

IN THE MATTER OF a complaint by Brian Richard Nolan pursuant to the ***Royal Newfoundland Constabulary Public Complaints Regulations***

AND IN THE MATTER OF a Public Complaint Adjudication pursuant to the ***Royal Newfoundland Constabulary Act, 1992***, R.S.N. 1990, c. R-17.

BETWEEN:

**ROYAL NEWFOUNDLAND CONSTABULARY
PUBLIC COMPLAINTS COMMISSIONER**

AND:

**CONSTABLE KRISTA CLARKE (DAY), CONSTABLE
LARRY HICKEY, CONSTABLE GLENN BARRY AND
CONSTABLE LESTER PARSONS**

DECISION

This decision follows a hearing conducted pursuant to the provisions of the **Royal Newfoundland Constabulary Act, 1992** (the "Act") and the **Royal Newfoundland Constabulary Public Complaints Regulations** (the "Regulations"), into a complaint of Mr. Brian Nolan, made shortly after an incident which occurred on Water Street, St. John's, in the early hours of July 8, 1993. The References to an Adjudicator set out the particulars of the allegations against each of the four police officers.

The three allegations against Cst. Krista Day can be summarized as follows:

- (1) that she did, without good and sufficient cause, arrest or detain Mr. Nolan, contrary to s. 3(1)(a) of the **Regulations**;
- (2) that she did use unnecessary force with a person, namely Mr. Nolan, contrary to s. 3(1)(b) of the **Regulations**; and
- (3) that she was discourteous to a member of the public, namely Mr. Nolan, by calling him "faggot", "queer" and other derogatory terms, contrary to s. 3(1)(c) of the **Regulations**.

The two allegations against each of the other three officers, Cst. Larry Hickey, Cst. Lester Parsons, and Cst. Glenn Barry, are the same. They may be summarized as follows:

- (1) that (each police officer) did aid or abet Cst. Krista Day in a contravention of s. 3(1)(a) of the **Regulations**, by failing to act to prevent the wrongful arrest or detention of Mr. Nolan, while under a statutory duty to do so contrary to s. 3(1)(g) of the **Regulations**; and
- (2) that (each police officer) did aid or abet Cst. Krista Day in a contravention of s. 3(1)(b) of the **Regulations** by failing to act to prevent the unnecessary use of force by Cst. Day on Mr. Nolan, while under a statutory duty to do so, contrary to s. 3(1)(g) of the **Regulations**.

BACKGROUND FACTS

Brian Nolan

On July 7, 1993, Mr. Nolan went to work at 5:00 a.m. He worked part of a shift for another employee before his own shift commenced at 9:00 a.m. Shortly after 5:00 p.m. he was picked up at work by a friend, Shawn Hyde. On the way to the home of a mutual friend, Ms. Lynn Andrews, Mr. Nolan and Mr. Hyde stopped at a submarine sandwich shop where they each had a sandwich. They also picked up a flask of gin as a small birthday celebration for Ms. Andrews was planned.

Ms. Andrews' home was on Prescott Street in St. John's. In July, 1993, Mr. Nolan and Mr. Hyde were sharing a house in Paradise, but prior to moving to Paradise, had shared the home with Ms. Andrews. Mr. Nolan and Mr. Hyde each retained keys to the Prescott Street home, as they frequently stopped by there, when in St. John's, and on many occasions, stayed overnight.

On July 7, 1993, Mr. Nolan and Mr. Hyde arrived at Ms. Andrews' house sometime around 5:30 p.m. Mr. Nolan had a bath to relax and freshen up and drinks were poured from the gin that Mr. Nolan and Mr. Hyde had brought. Sometime around 7:00 p.m., Geoff Parsons, who shared the house with Ms. Andrews arrived home. He had a drink of gin. It is likely that there was still a small amount of gin left when it was decided to purchase some beer. Mr. Nolan went across the street and purchased a dozen beer sometime around 8:30 p.m. The flask of

gin was probably consumed that evening with each of Mr. Nolan, Mr. Hyde and Ms. Andrews having two drinks and Mr. Parsons having one.

Around the time the beer arrived, it was decided to order Chinese food. The food arrived shortly after 9:00 p.m. and Mr. Nolan, Mr. Hyde, Ms. Andrews and Mr. Parsons ate. All four were drinking beer before and during the meal. Following the meal, Mr. Nolan cleaned up.

Around 11:30 p.m. Mr. Nolan and Mr. Hyde left to go downtown, to the Ship Inn, which was only a few minutes walk away. By this time, Mr. Nolan had consumed 2 drinks of gin and 2 or 3 beer. Mr. Nolan and Mr. Hyde planned to stay over at Prescott Street that night. Both Ms. Andrews and Mr. Parsons indicated that Mr. Nolan and Mr. Hyde were quite fine when they left, and were not showing any adverse effects from the alcohol they had consumed.

Mr. Nolan and Mr. Hyde were at the Ship Inn for around one hour, although neither was paying any particular attention to the time. During their stay there, Mr. Nolan had one or 2 beer (probably 2) and Mr. Hyde had 1 beer and a coffee with liqueur. They happened to meet up with Ron Knowling there. He joined them for a period of time before they all left and went to Solomons which was just a few hundred feet away at most.

Solomons was somewhere between one quarter and one half full. While at Solomons, Mr. Nolan, Mr. Hyde and Mr. Knowling spent most of their time in the bar area. Mr. Nolan spent most of his time talking with Mr. Hyde and Mr. Knowling although he chatted briefly with a few other people. He bought beer for himself and Mr. Hyde, and possibly for Mr. Knowling. Mr. Nolan had 1 or 2 beer at Solomons, Mr. Hyde had more.

Mr. Nolan estimated that it was around 1:45 a.m. on July 8, 1993, that he decided to leave, to walk back to Prescott Street. He indicated that he was feeling fine at the time, but was tired. He had to work the next day (actually later that day), but not until 2:00 p.m. Before he left he spoke to Mr. Hyde and checked to make sure that Mr. Hyde had his key to Ms. Andrews' house. At this time there were still 2 or 3 beer lined up on the bar for Mr. Hyde. Mr. Hyde was not concerned about Mr. Nolan's ability to get home, and likewise Mr. Nolan was not concerned about Mr. Hyde's. Both had been downtown drinking together many times in the past and had never had any difficulty walking back up to Prescott Street.

