

IN THE SUPREME COURT OF BRITISH COLUMBIA

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5	BETWEEN:	)	
6	MILTON LAYTON,	)	REASONS FOR
7		)	JUDGMENT OF
8	Plaintiff,	)	
9	AND:	)	THE HONOURABLE
10	JAMES NIKOLITSAS and	)	JUDGE LOW, L.J.S.C.
11	VILLAGE PANDORA HOLDINGS	)	
12	LTD.,	)	
13	Defendants	)	

14	D. BYL, ESQ.	appearing for the Plaintiff
15	G.A. WRIGHT, ESQ.	appearing for the Defendants

17 THE COURT: (oral) The defendants admit liability for damages  
 18 arising out of an assault by the defendant James  
 19 Nikolitsas of the plaintiff, Milton Layton, during the  
 20 early morning hours of November 17, 1985. Mr. Nikolitsas  
 21 struck Mr. Layton over the head with a baseball bat. Mr.  
 22 Layton contends this attack upon him was a continuation of  
 23 an earlier assault by Mr. Nikolitsas. He seeks special  
 24 damages, non-pecuniary damages, reimbursement for lost  
 25 wages and aggravated damages.

26 The defendant contends that the striking with the  
 27 baseball bat was not severe; that the assault was not

1        aggravated; and that it was provoked by Mr. Layton throwing  
2        the first punch during an earlier scuffle.

3                At approximately 2:30 in the morning, Mr. Layton, his  
4        wife, his sister Corveen Layton and her common-law husband  
5        Edmund Miller went to the Village Pandora Restaurant owned  
6        by the corporate defendant which, in turn, is owned by  
7        Mr. Nikolitsas, Mr. Sam Dimitropoulos, Mr. Jim Dimitropoulos  
8        and Mr. Tassos Stradikopoulos. Mr. Layton and his party  
9        were seated in a raised section in the restaurant not far  
10       from the front counter and till which are located very  
11       close to the inner of the two sets of doors leading into  
12       the restaurant. They ordered and eventually were served  
13       pizzas, coffee and coke. Mr. Miller was probably under  
14       the influence of alcohol to a mild extent but Mr. Layton  
15       was probably sober. The two ladies had very little to  
16       drink during the party's social evening and were quite sober.  
17       I find they were all orderly and quiet as they had their  
18       meal. I do not accept the evidence of Mr. Nikolitsas, who  
19       was operating the till, that he had to tell them to keep  
20       quiet and stop using bad language. Monique McGibbon, a  
21       waitress called as a defence witness, waited on the table  
22       and she gave no evidence that there was any unruly conduct.

23                Before the meal was finished Mr. Miller and Corveen  
24        Layton had a mild and brief dispute. It was conducted so  
25        privately that Mr. Layton and his wife were not even aware  
26        of it until Mr. Miller stood up, announced he was leaving,  
27        and put a twenty dollar bill on the table which he said was

1 to pay for the pizzas. As he went down the stairs to the  
2 lower level and past the till Mr. Nikolitsas asked if he was  
3 paying the bill, to which Mr. Miller replied that his wife  
4 had \$20.00 and he pointed to her. Mr. Miller then left  
5 the restaurant and went down the street. He did not return  
6 until the ensuing fracas was over.

7 In the meantime, the plaintiff's wife, Miss Marie  
8 Bourque, asked her husband to go with Mr. Miller as she  
9 was concerned about whether he should drive. It is not  
10 clear from the evidence, but it would seem the plan was  
11 that Mr. Layton and Mr. Miller would return with the car  
12 giving the two ladies time to finish their meal. Mr. Layton  
13 followed Mr. Miller, but as he went by the till he was  
14 confronted about the bill by Mr. Nikolitsas.

15 To this stage of the narrative there is very little  
16 dispute about the facts except the one point I already  
17 mentioned and resolved. However there was considerable  
18 divergence in the evidence as to what happened between  
19 Mr. Layton and the defendant at the till and subsequently.  
20 For reasons which I hope will become apparent I generally  
21 prefer the evidence of Mr. Layton, his wife and sister to  
22 that of Mr. Nikolitsas and his three partners in the  
23 restaurant business.

