No. C800692
Vancouver Registry

N THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: JAMES MacDONALD NIBLOCK PLAINTIFF AND: PACIFIC NATIONAL EXHIBITION and CITY OF VANCOUVER DEFENDANTS AND: PACIFIC NATIONAL EXHIBITION THIRD PARTY	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE MACFARLANE
J.N. Laxton, Esq., and J.M. Gropper, Esq.	for the plaintiff
J.G. Sanderson, Esq., and S. Lee	for the defendant Pacific National Exhibition
Date and Place of Trial:	May 25, 27, 28, 29, and June 1, 1981 at Vancouver, B.C.

The plaintiff's claim against the City of Vancouver has been abandoned and the action discontinued against that defendant, which also disposes of the third party proceedings.

The plaintiff's claim against the Pacific National Exhibition (P.N.E.), as occupier of premises, is for damages

arising out of injuries sustained when the plaintiff, a visitor to the annual P.N.E., fell over a railing on the stairs leading from the Showmart building to the exhibition grounds in Vancouver, B.C., between 3:00 p.m. and 4:00 p.m. on August 31, 1979.

Only the question of liability is before me. If the defendant is found liable then the issue of damages will be tried in September.

It is contended that the P.N.E. breached its duty to the plaintiff:-

1. In failing to provide safe access to and from the Showmart building;
2. In constructing and maintaining a "guard-rail" on the stairs to the said building so low as not only to be useless as protection, but which acted as a "trap" capable of causing people to be summersaulted over the rail to the ground below should they stumble or be pushed against it.

The plaintiff is a 56 year old married man, who was employed in 1979 as a core machine operator by a paper company. He was 5 feet 9 inches in height and weighed 145 to 150 pounds. He was awaiting a shoulder operation arising from a work-related injury, but there is no evidence that this problem

interfered with his mobility, or his ability to protect himself from falling. He had poor vision in his right eye, but there is no evidence that this contributed to his fall. The disability is a minor one and it does not, for instance, interfere with his driving a car. He was on the executive of a branch of the Canadian Legion, and as a regular habit had six to eight beers at the Legion on Saturday nights. Evidence given on behalf of his employer, the Union, and the Legion, shows that he did not exhibit any alcohol problems.

The critical factual issue is whether he fell over the railing because it was too low or whether he did so because he had consumed too much alcohol.

The facts are that the plaintiff arrived at the exhibition in mid-morning. At about 11:30 a.m. he left the exhibition grounds and went to a nearby branch of the Legion where he consumed some beer. The plaintiff had some food before or after he left the Legion. He returned to the exhibition grounds in the early afternoon and consumed three glasses of wine in a wine garden, operated in the Forum building by a exhibitor connected with the B.C. Wine Industry. The Forum is the most southerly of three buildings and the Showmart building is the most northerly of that group. The wine garden was carefully supervised. At the time that the plaintiff was there four or five security personnel, in

addition to waiters, were supervising a crowd of about 40 to 50 people. The reports of the security people do not contain any record of any intoxicated person on the premises. The buildings at the P.N.E. are patrolled by police, and there is no evidence of any intoxicated person on the premises that afternoon. No one was called to give evidence to say that they saw the plaintiff that day and that he was showing any signs of intoxication. He says that he was not having any difficulty, and his wife, who spoke to him on the telephone, knew he had been drinking but did not think he was intoxicated. Apparently he stutters when he drinks and she is able to measure his consumption by the extent of his stuttering. The plaintiff had called his wife to say that he was leaving for home. Soon after he went out of the northeast exit of the Showmart building and proceeded down the stairs in question. This is not the main exit from the building, but it was in regular use by visitors to the fair. There is a landing at the top, then 14 stairs to another landing, and an additional 14 stairs to the ground. A hand-rail is on the right side of the stairs to protect people from falling to the ground below. It is the height of this rail which is in question here. The plaintiff recalls being on the stairs, but he does not recall his fall. He has suffered a serious spinal injury which has left him as a triplegic. In the course of the fall he struck his head. The parties have

