
CANADA / JUDGMENT

Kellins v. Grotkopp

2000 BCSC 1137

COURT

Supreme Court of British Columbia

DECIDED

26 July 2000

Source: bccourts.ca - Research copy typeset by Esheria. Not court-issued or certified.

Source record

2000 BCSC 1137

Citation: Kellins v. Grotkopp Date:

20000726

2000 BCSC 1137 Docket:

B940503

Registry: VANCOUVER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RANDALL EDWARD KELLINS
PLAINTIFF

AND:

JENS GROTKOPP
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE E.R.A. EDWARDS

Counsel for the Plaintiff: Dana C. Neilson

Laurel M. Courtenay

Counsel for the Defendant: Bruce P. Cran

Date and Place of Hearing/Trial: July 10 - 14, 2000

VANCOUVER, BC

FACTS

- [1] This is a subrogated claim by the Workers Compensation Board ["WCB"] on behalf of the plaintiff who received benefits from the WCB after reporting an injury resulting from an altercation with the defendant on November 24, 1992.
- [2] The plaintiff, a Vancouver City police constable, responded about 4 p.m. on that date with his patrol partner Cst. Fenton to a "persons annoying" complaint from the pub at the Niagara Hotel.
- [3] Staff at the pub explained to them that the defendant and his companion, Mr. Noonan, had been "cut off" and asked to leave and the defendant had refused to leave the pub.
- [4] The police asked Mr. Smits, the pub manager, to reiterate to the defendant his request that the defendant leave the pub. Mr. Smits testified he did so. The defendant, according to Mr. Smits' evidence, refused to comply.
- [5] The plaintiff testified he then explained to the defendant that it was an offence for him to remain in the pub after the manager had asked him to leave.
- [6] The defendant denied he was ever asked to leave the pub by Mr. Smits. He said he had been "cut off" but understood that meant he and Mr. Noonan could finish their beer and then leave.
- [7] Before the police were called, the defendant had an argument with the bartender, Ms. Ziegler, over her request that the defendant provide identification and a deposit to obtain a cue ball so he and Mr. Noonan could play pool.
- [8] The defendant's version of events was that Ms. Ziegler told him he was cut off during this argument and when he asked to see the manager, Mr. Smits, to complain, Mr. Smits said he had to back up his bartender. The defendant testified he then returned to his seat and told Mr. Noonan "We've been cut off, I think it's wise to leave." Mr. Noonan testified the defendant told him they had been cut off.
- [9] Ms. Ziegler's version of events was that the argument over the cue ball resulted in her refunding the dollar the defendant had put into the pool table and the defendant returning to his seat. She then observed Mr. Noonan misplace his beer and take another customer's beer, so she told Mr. Noonan and the waitress serving him and the defendant they were "cut off", but could finish the beer they had.
- [10] Ms. Ziegler testified that when the defendant learned of her decision he approached her aggressively and demanded to know why she had cut them off. She then called Mr. Smits.
- [11] Mr. Smits testified that he responded to the call, decided after a discussion with the defendant to "back up" Ms. Ziegler and asked the defendant to leave. He testified that he got such an angry reaction from the defendant that he had the desk clerk call the police rather than try to "do the job" of evicting the defendant himself.

