

Citation: Parrett v. Vanderford et al.  
2001 BCSC 23

Date: 20010104  
Docket: 97-1415  
Registry: Victoria

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**JANET PARRETT**

PLAINTIFF

AND:

**CONSTABLE ROBERT VANDERFORD, CONSTABLE JOHN DOE 2,  
AND THE CORPORATION OF THE DISTRICT OF CENTRAL SAANICH**

DEFENDANTS

**REASONS FOR JUDGMENT**

**OF THE**

**HONOURABLE MR. JUSTICE OWEN-FLOOD**

Counsel for the Plaintiff

James A.S. Legh

Counsel for the Defendants

David Butcher

Date and Place of Hearing/Trial:

October 13,14,15 & 16, 1998

September 8, 2000

October 23, 24, 25, 26 & 27

2000

January 2, 2001

Victoria, BC

**General Background**

[1] The plaintiff sues the defendants for injuries allegedly sustained when she was taken into custody and held for approximately 6 hours at the Central Saanich Police Department on 25 September 1996. The police arrested the plaintiff on a charge of being drunk in a public place and causing a disturbance, contrary to the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267.

[2] The plaintiff alleges that the defendants wrongfully arrested and wrongfully detained her, causing her damages including loss of dignity, embarrassment, upset and physical discomfort from incarceration.

[3] The plaintiff claims that Constable Vanderford, or other constables embraced under the name "John Doe" in the style of cause, committed a battery upon her when she was placed in the police car and booked in at the police station. Alternatively, the plaintiff claims that the defendants are guilty of grossly negligent or negligent conduct, resulting in the same injuries.

[4] The plaintiff claims that the defendant Corporation of the District of Central Saanich, as the employer of each of the constables named as defendants, is vicariously liable,

jointly and severally, pursuant to s.20(1) of the **Police Act** R.S.B.C. 1996, c. 367.

**Findings of Fact**

**(1) Facts in Agreement**

[5] On September 25, 1996, the plaintiff had lunch with two women friends, France Gaulin and Angel Charbonneau. They met at 12:30 p.m. for lunch at the Carden Street Café at the crossroads of Stelly's X-Road and the West Saanich Road, in the District of Central Saanich.

[6] The lunch lasted until some time between 2:00 p.m. and 3:00 p.m. During the lunch the three women shared, approximately equally, two 750 millilitres bottles of wine.

[7] They all left the Carden Street Café and drove in three separate cars to a restaurant on the wharf at Brentwood Bay, then called The Rusty Duck. At this restaurant they had chips and salsa and, between the three of them, the better part of two litres of wine. The plaintiff testified that she did not think the second litre of wine was quite finished; in fact, she thought that perhaps two-thirds of it was left. While at The Rusty Duck, the three women each consumed two shooters of tequila.

[8] The plaintiff and Ms. Charbonneau then dared each other to go swimming off the government wharf at Brentwood Bay. For her part, the plaintiff jumped into the water fully clothed except for her shoes. Ms. Charbonneau took off all her clothes except for her pants. Ms. Gaulin simply stood on the wharf and watched. The three women then returned to their table at The Rusty Duck.

[9] I accept as true the plaintiff's testimony that the waitress, Lisa, told them it was the end of her shift and the restaurant manager did not want any of the three women to remain in the restaurant. The waitress told them that because they had been swimming, they would not receive any further service. I accept that the three women left The Rusty Duck some time between 4:00 p.m. and 4:30 p.m.

[10] The plaintiff and Ms. Gaulin drove off in their separate cars. I accept that Ms. Charbonneau went with one of them, although the plaintiff cannot remember with whom she went. In any event, Ms. Charbonneau's car was left at The Rusty Duck parking lot.

[11] The three women then went to the Brentwood Inn. There, the plaintiff drank one glass of beer over a period of approximately thirty minutes, and Ms. Charbonneau left her beer untouched.

[12] The parties agree that on September 25, 1996, the plaintiff weighed approximately 261 pounds and Ms. Charbonneau weighed approximately 130 pounds.

