care. She says that any injury to RP was as a result of the altercation between RP and AA and contends that she is not responsible for AA's actions. SK denies that the *OLA* applies and says that she and RP were merely co-tenants. SK also pleads contributory negligence on the part of RP. SK cross-claims against AA for contribution and indemnity pursuant to the *Tortfeasors Act*, RSNS 1989, c. 471.

[18] AA defends the action by denying that he caused or contributed to any loss suffered by RP and claims contributory negligence against RP.

[19] This Court is not tasked with dealing with the issue of damages, but only with the issue of liability, and the trial proceeded on that basis.

[20] RP and SK were represented by legal counsel at trial; AA acted on his own behalf.

Issues:

1. Did SK owe RP a duty of care as a social host?
2. Did SK owe a duty to care to RP pursuant to the *Occupiers Liability Act*?

3. Is AA liable to the RP in negligence and/or did he commit an intentional tort in the altercation between him and RP?

The Evidence

Background – Uncontested Evidence

[21] On November 20, 2019 a member of the women's varsity soccer team (not SK) sent an open invitation, electronically, to all varsity athletes advising that the annual varsity Christmas party was planned for Sunday, December 1, 2019, and that the theme was to be formal. Attached to the Facebook post was a Google document for signing up for a flip cup tournament.

[22] SK did not provide alcohol to the partygoers, but she organized a "beer pong" tournament for guests in advance of the party, clearly anticipating that certain partygoers would be bringing alcohol to the event. SK bought her own alcohol prior to the party and consumed it during the party. She admitted that she was intoxicated throughout the party.

[23] On December 1, 2019 the roommates in the house were the following:

- Ryley Peterson (RP)
- Sydney Kenney (SK)

- Daniel Jacyna (Daniel)
- Taylor Corrie (Taylor)
- Ajan Ramachandran (Ajan)
- Doug Breen (Doug)
- Havard Taylor (Havard)

[24] Varsity athletes could be first, second, third or fourth year students; first year students could be under 19 years of age.

[25] The roommates had a Facebook group called Oxford 2020 which shortly before December 1, 2019 became Zarklon 5000's Evil Lair. The roommates would sometimes have a group "chat" with each other by posting to this site.

[26] In the lead-up to the party, SK posted to the Facebook chat about the possibility of her hosting a party. Her post and the response posts of certain of the roommates are as follows:

SK:	November 5, 2019, 2:49 p.m.
	"How would people feel if i hosted the Christmas varsity party"
RP:	"Do we get to watch girls kiss?"
	"Only if we put mistletoe everywhere"
Havardi:	November 5, 2019, 3:20 pm
	"I'm in for the party" (happy face emoji)
SK:	"Nov 30th? It's a sat..one last fucker before exams
RP:	"Sure"

SK: "(text unclear) Dec 1st which is a Sunday is that a def no?"

RP: "It's still okay with me" (happy face emoji)

Doug: "Ya go for it syd"

SK: "Thanks guys u da best"

Doug: "Do it up! I will always be in support of fun times" (thumbs up emoji)

RP: "I'm not kidding about chicks making out though"

SK: "ahaha oh im well aware im sure you'll see some

Daniel: "No grenades"

Taylor: "(thumbs up emoji)"

[27] There was also a Dalhousie Varsity Facebook page. RP was not a member of this Facebook group.

[28] On November 20, 2019, varsity athlete Olivia posted to that page as follows:

> " Hey everyone! This year our annual Christmas party will be on Sunday December 1st, as we have some teams playing Saturday night. We've decided to ditch the ugly (and sweaty) Christmas sweaters for something a little more -classy-. The party will be a Christmas themed semi-formal, so think dressed-up casual (sorry Haley, the ballgown will have to wait). We'll also be doing another Flipcup tournament, so if you would like to play please sign up on the googledoc below! Last day to sign up will be November 25th, so that Maya and I have time to make and post the teams! More details about time and location to come, let's get elfed up!!!

[29] On November 27, 2019 the following posts were made to the tenants' Facebook page:

RP: "House meeting at 8 pm tonight pretty please. We need to go over this party"

SK: "I'm very busy until the 5th so can't meet till then lol what's up about the party"

RP: "I suggest you take 20 mins out of your day to come. We are all very busy"

Doug: "I cant make it back tn either riley

SK: "It's rlly last min is the thing. I have lab thesis and presentation tn"

Doug: "But I can talk when I see ya".

RP: "Okay well the rest of us will meet".

[30] Prior to the party, a handwritten document was drafted by Doug and Daniel with the support of RP and given to SK for her signature. SK did not sign it at that point and was upset to be asked to do so. SK did sign it and date it December 1, 2019. The text of the document provided:

> "*I Sydney Kenney take full responsibility for any damages, broken/stollen [sic] items and will clean-up after my party on December 1st – 2nd, 2019*".

[31] On the day of the party, December 1, 2019, the following posts were made to the tenants' group Facebook:

Havardi: (12:35 a.m.) "This is a freakin mad house"

Doug: "omg"

Havardi: "ppl fighting and shit"

Doug: "Jesus"

Daniel: "Hectic"

[32] The police attended at the house close to 1 pm. on December 2, 2019. RP gave a statement to the police in which he reported that he had been kicked in the face. He asked for charges to be laid against AA.

[33] In lieu of criminal charges, AA entered into a Restorative Justice Agreement pursuant to the Nova Scotia Restorative Justice Program. As part of the terms of that Agreement, AA attended a healing circle with RP and others. He indicated that he regretted his actions and said that he did not intend to cause injury to RP. AA successfully completed the requirements of the Agreement.

[34] The Court heard evidence from the following witnesses:

- SK
- RP
- AA
- Havard Taylor (Havard)
- Daniel Jacyna (Daniel)
- Ajan Ramachandran (Ajan)
- Doug Breen (Doug)
- Haley Glazebrooke (Haley)
- Paige Jamieson (Paige)
- Campbell Pickard (Campbell)

[35] The Court will now review the evidence of RP, SK, AA and the parts of the evidence of the other witnesses which touch upon the issues.

<u>The Evidence of Ryley Peterson</u>

[36] RP was 24 years old on December 1, 2019. He lived in the house with SK and five other co-tenants, Doug, Havard, Ajan, Daniel and Taylor. At the time of the party, RP was in the 4th and final year of a combined honours degree in International Development Studies and Political Science. At the time of trial RP was employed by the Canada Border Agency.

[37] When asked by his counsel if there were any rules in place at the house, RP said that people were to respect one another and clean up after themselves. There were no rules with respect to the number of people tenants could invite to the house. The tenants agreed to keep the noise level down if people were trying to study, especially after 11 p.m.

[38] RP moved into the house in January, 2019. From that point to December 1, 2019, RP said there had been no parties at the house, but only what he described as gatherings of less than 10 people. He recalled an occasion when SK had a few of her soccer teammates to the house, but not the entire team.

[39] RP first learned about the December 1 party in early November. He stated that SK had asked in the tenants' Facebook group chat if she could host a party. RP's evidence was that at first he thought that SK wanted to have women's varsity soccer team members come to the house because she was the varsity captain. He

said that he made an insensitive post about watching girls kiss. He didn't think he was invited to the party as a non-varsity student. Also, it was the end of term and he didn't plan to attend in any event.

[40] RP testified that at some point thereafter he learned that all varsity athletes were invited. His evidence was that all of the roommates started to become concerned about how big the party could be with more than 150 varsity athletes invited.

[41] RP did not intend to attend the party. He had a paper due the following day and he was studying for final exams. He said that he was also older than the rest of his roommates and was focused on doing well and completing his degree.

[42] When asked what other concerns he had about the party to be hosted at the house by SK on December 1, RP testified:

> I think once we realized as a group that there was this many people, it was all varsity teams, that there was going to be too many people in the house, a lot of alcohol, there was going to be a lot of testosterone, there was potential for things to get stolen, damages, a fight could start. The roommates were really quite concerned that a party with this many people and little to no supervision…it was quite concerning.

[43] In terms of "a lot of alcohol", RP stated that when you see the amount of people who could be coming and "they're all going to be drinking, that's concerning". He added that university students bring their own alcohol to parties.

[44] As to his evidence about "stolen items" RP said that the tenants' storage was in a area of the basement which was only blocked off by a curtain. He said that while the roommates had personal items in the house, mostly they were concerned about people going to the basement area and going through their belongings. RP had personal property stored there at the time.

[45] RP was asked to elaborate on his concern about "damage". His evidence was that he was mostly worried about damages to the house in terms of holes being punched in the wall, "there could be a fight that breaks out that damages the railing and people could get hurt". He said that it was concerning that there would be this many university-aged "boys all going to be in a very tight house and that something could happen".

[46] RP stated that his concern about "little to no supervision" came from his concern that if SK was hosting the party, who would be taking care of that many people.

[47] RP confirmed that he posted to the tenants' group Facebook page on November 27, 2019, "House meeting at 8 p.m. tonight pretty please. We need to go over this party (kissy face emoji)". He said that leading up to his posting this message there was a lot of concerns raised by the roommates which they wanted to

discuss with SK before the party. RP said that he took charge of organizing the house meeting because he was really concerned about the party, with over 100 people to attend, no ground rules and no precautions taken "for something we could foresee happening". RP wanted everyone who had concerns to gather in the living room/lounge area of the house, sit down and relay those concerns to SK.

[48] SK responded to RP's request for a house meeting by a post stating, "I'm very busy until the 5th so can't meet till then lol what's up about the party". RP then posted, "I would suggest you take 20 mins out of your day to come. We are all very busy". By then Doug had posted that he couldn't make the meeting. SK further replied, "it's rlly last min is the thing" and "I have lab thesis and presentation tn". RP then posted, "Okay well the rest of us will meet". "pretty please". RP testified that the house meeting that night went ahead. SK and Doug were not there, but he thought the rest of the roommates were. RP said that they discussed their concerns, but they still wanted SK to sit down and talk with them; they weren't asking her to call off the party, but to listen to their concerns. He added that it would be hard to tell the daughter of the owners of the house not to have a party.

[49] RP testified that the night before the party, on November 30, he tried to talk to SK about the concerns of the roommates, but she didn't want to listen to him.

[50] RP gave evidence about the document, which he called the "responsibility agreement". He said that if SK was not going to be responsive to their concerns, the next solution was to ask her to sign something that made her responsible. RP said that of the roommates, he, Daniel and Doug were the most concerned about the party happening. He wasn't present when the document was written. He tried to give it to SK, but initially she refused to sign it. He said that SK was upset and said, "you don't trust me to take responsibility for this?"; he responded, "no, you haven't listened to what I have to say and collectively what the roommates have to say. We want you to take responsibility by placing your signature here". SK was upset, crying and went upstairs to her room. RP then went upstairs to Doug's room. Daniel was with Doug and they decided that Doug should go to SK and ask her to sign the document. RP said that Doug was SK's closest friend and one of the least threatening people he had ever met. Doug went to SK's room and returned with the document signed by SK. He gave it to RP who put it in the desk in his room for safekeeping. RP said that it was relieving that SK was going to take responsibility for the party. While he knew that there would be a lot of people there and there was potential for mayhem, "I felt better about it because Sydney said that she was going to take full responsibility and accountability for her party".

[51] RP stated that he read the document before he presented it to SK. He said that the document did not encapsulate all of his concerns, but it gave the picture that, "you have to take responsibility for everything that is going to happen here". "We, as six other roommates don't want anything to do with it. If you're not willing to take responsibility, just call off the party". RP's evidence was that he expected to be safe in his own house during the party.

[52] RP's counsel asked him if he had an expectation that physical injury or personal injury would be encapsulated by the document. RP's response was that he thought there was a potential for fights to break out and that needed to be considered.

[53] On the evening of the party RP studied in his upstairs bedroom with the door closed. He said that he wanted to stay home, do his work and ensure that his belongings were kept safe. The party began about 9 to 9:30 p.m. RP consumed no alcohol the day and night of the party. His evidence was that he understood that the second floor of the house would be off-limits during the party. He said that Daniel and Taylor would not be home and so their rooms would not be protected. For that reason, he believed that SK and a few of her friends on the soccer team put up some furniture in the upstairs hallway near the top of the stairs to create a barrier between there and where the roommates' bedrooms were located.

[54] RP was working in his room on his paper wearing noise-cancelling headphones with music playing at the start of the party. He locked the door of his room. He could still hear some noise despite the headphones. At around 11:30 p.m. RP left his room and went downstairs to get a glass of water from the fridge in the kitchen.

[55] When there, RP observed "so many people in the house. It was jam-packed full of people. It's hard for me to even navigate into the kitchen to get a glass of water. He said that he had never seen so many people in the house. He said that people were drinking and having fun. He said that the people at the party were dressed up, that it was a formal event. At that point, he didn't see any of his roommates including SK and had no safety concerns.

[56] RP went back to his room and continued to write his paper. He said that his ears were hurting from the headphones so he took them off. He heard someone say, "Where's SK?" and a response, "She's in her room and she's locked the door". He ignored these comments and continued his work, putting his headphones back on. However, he said that at some point thereafter two people came into his room without him knowing. He turned around and they were lying on his bed "making out". He told them to get out. He had forgotten to re-lock his door after he returned to his room.

[57] At some point thereafter, RP said that he could feel the house shaking. He took off his headphones, opened his bedroom door and heard loud yelling and screaming and music playing. He opened his door and saw SK run past him. She was wearing a dress and moving quickly and heading down the stairs. His evidence was that he followed SK because she was running towards a group of people fighting and falling at the bottom of the stairs. He said that there was not even enough room to fight, he saw one person take a swing at another and fall over. He saw probably 10 to 15 people fighting or in a skirmish in the hallway. His evidence was that some people were trying to pull those skirmishing off of each other, but there was no room to do anything because there were so many people. He was behind SK as she went down the steps. She said that when SK was on about the third last step, he saw her slip, try to catch herself on the railing, but fall on top of others who themselves had fallen onto the lower staircase steps. He saw SK's dress come up as a result of the fall and her underwear was exposed. RP said that he pulled her dress down and pulled SK out from people falling onto her. He told SK to go back upstairs. He thought that she was going to get hurt. SK did so and he watched he go up the stairs. RP didn't know any of the people in the hallway.

