IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Minet* v. *Kossler,* 2007 YKSC 30

Date: 20070618
S.C. No. 03-A0182
Registry: Whitehorse

Between:

**LENORA MINET AND
HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA**

Plaintiffs

And

NORBERT KOSSLER

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

David Huculak — Counsel for the Plaintiffs
André Roothman — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Kossler and his wife own a motel, restaurant and campground in Teslin, Yukon. Mr. Kossler had an intimate affair with Ms. Minet. On June 19, 2003, in an altercation instigated by Ms. Minet, Mr. Kossler struck Ms. Minet on the face with his fist causing serious facial injury.

ISSUES

[2] The following issues will be addressed:

1. Did Mr. Kossler's physical blow to Ms. Minet's face constitute a battery?

2. Did Mr. Kossler act in self-defence by using reasonable force in the circumstances?

3. Was Mr. Kossler provoked into assaulting Ms. Minet such that her damages should be reduced?

4. What damages should be assessed for pain and suffering, loss of housekeeping capacity and loss of income-earning capacity for Ms. Minet?

5. Should Ms. Minet's general damages be reduced for her failure to mitigate her injuries?

6. Should Ms. Minet recover special damages claimed?

7. Should the subrogated claim of the province of Alberta for health care services rendered to Ms. Minet succeed?

THE FACTS

[3] Ms. Minet is a 36-year-old woman who resided in Teslin, Yukon, at the time of the altercation on June 19, 2003. She was born in the Yukon, but left with her family to live in Alberta from approximately 1976 to 2000, when her mother returned to Teslin. Her mother describes her as a fun-loving person who is full of life. Those are the same characteristics that attracted Mr. Kossler.

[4] Ms. Minet's life has been difficult as a result of a drug addiction, primarily cocaine, that she developed in her 20's and perhaps earlier. She started with smoking

crack cocaine but progressed to intravenous cocaine injections. She spent approximately two years in jail from 1998 to 2000 for trafficking cocaine. Ms. Minet returned to Teslin in December 2001. At the time of the altercation, she had two teenage children who have largely been raised by her mother.

[5] Ms. Minet and Mr. Kossler first met in early 2002 when she worked at his motel. They quickly developed an intimate relationship and would see each other on a daily basis. The affair was no secret in Teslin and it carried on until the incident on June 19, 2003, and occasionally afterwards. Mr. Kossler was clearly torn between his two relationships and did not wish to give up either. Mrs. Kossler was not aware of the extent of his relationship with Ms. Minet.

[6] Mr. Kossler's relationship with Ms. Minet was up and down depending on Ms. Minet's drug and alcohol use. When she was not using drugs and alcohol, she was a beautiful and fun-loving person to be with. But there was a dark side to the relationship when she would disappear for days and he would have to look for her in Teslin or Whitehorse. On other occasions, Ms. Minet would ask for money that was clearly used to support her drug dependency. Mr. Kossler was more than a bystander as he became directly involved in the payment of her drug debts. There is also some evidence that Mr. Kossler himself had a drug dependency but Mr. and Mrs. Kossler vehemently deny that. What is indisputable is that he was very much infatuated with Ms. Minet and spent as much time with her as he could. He supported her financially and emotionally during the affair.

[7] The one unwritten rule was that the affair was never carried on at the residence of Mr. and Mrs. Kossler and that brings us to the night of June 19, 2003.

The Altercation

[8] The two protagonists are Ms. Minet and Mr. Kossler. The two witnesses are Mrs. Kossler and Mr. Fortin, the restaurant manager in the Kossler business.

[9] The Kosslers lived in a lovely and meticulously cared-for log house adjacent to their business. Mr. Fortin and his spouse lived next door in a similar house supplied by the Kosslers for the manager of the business. The two houses were so close that the inhabitants of each would be aware of activities outside the other. Mr. Fortin described his relationship with the Kosslers as a professional one. They worked side by side in the business for several summers but they were not close friends.

[10] In finding the facts in this incident, I have relied primarily on the evidence of Mr. Fortin, the only independent witness of the events. I have found Ms. Minet's evidence to be less reliable because she was intoxicated that evening and very much out of control. The evidence of the Kosslers is more consistent with that of Mr. Fortin, but even their evidence was not consistent on the exact location of the struggle on their front lawn. The altercation was loud, physical and constantly shifting about the yard of the Kossler residence. What is not in dispute is that Mr. Kossler administered a blow to Ms. Minet's face that ended the altercation.

[11] Ms. Minet began drinking early in the day and she was intoxicated during the incident. There is no independent evidence on the extent of her drinking.

[12] Mr. Kossler and Ms. Minet had contact that day and a dispute arose between them. It is not clear what the dispute was or how it arose but it was evidenced by Ms. Minet telephoning Mr. Kossler in the late evening of June 19, 2003, before Mr. and Mrs. Kossler retired for the evening. The phone call itself broke an understanding that Ms. Minet would not call his residence, as that would unnecessarily aggravate Mr. Kossler's relationship with his wife. It did precisely that.