24 Mr. Layton testified that the conversation at the  
25 till went something like this:

26 Mr. Nikolitsas: Are you going to pay for your bill?

27 Mr. Layton: My wife has the money on the table.

1 Mr. Nikolitsas: No. You pay for your bill.

2 Mr. Layton: My wife has the money. They're going  
3 to pay for the bill.

4 Mr. Nikolitsas: You pay for your fucking bill.

5 Mr. Layton: My wife has got the fucking money on the  
6 table.

7 Mr. Layton says that as he made the last comment he turned  
8 away from Mr. Nikolitsas and pointed to his wife. As he  
9 did so he was struck on or about his face. He does not  
10 know what he was struck with or what happened to him as a  
11 result. He next remembers being outside on the sidewalk.

12 I have no doubt that Mr. Layton retaliated by striking  
13 Mr. Nikolitsas and a general altercation followed. It  
14 involved Mr. Layton, Mr. Nikolitsas, and at least one and  
15 probably two of his business associates. I am satisfied  
16 that Mr. Layton was set upon by Mr. Nikolitsas and others.  
17 There were several customers standing nearby and one of  
18 them received a blow to the face as did Mr. Jim Dimitropoulos.  
19 However, I do not accept the defence evidence that Mr.  
20 Layton deliberately administered those blows. If he did  
21 hit those people, he did so unintentionally and only in a  
22 reasonable attempt to defend himself from Mr. Nikolitsas and  
23 whoever was assisting him.

24 Mr. Layton's story is substantially corroborated by  
25 the evidence of his wife and sister who were both credible  
26 witnesses and who both demonstrated an admirable degree of  
27 objectivity. Neither of them embellished the story; nor

1 did they attempt to fill in details of those events they  
2 could not or did not see.

3 Miss Bourque saw her husband struck by Mr. Nikolitsas  
4 and both ladies saw that blow fell him on to an adjacent  
5 table.

6 The two ladies went to the aid of Mr. Layton when they  
7 saw that he was overpowered and over-matched in the small  
8 entrance hall between the inner and outer doors leading  
9 out of the restaurant. Corveen Layton became physically  
10 involved to a greater extent than did her sister-in-law.  
11 Corveen Layton kicked at Mr. Nikolitsas and scratched at  
12 his face in justifiable aid of her brother. For their pains  
13 the two ladies were forced, together with Mr. Layton, through  
14 the outer door and on to the sidewalk. I am sure the  
15 entire scuffle inside the building was brief, hysterical  
16 and involved a lot of screaming and raised voices by several  
17 of the participants and perhaps by-standers. I am equally  
18 sure the whole incident was caused by Mr. Nikolitsas being  
19 unreasonable in his demands about the bill, initiating the  
20 use of foul language and physically assaulting Mr. Layton  
21 when his demands about the bill were not met.

22 There was a baseball bat under the till to the  
23 knowledge of Mr. Nikolitsas. His associates disavowed any  
24 knowledge of its presence. Mr. Nikolitsas claims it had  
25 been there for several years during the tenure of his  
26 previous partners in the business and he does not know why  
27 it was there. I am very skeptical about this evidence.

1 A baseball bat is an odd thing to have by a restaurant  
2 till and the suspicion that it was kept as an available  
3 means of control of unruly patrons was not dispelled by the  
4 defence evidence.

5 In any event, Mr. Nikolitsas, after Mr. Layton was  
6 put outside, took the bat in hand. He claims he hit Mr.  
7 Layton over the head during a second attempt by Mr. Layton  
8 to re-enter the restaurant. I do not accept the defence  
9 evidence in that respect. I prefer the evidence of Mr.  
10 Layton, his wife and his sister that they were on the  
11 sidewalk and upset about what had happened with the ladies  
12 attempting to persuade Mr. Layton not to go back inside,  
13 as he wished to do. I find that he did not attempt to go  
14 through the door but that Mr. Nikolitsas opened the door  
15 and swiftly struck Mr. Layton on the head with the baseball  
16 bat. The bat landed on Mr. Layton's upper right forehead  
17 with such severity that the crunching sound of the contact  
18 alarmed Mr. Layton's wife and his sister. This conclusion  
19 as to the manner and effect of assault with the bat is  
20 consistent with the evidence of a taxi driver who saw it  
21 from his cab which was parked in front of the restaurant  
22 door and who was called as a defence witness.