It was after Mr. Nolan left Solomons that he encountered the four police officers. As the evidence of what happened then and after is conflicting, it will be dealt with in more detail below.

Mr. Hyde stayed on at Solomons until around 2:30 a.m. Bar sales closed before this but he stayed to finish the beer that had been purchased prior to Mr. Nolan leaving. At no time had he, Mr. Nolan or Mr. Knowling seen any police officers come into Solomons while they were there, nor did they see any disturbance. Mr. Hyde walked up to Prescott Street via the steps leading past the Ship Inn, to Duckworth Street, across Duckworth Street and up the steps to Victoria Street, up Victoria Street to Gower and along Gower to Prescott. When Mr. Hyde arrived at Prescott Street he noticed that Mr. Nolan was not here. He wondered where Mr. Nolan was but thought that he had perhaps run into some friends in the area. He was still not

concerned about Mr. Nolan's ability to get home by himself. In Mr. Hyde's opinion Mr. Nolan was not drunk, he was not slurring, spilling beer, or singing (which many witnesses noted was a sign that Mr. Nolan was intoxicated). Based on past experience, Mr. Nolan was able to get home quite well even on occasions when he had considerably more to drink than that night.

Mr. Hyde fell asleep and did not wake up until around 7:00 a.m. when he saw Mr. Nolan in the bedroom doorway. He described Mr. Nolan as looking like a ghost. He was white and looked to be in shock. Mr. Nolan started telling Mr. Hyde about his encounter with the police, and his detention at the city lock-up. He had difficulty getting words out, he was so upset and cried several times in the process. The crying in fact awakened Ms. Andrews and Mr. Parsons, who both described Mr. Nolan as being very distraught and sober when they saw him around 7:15 or 7:30 a.m. In the opinions of Mr. Hyde, Ms. Andrews and Mr. Parsons, all of whom had known Mr. Nolan for many years, Mr. Nolan was clearly traumatized by what had happened to him.

Police Officers

Cst. Krista Day and Cst. Glenn Barry became members of the Royal Newfoundland Constabulary in November, 1990. They received 11 months of training at Holland College, which included training in the **Criminal Code**, traffic enforcement and control, self defence, and transactional analysis; ie. dealing with people in different situations. Cst. Larry Hickey and Cst. Lester Parsons, joined the Royal Newfoundland Constabulary in April of 1984 and 1985 respectively. Each underwent 6 months training in the same areas as Csts. Day and

Barry. On July 7-8, 1993, all four officers were working with the Patrol Division. Cst. Day and Hickey were in a police car assigned to the downtown area of St. John's. Csts. Barry and Parsons were assigned to the police van which was patrolling the downtown area, but was also available to respond to calls where it may be necessary to have the van present for the purpose of transporting either difficult people or numerous people.

At approximately 2:00 a.m. on July 8, 1993, Cst. Barry and Parsons were dispatched to go to a complaint of a disturbance at Solomons on Water Street. Csts. Day and Hickey overheard the call and being in the area responded as a back up unit. The complaint had been phoned into the Royal Newfoundland Constabulary by the bartender at Solomons who indicated that two people were causing a disturbance at the club. He provided the names of these individuals to the police. The names were not passed on to the responding officers by the dispatchers. It was not Mr. Nolan, or anyone else involved in this matter who was responsible for the disturbance.

Csts. Day and Hickey arrived in the area first. They parked their police car on Water Street immediately to east of the laneway next to Solomons (hereinafter referred to as Solomons Lane) and waited for Csts. Barry and Parsons to arrive. Csts. Barry and Parsons arrived very shortly thereafter and parked on Water Street, a short distance behind the other police car. All four officers gathered together very briefly before entering the bar to prepare themselves. At this time Cst. Parsons stated that they were going into a "gay bar". He wanted the others to be aware of that, if they were not already, so that they would not be surprised. The other

three officers were, however, all previously aware that Solomons was a bar frequented by homosexuals.

All of the officers noticed a male sitting on the steps (which lead from Water Street to Duckworth Street in Solomons Lane) before they went into Solomons. All suspected that this person might be one of those responsible for the disturbance. However, none of the officers approached the man before entering the bar.

Upon entering the bar, Cst. Barry spoke with the bartender while the others generally observed the activity in the club. The bartender advised that the people responsible had left and that no further action was necessary. All four officers then left the bar, within one or two minutes of entering. What following from there is at best confusing. Shortly after exiting Solomons the encounter with Mr. Nolan occurred.

THE ENCOUNTER BETWEEN NOLAN AND THE POLICE OFFICERS

It is the encounter between Mr. Nolan and the four police officers that is of specific concern to me. The evidence in this area is quite conflicting among the various witnesses, and in some instances, a particular witness's evidence is internally inconsistent.

Mr. Nolan's Account

Mr. Nolan testified that as he left Solomons through the main door which faced towards Water Street, he started to turn left to walk up Solomons Lane to the steps leading to Duckworth Street. As he started to turn, he notice the four police officers standing 10-15 feet away on either the sidewalk, or in the lane, near the guardrail at the corner of the parking lot. He noticed the officers looking at him intently which caused him to feel nervous and uncomfortable. When he noticed that one of the officers was female he felt a little more comfortable. Although Mr. Nolan had no previous dealings with the police, he had general concern that dealings between the police and members of the gay community were sometimes confrontational.

Mr. Nolan testified that as he started to head up Solomons Lane Cst. Day approached him and said "What's the matter faggot? Have you go no place to go faggot? We've got just the place for you!" He said that Cst. Day then grabbed him and started moving him towards the police car and as she did she kicked at him - not so much to injure him, but rather to move him along. He was then put into the back seat of the police car by Cst. Day and one of the other officers.

