

Date: 19980821
Docket: B963109
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DANIEL D. GERVASIO

PLAINTIFF

AND:

**JAMES FULLERTON, DWAYNE DANELIUK, 971 HOLDINGS LTD.,
doing business as Fahrenheit 212, DEVIZES MANAGEMENT LTD.,
KIERAN MCCONNELL, CITY OF VANCOUVER, and BC TEL**

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE J.T. EDWARDS

Counsel for the Plaintiff:

David C. Halkett

Counsel for the Defendants
James Fullerton & 971 Holdings Ltd
dba Fahrenheit 212:

Denis K. Walz
& Mark V.C. Virgin

Place and Date of Hearing:

Vancouver, B.C.
June 1 - 5, 1998
July 30, 1998

[1] The plaintiff's claim at trial was for damages for injuries he suffered when he was being forcibly ejected by the defendant, Fullerton from Fahrenheit 212 ("212"), a bathhouse operated in Vancouver.

[2] The plaintiff has recovered a judgment by default against the defendant Daneliuk, and discontinuances have been filed by the defendants, Devizes Management Ltd., Kiernan McConnell, City of Vancouver and BC Tel.

[3] At all material times, Fullerton was employed by 971 as a doorman. His duties included the determination of who was entitled to enter the club. In exercising his duty he was called upon to make judgements about the protection of other clients of the club and about the state of sobriety or drunkenness of members seeking entry.

[4] Fullerton was behind a glass partition off of the foyer. He controlled the switch that opened the door to the inside of the club, much the same in the same manner that one would encounter at a movie theatre.

[5] Much evidence was given of the events leading up to the confrontation between the plaintiff and the defendant, Mr. Fullerton. Most of the evidence was not relevant to the issues at trial. What is relevant to the pre-confrontation events, is that the plaintiff and his friend, Paul Vickers were drinking

beer and smoking marihuana in the evening of July 1, 1994. They decided to go to 212 and arrived at 212 about 2:45 a.m. The plaintiff was by this time drunk.

[6] The events that then occurred can be divided into two versions; one of the plaintiff's version and one of Fullerton's version.

[7] What is not in dispute is that there was a physical confrontation between the plaintiff and Fullerton, that when the police arrived they used pepper spray in subduing the plaintiff.

[8] The plaintiff's view of the facts are as follows:

a) The plaintiff and his friend Vickers came into the foyer of 212 and the plaintiff showed Fullerton his temporary ID card which entitled him to enter the club;

b) Fullerton was not satisfied with the temporary ID and refused admission saying that he needed photo ID before he could admit the plaintiff and Vickers;

c) The plaintiff then told Fullerton that he knew the owners of 212, whereupon Fullerton swore at the plaintiff and became rude and belligerent. He said "I don't give a fuck who you know" and "no fucking ID, no entry";

d) Fullerton returned the temporary member's card to the plaintiff and the plaintiff was putting it in his back pocket when Fullerton flew out from behind the locked door, grabbed the plaintiff's upper right arm, dragged him out the front door and threw him to the ground. When the plaintiff attempted to get up, Fullerton punched him in the mouth. The plaintiff attempted to get up again when Fullerton pushed him back down;

e) The plaintiff attempted to get up again and Fullerton then grabbed him by the hair and twisted his fingers backwards and at one point, grabbed his hair and jerked his head back;

f) At some point the defendant Daneliuk became involved and held the plaintiff in a head lock;

g) Police Officer McConnell arrived and pepper sprayed the plaintiff. He was then taken by ambulance to St. Paul's Hospital where he had his eyes washed out.

The Defendant, Fullerton's Version of the Facts

[9]

a) Fullerton was hired by 971 Holdings Ltd. in February 1994 beginning as a cleaner and at all material times he was an attendant on the front desk.

b) One of his duties was to determine whether individuals who came to the check-in window were to be permitted entry into 212.

c) One of Fullerton's responsibility as a check-in attendant was to screen the people who came into the foyer. Fullerton says the plaintiff presented his temporary membership card and Fullerton asked him for a government issued photo ID, at which time the plaintiff snapped back "I don't) I don't need government) fuck) I don't need) I don't need fucking photo ID".

d) At this time there was no one else in the vestibule area. Fullerton explained that he wanted the government issued ID to allow a switchover to a permanent card and the plaintiff replied that if he didn't having his fucking permanent card yet this place has a problem. The plaintiff said that he knew Michael Hornby, the owner. Fullerton made a decision that he would ask the plaintiff to leave. Fullerton determined that the plaintiff was angry and hostile. He decided that it would be better for the clients and everybody involved that he not permit the plaintiff into the club. During the conversation that followed, Fullerton determined that the plaintiff was intoxicated. He was slurring his words and the alcohol odor was strong. Fullerton asked the plaintiff to leave at least three times. The plaintiff continued to argue and was yelling,

swearing, quite agitated, irate and aggressive. Fullerton says that he did not yell nor did he swear.