[13] Mr. Kossler refused to see Ms. Minet that evening but Mrs. Kossler intervened and called Ms. Minet to tell her to stop calling their unlisted number. Neither telephone call was a pleasant exchange to say the least.

[14] Mr. and Mrs. Kossler retired for the evening. Mr. Kossler then heard loud knocking at the door, which excited his dog. It was not unusual for customers to knock on his door after hours looking for service. He looked out the window and saw Ms. Minet. He implored her to go home but she continued knocking. He decided to open the door and step outside on the porch leaving his dog inside. Ms. Minet began to verbally attack him at once, hitting his chest and demanding the keys for his car. He grabbed her hands and pushed her back. She stepped back and then ripped a flower box from the porch. I accept as a fact that Ms. Minet ripped the flower box from the railing of the porch out of anger as opposed to being pushed off the porch. There is no doubt this angered Mr. Kossler, whose residence, as I previously stated, was kept in immaculate condition.

[15] At this point, the altercation came to the attention of Mr. Fortin in the house next door. He came over to the Kossler residence to see if he could negotiate or mediate the

dispute. He was very reluctant to get involved physically. He confirms that Mr. Kossler was trying to get a very angry and out of control Ms. Minet to leave. She was relentless in harassing Mr. Kossler even to the point of Mr. Kossler losing his nightgown and being momentarily nude. Mr. Fortin described the altercation as Ms. Minet persistently pleading for something from Mr. Kossler while in close physical contact. Mr. Kossler would then wrestle her to the ground where they would continue wrestling with Mr. Kossler clearly physically superior.

[16] When Mr. Kossler stopped holding her down, Ms. Minet would get to her feet and go at it again, with Ms. Minet ending up on the ground and Mr. Kossler controlling her. Mr. Fortin recalled that Mr. Kossler did not strike her on the ground but would grind his knuckles into her body while she was on the ground. Mrs. Kossler was at the door telling Ms. Minet to go away. Mr. Kossler repeatedly asked Ms. Minet to leave the premises. There was generally a lot of screaming, yelling, arguing, wrestling, pushing and grappling.

[17] Mr. Fortin recalled Mr. Kossler handing him a telephone to call the police. When Mr. Fortin took the phone, the police were on the line and he requested assistance.

[18] Finally, Mr. Fortin and Mr. Kossler tried to get Ms. Minet to get on her bicycle and leave.

[19] Ms. Minet would not leave and was coming towards Mr. Kossler in an agitated way. At that point, Mr. Kossler struck Ms. Minet “a very hard strike” to her face. Mr. Fortin testified that he could tell it was a hard strike because of the sound and obvious damage. He said it sounded “like a pumpkin getting hit by a two-by-four. It had

a hollow sound". Ms. Minet fell to the ground. She was dazed and bleeding but still conscious. Prior to this strike to her face, there had been no serious blows struck. Mr. Kossler said that he was not injured in the altercation. Mr. Fortin described the incident as arms flailing and grappling with some scratches resulting on both protagonists.

[20] Mr. Fortin said in cross-examination that although the punch took the fight out of her, Ms. Minet was still vocal and persistent as she began to leave the premises.

[21] I am satisfied that Mr. Fortin testified to the best of his knowledge and memory and provided the best evidence of the incident. He was very candid in acknowledging that his memory of the event four years later may not be accurate. His statement to the RCMP did not contain the reference to the pumpkin and a two-by-four. It did very clearly state that the punch was "a big one". It confirmed that Mr. Kossler was generally trying to control Ms. Minet but Mr. Fortin was shocked by the punch and did not feel it was necessary.

[22] Mr. Kossler was candid in his evidence but he disagreed with both his wife and Mr. Fortin in his description of the exact location of events. He did not minimize the blow he gave to Ms. Minet. He lost his glasses in the struggle but he saw her coming towards him and struck out with his hands. He stated that at the moment he hit her, he knew it was terrible. He said the blow would have been a big one in a boxing match. Mr. Kossler broke down completely at this point in his evidence and was weeping. He later said that he had strong feelings for her at the time of the incident and still cared for her. He said that he was not mad, in the sense of being angry, at the time of the

incident, but simply wanted her to go home and wait to discuss the matter the next day. He had no fear of personal injury and knew that he could handle her.

[23] Dr. Tadepalli, the treating physician, described the injury to Ms. Minet as a "significant trauma" and that "to recreate it would be like taking a hammer and hitting it on the cheekbone".

[24] I find that Mr. Kossler intended to hit Ms. Minet and bring an embarrassing incident to an end. I find that he did not have to engage physically at all. He could have remained in his house. Indeed, after stepping out onto his porch, he could simply have assessed the situation and returned to his house and called the police.