[13] On leaving the Brentwood Inn, Ms. Gaulin drove away. The evidence is that Ms. Charbonneau wanted to drive her car but, in view of her condition, the plaintiff held onto Ms. Charbonneau's keys and refused to return them to her.

[14] Ms. Charbonneau appeared to the plaintiff to be really drunk. For that reason, the plaintiff told Ms. Charbonneau that she had hidden her keys and Ms. Charbonneau would have to look for them.

[15] The plaintiff and Ms. Charbonneau walked over to the park adjacent to The Rusty Duck parking lot. Ms. Charbonneau sat at a picnic table in the park while the plaintiff walked across the street towards Ms. Charbonneau's car in The Rusty Duck parking lot, for the purpose of hiding her keys under one of its tires.

[16] The plaintiff was almost beside Ms. Charbonneau's car when a police car drove up, the sole occupant of which was Constable Vanderford. At the same time as Constable Vanderford's police car pulled up close to the plaintiff, a second police car, driven by another Central Saanich police

constable, pulled up close to where Ms. Charbonneau was sitting at the picnic table.

[17] Constable Vanderford was on shift that day with Constable Bruce Smith. For his part, Constable Vanderford was at the scene in response to a call he had received from the Central Saanich police dispatcher. The dispatcher informed him that a call had been received from The Rusty Duck restaurant that a nude woman was swimming in the ocean in front of the restaurant, along with another woman. The caller also indicated that one of the two women had just urinated in the parking lot of the restaurant. He was told that one of the women was a tall skinny brunette and the other was a shorter, heavy blonde and that it was the blonde who had urinated in the parking lot.

[18] Constable Vanderford was also told that the two women in question had a bronze Camaro car parked in the restaurant parking lot. I accept that Constable Vanderford arrived at the scene within 5 minutes or so of receiving the dispatcher's report.

[19] Constable Vanderford parked his car facing north on Peden Lane in the vicinity of The Rusty Duck parking lot. When he arrived, Constable Smith was dealing with Ms. Charbonneau. The plaintiff was walking south on Peden Lane,

near The Rusty Duck parking lot. She was walking away from the parked bronze Camaro. To Constable Vanderford she appeared to be the big woman with blonde hair, as described by the dispatcher. He stopped his police car in the plaintiff's path. The plaintiff continued to walk up to him and his car and he got out of it and stood in her way. He asked her if she was coming from the car, indicating the bronze Camaro. At this point, the testimony of the plaintiff and Constable Vanderford diverge.

**(2) Facts in Dispute**

**(a) The Plaintiff**

[20] The plaintiff testified that in response to Constable Vanderford's inquiry as to whether she was coming from the bronze Camaro, she replied something to the effect of "Why, what's the problem?" She said that Constable Vanderford told her she had been swimming naked and urinating in the parking lot. The plaintiff denied that she had done those things. She told him it was Ms. Charbonneau, who at that time was being apprehended by Constable Smith, who had gone swimming naked and urinated in the parking lot. The plaintiff further said that it was plain for all to see that her clothes were soaking wet.

[21] The plaintiff states that Constable Vanderford ordered her into the police car. She said that she questioned why he was doing this but that he simply kept yelling at her and repeating that she was the one who had been swimming in the nude and urinating in public. The plaintiff said she tried to explain that she had done nothing wrong and therefore there was no need for her to get into the police car.

[22] The plaintiff said that Constable Vanderford kept yelling at her, that he grabbed her shirt and in doing so turned her around. She conceded that she might have been attempting to walk away from Constable Vanderford when he grabbed her by her shirt. She said that she was facing the car, in preparation to getting into it if she had to, but was still trying to find out why he wanted her to enter the police car.

[23] She said that Constable Vanderford pushed her by the back of the head and neck into the police car. She says she ended up flat on her face in the back of the car. The plaintiff alleges that at that time her legs were hit in the back with quite a hard blow which made her legs hurt right away. She said that she was upset and reproached Constable Vanderford, saying "You don't have to hit me."

[24] The plaintiff conceded that she was possibly swearing, yelling and crying and that she may have started swearing before she was hit. At any event, she was swearing after she was grabbed.

[25] The plaintiff was then driven to the Central Saanich police station.