Mr. Nolan described Cst. Day's tone during the encounter as being vicious. He was afraid and consequently said nothing. He was not asked his name, address or where he was going. He stated he was not asked to perform any sobriety tests nor was he advised of the reason for his arrest. He said that as this was going on the other officers were certainly near enough to hear what was being said but they said nothing and took no action to intervene. He said that the language used displayed an obvious prejudice and he felt any protest on his part would have brought physical retribution

Mr. Nolan testified that he was then taken to the lock-up, which was a very short drive. During that drive, he said, verbal abuse continued from Cst. Day. Upon arrival at the lock-up, Mr. Nolan indicated that he was taken inside, his shoes, money, belt and other belongings were taken and he was put into a cell. He described himself as being in a state of shock by this point. He said he felt safer once he was inside the cell as there were bars between him and the officers.

Mr. Nolan testified that after a short time in the cell, he banged on the bars in the cell door and shouted out trying to get the attention of a supervisor. He said he could hear people outside but no one responded. When he finally realized it was futile he lay down and went to sleep. There were three other people in the cell, or drunk tank, but they were all asleep. Mr. Nolan indicated that at no time was he advised of the reason for his arrest, nor was he advised of his right to contact counsel or given an opportunity to exercise that right. He stated that at the lock-up he made no comments about being gay or about either sexual harassment or gay bashing.

Mr. Nolan testified that the next morning he was awakened and let out of the cell. While at the counter collecting his belongings he requested the name of the female officer who brought him in because he had been verbally harassed. He said he was not given that information, but as a result of his request ended up in a physical encounter with one of the warders, which resulted in him being put back into the cell for a short time before he was ultimately released. Once released he walked up to Ms. Andrews home on Prescott Street.

The Police Officers' Accounts

Cst. Krista Day

Cst. Day testified that before she and the other police officers made their way into Solomons she noticed a man on the steps (further up Solomons Lane) trying to make his way up. She said he appeared very unsure on his feet, he was taking the steps slowly, hanging onto the rail. He then sat on the first landing. She testified that she said to Cst. Hickey that they should "DIP" the man if they were not going on the call. She had formed this opinion before getting out of the police car. They then proceeded into Solomons.

Upon exiting Solomons, Cst. Day started back towards her police car. When she was on the sidewalk, 5-10 feet away from her car, she took a routine look around, and noted the same man making his way down the stairs. She said the man did not seem to be sure where he was going; he had no purpose. She then said to Cst. Hickey, "That's our "DIP", " and yelled out for the man to stop. Cst. Day said that at this time the man was by the stairs and she was at the

corner of the guardrails. She said Cst. Hickey then yelled out to the man as he did not stop upon her order.

Cst. Day testified that she and Cst. Hickey walked towards the man and caught up with him near the door to Solomons. She observed him as he looked at them. She said that he wasn't focused and there was a strong smell of alcohol coming from him. She described the man as having his feet planted as if waiting for something to happen. He then started yelling about police harassment. This was before she had touched him or said anything to him.

Cst. Day testified that she told the man (Mr. Nolan) that he was not allowed to be drunk in public, that it was an offence and that he was being arrested or detained for it. She told him he would get a place to sleep for a few hours. She then touched him on the shoulder. She said Mr. Nolan then shrugged or knocked her hand off his shoulder, at which point Csts. Parsons and Hickey took him to the police car. Cst. Day acknowledged that she did not ask Mr. Nolan his name or where he was going before detaining him. She said where he was going was none of her business, and they would get his name at the lockup. She also acknowledged that there was no attempt made to determine if anyone in Solomons knew who he was as there were "too many people in the world to ask".

Csts. Day and Barry went back into Solomons to speak to the bartender to obtain descriptions of the two people involved in the disturbance as Csts. Parsons and Hickey took Mr. Nolan. Cst. Day testified that the descriptions given did not match Mr. Nolan. She then exited

Solomons and returned to her police car where she advised Cst. Hickey that the descriptions did not match. She said she then told Mr. Nolan again that he was being detained for being drunk in public and that he would be brought somewhere to sleep for a few hours. She indicated that he simply sat in the back seat and said nothing either then or on the way to the lock-up.

Cst. Day testified that once at the lock-up Mr. Nolan raised the issue of sexual harassment while he was at the counter area being processed. She said Mr. Nolan stated that this was only being done to him because "I'm queer". She said she replied that she didn't know him or anything about him. She had no idea of his sexual orientation. She testified that while being processed, Mr. Nolan asked for their names and was told "Hickey and Clarke" (her name at the time) and was offered a card by Cst. Hickey, which was turned down.

During cross-examination Cst. Day confirmed that she quite specifically remembers Mr. Nolan using the word "queer" to describe himself. She was quite adamant that she did not call him "faggot". Cst. Day was uncertain whether Mr. Nolan was advised of his rights under the **Charter**. She did not think that she advised him.

Cst. Day was quite satisfied that Mr. Nolan was sufficiently intoxicated to detain. She boldly stated that she had never been wrong about someone she had detained as they had always been intoxicated.

Cst. Parsons

Cst. Parsons testified that on the way into Solomons he noticed a man sitting, sort of "half-slumped" on the steps in the laneway. He thought to himself at the time that the man may be one of the people responsible for the disturbance. After coming out of the bar, as he was walking back to the police van, Cst. Parsons noticed that something had happened, but he was not sure what. He noticed Cst. Hickey talking to the man who had been on the stairs. They were over in the area by the guardrail near the corner, not by the door to the bar. He said that at one point the man (Mr. Nolan) asked why he was being detained and Cst. Day told him that he was being detained because he was intoxicated.

Cst. Parsons and Cst. Hickey then took Mr. Nolan by the arm and escorted him to the police car. On the way, Mr. Nolan complained about police harassment which struck Cst. Parsons as strange. He said it was Cst. Hickey's decision to detain Mr. Nolan but he did not have any problem with that. If he did he would have said something. Cst. Parsons noticed nothing about Mr. Nolan to tell him that Mr. Nolan was not drunk. He had not, however, seen Mr. Nolan walk nor did he have any conversation with him. He did detect a strong smell of alcohol from Mr. Nolan.

