Citation: Anderson v. Smith et al.
2000 BCSC 1194

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Docket: S016178
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HARRY GUNNAR ANDERSON

PLAINTIFF

AND:

**CONSTABLE DANIEL SMITH and
THE CITY OF PORT MOODY**

DEFENDANTS

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MADAM JUSTICE DILLON**

Counsel for the Plaintiff: G. Fraser

Counsel for the Defendants: D. Butcher

Dates and Place of Hearing/Trial: January 4, 5, 6, 7, 8, ll and 12, 1999
February 14, 15, 16, 17 and 18, 2000
Vancouver, BC

Introduction

[1] The plaintiff claims against the defendant, Constable Daniel Smith, for assault, negligence, gross negligence, malicious misconduct and wilful misconduct in the pepper spraying and handcuffing of the plaintiff on July 31, 1993. Harry Gunnar Anderson also claims against the defendant, The City of Port Moody (“Port Moody”), as the employer of Constable Smith. The plaintiff says that he suffered nervous shock and personal injury from the incident.

[2] The defendants say that appropriate necessary force was used to effect a lawful arrest of the plaintiff and that the plaintiff suffered no injuries or that the plaintiff contributed to any injury.

[3] This civil litigation is the last salvo following the incident in 1993 when the plaintiff was charged with wilfully obstructing a police officer and resisting a police officer in the execution of his duty contrary to section 129(a) of the **Criminal Code**. His conviction on both charges following trial in Provincial Court was upheld in the Supreme Court of British Columbia. The Court of Appeal allowed the appeal for wilful obstruction of a police officer because there existed reasonable doubt as to mens rea, a point not argued in the lower courts. The conviction for resisting a police officer

remained. Leave to appeal to the Supreme Court of Canada was denied.

[4] A public inquiry was held under the **Police Act**, S.B.C. 1988, c. 53 following a complaint by the plaintiff about the conduct of Constable Smith. The board of inquiry found that the complaint had not been made out and there was no disciplinary default by the constable. Leave to appeal the decision was not granted. An appeal to the police commission was also unsuccessful.

Facts

[5] In the late afternoon of the warm summer day of July 31, 1993, Constable Smith, an eight year veteran of the Port Moody police department, was on uniformed police patrol in a marked police vehicle in the Municipality of Port Moody, British Columbia. Two other officers were patrolling the beach area in a paddy wagon and reported on the radio a suspected stolen Corvette automobile. They pursued the vehicle until it was determined that the driver had headed into the Village of Anmore. While two other officers blocked the two exits from Anmore, Constable Smith went into Amnore to look for the vehicle. Radio contact was maintained with the other police

officers in the area. The RCMP in Coquitlam who are responsible for policing Anmore were informed of the search.

[6] Constable Smith conducted an organized search for the vehicle following a grid pattern. He entered Eaglecrest Drive off of Sunnyside Road and followed the road past residences on his right until it turned into a dirt roadway through bush. He radioed other officers that he was up a private road. As he entered the dirt portion of the road, dogs came out and barked at the car such that the officer closed his window in expectation that the dogs would jump up at him. He radioed that there were dogs “that hate people” so he wouldn’t be getting out of his car. He continued along the dirt road until it was impassable and apparent that the Corvette could not have come that way. He turned the marked police vehicle around and headed back towards Eaglecrest Drive. As he approached the residences still on the dirt road, his path was blocked by a backhoe that had been placed across the road in the two minutes that it had taken for the officer to drive up and turn around. There was no way around the backhoe. Constable Smith radioed the other officers that “some joker [was] trying to block me in with a backhoe here” and asked for another car to help. The plaintiff, Harry Anderson, was standing beside the backhoe.

[7] The plaintiff is the owner of the property with the dirt road that continues from Eaglecrest Drive into logging and watershed lands. There is a sign saying ‘private road’ just as the dirt portion of the roadway starts. The plaintiff uses the road for access to his lands for private logging and for the neighbourhood watershed. Mr. Anderson had experienced people going up the road especially in summer. He had gone up the road earlier in the day to make sure that there were no campers. Usually, he kept the backhoe across the roadway so that cars could not go up into the bush. But, on July 31st, he had not yet returned the backhoe to its position after he had returned from his examination of his property. Instead, he returned to his house immediately adjacent for an early supper.

[8] Mrs. Anderson was standing at the window preparing supper when she heard the dogs bark and saw them chase a car up “into the back”. She told her husband that a white car had gone up. He immediately left the house and she continued with supper preparations. She said that her husband was gone five or ten minutes when a police vehicle with lights flashing went past the roadway.

[9] Sixty-year old Harry Anderson left his house in slippers and looked for the car. He was a strong, fit man for his age.

He went to the backhoe, moved the backhoe across the roadway to stop the car from leaving the private road, turned the machine off, pocketed the keys, and dismounted from the machine. As the plaintiff turned to go back to the house, he said that he heard a loud voice demanding to get the machine out of his way. He said that he turned and saw a blue car but could not see more because of the glare of the sun. He said that he was caught off guard and that he had no idea that there was a car there. However, I conclude that the plaintiff knew full well that his actions would block the car that had gone up into the back and expected to stop a vehicle. Mr. Anderson knew that a car had come speeding towards the backhoe and came quickly to a stop. It was also immediately apparent that the car was a police car because Mr. Anderson's first question was whether it was the RCMP. The driver responded that he was the Port Moody police. This response must be put in the dual perspective of the plaintiff.