[26] The plaintiff alleges that when she was fingerprinted at the booking-in desk, Constable Vanderford or Sergeant Snell forcefully slammed her hands on the desk in a violent manner, damaging a ring on her left hand. The ring has been filed as an exhibit. It is indeed now oval shaped.

**(b) The Defendant**

[27] Constable Vanderford said that, in response to his query as to whether the plaintiff was coming from the bronze Camaro in the parking lot, the plaintiff replied "None of your fucking business", or words to that effect.

[28] He said he tried to explain to the plaintiff that he was investigating a report of someone urinating in the parking lot and that the only response he got from the plaintiff was that she did not have to listen to him.

[29] He said he asked her for her name and that she replied with profanities, telling him to "Fuck off" and refusing to give her name. He said he tried several times to explain to her what was happening and to ascertain her name but in response received only verbal abuse, i.e. profanities, and a physical lack of co-operation.

[30] Constable Vanderford concluded that the plaintiff was highly intoxicated. He based his conclusion on her demeanour, her unsteadiness on her feet, and the strong smell of alcohol on her breath. He said that, in his opinion, the plaintiff was clearly out of control.

[31] Constable Vanderford stated that it was impossible for him to talk to the plaintiff because she simply would not listen. He said that she attempted to walk past him and he advised her that she was not free to do so because he was conducting an investigation. However, she continued to try to get past him.

[32] It was then that he grabbed the left sleeve of her sweater and held on, causing her to spin around some 180 degrees, ending up facing north on Peden Lane beside his police car.

[33] He said he released his grip on her sleeve and opened the rear door of the police car on the driver's side. He positioned himself so that the plaintiff was between himself and the now open door of the police car. He told her that she was under arrest for being intoxicated in a public place and that she had to get into the police car. He testified that the plaintiff continued with her verbal abuse and that she pushed against him with her upper body, trying to get him out of the way so that she could get past. Her recurrent theme was "Why are you doing this to me?", or words to that effect.

[34] He said that he repeatedly asked her to get into the police car, telling her many times that she was under arrest for being intoxicated in a public place.

[35] He eventually told her that if she did not get into the police car he would use pepper spray on her. He threatened to use the pepper spray on several occasions but without success. Therefore, he removed his pepper spray canister from his duty belt and held it in his right hand. He said it was at that point that the plaintiff, seeing the pepper spray, entered the police car in an ordinary manner - as any ordinary, sober, person would, that is, putting the right foot in, moving sideways and entering the rear of the car.

[36] He said that the only force he used was to place his hand on the top part of her head, guiding her down past the jamb of the car door, as the back seat is a constricted area due to the cage separating the front from the back. He said that she was seated upright in the rear seat, directly behind the driver's seat.

[37] Constable Vanderford testified that he closed the rear door only when the plaintiff was fully and completely inside the car. He said that the police car door did not strike the plaintiff at all. He specifically denied that he struck her on the back of her legs with the door or in any other manner.

[38] I note also that in regard to the police car incident, Constable Vanderford at first denied that he pushed the plaintiff into the police car. He then qualified that by saying that he simply could not recall whether he had pushed her in or not.

[39] After arresting the plaintiff, Constable Vanderford observed her placing a cell-phone call from the back of the police car. She told the person to contact her lawyer and brief them as to what was going on.

[40] At the conclusion of that telephone conversation, Constable Vanderford gave the plaintiff the standard **Charter**

warning and police caution. He told her that she was under arrest for being intoxicated in a public place. He advised her of her right to counsel and legal aid. I accept that he drove directly to the Central Saanich police station with her. During the trip, the plaintiff cried at times, but continued to verbally abuse Constable Vanderford, and bang on the plexiglass shield separating the rear and front of the police car.

[41] Constable Vanderford testified that when they got out of the police car at the Central Saanich police station sallyport, the plaintiff rushed up to him and struck him. The plaintiff denies this categorically. The police video, admitted as evidence at trial, shows movements by the plaintiff and that she clearly rushed up to Constable Vanderford. Immediately after this, both Constable Vanderford and Sergeant Snell placed the plaintiff face down on the trunk of the police car, holding her by her arms.