The Injury

[25] Ms. Minet was initially treated at the nursing station in Teslin. Dr. Tadepalli first saw her on June 23, 2003, at the Whitehorse General Hospital. She was transferred to Edmonton for surgery at the University of Alberta Hospital. She presented with a fracture to her left orbital floor, left medial maxilla and left nasal sidewall. In layman's terms, she had a fracture to her left cheekbone which is not a common bone to fracture. The fracture involved the maxillary bone and the nasal bone. Dr. Tadepalli described a picture of a swollen left eye, swollen left cheek and fluid leakage from her nose. I am satisfied that these injuries were caused by Mr. Kossler's assault. In particular, the fracture of her nasal bone had no connection to her cocaine use. I am not satisfied that there was leakage of brain fluid as a result of the assault or loss of teeth.

[26] The surgery took place on June 28, 2003, in Edmonton. She underwent an open reduction internal fixation of her left orbital floor, maxilla and nasal bones. Simply put, the displaced bones were secured by micro-plates and screws. The x-ray shows a metal plate along the orbital rim and two steel frames fixed by screws in a tent-like formation along the nasal wall and orbital rim. There was a great deal of swelling and significant amounts of pain post-operatively. She was discharged on June 30, 2003, and returned to Teslin where she was cared for by her mother.

[27] There is no doubt that Ms. Minet suffered a great deal of pain, swelling and temporary disfigurement in the two months following the blow she received on June 19, 2003. She also suffered a bout of infection following the operation and seizures.

[28] The infection was a combination of bone infection called osteomyelitis and a post-operative wound infection. The infection was treated with intravenous antibiotics for several months. She had to return to Edmonton for treatment and was also treated and monitored at the Whitehorse General Hospital over the three months of July, August and September 2003. The infection was cleaned up by September 2003. Dr. Tadepalli stated that there is always a risk of infection in any kind of operation. He did not find the occurrence of the infection unusual. He acknowledged that the use of drugs, alcohol and smoking can prolong recovery. He found it difficult to quantify any prolongation of recovery in the three-month period following her injury. He was aware of intermittent alcohol use but not drug use. He stated that the alcohol use complicated the healing process.

[29] The seizures were a more serious complication. Ms. Minet described a serious one immediately following her return to Teslin in July 2003, and several other episodes. Dr. Tadepalli said the post-traumatic seizures could be caused by the facial blow, alcohol use and cocaine use. He found it impossible to isolate the exact cause but attributed the seizures to a combination of these factors.

[30] The treatment of the seizures was complicated by the fact that the seizures did not occur in a medical setting. They were confirmed by her mother and in consultation with a neurologist, Ms. Minet was placed on Dilantin, an anti-seizure medication. The treatment was complicated by intermittent alcohol and drug use which would reduce the effectiveness of the Dilantin treatment. Dr. Tadepalli reported that Ms. Minet was brought into the hospital to manage certain binge episodes. There were also occasions where she left the hospital against medical advice. Dr. Tadepalli did not quantify this impact on treatment but he was clear that it made treatment difficult. Dr. Tadepalli also indicated that alcohol use with Dilantin could increase the risk of seizures. He confirmed that the Dilantin treatment for the first four months of treatment July, August, September and October was good. But after that there were issues of alcohol and drug abuse that resulted in termination of the Dilantin treatment in March 2004.

[31] There was also an issue of her abuse of Ativan, a mild sedative used to treat anxiety symptoms. Dr. Tadepalli prescribed it to control her emotions and to help her withdraw from alcohol and cocaine.

[32] Ms. Minet was also the victim of two subsequent and unrelated assaults, one in March 2004 and the other in September 2004. Dr. Tadepalli concluded that the injuries

she received on these occasions did not affect or prolong her recovery from the injury she suffered on June 19, 2003.

[33] Dr. Tadepalli saw Ms. Minet on July 21, 2004, when she was pregnant. He was satisfied that she was not abusing drugs and alcohol and that she was not suffering serious after-effects from her facial injuries. She is now working as an education support worker for her First Nation. She describes this is a permanent part-time job with opportunity for advancement. She earns $21.16 an hour and works 20 hours a week supporting students at risk.

[34] It took two months before her left eye would fully open and her vision recovered. She is very conscious of her left eye which she says looks like a glass eye when she looks in the mirror. Her left eye does not squint properly. It waters and tears frequently affecting her computer use. She can feel the metal in her left cheek and it is painful when bumped. She suffered headaches daily and still uses Tylenol intermittently for morning headaches. Dr. Tadepalli confirms that she has ongoing issues with the scarring, frontal headaches, tearing, numbness and inability to close her left eyelid completely causing some blurring. Wearing her glasses causes some discomfort. She has been referred to an ophthalmologist to determine if the scar can be improved. I would not describe the scar as a disfigurement but there is no doubt that it is present and it clearly bothers Ms. Minet.

ANALYSIS

Issue 1: Did Mr. Kossler's physical blow to Ms. Minet's face constitute a battery?

