COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Minet v. Kossler***,
2008 YKCA 12

Date: 20080805
Docket: CA 07-YU585

Between:

Lenora Minet and
Her Majesty the Queen in right of Alberta

Respondents
(Plaintiffs)

And

Norbert Kossler

Appellant
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

A. Roothman	Counsel for the Appellant
D. Huculak	Counsel for the Respondents, appearing by videoconference
Place and Date of Hearing:	Whitehorse, Yukon Territory May 29, 2008
Place and Date of Judgment:	Vancouver, British Columbia August 5, 2008

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] This appeal is taken from a judgment awarding damages against Mr. Kossler in connection with an altercation between him and Ms. Minet on June 19, 2003. Ms. Minet suffered a significant facial injury as a result of a blow struck by Mr. Kossler. Ms. Minet sued for assault and battery. The trial judge ruled against Mr. Kossler, and awarded damages in the aggregate amount of $102,284.99.

Background

[2] Mr. Kossler and Ms. Minet met in 2002 when Ms. Minet worked at a motel in Teslin, Yukon, owned by Mr. Kossler and his wife. Mr. Kossler became infatuated with Ms. Minet, and they engaged in an intimate affair. Ms. Minet had a dependency on cocaine, and Mr. Kossler provided financial and emotional support to her during their affair. There was an understanding between them that Ms. Minet would not call, nor would the affair be carried on at, Mr. Kossler's residence.

[3] A dispute arose between Mr. Kossler and Ms. Minet during the daytime hours of June 19, 2003. Ms. Minet phoned Mr. Kossler's residence in the late evening hours, and Mr. Kossler refused her request to see him that evening. Mrs. Kossler also spoke to Ms. Minet to tell her to stop calling the Kosslers' unlisted number, and unpleasantries were exchanged between them.

[4] After Mr. and Mrs. Kossler had retired to bed, Ms. Minet came to their residence. She was in an intoxicated state. She knocked loudly on the door of the Kossler residence and continued knocking despite the urgings of Mr. Kossler for her to leave. Mr. Kossler then opened the door and went outside on the porch. Ms. Minet was verbally abusive to Mr. Kossler and began hitting him on the chest. After Mr. Kossler grabbed her and pushed her back, Ms. Minet ripped a flower box from the railing of the porch. The trial judge found that Ms. Minet was acting out of anger and that her actions angered Mr. Kossler.

[5] The commotion was heard by Mr. Fortin, the manager of the restaurant adjoining the Kosslers' motel, who resided in a house beside the Kossler residence. Mr. Fortin came over to the scene of the commotion in front of the Kossler residence. He was reluctant to become involved physically but tried to mediate the dispute. The trial judge found that Mr. Fortin gave the best evidence of the incident.

[6] Ms. Minet was very angry and out of control, and Mr. Kossler was trying to get her to leave. She harassed him to the point of causing his nightgown to come off momentarily. Mr. Fortin testified that Ms. Minet was pleading for something while in close contact with Mr. Kossler, who wrestled her to the ground where the wrestling continued. While on the ground, Mr. Kossler ground his knuckles into Ms. Minet's body but did not strike her. This sequence occurred on more than one occasion. There was a lot of wrestling, pushing and grappling between Mr. Kossler and Ms. Minet, who at one point ripped Mr. Kossler's eyeglasses from his face and threw them away.

[7] Mr. Kossler and Mr. Fortin tried to get Ms. Minet to leave on her bicycle, but she refused. She came at Mr. Kossler in an agitated state and he punched her in the face. She fell to the ground and, although she continued to be verbal, the punch effectively brought the altercation to an end.

[8] Ms. Minet was initially treated for her injury in Teslin and then in Whitehorse. She was transferred to the University of Alberta Hospital where she underwent surgery for a fracture to her left cheekbone, maxillary bone and nasal bone. Micro-plates and screws were installed to secure the displaced bones.

[9] The swelling of Ms. Minet's face took approximately two months to subside. Following the operation, she suffered an infection for which she was treated over the months of July, August, and September 2003.

[10] Ms. Minet also began to have seizures, caused by a combination of the facial blow, alcohol use and cocaine use. Her continued alcohol and drug use reduced the effectiveness of the medication prescribed to prevent seizures.

The Trial Decision

[11] In his reasons for judgment indexed as 2007 YKSC 30, the trial judge found that when Mr. Kossler struck the blow to Ms. Minet's face, he had not been acting in self-defence and had committed an assault and battery of Ms. Minet. He found that the actions of Ms. Minet did not constitute provocation.