[58] RP's evidence was that he then started to herd people out the front door of the house. He saw blood on the walls and on the floors. RP was telling people to get

out with his voice raised, and he said if they wanted to fight, to go outside. He said that his arms were like a big hug. He said, "this is over. It's done". "You can't be here anymore". His evidence was that he tried to be very very loud because the party was still going on and music was playing.

[59] RP testified that the party was out of control. He said that he thought SK was intoxicated and that she could not get people out. He wanted the mayhem to stop.

[60] RP did not call 911, but thought that someone did. He saw people outside the house fighting on Oxford Street. People were also sitting on the front lawn. At that point, he locked the interior door to the house inside the front door, turned the music off and turned on the lights downstairs. There were still a few people in the house, maybe ten. He told them to get out. He said that he remembered seeing Paige in the foyer of the house. He observed seeing blood on her shirt.

[61] RP then went from room to room downstairs trying to see if there were any people left in the house. He said that he was shocked at the state of the house; the living room was a mess, with beer cans everywhere including the kitchen. He said that there was spillage on the floors and some were sticky. He said that there were less then ten people left at that point. He recalls that Havard was there. At some point he heard people come into the house from the back door. He was in the front

foyer at the time. His evidence was that he heard one of these people say, “Where the fuck is Ben”. He recalled two people, but he didn’t know which of the two people made this comment. RP’s evidence was that the two starting running upstairs. He said, “Party’s over. Get the fuck out”. His tone was loud and he was trying to have authority. One of the two people looked back at him. He says he now knows that person to be AA. AA responded, “Or what?”. The other male was further up the stairs from AA. He came to know the other person was Campbell Pickard because he left his wallet at the house. RP saw his ID in the wallet and the photo on it matched the person who was with AA. RP said that Doug was upstairs in the frame of the door to his bedroom at the top of the stairs at that point Doug said to AA and Campbell, “you guys can’t be up here. We don’t know who Ben is”.

[62] RP described going up the stairs at his normal pace which he said was a jog. He said he was not sprinting or running. He said that he, Doug, AA and Campbell had a “short conversation”, with Doug saying, “guys we don’t know who you are looking for. The party is over and you need to leave”. By that point, RP said that he was standing on the second or third step from the landing at the top of the stairs. Doug was still in the doorframe of his room. He said that Doug was very calm. However, he, RP, was upset but didn’t raise his voice and didn’t make any gestures towards AA and Campbell. He just wanted them to leave. RP’s observation of AA

at that point was that he thought AA was very intoxicated and seemed very, very mad, breathing heavily. AA didn't say anything back to RP. RP took AA's earlier response, "Or what?" to be confrontational, but RP's evidence was that his undergraduate degree was in diplomacy and he had no intention of putting hands on AA, that he was more about talking things through than fighting, and he had never been in a physical fight in the past. He had no intention of dragging AA or Campbell out of the house.

[63] When asked what happened next, RP testified that AA then faced towards him and kicked him down the stairs. He was still standing on the second or third step from the top of the stairs and was stationary when AA kicked him. He said that he saw AA put his hand on the banister as he kicked him. He said that the kick was with AA's right leg and AA was holding onto the top of the banister for stability with his left hand. AA hit him in the left collar bone and left chin area with his leg straight out. RP described the force as "really hard". He said that he pushed him backward. He observed bruising on his collarbone afterwards. RP's evidence was that he went backwards and hit his head. He tumbled down the full staircase landing at the bottom on his stomach. RP's evidence was that there was no time for him to react to the kick and attempt to safe himself before tumbling down the stairs. He remembers Doug saying at that point, "You've got the wrong guy".

[64] He recalled that people then came down the stairs who he assumed were AA and Campbell. His evidence was that as he went by AA stomped on his right ankle, saying, “fucking pussy”. RP also recalled that Havard came to him while he was still laying on the ground and tried to take care of him. He also recalled hearing SK say, “Who’s that?” as she stepped over him. He heard Havard respond, “It’s Ryley”.

[65] About a half hour later RP left Havard’s room. He thought that everyone had left and he was safe. He called 911 and told them that he had been assaulted and needed the police to come. He was asked if he needed am ambulance and he said, “no”, that he knew that he had a concussion. An officer came to the house and he told her what had happened. He was asked if he wanted to press charges and he said that he did. The police took a statement from him.

[66] RP said that he went through a restorative justice process with AA and that no criminal charges were laid.

[67] During cross-examination, counsel for SK put to RP certain evidence that he gave during his discovery examination in October 2021. For example, during his direct examination RP’s evidence was that he thought everyone but Doug was present at the house meeting, whereas his sworn discovery evidence was that all tenants were present. The difference, he said, was that after his discovery evidence

he checked the Facebook group chat posts and realized that Doug was not present. Another example was that during discovery, counsel for SK asked RP details as to who said what to whom about SK taking responsibility for personal injuries during the party and he could not recall and did not know. His trial evidence, however, was that he and his roommates discussed fighting. In cross-examination he said that he thought that personal injury meant someone getting hurt and he didn't think fighting was personal injury in 2021 when asked.

[68] During discovery examination, RP was asked by counsel for SK about concerns raised at the house meeting and his evidence was how large the party would be, whereas at trial, he also gave evidence about alcohol consumption, the lack of supervision and testosterone. RP said that during this time he was dealing with a lot of trauma and his memory wasn't good, but by the time of trial, he had had time to heal.

[69] In cross-examination RP agreed that at no point prior to the hallway skirmish did he feel it was necessary to ask people to leave the party. He also agreed that SK had no role to play in the drafting of the document.

[70] RP further agreed that he could have returned to his room when he saw the fighting going on, and instead he went down the stairs.

[71] RP also agreed in cross-examination that he could have said “no” to the party but added that was why they went to SK to get her to sign the document he called the “responsibility agreement”.

[72] RP also agreed in cross-examination that the fighting in the hallway and AA’s conduct in pushing or kicking him down the stairs were two separate incidents separated by time.

[73] RP also said that he did not anticipate that AA was about to assault him in the seconds before it happened. He did not see it coming and he had no time to react.

[74] RP said that, yes, he expected that SK could foresee that someone could get injured like he did because the party could get out of control.

[75] In cross-examination of RP conducted by AA, RP agreed that he had not seen AA fighting before his encounter with AA on the staircase.

The Evidence of Sydney Kenney

[76] Plaintiff’s counsel subpoenaed SK and she gave her evidence as part of the Plaintiff’s case. She was cross-examined by her own counsel within the limits of Civil Procedure Rule 54.06(2).

[77] SK was 21 years old in December 2019. She was in her fourth year of a Bachelor of Science degree. After graduation she studied nursing and at the time of trial was a nurse at a hospital in Toronto.

[78] SK thought that the varsity party she hosted on December 1 and 2, 2019 was the largest party (by number of guests) she had hosted at the house that year or in previous years. There were no house rules set by her parents, or otherwise which prevented parties from taking place at the house.

[79] SK's evidence was peppered throughout with statements such as, "It was five years ago, I don't remember"; "it was so long ago, I can't say for certain" and "it being five years ago, it's hard to say anything". She also admitted that she was intoxicated throughout the party.

[80] SK's evidence was that before the party she and the other tenants, including RP, all got along well. Her description of RP in the months leading up to the party was "as a friend".

[81] In December 2019 SK was a member of the women's varsity soccer team at Dalhousie.

[82] When asked about the original scope of the party, SK said that the party happened every year and that it was known that all varsity athletes were invited to

attend. She said that in the past approximately half of those varsity athletes would show up for the party.

[83] SK said that she was a member of the Dalhousie Athletics Society (DAS) and its treasurer. In a DAS group chat SK learned that varsity athletes were looking for someone to host that annual Christmas party. She said that her name came up as a possible host, given that the house was quite large.

[84] SK said that she checked with her roommates before confirming that she could host the party. She said that she thought she told them that there would be around 70 people at the party. She said that she thought she communicated this information through the Facebook group and that she also "checked in with them" in person. She did not recall specific conversations with any of them, including with RP.

[85] SK did not recall a house meeting on November 27, which the tenants' Facebook page shows RP proposed for that evening. She did recall an evening meeting on November 30 which she thought was organized in advance by RP and took place in a living room in the house. She said that not all roommates were present. She testified that she knew that RP was there because he was the one who spoke to her during the meeting and who "led" it.

[86] SK testified that the two topics discussed at the meeting were the party and her dog. She said that RP said that the dog was too depressed and couldn't live there anymore. SK responded that if the dog couldn't live there, than neither could she. That ended the discussion about the dog.

[87] In terms of the party, SK's evidence was that she did not recall anyone raising a specific concern about the party at this meeting, but she remembered that someone, she thought RP, presented her with a handwritten document and that it came up that it had to do with the party. She asked why they would want her to sign it and the response from RP was, "Because it's the adult thing to do". SK didn't sign it at that time and left the meeting crying to go to her room on the second floor. Her evidence was that she was friends with everyone in the house and felt blindsided by their asking her to sign the document.

[88] Doug came to her bedroom shortly thereafter and according to SK said something along the lines of "please sign this. It will appease people. I know it's stupid". SK's recollection is that she then signed the document. When asked if Doug mentioned who it would "appease", SK's response was that, "I want to say Ryley, but given it was so long ago" she didn't remember. SK testified that she thought it was "weird" for her to be asked to sign the document, because broken or

stolen items, damage to the house and clean-up were all things she was planning to do.

[89] SK did not recall any further discussion with any of her roommates, including RP, after she signed the document. She remembered speaking with RP in the kitchen on the morning of the party. She recalled that he conveyed to her that he planned to stay in his room during the party.

[90] SK also learned that Havarti would not be home and she and another member of the women's soccer team and her put tape across the door of his bedroom on the first floor of the house, where the party would largely take place.

[91] SK and a few of her co-members of the soccer team helped her to set up for the party in the afternoon. They brought in a fold-up table and put it in the living room for the flip-cup tournament. They moved a table to the second floor of the house and positioned it in the hallway near the top of the staircase in an effort to deter guests from going down the hallway where the majority of the tenants' bedrooms where located. There was a small bathroom at the top of the stairs and guests were free to use it during the party. SK supplied "Solo" cups for the flip-cup event. She did not provide any alcohol nor make alcohol available to guests either before or during the party.

[92] Once the party was underway, SK did not monitor guest's consumption or overconsumption of alcohol. She testified that she moved throughout the ground floor of the house and thought that she would have noticed if someone was "over-intoxicated".

[93] SK was asked whether, as host of the party on December 1, she took any steps to make the party safe. Her response was that there was no concern for safety so there was nothing to be done. SK was asked whether, looking back at the party, she considered that it turned out to be safe. SK responded that she knew that there was an incident afterwards, but that during the event she didn't think the event was unsafe. When asked when the party ended, SK said she "deemed" the party ended when most of the athletes were gone and there was no more partying going on. She remembered the house being mostly empty, but said there could have been a couple of people left in the downstairs hallway. She then went to bed. She gave a "rough guess" of it being around 11:30 to 12 a.m., when she went to bed based on the average length of parties and not because she had a specific recollection of the time.

[94] When asked when she woke up SK's evidence was "when the scuffle is happening". She didn't recall hearing the scuffle and couldn't say specifically what woke her. She recalled leaving her room. When she got to the top of the stairs, she remembered seeing guys all together at the bottom of the stairs and that there was

clearly some kind of altercation happening, but she could not recall the specifics. She went downstairs to deal with it. She guessed that there were maybe five or six other guys at the bottom of the stairs. She saw guys with their hands on each other. She recalled that she tried to separate guys by pushing them apart. SK said that she did so because they were trying to injure each other. She thought that a fight was happening but didn't recall the details. SK's evidence was that she didn't think that her attempt to separate the two guys worked. She did not recall who the two guys were, but she knows they were a hockey and a soccer player. "The details allude me". When asked if she had any trouble getting down the stairs, her answer was "I think at some point on the way down, I think I slipped on a step and caught myself". She said that she was intoxicated at the time because she was at the same level of intoxication the entire night.

[95] SK said that she surprised by the fight because she had never seen this kind of behaviour before at any varsity Christmas party or soccer parties. SK's evidence was that she didn't contemplate at the time she saw the fighting that there might be another altercation. She said that she was probably focussed in the moment.

[96] SK said that her next memory was seeing people outside the house; she didn't know how they got outside and she didn't see people fighting outside. She didn't remember seeing RP. She thought she saw her friends and members of the women's

varsity soccer team, Haley and Paige. She remembers that Haley told her that she would talk to the police. SK remembered the police outside; she thought that she was going to go to talk with them, when Haley offered to talk to them instead. SK didn't think she was the person who called the police. She presumed that the police were at the house because of noise, "maybe".

[97] SK's next memory was "dealing with Ben bloody". She said she had a general memory that Ben was bleeding and he was inside the house when she saw him. SK said that Ben was the goalie for the men's varsity soccer team. She thought that Ben was bleeding from "somewhere on his face" and that maybe there was blood on his shirt. SK thought that she guided or pointed Ben and his girlfriend, Olivia, to where the washrooms were (one upstairs and one downstairs on the main floor). SK also testified that she thought she remembered washing blood off Ben, which she said meant that she might have gone to the washroom with him.

[98] SK testified that she thought that around the same time she saw RP on the floor at the bottom of the stairs in the foyer. She thought she was helping Ben at the time; she didn't help RP.

[99] SK's next memory was cleaning the living room; she didn't know what time this was, apart from the sun not being up. It was after midnight. SK then set an alarm and went to bed with the intent of cleaning up in the morning.

[100] She didn't recall seeing any posts to the group Facebook throughout the evening of the party.

[101] Either the morning of the party or the day before it, SK left a note on the door of the neighbour's house which said that they were going to be having a party and if there were any concerns to call "Mya" who was one of her core group of friends and who would be attending the party. Her other core friends were Haley and Paige. SK didn't leave her own cell phone number with her neighbour because she planned to use her cell phone during the party to connect to speakers which would play music.

[102] SK estimated that there were about 70 guests at the party at its busiest. Most of the people were on the main floor, although guests could also go to the basement. She said she only saw two or three people in the basement of the house, which was set up as a rec-room.