[42] Constable Vanderford and Sergeant Snell then escorted the plaintiff out of the sallyport and over to the booking-in desk. At the counter, the defendant says that the plaintiff was searched by the matron, asked to remove her jewelry and processed, at which time she was escorted to a cell.

[43] The defendant concedes that he may have been holding on to the plaintiff as she was searched by the matron, but says at no time did he injure the plaintiff by smashing her left arm or hand against the counter.

[44] I note that in his examination for discovery, Constable Vanderford conceded that he had indeed placed the plaintiff's left hand on the desk while he searched her, but he denies ever smashing it down on the counter.

[45] In summary, there are three major factual conflicts between the testimony of the plaintiff and that of Constable Vanderford as to what transpired at the scene. Those conflicts are:

- 1) Did the plaintiff create a public disturbance by being intoxicated in a public place?
- 2) Did Constable Vanderford injure the plaintiff's legs by kicking her or, in the alternative, by closing the rear door of the police car on them?
- 3) Did the defendants cause the bruising on the plaintiff's left hand and fingers during the booking-in process?

**(c) Civilian Witnesses**

[46] Suzanne Whitson, an owner of The Rusty Duck restaurant, testified that on the afternoon of September 25, 1996 in the parking lot of The Rusty Duck, Debbie Barker, a waitress, informed her that she had had to ask three women to leave the restaurant because they were drunk. She also told Ms. Whitson that one of the women had backed her car into a fence on the parking lot and that the other two women had gone swimming off the government dock.

[47] Ms. Whitson checked the fence and found it had been damaged. She saw two women walking away from The Rusty Duck towards another licensed premises, the Brentwood Inn. She asked her daughter, Lisa Ferris, to keep an eye out for the two women as there were two cars left in the parking lot of The Rusty Duck, namely, a Camaro and a Firebird.

[48] Ms. Whitson's daughter, Lisa Ferris, informed her that someone was urinating on the parking lot. In the result, Ms. Whitson investigated this and saw a woman squatting on the parking lot and requested her to stop. I accept that the person she saw squatting and urinating was the plaintiff.

[49] Ms. Whitson also saw the slim brunette with long hair, Ms. Charbonneau, beside her Camaro.

[50] I accept that Ms. Whitson called the Central Saanich police to complain about the plaintiff and her friends.

[51] During the arrest, Ms. Whitson saw Constable Vanderford put his hand on the back of the plaintiff's head and push her into the police car through the rear door on the driver's side. She testified that she saw the plaintiff trying to push away from the car. I accept that she saw all this from a position approximately two car lengths away from the police car.

[52] Ms. Whitson says that the plaintiff resisted being put into the car and pushed back against Constable Vanderford. I accept her testimony that she did not see Constable Vanderford strike or kick the plaintiff.

[53] Lisa Ferris' testimony corroborated the evidence of Ms. Whitson that it was the plaintiff and not Ms. Charbonneau who was urinating on the parking lot.

[54] Ms. Ferris also observed that Constable Vanderford had his hand on the back of the plaintiff's head, guiding her into the police car. Ms. Ferris testified that she did not see the plaintiff's legs sticking out when Constable Vanderford closed the car door. However, Ms. Ferris said that the plaintiff fell into the car on her stomach or on her side. Ms. Ferris

conceded that, from where she was making her observations on the balcony of a building adjacent to The Rusty Duck, she would not have been able to see whether or not the plaintiff's legs were sticking out or not.

[55] When Ms. Ferris made her observations, her father, Gregory Whitson, was standing beside her. His testimony, which I accept, is that he saw the plaintiff resist Constable Vanderford's attempts to put her into the police car. He heard Constable Vanderford advise the plaintiff that he had no choice but to arrest her and that she must get into the police car. He testified that Constable Vanderford pushed the plaintiff into the car either face first or on her side. He testified that the plaintiff sat up before the car door was closed.

[56] Ms. Christine Kintoff testified that she watched the incident from outside a store across from The Rusty Duck. She also identified that it was the plaintiff who urinated in the parking lot and confirmed the evidence that the plaintiff was struggling against Constable Vanderford.