Cst. Parsons did not hear anyone say the words "faggot" or "queer". If they had been said he thought he would have heard them.

Cst. Parsons confirmed that it would not be normal practice to conduct any sobriety tests on someone before detaining under the **Detention of Intoxicated Persons Act** (the "D.I.P.

Act"). He would know when a person is drunk by observation. Additionally, he indicated that generally persons detained under the **D.I.P. Act** are not advised of their rights under the **Charter** because they are too intoxicated to understand.

Cst. Glenn Barry

Cst. Barry noticed a man on the steps while he was on his way into Solomons. Coming out of the bar he again noticed him on the steps, sitting, sort of slumped over, a few steps below the first landing and he commented that this man may have been one of the people responsible for the disturbance. When he was over by the police van, Cst. Barry turned around when he heard Cst. Hickey and Cst. Day shout out to the man. He then went over to where they were, which was by the door into Solomons.

Cst. Barry described the man (Mr. Nolan) as having a "blank look", a "drunk look" about him. He noticed Cst. Hickey speaking with him and overheard something about harassment. He did not hear Cst. Hickey say anything. Cst. Barry stated that Cst. Hickey then took Mr. Nolan by the arm, at which time Mr. Nolan just shrugged his arm away from Cst. Hickey. Cst. Day was next to Cst. Hickey at this time. Cst. Day and Cst. Barry then went back inside the bar to speak with the bartender to get a description of the people who had caused the disturbance. When they got out of the bar, Mr. Nolan was already in the police car. Cst. Barry had no further contact with Mr. Nolan.

Cst. Larry Hickey

Cst. Hickey testified that he and Cst. Day arrived in the area of Solomons first. They parked their car and waited until Csts. Parsons and Barry arrived. While waiting he noticed two men come out of Solomons, one turned right and headed towards Water Street while the other turned left and headed up Solomons Lane towards the steps. He described both men as being extremely intoxicated. He stated that the man who headed towards the steps went up and sat on the steps.

When the other police officers arrived, they all got out and went into the club. He thought that Cst. Parsons spoke with the bartender. (It was actually Cst. Barry.) As they were all coming out, Cst. Hickey noticed the man who had been on the steps heading back towards Solomons. The man was in the laneway at this time several feet from the bottom of the steps.

Cst. Hickey stated that Cst. Day approached the man (Mr. Nolan). He believed Cst. Day had spoken to him first. He noticed Mr. Nolan brush Cst. Day's hand off his shoulder. Cst. Hickey then went over to where they were, which was about 5 feet away from the door to Solomons.

Cst. Hickey had no doubt that the man was heading back into Solomons, nor did he doubt that it was the same man who they had all seen before they went into the bar.

Cst. Hickey stated that after Cst. Day's hand was brushed away he stepped in. He had not, up to this point heard anything said between Cst. Day and Mr. Nolan although he believed that if anything had been said, he would have heard it. He noted that Mr. Nolan showed several

signs of impairment, namely, blood shot eyes, slurred speech and unsteadiness on his feet.

Cst. Hickey stated that Mr. Nolan started complaining about police harassment and became belligerent. He told Mr. Nolan that he would have to come with him, that he was being detained and would be taken somewhere to sleep it off. Cst. Hickey stated that it did not seem as if Mr. Nolan understood what he was being told. In Cst. Hickey's opinion, Mr. Nolan was extremely intoxicated. He was concerned that Mr. Nolan could have stumbled and fallen or wandered into traffic. He also believed that Mr. Nolan was being a nuisance as he thought that Mr. Nolan was one of the people responsible for the disturbance. In fact, Cst. Hickey stated that he continued to believe that Mr. Nolan was one of those responsible even after the descriptions obtained from the bartender did not match. He maintained that belief up until he was advised months later of the names of those who were responsible for the disturbance.

Cst. Hickey stated that he and Cst. Parsons escorted Mr. Nolan to the police car and that once in the car, Mr. Nolan just babbled on "like other drunks". Cst. Hickey did not pay attention to what Mr. Nolan was saying. He made no attempt to find out anything about him until they arrived at the lock-up.

Cst. Hickey testified that once at the lock-up, Mr. Nolan repeated his complaint about police harassment several times, and also complained of sexual harassment. This was the first time he had ever heard anyone complain about being harassed because they were gay. Mr. Nolan did not complain to anyone specifically; he just made general complaints. Cst. Hickey stated that he did not pay much attention to Mr. Nolan as he was just interested in getting the

necessary information from him to complete the forms. He said he had to ask Mr. Nolan several times for his name and date of birth. Cst. Hickey stated that he did not respond to Mr. Nolan's complaints at the lock-up and he did not recall whether Cst. Day did. Cst. Hickey said that his entire dealings with Mr. Nolan that night lasted only 5-6 minutes.

Cst. Hickey did not advise Mr. Nolan of his rights under the **Charter**. It is not his practice to do so when someone is detained under the **D.I.P. Act**. He did not inquire as to whether there was anyone who could take him home. He did not offer the use of the phone to Mr. Nolan, although he stated he would have let him do so if he had asked.

Other Evidence

During the hearing, four warders from Her Majesty Penitentiary also testified. Lt. Morris Power, who was completing his last shift as a correctional officer before his promotion to lieutenant, was on duty when Mr. Nolan was brought into the lock-up shortly after 2:00 a.m. He was relieved just before 7:00 a.m. by Correctional Officer Barry Whitty who shortly thereafter released Mr. Nolan. Correctional Officers Owen Devereaux and Robert Pinsent, (who was then on on-the-job training), were both present throughout Mr. Nolan's stay.

Rather than review in detail the evidence of the four correctional officers, I will restrict myself to those parts which are relevant to the issues before me.

