

CANADA / JUDGMENT

Kim v. Kwak

2006 BCSC 641

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Supreme Court of British Columbia

DECIDED

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2006 BCSC 641err1 Kim v. Kwak

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kim v. Kwak,

2006 BCSC 641

Date: 20060424

Docket: S56398

Registry: New Westminster

Between:

Jwa Jin Kim

Plaintiff

And:

Choon Hwan Kwak also known as Chun Hwan Kwak

Defendant

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for the Plaintiff

Neil A. Mulholland

Counsel for the Defendant

Roy Swartzberg

Date and Place of Trial:

April 4, 5 and 6, 2006

Vancouver, B.C.

- [1] On September 9, 1999, the defendant Mr. Kwak slashed the plaintiff Mr. Kim several times with a broken beer bottle. Mr. Kim seeks damages for his resulting injuries and losses, including aggravated and punitive damages.
- [2] Mr. Kwak has pleaded self-defence, and he counterclaims for injuries inflicted upon him by Mr. Kim in the same incident.
- [3] Both individuals were gentlemanly businessmen in their early fifties. Neither seemed to hold any ill will toward the other before that evening. They were fellow members of a group of about 16 men of Korean extraction calling themselves the Korean Golf Association. They and the others had spent the afternoon golfing, after which they all met again at a Japanese restaurant in Coquitlam, British Columbia, for a dinner meeting.
- [4] The members all arrived at the restaurant between 6:00 and 6:30 p.m. and sat together at a long, low, rectangular table. Mr. Kim, as President and Chair of the meeting, sat at the head. The group enjoyed drinks before dinner at about 7:00 p.m.
- [5] Mr. Kim and Mr. Kwak both drank a couple of beers before dinner. After dinner, two or more bottles of scotch whisky were produced and shared around. Over the space of perhaps an hour, before 8:30 p.m., Mr. Kwak's glass was filled four times with three to five ounces of straight whiskey, which he drank, and he admits that he became drunk. Mr. Kim testified that he limited his drinking to two beers. I'm sure that that was a conservative estimate. He was evidently able to recall for the police later that he consumed some whiskey as well. Their combined liquor intake did not evidently help matters afterwards.
- [6] At sometime around 8:30 p.m., Mr. Kim noticed Mr. Kwak and another member, Mr. Lee, arguing and then standing up and pushing each other before others intervened and separated them. According to Mr. Kwak, Mr. Lee forgot himself. In the gathering bonhomie of toasts and golf post mortems, he had blithely suggested to the older Mr. Kwak that they become friends. In effect, it was a request to dispense with the formal Korean rituals of address meant to show respect and deference to one's elders. Mr. Lee wanted to relax the old etiquette in favour of more familiar, less stilted conversation. Mr. Kwak didn't, and he thought it impertinent of Mr. Lee to ask. He refused, and instead he lectured Mr. Lee and others nearby about how these formalities, longstanding in Korea, were necessary to preserve order in society.
- [7] According to Mr. Kwak, Mr. Lee responded by rising from his seat in a hostile manner, thus forcing Mr. Kwak to stand as well to defend himself. By that point, Mr. Kwak was also becoming convinced that all or most of the others at the table were supporting Mr. Lee against him, and he felt oppressed.

- [8] Anxious about the disturbance, and feeling a responsibility as Chair to maintain decorum, Mr. Kim rose and went over to the two combatants, who were by then sitting again and had settled down somewhat. According to Mr. Kim, he coaxed Mr. Kwak to consider Mr. Lee's suggestion. He said to Mr. Kwak that friendship and informality between people with a ten-year difference in age was well known and acceptable in Korean culture, and Mr. Lee was only two years younger than Mr. Kwak.
- [9] Mr. Kwak's recollection was that Mr. Kim wasn't very cordial. He said that Mr. Kim berated him with swear words, and took the side of Mr. Lee, which was an insult. Worse, Mr. Kim also pronounced that Mr. Kwak was no longer welcome as a member of the group. That led to an angry exchange over whether and how much of Mr. Kwak's membership fees should be refunded. Mr. Kwak admits he became so angered that he picked up a glass of water and threw the water at Mr. Kim. He said that Mr. Kim then attacked him.
- [10] Mr. Kim described this stage of the event a little differently. He acknowledged his request for Mr. Kwak's resignation. He said that when the water was thrown at him, he stepped outside of the restaurant for about 30 seconds and then came back, at which point he was struck on the shoulder by a beer glass thrown by Mr. Kwak. Very concerned that Mr. Kwak might commit some further violence, and in order to defend himself, he then attempted to restrain Mr. Kwak. He demonstrated how he gently pulled down Mr. Kwak's head. He said there ensued a short scuffle wherein Mr. Kwak punched him four or five times. When it was over, he saw a broken beer bottle in Mr. Kwak's hand. He also saw that he himself was bleeding from cuts in several places.
- [11] A friend helped Mr. Kim stop the bleeding, and an ambulance came and took him to a hospital. The police also arrived, arrested Mr. Kwak, and took him to the police station. They kept him there overnight and released him the next morning. There were no criminal charges.
- [12] On cross-examination, it was put to Mr. Kim that the route he took to reach Mr. Kwak was over the table. Mr. Kim did not deny this; he confirmed that he stepped up onto the table and walked across it to where Mr. Kwak was sitting. He testified by way of explanation that it was a low table (not a mitigating factor in my opinion).
- [13] Mr. Kwak denied throwing the beer glass. He said that Mr. Kim advanced at him over the table and forcefully pushed his head down, and punched him in the side of the head. All of that made Mr. Kwak terrified for his life he said. He said that he struggled to defend himself, and they ended up grappling and rolling on the table. He admitted that he picked up a beer bottle, smashed it on the table, and then used it to jab Mr. Kim, but only once as best he could recall, and only to defend himself.