[57] Ms. Kintoff said that Constable Vanderford finally got the plaintiff into the car but all Ms. Kintoff could see were the plaintiff's feet and arms thrashing about. She said that she did see the plaintiff when she was half way into the back

seat of the police car, by the rear door. The plaintiff had her hands in front of her, trying to get out, partially sitting with her legs outside the car. The plaintiff was kicking and punching at Constable Vanderford.

**(d) Holdings as to Facts in Dispute**

[58] There are a number of factors that affect the reliability of the plaintiff's testimony in this case. First, I am mindful that, even though she was at the time a large woman, by her own admission she had consumed a considerable amount of alcohol between 12:30 p.m. and her arrest at approximately 4:30 p.m. This, taken together with her self-admitted conduct, that is, jumping into the ocean and swimming fully clothed, is only consistent with her being intoxicated by alcohol to a significant extent. For that reason, I find that her memory of events is not entirely reliable.

[59] Second, the plaintiff testified that Constable Vanderford was not alone when he arrested her. She swore an affidavit, which I find to be false insofar as this aspect is concerned, to the effect that Constable Vanderford was accompanied by another police officer who was in the car when she was placed in it. Further, that this police officer was with Constable Vanderford when he drove her back to the Central Saanich police station. On the whole of the evidence,

I am satisfied that Constable Vanderford was alone in his police car and at the scene. The plaintiff was clearly mistaken in that regard and I attribute that to the effect of considerable alcohol consumption on her memory.

[60] There are other instances in the plaintiff's narrative about the day's events that are consistent with alcohol impairment of her memory. The plaintiff does not remember Ms. Gaulin backing her car into the fence at The Rusty Duck parking lot, although she did say that she was present when Ms. Gaulin drove away. The plaintiff further deposed that when she arrived at the Central Saanich police station, it was the female jailer, Mrs. Curry, who escorted her into the cells after she had been booked in. The evidence in the police videotape shows that in actual fact it was Sergeant Snell who had escorted her into the cells and not the jailer.

[61] The plaintiff said that it was Ms. Charbonneau who had been urinating in the parking lot. The plaintiff categorically denied that she urinated in the parking lot. I accept as a fact that it was the plaintiff who urinated in the parking lot.

[62] Based on these considerations, I find as a fact that the plaintiff was causing a public disturbance by being intoxicated in a public place on 25 September 1996.

[63] There have been a number of possible theories advanced as to the cause of the bruises on the plaintiff's legs. These include defence suggestions that the bruises were caused when she clambered up the jetty after her swim or by swinging her legs on the jail cell bunk. The plaintiff's theory is that they were caused by Constable Vanderford kicking, or closing the police car door on, her legs.

[64] Dr. Charlesworth, a pathologist, testified for the defence. In the result, I do not place much emphasis on the testimony provided by this expert witness because I note that he could not definitively explain the origin of the plaintiff's bruises on her legs. It was the opinion of Dr. Charlesworth that the plaintiff's injuries could have been self-inflicted, as by the defence's theory that she banged her legs repeatedly on the jail bunk, or alternatively, but less likely, that a car door had been closed on her legs.

[65] The plaintiff has not provided this court with any expert evidence regarding the exact or most probable source of her injuries. In that regard, I agree with the testimony of Dr. Charlesworth that a proper assessment of the plaintiff's bruising requires an analysis of the actual car and victim.

[66] I bear in mind the evidence of the jailer, Mrs. Curry, that during the time the plaintiff was in the cells she

observed the plaintiff swinging her legs back and forth. This did not concern Mrs. Curry as she was of the view that the leg-swinging was unlikely to cause any injury to the plaintiff. She also observed the plaintiff shouting and yelling from the cells and banging her buttocks up against the bars.

[67] On the whole of the evidence, I am unable to determine the cause of the bruises based on the evidence tendered.

[68] I accept that, on arrival at the Central Saanich police station sally port, the plaintiff threw a punch at Constable Vanderford, which landed on his left upper arm. I accept that this caused Constable Vanderford to grab the plaintiff's right arm, assisted by Sergeant Snell who grabbed her left arm, and place her face down on the trunk of the police car. This finding is consistent with the movements of the plaintiff depicted in the video. This is apparent, notwithstanding that the video is somewhat hazy.

