

1 Prince George Registry  
2 No. SC1100/82

3 IN THE SUPREME COURT OF BRITISH COLUMBIA

4 PRINCE GEORGE, B.C.

5 3 November 1983

6 BETWEEN:

7 THOMAS JOHN MASUR

8 PLAINTIFF

9 AND:

10 DANNY W. WILLIAMS

11 DEFENDANT

) REASONS FOR JUDGMENT

) OF THE HONOURABLE

) MR. JUSTICE MACDONALD

12 D. BYL, Esq.

) appearing for the Plaintiff

13 P.D. MESSNER, Esq.

) appearing for the Defendant

14 THE COURT: (Oral) The Plaintiff sues for damages arising out  
15 of an alleged assault on him by the Defendant. The incident  
16 occurred outside the premises of the Royal Canadian Legion in  
17 100 Mile House on the evening of August 13, 1982. As the result  
18 of an injury which he suffered during that incident, the Plaintiff  
19 lost his left eye. The issue in this case is whether that injury  
20 was inflicted by the Defendant kicking the Plaintiff while he  
21 was down or whether it resulted from a fall which the Plaintiff  
22 took in the course of their altercation.

23 If the Defendant kicked the Plaintiff in the face, that  
24 conduct clearly goes beyond the "fair fight" concept to which  
25 both parties can be deemed to have consented, and constitutes  
26 excessive force "out of all proportion to the occasion".

27 (Lane vs Holloway (1968), Q.B. 379) On the other hand, if the

1 Plaintiff was injured in the course of a fall which resulted from  
2 him losing his footing, the Defendant is not liable. There is a  
3 serious and direct conflict of evidence on that question. In  
4 order to resolve that conflict, I must reject the evidence of  
5 several witnesses on one side or the other.

6 The background to the events which occurred on the evening  
7 of August 13, insofar as the relationship between the parties  
8 is concerned, does little to explain them. The Plaintiff operates  
9 a Husky service station. The Defendant is a car salesman. Their  
10 respective businesses resulted in some contact between them.  
11 Those contacts gave rise to no problems. The Plaintiff dated  
12 the Defendant's sister-in-law and visited the latter's home on  
13 a social basis, because of that relationship, on several occasions  
14 and as recently as a month or so before August 13. Once again,  
15 no apparent problem arose from those contacts. However, some  
16 weeks before this incident, the Defendant heard rumours that the  
17 Plaintiff was making uncomplimentary remarks about his wife. He  
18 had coffee with the Plaintiff and told him of those rumours. The  
19 Plaintiff denied any such remarks and the Defendant says he  
20 accepted that denial. Some one and a half weeks before this  
21 incident, the Defendant heard similar rumours and they met over  
22 coffee again. The Plaintiff repeated his denial. The Defendant  
23 says that he considered the matter closed. The Plaintiff  
24 testified that he thought the matter was cleared up. Those views  
25 are not consistent with what happened on August 13. They do  
26 however lead me to the conclusion that the Defendant was not  
27 anticipating a fight when he agreed to go outside with the

1 Plaintiff on the evening in question.

2 That evening, the Plaintiff went to the Legion after work.  
3 It was a Friday night and he arrived there about 6:00 o'clock.  
4 This incident occurred some three hours later, shortly after  
5 9:00 p.m. The Plaintiff had not eaten anything during the day.  
6 He testified that he consumed six or eight draft beer during the  
7 evening. John McKenzie, who was sitting at the same table and  
8 had arrived about the same time, estimated his own consumption  
9 at "maybe a dozen glasses". The Plaintiff told the eye specialist  
10 in Vancouver who removed his damaged eye the following morning  
11 that he had been drinking heavily and was drunk at the time of  
12 the injury. I find that to be the case, and I reject his  
13 estimates, both of his consumption and its effect on him,  
14 particularly in light of the fact that he was drinking on an  
15 empty stomach.