e) At some point during this discussion, Daneliuk entered the vestibule and was standing waiting to come to the window. Fullerton says that Vickers was standing not paying much attention, but indicating by motion to the plaintiff that the two of them should leave. Fullerton went to the entrance door, again asked the plaintiff to leave, Fullerton then closed the door behind him, put his hands on the plaintiff's hips and walked him out the door and then turned around to head back into the club. Fullerton says that he used only enough force to move him and that the plaintiff didn't lurch backwards but leaned back passively, trying not to move.

f) After Fullerton turned around to go back into the club, he was punched in the right side of his face and kicked or punched in his lower back. Fullerton immediately turned around and gave a shot arm to the plaintiff's chest to get him away. He was holding off the plaintiff with his straight arm to the plaintiff's chest. The plaintiff stumbled and fell to the ground on his hands and knees, but then got up again and attacked Fullerton by hitting his back. Fullerton then turned and gave the plaintiff another shot arm to the mid section to push him away. The plaintiff again fell to the pavement on his hands and knees, and about that time Daneliuk entered the fray and was helping Mr. Fullerton hold the plaintiff down on the ground. Fullerton's observation of the plaintiff at this time was that the plaintiff was quite irate, quite upset, intoxicated and had already attacked him twice.

g) After about five minutes, the police arrived and the plaintiff was still enraged and screaming and swearing and very hostile.

h) The police officer pepper sprayed him in the face, put his hand on his shoulder and shoved him to the ground against the light post.

[10] The evidence of the plaintiff's drunkenness and hostility at the entrance to the club is supported by the evidence of Vickers and Daneliuk.

[11] The evidence of Vickers on this point, is that when he and the plaintiff left Celebrity's, the plaintiff was intoxicated. He was argumentive, he slurred his words and was swaying. Vickers could not understand why the plaintiff was getting so excited. He acknowledged that he did not hear Fullerton swear, but the plaintiff was really agitated and very loud. He was very drunk. Vickers also testified that when the plaintiff was taken by ambulance to St. Paul's Hospital, they would treat him because he was drunk.

[12] At the 212, the plaintiff was ranting and raving. Fullerton advised the plaintiff that he should settle down or Fullerton would call the police. The plaintiff was swearing, Fullerton was calm. The plaintiff was drunk, belligerent, obnoxious and out of control. Fullerton came up behind the plaintiff and tried to push him out. Daneliuk also testified that while Fullerton was attempting to evict the plaintiff, the plaintiff swung around and punched Fullerton in the face.

[13] In cross-examination of Daneliuk, plaintiff's counsel attempted to establish a relationship between Fullerton and Daneliuk. The foundation for this belief was that in giving evidence Daneliuk referred to Fullerton by his first name, Scott. In my view this is not an appropriate inference to be drawn from the circumstances; I concluded that Daneliuk was an independent witness. His evidence was given in a clear but forceful manner and his evidence is credible.

[14] Constable Gilbert, a police officer with the Vancouver City Police Department arrived at the scene to see Constable McConnell dealing with the plaintiff and attempting to control him on the ground. The plaintiff at that time was shouting and swearing and not paying any attention to Constable McConnell. There was a smell of alcohol and the plaintiff's words were slurred. Constable Gilbert testified that the use of pepper spray is mandated when a subject becomes over aggressive to the police or others and as a last resort to get a person under control, and that pepper spray was used because the subject could not otherwise be subdued.

THE LAW

[15] The law is succinctly set out in a judgment of Mr. Justice Bouck in **Robert Vasey v. Wosk's Ltd. et al** (unreported) Vancouver Registry No. C855488, 17 November 1987, page 4:

At law, a battery is the application of force to another person without lawful justification. On the other hand, an assault is merely the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery. Salmond on Tort, 16th Edition, pages 122 to 124.

Defences to the biting of the defendant Brock include self-defence and ejection of a trespasser. Both of these defences contemplate the application of reasonable force by a person such as Brock in the circumstances. In other words, given the situation, Mr. Brock had the right to react to the bite of Mr. Vasey provided the force he used was not disproportionate to the bite.

[16] In the case at bar, Fullerton had the right to eject the plaintiff from the premises provided that the force he used was reasonable in all of the circumstances.

[17] The defendant raises the issue of **Occupier's Liability Act** 1979 R.S.B.C. c.303, which in part says:

3.(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, on property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to

- a) condition of the premises,
- b) activities on the premises, or
- c) conduct of third parties on the premises.

(3) Notwithstanding subsection (1) an occupier has no duty of care to a person

- a) in respect of risks willingly accepted by that person as his own risks ...

[18] In the case at bar, a duty of care of Fullerton arose when he decided that because of the drunkenness of the plaintiff, the plaintiff should not be admitted to the premises. It was Fullerton's job to make those kinds of determination and he did so in a calm and rational manner by asking the plaintiff to leave. When the plaintiff would not leave, Fullerton walked him to the door by pushing his hips. The plaintiff responded by punching Fullerton.

[19] Upon consideration of all of the evidence in the case at bar, I find that the defendant's version of the facts to be more credible and where the evidence is conflicting, I prefer the evidence of the defendant over the evidence led by the plaintiff. The actions of the defendant, Fullerton, were reasonable in all of the circumstances. The plaintiff is the author of his own misfortune.

[20] The action is dismissed. Costs to the defendants on Scale 3.

"J.T. Edwards, J."