[35] The legal distinction between an assault and a battery is important: see Linden and Feldthusen*, Canadian Tort Law,* 8th ed., (Ontario: Butterworths, 2006) pp. 43 – 49. Assault is the intentional creation of the apprehension of imminent harmful or offensive contact. Battery occurs when a person intentionally causes harmful or offensive contact with another person. As Linden and Feldthusen point out, battery is distinct from negligence, as a defendant will be held liable for all the direct consequences of wrongful conduct whether they were intended or foreseeable. Borins J. stated it succinctly in *Bettel* v. *Yim* (1978), 20 O.R. (2d) 617 (Co. Ct.), at pp. 628 – 29: "If physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference." Thus, the intentional tort of battery is distinct from the law of negligence.

[36] Throughout the trial, the assault and battery was referred to as the assault and I will use the word assault for convenience. There is no dispute about the fact that Mr. Kossler assaulted Ms. Minet on June 19, 2003. I have found that the assault was intentional. I find this did constitute a battery. The real issue at the trial was whether Mr. Kossler acted in self-defence which, if found to be a fact, would result in no liability for Mr. Kossler.

[37] Counsel raised the issue of whether Ms. Minet, by her actions, consented to the assault. I find there is no evidence of consent to the assault. Moreover, the seriousness and prevalence of domestic violence in our society makes the issue of consent

inappropriate for policy reasons. It is quite distinct from fist fights or brawls among friends or strangers. This was a case of domestic violence and I adopt the view of Lambert J.A., in the criminal case of *R.* v. *Bruce*, [1995] B.C.J. No. 212, at para. 16:

> "… In my opinion, the intentional application of sufficient force as to be capable of causing an injury that is more than trivial should operate to vitiate apparent consent in a domestic altercation between a man and a woman."

Issue 2: Did Mr. Kossler act in self-defence by using reasonable force in the circumstances?

[38] The onus of proving self-defence in a civil action lies with the person invoking the defence. Mr. Kossler has the onus of proving that his assault was justified and that it was made with reasonable force. If self-defence is made out, Mr. Kossler is not liable for the damages caused by his assault of Ms. Minet.

[39] Sigurdson J. provided a concise statement of the defence in *Glover* v. *Fell*, [1999] B.C.J. No. 1333 (S.C.) at para. 38:

> "In preventing or repelling an attack, if in fact that is what it was by Mr. Glover, no more than reasonable force may be used, and what is reasonable depends on the facts and circumstances of the case, including the nature and seriousness of the attack or threatened attack, the relative size and strength of the combatants, and whether the acts complained of took place after the threat was averted: (Klar et al, Remedies in Tort, looseleaf ed., vol.1 (Toronto: Carswell) at pp. 2-28). Further, force may only be used to repel or prevent an attack, not to punish an aggressor for past actions or as a guise for a counterattack: Klar, supra at 2-27."

[40] The first thing to determine is the nature of the attack or assault by Ms. Minet. There is no doubt that she assaulted Mr. Kossler that evening and that she was the

aggressor in a domestic dispute. It is also clear that Mr. Kossler had no fear of personal injury and was always able to handle Ms. Minet physically. I also recognize that Mr. Kossler is not expected to observe legal niceties in his response. Nevertheless, his assault in response to her aggression must be placed in its context:

1) he could have remained in his house and not engaged in the altercation;

2) he had, in my view, no difficulty in extricating himself from the altercation;

3) he was physically superior and while the altercation may have been embarrassing, he was never under any risk of sustaining serious injury;

4) the presence of Mr. Fortin who was clearly verbally assisting Mr. Kossler, although reluctant to physically intervene, further reduced the possibility that he would be overwhelmed in any way.

[41] The blow struck by Mr. Kossler was not a reasonable use of force. A fight-ending blow was not appropriate. Mr. Kossler intentionally struck Ms. Minet with a blow that was all out of proportion to the physical response that would control or thwart Ms. Minet. Both Mr. Kossler and Mr. Fortin knew it was a terrible blow immediately following the strike on her face. Accordingly, I find that Mr. Kossler has failed to establish that he acted in self-defence.

Issue 3: Was Mr. Kossler provoked into assaulting Ms. Minet such that her damages should be reduced?

[42] While self-defence is a complete defence to an assault claim, provocation is only relevant as a factor to be considered in reducing damages.

[43] In Linden and Feldthusen, *Canadian Tort Law,* at p. 91, a widely-accepted explanation of provocation is set out:

> "In order to amount to provocation, the conduct of the plaintiff must have been "such as to cause the defendant to lose his power of self-control and must have occurred at the time of or shortly before the assault". Prior incidents would have relevance only "if it were asserted that the effect of the immediate provocative acts upon the defendant's mind was enhanced by those previous incidents being recalled to him and thereby inflaming his passion". One cannot coolly and deliberately plan to take revenge on another and expect to rely on provocation as a mitigating factor."