[69] I am satisfied that Constable Vanderford and Sergeant Snell caused the bruises on the plaintiff's upper left and right arms when they escorted her into the booking-in room after the plaintiff punched Constable Vanderford.

[70] While in the booking-in room, I accept that, at one time, Constable Vanderford held onto the plaintiff's right arm and later held onto her left arm.

[71] I have reviewed the evidence of both parties, including the police videotape, concerning the origin of the bruises to the plaintiff's left hand and damaged ring. I am unable to make a finding, based on this evidence, as to the exact causes of the injuries.

**The Issues**

[72] There are four issues:

- (1) Was the plaintiff lawfully arrested?
- (2) Did Constable Vanderford commit a battery against the plaintiff?
- (3) Are Constable Vanderford and/or other members of the Central Saanich Police Department guilty of gross negligence, causing injuries to the plaintiff?
- (4) If Constable Vanderford and/or other members of the Central Saanich Police Department were not guilty of such gross negligence, is Constable Vanderford, or such other members of the police department, guilty of simple negligence?

**Analysis**

**Issue 1: Was the plaintiff lawfully arrested?**

[73] The plaintiff was arrested for being intoxicated in a public place and causing a disturbance. The following statutory provisions apply in this case:

Criminal Code

INDECENT ACTS

173. (1) Every one who wilfully does an indecent act

(a) in a public place in the presence of one or more persons, or

(b) in any place, with intent thereby to insult or offend any person,

is guilty of an offence punishable on summary conviction.

CAUSING DISTURBANCE, INDECENT EXHIBITION, LOITERING, ETC.

Section 175

175. (1) Every one who,

(a) not being in a dwelling-house, causes a disturbance in or near a public place,

...

(ii) by being drunk,

...

is guilty of an offence punishable on summary conviction.

**Liquor Control and Licensing Act**

## Section 41

## Drunkenness in public place

41(1) A person who is intoxicated must not be or remain in a public place and a person who contravenes this section commits an offence.

(2) A peace officer may arrest, without a warrant, a person found intoxicated in a public place.

[74] The issue of intoxication and reasonable and probable grounds for arrest was recently canvassed in **Irving v. Canada (Royal Canadian Mounted Police)**, (17 February 2000), New Westminster Registry No. S030524 (B.C.S.C.), [2000] B.C.J. No. 424 (Q.L.). In that case, Singh J. began his analysis at para. 31 with the seminal case of **R. v. Storrey** (1990), 53 C.C.C. (3d) 316 (S.C.C.) in which Cory J., at p.324, articulated the conduct required of the arresting officer:

In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a *prima facie* case for conviction before making the arrest.

[75] Singh J. went on to review the degree of intoxication which the police officer must prove in order to fit within the mandate of having reasonable and probable grounds for the arrest. Quoting with approval from *R. v. Robertson* (1978) 42 C.C.C. (2d) 78, [1978] 5 W.W.R. 289 (B.C.C.A.), at para. 32 he states:

However, the decision in *R. v. Robertson* has altered the law in British Columbia. It establishes that a policeman is justified in arresting a person without a warrant if the person being arrested is apparently intoxicated in a public place (my italics). In such circumstances the arrest is lawful. ...

[76] I have accepted the evidence of Constable Vanderford on this issue. The amount of alcohol consumed by the plaintiff on the day in question, together with her demeanour, unsteadiness on her feet and odour of alcohol on her breath, are sufficient indicia that the plaintiff was intoxicated.

[77] I am also satisfied that the plaintiff was indeed creating a public disturbance, because it is clear that it was the plaintiff who had urinated in the parking lot of the Rusty Duck restaurant. This is a public area, and her behaviour was witnessed by a number of people who testified at this trial.

[78] It was also these events which led to the police being called and which resulted in her arrest. I am persuaded that Constable Vanderford did have reasonable and probable grounds to arrest the plaintiff pursuant to s.41 of the *Liquor Control and Licensing Act, supra*, for being intoxicated in a public place.