23 Some of the evidence given by Mr. Jim Dimitropoulos,  
24 Mr. Sam Dimitropoulos and Mr. Tassos Stradikopoulos was  
25 intended to support the story given by Mr. Nikolitsas.  
26 But the evidence of those witnesses contains so many gaps  
27 and is so inconsistent as to such important matters as

1 sequence of events, that I do not find any of it to be  
2 reliable. I am particularly unimpressed by the general  
3 suggestion that Mr. Layton was ushered nicely and gently  
4 out the door.

5 I turn now to the balance of the evidence of Mr.  
6 Nikolitsas. He is not a credible witness. There are  
7 several areas of concern about his evidence.

8 Firstly, I do not believe the explanation Mr.  
9 Nikolitsas gave for accosting Mr. Layton about the bill.  
10 It simply does not make sense. He suggests that he had  
11 concern about payment of the bill because late at night  
12 people sometimes leave the restaurant without paying.  
13 He does not suggest that these people were drunk or that  
14 he had any other reason to believe they might not pay.  
15 Mr. Miller told him the money was on the table and he  
16 believed that statement. There were two people still at  
17 the table eating their meal when Mr. Layton began to leave.  
18 It is not necessary for the plaintiff to prove why Mr.  
19 Nikolitsas accosted him about the bill or why he struck him  
20 as he began to leave the restaurant. It may have been  
21 because, unlike Mr. Miller, Mr. Layton, his wife and sister  
22 are native Indian people. That possibility was only alluded  
23 to inferentially in cross-examination of defence witnesses  
24 and I can make no concrete findings of fact about it.  
25 However, it does stand as a possible explanation for Mr.  
26 Nikolitsas striking the first blow whereas there is no  
27 explanation for Mr. Layton striking the first blow.

1 I conclude that Mr. Nikolitsas became irrationally angry  
2 as a result of a wholly unreasonable belief the bill might  
3 not be paid and struck Mr. Layton as he attempted to leave  
4 the restaurant without meeting Mr. Nikolitsas' demand to  
5 first pay the bill.

6 Secondly, I think Mr. Nikolitsas contrived the evidence  
7 about the plaintiff and his companions being unruly at  
8 their table in order to discredit them and attempt to  
9 justify his concerns about their paying the bill.

10 Thirdly, Mr. Nikolitsas insisted the plaintiff's wife  
11 or sister grabbed him by the testicles with her hand during  
12 the fracas in the restaurant. This outrageous suggestion  
13 was never put to either lady in cross-examination and I  
14 think it was also contrived in an attempt to discredit the  
15 evidence of the plaintiff's witnesses.

16 Fourthly, the contention by Mr. Nikolitsas that he  
17 and his associates grabbed Mr. Layton nicely and gently and  
18 pushed him out the door is patently false.

19 And finally, Mr. Nikolitsas in cross-examination denied  
20 that he caused the injury to Mr. Layton's head clearly  
21 shown by a police photograph taken the same night. He  
22 claimed he hit him in the centre of the head rather than  
23 on the right side as shown in the photograph. He was again  
24 attempting to discredit the plaintiff by claiming he did  
25 not cause the principal injury of which the plaintiff now  
26 complains.

27 I find Mr. Nikolitsas assaulted Mr. Layton inside the



1 restaurant and with the baseball bat outside the restaurant.  
2 I further find the assault was unprovoked by Mr. Layton.  
3 Mr. Nikolitsas is liable for all the damages caused Mr.  
4 Layton by the assault. It is admitted that the corporate  
5 defendant is vicariously liable.

6 It is fortunate the injury did not cause any permanent  
7 damage. Mr. Layton bled profusely but only two or three  
8 stitches were needed to close the wound caused by the  
9 baseball bat. There were other abrasions to his face which  
10 healed without consequence. The blow with the baseball  
11 bat caused Mr. Layton's face, particularly on the right  
12 side, to swell to remarkable proportions. Members of his  
13 family referred to him jokingly as "the Elephant Man".  
14 It goes without saying but there was very extensive bruising  
15 which lasted for several weeks. The swelling lasted for  
16 three weeks to a month. Mr. Layton had severe headaches  
17 and required pain killers. The headaches caused by this  
18 injury probably occurred at a decreasing level and frequency  
19 for some months but there is no medical evidence to support  
20 the claim that some infrequent headaches he now gets stem  
21 from the injury. I would think that within three months  
22 of the assault Mr. Layton was fully recovered from the  
23 effects of it. There is a small scar on his head but it is  
24 entirely within the hairline and was not shown to the court.