[10] Firstly, Harry Anderson was one of the original creators and aldermen of the Village of Anmore. He had been on council since inception of the village in 1987 after a struggle to keep the village separate from the Municipality of Port Moody. He had been involved with policing of the village and was strongly supportive of the presence of the RCMP as opposed to

the neighbouring police department of Port Moody. There had been “sticky moments” between the two police departments over the years and Mr. Anderson thought of the Port Moody police as at a lesser calibre than the RCMP. The plaintiff admitted at his criminal trial that he was biased against the Port Moody police. The plaintiff was unaware at the time that any police officer had jurisdiction throughout British Columbia. He thought that only the RCMP could police Anmore.

[11] Secondly, Mr. Anderson had trapped people going up his private road before, at least eight times, and had called the RCMP three or four times. He considered that if a person trespassed knowingly on his property, he/she could suffer the consequences. He assumed that anyone who went onto the property knew that it was private because of the sign. He would hold their car depending on their manner, whether they were “winners or losers”. This made them leave their car and walk to the nearest phone some distance away.

[12] The plaintiff said that he asked Constable Smith what he was doing up the logging road. He told him that Port Moody did not police Anmore and that he had better call the RCMP. The Constable asked that the machine be moved three times. The last time, he told the plaintiff that if he did not move the machine, he would be arrested. Two dogs had come around the

plaintiff by this time and were barking. These were the same dogs that had frightened Constable Smith as he went up the road at the beginning. Harry Anderson told the constable that he was going in for supper and walked away.

[13] Constable Smith recalled the conversation partly from notes made shortly afterwards. He said that the plaintiff came up to his window and asked the officer what he was going to do now, and that he was not the RCMP and should not be there. The officer said that he asked Mr. Anderson to remove his machine because he was searching for a vehicle involved in a police pursuit. The plaintiff refused to move the vehicle and Constable Smith told him that if he did not do so, he would be arrested. This was repeated twice. The plaintiff still refused to move the machine and told Constable Smith to call his boss. The officer again demanded that the machine be moved in a purposefully assertive tone. The plaintiff said that he was going for supper and walked away. Constable Smith radioed the other officers that he was blocked in and that the man was refusing to move the tractor. The watch commander replied: “Arrest him for obstruction”. Constable Smith asked again for another car, saying that he had the man to contend with as well as dogs. He had decided to arrest Mr. Anderson based upon

his own assessment of reasonable and probable grounds. He got out of the car.

[14] The plaintiff said that he remained near the back tire of the backhoe, about twenty or thirty feet from the police car, throughout this conversation which lasted about thirty-seven seconds. He said that he walked away because the police officer would not answer the simple question of what was he doing on Anderson's private property. This placed the officer in Mr. Anderson's "loser" category. The plaintiff said there had never been such a loud, clear demand to move the machine from someone on his property before. He mistakenly thought that the officer was out of bounds in terms of policing and that he could ignore him. The officer had driven onto private property where he was not authorized to go. He expected the officer to walk away, leaving his police car where it was, like all the other people that he had blocked on the road before. After all these years and proceedings, his attitude at trial was that the officer had brought it on himself for not answering his question. He said that the officer should have stopped and asked to go up back before proceeding along the road in the first place.

[15] Harry Anderson turned his back and walked fifteen or twenty feet towards his house, ignoring the instruction of the

officer that he would be arrested if he did not move the machine. He said that he did not hear anything after. He said that the officer did not tell him to stop or he would be arrested. He said that the officer did not tell him to stop or he would be pepper sprayed. The dogs were barking such that the plaintiff said that if anything was said to him, he could not hear it.

[16] Constable Smith said that as he got out of his car, the dogs came charging at him and he sprayed one of them with pepper spray. He had a known fear of dogs. He raised his voice and told the plaintiff to stop or he would be arrested. The plaintiff continued to walk away. Another dog came after the officer and he also sprayed that animal. He again told the plaintiff to stop as he was under arrest. The plaintiff still continued to walk away. The officer hurried up and came behind Mr. Anderson. He told him to stop and put his hands behind his back as he was under arrest. Mr. Anderson just waved his hand and continued on without looking at the officer. Constable Smith said that he then told Mr. Anderson that if he did not put his hands behind his back, he would use mace. The dogs continued to bark and growl.

[17] A third dog entered the picture at this time, running so fast that it hurt Mr. Anderson’s hand when he grabbed the

dog's collar. At that moment, Constable Smith sprayed the plaintiff in the side of his face with pepper spray. The officer said that he told Mr. Anderson to stop. The plaintiff said that after the first spray, he walked another few feet, struggling to get to the house. He was choking and lost his vision in the right eye. He let go of the dog and was handcuffed on one wrist. Constable Smith said that it took the second spray to bring Mr. Anderson sufficiently under control so as to place a handcuff on. The plaintiff continued to push and struggle. He could not hear anything because of the dogs. His vision was lost in the other eye. The plaintiff was trying to rub the spray from his eyes. Constable Smith thought that the accused was struggling against him and feared that he would be unable to get the second handcuff on. He pushed Mr. Anderson to a bobcat parked nearby and sprayed again from very close range in the face. Constable Smith then managed to handcuff Mr. Anderson to the bobcat.