- [12] Mr. Smits and Ms. Ziegler used the words "angry", "hostile", "belligerent", "verbally abusive" and "vociferous" to describe the defendant during their dealings with him.
- [13] Ms. Ziegler's written statement to police was admitted in evidence as an exhibit. It was taken within minutes of the events unfolding. It is generally consistent with her evidence at trial and that of Mr. Smits. The words they used to describe the defendant's behaviour are consistent with their assessment and that of the police officers that the defendant was considerably more intoxicated than the evidence he gave about the amount of alcohol he had consumed that day would suggest.
- [14] Neither Ms. Ziegler nor Mr. Smits has any interest in the outcome of this action. I accept their evidence. Both were experienced bar personnel, well able to determine when patrons' behaviour was unacceptable. There would be no reason for Mr. Smits to have the police called except the defendant's angry refusal to leave. I reject the defendant's evidence that he was never asked to leave by Mr. Smits. I reject his version of his dealings with Ms. Ziegler.
- [15] The plaintiff testified he believed he had the power to arrest the defendant, in light of his refusal to leave. Section 47(4) of the Liquor Control and Licensing Act, R.S.B.C. 1979, c. 237 [now, R.S.B.C. 1996, c. 267, s. 46(5)] gives a peace officer that authority. Neither police officer told the defendant he was under arrest when they told him to leave the pub. The plaintiff testified he explained s. 47(4) to the defendant. This, the defendant denied.
- [16] The plaintiff touched the defendant. The plaintiff testified the defendant took a "swing" at him in response. Ms. Ziegler's statement to the police says the defendant "proceeded to shove the officer and tried to take a swing at him". The defendant denied this. He testified he was merely making a "why me?" gesture by raising his hands when told to leave. The defendant did not strike the plaintiff.
- [17] Both police officers forcefully escorted the resisting defendant out of the pub. Cst. Fenton testified that as the plaintiff, who was leading the defendant out while holding him either in a headlock or by the arm, pushed on the door to open it, the plaintiff fell and the defendant fell on top of him.
- [18] The plaintiff testified that once on the street, because of the defendant's attempts to break away from his grasp, he put the defendant in a headlock and told him to "get down" with the intention of handcuffing him.
- [19] According to the plaintiff's testimony he and Cst. Fenton, meeting continuing resistance, wrestled the defendant to the ground. In the course of doing so, they all fell to the ground, with the plaintiff beneath both the defendant and Cst. Fenton.
- [20] The plaintiff testified his left shoulder struck the ground and that he immediately experienced pain. He went to St. Paul's hospital that day fearing his collarbone might be broken. It was not. He was diagnosed with a soft tissue injury to his neck, shoulder and back.

- [21] As a result of this injury he was off work until mid-January 1993. During this period he was treated with medication and chiropractic adjustments. He did not pursue leisure activities such as running, biking, weight training and swimming. He had back pain he related to the injury that made sleep painful and difficult.
- [22] During this absence from work and another period from January to March 1994 the WCB paid 75% of his salary. The plaintiff's employer, the City of Vancouver, paid the other 25%. Both absences were recommended by physicians. The total paid was \$21,432.35.
- [23] The defendant testified that he was pummelled with a stick or flashlight by the officers as they escorted him out of the pub and then forced to the ground, handcuffed and held on the ground for about 10 minutes until taken to jail in a "paddy wagon."
- [24] Cst. Fenton testified he handcuffed the defendant and held him face down on the ground first with his knee and then with his foot on the defendant's back or shoulder until the "paddy wagon" arrived.
- [25] Mr. Noonan testified that he saw "one cop give [the defendant] the boot when he was down". From this evidence defendant's counsel made the submission that Mr. Noonan had seen the plaintiff kick the defendant. The defendant testified that his rib was injured by a blow, but his evidence was unclear about when the blow was sustained.
- [26] The position taken by counsel for the defendant was that the plaintiff did not fall to the ground and was not injured. He argued that the plaintiff concocted his story about being injured in the altercation with the defendant in order to deflect an inquiry or litigation he anticipated would arise from his alleged misconduct of kicking the defendant.
- [27] At the time of his arrest, the defendant threatened to sue the police. He did so, alleging injuries as a result of his arrest. At the outset of this trial the defendant's counsel asked me to approve a discontinuance of that action without conditions, which I did.
- [28] Shortly after his arrest, the defendant filed a written complaint with the police department in which he said he had lost his \$120 sunglasses during the events in question. The complaint made no reference to the defendant being beaten, kicked or injured.
- [29] Both the plaintiff and Cst. Fenton denied striking or kicking the defendant.
- [30] Mr. Noonan testified that he called a lawyer friend on November 24, 1992, shortly after the events in question but did not discuss what had just happened to him and the defendant.
- [31] The defendant testified that he knew he had a right to call a lawyer from jail but did not do so because he did not know one and because he understood Mr. Noonan would make or had made such a call.