been unable to find anyone who saw him before or as he went over the rail. One witness, Mrs. dosSantos, was standing in a booth located no more than about four feet from the side of the stairs when she saw the plaintiff in mid-air about three to four feet from the ground. He was face up, with his head towards the stairs. He landed on his back and was unconscious when she went to him. She and another witness placed the body at about ten feet from the bottom of the stairs. Ambulance personnel attended. Mr. Thom, an employee of the St. John's Ambulance Society, observed that the plaintiff had an odour of alcohol on his breath. The plaintiff was taken to the hospital by ambulance and Mr. D.E. Devine, an ambulance attendant, testifies that he smelled alcohol on the breath of the plaintiff and was told that the plaintiff had consumed six beer. A hospital nurse, Mrs. Maclean, testified that the accused told her and another nurse that he had consumed six beer and three wine. The hospital records bear out that testimony. The plaintiff was conscious but somewhat disoriented when he made his statements to the ambulance driver and to the nurses. Blood was taken from the plaintiff at about 4:00 p.m. and was later found to have a level of .223 as the result of a blood serum alcohol test. The City Analyst, E.F. Rideout, testified that the true alcohol level in whole blood would be at a level of .203. His report contains these observations:-

"From the time of the accident until the blood sample was taken I assume was one hour elapsed time. If this is the case and if the blood alcohol level was declining due to the usual loss by elimination (i.e. 15 mg/100ml/hr.) then one would expect the blood alcohol level to be about 218 mg/100 ml. at the time of the accident.

At a blood alcohol level of over 200 mg/100ml. most people would show obvious signs of intoxication. These would be symptoms of muscular incoordination such as deteriorated gait, difficulties with balance and slurred speech. In addition there would be impairment of judgment, care and attention, visual acuity and the other senses.

It is my opinion that a person with a blood alcohol level of about 220 mg/100 ml. would have more difficulty negotiating stairways than when sober. A blood alcohol level of 220 mg/100 ml. would require the intake by a 150 lb. man of at least 11 oz. of any of the hard distilled liquors or at least 7 1/3 bottles of beer or at least 44 fl. ozs. of 10% alcohol by volume wine."

Mr. Rideout, agreed, in cross-examination, that a person who was accustomed to drinking six to eight beers every Saturday night, might exhibit fewer symptoms than a person not accustomed to that amount of alcohol. He also agreed that each individual will react differently to a given quantity of alcohol and he is unable to say that a person with a reading of .220 could not safely navigate the stairs in question. The plaintiff gave conflicting evidence with regard to the amount he had had to drink, and was not prepared to admit that he had as much as he told the nurses. The whole of the evidence, in my opinion, justifies the conclusion that he did have at least six beer and three wine during the afternoon leading up to his fall from the stairs.

The first question to be decided is the height of the railing over which the plaintiff fell.

Mrs. Niblock, assuming that her husband fell from the seventh step above the ground, took measurements on August 22, 1979, and found that the top of the rail was 25-1/2 inches above the nose of the seventh step. From the top of the rail to the ground was 7 feet 5-1/2 inches (89-1/2 inches). P. Henson, a private investigator, accompanied Mrs. Niblock to the site again on December 6, 1979, to take photographs and make measurements. Henson found that the height of the rail from the nose of the seventh step was 25 inches, and from the heel was 29 inches. Those measurements cannot be correct because there is a six inch rise between the steps (24 inches and 30 inches would be consistent with that configuration). The treads on each step were found by Henson to be 11-1/2 inches, and the distance to the ground was 75 inches.

As the defence case was about to close the defendant had not yet called any evidence as to the height of the rail on August 21, 1979. The issue was not only crucial but the defendant had attacked the accuracy of the measurements taken on behalf of the plaintiff. It was impossible to have further measurements taken, or to have a useful view, because the defendant has raised the height of the railing and

changed the configuration of the stairs in 1980. It was clear that the defendant had evidence in its possession of what the actual height had been. I warned counsel for the defendant that if he chose not to call evidence on that point that I would accept the evidence led by the plaintiff which was the only direct evidence I had on the matter.