[18] The plaintiff denied that the officer told him that he was looking for a stolen vehicle. He also denied that the officer told him to stop or he would be arrested, or that he threatened to use pepper spray. He said that it was not possible that he did not hear this part of the conversation, that there was no possible way that the officer made these

statements, or that it was so remote that it could be forgotten. However, in direct examination, he said that it was difficult to hear what he was saying when he stood near the backhoe because of the barking dogs. He denied that his hearing was bad, an assessment not shared by his daughter and wife. Further, at discovery, he admitted that it was possible that he had not heard these instructions.

[19] The details of the conversations differ. I prefer the recollection of the officer who took notes afterwards. His recollection also coincides with the expressed attitude of the plaintiff who, I am satisfied, would not have accepted any explanation as to why the Port Moody officer was on his property and who was not about to take commands from someone on his private property. The officer was on a routine patrol and held no animosity or attitude towards the plaintiff. Mr. Anderson had difficulty hearing. The officer said that Mr. Anderson remained at his window for only a few seconds and then leaned back several feet from the car.

[20] I also accept the evidence of Constable Smith that he told the plaintiff to stop or he would be arrested and that he repeated the command to stop or be pepper sprayed. Mr. Anderson’s hearing was poor, a fact that he refused to acknowledge within his family and at trial.

[21] The plaintiff said that after the first spray of pepper, he continued towards his house, despite the fact that the officer had placed one handcuff on. He denied grabbing or shoving the officer, even remotely. He acknowledged that he struggled, but said that it was to get to the house to wash off the spray. However, at the police inquiry, Mr. Anderson admitted that he may have shoved the officer in his attempt to get to his house. He said that all that he wanted to do was get to the house, regardless of the police officer. Clearly, his actions could have been interpreted as swinging at the officer, just as Constable Smith described.

[22] By the time other police officers arrived at the scene, eight minutes had elapsed from the time that Constable Smith entered the private road. The dogs were still barking and milling around such that one police officer used pepper spray against a dog near his door that bared his teeth. Mr. Anderson was untied from the bobcat, handcuffed behind his back, and removed to a police van. He told his wife to call the mayor. While in the van, the plaintiff said that he offered the keys to move the backhoe, but was rebuffed. The officer in the van recalled only that the plaintiff was annoyed that he had not been given the opportunity to move the backhoe before being taken away. The van remained parked for some time at the

corner of Eaglecrest and Sunnyside as the officers waited for the RCMP and two others were taken into the van at another location before proceeding to the police station. The plaintiff was allowed to wash his face and hands for the first time at the police station, about forty five minutes after he had been sprayed. Constable Smith testified that the situation was not sufficiently under control to allow decontamination at the scene. The police gave no reassurance as to the short-lived effects of the spray. The only request or statement from the plaintiff during this time was that the Port Moody police had no business being in Anmore. He was released on his own promise to appear at 7:40 p.m.

[23] Police officers from Port Moody are issued with pepper spray and have been known to use it on other occasions. The product actually used is called ‘Punch’. Constable Smith had been trained in use of the spray, was a certified trainer himself, had used the spray on multiple occasions previously, and was a member of the emergency response team. He knew the spray to be non-injurious and very effective against people and animals. Under optimal conditions, the victim is sprayed directly in the face. He considered that the spray was appropriate for use when someone was resisting.

[24] Constable Smith thought that Mr. Anderson was actively resisting, showing defiance, and refusing to follow directions. It was apparent from the actions of the plaintiff that talking was over. He chose to use the spray against Mr. Anderson rather than attempt to physically control him or use a baton because he feared that he might be placed in danger from the dogs and injure Mr. Anderson. He considered Mr. Anderson to be similar in stature, strength and size to himself, not an unfounded assessment. He considered that this was the least invasive, lowest risk means of bringing the situation under control in the circumstances, including the dogs as multiple assailants. He did not know when the other officers might arrive, although he expected them within five minutes. Constable Smith decided not to leave because he feared that the situation would escalate: he did not know what Mr. Anderson had in his house, he was on unfamiliar territory, and Mr. Anderson was acting bizarre. The officer took action so as not to escalate the situation and to reduce risk to everyone involved according to his estimation at the moment. The use of the spray on this occasion complied with the policy for use in existence with the police department at the time.

[25] The Port Moody police department works cooperatively with the RCMP, regardless of any political animosity between the two towns.

[26] Mr. Anderson was charged with obstruction of a police officer and resisting arrest. As outlined above, he was convicted of resisting arrest.

The Expert Evidence

[27] Both sides called experts in the police use of force, particularly the use of pepper spray on the use of force continuum.