[103] SK did not recall seeing AA arrive at the party. She described AA as someone whose face she probably saw "around", likely at athletic banquets or hockey games.

[104] SK testified that she knew that RP planned to stay in the house during the party and would be in his room studying.

[105] When asked if she had a specific recollection of seeing a guest who was over-intoxicated during the party, SK responded that "it being five years ago I feel like I wouldn't have a clear memory of anything five years ago but I don't remember anyone super-intoxicated", during the party.

[106] SK considered herself intoxicated throughout the party. When asked what she meant by "intoxicated", her answer was that it meant that she could probably not walk in heels or she would "stumble" but could probably run in sneakers. She didn't think she was wearing heels during the party.

[107] When asked whether her memory was impaired by the alcohol she consumed, SK responded, "it could have been". In terms of her memory of the party in general SK's evidence was that she didn't remember a sequence of events. Rather, she had memories of moments when she was in the living room, her bedroom, the kitchen, the room with the flip cup game and the basement but the sequence of when those events took place was blurred.

[108] When asked if she had a plan in place if there was a fight during the party, SK's evidence was that there had not been any fights at previous parties which happen every year, so that was not something which crossed her mind.

[109] SK did not see anything which happened on the staircase between AA and RP and did not know at the time how RP came to be lying on the floor at the bottom of the stairs.

The Evidence of Ashton Anderson

[110] AA was 22 years old at the time of the party. He played varsity hockey and was in the second year of a Bachelor of Science degree.

[111] AA and other members of the men's hockey team attended a pre-party at a the house he lived at on Pepperrell Street at about 7 p.m. on December 1. There, the players exchanged "hidden Santa" gifts and had some alcoholic beverages. They brought their own alcohol to consume. AA had three or regular-sized cans of Coors Light (4% alcohol content) beers having brought an 8 -pack with him. The group then walked to SK's house on Oxford Street to attend the party, arriving at about 9 or 9:30 p.m.

[112] AA said that the varsity Christmas party was an annual event that he had attended in the past. He knew that all varsity athletes were invited. He said that the party SK hosted had a "similar vibe" as these previous parties. There had not been fist fights at any of these previous parties with a similar number of attendees and he described the party before the fist fight in the hall as being "pretty normal". He saw SK at various moments throughout the party. AA did not witness "excessive" intoxication or anything out of the ordinary.

[113] During the course of the following three hours or so, AA consumed another two of the cans of beer he brought with him. After their consumption, AA described his level of sobriety as having a "little" or a "nice buzz on". At the time he arrived at the party, AA estimated that there were about 50 guests; at the "peak" of the party, AA said that there were more than 100 people in the house.

[114] AA said that at approximately 1 a.m. (December 2) he witnessed a fistfight in the downstairs hallway of the house. He said that he didn't think he saw the entire fight, but did see men throwing punches at each other. He identified these as Ben G, Ryan F, and Dylan B. In close proximately he saw Olivia M. AA said that he saw Olivia shove or push a guy. Ben was a member of the man's soccer team. Ryan was the assistant coach of the men's hockey team. Dylan was a member of the men's

hockey team and Olivia was a member of the women's soccer team. Ben and Olivia were a couple at the time.

[115] AA said that he heard and saw "girls" screaming. There were 20 to 30 partygoers crowded into the hallway, some of whom tried to break up the fight. Those in the hallway and others who soon gathered with them were shoved by the momentum of the pressing group of people towards and then out the front door of the house. AA was shoved out the front door as a result of the people behind him trying to get out of the house and fell down the front steps of the house as a result.

[116] At that point, AA said that the fight continued outside. He saw Ben fall to the ground as a result of the fighting.

[117] While on the front lawn of the house, AA met two of his teammates on the hockey team, Campbell and Aiden who had been at the party and pushed or went out the front door. AA then saw Ryan stumble out of the front door of the house, bleeding from his forehead.

[118] AA described Ryan as his friend who had just been punched. He, Campbell and Aidan decided at that point to go back into the house in an attempt to find the person who had punched Ryan. AA said that it was Campbell who said, "Let's go inside". AA said that he didn't see Ben hit Ryan but he and Campbell probably

thought that Ben had done so. However, when his sworn discovery evidence taken on October 20, 2012 was put to him, AA confirmed that at discovery his evidence was that he saw Ben hit Ryan. AA said that his trial evidence, and not his discovery evidence was the correct version.

[119] Once in the house, AA said that he and Campbell started looking for "the guy" who hit Ryan. AA then adopted his discovery evidence, that he and Campbell were looking for Ben, not just an unknown person who had hit Ryan.

[120] Although AA didn't know who RP was at the time, once he and Campbell entered the house, they saw a man who they learned later was RP, pushing people out the front door of the house.

[121] AA denied that his plan was to find Ben and take revenge on him. Rather, he said that he was mainly following Aidan and Campbell and was there to support them if they needed help, i.e., if someone else grabbed them.

[122] AA, Campbell and Aidan made their way to the second floor of the house, looking for Ben. They did not find him in the bathroom located at the top of the stairs. AA's evidence was that he then saw RP yell at them from the hallway at the bottom of the stairs, "Get the fuck out of my house". At that point, AA was facing towards the bathroom, with his back turned. When he heard RP yell, he turned

around to face RP and yelled back, “Or what?” AA described this moment as being “high intense”. He’d seen RP pushing people out of the house. He agreed with RP’s counsel in cross-examination that the words, “Or what” did not help to de-escalate the intensity of the moment. However, AA stated at that point, he considered AA to be a threat. AA was larger than him and running up the stairs towards him. He felt that RP might have been with Ben, or part of Ben’s group before then.

[123] AA said that if SK or another host had asked him in a nice manner, he would have left the house. His evidence was that he didn’t know that RP was a tenant in the house at the time.

[124] AA’s evidence was that as RP approached him, he held his foot out “to keep him away from me and my friends”. He further stated that he wasn’t going “to let this big man come up and push me out”. AA said that his leg was fully extended because he wanted to “keep away from this guy”. AA said that he was hanging onto the railing of the staircase to keep his balance. AA described RP as “chugging” up the stairs towards him. AA stated that RP lost his balance when his chest made contact with his outstretched leg, resulting in RP falling down the staircase. Before RP fell, AA heard him say, “What the fuck” and observed him fall backwards down the staircase to the ground floor.

[125] At discovery, AA gave evidence that he put his foot out and pushed AA in the chest". At trial, AA attempted to explain that he didn't actually push AA, but that his extended foot was a "subtle push back" to keep RP away from him.

[126] Soon thereafter, AA said that he heard someone yell, "Cops are on the way". His reaction was "Let's get out of here" and he, Aiden and Campbel came down the staircase and past the place where RP was lying outstretched on the ground.

[127] AA said that he accidently stepped on RP's ankle as he made his way past his prone body. He did not recall saying "Fucking pussy" to RP as he went past him.

[128] After that, AA, Campbell and Aiden left the house and walked back to AA's place on Pepperell Street.

[129] In cross-examination by counsel for SK, AA admitted that SK didn't encourage him to re-enter the house to look for Ben, and in fact knew nothing about that "plan". AA also admitted that SK had no role in his personal choice about what and how much alcohol to drink, his decision to re-enter the house to find Ben and his body movements at the top of the staircase and RP's fall down the stairs.

The Evidence of Douglas Breen

[130] On December 1, 2019 Douglas Breen (Doug) was a 22-year-old Dalhousie student studying for his Certified Public Accountant (CPA) designation. He was a tenant in the house along with others, including SK and RP. Doug described himself as being friends with all of the other tenants.

[131] Doug was a member of the tenant's Facebook group. Before December 1, 2019 Doug stated that there had been parties with people having friends over, but nothing "big".

[132] Doug remembered meeting with some of his co-tenants prior to the party. He remembered talking to RP and Daniel about concerns in the week leading up to the party about the risk of damages. He stated that he wasn't really concerned, that he trusted the people he lived with. He added that he didn't really understand the size of the party beforehand.

[133] Doug's evidence was that he was in his room studying throughout the party. He was wearing headphones and tried to drown out all of the noise.

[134] Doug identified the document as being in his handwriting. He did not recall exactly when he wrote it, other than that it was in the days leading up to the party. He thought that RP was with him at the time the document was drafted. He described the circumstances leading up to his writing the document as writing down other

peoples' concerns, primarily those of RP. The concerns were about "damage deposits and things".

[135] Doug's evidence was that he was the one to deliver the document to SK because he was friends with everyone in the house. He tried to deliver it to SK as cordially as possible. Doug didn't remember what he said to SK or what SK said although he didn't think SK was very happy about having to sign the document, but did so. Doug thought he then gave the document back to RP. Doug didn't recall who selected the words written on the document; he believed that RP, Daniel and Havard each had some input. His evidence was that fights and personal injury were "not on his radar" when he was involved with writing the document.

[136] Doug stated that he might not have been home when the party started, but when he came home he went to his room to study. His evidence was that he didn't recall whether he saw SK once the party had started.

[137] Doug's evidence was that he saw a post to the tenants' Facebook page sent by Havard at 12:35 a.m., stating, "This is a freakin mad house". Doug posted back, "Omg". Havard responded, "Ppl fighting and shit". Doug posted, "Jesus". Doug's evidence was that he made these posts while in his room. He could hear "fighting,

confrontational noises". Doug left his room to check in on people and see what was going on.

[138] At some point Doug managed to find RP, who he said at or near the top of the stairs facing towards the bathroom. He thought that RP was stationary at that point; he didn't recall seeing RP ascend the stairs. Doug heard RP asking people to leave the house. Doug also saw three people in the upstairs bathroom who then left the washroom and were facing RP. Doug pointed to AA as being one of the three people at the top of the stairs.

[139] Doug testified that he saw AA kick RP and that it looked to him as though RP took a few steps back, tripped up and ended up at lying on the floor at the bottom of the stairs. Doug stated that the kick was to the front of RP's body, but he could not say exactly where.

[140] Doug said that he then went to his bedroom and closed the door. He guessed that those three people, including AA left the house, because it wasn't long before he checked on RP to see how he was. He believed that Havard was with RP when he did so. Doug asked RP if he was OK and then checked to see if anyone else was still in the house.

[141] Doug stated that he remembered talking to the police that evening.

The Evidence of Daniel Jacyna

[142] Daniel Jacyna (Daniel) was 25 years old on December 1, 2019. He lived in the house with the other tenants, including RP and SK. He described being friendly with SK at the time and extremely close friends with RP, "closer than a brother". In December, 2019 he was in the second year of a two year program at the Nova Scotia College of Early Education.

[143] Daniel recalled posting to the tenants' Facebook page. He renamed the "Oxford 2020" Facebook page to "Zarklon 5000's Evil Lair".

[144] Daniel testified that there were parties before at the house prior to the December 1, 2019 party. He recalled one that was hosted by a boyfriend of SK in September, 2019. He thought about 30 or 40 people attended that party and that a party of that size was typical of other parties at the house before December 1, 2019.

[145] Daniel testified that he recalled attending a house meeting with other tenants in late November, 2019. Daniel described the discussion at the meeting as being about order at the party so that things did not get out of hand and that things should be properly cleaned up afterwards. By "out of hand" he meant items broken, stolen or damage to the house and to "personals". By "personals" he stated he meant items or possible violence.

[146] Daniel testified that his concern about violence, resulted in him staying away from the party. He stated that he definitely also had a concern about the number of people who would be in the house when he learned that it was to be more than the soccer teams. As the party approached he recalled it switching to a grander party. When asked if he expressed these concerns to SK, Daniel stated that he did so.

[147] Daniel's evidence was that he could not recall for sure if SK attended the meeting he attended about the party. He recalled RP, Havard and Doug being present. He also recalled conversations with RP, Doug and Taylor afterwards about the number of people invited and events that could take place with so many people in the house.

[148] Daniel testified that he recalled the document. He did not know who wrote it, but stated that it was a collaboration between him, RP and Doug. He described the anticipated outcome of preparation of the document as "accountability for Syd". When asked why he felt the need to have the document prepared, Daniel's evidence was for accounting, and to make sure possible damages would be replaced or accounted for and "personal". When asked what he meant by "personal", Daniel's evidence was "injury". He also expected SK to clean the house properly after the party. Daniel recalled SK being offended that she was asked to sign the document.

[149] Daniel did was not at the party. His evidence was that he was concerned for his safety so he stayed at a friend's house that evening. He did not return to the house until about 6 or 7 a.m. the morning of December 2. Daniel testified that he posted to the Facebook page at around 12:35 a.m. on December 2, "hectic" after reading a post from Havardi stating, "This is a freakin mad house". However, Daniel was not in the house at the time he made the "hectic" post and he didn't do anything as a result. He recalled RP calling him "after the assault". Daniel's evidence was that he believed what RP had to say in that regard.

The Evidence of Ajan Ramachandran

[150] Ajan Ramachandran (Ajan) was 29 years old on December 1, 2019 and was completing a PhD in Physics at Dalhousie. He is currently employed as research scientist. He was a tenant at the house along with RP and SK.

[151] Ajan recalled conversations with SK and his other co-tenants about SK hosting a party at the house. His understanding at the time was that SK was referring to a party with the men's and women's soccer team; he thought that there were about 30 individuals on each team.

[152] Ajan described having a cordial and sociable relationship with his co-tenants, including SK and RP prior to December 1, 2019.

[153] Ajan confirmed that he was a member of the tenant's Facebook group.

[154] Ajan testified that SK told him that party would involve the women's soccer team at first but then she told him it was more people than that. Ajan's evidence was that he didn't tell SK that he didn't want the party, but he wasn't happy; he was trying to finish his PhD and wanted to get work done at home. He didn't want the house to be noisy.

[155] Ajan's evidence was that there was a meeting about the party at the house. He did not attend. However, he said that he was present before the meeting when other tenants told him that they didn't want such a huge party taking place in the house.

[156] Ajan was not at the party. He had a class then went to a friend's place; he arrived back to the house after midnight.

[157] Ajan stated that when he arrived at the house he said that most people had left. The police were there and an officer was inside the house talking with RP. His evidence was that Havard was cleaning in the house; he said that there was beer spilled and there were blood marks in some locations. Ajan did not speak with RP. He may have helped with cleaning and then he went to bed. Ajan did not see SK that evening.