[44] *Bruce* v. *Coliseum Management* (1998), 165 D.L.R. (4th) 472 (B.C.C.A.) provides an example of the loss of self-control from the actions of the injured person that will amount to provocation. In that case, a bouncer or doorman for a club was ejecting Mr. Bruce for fighting. The trial judge accepted the evidence of the doorman that Mr. Bruce was opposing his ejection physically and with abusive language such that the doorman pushed Mr. Bruce off balance and down a set of stairs breaking his kneecap. In finding the force unreasonable, the trial judge assessed Mr. Bruce as 30% responsible for his injury. The Court of Appeal upheld the assessment of provocation but confirmed that it should only be considered in respect of mitigation of Mr. Bruce's damages, not as a complete defence to the assault of Mr. Bruce.

[45] In the case at bar, I do not find the conduct of Ms. Minet to be a provocation. Both parties behaved aggressively in this unfortunate altercation. Mr. Kossler, in fact, maintained his self-control throughout the episode. No doubt his embarrassment in having such an event occur at his home with his wife watching was distressing. But there was no reason for him to strike the blow to the face of Ms. Minet. There was no

loss of self-control but rather an aggressive punch at a time when his manager had arrived to assist.

[46] Although there has been a move, fully discussed in Linder and Feldthusen, at pp. 90 – 92, to limit the application of provocation to reducing only aggravated and punitive damages, the most recent authorities confirm the view that provocation can reduce general compensatory damages. See *Hurley* v. *Moore* (1993), 107 D.L.R. (4th) 664 (Nfld. C.A.) and *Bruce* v. *Coliseum Management*. While there may be some merit in retaining the principle of provocation in fist fights or brawling circumstances, I consider it to be an inappropriate concept in the context of domestic or family violence. Surely, the concept of self-defence and contributory negligence are adequate to ensure that justice is done in cases of family violence. Many regrettable things are undoubtedly said and done in the circumstances of family violence. To continue to apply the concept of provocation for the purpose of reducing damage assessments in family violence sends the wrong message. In my view, provocation is all too easy to find as in *Hurley* v. *Moore* where damages inflicted in a vicious assault were reduced because the victim “may have agitated (the aggressor) and interfered with his driving”. My comments are entirely *obiter dictum* and the issue was not raised in the case at bar.

Issue 4: What damages should be assessed for pain and suffering, loss of housekeeping capacity and loss of income-earning capacity for Ms. Minet?

General Damages

[47] This category of damages encompasses financial compensation for pain and suffering, loss of amenities and loss of expectation of life. General damages are often referred to as non-pecuniary damages.

[48] The first issue to address is whether the infection and seizures should be included. It has long been established that where the plaintiff proves, on a balance of probabilities, that the defendant caused or contributed to the injury, the defendant will be liable for the damage. See *Snell* v. *Farrell*, [1990] 2 S.C.R. 311, and *Athey* v. *Leonati*, [1996] 3 S.C.R. 458. I have accepted that infections are not unusual in any kind of operation and thus are caused by the injury. Dr. Tadepalli said the seizures could be caused by the injury, alcohol or cocaine use or any combination of these factors. That is sufficient to make Mr. Kossler liable for that damage. As indicated earlier, the intentional tort of battery does not import the issue of foreseeability.

[49] Counsel were far apart on the assessment of damages. Counsel for Ms. Minet submitted that $95,000 was a reasonable assessment while counsel for Mr. Kossler proposed less than $40,000.

[50] *Yeh* v. *Whittle,* 2005 BCSC 1798, has similarities to the present case. The plaintiff was punched several times and when he was down on the ground, he was kicked in the face. He had fractures to the bone around his left eye, a fractured left orbital rim and shattered pieces of bone. One bone fragment moved into his lower

sinus. He had three different surgeries and may require further eye and nose surgery. His permanent injuries are a scar on the left lower eyelid, some irritation in the left eye due to a decreased blink response and a nose flattened in the ridge and deviated to the right. He still had significant double vision with upgaze. The court awarded general damages of $40,000.

[51] While precise comparisons are difficult, if not impossible, I am of the view that Ms. Minet had a somewhat more serious fracture with the added complication of infection and seizures. She also has a number of ongoing issues in the scarring, headaches, tearing, numbness and inability to close her left eyelid causing some blurring. I award $50,000 for general damages.

Loss of Housekeeping Capacity

[52] This loss is also called impaired homemaking capacity. It is designed to add some gender equality to the assessment of damage to compensate for an economic loss. There was little evidence presented on the issue although it is a fact that Ms. Minet had a baby in February 2005 and is raising and caring for the child unlike her pre-injury days when she was using drugs which resulted in her mother raising her two older children. The injury that she has received does not prevent her from doing homemaking although it would probably affect her ability to do so in terms of headaches and tearing of the eye. In these circumstances, it should be a nominal amount and I award $1,500 for loss of homemaking capacity.