[28] Orville Nickel was called for the plaintiff. He is a private consultant on police conduct. He retired from the RCMP in 1995 after 26 years of service. He was a trainer in the empty hands level use of force especially martial arts and batons. He was certified as an instructor in the use of aerosol projector sprays in September 1993 after a one day course. Prior to implementation of RCMP policy, he was taught that pepper spray was appropriate for use after mere presence and verbal commands had failed and before the application of empty hand tactics. Mr. Nickel said that in 1993, the policy of the RCMP was not set and the force had not used the spray

in practice. However, a July 1993 operations manual said that pepper spray may be used to aid in the arrest of a resisting person or to control a threatened attack by an animal. The lesson plan adopted for the force in late 1993 taught use of pepper spray at the same level as empty hand tactics in the use of force continuum dependent upon officer-subject considerations at the moment. It was recommended to use when arresting a resisting person, to control a person when lesser means have failed, and to control a threatened attack by an animal. Pepper spray was to be used when lower levels of force such as presence, dialogue, and soft empty hands have been ineffective or inappropriate and use of higher levels of force would not be justified. Pepper spray was known not to have lasting or lethal effect. It was touted as completely effective in stopping a subject immediately, although often requiring more than one spray. The RCMP implemented operational use of pepper spray in June 1995, just as Mr. Nickel left the force. It was for use mainly by patrol officers and emergency response teams, neither of which Mr. Nickel had experienced since 1977. He had been primarily involved in commercial crime since 1983 and never had to use force to arrest since then. He was never present when pepper spray was used outside of training.

[29] Mr. Nickel testified that the police use of force came into play immediately when the marked police car with an officer in uniform was visible. A determination of the appropriate use of force required consideration of all of the circumstances. Significant weight is given to the officer's evaluation at the time. He said that 97% of situations resolve with dialogue. However, dialogue had not resolved this situation. He described Mr. Anderson as passively resisting. Mr. Nickel agreed that this behavior was irrational. This meant that a higher use of force was justified.

[30] He said that the dogs were not to be considered multiple subjects because they were not under anyone's specific control and were only a barrier to the officer. However, his assessment of their level of aggression changed in cross-examination when he acknowledged that they were significantly aggressive. Constable Smith's personal fear of dogs was also a factor that played into use of force against the dogs but not against Mr. Anderson, according to Mr. Nickel. He also acknowledged that Mr. Anderson appeared to be a fit man in his 60's. He considered it important that the situation involved multiple officers because Constable Smith had radioed for backup prior to dealing with Mr. Anderson and other officers arrived within a couple minutes. It was even more important to

wait for backup if the dogs were threatening. He thought that Constable Smith should have moved the car backwards if he was threatened or just sit in the car until the other officers arrived. He acknowledged some level of resistance from Mr. Anderson, but said that the officer should have made sure that his command was heard and then blocked Mr. Anderson's path in a direct confrontation to resume dialogue. At that point, he could have said that Mr. Anderson was under arrest. He said that the situation had not escalated to a level where pepper spray was required. He also criticized handcuffing one arm until complete control was established. He said that there was no justification for spraying a second and third time because there was a significant amount of control at that point. He agreed in cross-examination, however, that control was not established until handcuffs were placed on both hands behind the back. He thought it inappropriate to handcuff Mr. Anderson to a vehicle because it could have moved and this was not a multiple subject/single officer situation. He said that the fact that Mr. Anderson was the owner of the property did not change the use of force consideration. Aftercare was appropriate only after the situation was under control and as soon as practicable. It involved reassurance and flushing of eyes with cool water.

[31] Sergeant Joel Johnston was called for the defence. He is presently a member of the Vancouver Police Department in charge of the emergency response team. Previously, he was a patrol officer and a control tactics coordinator for seven years. In the latter capacity, from 1990 he taught use of force to 1100 police officers. He has seen pepper spray used by patrol officers many times. He first became aware of it as an alternative use of force in 1990 following a death by shooting in 1988 that could have been prevented by use of the spray. The force began immediate investigation of its use and developed a lesson plan. Within the force options theory, a police officer must make a decision on the appropriate use of force in a very short time. The duty is to arrest using the least amount of force dependent upon the level of resistance. The model is not incremental but circumstantial. The appropriate use of force depends on whether the subject is actively or passively resisting. Active resistance includes resisting an attempt to control behavior or movement by walking away. Passive resistance is remaining in place and refusing to move. Sergeant Johnston said that pepper spray can be used before empty hand methods because the latter can lead to assaultive behavior. In most cases, one spray is not enough.

[32] Sergeant Johnston also considered that Mr. Anderson's behavior was bizarre and that dialogue had broken down. He considered that Mr. Anderson was actively resisting police so that another use of force was required. He considered his turning away towards his house as threatening behavior. He said that either empty hands or pepper spray could be used with the attendant risk of escalation with empty hands. The fact that Mr. Anderson was going back to his house escalated the risk of officer safety. He thought that the big factor here was the dogs who were an unknown risk if their owner should become engaged. He said that the use of three blasts of spray is consistent with usage in B.C. depending on whether the subject is incapacitated. While it is more effective to spray directly in the face, it is not always possible in confrontational situations. In his opinion, disengagement by going back to the vehicle was unsafe in the circumstances of the car locked in unfamiliar territory with the subject's house nearby. He said that it is a single officer situation until other officers arrive: but, he agreed that if Constable Smith knew that they would be there within two or three minutes, then it would have been prudent to wait. A subject is not under control until fully handcuffed. Ultimately, everything depends on the officer's perception of the situation.