The Evidence of Havard Taylor

[158] Havard Taylor (Havard) was 21 years old on December 1, 2019. He was a co-tenant of SK in the house. He was in his final year of a Bachelor of Science degree at Dalhousie. He described his relationship with both SK and RP as friendly.

[159] He knew about the varsity Christmas party in advance and anticipated that there could be 70 or 80 people in attendance. He didn't have a problem with the party being hosted at the house.

[160] Havard recalled attending a house meeting organized by RP on the evening of November 27, 2019 or the day after. He was in attendance and thought that all seven tenants were as well. He said that he believed that it was during this "very quick" meeting that the document was discussed. He thought that RP had drafted the document in advance and brought it with him. Harvard said that it was spear-headed by RP who wanted to go over and over every last detail of the party prior to it happening. Havard's testimony was that he was fine with the party as long as things were taken care of and accountability taken.

[161] Havard's evidence was that "many of us" wanted to make sure that there wouldn't be damage to their personal property or the rental property which might reflect on their tenancy, i.e. would result in a rent increase, or them losing their damage deposit. He said that he expressed that opinion verbally to SK.

[162] Havard's evidence was that the risk of fighting at the party was not discussed at the meeting and this was not something that he thought would happen

[163] Harvard was not present when the party started. He went to a friend's house to watch a basketball game and returned to the house at approximately 9 p.m. He did not mention, nor was he asked, if the door to his room was taped, as SK's testified she had done prior to the party.

[164] Havard said that when he returned, he saw a few people outside the house who he wanted to avoid because he didn't know them, so he entered through the back door. He said that the house was very crowded. He said his bedroom was on the ground floor and he wanted to get to it and be "out of harm's way". He added that at that time he did not observe any violent behaviour and nothing that indicated it would be a "remarkable party".

[165] After returning to his room, Havard studied, wearing noise cancelling headphones. He could hear ambient noise but it wasn't until he heard "thundering footsteps" and "elevated yelling" from party attendees that he clued into what was happening. Until that happened, he had no problem with the party.

[166] At 12:35 a.m. Havard posted to the tenants' Facebook page, "This is a freakin mad house". He said that he did so after a sustained period of time (10 to 15 minutes)

with thundering footsteps, up and down the stairs, multiple floors of the house and overlapping yelling with “malicious intent”. He said that he knew that there were a couple of his co-tenants home and he sent the message to the group to see if they were experiencing the same. Havard then posted, “ppl fighting and shit”. He said that he could hear scuffling and gathered it was from people fighting.

[167] Havard testified that he left his room when he heard the music shut off and heard RP’s voice telling people to leave the house.

[168] Havard stated that he could hear RP on the second floor at or near the landing telling people, with authority, to leave the house; he recalled the words, more than once, “Get the fuck out”. He then heard some commotion at the top of the stairs. Havard then saw, in a bit of a blur, RP tumble down the stairs.

[169] Havard went up to RP to see if he was responsive. He testified that he tried to get RP out of harm’s way. He did not know who was at the top of the stairs or what had happened prior to that, but RP laying at the bottom of the stairs did not seem like a safe place to be. Havard testified that he dragged RP away from the bottom of the staircase. He said that RP was lying semi-prone on the floor.

[170] At this point, Havard did not see any of his roommates, including SK. He then saw AA come down the stairs with a friend of his to “escort him out of the

house". Havard testified that at that point, he hadn't moved RP fully from the bottom of the staircase and when AA reached the bottom he stepped hard on RP's ankle before being ushered out of the house by his friend. He said that this was an intentional "stomp" to RP's feet. He said that there was plenty of room for AA to avoid stepping on RP.

[171] Havard helped RP to his feet and took him down the hallway to Havard's room. He place RP on his bed and shut the door. Harvard checked a few minutes later to see if people had left and they had.

[172] Havard saw the police at the front door. He thought that SK was speaking with them. He saw SK start to clean, but didn't talk with her.

[173] In cross-examination by AA, Havard agreed that AA was of much smaller build than RP. He agreed that there was no limit to what floors guests to the party could be on. He also agreed that he did not know what caused RP to fall down the stairs.

The Evidence of Campbell Pickard

[174] AA called Campbell Pickard as a witness. Campbell was 22 years old on December 1, 2019 and a student in the commerce program. He was 27 years old at the time of trial and in third year law school.

[175] Campbell was a member of the men's varsity hockey team in 2019. AA was his teammate. He described AA as laid back, pretty chill, out-going and friendly.

[176] Campbell recalled a gift exchange between hockey team members in the early evening of December 1, 2019. It took place at AA's house. The majority of the 25 players on the men's team were there. He said that he consumed alcohol at this event and was probably "buzzed" and getting close to drunk. Once the gift exchange was over, he walked with other members of the team, including AA to the Oxford street house where the varsity Christmas party was taking place. He didn't recall at what time he arrived. He guessed that there about 75 to 100 guests there when he got there. Campbell brought his own alcohol with him and no one, including SK gave him alcohol that night. He said that he had a few alcoholic drinks at the party.

[177] When asked by AA what other things he recalled about the party, his response was that he was told there was a fight, but he didn't see it. He was standing in the foyer at the time and was shuffled out the front door. He said that he knew now that

the fight was between Ryan and Ben. Campbell said that he had had multiple drinks by then and was moderately drunk.

[178] Campbell's evidence was that once outside the house he saw Ryan who told him that he had been sucker punched in the face. Ryan was the assistant coach of the men's hockey team. He said that Ryan was cut and "all bloodied up". He asked "who did this" and Ryan told him someone on the soccer team. Duncan, Aiden and AA were standing with him at the time, each of whom was also a member of the men's hockey team. Campbell's evidence was that he wanted to find the person who did this, confront him and ask him why he hit Ryan. Campbell said to the others, "let's go in the side door. Come with me". He said that AA went behind him. They entered the house and went up the staircase to the second floor. Campbell's evidence was that at that point there were still people in the house but he didn't know how many. He said that he and AA were together in the upstairs hallway when RP started to run up the stairs and yell at them to "get out of the house". He said that he saw RP coming up the stairs really fast. Campbell saw AA put his foot out to stop RP's momentum from coming towards them. He said that he saw AA's foot make contact with RP's chest and RP fell backwards to the bottom of the stairs. Campbell stated that they then heard that the police were either there or on their way, so they hustled down the stairs and left by way of the side door. His evidence was that he did not

recall what RP was doing at the bottom of the stairs. Campbell had no recollection of Doug being in the doorframe of his room prior to the interaction between AA and RP.

[179] When asked to describe the contact between AA and RP near the top of the stairs, Campbell's evidence was "AA's foot was extended. I would describe it as a very light force with his foot that stopped his momentum from coming forward. As simple as I can put it, a light push on the chest. That's how I would describe the contact". And further, "Yes, AA's foot was extended outwards". Campbell said it was more a defensive manoeuvre than a kick, but not like kicking a soccer ball. He said he didn't know who RP was and he was running towards them. He didn't know what RP's plan was. He agreed that he didn't leave when RP yelled, "get the fuck out", but he said there wasn't time. Campbell said that he didn't think, at the time, that RP ascending the staircase and he and AA standing above him placed RP in a vulnerable position.

[180] During cross-examination by counsel for SK, Campbell said that he had been to other varsity Christmas parties before the one hosted by SK. He said that they were comparable in size. He agreed that these prior varsity parties had a happy, festive mood and were not rowdy. Campbell also said that there were flip cup games at these prior parties. He said that to his knowledge, there had been no fights or

altercations at the previous parties. He agreed that the events that evening were "truly exceptional". Campbell said that until the fight broke out, the party was in control and no different than previous varsity Christmas parties, in fact he said that the party might have been "calmer" than previous parties. Campbell did not hear any threats or warnings of any kind before the fight broke out in the hallway.

[181] Campbell described being sucker punched as one of the worst kind of things because you don't see it coming. He didn't see Ryan get sucker-punched himself. He admitted that he was angry at whoever had done this. He said that they wanted to find the person so that they could ask him why he did it. He said that he went back into the house because he also wanted to know if there was anything else going on, such as a fight. He wanted to break up any fight that might have been happening.

[182] Campbell maintained in cross-examination that RP was ascending the stairs when AA held out his foot. He said that the contact with RP didn't happen until RP was almost in AA's face. He also said that he was moderately drunk throughout the party. He thought he consumed maybe 7 – 10 cans of beer throughout the night.

[183] When asked by counsel in cross-examination by RP's counsel if his recollection of the events of December 1 and 2 was impaired by alcohol, he said that

he didn't remember all events that evening, but he remembered what took place at the top of the stairs.

[184] Campbell agreed that he went back to the house the next day and apologized to RP. He felt it was necessary to say "sorry" for any involvement they had in what happened.

The Evidence of Haley Glazebrooke

[185] On December 1, 2019 Haley Glazebrooke (Haley) was studying at Dalhousie and in the fourth year of a Bachelor of Science degree. At the time of trial, Haley was a second year medical student. Haley was a member of the varsity women's soccer team during the years 2016-2020.

[186] Haley testified that she had attended varsity parties before December 1, 2019 and that these were sometimes at the house rented by group of the male varsity soccer players. Her evidence was that the varsity Christmas party was an annual occurrence. Haley said that she normally went to previous varsity Christmas parties at the volleyball men's house. Haley said she probably went three previous years.

[187] Haley said that the number of attendees would vary from year to year and fluctuate during the night, as people came and went. She said that maybe half of the

people on each team would show up. Haley said that there were no issues with fights at the previous varsity Christmas parties she attended.

[188] Haley's evidence was that the party hosted by SK was on a Sunday and that there were classes on Monday. She attended the party. Haley stated that there were about 80 attendees, and this was a smaller number than typically showed up when the party was at the volleyball house, "when you couldn't really move from room to room.

[189] Haley didn't recall what time the party began, but normally parties started around 8 p.m. Haley described the event as a typical undergraduate party; people were having fun and chatting. Haley described the atmosphere at the party as being the same as at previous parties. It was a bring your own booze party which she said was very typical of any undergraduate varsity party. SK did not serve alcohol at the party.

[190] Haley said that she probably played flip cup. When asked if she saw SK at the party, Haley said that "Syd was being her normal self, bopping around from one group to the next".

[191] Haley said that she didn't observe anything happening during the party which caused her concern.

[192] Haley stated that she wasn't aware of any verbal altercations at past varsity parties. She said that sometimes the police would come later in the night to shut the party down if it was too loud or neighbours had complained. "That was very typical for an undergrad party".

[193] When asked about the level of drinking during the party, Haley stated that it varied and that a lot of people left early. Haley said that her birthday was November 30 so she was in a celebratory mood and probably drank more than some other people. Haley didn't observe anyone passed out or vomiting during the party. Haley described herself as being "fairly drunk". When asked what effect, if any, her alcohol consumption had on her, Haley stated, "it may have impaired my memory of that night" as she said would the passing of five years.

[194] Haley's evidence was that she knew AA from varsity sports, but she didn't recall seeing him at the party. She knew RP prior to the party but she didn't see RP at the party.

[195] Haley did not observe a fight during the party. Being in the bathroom on the main floor of the house with someone from each of the men's and women's soccer teams – Ben and Olivia. Ben had cuts and was bloody. She thought that this was

probably around 11 – 12 p.m. The party was winding down and a lot of people had left.

[196] She then went outside the house where she met Paige Jamieson. Haley called her mother to come and pick her up. Her mother came quickly and picked her and Paige up and they went home. Haley did not remember seeing SK after leaving the bathroom with Ben and Olivia and walking to the front door.

The Evidence of Paige Jamieson

[197] Paige was 20 years old on December 1, 2019 in the fourth year of a Bachelor of Science Degree in neuroscience. She was 26 years old when she testified, working as an emergency room nurse and in second year of medical school.

[198] Paige was a member of the varsity women's soccer team throughout her time as an undergraduate student at Dalhousie. Paige testified that she had been to varsity parties before the one hosted by her teammate SK on December 1, 2019. She did not see any verbal or physical altercations during any of those previous parties.

[199] Paige attended the December 1 party, arriving at 8:30 or 8:45 pm. She estimated that there might have been 65 to 70 people there when she arrived. Paige described guests as being mainly on the downstairs level of the house, but there were

a few people in the basement when she went there at one point. Paige described the party as being "not super crowded". She said that it was easy to walk around the house. She did not recall seeing AA at the party. She did not see RP until the end of the evening after people had cleared out of the house. Paige said that she was completely sober throughout the evening.

[200] Paige did not witness what happened that led to people rushing out the front door of the house. She saw people on the middle of the road fighting when she made her way outside. She pulled those people off the road so they wouldn't get hurt. Paige then met up with Haley and Haley's mother drove them both home.

Credibility Findings

[201] At the outset, I note that the party occurred five years before this trial. The passage of time had some impact on the reliability of the evidence of each witness. Further, the reliability of the recollections of certain witnesses was also negatively impacted by their consumption of alcohol.

[202] SK was a credible witness in the sense that I accept that she tried to be truthful. She was not caught in any outright lies.

[203] However, SK's evidence as to the events once the party started and throughout the rest of the evening and early morning hours of December 1 and 2, 2019 is largely unreliable. Her recollections were negatively impacted by the fact that she was intoxicated throughout the party. Where her memories conflict with those of RP, I accept RP's recollections as being both credible and reliable.

RP

[204] I find that RP gave, for the most part, credible and reliable evidence. He did not consume any alcohol the night of the party. I do not, however, accept his evidence that he spoke about the possibility of personal injury as a concern of his about the party prior to it with either SK or other tenants. He did not say so during his discovery examination and raised this concern for the first time at trial. No other roommate, with the exception of his good friend Daniel, said there was any concern discussed between them, nor with SK, in the lead up to the party about injury. Daniel thought there was discussion about possible violence. I do not accept that evidence over that or Doug, Ajan and Havard who did not have any recollection of either fights or personal injury being a concern discussed by the tenants.