- [32] The defendant also testified he felt a bump on the back of his head and experienced breathing spasms while he was at the jail. He testified he asked to see a doctor at the jail. A nurse saw him. Unsatisfied with this, he then "feigned a seizure" and was taken to hospital under police escort where doctors examined him. The hospital admission report was not in evidence. The defendant was then returned to jail and released on a promise to appear.
- [33] The defendant was charged under s. 47 of the Liquor Control and Licensing Act, with failing to leave a licensed establishment after being requested to leave. He was acquitted after a May 1994 trial in Provincial Court. I was not provided with a copy of the transcript or the judge's reasons in that case so I do not know what evidence was led or what findings of fact she made.
- [34] Since the defendant's action claiming injury at the hands of the police was discontinued, I need not decide whether he was injured during the altercation.
- [35] Based on all the evidence, including that which I have outlined, I make the following findings of fact.
- [36] The defendant's failure to contact a lawyer from the jail, provide the hospital admission report or make a timely formal complaint is inconsistent with the defendant being beaten, kicked and injured by the police. It is improbable the police would apply excessive force in full view of pub employees and patrons or passers-by on the busy street outside.
- [37] The defendant was aware that the police were called to the pub because he would not leave voluntarily. Mr. Smits twice asked the defendant to leave.
- [38] The defendant resisted the police efforts to remove him with sufficient force that they responded, once outside, by handcuffing him and holding him down.
- [39] During the course of removing the defendant from the pub and subduing him, the plaintiff fell and suffered the shoulder, neck and back injury later diagnosed. Unlike the defendant's seizure in the jail, this was not "feigned" by the plaintiff.

LIABILITY

- [40] The position taken by the plaintiff's counsel was that the defendant was negligent in resisting the police efforts to remove him from the pub and that it was foreseeable his active resistance could result in injury to the plaintiff. Alternatively, she argued the defendant had committed battery of the plaintiff.
- [41] Two authorities were relied upon to support this position: *Vanderford v. Hawksley* (May 9, 1996), Vancouver B940476, (B.C.S.C.) and *Fetterly v. Peake* (March 24, 1988) Vancouver F831847, (B.C.Co.Ct.); [1988] B.C.J. No. 490 (QL). In each case the defendant was found liable for damages resulting from battery of a plaintiff police officer while resisting arrest.

- [42] The position of defence counsel was that if the plaintiff was indeed injured as a result of an altercation with the defendant, since the defendant was not told that he was under arrest, he committed no tort in resisting his forcible ejection from the pub. Defence counsel distinguished Vanderford and Fetterly on the basis that both cases involved resistance to an announced arrest of the defendant.
- [43] The fall which caused the plaintiff's injury was the result of the defendant's reaction to being placed in a headlock by the plaintiff. Cst. Fenton testified he would not use a headlock in the circumstances and that it was a natural impulse for the defendant to react to it by resisting. The defendant, while he actively resisted being removed from the pub, subdued and handcuffed, did not intend to injure the plaintiff.
- [44] In Fetterly, Judge Houghton adopted the following definition of battery (at p. 5):
- A person who intentionally causes a harmful or offensive contact with another person is liable for battery. This nominate tort protects the interest in bodily security from deliberate interference by others. It seeks to reduce the incidence of violence in our society. (Linden, Canadian Tort Law).
- [45] The court therefore found at p. 6, "engaging in a physical struggle with a constable who has arrested one is battery within the definition of the term . . . The tort of battery is actionable without proof of damage and the wrongdoer must make good the loss inflicted." There is no doubt the defendant in the case at bar engaged in a "physical struggle" with the plaintiff.
- [46] The fact the defendant was not told he was under arrest is not a basis for distinguishing this case from Fetterly and Vanderford. The defendant knew the police came to remove him from the pub. Indeed by his own evidence he told Mr. Noonan "it's wise to leave" before the police arrived. He understood why they were called to the pub.
- [47] In light of Mr. Smits' requests that the defendant leave, the police had authority to arrest the defendant. They did not tell him he was under arrest him before escorting him out of the pub, perhaps in the hope or expectation that once outside he would leave quietly without a formal arrest and charge.
- [48] In Vanderford at p. 2, Drake J rejected a submission that the defendant had not been informed of the reason for his arrest. He found the defendant had been informed of the reasons for the police officer's action and "knew why he was being followed and apprehended". That closely parallels the situation in this case. At p. 3 Drake J observed that a person who knows the police are investigating a matter has the duty to peacefully "submit to whatever is required of him". Here the defendant knew he was required to leave.
- [49] I reject the submission that the defendant could with impunity resist the police in the execution of their duty simply because they did not tell him he was under arrest. As Drake J observed at p. 2, the fact it is an offence to assault a police officer "disposes of any suggestion" that police officers voluntarily assume the risk of being assaulted.