[33] Sergeant Johnston said that decontamination of pepper spray should be done as soon as practicable. This meant that the scene had to be secure, the dogs contained, and water available.

[34] As is apparent from this summary of the expert evidence, both experts were close in their opinions. Both agreed that dialogue had failed. Both agreed that Mr. Anderson's behavior was bizarre. Both agreed that greater use of force was required to control the situation. Both agreed that the dogs were a factor. Both agreed that Mr. Anderson was not incapacitated until his hands were handcuffed behind his back. Both agreed that the officer's evaluation of the situation at the time is important.

[35] The difference in their opinions rests on whether Constable Smith should have use empty hands or retreated as suggested by Mr. Nickel or whether he should have used pepper spray as suggested by Sergeant Johnston. Both choices were within the range of options for officers in the situation of a resisting subject according to the intervention model (RCMP) or force options theory (Vancouver Police Department), dependent upon an officer's assessment of the situation.

[36] On the whole, I prefer the evidence of the defence expert who was familiar with use of pepper spray from its origin, had

been involved in its use on patrol, and was currently involved in assessment of appropriate police use. Mr. Nickel's experience was limited to RCMP usage that pre-dated these events and he had not been a patrol officer for many years. When a decision comes down to an individual officer's assessment in a confrontational situation, the expert with more realistic experience is to be preferred, all else being equal. The conduct of Mr. Anderson was not passive but actively resistant. It was not clearly safe to retreat to the police car that was locked in unknown territory with an actively resisting subject, acting bizarrely, who could potentially have gone into his house and returned with others or weapons. It was not a multiple officer situation because it would take four more minutes before other officers arrived, enough time for anything to happen. The dogs posed a personal threat to Constable Smith and were a cause for concern if running around Mr. Anderson. The difference of opinion between the two experts is really not that great when it is appreciated that both ultimately gave the benefit of final assessment to the officer involved in a confrontational situation when the response given was within the acceptable range.

Issues

[37] The issues to be resolved are:

(1) was the police officer acting within his right in entering upon the plaintiff's property?

(2) was the police officer justified in arresting the plaintiff?

(3) did the police officer use reasonable force to effect the arrest?

(4) did the use of pepper spray and the decontamination that followed fall below the standard of care for use of that product?

(5) was the police officer grossly negligent or guilty of wilful or malicious misconduct?

(6) was the plaintiff contributorily negligent?

(7) did the plaintiff suffer damage as a result of the negligence of the defendants?

Legal Analysis

(1) Entitlement to enter upon the plaintiff's property

[38] Although the plaintiff's conduct in this matter was defined by his determination to capture whomever was on his property, it was not strenuously argued at trial that the police officer did not have a right to be on the plaintiff's property for the purpose of searching for the stolen vehicle. It is really unnecessary to decide this issue because the plaintiff has not claimed in trespass. Also, there was no

section 8 **Charter** argument that the privacy rights of the plaintiff had been infringed by an unreasonable search. However, because of the plaintiff's attitude towards this issue, it should be dealt with. Further, the plaintiff's written submission concerning ***R. v. Mulligan***, [1999] O.J. No. 4252 (QL) (Ont.S.C.), aff'd (2000) 142 C.C.C. (3d) 14 (Ont. C.A.) suggested that the obstruction charge was initiated because of the defendant, Constable Smith, being on the plaintiff's property, leaving the full implication of this open. In these circumstances, it should be dealt with.

[39] There was no dispute that the police officer was engaged in a search. There was no evidence that the plaintiff had ever indicated that police were not to enter upon his property to detect crime. In fact, the evidence established that the plaintiff would have accepted the presence of the RCMP but not the Port Moody police. Further, the plaintiff was unaware that general police jurisdiction extended beyond the Port Moody border. While the plaintiff usually had the backhoe down as a barrier, this was not the case on the day in question. The fact that there was a sign saying 'private road' is noticed for the fact that it did not say 'no trespassing'.

[40] In ***Priestman v. Colangelo***, [1959] S.C.R. 615, a case involving negligence in the performance of police duty, Locke,

J. contemplated that, in the exercise of police powers, interference with private rights may occur. It would not, however, give rise to action if the police officer acts reasonably. This principle was reiterated in ***Schoenau v. Brymer*** (1990), 89 Sask.R. 130 (Sask.Q.B.) where an implied licence to enter upon private premises, not a house, for a lawful purpose and to remain for a reasonable time to effect that purpose was the basis for determination that a police officer was not obliged to leave when told to do so by the owner.