AA

[205] I find that AA was primarily a credible witness in the sense that he tried to tell the truth. However, I do not accept his evidence that he felt intimidated or threatened when he saw RP ascend the staircase and move close to him. AA was on the landing or top step of the staircase. RP was below him standing on the second step of the staircase. I accept RP's evidence that he was stationary, not moving over that of AA and Campbell. RP's evidence that he was stationary was confirmed by Doug, who was credible and reliable witness and who had nothing alcoholic to drink, unlike AA and Campbell who I find were both intoxicated. The fact that RP is taller than AA does not change the fact that AA had secure footing at the top of the staircase. I accept RP's evidence over that of AA that prior to being hit by AA, RP was standing still near the top of the stairs. Further AA has a motive to be untruthful in this regard which is not the case for Doug.

[206] I also do not accept that AA merely held his leg and foot out in front of him and it was that contact which led to RP falling. Rather, I accept the evidence of RP, confirmed by Doug, that AA pushed or kicked RP.

[207] I accept RP and Havard's evidence that once at the bottom of the staircase, AA intentionally stepped on one of RP's ankle. I do not accept AA's evidence that this was accidental.

[208] I find that each of the other witnesses, Daniel, Doug, Paige, Haley, Ajan and Havard to be generally credible witnesses.

Findings of Fact Based on the Evidence

[209] I find the following facts:

- SK was intoxicated throughout the party. She did not supply alcohol to any partygoer either before or during the party.

- SK went upstairs to her bedroom at some point prior to the fist fight breaking out. At that point, the party continued without her and she exercised no control over it. I reject her evidence that before going to her bedroom that she "deemed" the party was over and few people were left in the house. That evidence conflicts with the evidence of all the other witnesses who say that the fistfight in the hallway happened while the party was in full swing and that RP's fall down the staircase came afterwards.

- AA drank 3 or 4 beers before the party and 2 or 3 while at the party. He was, in his own words, "pretty buzzed" when he arrived at the party and throughout it until his departure.

- Campbell was “moderately” intoxicated throughout the party.

- RP drank no alcohol the night of the party. Nor did Doug.

- The document does not refer to “personal damages” and cannot be interpreted in a way which demonstrates that personal injury was implied or that SK accepted responsibility for any personal injuries suffered by any person at the party. I say that because, with the exception of Daniel, who said he considered RP to be as close to him at the time as a brother, every tenant witness who discussed their concerns before the party and before the document was written, said that the concerns were about the number of attendees, the risk of possible damage to the house or to their personal property or about the possible theft of their personal property. It was only Daniel who said that he was also concerned about the possibility of violence at the party. This may have been his evidence, despite the fact that every witness who had attended such parties in the past did not witness violence of any kind, but it was not a concern he discussed with other tenants, including SK.

- RP went up the staircase in an attempt to get AA and Campbell to leave the party.

- RP was stationary on the second or third step from the top of the staircase when AA held out his foot and kicked or pushed him, making contact with RP in the area of his right collarbone and chin. This contact came out of nowhere and resulted in RP falling down the staircase.

Law and Analysis

Issue 1: Did SK owe RP a duty of care?

[210] There is no categorical duty of care owed by a party host to their guests. Accordingly, the Court must consider whether a novel duty of care exists. The legal inquiry as to whether a novel duty of care exists between a plaintiff and a defendant is the *Anns/Cooper* test.

[211] In *Cooper v. Hobart*, 2001 SCC 79 (SCC), the Supreme Court of Canada (majority) held that in assessing whether a duty of care should be imposed, the approach set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) remains the correct approach in Canada.

[212] The Supreme Court of Canada's decision in *Childs v. Desormeaux*, 2006 SCC 18 (SCC) is the leading case on social host liability and the Court applied the *Anns/Cooper* test in its analysis.

[213] The *Anns/Cooper* test was originally proposed by Lord Wilberforce in *Anns v. Merton London Borough Council* by way of a two-stage test with shifting burdens.

[214] The first stage focuses on whether the relationship between the plaintiff and defendant is "proximate" enough to give rise to a duty of care. The second stage asks whether there are "countervailing policy considerations that negative the duty of care.": *Childs* (SCC) at para. 11, citing *Anns* at pg. 742.

[215] Stage one of the test involves a foreseeability and proximity analysis, in which the plaintiff bears the onus of proof. If the plaintiff is successful at stage one, a *prima facie* duty of care is established, and the burden shifts to the defendant. At stage two, a duty of care can be negated by residual policy considerations.

[216] In *Odhavji Estate v. Woodhouse,* [2003] 3 S.C.R. 263, 2003 SCC 69, the Supreme Court of Canada affirmed the *Anns* test. Iacobucci J., for the Court, spoke of three requirements for a novel duty of care to be established (para 52):

- Reasonable foreseeability;
- Sufficient proximity;
- Absence of overriding policy considerations which negate a *prima facie* duty established by foreseeability and proximity.

[217] The Supreme Court clarified in *Childs* that:

> [12] …Some cases speak of foreseeability being an element of proximity where "proximity" is used in the sense of establishing a relationship sufficient to give rise to a duty of care: see, e.g. *Kamloops* [*Kamloops (City of) v. Nielsen,* [1984] 2 S.C.R. at pp. 10-11]. *Odhavji,* by contrast, sees foreseeability and proximity as separate elements at the first stage; "proximity" is here used in the narrow sense of features of the relationship other than foreseeability. There is no suggestion that *Odhavji* was intended to change the *Anns* test; rather, it merely clarified that proximity will not always be satisfied by reasonable foreseeability. What is clear is that at stage one, foreseeability and factors going to the relationship between the parties must be considered with a view to determining whether a *prima facie* duty of care arises…

[218] *Childs* arose from a car accident that took place after a house party. Courrier and Zimmerman hosted a "BYOB" (Bring Your Own Booze) event. The only alcohol served by the hosts was three-quarters of a bottle of champagne in small glasses at midnight. Mr. Desormeaux was known by the hosts to be a heavy drinker. When he walked to his car to leave the event, Mr. Courier went with him and asked, "Are you okay, brother?" He replied, "No problem", got behind the wheel, and drove away with two passengers.

[219] While impaired, Mr. Desormeaux drove his vehicle into oncoming traffic and hit a vehicle driven by Patricia Hadden. One of the passengers in her car was killed and three others were seriously injured, including Zoe Childs, who was teenager. Her spine was severed, and she was paralyzed from the waist down as a result of the accident.

[220] The plaintiffs sued the party hosts. The trial judge found that a reasonable person in the position of the hosts would have foreseen that Mr. Desormeaux might

cause an accident and injure someone. However, the judge found the duty of care was negatived by policy considerations involving the social and legal consequences of imposing a duty of care on social hosts to third parties injured by their guests, government regulation of alcohol sales, and preference for a legislative, rather than a judicial, solution. As a result, the trial judge dismissed the action.

[221] The Ontario Court of Appeal upheld the trial judge's decision and found that the factual circumstances did not disclose a *prima facie* duty of care: 71 O.R. (3d) 195, [2004] O.J. No. 2065. The Court held that unless social hosts are actively implicated in creating the risk that gives rise to the accident, they cannot be found liable.

[222] Ms. Childs appealed to the Supreme Court of Canada. In summarizing the crux of the legal question before the Court, Chief Justice McLachlin (as she then was) wrote:

> [8] **The central legal issue raised by this appeal is whether social hosts who invite guests to an event where alcohol is served owe a legal duty of care to third parties who may be injured by intoxicated guests**. It is clear that commercial hosts, like bars or clubs, may be under such a duty. This is the first time, however, that this Court has considered the duty owed by social hosts to plaintiffs like Ms. Childs.
>
> [Emphasis added]

[223] Chief Justice McLachlin stated:

> [1] A person hosts a party. Guests drink alcohol. An inebriated guest drives away and causes an accident in which another person is injured. Is the host liable to the person injured? **I conclude that as a general rule, a social host does not owe a duty of care to a person injured by a guest who has consumed alcohol** and that the courts below correctly dismissed the appellants' action.
>
> [Emphasis added]

[224] The unanimous Supreme Court of Canada held that a social host does not owe a *prima facie* duty of care to a person injured by a guest who consumes alcohol:

> [44] Holding a private party in which alcohol is served – the bare facts of this case – is insufficient to implicate the host in the creation of a risk sufficient to give rise to a duty of care to third parties who may be subsequently injured by the conduct of a guest. All this falls within accepted parameters of non-dangerous conduct. More is required to establish a danger or risk that requires positive action…**suffice it to say that hosting a party where alcohol is served, without more, does not suggest the creation or exacerbation of risk of the level required to impose a duty of care on the host to members of the public who may be affected by a guest's conduct.**
>
> [Emphasis added]

[225] In *Childs*, the court stated that a positive duty of care *may* exist if foreseeability of harm is present, and if there is sufficient proximity between parties. There are three factors/features of the relationship between a plaintiff and defendant that courts have recognized to create a link of sufficient proximity:

> [34] A positive duty of care may exist if foreseeability of harm is present *and* if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity. Three such situations have been identified by the courts. They function not as strict legal categories, but rather to elucidate factors that can lead to positive duties to act. These factors, or features of the relationship, bring parties who would otherwise be legal strangers into proximity and impose positive duties on defendants that would not otherwise exist.

> [35] **The first situation where courts have imposed a positive duty to act is where the defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls**…for example, it has been held that a boat captain owes a duty to take reasonable care to rescue a passenger who falls overboard (*Horsley)* and that the operator of a dangerous inner-tube sliding competition owes a duty to exclude people who cannot safely participate (*Crocker).* These cases turn on the defendant's causal relationship to the origin of the risk of injury faced by the plaintiff or on steps taken to invite others to subject themselves to a risk under the defendant's control. **If the defendant creates a risky situation and invites others into it, failure to act thereafter does not immunize the defendant from the consequences of its acts…**
>
> [36] The second situation where a positive duty of care has been held to exist concerns paternalistic relationships of supervision and control, such as those of parent-child or teacher-student…the duty in these cases rests on the special vulnerability of the plaintiffs and the formal position of power of the defendants….
>
> [37] The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large…
>
> […]
>
> [42] **The first category concerns defendants who have created or invited others to participate in highly risky activities. Holding a house party where alcohol is served is not such an activity. Risks may ensue, to be sure, from what guests choose to do or not do at the party. But hosting a party is a far cry from inviting participation in a high-risk sport or taking people out on a boating party. A party where alcohol is served is a common occurrence, not one associated with unusual risks demanding special precautions**. The second category of paternalistic relationships of supervision or control is equally inapplicable. Party hosts do not enjoy a paternalistic relationship with their guests, nor are their guests in a position of reduced autonomy that invites control. Finally, private social hosts are not acting in a public capacity and, hence, do not incur duties of a public nature.
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> [Emphasis added]

[226] RP and SK agree that the relevant parts of the *Anns/Cooper* test in this case are reasonable foreseeability, and the "obvious and inherent risk" element of the proximity analysis. There was no commercial enterprise or paternalistic relationship

between RP and AA (the second and third situation identified in *Childs* paras. 36-37).

***ANNS/COOPER* STAGE ONE ANALYSIS**

Foreseeability

The Positions of RP and SK

[227] RP and SK agree that foreseeability is a critical issue in this case. RP submits that it was reasonably foreseeable that personal injury could occur at a varsity athlete house party, with unmonitored alcohol consumption, an unknown number of invitees, the potential for underaged drinking, and a lack of meaningful supervision. The defendant SK argues that it was not reasonably foreseeable that personal injury would occur to a co-tenant and non-party attendee, perpetrated by a party attendee, AA, who was a stranger to the plaintiff.

[228] RP argues that SK owed him a duty of care because there was a proximate link between RP and SK as roommates, and the harm was reasonably foreseeable due to the risk created by SK. RP argues there is no doubt that he was assaulted by AA, but that this case turns on whether SK is liable for being a negligent host. He argues that SK and AA's acts are inextricably tied together, and this incident could have been avoided had SK acted appropriately as host.

[229] RP submits that personal injury was foreseeable once the party started, and that during the approximately 20-minute period between the fight breaking out and the time that he was injured, it was reasonably foreseeable that an injury could occur. RP also argues that the document was evidence of the roommates' concerns about the party.

[230] While the document does not refer to personal injury, RP submits that SK should have clarified the scope when she signed it. When this Court asked why SK would seek to clarify their concerns, RP responded that SK's evidence was that she did not really read the document, did not keep a copy, and did not remember it. RP acknowledges that the specific assault that occurred was not objectively foreseeable, and testified to that effect, saying he wasn't a "mind-reader," and neither was SK.

[231] RP also argues that there were underaged students invited, although he concedes that there is no evidence that underaged drinking occurred. He says, however, that there was no system in place to prevent it. RP further argues that SK, as the host of the party, became too intoxicated to act as a host, and that she neglected to delegate her hosting responsibilities before leaving the party.

[232] RP further argues that it was clear the roommates had concerns prior to the party, but SK did not meaningfully engage with them. RP argues that this was not a

hyper-sensitive group of roommates: there had been previous house parties without similar measures being taken, which, RP submits, speaks to the "exceptional nature" of this party.

[233] RP ultimately argues that physical harm was reasonably foreseeable to SK, given the number of attendees, unsupervised alcohol consumption, the presence of individuals who were actively seeking confrontation, and the lack of rules established by SK. While RP acknowledges that he himself did not foresee the events occurring, he argues that this is not fatal to his claim.

[234] SK shares the view that the crux of this case boils down to foreseeability. She argues, however, that an assault was not foreseeable, as required by the case law for a duty of care to exist, and therefore the *Anns/Cooper* analysis should stop there. SK argues that it would be exceptional for one person to be liable for another person's intentional tort. She argues that it was not foreseeable that the party guest AA would act with aggression or intent to injure a resident of the home.

[235] SK further argues that even if the court finds that it was reasonably foreseeable that property damage might occur, it does not follow that personal injury to a tenant, perpetrated by a party attendee, was also reasonably foreseeable. She argues that

similar cohorts of students had similar holiday parties year after year, and personal injury did not occur.

[236] SK relies on *Rankin (Rankin's Garage & Sales) v. J.J.,* 2008 SCC 19, for the proposition that simply because one type of harm is reasonably foreseeable, does not mean another type of harm is. She also emphasizes that the roommates' document did not reference personal injury.