Loss of Income-Earning Capacity

[53] This head of damage addresses impairment of future earning capacity even where the person will often earn as much after the injury as before. It is particularly problematic in this case because Ms. Minet had not been working in the year prior to her injury. Her employment post-injury appears to be a significant improvement as she is now working in the education field rather than the service industry.

[54] The oft referred-to statement of law of diminished earning capacity is found in *Brown* v. *Golaiy*, [1985] B.C.J. No. 31 (S.C.), at para. 8:

> "The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market."

[55] Counsel for Ms. Minet seeks an award of $40,000 under this heading and counsel for Mr. Kossler submits no award should be made as her long-term use of cocaine has made Ms. Minet unsuitable for the labour market.

[56] Assessments of impaired earning capacity are often difficult because there is no actual pecuniary loss that can be calculated. In *Yeh* v. *Whittle*, there was a very clear

impairment of vision which would affect his earning capacity. The trial judge found that all four factors were affected and he awarded $40,000 for loss of earning capacity.

[57] In this case, Ms. Minet's past addiction and lifestyle have clearly had an impact on her earning capacity in the past. As to her future earning capacity, her facial injury undoubtedly has an impact on her earning capacity, as she is very conscious of the injury and its permanent change to her face. I find that the injury has rendered her less capable of earning income and award $10,000.

Issue 5: Should Ms. Minet's general damages be reduced for her failure to mitigate her injuries?

[58] The duty to mitigate has been described in *Janiak* v. *Ippolito* (1985), 16 D.L.R. (4th) 1, as the principle that an injured plaintiff cannot recover damages for not taking reasonable steps post-injury to avoid loss or damage. In other words, the injured plaintiff has an obligation to minimize the damages suffered by her.

The Onus of Proof

[59] In *Janiak* v. *Ippolito*, the plaintiff refused to undergo spinal surgery that had a 70% chance of success according to the orthopaedic surgeon. The court concluded that it is for the trial judge to determine if that refusal was reasonable. It further stated that the burden of proof that a plaintiff could reasonably have avoided some of the loss claimed is on the defendant. The onus also includes establishing the extent to which the loss would be avoided or the amount by which the loss would have been reduced. This latter part of the onus on the defendant is certainly an easier task where experts give

specific percentages of success or failure in surgery. But this part of the onus must be tempered somewhat where precise quantification is impossible.

The Thin Skulled Plaintiff

[60] The Supreme Court was careful to distinguish between plaintiffs who develop an oversensitive condition subsequent to an injury and those who have a pre-existing thin skull condition. Thin skull is terminology used to describe a person whose injury is more serious or prolonged because of a pre-existing susceptibility. It applies both in the physical sense and the psychological sense. In *Elloway* v. *Boomars et al*. (1968), 69 D.L.R. (2d) 605 (B.C.S.C.), a plaintiff who suffered minor injuries in an automobile accident, developed a disabling psychosis of a schizophrenic nature. Because the plaintiff suffered from a pre-existing condition which predisposed him to schizophrenic illness and it was triggered by the accident, the trial judge concluded the plaintiff did not wilfully fail to mitigate his damage. The Supreme Court was also prepared to limit the application of the principle of a psychological thin skull plaintiff. Wilson J. stated in *Janiak* at para. 24:

> "… It is evident that not every pre-existing state of mind can be said to amount to a psychological thin skull. It seems to me that the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to some pre-existing psychological condition, are not capable of making such a decision. …"

[61] In this test, the precise issue is whether the plaintiff is capable of choice. If the plaintiff can choose, then she assumes the cost of any unreasonable decision. Thus the

pre-existing psychological condition must be such that she is incapable of making any choice at all, to be in the thin skull category resulting in the defendant bearing the cost.

[62] The evidence before me is that Ms. Minet used and abused drugs and alcohol. The nature of her addiction to alcohol and cocaine was not clarified as to whether it amounted to a disease over which she had no control. It was clearly manifested in episodes of binge drinking and intravenous cocaine use. Nevertheless, her conduct before and after the injury indicates she could choose not to drink and use cocaine. Her evidence, which I accept, is that she is now free of the drug.

[63] Having concluded that she was capable of choosing to drink and use cocaine or not, I turn to the question of what effect the abuse of alcohol and cocaine had on her recovery. I have previously stated that Mr. Kossler is liable for the fracture of her facial bones, the infection and the seizures. This is not a case of an unreasonable refusal to accept treatment but whether her alcohol and drug use rendered the treatment less effective thus prolonging her recovery from the infection and seizures.

[64] Dr. Tadepalli acknowledged that the drug and alcohol use by Ms. Minet complicated her treatment and healing. He was not able to quantify any prolongation of the infection resulting from the surgery on her cheekbone. In my view, it would be very speculative on the evidence before me to say that the infection, which lasted for three months, would have healed faster if Ms. Minet did not engage in binge drinking or drug use.

