

**SUPREME COURT OF YUKON**

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COUR SUPRÊME DU YUKON  
OCT 09 2008  
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Citation: *Minet v. Kossler*, 2008 YKSC 76

Date: 20081009  
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  
André Roothman

Counsel for Lenora Minet  
Counsel for Norbert Kossler

**REASONS FOR JUDGMENT  
(Contributory Negligence)**

**INTRODUCTION**

[1] This personal injury case was decided on June 18, 2007, in Reasons for Judgment cited as *Minet v. Kossler*, 2007 YKSC 30. The defendant appealed successfully only to the extent that the case was remitted for the purpose of considering whether sections 1 – 3 of the *Contributory Negligence Act*, R.S.Y. 2002, C. 42 are engaged; see *Minet v. Kossler*, 2008 YKCA 11. For ease of reference and to review the facts, I will repeat certain paragraphs from my earlier Reasons for Judgment but renumber them as part of this judgment.

## **The Altercation**

[2] 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. Mr. Kossler was married, and clearly torn between his two relationships.

[3] The incident at issue occurred on June 19, 2003. Ms. Minet had been drinking since early in the day and she was intoxicated during the incident. There is no independent evidence on the extent of her intoxication.

[4] 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 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.

[5] 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.

[6] 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 was kept in immaculate condition.

[7] 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.

[8] 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.

[9] 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.

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

[11] 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.

[12] 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.

[13] 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.

[14] 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.

[15] 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".

[16] 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 LAW OF CONTRIBUTORY NEGLIGENCE**

[17] The *Contributory Negligence Act* provides:

#### Apportionment of damage or loss

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.

### Degree of fault

2 If damage or loss has been caused by the fault of two or more persons, a judge or a jury, as the case may be, shall determine the degree in which each was at fault, and if two or more persons are found at fault, they are jointly and severally liable to the person suffering damage or loss, but as between themselves, in the absence of any contract express or implied, they are liable to make contribution to and to indemnify each other in the degree to which they are respectively found to have been at fault.

### Apportionment of costs

3 Unless a judge otherwise directs, the liability for costs of the parties in an action under this Act is in the same proportion as their respective liability for the damage or loss.

[18] These provisions are similar to the British Columbia *Negligence Act*, R.S.B.C. 1996, Chapter 333.

[19] In *Brown v. Cole*, [1996] 2 W.W.R. 567, 14 B.C.L.R. (3d) 53 (CA), the British Columbia Court of Appeal decided that the word "fault" includes both negligence and intentional torts.

[20] This principle was applied in *Logeman v. Rossa*, 2006 BCSC 692, where the trial judge concluded at para. 12:

In other words, if a plaintiff acts in a tortious manner and if that conduct contributes to a chain of events that ultimately culminates in a defendant's tortious conduct, for reasons of fairness, a defendant is liable for damages to the extent that his/her own conduct gives rise to the commission of the tort.

[21] The facts in *Logeman* were that Ms. Logeman was at a Skytrain station in Vancouver. She was frustrated and angry with her boyfriend who had hidden her wallet with her money and apartment keys and was preventing her from getting on the

Skytrain. She was crying and shouting at him. The Skytrain police arrived to assist Ms. Logeman but were unable to find her wallet.

[22] Ms. Logeman then swung a bag of shoes at her boyfriend and the Skytrain police intervened to restrain Ms. Logeman. In the ensuing arrest, she sustained a blow-out fracture of the orbit of her left eye. She was taken to jail and detained for 15 hours.

[23] There was no dispute that the Skytrain police assaulted Ms. Logeman or that one of them, Mr. Rossa, had used excessive force. The jury decided that Ms. Logeman, as a result of her own tortious conduct, contributed to the extent of 35% for the assault upon her.

[24] Another case that applies the principle of contributory tortious conduct is *Baines v. Westfair Foods Ltd.*, 2007 BCSC 473. Here, Mr. Baines was apprehended for shoplifting. In the process of trying to pull away and run, he was assaulted by the defendant's loss prevention officer. Ehrcke J. apportioned Mr. Baines' responsibility for his injuries at 20%.

## **ANALYSIS**

[25] In the circumstances of Ms. Minet, I conclude the following:

1. she was involved in a physical dispute with her lover at his residence with his wife observing;
2. she was trespassing on Mr. Kossler's property;
3. she intentionally damaged his flower box;
4. she struck him with her fists and repeatedly returned to engage him in a physical way;

5. prior to Mr. Kossler's punch that caused Ms. Minet's injury, there had been no serious blows struck, and the dispute was described as more in the order of "arms flailing and grappling";
6. Mr. Kossler did not have to engage physically at all with Ms. Minet.

[26] This case is distinguishable from the *Logeman* and *Baines* cases, as the defendants were acting in a police capacity in *Logeman* and as store security personnel in *Baines*. The case at bar is more akin to a domestic dispute. Mr. Kossler was in full control of the situation with Ms. Minet and had no difficulty controlling her at any time. In these circumstances, the bulk of the fault for the assault lies with Mr. Kossler. I find his fault to be 80% with Ms. Minet contributorily negligent for 20% of her injuries as she was trespassing and engaging in assaultive behaviour.

[27] A dispute has arisen as to the order in which contributory negligence and mitigation are applied to the damages in this case. In my view, damages are first reduced by the percentage of contributory negligence. That amount is what the plaintiff should recover less any amount assessed for failure to mitigate. In other words, the plaintiff is only entitled to judgment in the amount that the defendant is liable less the amount for failure to mitigate.

[28] Counsel for the defence submits that the percentage of mitigation should be applied to the total damage figure (before reduction for contributory negligence) and that figure should be applied to reduce the damages after the contributory negligence deduction. This would reduce the judgment for the plaintiff. I do not agree.



[29] In summary, Ms. Minet's damages (before a 10% deduction for her failure to mitigate) and costs that may be assessed, will be reduced by 20%.

  
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VEALE J.