Reluctantly the defendant called an adjuster, T.R. Davis, who said in effect that he had measured the height of the railing above the nose of the first step and had found it to be 30 inches. It was 27 inches above the nose of the middle platform. The rail was 55 inches from the nose of the upper landing.

That evidence is in conflict with the evidence of A. Schueck, the contractor who built the stairs in 1959, and who says that he built them in accordance with the plans which show that the rail should be 30 inches above the nose of each step and 36 inches above the heel of each step. But the steps were not built in accordance with the plans because the contractor found it necessary to build more steps than were provided therein. No alterations were made to the configuration of the steps from 1959 to 1979.

The evidence supports the conclusion that the plaintiff fell over the rail at a point between ground level and

the middle landing. The evidence of Henson is that the point on the ground below the seventh step is 83 inches back from the concrete pad on the ground level at the base of the stairs. Mrs. dosSantos and Mr. Matheson, who saw the body on the ground, place it at a point ten feet (120 inches) back of the base of the stairs. That evidence would indicate that the plaintiff fell from a step nearer to the middle landing. Neither the measurement made by Henson or the estimate made by dosSantos and Matheson can establish which step the plaintiff was on when he fell. It does however, indicate that the plaintiff did fall after he had left the middle landing and was proceeding down the last 14 stairs.

On balance the evidence justifies the conclusion, in my view, that the railing was probably no lower than 25 inches and no higher than 27 inches at the point at which the plaintiff fell. The railing would be at about thigh level for a person of average height. (The photographs in exhibit 2 illustrate the height of the rail in relation to Mrs. Niblock as she stood next to it on December 6, 1979. By way of contrast, the photographs contained in exhibit 3 illustrate the height of the rail as Mrs. Niblock stood next to it on May 22, 1981, after the guard-rail has been raised by 18 inches. Those photographs indicate the railing to be closerto the shoulder than to the waist.)

The height of the rail at the level from which the plaintiff must have fallen did not comply with the by-law which had been in effect when the stairs were built in 1959 and which required that the railing be 30 inches above the nose of each step and 36 inches above the heel and above each landing.

The height of the rail did not comply with the 1977 by-law which was in effect in 1979 and which required that the rail be 36 inches above the nose of the steps and 42 inches above the heel and each landing. It should be noted, however, that the P.N.E. was not legally obligated to alter the height of the railing in order to comply with the 1979 by-law.

In 1980 at a cost of just under $10,000.00 the P.N.E. raised the level of the railing to 42 inches above the nose of each step or (assuming the measurement in 1979 to have been 26 inches) a rise of 18 inches over the 1979 height. Parenthetically I should say that this subsequent conduct is not proof of negligence, but it does indicate that it would have been relatively easy and economical for the P.N.E. to have avoided the risk of this accident in 1979.

The duty of care owed by the P.N.E. as an occupier of premises is prescribed by s. 3 of the Occupiers Liability Act, R.S.B.C. 1979, c. 303, subsections (1) and (2):-

> 3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, ... on the premises, ... will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises;
>
> (b) activities on the premises; or
>
> (c) conduct of third parties on the premises."

In Weiss v. Young Mens Christian Association of Greater Vancouver (1979), 11 B.C.L.R. 112 at 118, Aikins, J.A. put to rest the suggestion that despite the new statute different standards of care based on different relationships were of continuing relevance. He said:-

> "...in my view, s. 3(1) is comprehensive, in the sense that fully and clearly imposes a duty on an occupier and defines the standard of care necessary to fulfil that duty. Thus, in my judgment, it is unnecessary to an understanding of the standard prescribed by the subsection to refer to any of the specially formulated standards of care laid down in the common law cases. Indeed, to do so is more likely to mislead than assist in understanding what the subsection says. I add only that if the standards are indeed identical then it is unnecessary to go beyond the statutory definition; if they are not, then it will lead only to error to consider any standard other than the one prescribed by the statute."

The question to be considered is what care, in all the circumstances of this case, was reasonable to see that the plaintiff would be reasonably safe in using the premises. Obviously it was reasonable that there should be a guard-rail on the stairs. It ought to have been at a height which would have prevented people from falling off the stairs to the ground.