[12] The trial judge assessed general damages in the amount of $50,000, damages for loss of homemaking capacity in the amount of $1,500, damages for

loss of future earning capacity in the amount of $10,000, and special damages in the amount of $5,000. He held that the award for general damages should be reduced by 10% as a result of Ms. Minet's failure to undertake her seizure treatment in a reasonable manner. Finally, the trial judge awarded $40,784.99 to the Alberta Government under its subrogated claim for health care services rendered to Ms. Minet.

Issues on Appeal

[13] Mr. Kossler says that the trial judge erred in finding that Mr. Kossler did not act in self-defence or under provocation. He also says that the award of $45,000 for general damages was excessive. He further maintains that the trial judge erred by failing to consider the ***Contributory Negligence Act***, R.S.Y. 2002, c. 42.

Self-Defence

[14] There is no dispute between the parties regarding the law on the topic of self-defence. The law was summarized by the Supreme Court of Canada in ***Mann v. Balaban*** (1969), [1970] S.C.R. 74 at 87:

> In an action for assault, it has been, in my view, established that it is for the plaintiff to prove that he was assaulted and that he sustained an injury thereby. The onus is upon the plaintiff to establish those facts before the jury. Then it is upon the defendant to establish the defences, firstly, that the assault was justified and, secondly, that the assault even if justified was not made with any unreasonable force and on those issues the onus is on the defence.

In assessing the reasonableness of the force used, the law does not require defendants to measure with nicety the amount of force required to defend themselves, and the court should look at the amount of actual force used, as opposed to the consequences of the force: see ***Myshrall v. Fraser Fort George (Regional District)***, [1999] B.C.J. No. 1088 (S.C.) (QL).

[15] Mr. Kossler says that the trial judge erred in law when he found that other options were available to Mr. Kossler. It is also argued that Mr. Kossler should have been permitted to take preventative action despite the trial judge's finding that he was not at risk of sustaining injury.

[16] In my opinion, the trial judge made two critical findings of fact: the first was that Mr. Kossler had no fear of personal injury to himself and punched Ms. Minet to bring the embarrassing incident to an end; the second was that the blow struck by Mr. Kossler was a very hard strike and was not a reasonable use of force. Each of these findings of fact precludes reliance on the defence of self-defence. As neither of these findings constituted palpable and overriding error, there is no basis for this Court to interfere with the trial judge's conclusion that the defence of self-defence was not available to Mr. Kossler.

Provocation

[17] Relying on the decision in ***Bruce v. Coliseum Management Ltd. (c.o.b. Uncle Charlie's)*** (1998), 165 D.L.R. (4th) 472, [1999] 4 W.W.R. 178 (B.C.C.A.), Mr. Kossler says that Ms. Minet provoked him into hitting her and that the amount of

damages should be reduced to reflect her responsibility for the injuries sustained by her.

[18] Mr. Kossler says that the trial judge erred in finding that he did not act under provocation. He points to the facts that (i) Ms. Minet insulted his wife on the telephone, (ii) she came to his house and banged on the door, (iii) she attacked him when he came outside, (iv) she ripped the flower box from the railing of the porch, (v) she wrestled with him, (vi) she caused him to momentarily lose his nightgown, (vii) she ripped his glasses from his face, and (viii) she came at him in an agitated way.

[19] The obstacle facing Mr. Kossler is, again, the findings of fact made by the trial judge. He found that Mr. Kossler maintained his self-control throughout the episode and threw the punch to bring the embarrassing incident to an end. The evidence supports these findings, and there is no reviewable error on the part of the trial judge in concluding there was no provocation.

Quantum of Damages

[20] Mr. Kossler maintains that the award of $50,000 for non-pecuniary damages (prior to the deduction for Ms. Minet's failure to mitigate) was excessive and should be reduced to $40,000.

[21] In support of his position, Mr. Kossler points to ***Yeh v. Whittle***, 2005 BCSC 1798; ***Stadnyk v. Allan***, 2004 BCSC 1128; and ***Culver v. 624671 B.C. Ltd. (c.o.b. 7 Alexander)***, 2006 BCSC 1241.

[22] In ***Yeh v. Whittle***, the principal authority relied upon by Mr. Kossler, the plaintiff had fractures to bones around his left eye, a fractured left orbital rim and shattered pieces of bone. He underwent three surgeries, with the possibility of further surgeries in the future. The range of damages suggested by the two lawyers went from a low of $10,000 to a high of $60,000. Silverman J. awarded $40,000 for non-pecuniary damages.

[23] The award in ***Stadnyk v. Allan*** for non-pecuniary damages was $22,500 inclusive of a component of aggravated damages in the amount of $2,500. The plaintiff suffered a fractured cheekbone and bruising on one eye and his mouth. He underwent a four-hour surgery and was incapacitated for two weeks.