The correctional officers present when Mr. Nolan arrived all described him as being drunk or intoxicated. They all noted some or all of the "usual signs of impairment"; ie. smell of alcohol, blood shot eyes, slurred speech, and staggering. He was not "falling down drunk". They all stated that Mr. Nolan complained of sexual harassment while he was being processed; more specifically that he was being harassed "because he was a homosexual". To the correctional officers it was just a routine admission of someone who was intoxicated. Mr. Nolan was not offered the use of a phone upon his admission because he was too drunk. He was described as not being aggressive.

For some time, after he was placed in the cell or "drunk tank", Mr. Nolan rattled the bars and called out. Correctional Officer Power checked on him on one occasion but did not recall what Mr. Nolan wanted.

When Mr. Nolan and the three other men in the "drunk tank" were being released, just before 7:00 a.m., they were all described on their release forms as being sober. This simply meant that they knew who they were and could find their own way to wherever they were going.

At the counter, while collecting his belongings, Mr. Nolan became quite upset and wanted the "name of the female officer who called him a faggot". Correctional Officer Whitty told Mr. Nolan that Cst. Larry Hickey was the arresting officer but he did not know the name of the female. Correctional Officer Devereaux who did know, did not speak up to give Mr. Nolan the information. Mr. Nolan became upset over this and he was then restrained by Correctional

Officer Devereaux and placed back into the cell for a short time before he was released. I have not described, in detail, the encounter between Mr. Nolan and Correctional Officer Devereaux and what led up to it as it is not relevant to this proceeding.

Paul McCormick

Mr. McCormick was at Solomons very briefly on July 8, 1993. He saw two police officers come into the bar. Shortly after that he left and as he went out the door noticed four police officers standing over near the corner of the guardrails. He heard the door open behind him and turned briefly to see Mr. Nolan coming out. He then got into a car and left. He had not been drinking.

Dr. Theodore B. Hoekman

Dr. Hoekman is an Associate Professor of Biophysics in the Faculty of Medicine, at Memorial University. He has given expert evidence in the area of absorption, distribution and elimination of alcohol in the human body before many courts in the province. In this hearing he was accepted as an expert in that field and permitted to give opinion evidence. The purpose of Dr. Hoekman's evidence was to estimate the blood-alcohol level of Mr. Nolan at various times, and thereby attempt to more scientifically determine his level of impairment. As there was no actual measurement of Mr. Nolan's blood-alcohol level, Dr. Hoekman was limited to using generally accepted formulas. Additionally, as some of the required information was not known, estimates had to be made.

On the assumption that Mr. Nolan drank two 12 oz. drinks of gin between 6:00 - 7:30 p.m. and then 7 regular strength beer between 7:30 p.m. and 2:00 a.m., Dr. Hoekman estimated his blood-alcohol level at 2:00 a.m. to be 185 mg of alcohol per 100 ml of blood (mg/100 ml). Taking into account what Mr. Nolan had to eat during that period of time (the food factor), his blood-alcohol level would likely have been reduced by 20-30 mg/100 ml, thus giving a revised estimate of 155-165 mg/100 ml at 2:00 a.m. I note that this also assumes that all alcohol consumed was completely absorbed by 2:00 a.m. Complete absorption would normally take 30-60 minutes, therefore, any alcohol consumed by Mr. Nolan in the 30-60 minutes before 2:00 a.m. may not have been completely absorbed.

If Mr. Nolan had consumed more beer, or for that matter less beer, his blood-alcohol level would increase or decrease (as appropriate) by about 30 mg/100 ml for each beer.

With respect to elimination, the average male of Mr. Nolan's physical stature will eliminate 15-20 mg/100 ml per hour. Therefore, between 2:00 a.m. and 7:00 a.m. Mr. Nolan's blood-alcohol level would have decreased by 75-100 mg/100 ml. Dr. Hoekman's best estimate, based on the information presented was a reduction of 80 mg/100 ml between 2:00 a.m. and 7:00 a.m.

On the assumption that Mr. Nolan had 2 drinks of gin, and somewhere between 5 and 8 beer, the table below sets out the estimated blood-alcohol levels at 2:00 a.m. and 7:00 a.m. Again this assumes complete absorption of all alcohol consumed.

	2:00 a.m. Highest Estimate	2:00 a.m. Reduced by food factor	7:00 a.m.
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5 beer (+ 2 drinks)	120	100	20
6 beer (+ 2 drinks)	152	120	40
7 beer (+ 2 drinks)	185	155	80
8 beer (+ 2 drinks)	218	185	105

Dr. Hoekman was asked to express his opinion on the state of intoxication of individuals at certain blood-alcohol levels. Dr. Hoekman was only able to give generalities because he had not had occasion to observe Mr. Nolan at various blood-alcohol levels. Dr. Hoekman indicated that most people have a pattern in how they react to alcohol, that is, they react the same way all the time in the absence of some unusual circumstance. He said he would expect that people who have seen an individual regularly at various stages of impairment would be good judges of how an individual is reacting to alcohol. He stated that alcohol affects the motor control but at the same blood-alcohol level different people would be at different levels of impairment, and would demonstrate different signs. He would expect that at a level of 150 mg/100 ml the average person would be affected in a major way and would be noticeably impaired. Dr. Hoekman also stated that a long period of time without sleep before drinking may cause a person to become more sensitive to the alcohol and thus the symptoms demonstrated would be more extreme than usual; a person would be more impaired than usual at the same blood-alcohol level. Stress could also have the same result.

BURDEN AND STANDARD OF PROOF

There is no question that burden of proving the allegations rests with the counsel for the Commissioner. There is no burden on the police officers to disprove anything. The standard of proof is set out in s. 33 of the **Act** which requires that all determinations be made on the balance of probabilities. The issue of just what "balance of probabilities" is, has been raised by Mr. Wicks, as counsel for the police officers.

Mr. Wicks put forward the case of **Re Bernstein and College of Physicians and Surgeons** (1977), 15 O.R. (2d) 447 (Ont. H.C.) in which the Divisional Court, dealt with the standard of proof in professional disciplinary matters, which had been previously held to be a "balance of probabilities". The court concluded that "balance of probabilities" had never been precisely formulated and that it must mean more than a mere mechanical comparison of probabilities independent of the belief in the reality of the factual occurrence of the alleged event. The court found that the proof must be clear and convincing and based on cogent evidence.