[237] SK notes that alcohol consumption is commonplace at adult gatherings such as funerals, wakes, barbeques, birthday parties, and others. She says she was not trained in monitoring alcohol consumption, nor does the law require her to be. She emphasizes the autonomy of RP and AA, which she argues factors into the foreseeability analysis pursuant to *Childs.* RP and AA were both adults at the relevant time, and neither was being forced to act in the way that they did. The Supreme Court noted in *Childs* that alcohol consumption is a personal activity. SK submits that the choice to engage in violence is also personal. She argues that if RP felt unsafe or at risk, he could have withdrawn, gone to his room, called 911, or otherwise physically removed himself from the situation.

[238] SK says that she merely provided a venue for the event: she did not provide alcohol, and she says there was no evidence that anyone was excessively intoxicated

or drinking underage. She argues she was not under a legal duty to monitor others' alcohol consumption.

[239] SK also argues that it is irrelevant whether she was present at the time the injury was incurred. She argues there was no evidence that her presence would have prevented the injury from occurring. RP notes, however, that AA testified that if SK had asked him to leave, he would have done so. RP argues that SK being a present and active host could have prevented the injury altogether.

[240] SK argues it would be an error to say that while RP could not have foreseen the assault, that she should have foreseen it, and should be liable.

The Position of AA on Foreseeability

[241] AA did not present a specific position on foreseeability. The general scope of his defence and his closing submissions was that his interaction with RP at the top of the staircase was reasonable in the circumstances, given what he perceive to be the threat of RP getting closer to him.

Case Authorities

[242] Most of the caselaw provided by counsel to RP concerned commercial host liability. In that regard, the court was referred to the decision of the Ontario Court

of Appeal in *Turcotte v. Lewis,* 2018 ONCA 359, leave to appeal refused, [2018] S.C.C.A No. 217.

[243] SK also referred to the decision of the British Columbia Supreme Court in *P.S. v. Miki,* 2005 BCSC 406. This was not a case of social or commercial host liability, and there was no party/gathering or intoxication involved. The case deals with vicarious liability. P.S. brought a claim against her landlord, Miki, in vicarious liability, alleging battery by the landlord's cousin, a carpenter, who worked on the property. Miki admitted to committing battery upon P.S. consisting of inappropriate touching accompanied by inappropriate comments and gestures. The court held that Mr. Miki exercised reasonable care in selecting Mr. Miki to undertake the work and that it was not reasonably foreseeably that P.S. would be injured by Mr. Miki:

> [21] **A duty of care is only owed to persons whom one would reasonably foresee would be injured by a contemplated act or omission**. In *Home Office v. Dorset Yacht Co.*, [1970] 2 All E.R. 294 (H.L.), Lord Reid on behalf of the majority stated:
>
> > These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have something very likely to happen if it is not to be regarded as novus actus interveniens [sic] breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal**.** Unfortunately tortious or criminal action by a third party is often the "very kind of thing" which is likely to happen as a result of the wrongful or careless act of the defendant.

> [23] **Ms. P.S. must be able to show that it was reasonably foreseeable that Mr. Miki would assault her**. In *Newton v. Newton,* (2003) 2003 BCCA 389 (CanLII), 17 B.C.L.R. (4th) 1 (B.C.C.A.), Lambert J.A. on behalf of the Court emphasized that it was necessary to consider the question of **whether a duty of care was owed in relation to a foreseeable risk of harm that injury would be caused within the risk that was foreseeable and that liability can not lie solely on unpredictability producing a result that everything unpredictable which occurs should have been foreseeable and should give rise liability** [sic] (at paras. 9 –10).
>
> [Emphasis added]

[244] SK argues that as in *P.S.*, in this case, it was unforeseeable that the injury RP complains of would occur, and submits that an unpredictable situation cannot ground liability.

[245] RP also relies on *Van Hartevelt v. Grewal,* 2012 BCSC 658. Social host liability is not directly referenced in this case. A battery occurred during a small gathering in an apartment. There were many different versions of events in evidence, but the trial judge found that Grewal entered the apartment of Van Hartevelt uninvited and there was a verbal exchange. Grewal was asked to leave, refused, and Van Hartevelt lightly pushed her toward the door, and indicated that they were not welcome. Grewal then attacked Van Hartevelt, "pummelling him with his fists and sending him to the ground" (para. 47). Grewal tried to pull him off, and Mr. Grewal kicked Mr. Van Hartevelt forcefully in the ribs as he laid on the floor. He then proceeded to trash the apartment.

[246] The Court held that the assault was reasonably foreseeable in part due to a previous altercation between the parties. The Court distinguished *Miki*:

> [72] The court in *Miki* went on to state that in order to find liability under the *Act*, "Ms. P.S. must be able to show that it was reasonably foreseeable that Mr. Miki would assault her" (at para. 23). In *Miki*, this was found not to have been reasonably foreseeable. In the present circumstances however, I find that it was reasonably foreseeable that Mr. R. Grewal would commit the assault. Unlike in *Miki*, in the present case, the Second Named Defendants were aware of a previous confrontation between Mr. R. Grewal and Mr. Van Hartevelt.
>
> [73] This confrontation sufficiently concerned Mr. Van Hartevelt that he wrote a letter to the Second Named Defendants alerting them to the problem, and asking them to do something about it. In these circumstances, in my view the event that occurred was reasonably foreseeable…

[247] SK argues that *Van Hartevelt* is distinguishable because in that case there was evidence of previous bad blood and altercations between the parties, an element which is not present in this case, since AA and RP were total strangers to one another.

[248] SK also relies upon Supreme Court of Canada's decision in *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19.

[249] In that case, the issue was whether a commercial garage owed J a duty of care. J and his friend C, both minors, were drinking alcohol and smoking marijuana at C's mother's house. Sometime after midnight, they left the house to walk around town. They eventually made their way to the unlocked garage and C found an unlocked

car with keys in the ashtray. C, who had never driven a car on the road before, stole the car to pick up a friend in a nearby town. C told J to "get in," which he did, and C drove onto the highway, and crashed the car. J suffered a catastrophic brain injury. J sued the garage, C, and C's mother for negligence.

[250] The Supreme Court of Canada's majority decision in *Rankin* addressed the conditions for finding reasonable foreseeability, linking it to the type of damage and the class of plaintiff involved:

> [24] When determining whether reasonable foreseeability is established, the proper question to ask is whether the plaintiff has "offer[ed] facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged": A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at p. 322 (emphasis added). This approach ensures that the inquiry considers both the defendant who committed the act as well as the plaintiff, whose harm allegedly makes the act wrongful. As Professor Weinrib notes, the duty of care analysis is a search for the connection between the wrong and the injury suffered by the plaintiff: p. 150; see also *Anns*, at pp. 751-52; *Childs*, at para. 25.
>
> […]
>
> [26] Thus, in this context, it is not enough to determine simply whether the theft of the vehicle was reasonably foreseeable. The claim is not brought by the owner of the car for the loss of the property interest in the car; if that were the case, a risk of theft in general would suffice. Characterizing the nature of the risk-taking as the risk of theft does not illuminate why the impugned act is wrongful in this case since creating a risk of theft would not necessarily expose the plaintiff to a risk of physical injury. Instead, further evidence is needed to create a connection between the theft and the unsafe operation of the stolen vehicle. **The proper question to be asked in this context is whether the type of harm suffered — personal injury — was reasonably foreseeable to someone in the position of the defendant when considering the security of the vehicles stored at the garage.** [emphasis added].
>
> […]

> [46] **The fact that something is *possible* does not mean that it is reasonably foreseeable. Obviously, any harm that has occurred was by definition possible. Thus, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met:** *Childs*, at para. 29. Some evidentiary basis is required before a court can conclude that the risk of theft includes the risk of theft by *minors*. Otherwise theft by a minor would always be foreseeable — even without any evidence to suggest that this risk was more than a mere possibility. This would fundamentally change tort law and could result in a significant expansion of liability.
>
> [Italics and underlining in original, bolding added]

[251] SK also relies on *McCormick v. Plambeck,* 2022 BCCA 219, for its analysis of the foreseeability element of personal injury in the social host liability context. In *McCormick,* the appellant attended a party at the respondents' home, where minors were permitted to consume alcohol and drugs. The appellant and a friend left the party on foot. They later stole a vehicle, which crashed and injured the appellant.

[252] The trial judge dismissed the appellant's claim in negligence against the respondents on the basis that they did not owe him a duty of care, because the harm that occurred was not foreseeable.

[253] The appellant argued that the trial judge erred in requiring the precise mechanism of harm to the appellant to be foreseeable**.** The British Columbia Court of Appeal dealt specifically with "whether foreseeability of any type of personal injury suffices to establish a duty of care, or whether the general mechanism of injury must be foreseeable" (para. 1).

[254] On appeal, the appellant argued that trial judge erred by finding it necessary for the precise sequence of events leading to the appellant's injuries to be foreseeable:

> [27] The appellant's argument rests on the assumption that foreseeability of personal injury of any kind walking home after consuming alcohol suffices to impose a duty of care and liability for any form of personal injury, even an injury caused by an unforeseen mechanism, such as a car accident. The appellant submits that if the class of harm – either personal injury or harm to property – is foreseeable, a duty of care exists and liability may follow for any harm falling within that class if the other elements of negligence can be established. In short, the appellant says the way the personal injury occurs does not matter and need not be foreseeable, as long as the class of harm is foreseeable.
>
> [28] I cannot agree with this submission. **Although the *precise* mechanism of injury need not be foreseeable, I conclude that the *general* mechanisms must be**.
>
> [29] In my view, the foreseeability analysis involves more than merely asking whether personal injury as opposed to damage to property is foreseeable in relation to a particular class of plaintiff. The potential for occurrence of either type of harm cannot be assessed in the abstract, untethered from the circumstances and the way in which harm might occur. As the Court emphasized in *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 [*Rankin*]:
>
> > [53] Whether or not something is "reasonably foreseeable" is an objective test. **The analysis is focussed on whether someone in the defendant's position ought reasonably to have foreseen the harm** rather than whether a specific defendant did. Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. **The question is properly focussed on whether foreseeability was present *prior* to the incident occurring and not with the aid of 20/20 hindsight.**
>
> [30] The duty of care analysis is a search for the connection between the alleged wrong (here, letting minors who have been drinking walk home on their own), and the harm (here, personal injuries sustained in a car crash). **Reasonable foreseeability, like proximity, is a crucial limiting principle that ensures liability will only be found when the defendant ought reasonably to have contemplated the type of harm the plaintiff suffered: *Rankin* at para. 22**. It

is a practical impossibility to assess whether a class of harm could potentially occur without considering general mechanisms of injury. **It follows that the foreseeability analysis asks whether someone in the defendant's position, prior to the incident occurring, ought reasonably to have foreseen the class of harm, to the class of plaintiff, through the general mechanism that caused the injury.**

[…]

[38] The appellant's reading of the jurisprudence is based in part on the lack of clarity in the phrase "type of harm", which courts use to refer to both the class of harm (damage to property or personal injury) and to the way in which the harm occurred (for example unsafe operation of a vehicle, or an unfenced excavation). **On close reading, I conclude the cases do not suggest that a duty of care can be based on a free-floating foreseeability of personal injury**. To summarize, *Rankin* asked whether personal injury from dangerous operation of a stolen car was foreseeable; *Abdi* asked whether the City could have foreseen personal injury from operation of an open fire; *Hughes* asked whether risk of injury from boys playing with paraffin lamps was foreseeable; and *Assiniboine* asked whether damage to gas pipes on the outside of a building from a riderless snowmobile could be foreseen. In each case, foreseeability was not tied to the precise sequence of events, or to the extent of the injury or damage resulting. But foreseeability *was* tied to a general mechanism of injury: an open fire, paraffin lamps, dangerous operation of a motor vehicle, a careening riderless snowmobile. [emphasis added].

[39] In the case at bar, **the question is whether the respondents ought reasonably to have foreseen that the appellant, who had arrived at their home on foot and left the party on foot, would suffer personal injury from riding in a car being operated dangerously**. If the Pearsons had reason to know that the appellant and Ryan were impaired and had access to a car, personal injury as a result of dangerous operation of a motor vehicle might have been foreseeable. It would not have been necessary for the respondents to foresee the precise mechanism of injury, whether due to the car leaving the road as it did, colliding with another car, or failing to avoid an object on the road. Nor would it have been necessary for the severity of the injuries to be foreseeable. **But on the facts of this case, the foreseeability analysis must be rooted in the circumstances of a 17- and 18-year-old walking home from a party. I see no error in the judge's finding that it was not foreseeable that Ryan and the appellant could sustain personal injury from riding in a car being operated in a dangerous manner.**

[Emphasis added]

Analysis and Findings – Foreseeability:

[255] On the particular facts of this case the roommates' concerns, including those of RP, about SK's party are not relevant to the foreseeability analysis. This may have been different if the document specifically referred to personal injury, or words to that effect, as a concern about the party. It did not – if anything, this implies that personal injury was not foreseen by the roommates. Regardless, reasonable foreseeability is an objective test, so what they subjectively foresaw bears little weight.

[256] RP's arguments about the fact that SK did not have rules for the party, in this Court's view, are equally irrelevant to the foreseeability analysis. SK did not have a duty to have a security system, a list of rules, or a system in place to monitor alcohol consumption or general alcohol consumption of attendees. The suggestion by RP that these should have been features of her party has no foundation in the law governing social host liability. These features may be required in a commercial host setting, but not a social host setting. The fact that SK did not have these systems in place did not make what occurred reasonably foreseeable.

[257] Commercial hosts and social hosts are differentiated at law, for good reason. The Supreme Court of Canada in *Childs* directly addressed the differences between commercial and social hosts. Commercial alcohol providers owe a duty to third party members of the public who are injured because of drunken driving by a patron

(*Childs,* para. 16). The differences between commercial hosts and social hosts as set out in *Childs* can be summarized (paraphrased) as follows:

1. Commercial hosts have a special incentive to monitor consumption because they are being paid for a service, and servers can generally be expected to possess special knowledge about intoxication (*Childs,* para. 18)
2. The sale and consumption of alcohol is strictly regulated by legislatures, and the rules applying to commercial establishments suggest that they operate in a very different context than private party hosts (*Childs,* para. 19)
3. The contractual nature of the relationship between a tavern keeper serving alcohol and a patron consuming it is fundamentally different from the range of different social relationships that can characterize private parties in the non-commercial context: unlike the host of a private party, commercial alcohol servers have an incentive not only to serve many drinks, but to serve too many (*Childs,* para. 22).