- [50] It is noteworthy that Criminal Code s. 270(1) creates separate offences of assaulting a police officer "in the execution of his duty" and "with the intent to resist lawful arrest". These offences discourage active resistance to the police, with a view to protecting both the police and persons with whom they deal from physical harm.
- [51] I am mindful that the defendant was not charged under this section. I point to it only to underline that s.270(1)(a) is intended to protect police and persons they deal with when no arrest is in progress. It recognises there are numerous situations where police in the exercise of their duties, other than in the course of a formal arrest, have physical contact with persons which put police at risk of assault.
- [52] The defendant's position is that a person subject to the use of force by police could, with legal impunity, vigorously resist until the police utter the words "you are under arrest". Counsel for the defendant made the submission that "this is not a police state" implying the law recognises the citizen's right to resist the use of force by police.
- [53] That right is at law limited to resistance to the illegal use of force by police. The police may use reasonable force in the exercise of their duties apart from their powers of arrest. (See *R. v. Roach* [1999] B.C.J. No. 1827, per de Villiers, P.C.J. at paragraphs 55-58.)
- [54] In a particular case it may be difficult to determine whether the force used by police was reasonable. A person subject to unreasonable use of police force has recourse through internal and external complaint procedures and litigation, as the defendant was aware in this case. Unsatisfactory as these avenues may be in light of a variety of factors including delay and expense, they are preferable to the self-help remedy of active and vigorous resistance to the police use of force.
- [55] In almost any circumstance I can imagine it would be foolhardy for any person to meet police use of force with force, whether the person is legally justified in doing so or not. The legality of the use of force by the police and by the person resisting can only be resolved long after the event by an inquiry or other proceeding.
- [56] An escalation of the force used by the police is the almost inevitable result of active resistance to police use of force. The likelihood of injury, most often to the person resisting the police, escalates with the resistance, as *Roach* illustrates. Such resistance can also cause injury to the police, as this case illustrates.
- [57] I reject the submission that the defendant did not commit battery when he actively resisted removal from the pub because he had not been told he was under arrest. Even if the defendant was not formally arrested the police could use reasonable force to remove him. In any event, the defendant was arrested once the plaintiff explained s. 47 of the Liquor Control and Licensing Act and physically constrained him. (See *R. v. Alphonse* [1996] B.C.J. No. 1324, per de Villiers P.C.J. at para. 28.)