16 That fact accounts for several serious discrepancies in the  
17 Plaintiff's evidence: 1. Despite the reference in the medical  
18 report, Exhibit 2, to his state of sobriety, he refused to  
19 acknowledge that he had given Dr. Brosnan that information.  
20 2. He insisted that the Defendant made the first suggestion that  
21 they go outside, and that the Defendant did so on more than one  
22 occasion. On discovery at Page 6, Question 48, he stated that  
23 the Defendant "finally made me mad enough and I motioned him to  
24 come outside". When faced with that answer, he admitted that he  
25 was the one who first indicated that the Defendant should come  
26 outside with him. 3. He testified that he fell while he and  
27 the Defendant were going down the steps, still holding on to

1 one another, in front of the Legion. I am satisfied on all of  
2 the evidence that the two of them never tried to negotiate those  
3 steps. 4. He testified that after the Defendant kicked him in  
4 the eye, he put his arms up over his head and the Defendant  
5 continued to kick him. That contradicts the evidence of his own  
6 witness, John McKenzie, who claims that he saw the final kick.

7 Based on those and other inconsistencies, I have concluded  
8 that I cannot rely on the Plaintiff's version of the events  
9 which occurred that evening. I find that he has reconstructed  
10 what he now believes must have occurred, partly from what he has  
11 been told by others. But that does not resolve the matter. There  
12 are other significant pieces of evidence which support the  
13 Plaintiff's version of those events and which are in conflict  
14 with the Defendant's version.

15 First, John McKenzie was with the Plaintiff and five or six  
16 others at one table in the Legion. When John Kikkert, who was  
17 in the Defendant's party, followed the two combatants outside,  
18 McKenzie got up as well and went out on Kikkert's heels.  
19 McKenzie testified that as he came out the door, the Plaintiff  
20 was just crawling up onto the sidewalk from in front of a car  
21 that was parked close to it, and that the Defendant kicked him  
22 in the face. McKenzie said in his direct evidence that it was  
23 not a full swing and that he saw nothing wrong with the  
24 Plaintiff's eye before the kick. He conceded in answer to a  
25 question from the Court that he couldn't say whether or not the  
26 kick which he saw caused the eye damage. On cross-examination  
27 he conceded that the Defendant might have been trying to get

1 the Plaintiff's hand off his foot or ankle by moving his leg. He  
2 also testified on cross-examination that there were already  
3 marks on the Plaintiff's face as if he had been punched or fallen  
4 on his face in the gravel. He said nothing about the Plaintiff's  
5 hands or arms being up around his head as protection; on the  
6 contrary, he left the impression that the Defendant's hands  
7 were at ground level.

8 I have concluded that Mr. McKenzie misinterpreted the  
9 movement of the Defendant's leg. That he did so honestly is  
10 beyond question. He immediately accused the Defendant of kicking  
11 the Plaintiff and punched him. John Kikkert had preceded  
12 McKenzie out of the door. Kikkert says that the Defendant did  
13 not kick the Plaintiff and he protested vehemently when McKenzie  
14 accused the Defendant of doing so. The Defendant says, that  
15 after the Plaintiff slipped and fell against the parked car and  
16 then to the ground between its bumper and the sidewalk or ramp,  
17 the Plaintiff grabbed him by the ankle. The Defendant says he  
18 pulled his leg sideways twice to remove it from the Plaintiff's  
19 grasp. I find that this is the movement which John McKenzie saw  
20 as a kick to the Plaintiff's face.

21 In reaching that conclusion, I have in mind that the  
22 Defendant and Kikkert were not drunk, whereas the Plaintiff and  
23 McKenzie were. The Defendant and Kikkert had arrived at the  
24 Legion only twenty or twenty-five minutes before the altercation  
25 occurred, had both gone home for dinner, collected their  
26 respective wives, and spent an hour at another establishment  
27 before arriving at the Legion. I am satisfied that neither had

1 more than three drinks before these events.