[65] It is a different matter with the seizures. None of the seizures were observed in a medical setting. The treatment with the drug Dilantin could be rendered less useful with

alcohol but it could also increase the risk of further seizures rather than preventing them. Dr. Tadepalli found the Dilantin treatment reasonable for the first four months but thereafter to its termination in March 2004, her conduct clearly prolonged the treatment and the condition. While it may be difficult to establish a precise quantification on the amount by which her damages should be reduced, it is appropriate to encourage the injured party's reasonable participation in recovery and rehabilitation.

[66] I conclude that Ms. Minet's general damages should be reduced by 10% for her failure to undertake her seizure treatment in a reasonable manner.

Issue 6: Should Ms. Minet recover special damages claimed?

[67] Special damages are claimed by Ms. Minet in the amount of $6,900 and her mother, Michelle Minet, in the amount of $4,400. There is no doubt that a certain amount of costs were incurred in hospital treatment in Whitehorse and Edmonton. Ms. Minet was not a in a physical condition to travel to Whitehorse and Edmonton on her own. The claim is for travel costs, hotel and apartment costs and meals. Unfortunately, no supporting receipts or documents were provided to support the claim although Ms. Minet and Michelle Minet testified that they were incurred.

[68] In his final submission, counsel for Ms. Minet submitted that Michelle Minet's claim should be reduced by $2,300, making a total claim of $2,100. Counsel for Mr. Kossler submitted that some amount for special damages was appropriate but it should not exceed a maximum claim of $5,000 for both.

[69] The onus is on Ms. Minet and Michelle Minet to prove the validity of their special damages claim. They have failed to provide receipts. However, there was no dispute that expenses were incurred including an apartment for two months in Whitehorse to avoid the necessity of travelling back to Teslin on the occasion of each hospital or doctor attendance.

[70] In these circumstances, I accept the submission of counsel for Mr. Kossler and award special damages of $2,900 for Ms. Minet and $2,100 for Michelle Minet.

Issue 7: Should the subrogated claim of the province of Alberta for health care services rendered to Ms. Minet succeed?

Introduction

[71] I have found Mr. Kossler liable for the injury to Ms. Minet. In the normal course, health care services rendered by the Yukon would be paid by the defendant as well. These heath services could be rendered solely in the Yukon but often include the services of specialists from Alberta or British Columbia. However, Alberta Health has claimed the cost of health services rendered in the Yukon and in Alberta. I will use the generic terms of Yukon Health and Alberta Health for the health care services authorities in Yukon and Alberta.

[72] Counsel for Ms. Minet relies on *Cowley* v. *Brown Estate*, [1997] A.J. No. 442 (C.A.), which permitted a Saskatchewan health claim to be recovered in Alberta. Counsel for Mr. Kossler relies on *United States of America* v. *Bulley* (1991), 79 D.L.R. (4th) 108 (B.C.C.A.), which denied a similar health service claim, albeit from the government of the United States.

The Facts

[73] Ms. Minet resided in the Yukon at the time of the assault on June 19, 2003. The assault took place in Teslin, Yukon. Although Ms. Minet was a resident of the Yukon, she was a beneficiary under the Alberta Health care system and not the Yukon Health care system. No evidence has been presented about any agreement between the Yukon and Alberta in this case. Health care services were provided by Alberta Health and Yukon Health. Alberta Health is making the claim (via Her Majesty the Queen in Right of Alberta) in the action for services rendered in Yukon and in Alberta following the injury in the amount of $40,784.99.

The Law

[74] The statutory framework for recovery of health care services is somewhat similar in the Yukon and Alberta. In the Yukon, s. 9(1) of the *Health Care Insurance Plan Act*, R.S.Y. 2002, c. 107, permits the Government of Yukon to recover all health care costs resulting from a wrongful act. Under ss. 9(2) and (3), the insured person who suffers injury from a wrongful act is obligated to claim the cost of health services in any action commenced.

[75] Pursuant to s. 62(1) of the *Hospital Act,* R.S.A. 200, c. H-12, the Crown has the right to recover the costs of health services as a result of a wrongful act. There is no equivalent section in the Alberta legislation to s. 9(2) in the Yukon legislation obligating the insured person to collect a claim for health services on behalf of the Government of Alberta. However, s. 72 obligates an injured person who consults a lawyer to provide the Director of Third Party Liability with certain information.

[76] In *Cowley* v. *Brown Estate,* a Saskatchewan resident claimed for the cost of health services incurred by the health authority of Saskatchewan for an accident that occurred in Alberta for which an Alberta resident was fully liable. The Saskatchewan claim was for health services rendered in both Alberta and Saskatchewan. Both the Alberta and Saskatchewan Acts provided a right of subrogation to the province for health care services rendered to the injured person. The trial judge denied the claim on the ground that the law of Saskatchewan could have no application in Alberta.