- [58] The defendant relies on his asserted right to forcefully resist the police and particularly to resist being placed in a headlock, as a shield akin to self-defence in this case. In effect, the defendant's submission is as follows. The plaintiff's use of the headlock was unreasonable and precipitated a natural and spontaneous reaction of resistance. If this caused the plaintiff to fall and injure himself, since the defendant had a right to resist the "unreasonable" headlock, he is not liable for injury to the plaintiff caused by the defendant's forceful resistance.
- [59] The position taken by the plaintiff's counsel in response to a question from the court was that the fact the defendant resisted at all rendered him liable. That is, it was foreseeable that resistance, active or passive, might result in an injury to the plaintiff and the defendant's liability followed accordingly. The implication of this submission is that had the defendant resisted by merely lying on the floor and had the plaintiff injured himself trying to lift him, the defendant likewise would be liable for the injury.
- [60] I am reluctant to accept this position. Passive resistance presents an entirely different dynamic than active, forceful resistance. If faced with passive resistance, the plaintiff could have decided after some deliberation if it was prudent to attempt to physically lift and remove the defendant. Faced with the defendant's active resistance the plaintiff responded with a headlock, something Cst. Fenton said he would not normally do.
- [61] However, on all the evidence I am unable to conclude the headlock was an unreasonable or demonstrably excessive use of force by the plaintiff in response to the defendant's belligerence and aggressive resistance to being removed from the pub. I find the defendant committed battery by forcefully resisting the plaintiff and Cst. Fenton which resulted in injury to the plaintiff for which the defendant is civilly liable for damages.

DAMAGES

- [62] The plaintiff's evidence was that when he returned to work in January 1993 he had recovered to the point that he could have resumed extracurricular activities he had curtailed, but for other reasons did not.
- [63] The plaintiff linked his January 1994 to March 1994 absence from work to a flare-up of the injury sustained in the November 1992 altercation. His primary complaint was sleeplessness. Dr. Fenton, who recommended the plaintiff continue this second absence, accepted the plaintiff's attribution of the sleeplessness to symptoms arising from the accident.
- [64] Dr. Fenton was not aware the plaintiff's sleep disorder might be related to snoring or that the plaintiff was in the course of a stressful breakdown in his domestic relationship at the relevant time. Dr. Fenton candidly acknowledged on cross-examination that the plaintiff's symptoms as reported to him, were "entirely consistent with stress related disorder" and that he would have pursued this had not the plaintiff attributed them to the November 1992 shoulder injury. Dr. Fenton's evidence establishes no causal relationship between the

November 1992 injury and the January 1994 symptoms other than what the plaintiff told him.

- [65] Dr. Yuen, treated the plaintiff's injury in November 1992. His January 1995 report indicates that in January 1994 the plaintiff reported frequent back spasms in the summer of 1993 which were exacerbated in January of 1994 by "stress with some personal emotions". After the plaintiff saw Dr. Fenton, on a referral he requested from Dr. Yuen in January 1994, Dr. Yuen declined the plaintiff's request for massage therapy. Instead he steadily increased dosages of an antidepressant he prescribed for the plaintiff.
- [66] On cross-examination, Dr. Yuen said the plaintiff related his January 1994 back problem to a possible broken rib which a chiropractor had diagnosed from an x-ray. Dr. Yuen's reading of the x-ray found no rib fracture. Dr. Yuen's treatment of the plaintiff from January through March 1994 targeted insomnia and stress.
- [67] Neither the chiropractor nor Dr. Yuen diagnosed the source of the back spasms. It is understandable the plaintiff would link them to the November 1992 injury. However, the evidence does not satisfy me that the plaintiff's symptoms from January to March 1994 are more likely attributable, even in part, to the November 1992 injury rather than entirely to stress resulting from the breakdown of his domestic relationship.
- [68] I find the plaintiff suffered a mild soft tissue injury in November 1992 as a result of the altercation with the defendant. Muscle strain caused pain in his neck, shoulder and back from which he had substantially recovered when he returned to work in January 1993.
- [69] I assess general damages of \$5,000 and special damages of \$800. The claim for punitive damages was properly abandoned.
- [70] I award damages for notional wage loss for the period November 25, 1992, to January 18, 1993, of \$9,593.52. I reject the submission of defendant's counsel that this represents double recovery for the plaintiff. In light of s.10 of the Workers Compensation Act, R.S.B.C. 1996, c.492, the plaintiff will personally recover nothing as a result of this judgment because the total award is less than the amount of compensation paid to him by the WCB.
- [71] I award the plaintiff costs on scale 3 and court order interest.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/00/11/S00-1137.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kellins-v-grotkopp-2000>

Prepared on 26 October 2026 · Esheria