2 Secondly, Judy Maitland testified for the Plaintiff. While  
3 she had left the Legion just before this incident occurred, she  
4 gave evidence that when the Defendant arrived in the Legion and  
5 took a table across the aisle from the one occupied by the  
6 Plaintiff and his party, of whom Miss Maitland was one, the  
7 Defendant stared at the Plaintiff for about two minutes in a  
8 provoking manner before he sat down. In such a situation, two  
9 minutes is a long time. I find it difficult to understand why  
10 none of the other ten or twelve persons in the two parties  
11 noticed that occurrence. The Defendant sat where he did because  
12 his boss was sitting at the next table, in the opposite direction  
13 from the Plaintiff's table. Both the Defendant and Kikkert say  
14 that they immediately began a conversation with the Defendant's  
15 boss.

16 There was considerable evidence from the Plaintiff and  
17 others at his table, McKenzie and Flett in particular, regarding  
18 the Defendant "glaring" at the Plaintiff and mouthing obscenities  
19 and invitations to fight. None of those witnesses agree on the  
20 words which were mouthed, yet none of them are at all uncertain  
21 as to what the words were. Such conduct may have little bearing  
22 on the events which occurred later outside the Legion, but it is  
23 flatly denied by the Defendant and by those who were at his  
24 table. I find it impossible to accept that the Defendant could  
25 have conducted himself in the manner suggested without others  
26 noticing and while carrying on a conversation with his boss.  
27 I cannot explain Judy Maitland's evidence but I cannot accept it

1 nor can I accept the evidence of McKenzie and Flett on that  
2 alleged conduct by the Defendant.

3 Thirdly, Ben Harder was also in the Legion that evening. He  
4 was not with either group. He was on his first drink when he  
5 saw the Plaintiff and the Defendant go out. He knew them both.  
6 When the commotion started a few seconds later, he was one of the  
7 first out the door following Kikkert and McKenzie. He went  
8 directly to the Plaintiff who was prone on the sidewalk and  
9 propped him up in a sitting position against the front of the  
10 parked car. He was shocked at the condition of the Plaintiff's  
11 eye and heard somebody, presumably McKenzie, say that the  
12 Defendant had kicked him. Someone took over care of the Plaintiff  
13 and he moved over to where the Defendant was standing. Harder  
14 asked the Defendant why he had done it. The reply was that the  
15 Plaintiff had hit him first. If that had been the full extent  
16 of the conversation, it would be damaging to the Defendant.  
17 Despite Harder's evidence that he did not hear the Defendant  
18 deny kicking the Plaintiff, I accept the testimony of the  
19 Defendant that he also said to Harder, "They say I kicked him,  
20 but I didn't".

21 Finally, despite at least three separate answers on  
22 discovery, Questions 125, 132 and 222, to the effect that when  
23 the Plaintiff lost his footing he fell backwards or on his back,  
24 the Defendant gave evidence on his direct examination at trial  
25 that the Plaintiff fell with his face toward the grill of the  
26 parked car. He attempted to resolve that discrepancy on cross-  
27 examination by referring to the Plaintiff's motion as a twisting

1 fall. I am not satisfied that the Defendant has any clear  
2 recollection of that fall, except that the Plaintiff ended up  
3 between the car and the sidewalk or ramp. The Defendant is  
4 seeking, with some desperation, to provide an explanation for  
5 the loss of the Plaintiff's eye other than the one advanced by  
6 the Plaintiff. He has no legal obligation to do so. The onus  
7 of proof is on the Plaintiff and it has not been satisfied.

8 On a balance of probabilities, I am not satisfied that  
9 the injury to the Plaintiff was the result of the Defendant  
10 kicking him in the face while he was down. I am influenced by  
11 McKenzie's evidence that the Plaintiff's face was marked before  
12 the movement of the Defendant's leg which he observed. I consider  
13 it more probable that the Plaintiff was too drunk to know what  
14 happened, and has reconstructed those events based on what  
15 McKenzie thought he saw. In the result, the outcome of this  
16 case is decided by the rules relating to the burden of proof  
17 which is on the Plaintiff. I have no idea how the Plaintiff  
18 injured his eye in the course of his fall, but I consider it  
19 more probable that he did so than that he was kicked by the  
20 Defendant.

21 The Plaintiff's action is dismissed, with costs, to be  
22 taxed on the basis that the amount involved was \$30,000.00.  
23 Had I found the Defendant liable, the total damages would likely  
24 have exceeded that amount.  
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