[77] The Alberta Court of Appeal allowed the claim on the basis that it was not a conflict of law issue but one of subrogation. The Saskatchewan resident was permitted to enforce a right of subrogation under Saskatchewan law for a claim arising in Alberta against an Alberta resident.

[78] The Alberta Court of Appeal followed the decision in *Régie de l'assurance automobile du Québec* v. *Brown* [1990] N.B.J. No. 417 (N.B.C.A.), which decided that subrogation is a private matter between the victim and the person who compensated him. In that case, both the victim and the person who compensated him were Québec residents. Even if the case were heard in New Brunswick, the right of subrogation would be determined by Québec law.

[79] As stated by Foisy J. at para. 26 in *Cowley* v. *Brown Estate*:

> " … In the instant case, the application of Saskatchewan law is not invoked to deny Alberta residents their cause of action, but to entitle the Province of Saskatchewan to pursue its right of subrogation and to recover from the tortfeasor expenses incurred directly as a result of the tortfeasor's negligence. No law in Alberta protects the tortfeasor from payment of all damages which arise from the accident

> caused by his negligence. The application of Saskatchewan legislation in this case does not compromise any rights of an Alberta resident."

[80] The Alberta Court of Appeal made this finding regardless of who paid for the premiums. In other words, the court did not require the injured person to have incurred out-of-pocket expenses. It found that there was no double recovery involved.

[81] In *United States of America* v. *Bulley*, the British Columbia Court of Appeal denied the claim of the USA to recover medical expenses paid for the wife of an American serviceman injured by a British Columbia resident in British Columbia. The USA paid for the medical expenses based on a USA statutory obligation under the *Federal Medical Care Recovery Act.*

[82] The British Columbia Court of Appeal denied the claim on three grounds:

1. the claim for medical expenses was too remote and not reasonably foreseeable;

2. the claim could not proceed on a subrogated basis because the medical expenses were paid as part of a statutory scheme for which no fee or premium was paid;

3. although the USA law created a statutory right of subrogation, it conflicted with the common law of British Columbia that benefits paid to an injured person pursuant to a statutory scheme without payment of a premium cannot be recovered.

[83] In my view, the *United States of America* v. *Bulley* is distinguishable on all three grounds as follows:

1. the claim for medical expenses from this jurisdiction and others is quite foreseeable in the Yukon. Court actions by visitors who are medically treated elsewhere are very common in this court and Yukon residents themselves are often treated out of territory. This case is also one involving an intentional tort which does not import the negligence concept of foreseeability;

2. there is no precedent in the Yukon for requiring a premium to be paid to recover medical expenses which are part of a statutory scheme. There is no basis on which to discriminate between premium or non-premium medical expenses;

3. the ground that the common law of British Columbia prevailed over the statute of the United States of America is not at issue in the case at bar. There is no common law of the Yukon prohibiting subrogated recovery from other jurisdictions.

[84] There is another decision in the British Columbia Court of Appeal not cited by the parties. In *Semenoff (Committee)* v. *Kokan*, [1991] B.C.J. No. 2674 (C.A.), the court denied a claim of $29,135.15 paid by the Medical Services Commission for health services to Gordon Semenoff who sustained brain damage as a result of negligence admitted by Dr. P.J. Kokan. Without any references to the *United States of America* v. *Bulley* case decided on April 8, 1991, the court in *Semenoff*, on September 16, 1991,

denied the claim of the Medical Services Commission based on the fact that there was no obligation of Semenoff to pay the doctors nor to reimburse the Medical Services Commission. Apparently the subrogation right (then s. 27 and now s. 25) in the *Hospital Insurance Act* had not been proclaimed. I prefer the *Semenoff (Committee)* v. *Kokan* decision as it implies that once the statutory right of subrogation is proclaimed, the health services claim should be granted.

[85] I prefer to follow the reasoning in the *Cowley* v. *Brown Estate* decision on the basis that the law of Alberta provides a statutory right of subrogation which is the law to be applied in this case. It would not be good public policy to deny a legitimate Alberta Health claim, which includes the payment of health care services rendered in the Yukon by Yukon Health, on the basis that Alberta law does not apply. This is not a case of conflict of law but one of recognizing a valid statutory right of subrogation between the province of Alberta and Ms. Minet.

[86] I conclude that the claim of Alberta Health in the amount of $40,784.99 can be recovered and I order it to be paid by Mr. Kossler.

SUMMARY

[87] In summary, I have found Mr. Kossler liable for the injury to Ms. Minet. I have denied the claim of self-defence and provocation. The damages assessed against Mr. Kossler are as follows:

1.	General damages: ($50,000 less 10%)	$45,000

2.	Loss of housekeeping capacity	$1,500
3.	Loss of income-earning capacity	$10,000
4.	Special damages	$5,000
5.	Alberta Health (which includes a prejudgment interest calculation)	$40,784.99
	Total	$102,284.99

[88] Counsel may speak to the issues of prejudgment interest and costs, if necessary.

VEALE J.