Since **Bernstein** this issue has been considered by a number of courts. In 1982 the Supreme Court of Canada considered the standard of proof appropriate in civil cases in **Dalton Cartage Company Limited v. The Continental Insurance Company and St. Paul Fire and Marine Insurance Company**, 40 N.R. 135, and concluded that there was no different or shifting standard of proof. Chief Justice Laskin said the following at p. 140:

In my opinion [the trial judge] in dealing with the burden of proof could properly consider the cogency of the evidence offered to support proof on a balance of probabilities and this is what he did when he referred to proof

commensurate with the gravity of the allegations ... There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.

Laskin, C.J.C then went on to hold that there has been no departure from the standard of proof based on a balance of probabilities, and that it is not a shifting standard. He stated at p. 141:

The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

Looking at this issue another way, a more serious allegation, or, one which has a low probability of occurring in everyday life, will require a greater degree of evidence than a less serious, and accordingly more likely, allegation in order to make it sufficiently probable, thereby satisfying a court of its occurrence.

As suggested by Sopinka and Lederman in **The Law of Evidence in Canada**, (1992) at p. 143, "*Simply put the trier of fact must find that the existence of the contested fact is more probable than its non existence.*" In some cases, therefore, depending on the seriousness of the allegation, very cogent evidence may be necessary to satisfy the trier of fact.

ANALYSIS

Excessive Force Allegation

With respect to the allegation of excessive use of force I am satisfied that there was no unnecessary force used in Mr. Nolan's detention. Mr. Nolan's evidence about being taken to, and placed into, the police car by Cst. Day is quite different from that of the police officers who all testified that it was Csts. Hickey and Parsons who escorted Mr. Nolan and not Cst. Day. Additionally, Mr. Nolan's only evidence with respect to the use of force was his description of Cst. Day kicking at him trying to move him along to the car. As the criminal definition of force includes touching, any arrest or detention will involve the use of force. Mr. Nolan's demonstration of Cst. Day's actions suggested that the degree of force was minimal, certainly not excessive. I note further that Mr. Whalen, as counsel for the Commissioner, did not strenuously argue this issue. In my view then it is not necessary to attempt to reconcile the evidence on this issue, as regardless of which version I accept, the allegation is not substantiated.

Improper Detention Allegation

Sections 4 and 5(1) of the **Detention of Intoxicated Persons Act** provide as follows:

4. (1) *Where a peace officer finds in a place to which the public has access a person who is in an intoxicated condition, he or she may, where that peace officer is of the opinion that the person may*
 - (a) *be a danger to himself or herself;*
 - (b) *be a danger to others; or*
 - (c) *cause a nuisance.*

take that person into custody.
- (2) *Where a peace officer takes a person into custody under subsection (1), the peace officer may escort that person to a detoxification centre.*
5. (1) *Where a person is taken into custody under section 4, the person having custody of him or her shall release that person*
 - (a) *on his or her recovering sufficient capacity to remove himself or herself without danger to himself or herself or others and without causing a nuisance; or*
 - (b) *where an application is made sooner by*
 - (i) *a member of his or her family, or*
 - (ii) *a person of the age of majority*

who appears to be suitable and capable of taking charge of the person, into the charge of that applicant.

These provisions do not provide police officers with broad and unfettered powers to arrest persons who are under the influence of alcohol. It is implicit in the wording that not only must the person be intoxicated, but that there must also be either some immediate safety concern

(for that person or others) or some concern for the public order. The requirement that the police officer form an opinion, is no different than many other statutory provisions. The opinion must be based on evidence sufficient to justify the formation of that opinion. There must be reasonable grounds.

It is difficult to resolve the matter concerning Mr. Nolan's arrest, and whether or not there was sufficient cause for it. It is quite clear that Mr. Nolan had quite a bit to drink that night. I do not believe, however, looking at the matter objectively, that he could be classified as extremely intoxicated. Based on Dr. Hoekman's evidence, accepting that Mr. Nolan had 7 beer plus 2 drinks of gin over the 8 hour period from 6:00 p.m. to 2:00 a.m., his estimated blood-alcohol level would have been 155 mg/100 ml at 2:00 a.m. This assumed that Mr. Nolan had completely absorbed the alcohol in the last beer that he consumed. It is highly unlikely that such was the case. It is, therefore, appropriate to estimate Mr. Nolan's blood-alcohol level at 2:00 a.m. at around 130-140 mg/100 ml. Someone at this level is substantially over the legal limit to operate a car and would clearly be impaired for that purpose. That, however, is not the issue. The issue is whether Mr. Nolan was so intoxicated that he was a danger to himself, or a nuisance.

Mr. Nolan's friends, Mr. Hyde and Mr. Knowling, all testified that they know when Mr. Nolan becomes quite intoxicated as he starts to sing. They had seen him in that condition on occasions. They have a good idea how Mr. Nolan reacts to alcohol. To them he had not reached the stage where he would be described as quite intoxicated. Neither had any

concern for Mr. Nolan's ability to walk back to Prescott Street, as he had done on several prior occasions. While Mr. Hyde and Mr. Knowling had both consumed a fair quantity of alcohol themselves, I do not believe, they were so impaired as to not be able to judge Mr. Nolan's ability to find his way home in a safe manner. All of this evidence corroborates Mr. Nolan's evidence that he was not "quite intoxicated".

This evidence is contradicted by that of Csts. Hickey and Day and to some extent by that of the warders. The warders essentially described the event as a routine admission of someone who was drunk or intoxicated (with the exception of the complaint about sexual harassment).

One description of note, however, was that Mr. Nolan was not "falling down drunk". Other, usual signs of impairment were noted. While the warders expressed opinions as to whether or not Mr. Nolan was intoxicated; they did not address themselves to the other requirements of the **D.I.P. Act**. While one warder stated that Mr. Nolan was too drunk to be offered the use of the phone, the evidence suggested that anyone brought in under the **D.I.P. Act** fell into that category and that it would be very rare indeed that any such person would be permitted to make a phone call. (I note that Cst. Hickey said he would have allowed Mr. Nolan to use the phone if he had asked.) I will deal with the evidence of the police officers below.