- [14] At the hospital, Mr. Kim was treated for several deep cuts, each of them several inches long, one behind his right ear and down his neck, one on his left arm near the elbow, two on his right arm, and another on his abdomen. Three medical reports were submitted on Mr. Kim's behalf, including one dated January 17, 2001, by his family physician, Dr. Oh, and two by Dr. Mian, a plastic surgeon, dated February 14, 2001 and March 30, 2001.
- [15] Dr. Oh described the injuries as non-life-threatening lacerations to the skin, subcutaneous tissue, and muscles, with no damage to nerves, arteries, or tendons. He said he did not anticipate ongoing treatment.
- [16] Dr. Mian, in his first report, said, "Mr. Kim suffered mainly from pain and immobility and stiffness of his arm." The treatment for this was physiotherapy, massage, and "the tincture of time". He reported that Mr. Kim suffered total disability in the form of complete inability to use his right upper arm from September 9, 1999 to October 9, 1999, and partial disability until November 10, 1999, after which he was essentially not disabled.
- [17] In his second report, however, Dr. Mian reported that:
- he will likely continue to have paresthesias in the left forearm and will likely continue to have muscle belly deformity and the aches in the right upper extremity in the area of the lateral epicondyle. This is most likely a permanent condition. Mr. Kim also notes anaesthesia in the distribution of the posterior cutaneous nerve of the forearm and this is a permanent condition as well.
- [18] Finally, Dr. Mian noted that "scar revisions would improve the appearance of the scars."
- [19] According to Mr. Kim himself, the injuries to his arms kept him from working at his grocery store for four or five months, and for another two or three months, he needed his wife's help nursing his wounds. He was unable to golf for another eight months or enjoy other sports like fly fishing and tennis. He declined from a plus two to a plus twelve handicap golfer.
- [20] Worst of all, according to Mr. Kim, was his disgrace in the eyes of the local Korean community where, in Mr. Kim's mind, it became the general feeling that he was of the type to engage in public fighting. This led to a decision by him and his wife to move away to where there would be no Koreans to shun him. They relocated in May, 2002 to Wass, British Columbia. He got a job there as manager of a gas station and convenience store.
- [21] Unfortunately, Mr. and Mrs. Kim found it awfully lonely living without friends in a new area, and both of them were disappointed to find that the nearest golf course was more than an hour and a half's drive away from their home. They separated, and Mrs. Kim is now suing for divorce.
- [22] There were a few conflicts in the evidence. One was as to the number of times Mr. Kwak slashed Mr. Kim. I do not accept Mr. Kwak's testimony that he gouged Mr. Kim only once. He wasn't perfectly certain himself of that. It was suggested that Mr. Kim's cuts, or some of them, could have occurred from rolling on glass broken in the scuffle. I do not accept that.

The long, deep cuts that Mr. Kim sustained would very improbably have come from rolling on glass. It wasn't proven to my satisfaction in the first place that there was much, if any, broken glass on the table.

- [23] I find that Mr. Kwak caused all of the serious cuts by slashing Mr. Kim several times with the sharp edge of a broken bottle. Four or five thrusts, as Mr. Kim recalled, is consistent with the number of his scars from the encounter, and the scars have no other likely cause.
- [24] I find also that Mr. Kwak threw a beer glass at Mr. Kim. I prefer Mr. Kim's evidence on the point, and I reject Mr. Kwak's denial. Mr. Kwak was in a very angry mood, and he was certainly capable of it. It seems less likely that thrown water would spur a gentleman like Mr. Kim to retaliate, and more likely if something like a glass was also thrown. I conclude that Mr. Kwak assaulted Mr. Kim by throwing water at him, and then again by throwing a beer glass at him. I find that nothing in Mr. Kim's behaviour to that point was inappropriate.
- [25] However, after Mr. Kim was hit with the glass, I find that Mr. Kim manhandled Mr. Kwak. He downplayed this, but his admissions support Mr. Kwak's account. Mr. Kim admitted that he was doubly upset at being hit by the water and then by the glass. I do not accept that, thus provoked and angry, Mr. Kim exercised restraint. He charged at Mr. Kwak over the table. He admitted that there was a scuffle. He may or may not have punched Mr. Kwak, but it was a fierce reaction, and not at all gentle. It was unwanted, unnecessary, and ill advised. It was an assault.
- [26] Mr. Kim claimed alternatively that he acted in self-defence, which patently was not the case. He had plenty of opportunity to avoid any further attack by Mr. Kwak, who was not even pursuing him at that point. The evidence indicates that Mr. Kwak was sitting in his seat. Mr. Kim, if he had restrained himself then, would in all likelihood have avoided the fight and his injuries. He chose to stay and retaliate out of anger.