[258] The law is clear that general foreseeability of personal injury is insufficient to establish foreseeability in this context. The same is true for unpredictability. In *Miki,* the court relied upon *Newton v. Newton*, 2003 BCCA 389, in which Lambert J.A. emphasized that it was necessary to "consider the question of whether a duty of care was owed in relation to a foreseeable risk of harm that injury would be caused within the risk that was foreseeable and that liability can not lie solely on unpredictability producing a result that everything unpredictable which occurs should have been foreseeable and should give rise to liability." (*Miki,* para. 23).

[259] RP and his roommates' concerns about things potentially going wrong, and the possibility of the party getting out of hand – in other words, its unpredictability – do not establish reasonable foreseeability. The Courts in *McCormick* and *Rankin*

made it clear that the standard of reasonable foreseeability goes beyond mere possibility that personal injury could occur. The Supreme Court of Canada majority in *Rankin* provides:

> [53] …whether something is "reasonably foreseeable" is an objective test. The analysis is focused on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether the specific defendant did. **Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. The question is properly focussed on whether foreseeability was present *prior* to the incident occurring and not with the aid of 20/20 hindsight…**
>
> [Emphasis added]

[260] The British Columbia Court of Appeal in *McCormick* referenced the Supreme Court of Canada majority's analysis in *Rankin* and added "the potential for occurrence of either type of harm cannot be assessed in the abstract, untethered from the circumstances and the way in which harm might occur" (para. 29).

[261] The Court in *McCormick* elaborated on the foreseeability analysis, confirming that there is a certain specificity requirement, stating that: "the foreseeability analysis asks whether someone in the defendant's position, prior to the incident occurring, ought reasonably to have foreseen the class of harm, to the class of plaintiff, through the general mechanism that caused the injury" (para. 30). The Court further clarified that a duty of care cannot be based on a "free-floating foreseeability of personal injury"; referring to several earlier cases, the Court said, "[i]n each case foreseeability was not tied to the precise sequence of events, or to the extent of the

injury or damage resulting. But foreseeability *was* tied to a general mechanism of injury: an open fire, paraffin lamps, dangerous operation of a motor vehicle, a careening riderless snowmobile (para. 38).

[262] I find that RP's personal injury in the house by battery committed by AA, a person unknown to RP, was not reasonably foreseeable by SK in the circumstances of this case. Reasonable foreseeability cannot be grounded in individuals being concerned that something could go wrong. More is required. Just because a harm is *possible* does not mean it is *reasonably foreseeable.* The foreseeability test is objective. It does not turn on whether the plaintiff or defendant had subjective foresight. The majority in *Rankin* emphasized that "the question is properly focussed on whether foreseeability was present *prior* to the incident occurring and not with the aid of 20/20 hindsight" (para. 53).

[263] In this case -- with the assistance of 20/20 hindsight of the party and ensuing events that took place on December 1 and 2, 2019 -- this Court might conclude that personal injury was possible. But it does not follow that someone in SK's position, prior to the incident occurring, ought reasonably to have foreseen the class of harm (personal injury) to the class of plaintiff (a co-tenant) through the general mechanism that caused the injury (battery by a party attendee). I find the reasonable foreseeability branch of the *Anns/Cooper* test is not satisfied.

[264] In the alternative, and for completeness of reasoning, I have conducted an analysis on the proximity branch of stage one of the *Anns/Cooper* test.

***ANNS/COOPER* STAGE ONE: PROXIMITY ANALYSIS**

The Positions of RP and SK

[265] RP points out that most social host liability cases in Canada deal with parties where the host and plaintiff are much less proximate than RP and SK were at the time of the event. RP and SK lived in the same house at the time, and were roommates. In certain cases, courts have found the defendant owed a duty of care to third parties unknown to the defendant. SK argues in response that there is insufficient proximity because the party was not an inherent or obvious risk. She argues that she had no positive duty to act any differently than she did.

[266] RP acknowledges that in *Childs*, the Supreme Court of Canada held that a house party with consumption of alcohol does not automatically create a situation of risk. However, RP argues that SK's conduct in hosting this party gave rise to an exception contemplated by *Childs*, in which courts can impose a positive duty to act.

[267] RP argues that there is post-*Childs* caselaw whose facts could support a house party being considered an inherent and obvious risk. While the unanimous Supreme Court of Canada in *Childs* did not find that a house party, without something more,

was inherently risky; RP argues there is a spectrum of risk that can raise a house party to the level of "inherent and obvious risk." For instance, in *Williams v. Richards*, 2018 ONCA 889, an appeal of a summary judgment motion, the Court of Appeal described post-*Childs* legal principles in the following terms:

> [28] **There are many different factual permutations of what could transform a social gathering into an invitation to an inherent and obvious risk**. It is helpful to think of these situations as being situated along a spectrum. At one end of the spectrum is *Childs*, which was a "bring your own alcohol" party where the hosts provided minimal alcohol. Similarly, private parties of a reasonable size are usually viewed by the courts as not inherently risky: see *Robinson v. Lewis*, [2015] A.J. No. 860, 2015 ABQB 385, at paras. 72-77. Likewise, an invitation to a co-worker's home to have dinner and after-work drinks outside is not inherently dangerous or risky: see *Allen*, at para. 78. Moving further down the spectrum, a young adult throwing a "wild" Halloween party and providing alcohol for around 40 people, some of whom are using illegal drugs, may implicate a host in the creation of an inherent risk: see *Kim* (S.C.J.), at paras. 9-10, 25. **On the far end of the spectrum, a teenager throwing a house party at which over 100 people attend, most of whom are underage drinkers, while their parents are out of town, likely implicates the host in the creation of an inherent risk**: *Oyagi*,at paras. 6-7 and 12.
>
> [Emphasis added]

[268] The Court of Appeal remitted the matter back to the Superior Court for trial, finding that there were genuine issues requiring a trial.

[269] The Court in *Williams* referred to *Oyagi v. Grossman*, [2007] O.J. No. 1087 (Q.L.), 2007 CanLII 9234 (ON SC), *Oyagi* was also a summary judgment motion. A 17-year-old threw a party, in his family's house, arranged for security to attend, and charged money for alcohol. The party was advertised online, and was held against the host's parents' express direction before they left on vacation.

Approximately 100 people attended, and the host lost control. Random people, unknown to the host, attended, and there were people present who claimed to be members of a gang. Items began to go missing, including the plaintiff's wallet. When the plaintiff was leaving she saw a person running to and getting into a vehicle with a sack over his shoulder. She and ten to fifteen other people surrounded the vehicle, and the plaintiff stood directly in front of it. The driver put the vehicle in motion and seriously injured the plaintiff.

[270] On the issue of whether the defendants owed a duty of care to the plaintiff, the court opined that the environment created by the host was by nature dangerous, due to the host being underage, inviting other underage people, and indicating that alcohol would be served. The court concluded that whether there was a duty of care was a genuine issue for trial and the summary judgment motion was dismissed. The issue of whether there was a duty of care owed was not decided by the Court, due to its limited function in the context of a summary judgment motion. There is no subsequent reported trial decision.

Analysis and Findings - Proximity:

[271] The question of whether there was a sufficiently proximate relationship between SK and RP depends on whether this Court finds that SK intentionally attracted third parties to an inherent and obvious risk that she created or controlled.

It is not contentious that SK was the sole host of the party, and thus, would have been the person in "control" of the event. Whether there was sufficient proximity depends on whether this particular house party was an "inherent and obvious risk." As the majority in *Childs* ruled, house parties without something more are not inherently risky.

[272] Based on the evidence and the findings of fact that I have made, I find that SK's party did not constitute an inherent and obvious risk for the purpose of the proximity stage of the *Anns/Cooper* test.

[273] Having said this, the evidence demonstrates that SK was an irresponsible host. By her own admission SK was intoxicated throughout the party.

[274] While her evidence was that she went to bed after deeming the party to be over, this evidence does not find any support from the evidence of the other witnesses. The party was in full swing when SK went to bed which had the effect of abdicating her responsibilities as host.

[275] However, it would be an error for this Court to conflate SK's irresponsibility toward her fellow tenants, with the legal standard of creation of an inherent and obvious risk. Alcohol was not served at the party (guests brought their own) and there was nothing SK did to create more of a risk than a normal house party. The

Supreme Court in *Childs* was clear that something more is required for a social gathering to become an inherent and obvious risk. I find that the "something more" is not present in the evidence before the Court.

[276] The evidence shows that the annual varsity Christmas party had taken place in previous years without incident and certainly without anyone being hurt. While the police were often called to respond to noise complaints during varsity parties in the past, that is a far cry from the police showing up to learn that a physical fight had happened and that someone was claiming that a partygoer had assaulted them, which is what took place in this case.

[277] Further, as SK emphasizes, all parties involved – SK, RP, AA – were autonomous adults. To reiterate, the Court in *Childs* said on this point:

> [45] …A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. **Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of risks of impaired judgment, is in almost all cases a personal choice and inherently personal activity**…
>
> [Emphasis added]

[278] AA, in acting as an autonomous adult, chose to act in the manner he did. SK's provision of a location for the Dalhousie varsity athletes to gather and drink alcohol did not create an inherent and obvious risk in which it was reasonably foreseeable

that someone like AA would assault another party guest. These consequences arose from AA's personal judgment, or lack thereof.

Issue #2: Did SK owe a duty of care to RP pursuant to *OLA*?

[279] RP also argues that SK breached the duty of care owed to him under the *Occupiers' Liability Act,* S.N.S. 1996, c. 27. The relevant provisions of the *OLA* are ss. 2-5, which cover the definition and duties of the occupier, as well as willing assumption of risk:

> **Duties of occupier**
>
> **Interpretation**
>
> **2** In this Act,
>
> (a) "occupier" means an occupier at common law and includes
>
> (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 the premises or the persons allowed to enter the premises, and, for the purpose of this Act, there may be more than one occupier of the same premises;
>
> **Replacement of common law rules**
>
> **3** This Act applies in place of the rules of common law for the purpose of determining the duty of care that an occupier of premises owes persons entering the premises in respect of damages to them or their property.

Duties of occupier

4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.

(2) The duty created by subsection (1) applies in respect of

(a) the condition of the premises;

(b) activities on the premises; and

(c) the conduct of third parties on the premises.

(3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to

(a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;

(b) the circumstances of the entry into the premises;

(c) the age of the person entering the premises;

(d) the ability of the person entering the premises to appreciate the danger;

(e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and

(f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

(4) Nothing in this Section relieves an occupier of premises of any duty to exercise, in a particular case, a higher standard of care that, in such case, is required of the occupier by virtue of any law imposing special standards of care on particular classes of premises.

Willing assumption of risk

5 (1) The duty of care created by subsection 4(1) does not apply in respect of risks willingly assumed by the person who enters on the premises but, in that case, the occupier owes a duty to the person not to create a danger with the deliberate intent of doing harm or damage to the person or property of that person and not to act with reckless disregard of the presence of the person or property of that person.

[280] The definition of "occupier" at s. 2(a) of the *OLA* includes "(ii) a person who has responsibility for, and control over, the condition of the premises, the activities conducted on the premises or the persons allowed to enter the premises."

[281] RP argues that the *OLA* applies, and that SK failed to fulfill her duty as occupier. SK argues that the *OLA* does not apply, but if the Court finds it does apply, the duty of care created by s. 4(1) does not apply to risks willingly assumed by those entering the premises.

[282] In the view of this Court, SK meets the definition of "occupier" in the statute and thus, it follows that the statute applies.

[283] Considering the statute's definition of "occupier," I also find that SK was an "occupier" within the meaning of s. 2(a)(ii) of the *OLA.* She had responsibility for the house, the party, and the persons allowed to enter the residence on the night in question. The evidence was clear that she was the sole host of the party. Section 4(1) of the *OLA* requires an occupier to "take care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises."

[284] Section 4(2)(c) notes that the duty created by s. 4(1) applies in respect of "the conduct of third parties on the premises."

[285] RP bears the onus of proving that the defendant did not meet the standard of care. First, the Court must determine if SK owed a duty of care to RP. The answer to this question lies in the Court's analysis of s. 4(2)(c) of the *OLA* as quoted above.

Analysis and Findings - *OLA*

[286] The Nova Scotia Court of Appeal addressed principles applicable to an *OLA* claim in *Theriault v. Avery's Farm Markets Limited,* 2022 NSCA 36. The Court of Appeal set out the following principles of occupiers' liability, which are drawn from several case authorities. These principles are listed at paras. 63-4 of the decision:

- There is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe;
- The onus is on the plaintiff to prove on a balance of probabilities that the defendant failed to meet the standard of reasonable care;
- The fact of an injury in and of itself does not create a presumption of negligence. The plaintiff must point to some act or failure to act on the part of the defendant that resulted in their injury;
- If a plaintiff is able to demonstrate a *prima facie* case of negligence, the occupier can discharge its evidential burden by showing it has a regular regime of inspection, maintenance and monitoring sufficient to achieve a reasonable balance between what is practical in the circumstances and what is commensurate with reasonably perceived potential risk to those lawfully on the property;
- An occupier is not a guarantor or insurer of the safety of the persons coming on its premises; and
- In assessing whether an occupier has taken reasonable care in the circumstances to make the premises safe, the factors to be considered by the trial judge will be specific to the particular fact situation (*Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at para. 33); and
- Demonstrating the existence of an act or omission by an occupier does not give rise to an automatic finding of negligence. Whether an action or omission constitutes negligence giving rise to a statutory breach will depend on all the circumstances (*Miller*, supra at para. 9).

[287] In *McAllister v. Calgary (City)*, 2019 ABCA 214, the court deal with the issue of whether the City of Calgary was an "occupier" of a particular overpass where someone was assaulted, such that the city would be liable for the injuries incurred.