25 Mr. Nikolitsas pleaded guilty to assault with a weapon  
26 in Provincial Court and received a \$700.00 fine. For  
27 that reason, on the basis of several authorities which I

1 need not cite, I cannot award exemplary or punitive damages.  
2 The purpose of awarding those damages has been met by the  
3 criminal sanction that was imposed.

4 However, this is an appropriate case for aggravated  
5 damages. I accept Mr. Layton's evidence that he was  
6 humiliated and degraded by the unwarranted and persistent  
7 assault in the presence of family, friends and others in  
8 a public place. He was further embarrassed by the horrifying  
9 appearance his facial injuries gave him. He said he felt  
10 that people thought he was just another native person who  
11 got drunk and lost a fight. I expect he exaggerated this  
12 feeling but; although it does not make sufficient allowance  
13 for the basic fairness of most people, it does recognize  
14 the unfortunate prejudice which exists in our society.  
15 I think it is fair to say that, because of his race, Mr.  
16 Layton would be more humiliated and degraded by the  
17 unprovoked assault than would other people.

18 The plaintiff and his wife and sister say they were  
19 subjected to laughter and rude gestures by Mr. Nikolitsas'  
20 associate through the small window by the restaurant door  
21 as they stood outside on the sidewalk. Mr. Stradikopoulos  
22 was at that window checking the scene outside but I am not  
23 satisfied he made any rude gestures or was in any way  
24 derisive. Emotions and tempers were then running high and  
25 the people on the sidewalk probably misinterpreted Mr.  
26 Stradikopoulos' likely agitation.

27 Counsel for the plaintiff refers to the case of

1 Delta Holdings Ltd. v. Magrum (1975) 50 D.L.R. (3d) 126  
2 on the issue of aggravated damages. In that case the sum  
3 of \$4,000 was awarded for aggravated and exemplary damages  
4 and counsel argues that with inflation that sum should now  
5 be \$10,000. The assault in that case was more severe than  
6 in the present case and the sum there awarded included  
7 exemplary damages which is not the situation here. The  
8 assault of Mr. Layton with the baseball bat was quite  
9 vicious, but I think the bat was used like a billy club to  
10 knock him on the head, rather than in a shoulder level  
11 swing in the manner one swings at a ball. It is also  
12 likely that Mr. Nikolitsas swung with one hand as he opened  
13 the door with the other.

14 For non-pecuniary damages I award the sum of \$5,500  
15 inclusive of \$2,500 aggravated damages.

16 Special damages are agreed at \$123.00.

17 The wage loss claim is very difficult to assess. On  
18 the one hand, Mr. Layton has a poor earning record for the  
19 past several years despite being under thirty years of age.  
20 Before the assault he was working for a sawmill maintenance  
21 company near his home in Grande Prairie, Alberta on a part-  
22 time basis. On the other hand, it is conclusively proved  
23 that on November 18, 1985, the day after the assault, he  
24 would have started a four month temporary full-time job with  
25 that company in which he would have made \$2,500 per month for  
26 a total of \$10,000. Because of the assault he lost that  
27 opportunity as he could not work the first week and they

1 had to get somebody else. He worked the week of November  
2 25th under great discomfort and earned \$660.00. During the  
3 four month period he worked sporadically at part-time jobs  
4 but he has no way of showing what he earned, although if  
5 his income tax return for 1986 is accurate it could not have  
6 been very much. He admits his attitude towards work was  
7 poor during that period and that he took to drinking a little  
8 too much causing his wife and family to eventually leave  
9 him. I am pleased to say they are now reconciled and Mr.  
10 Layton is steadily employed in Prince George.

11 It is impossible to determine how much Mr. Layton  
12 actually earned during the four month period and how much  
13 more he should have earned if he were better motivated to  
14 find work to mitigate the damages flowing from the lost  
15 employment opportunity. I must do the best I can with the  
16 evidence available and in so doing I take into account the  
17 fact that the winter months were involved as well as the  
18 fact that any work Mr. Layton could have found might not  
19 have been at as high a rate as the \$12.00 per hour paid by  
20 the maintenance company. I assess the wage loss at \$4,500.

21 The plaintiff will have judgment for \$10,123.00,  
22 pre-judgment interest at nine percent from November 17,  
23 1985 and costs.

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