[24] As in ***Yeh v. Whittle***, the award in ***Culver v. 624671 B.C. Ltd.*** for non-pecuniary damages was in the amount of $40,000. The plaintiff was punched in the face and suffered a complex orbital fracture. He had plastic and reconstructive surgery, and his recovery was complicated by headaches. Six months after the incident, he continued to have intense headaches a few times a week, and at the time of the trial five years later, he was still having headaches.

[25] In response to the alleged error by the trial judge in assessing the non-pecuniary damages, Ms. Minet points to ***Lyon v. Gill***, [1985] O.J. No. 626 (H.C.J.) (QL), and ***Resendes v. Boutros*** (1989), 2 C.C.L.T. (2d) 275 (Ont. H.C.J.), in which the awards for non-pecuniary damages were in the amounts of $90,000 and $75,000 respectively. The plaintiffs in those cases both suffered a Le Fort II maxillary fracture and numerous other injuries not sustained by Ms. Minet in the present case.

The plaintiff in ***Lyon v. Gill*** required nine surgeries, and the plaintiff in ***Resendes v. Boutros*** had at least six surgeries.

[26] The principal decision relied upon by Mr. Kossler, ***Yeh v. Whittle***, was considered by the trial judge in the present case. He concluded that Ms. Minet had a more serious fracture than the plaintiff in that case, and also had added complications of infection and seizures. He also referred to her ongoing issues of scarring, headaches, tearing and numbness.

[27] In my opinion, the assessment of Ms. Minet's non-pecuniary damages in the amount of $50,000 was reasonable in the circumstances of this case. As the amount has not been shown to be inordinately high, this Court should not interfere with the trial judge's assessment.

Contributory Fault

[28] Mr. Kossler asserts that the trial judge erred because he failed to consider provisions of the ***Contributory Negligence Act***. Section 1 of the Act reads as follows:

> 1 (1) Subject to subsections (2) and (3), if by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.
>
> (3) Nothing in this section makes a person liable for damage or loss to which the person's fault has not contributed.

Section 2 provides that if damage has been caused by the fault of two or more persons, the trier of fact is to determine the degree to which each was at fault.

[29] The British Columbia Court of Appeal has held that the corresponding provisions of the ***Negligence Act***, R.S.B.C. 1996, c. 333, apply to intentional torts as well as the unintentional tort of negligence. See ***Brown v. Cole*** (1995), [1996] 2 W.W.R. 567, 14 B.C.L.R. (3d) 53 (C.A.), which was applied in the context of an assault claim in ***Logeman v. Rossa***, 2006 BCSC 692.

[30] Mr. Kossler pleaded the ***Contributory Negligence Act*** in two paragraphs in his statement of defence. While those paragraphs asserted that Ms. Minet was contributorily negligent, they also stated that Mr. Kossler relied generally upon the provisions of the Act. Counsel for Mr. Kossler also raised the Act during closing submissions but, out of fairness to the judge, he was not referred to ***Brown v. Cole*** or ***Logeman v. Rossa***, and the judge may have understood counsel's reference to the Act to relate to the issue of provocation.

[31] The trial judge made a reference to contributory negligence in paragraph 46 of his reasons for judgment, when he made *obiter dicta* comments to the effect that provocation should not be a basis in cases of family violence to reduce the amount of damages because the concepts of self-defence and contributory negligence were adequate to ensure that justice is done. However, the judge did not consider whether the Act had application to the case before him.

[32] The Act was pleaded by Mr. Kossler, and the pleading was never abandoned by him. It was open on the evidence for the trial judge to have found that Ms. Minet had committed the torts of trespass and assault. In my opinion, the judge should have addressed this issue in his reasons for judgment.

[33] The respondents argue that there was no causal link between Ms. Minet's actions and her injuries because there were breaks in the altercation. This argument would require one or more findings of fact to be made in order to determine whether or not tortious acts by Ms. Minet were a proximate cause of her injuries. The making of findings of fact is within the purview of the trial court, not this Court.

[34] When asked if he was requesting this Court to make a finding under the Act, counsel for Mr. Kossler conceded that it was difficult for submissions to be made in view of the fact that the trial judge had overlooked the issue. He urged us to apportion liability equally pursuant to section 1(2) of the Act. However, section 4 of the Act specifically provides that findings of fault (if any) and apportionment of fault are questions of fact. These questions must be answered by the trial court.

[35] In addition to the damages award in favour of Ms. Minet, the potential applicability of the Act is relevant to costs and the award on the subrogated claim of the Alberta Government.

Conclusion

[36] I would allow the appeal to the extent of remitting to the Supreme Court the issue of whether the provisions of the ***Contributory Negligence Act*** are engaged in this case.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Kirkpatrick"

CORRECTION – October 9, 2008

The citation number has been changed from 2008 YKCA 11 to 2008 YKCA 12.