[41] An implied licence to enter private property if on legitimate business has been recognized in recent cases: ***R. v. Tricker*** (1995), 96 C.C.C. (3d) 198 at 203 (Ont.C.A.); ***R. v. Evans*** (1996), 104 C.C.C. (3d) 23 at 30 (S.C.C.); ***R. v. Mulligan*** , *supra*. In ***R. v. Evans*** at pp. 30-33, Sopinka, J. said that the implied invitation is to knock at a dwelling for purposes of communication with the occupant. Anything beyond this is not authorized within the invitation. This invitation relates to the approach to the home, not the premises generally. In other words, the expectation of privacy relates to the home without extension to the premises so that **Charter** protection is physically confined to the approach to the home itself. Sopinka, J. restricted police rights to search for

evidence of criminal activity by randomly knocking on the doors of private homes. No cases were cited to me to suggest that police could not enter upon private property, not in approach of a dwelling house, in legitimate pursuit of evidence.

[42] Whether there is an expectation of privacy is to be determined in all of the circumstances, including the plaintiff's presence at the time of the search, possession or control of the property, historical use of the property, ability to regulate access, the existence of a subjective expectation of privacy, and the objective reasonableness of the expectation: **R. v. M.(M.R.)** (1998), 129 C.C.C. (3d) 361 (S.C.C.); **R. v. Mulligan**, *supra*.

[43] In this case, the plaintiff's objection was not to the police presence so much as the presence of Port Moody police and the belief that the officer refused to answer as to why he was on the premises. This expectation is unreasonable. Whether this is part of an implied invitation or a warrantless search need not be decided in this case. The officer was not investigating the plaintiff. In the circumstances, I would conclude that it was within the implied invitation to pursue community police objectives of pursuit of stolen property, regardless of which police force was involved.

[44] The search by Constable Smith was conducted in a reasonable manner, as quickly and unobtrusively as possible. The level of intrusion was minimal. The purpose of the search did not relate to the plaintiff.

[45] I conclude that Constable Smith was entitled to enter the plaintiff's property and was not in violation of any of the plaintiff's rights in so doing.

(2) Justification to arrest the plaintiff

[46] The conviction of the plaintiff for resisting a police officer in the execution of his duty makes it apparent that the officer was justified in arresting the accused. The conduct of the plaintiff in blocking the police vehicle and refusing to move it after being told to do so by the officer gave reasonable and probable grounds for the officer to arrest the plaintiff in the circumstances. It matters not that the plaintiff was intending to go back to his house to call the R.C.M.P.: ***Berntt v. Vancouver (City)*** (1999), 63 B.C.C.R. (3d) 233 at para. 27 (C.A.).

[47] In ***R. v. Bottrell*** (1981), 60 C.C.C. (2d) 211 at 217 (B.C.C.A.), Anderson, J.A. said that the starting point is whether the police officer had reasonable and probable grounds

to arrest an accused. This arises from section 25(1) of the **Criminal Code** which says:

> 25(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,
> (b) as a peace officer or public officer,
> (c) in aid of a peace officer or public officer, or
> (d) by virtue of his office
>
> is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[48] Constable Smith was justified in arresting the accused. He had a duty to enforce the law. He had a duty to arrest the accused in the circumstances. The question then becomes whether the officer used excessive force to effect the arrest.

(3) Use of reasonable force to effect arrest

[49] Once the plaintiff has proven that force was applied against him, the onus shifts to the defendants to prove that the assault was justified. The burden is also upon the defendants to prove that the assault was neither intentional nor negligent: ***Berntt v. Vancouver (City)*** (1997), 28 B.C.L.R. (3d) 203 at 212 (S.C.). Whether Constable Smith used reasonable force to arrest the plaintiff is a question that

must be answered in the defence of both the assault and the negligence claim. In the latter, the question arises within the analysis of whether there was a breach of the standard of care.

[50] The defendants have relied upon section 25(1) of the **Criminal Code** to justify the use of force in the assault. This section provides relief from liability for assault but not for negligence: ***Noel (Committee of) v. Royal Canadian Mounted Police*** (1995), 9 B.C.L.R. (3d) 21 at 34 (S.C.). Section 25(1) absolves of blame anyone who does something which he is authorized by law to do and empowers that person to use as much force as is necessary for the purpose of doing it: ***Eccles v. Bourque*** (1973), 14 C.C.C. (2d) 279 at 280-281 (B.C.C.A.). There is a limitation upon the amount of force that can be used. The officer cannot use force that is intended or likely to cause death or grievous bodily harm: **Criminal Code**, section 25(3); ***R. v. Bottrell*** *, supra* at 217-218. This is not in issue here.

[51] Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment, keeping in mind that the police officer cannot be expected to measure the force with exactitude: ***Wackett v. Calder*** (1965), 51 D.L.R. (2d) 598 at

602 (B.C.C.A.); ***R. v. Botrell*** *supra* at 218; ***Allrie v. Victoria (City)***, [1993] 1 W.W.R. 655 at para 20 (B.C.S.C.); ***Levesque v. Sudbury Regional Police Force***, [1992] O.J. No.512 (QL) (Ont. Gen. Div); ***Breen v. Saunders*** (1986), 39 C.C.L.T. 273 at 277 (N.B.Q.B.); ***Berntt v. Vancouver (City)***, *supra* at 217. This may include the aura of potential and unpredictable danger: ***Schell v. Truba*** (1990), 89 Sask.R. 137 at 140 (Sask.C.A.) (in dissent). There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself: ***Levesque v. Sudbury Regional Police Force***, *supra*.