Based on the evidence of Mr. Nolan, Mr. Hyde, Mr. Knowling and Dr. Hoekman, I conclude that Mr. Nolan was not so intoxicated as to be a danger to himself or others, or to be a general nuisance. Despite this conclusion, which I have made long after the fact, it is still quite

possible that the officers, based upon evidence available at the time, had grounds to detain Mr. Nolan.

Cst. Day testified that when she arrested Mr. Nolan she told him he was not allowed to be drunk in public. This, of course, is not a correct statement. I have serious doubts about whether Cst. Day understood the provisions of the **D.I.P. Act**. If she did, she did not address her mind to them. Cst. Day made a decision that the man heading up the stairs should be "dipped" before she even got out of the police car. This decision was based solely on the appearance of the man some 50 feet away, who was walking up the steps slowly, hanging onto the rails while appearing unsure on his feet. Despite this apparent concern, she did not take any action. While it is understandable that she and the other officers would respond to the call that brought them there, if there was genuine concern, they could have called for another police vehicle. The evidence did disclose that at least one more police car came to the scene after the four officers came out of Solomons, but went on when it was apparent that additional officers were not needed. Further, if there was genuine concern, Cst. Day could have checked for the man on the steps immediately upon coming out of Solomons.

Cst. Hickey, like Cst. Day, essentially made the same determination from the police car, and took no different action than Cst. Day. While Cst. Hickey in his evidence expressed concern that Mr. Nolan could have wandered or stumbled into traffic, he did not act on those concerns (either on his way into, or out of Solomons) while the man was negotiating the steps.

Cst. Hickey was quite candid, in that he admitted that he suspected at the time, and in fact held that suspicion until shortly before the hearing) that the man arrested, Mr. Nolan, was one of two people responsible for the disturbance. He formed this belief without any reasonable grounds, and maintained it even when the descriptions given by the bartender indicated that Mr. Nolan was not one of the people responsible. I am forced to conclude that Cst. Hickey incorrectly determined, without any reasonable basis, that Mr. Nolan should be detained under the **D.I.P. Act**. It is apparent that Cst. Hickey believed that Mr. Nolan had been a nuisance, in that he had caused the disturbance at Solomons. Unfortunately, there was no basis for that belief.

Having made essentially independent decisions to detain Mr. Nolan even before having any conversation with him, neither Cst. Day nor Cst. Hickey changed their decision upon having close contact with Mr. Nolan. The further observations by Cst. Day were, the strong smell of alcohol and Mr. Nolan's "unfocused" appearance. Cst. Hickey noted additionally, slurred speech, blood shot eyes and unsteadiness. There was nothing that occurred in the conversation that either Cst. Day or Cst. Hickey had with Mr. Nolan to suggest that they were interested in anything but locking him up.

They did not ask for example, his name, where he was going, or whether he was with friends. They made no further effort to determine whether Mr. Nolan was a danger to himself. At that point Mr. Nolan became just another person detained under the **D.I.P. Act**. It was simply a routine matter.

The observations made by Csts. Day and Hickey upon which they each determined to detain, were made of the man on the steps, who they state was Mr. Nolan. Mr. Nolan has testified that he was detained almost immediately upon exiting Solomons, and that he made it no more than a few feet from the door before he had contact with the officers. Someone is clearly incorrect.

On this issue I conclude that Mr. Nolan's version is the more probable. It is confirmed to some degree by Mr. McCormick who says Mr. Nolan came out of Solomons behind him, after the police had been inside. While all four police officers noted a man on the steps before they went into Solomons, none paid particularly close attention to him. Their focus was on the reported disturbance inside the bar. None of the officers noted the man on the steps immediately upon exiting. The man may or may not have been there. There was a short interval of time before any of the officers made any observations of the laneway, at which time Mr. Nolan was observed. While Csts. Day and Hickey may have believed that Mr. Nolan was the man on the steps, I am satisfied that they were mistaken.

Csts. Day and Hickey disagree with each other concerning Mr. Nolan's behaviour once in the police car. Cst. Day said Mr. Nolan sat quietly in the back and said nothing, while Cst. Hickey said that he babbled like other drunks. Csts. Day and Hickey also disagree with respect to what happened at the lockup. Cst. Day said that both she and Cst. Hickey replied to Mr. Nolan's complaints, and that Cst. Hickey offered Mr. Nolan a business card. Cst. Hickey said that he ignored Mr. Nolan in the car and at the lockup and did not respond to him at all. These

examples highlight the difficulties Csts. Day and Hickey had remembering accurately what occurred during their contact with Mr. Nolan.

I conclude, therefore, that Cst. Day and then Cst. Hickey detained Mr. Nolan without having good and sufficient cause to do so. They made assumptions rather than inquiries, and either did not fully understand the requirements or the purpose of the **D.I.P. Act**, or were not concerned about them.

With respect to Csts. Parsons and Barry it is not necessary for me to review the evidence any further. I am satisfied that Csts. Parsons and Barry played a peripheral role in Mr. Nolan's detention. Neither of these officers were privy to the conversation between Csts. Day and Hickey and Mr. Nolan. They did not participate in the decision to detain him. Under the circumstances, it would not be reasonable to expect them to question the other officers as to their grounds for the detention. There was no clear or obvious reason for them to do so. Csts. Parsons and Barry did not assist the other officers in making the decision to detain, nor did they encourage it.

I have omitted so far, any consideration of Mr. Nolan's complaint that his detention was a form of sexual harassment. I can appreciate how Mr. Nolan would come to this conclusion, as he was detained, without good and sufficient cause, immediately upon exiting a gay bar. There is also his complaint about how he was addressed by Cst. Day.