It ought to have been at a height which took account of the "risk reasonably to be perceived" (the words of Cardoza, A. sited by Freedman, J.A. and adopted by Spence, J. in Campbell v. The Royal Bank of Canada (1964), S.C.R. 85 at 98. The attendance at the fair on weekdays in 1978, ran from 49,000 to 106,000 people. In 1979 the weekday attendance fluctuated between 46,000 and 98,000 people. On a Saturday in 1978 there were 129,000 persons, and on a Saturday in 1979 113,000 persons were in attendance. A risk on such stairs was that there would be a crush of people, and a person might be pushed or forced towards the rail and might stumble and fall. There was a long drop to the ground. It was to be expected that people, in a carnival atmosphere, might be carefree and careless. Liquor was served at three locations on the grounds, and it was to be expected that some persons would be under the influence of liquor.

The railing in question was low. It was four to five inches lower in places than the standard set by the 1959 by-law. It was a foot lower than the standard set by the 1977 National Building Code, and the by-law based upon it which was in effect in 1979. It was 18 inches lower than the standard which the P.N.E. adopted in 1981. Although the P.N.E. was not legally bound to comply with the 1977 standards it should have foreseen danger from having a railing which came

only to the fulcrum point for people of average height. The inadequacy of the rail was demonstrated by the way in which the plaintiff summersaulted over it to the ground. When he was first seen by Mrs. dosSantos he was face up with his head to the wall, and with his feet pointing towards her. To have arrived in that position he must have gone head over heels and struck the wall with his head, causing the injury to his forehead. It is a reasonable inference, I think, that the rail was not only low but was a springboard to injury.

In defence the P.N.E. contends that it could not have reasonably foreseen that this accident would occur. In twenty years no one had fallen over that or any similar rail at Exhibition Park. The premises were regularly inspected, and the P.N.E. had never been warned of any danger on the stairs by fire, police, municipal or insurance inspectors, nor by any member of the public. There is, however, no evidence that any of those persons had put their mind to the question of whether the rail was at a level where it might constitute a trap.

I do not think that an occupier can be relieved of responsibility for a failure to keep his premises reasonably safe by saying that he turned a blind eye to the danger because no one had yet been hurt, and because no one else had warned him of the danger. If the unsafe condition was there

to be seen by someone who was applying his mind to the relevant risks, then it was a duty of that occupier to take reasonable steps to remedy the problem. It could have been done easily and economically.

It is contended on behalf of the defendant that the danger, if any, was visible to the plaintiff who was not unfamiliar with the stairs, having used them on other occasions. The plaintiff was not asked and did not say that he had ever put his mind to the question of whether the rail was so low as to cause a person to pitch over it if he stumbled or was pushed against it. There is no evidence that he even noticed it. I think it unlikely that a visitor to the exhibition, in a holiday mood, would do so. The P.N.E., on the other hand, while it denies any knowledge of a problem with that rail is aware of the dangers of people falling over rails. Although not in similar circumstances such accidents have happened on the grounds. The P.N.E. is in the business of inviting large numbers of people to visit its premises. They vary in age and health and come with different disabilities, temperments, dispositions and habits. Some will be sober. Some will not. Some will be steady on their feet and some unsteady. The P.N.E., as an occupier of premises to which such people will come, is bound to keep them reasonably safe for the use of such persons, and to consider with care and foresee, for instance, whether railings may be too low to prevent people

falling over them if they are jostled, stumble, or stagger against them. The P.N.E. is not an insurer, and is not liable for damages suffered by anyone who falls on a stair, but it is liable if it fails to take reasonable care to keep the premises in a safe condition. In short, such an occupier must be alive to any real danger or trap which might exist on its property. It must be on the outlook for unsafe conditions, and must not leave it to individual patrons or others to discover them. By then it may be too late.