[288] The Alberta Court of Appeal found that the City was an occupier of the overpass. It stated:

> [23] It is not necessary for a person to be physically present on the property 24 hours a day in order to be "in physical possession"…a homeowner does not cease to be an occupier just because he or she goes shopping for a few hours. The fact that City staff are not present on the overpass 24 hours a day does not mean that the City is not in physical possession of the overpass.

[289] Applying this reasoning to the present case, SK did not cease to be an occupier at the point in the night when she went to bed and abandoned her party.

[290] With respect to the duty of care, the Court in *McAllister* disagreed with the trial judge regarding the City's duty with respect to preventing crime:

> [31] …There is no duty to truly "prevent" crime; the statute does not make the occupier an insurer. Merely because crime happens, and damage results, does not meant that the occupier is liable.

[291] Further, the Court of Appeal said the correct standard of care is set out in s. 5 of the statute, and "mere foreseeability of harm does not equate to liability for that harm" (para. 32*).*

[292] As under s. 2(c) of the Nova Scotia *OLA,* Alberta's legislation extends the duty of care to the "conduct of third parties" under section 6(c). The Court of Appeal stated that despite this provision "a defendant will only be held responsible for failing to prevent damage caused by the intentional tort of a third party in narrow circumstances" (para. 42*).* The Court of Appeal in *McAllister* noted:

> [51] One important consideration is the amount of control that the occupier has over the third party. One can say that in most (if not all) cases where one defendant is held to owe a duty to prevent damage caused by the tort of a third party, **there is either a special relationship between the defendant and the plaintiff, or an element of control by the defendant over the third party,** or some combination of the two. In most situations, the occupier will have less control over intentional torts by third parties, and the standard of care in those situations will accordingly be moderated.
>
> [52] …The very definition of "occupier" in s. 1(c)(ii) refers to "control over…the activities conducted on those premises and the persons allowed to enter those premises." **The statute does not intend to hold occupiers liable for matters that are not reasonably within their control**. Dr. Sundberg, the City's expert, described the assault as being "grievance based violence" that is difficult to deter…
>
> [underlining in original, my bolding added]

[293] RP argues that in the circumstances there was a "special relationship" between him and SK, as roommates and co-occupiers. He argues that if SK did not have a duty of care to prevent assaults at a party she was hosting, she still had a duty to detect and respond to those assaults and ensure that persons on the premises were reasonably safe. He argues that there was a period of time after SK intervened in the fist fight taking place in the hallway until he was a assaulted by AA, when SK

could, and should have taking steps to end the party or otherwise provide for his safety.

[294] The Alberta Court of Appeal in *McAllister* also analyzed whether the City had a duty to detect crime. It stated that the law does not, in general, impose a duty on bystanders to "rescue" a plaintiff who is at risk of suffering damages (para. 59), and cited *Childs,* where the Supreme Court said:

> [31] …Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved…
>
> […]
>
> [39] …The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy…
>
> [Emphasis in original]

[295] SK had no control over AA: an autonomous, adult, man. The analysis boils down to whether there was a special relationship between SK and RP. RP argues that there was, due to them being co-occupiers and roommates.

[296] SK exercised no public function and was not a commercial host. I find that there was no "special relationship" between SK and RP. The Supreme Court of

Canada in *Stewart v. Pettie*, [1995] 1 SCR 131, also commented on the necessity of reasonable foreseeability of risk in the analysis, even when there was a "special relationship" between the plaintiff and defendant:

> [48] **I do, however, have difficulty accepting the proposition that the mere existence of this "special relationship", without more, permits the imposition of a positive obligation to act.** Every person who enters a bar or restaurant is in an invitor-invitee relationship with the establishment, and is therefore in a "special relationship" with that establishment. However, it does not make sense to suggest that, simply as a result of this relationship, a commercial host cannot consider other relevant factors in determining whether in the circumstances positive steps are necessary.
>
> [49] The existence of this "special relationship" will frequently warrant the imposition of a positive obligation to act, but the *sine qua non* of tortious liability remains the foreseeability of the risk. **Where no risk is foreseeable as a result of the circumstances, no action will be required, despite the existence of a special relationship**…
>
> [Emphasis added]

[297] If this Court is wrong and there was a special relationship between SK and RP, I find that there was no duty on SK to act to prevent the harm in question, because the risk of harm was not reasonably foreseeable.

[298] Returning to the principles of *OLA* analysis listed by the Nova Scotia Court of Appeal in *Theriault*, I find that RP has not met his onus and has not proven that the occupier SK failed to meet the standard of reasonable care.

[299] Finally, below I consider the *OLA* section 4(3) codified factors that the court *shall* consider in determining "whether the duty of care created by subsection(1) has been discharged":

(a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;

[300] SK had knowledge that persons would be at the house on the night of the party. She did not know exactly how many people would be there since "plus ones" of invitees were welcome. RP was not privy to the invite list.

(b) the circumstances of the entry into the premises;

[301] The circumstances of entry were that SK was hosting a party where approximately 70-100 individuals were invited.

(c) the age of the person entering the premises;

[302] The person considered here is RP. He was an adult.

(d) the ability of the person entering the premises to appreciate the danger;

[303] RP had concerns about the party prior to its occurrence, which he expressed to SK. RP could not have appreciated that when he left his room, he would be kicked down the stairs by the party guest, AA.

(e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and

[304] There was no warning by SK of concern of danger, nor evidence that she was concerned about danger.

(f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

[305] The risk of an assault by a third-party invitee is not one which SK may reasonably be expected to offer protection from. The assault by AA of RP was entirely unpredictable, it was not reasonably foreseeable. AA and RP did not have prior bad blood -- they had never met before this incident. The Court finds that there is nothing SK could have done to protect from this risk because the risk was not reasonably foreseeable.

Conclusion on duty of care under *OLA*

[306] SK did not owe RP a duty of care regarding the conduct of third parties on the premises, pursuant to s. 4(2)(c) of the *OLA.* As the Court noted in *McAllister,* imposing liability on the occupier for the conduct of third parties will only occur in exceptional circumstances: either where there is a relationship of control between the plaintiff and defendant, or a "special relationship" between same (para. 51*).* Here there was no relationship of control, nor was there a "special relationship" between RP and SK.

[307] If I am wrong and there was a "special relationship" between SK and RP, SK still did not have a duty to act to prevent the harm, because the harm was not reasonably foreseeable (*Stewart*, paras. 48-49).

[308] If I am wrong and there was a duty of care owed by SK to RP with respect to the conduct of third parties, I find it is negated by the willing assumption of risk of RP pursuant to s. 5(1) of the *OLA.* He could have stayed in his room during the party, and to that extent, willingly assumed risk in engaging with attendees. That, however, does not constitute contributory negligence on his part, in the sense that he contributed, negligently, in his interaction with AA, so as to share in the responsibility for his injuries.

[309] Under this provision, the occupier still owes a duty to the person:

> **Willing assumption of risk**
>
> **5 (1)** The duty of care created by subsection 4(1) **does not apply in respect of risks willingly assumed by the person who enters on the premises but**, in that case, the occupier owes a duty to the person not to create a danger with the deliberate intent of doing harm or damage to the person or property of that person and not to act with reckless disregard of the presence of that person or property of that person.
>
> [Emphasis added]

[310] I find that SK discharged her occupier's duty and did not act with deliberate intent of harm or damage to RP, nor with reckless disregard of RP. SK did not insist, require, or ask her co-tenants to be present in the home and/or attend the party. Therefore, RP willingly assumed the risk of entering the party, for whatever purposes, because he chose to do it of his own free will.

[311] In conclusion, RP has not discharged his burden as the plaintiff to prove, on a balance of probabilities, that SK failed to meet the standard of reasonable care. I am not satisfied that SK owed a duty to RP with respect to the conduct of AA. The circumstances before the Court do not equate to exceptional circumstances wherein it would be just for an occupier to be held liable for the intentional torts of a third party – an autonomous adult in which the occupier had no control over. In the recent *Theriault* decision, the Nova Scotia Court of Appeal noted that "an occupier is not a guarantor or insurer of the safety of the persons coming on its premises" (paras. 63-4).

[312] RP did not discharge his burden of establishing the foreseeability and proximity elements of stage one of the *Anns/Cooper* analysis. As a result, the Court finds that the test to establish a novel duty of care has not been met.

[313] I am not satisfied that SK owed a duty of care to RP with respect to the conduct of AA. In the alternative, if SK did owe a duty of care to RP, then he willingly assumed the risk pursuant to s. 5(1) of the *OLA*, thereby negating the duty of care. RP did not discharge his burden to prove on a balance of probabilities that SK failed to meet the standard of reasonable care.

Issue #3: Is AA liable to RP in negligence and/or did he commit an intentional tort in the altercation between him and RP??

[314] RP claims against AA both in negligence and intentional battery.

[315] Starting with the tort of intentional battery, in *Pelletier v. Forbes*, 2010 NSSC 309, Justice A. Pickup set out the three essential elements of the tort:

i. Infliction of contact or force upon another person;

ii. The contact is intentional; and

iii. The contact is harmful or offensive.

[316] "Intention" in the context of the tort of battery means the desire to produce the immediate physical consequences of an action. In *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, Justice Iacobucci stated:

> 97. A.M. Linden, in Canadian Tort Law (6th ed. 1997), emphasizes this point at p. 43: "A battery can be committed even though no harm or insult is intended by the contact. If the contact is offensive to the recipient, even if a compliment was intended, it is tortious."
>
> 98. Intentional battery generally requires only the intent to cause the physical consequence, namely, an offensive touching, Klar, *supra*, makes this point at p. 30:
>
> > Technically, however, the intention of "intention" in the intentional torts does not require defendants to know that their acts will result in harm to the plaintiffs. Defendants must know only that their acts will result in certain consequences. It is not necessary for defendants to realize that these intended consequences are in fact an

> infringement of the legal rights of others. Intention, in other words, focuses on physical consequences.

[317] I find that AA intended to contact RP and that RP found the contact to be offensive. The fact that RP incurred particular injuries the seriousness of which AA did not contemplate is not relevant to the analysis as is evident from the following passages of Justice Iacobucci's reasoning in *Non-Marine Underwriters*:

> 99. Moreover, if a tort is intended, it will not matter that the result was more harmful than the actor should, or even could have foreseen. Linden, *supra,* at p. 45, quotes Borins Co. C.t. J. (as he then was) in *Bettel v. Yim* (1978), 178 CanLii 1580 (ON SC). 20 O.R. (2d) 617, at p. 628:
>
> > If physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference. To hold otherwise…would unduly narrow recovery where one deliberately invades the bodily interests of another with the result that the totally innocent plaintiff would be deprived of full recovery for the totality of the injuries suffered as a result of the deliberate invasion of his bodily interests.
>
> [Emphasis in original]

[318] AA argues that he acted in self-defence and that he did not intend to injure RP. AA has not met the onus of establishing self-defence in the circumstances. Even if the Court accepts that AA felt intimidated by RP running up the steps towards him (and I have found as a fact that RP was stationary and not running at the point AA made contact with him), holding an extended leg out to stop RP's momentum was an unreasonable and dangerous thing to do. AA could have simply stepped to one side and let RP continue his ascent. Further, AA was with Campbell. AA says that he did not see Doug. I find that Doug was standing in his doorway close by. But

the point is that Campbell didn't see him. That means it would have been RP against AA and Campbell if RP took further actions against either of them. RP would have been out-numbered.

[319] There is no evidence from any witness, including AA and Campbell that RP threatened to apply, or in fact applied any physical force to AA. Further, AA's action in holding out his foot to stop RP from coming closer was inherently dangerous and greatly exceeded what was necessary for him to avert any harm he feared might happen. Further, AA and Campbell could have walked away from an encounter with RP. All they had to do was leave the house, which is exactly what RP was demanding that they do. AA showed an intention to engage with RP by yelling back to him, "Or what?". That is not a response from a person who is attempting to protect themselves or de-escalate a situation.

[320] I also find that AA was negligent in outstretching his leg at the top of a staircase and pushing RP. AA owed a common law duty of care to RP in the circumstances. It was entirely foreseeable to AA that RP could fall as a result of that push, and that is exactly what happened. RP claims he was injured as a result. That is enough to establish liability on the part of AA in negligence.

[321] RP was not contributorily negligent. Further altercation between him and AA was not "consensual", as AA pleads in his defence. RP was a tenant in the house. It was reasonable for him to take steps to ensure that AA and Campbell left. The party was over, the police had been called and he had witnessed a fist fight. The only steps that RP took were to demand that they leave. His actions were reasonable in the circumstances and attract no contributory negligence on his part. Had RP chosen to engage in, or participate in the fistfight earlier that evening, and been injured as a result, that would be a different matter. That is not the case before this Court.

[322] Nor was SK contributorily negligent as a result of not stopping the party after the fight. SK could not have known that after the fight that AA would kick someone down the staircase.

[323] There is no joint liability here. AA is responsible for his own actions that night. SK is not responsible for AA's actions.

[324] At this point, the Court wishes to comment on AA's interaction with Court and counsel in this matter. Despite acting on his own behalf at this trial, AA conducted himself admirably. His direct and cross-examinations were focused and

clearly planned. He was respectful of this Court and professional in his dealings with opposing counsel in any interactions observed by this Court.

[325] Therefore, despite the findings which I have made against him, the Court wishes to commend AA for his conduct throughout the trial of this matter.

Conclusions

- SK is not responsible for any injury suffered by RP as a result of AA's actions either in negligence or pursuant to the *OLA*. She could not have foreseen that A would push or kick RP in the manner he did. How could she, when RP did not foresee that AA would push him down the staircase? Nor is SK contributorily negligent for AA's actions.

- AA committed the tort of intentional battery by kicking AA and causing him to fall and sustain injury. He is also liable in negligence to RP for his actions. AA's liability is several, not joint.

- RP is not contributorily negligent for any of his actions.

[326] RP is entitled to costs against AA. SK is entitled to costs against RP. The Court will receive written submissions on costs within thirty (30) days of this decision, if counsel and Mr. Anderson do not reach agreement on same.

[327] I ask counsel for RP to draft the necessary order.

Smith, J.