Derogatory Remarks Allegation

Mr. Nolan states that the derogatory remarks were made by Cst. Day as she was detaining him. Cst. Day denies making the remarks. None of the other officers heard any of the conversation between Cst. Day and Mr. Nolan. It is, therefore, necessary to look at the other evidence to see if any of it is helpful in resolving this issue.

Although Mr. Nolan said he did not complain about sexual harassment while being at the lock-up, I am satisfied based on the evidence of the warders and the police officers, that he did complain. I accept that he complained that what was happening to him was only happening because he was a homosexual. I do not accept that he referred to himself as "queer" while making his complaint. I also accept that just prior to his release, Mr. Nolan insisted on being advised of the name of the female officer. As Correctional Officer Whitty recalled, Mr. Nolan wanted the name of the female officer who called him a "faggot".

Cst. Day stated that until Mr. Nolan made an issue of his sexual orientation at the lockup, she knew nothing about him, and therefore, did not know Mr. Nolan was homosexual. She did know that Solomons was a gay bar but her evidence suggests that she did not see Mr. Nolan come out of that bar. Cst. Day, in giving her evidence, demonstrated a lack of appreciation for or sensitivity to appropriate terminology used to describe homosexuals. She stated that she did not see any difference between the words, "gay", "homosexual" or "queer" - just letters. They all mean the same thing to her.

Considering all of this evidence, I am satisfied on a balance of probabilities that Cst. Day called Mr. Nolan "faggot" sometime during her dealings with him. I am not prepared to conclude that the verbal abuse was as vicious as Mr. Nolan suggests.

Despite this conclusion, the evidence is not sufficiently cogent to satisfy me that Mr. Nolan's detention was motivated by his sexual orientation or that it was a form of sexual harassment.

While I cannot rule out the possibility that it was a factor, I quite firmly believe that the arrest was a result of unfounded assumptions, a failure to conduct proper inquiry, a failure to pay any attention to clear evidence (ie. that it was not Mr. Nolan who caused the disturbance) and a failure to understand the **D.I.P. Act**.

CONCLUSION

In conclusion, I find the allegations against Csts. Day and Hickey with respect to the arrest without good and sufficient cause to be proven. I find the allegation against Cst. Day with respect to derogatory remarks to be proven. All other allegations are unfounded. It will, therefore, be necessary to hear all parties on the issue of disposition with respect to Csts. Day and Hickey.

RECOMMENDATIONS

The Detention of Intoxicated Persons Act

Section 33 of the **D.I.P. Act** provides authority for an adjudicator to make recommendations with respect to matters of concern or interest to the public relating to police services. Based

upon the evidence presented at the hearing in this matter, I feel compelled to make recommendations concerning the **D.I.P. Act** and its use by the police.

The evidence presented did not focus on the general use of the **D.I.P. Act**, but some general evidence was heard. This was estimated by the correctional officers who are regularly assigned to the lock-up that some 1,000 - 1,500 people a year are detained at the lock-up under the **D.I.P. Act**. This estimate was not based on a review of the records, but one based on general knowledge. It suggests that on average 3 or 4 people are detained every day under the **D.I.P. Act**. The records from the lock-up entered into evidence which covered a few days during July, 1993, support this average. In fact, on the night Mr. Nolan was there, there were 4 males and 1 female detained under the **D.I.P. Act**.

Also disclosed in the evidence was the fact that among those people detained, there were a number of regulars who were at the lock-up on successive nights or several times a week. It is not apparent from the evidence that anyone detained is ever taken to a detoxification centre. However, that issue was not specifically addressed.

The evidence disclosed as well that very rarely does anyone who is detained under the apparent authority of the **D.I.P. Act** get advised of the right to counsel, and therefore, receive the opportunity to contact counsel. The use of the phone to contact family or friends is also

seems to be a rare occurrence, and to depend entirely on the discretion of who ever happens to be working at the time.

It is evident from the testimony heard in this matter that there is little, if any, training given to police officers, with respect to use of the **D.I.P. Act**. The officers seemed to be using a less stringent test than the **D.I.P. Act** contemplates, a test which could, and likely does, result in far more people being detained than should be. The test in the **D.I.P. Act** is clearly a two part test which requires intoxication as a first step. (See **R. v. Sheppard** (1993), 107 Nfld. & P.E.I.R. 261 (Nfld. Pv. Ct.) Intoxication itself is a broad and general term. It seems that the standard being implied is the same as impairment for the purpose of operating a vehicle. I do not believe that this lower standard is what was intended.

The second step requires a determination that the intoxication be to a degree that creates a danger (a safety issue) or a nuisance (a public order issue). It is perhaps easier to determine whether someone is a danger than it is to determine whether that person is a nuisance. It seems that in practice the word nuisance is being very liberally interpreted.

The emphasis as well seems to be directed at locking people up for the night rather than looking at some other remedy such as calling family or friends to take the person home. Ironically, in this matter, if Mr. Nolan had been driving a vehicle when he encountered the police, after he had been dealt with for the breathalyzer, he would have either been driven home, or been allowed to call someone to come and get him. He would have been advised

of his right to counsel and been given an opportunity to contact counsel. His detention would have only been for that period necessary to conduct the breathalyzer tests. He would not have been taken to the lock-up for the night. Mr. Nolan, however, was detained, and denied the opportunity to contact friends and denied the right to contact counsel. Section 5(1)(b) of the **D.I.P. Act** is of little practical use if those properly detained cannot contact someone who would be able to make application to take charge of them.

The above sets out in summary fashion what I perceive to be a serious problem with the application of the **D.I.P. Act**. At the very least, appropriate training must be given to the police.

I would hope that this will be given urgent attention. I cannot pass judgment on any detention other than this one, but from the evidence I did hear, there is cause to be concerned that many unnecessary and inappropriate detentions occur each year.

I suggest, however, that the **D.I.P. Act** and its use be fully reviewed to determine whether the purpose of the **Act** is being achieved or whether it is being used for some unintended purpose while its remedial provisions are being forgotten.

DATED at St. John's in the Province of Newfoundland, this 30th day of August, 1994.

J. DAVID EATON
ADJUDICATOR