**Issue 2: Did Constable Vanderford commit a battery against the plaintiff?**

[79] The plaintiff has alleged that, while being placed in the police car, she sustained significant bruising to the back of her legs. Further, the plaintiff alleges that during the booking-in process the police intentionally slammed her hand and arm down on the desk, causing bruising to her left hand and bending her ring.

[80] The theory of the defence is that the bruises on the plaintiff's legs were self-inflicted and that at no time during the booking-in process did the police slam the left arm or hand of the plaintiff against the counter.

[81] The plaintiff has also claimed that the bruises on her left arm and hand were caused by improper police conduct.

[82] The plaintiff sues for assault and battery. I follow the law enunciated by P.H. Osborne in *The Law of Torts*,

(Toronto: Irwin Law, 2000). There, the learned author wrote at p.1:

1) Battery

A direct, intentional, and physical interference with the person of another that is either harmful or offensive to a reasonable person is a battery ... Actual bodily contact is not essential to establish a battery. To grab a person by her clothing or to snatch something from the plaintiff's hand is sufficient ...

[83] Once the plaintiff has proven that the defendant directly interfered with his or her person in a harmful or offensive way, the burden of proof in allegations of battery shifts to the defendant.

[84] There is no action in battery where the police conduct complained of falls within the protection afforded by virtue of s.25 of the **Criminal Code**. That section provides:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

...

(b) as a peace officer or public officer,

...

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[85] The key question to be resolved in this issue is whether the degree of force used by Constable Vanderford, and/or other Central Saanich police officers named in the style of cause, used more force than was necessary in dealing with the plaintiff on the day in question.

[86] In resolving this issue I am mindful of the decision in ***Anderson v. Port Moody (City) Police Department***, (4 August 2000), New Westminster Registry No. S016178, [2000] B.C.J. No. 1628 (Q.L.). In that case, Dillon J. reviewed the authorities dealing with the issue of reasonable force, stating at para. 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. Bottrell* supra at 218; *Allrie (sic) v. Victoria (City)*, [1995] 1 W.W.R. 655 at para 20 BCSC; *Levesque v. Sudbury Regional Police Force*, [1992] O.J. No. 512 (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.

[87] I concur with the comments of Dillon J. and conclude that in the case at bar the amount of force used by Constable Vanderford in effecting the arrest of the plaintiff was reasonable in all the circumstances. Accordingly, it is my conclusion on this issue that the intentional tort of battery has not been made out by the plaintiff.

[88] Regarding the bruises to the plaintiff's arms and left hand, with hindsight the degree of force used by the police officers may have been more than was absolutely necessary. But that is not the test. In the urgency of the moment, they were faced with a drunken, aggressive, unco-operative prisoner. I find that grabbing the plaintiff firmly by her arms was reasonable under the circumstances.

[89] Similarly, the plaintiff has not discharged the first stage of the burden in proving that the defendants caused the bruises on her legs by means of direct or otherwise offensive conduct. That is not to say that I believe the theory of the defence over the theory of the plaintiff, but simply that it was for the plaintiff to tender some evidence to show how the bruises on her legs were caused by wrongful acts of Constable Vanderford or other police officers.

**Issue 3: Is Constable Vanderford and/or other members of the Central Saanich Police Department guilty of gross negligence, causing injuries to the plaintiff?**

[90] The *Police Act*, R.S.B.C. 1996, c.367, s.21 protects police officers from personal liability under certain conditions. The section provides:

Personal liability

21 (1) In this section, "police officer" means a person holding an appointment as a constable under this Act.

(2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.

(3) Subsection (2) does not provide a defence if

- (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
- (b) the action is libel or slander.

[91] The meaning to be given to the term "gross negligence" is its plain meaning under the common law. In *Doern v. Phillips Estate* (1994) 2 B.C.L.R. (3d) 349 (S.C.), affirmed

(1997), 43 B.C.L.R. (3d) 53 (C.A.), Kirkpatrick J. cited with approval the "classic test for gross negligence" enunciated by the Supreme Court of Canada in **Walker v. Coates**, [1968] S.C.R. 599, 64 W.W.R. 449. She noted that in that case, Ritchie J. referred, at p.601, to the Court's earlier decision in **McCulloch v. Murray**, [1942] S.C.R. 141, where Duff C.J.C., at p.145, had defined gross negligence as:

All these phrases, gross negligence, wilful misconduct, imply conduct in which, if there is not conscious wrongdoing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves.