[52] The defendants also rely upon section 25(4) of the **Criminal Code** that provided at the time of the incident:

> **(4)** A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner. R.S.C. 1985, c.C-34, s. 25.

[53] In ***Priestman v. Colangelo***, *supra*, police officers were in pursuit of a stolen vehicle and fired a warning shot at the rear tire of the vehicle. Just then, the police vehicle hit a bump in the road and the shot miscarried, hitting the thief in

the neck. The stolen vehicle went out of control and killed two bystanders. In considering section 25(4) of the **Code**, due regard must be given to the fact that the police conduct is in pursuance of a statutory duty to arrest those fleeing to avoid arrest. In the absence of negligence, a reasonable attempt to perform the duty will be a complete defence.

[54] With respect to the claim in negligence, both parties agree that the defendants owed the plaintiff a duty of care. The issue is whether Constable Smith fell below the standard of care by application of unreasonable force by the use of pepper spray. After a thorough review of Canadian authorities, Madam Justice Kirkpatrick found that our courts have been reluctant to find negligence by police officers in pursuance of their duties: ***Doern v. Phillips Estate*** (1994), 2 B.C.L.R. (3d) 349 at 372 (S.C.)). The standard of care to which a police officer will be held is that of a reasonable police officer, acting reasonably within the statutory powers imposed upon him, in the circumstances of the case. Kirkpatrick, J. said at pp. 372-3:

> Based on the authorities provided, there is little doubt that the standard of care to which a police officer will be held is that of a reasonable police officer, acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case. In this case, it is necessary to consider whether the pursuit policy,

> which constituted a self-imposed standard of care, was followed. The police pursuit policy was obviously carefully and thoughtfully crafted. It was designed to assist officers in the conduct of the activity that put them at more risk of harm than any of their other duties. Although the policy does not, in itself, constitute the standard of care, compliance with the policy, in my view, is a very important factor to consider in determining whether the standard of care has been met.

[55] The British Columbia Court of Appeal has approved this statement: ***Doern v. Phillips Estate*** (1997), 43 B.C.L.R. (3d) 53 at 57 (C.A.); ***Fortey v. Canada*** (1999), 63 B.C.L.R. (3d) 185 at 193 (C.A.). Police policy may be evidence of the standard of care: ***Fortey v. Canada,*** *supra*). An error of judgment which someone acting with ordinary care might have made is not negligence: ***Noel (Committee of) v. RCMP****, supra* at 35-36.

[56] The question here is whether Constable Smith acted reasonably in the application of pepper spray and handcuffs to the plaintiff in all of the circumstances, including his duty to enforce the law, the use of force theory applicable within his police department, the information available to him at the time, police policy on the use of pepper spray, and the recognized need to make allowance for exigencies of the situation and the potentially dangerous situation that the officer was in.

[57] Numerous other cases involving police use of pepper spray were presented. In ***Christopherson v. Saanich*** (1994), 2 B.C.L.R. (32d) 218 (S.C.), the plaintiff had been arrested following a donnybrook outside a casino and then refused to leave the police van, swore and was prepared to physically engage the officers. None of them were prepared to use physical force against a female and so the officer trained in the use of pepper spray was called in. He warned the plaintiff who still refused to come out of the van. One or two sprays was used to bring the plaintiff under control. In this circumstance, Drake, J. found no other practical alternative open and fair warning given. Use of force was reasonable.

[58] The plaintiff in ***Lynch v. Canada (Royal Canadian Mounted Police)***, (3 February 2000), Prince George D4186, [2000] B.C.J. No.228 (QL), 2000 BCSC 53 caused a disturbance when her husband came to remove possessions from their house. She kicked, screamed at, and resisted the police officer who had accompanied her husband. She fell to the ground rather than be handcuffed. The officer warned her that she would be sprayed and then did so. Maczko, J. had no doubt the officer used no more force than was necessary to effect an arrest.

[59] The use of tear gas in the 1974 case of ***Bell v. Hudson*** (1974), 9 N.B.R. (2d) 441 (N.B.Q.B.) was appropriate to effect the arrest of two subjects who had fled from a police car.

[60] The use of pepper spray after a subject was under control in the cell of the police lockup was not appropriate in ***R. v. M.S.M.***, [1998] B.C.J. No. 321 (QL) (Prov.Ct). Similarly, in ***R. v. Spannier***, [1996] B.C.J. No. 2525 (QL) (S.C.), the immediate use of pepper spray against a detained subject who refused to walk towards the cells was excessive.