The defendant contends that it could not have foreseen that a man like the plaintiff would visit the premises, a man with a shoulder disability, with defective sight in his right eye, and one who was intoxicated. There is no evidence that the plaintiff's shoulder disability or eyesight played any part in his accident. Even if that had been a factor I think that the P.N.E. ought to have reasonably foreseen that persons with such disabilities would be on the grounds, and to take that into account when deciding safety standards. The P.N.E. contend that they took reasonable steps to guard against the presence of intoxicated persons on the premises. Security personnel were on duty at the wine garden, and policemen were patrolling the grounds. Nevertheless they ought to have foreseen that some persons who had been drinking, and who might be unsteady on stairs, would be part of

the crowd of thousands on the premises, and might go undetected. The extent and effect of drinking by the plaintiff will, of course, be discussed in more detail when I deal with contributory negligence.

I find that the P.N.E. failed to take that care that in all of the circumstances of the case was reasonable to see that the plaintiff would be reasonably safe in using the premises.

The plaintiff was permitted to amend his pleadings during the course of the trial to plead, as paragraph 13 of his statement of claim:-

> "13. Alternatively, the Plaintiff claims damages for the aforesaid injuries and loss for a breach of statutory duty, specifically for breach of the Vancouver City By-Law #2445 which reads:
>
> > 's357 (7) Handrails shall not be less than 30 inches above the nose treads or 36 inches above landings measured vertically.'
>
> In fact, the handrail referred to herein in paragraph 8(c) was only 25 1/2 inches above the nose treads and 29 1/2" above the landing."

The plaintiff contends that the P.N.E. is liable, without proof of negligence, on the basis of the breach of the by-law. I think the by-law may be looked at together with the other evidence in considering whether the defendant has been negligent, but I do not think that liability can rest alone on the basis of the breach of the by-law. I am

not persuaded that the Vancouver Charter has conferred upon the City the power to create rights of civil action to persons aggrieved by the breach of such a by-law. No provision of the by-law has been brought to my attention which in fact purports to give such a right. What the by-law does do is to prescribe penalties for breach of its provisions. So far as the plaintiff is concerned the by-law goes no further than that. I am not persuaded that such a by-law imposes civil liability upon the defendant - see Wynant v. Welch (1943), 1 D.L.R. 13 at 14; Commerford et al v. Board of School Commissioners of Halifax et al, [1950] 2 D.L.R. 207 at 214, 216 - 217.

The defendant contends that the plaintiff failed to take reasonable care for his own safety by becoming intoxicated and thereby disabling himself from becoming aware of the danger of the low railing and of avoiding injury.

The plaintiff had about six beers and three wine over a period of about 3-1/2 hours leading up to the accident. There was no direct evidence as to the effect of the liquor upon him. No one saw him stagger and he appears to have descended about 21 steps before he fell. It is contended on his behalf that if he had been showing symptoms of drunkenness that they would have been observed by the

security personnel in the wine garden. The evidence of the plaintiff is that he was in the wine garden after he had the beer, but his evidence is suspect. The plaintiff says, in effect, that he was not affected by the alcohol and was not unsteady on his feet. His evidence, unfortunately, must be viewed with caution, and does not inspire confidence because he has not been prepared to tell the truth about the amount he had to drink. On discovery, he was positive in saying that he had consumed only two glasses of wine, no mention being made of beer. At trial he admitted to having consumed two beer and three wine. Little weight can now be placed on his evidence as to the effect of the alcohol upon him. I think it had more effect upon him than he is prepared to admit. The independent evidence is that he does not have an alcohol problem, that he is able to consume six to eight beers on a Saturday night without showing signs of drunkenness, and he has been a moderate drinker for a number of years. It can be inferred that he probably has developed some tolerance to alcohol. The evidence of the City Analyst is that a person who had consumed that much alcohol "would have more difficulty negotiating stairs than a sober man". It might effect his gait and his balance. He is not prepared to say categorically that no man with that reading could navigate the stairs safely, but the effect of his evidence is that such a man would have more difficulty in walking

on the stairs than on the level and would probably be prone to stagger. Viewing the evidence carefully, but realistically, I have concluded that the alcohol probably contributed to his fall. I think, however, that the major cause of the plaintiff's injuries was the dangerously low railing, which was a trap into which the plaintiff stumbled. Probably if he had been more sober he could have avoided the danger. Fault is apportioned on a basis of 75% to the P.N.E. and 25% to the plaintiff.

June 9, 1981

Vancouver, B.C.