[92] This definition of gross negligence was adopted in the context of police conduct in **Glover v. Magark**, (1 March 1999) Vancouver Registry No. C912286, [1999] B.C.J. No. 472 (Q.L.). In that case, Koenigsberg J. held at para. 12:

I can see no difficulty in applying the principles as set out in the above noted cases. It is obvious that the "particular circumstances" of police acting in the course of their duties, will circumscribe the standard from which there must be a marked departure.

[93] What must be determined in the case at bar is whether the actions of Constable Vanderford, and/or other members of the Central Saanich police department, in arresting or processing

the plaintiff were such a "marked departure" from the standards expected of competent policemen.

[94] The defence tendered the expert evidence of Sergeant McKay, of the Vancouver police department, on the use of force by British Columbia police officers in 1996. I accept his evidence that the proper degree of force to be used in any situation is determined by the officer in considering the subject and his own circumstances.

[95] When Constable Vanderford arrested the plaintiff she was apparently intoxicated and behaving aggressively towards him. Constable Vanderford, acting within his authority as a police officer in responding to a complaint made by a citizen, properly identified the plaintiff as the person causing the public disturbance. During the arrest, I have found that Constable Vanderford used only the degree of force necessary to control the plaintiff. There has been no evidence presented to this court which suggests that Constable Vanderford's actions departed in any way from the standards expected of police officers when arresting people who are resisting them.

[96] During the time that the police officers booked the plaintiff in at the Central Saanich police department, I also conclude that I have been presented with no evidence to suggest that the officers' conduct was grossly negligent. I

must emphasize that the court cannot engage in speculation where the plaintiff has failed to provide evidence as to the cause of injuries.

[97] Accordingly, I dismiss the plaintiff's claim of gross negligence.

**Issue 4: If Constable Vanderford and/or other members of the Central Saanich Police Department were not guilty of such gross negligence, is Constable Vanderford, or such other members of the police department, guilty of simple negligence?**

[98] The "reasonable person" standard applicable in general negligence cases has been held appropriate in the police context, with the substitution of the "reasonable police officer" as the construct for comparison. In *Doern v.*

*Phillips Estate*, *supra*, Kirkpatrick J. held at p.372:

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.

[99] Was the conduct of Constable Vanderford, and/or other officers of the Central Saanich police department, reasonable in the circumstances? I have already concluded that Constable Vanderford, in effecting the arrest of the plaintiff, utilized

only the degree of force necessary, given the circumstances he faced.

[100] In that regard, I emphasize the comments of Southin J.A. in **Berntt v. Vancouver (City)**, [1999] B.C.J. No. 1257, 63 B.C.L.R. (3d) 233, where at p.241, in discussing the police officer's beliefs at the time of the alleged misconduct, she stated:

In a case such as this, if the first two questions are answered "yes", the trial judge must proceed to the third and fourth questions. In so proceeding, he or she should be a doppelganger to the peace officer whose conduct is in issue.

[101] Although **Berntt**, *supra*, dealt with the issue of police conduct in a riot situation, I find that the comment noted above is equally applicable in this case when analysing Constable Vanderford's, and other officers', conduct on the day in question.

[102] The plaintiff alleges that when Constable Vanderford arrested her, he acted negligently, thus injuring her legs. I have concluded that the plaintiff has not provided sufficient evidence on which to base a finding that Constable Vanderford's actions were a cause of the plaintiff's bruises on her legs. Similarly, I have concluded that the plaintiff has not discharged her burden of proving that Constable

Vanderford, or any other Central Saanich police officer, caused the bruises on her left hand.

[103] In the result, I must dismiss the plaintiff's claim in negligence.

**Conclusion**

[104] The plaintiff's claim for damages is dismissed.

[105] If I am wrong on liability, I would have found the plaintiff's claim for damages was proper and would have awarded the amount claimed.

[106] Costs are awarded to the defendant on Scale 3.

"D.D. Owen-Flood, J."  
The Honourable Mr. Justice D.D. Owen-Flood