[61] Constable Smith was on uniformed patrol in a marked police car when faced with an uncooperative, belligerent man acting in a bizarre manner who was actively resisting arrest. The officer was alone in a rural location. There was potential danger from the dogs and unknown circumstances in the nearby houses. Dialogue had failed. The officer warned the plaintiff to stop or he would be sprayed. Pepper spray was one of the options to bring the situation under control. It was unnecessary for the officer to first engage in empty hands methods when his assessment of the situation called for rapid deployment of the pepper spray. The pepper spray was reasonably used based upon Constable Smith’s knowledge of the situation. He did not know how soon the other officers would arrive and did not know the intentions of the plaintiff. The

arrival of the other officers within four minutes was outside the estimated two to three minute range suggested by both experts as the estimated time for safe withdrawal. Further, it is unrealistic to expect the officer to sit in his car and wait for whatever was to happen. Use of pepper spray in the circumstances was within the options for use of force model employed at the time and within the policy for use of pepper spray. Constable Smith was personally fearful of dogs and these dogs were out of control.

[62] Constable Smith used reasonable force to arrest the plaintiff. He did not fall below the standard of care expected of him in the circumstances.

(4) Use and decontamination of pepper spray

[63] It was established that more than one spray is sometimes necessary to stop a resisting subject. Two or sometimes three sprays are often used. This was the case with the plaintiff who continued to struggle after the first and second spray. The number of sprays cannot be criticized especially when Mr. Anderson continued to physically resist. Nor can there be criticism because the spray was not face-on. The situation did not allow for that efficacy.

[64] Neither do I find fault for not decontaminating the plaintiff at the scene. The officers did not see a hose, although apparently there was one. More importantly, however, priority was appropriately given to securing the scene. Mr. Anderson was brought to the detachment within a reasonable time and immediately given water. While there could have been more consolation and reassurance given, I do not find the police conduct actionable.

(5) Gross negligence or wilful or malicious misconduct

[65] Gross negligence is defined according to its plain meaning at common law. Kirkpatrick, J. in ***Doern v. Phillips Estate****, supra* at 376-377 applied the classic test used in other cases in that there had to be marked departure from the standards usually used by competent people, dependent upon the foreseeable risk in the circumstances. In that case of police pursuit, Kirkpatrick, J. held the police to a reasonably high standard of care by reason of the inherent danger and foreseeably high risk of serious injury or death in the conduct in question. This higher standard raises the standard for gross negligence.

[66] In **Insurance Corp. of British Columbia v. Vancouver (City)** (1997), 38 B.C.L.R. (3d) 213 at 237 (B.C.S.C.), Harvey,

J. considered this standard with respect to police officers engaged in a tactical takedown manoeuvre and said at p. 237:

> Similarly, police officers engaged in a tactical takedown manoeuvre are held to a reasonably high standard of care by reason of the inherent danger of such manoeuvres and the foreseeably high risk of serious injury and death, and this raises the standard for gross negligence. In the present case, the use of the gun in the tactical manoeuvre fell below the standard of care expected in such a manoeuvre, however, I am not satisfied that it was grossly negligent in the circumstances.

[67] Constable Smith can be personally liable only if he was grossly negligent. He did not fall below the standard of care in his use of force and did not come even close to being grossly negligent in the circumstances here.

(6 & 7)Contributory negligence and damages

[68] While it is not necessary for me to decide either of these issues given the conclusions above, if I am found to have been in error, I would have made these determinations.

[69] Mr. Anderson was the author of his own misfortune. He was in error in thinking that the Port Moody police did not have jurisdiction in his area. He disliked the Port Moody police for political reasons unrelated to policing in the area. He was rude and uncooperative to an officer actively engaged in regular police duties. He ignored the instruction of the

officer and thought that he could entrap the officer's vehicle just as he had entrapped others in the past. He ignored instructions when he was under arrest, turned his back on the officer, and walked away. He did not control his dogs.

[70] There are numerous cases where contributory negligence has been found after police were held liable: ***Teece v. Honeybourn,*** [1974] 5 W.W.R. 592 (B.C.S.C.); ***C(T.L.) v. Vancouver*** (1995), 13 B.C.L.R. (3d) 201 (S.C.); ***Berntt v. Vancouver,*** *supra*; ***Rosario v. Canada (Royal Canadian Mounted Police)*** (4 February 2000), New Westminster S044043, [2000] B.C.J. No. 242 (QL), 2000 BCSC 214; ***Fortey v. Attorney General of Canada*** *, supra*.

[71] I would have found the plaintiff eighty percent liable in this case.

[72] With respect to damages, the plaintiff did not prove that he suffered permanent eye damage as a result of this incident. None of the three opthamologists who examined the plaintiff after the incident found any permanent injury. An opthamologist who examined the plaintiff twelve days after the incident found nothing wrong with the plaintiff's eyes. The plaintiff had complained of eye symptoms before the event as proven from his previous clinical records. It was not proven that the pepper spray probably accounted for chronic

inflammation in the right eye. There was superficial irritation of the surface of the eye that lasted no longer than six hours.

[73] There is no reliable evidence that the plaintiff has suffered any permanent allergic reaction to the spray. Two allergists found nothing. The plaintiff has not taken any steps to remove chemical substances from his home. There is just no basis to say that the plaintiff suffers from chemical sensitivity as a result of the pepper spray.

[74] I would have assessed damages for short term eye injury at $2,500.

Conclusion

[75] The action is dismissed with costs to the defendants on the scale of three.

“Janice Dillon, J.”
The Honourable Madam Justice Janice Dillon