LIABILITY

- [27] The most serious issue by far is Mr. Kwak's liability for cutting Mr. Kim with the broken beer bottle. Mr. Kwak claims self-defence and provocation.
- [28] A familiar authority on self-defence is the case of *Hartlen v. Chaddock* (1957), 11 D.L.R. (2d) 705 (N.S.S.C.), followed in *Norman v. Kipps*, [1994] B.C.J. No. 97 (Q.L.) at ¶ 34 (S.C.). In *Hartlen*, Isley C.J. answered the defendant's argument on self-defence as follows:

...while it is lawful for a man to use force towards another in the defence of his own person, that force must not transgress the reasonable limits of the occasion, and that while the law does not require that a man when labouring under a natural feeling of resentment consequent on gross provocation should very nicely measure the weight of his blows, the severity of the beating which the defendant gave the plaintiff did transgress the reasonable limits of the occasion.

- [29] Smashing the bottle to turn it into a lethal weapon, and repeatedly thrusting it at Mr. Kim were deliberate or reckless acts designed to injure Mr. Kim gravely. They were out of all proportion and far in excess of what could be called the reasonable limits of the occasion. One of the cuts was within an inch of Mr. Kim's jugular vein. The result could have easily been a homicide. Mr. Kwak may well have been terrified to see Mr. Kim come across the table and grab and hit him. Still, it was not a situation where Mr. Kwak could reasonably believe that he was in a fight for his life so that maiming or killing his adversary was necessary. Mr. Kim had no weapon. There is no acceptable excuse for Mr. Kwak's actions. The defence of self-defence is rejected.
- [30] Should Mr. Kim bear some of the blame for his injuries? The law will attach a percentage of fault to the conduct of the plaintiff where the plaintiff's actions have constituted a provocation: *Norman v. Kipps*, supra.
- [31] Mr. Kim argued that he had no reason to anticipate that Mr. Kwak would resort to the savagery that he did. I'm not quite as sure of that. When Mr. Kim was about to attack, he could see that he was confronting an enraged, drunken, violent individual. His attack was bound to excite an instinctive reaction of some kind. Mr. Kwak wasn't a person well known to Mr. Kim, and the risk of escalating the violence was, or should have been, apparent. Equally, he should have seen that with restraint on his part he would likely have avoided the scuffle and his injuries. Some fault should be attributed to him, therefore, but not without also weighing Mr. Kwak's earlier belligerent and provocative acts that started the chain of assaults.
- [32] It would appear from the authorities that where some fault is found in respect of provocation, it is appropriate to account for it as a mitigating circumstance reducing the award of damages generally, or to apportion some fault to the provoking party pursuant to the Negligence Act, R.S.B.C. 1996, c. 333. "Fault" in this context has been held to encompass both intentional and negligent torts. See *Norman v. Kipps*, supra; *Springett v. Shanklin* (2001), 105 A.C.W.S. (3d) 865, 2001 BCSC 853.
- [33] In the circumstances, I find it appropriate to apportion fault for this incident between Mr. Kwak and Mr. Kim. It is also appropriate to separate Mr. Kim's claim in respect of his injuries from the slashing with the broken bottle from the mutual claims in respect of the miscellaneous cuts and bruises incurred otherwise by both men in the incident. I find Mr. Kwak ninety per cent at fault and Mr. Kim ten per cent at fault for Mr. Kim's injuries and losses flowing from the slashings with the broken beer bottle. The minor bruises and cuts otherwise incurred in their scuffle were roughly the same, and were minimal. The fault for them was also roughly equal, and so their claims to that extent are offsetting, and will be dismissed.

NON-PECUNIARY LOSS

- [34] Mr. Kim's injuries from the slashes of the broken bottle were painful and even disabling for a while. The last medical report, which was March 19, 2001, shows that there will be some chronic numbness and pain. I accept what is contained in the medical reports. I accept Mr. Kim's evidence of his pain and suffering, as described earlier, including the trauma and emotional pain that he no doubt felt on discovering how badly Mr. Kwak had wounded him. Beyond that, there has been some ongoing embarrassment over the physical scars.
- [35] There was a lot of scarring, but almost none of it is visible, unless he wears a short-sleeved shirt, in which event, the scars on his forearms would show. The scar from behind his ear down his neck shows slightly. At his age, in the circumstances, it does not appear to me that his scarring should be of significant embarrassment to him.
- [36] There is some evidence of ongoing depression, but it is not supported by medical evidence. It derives from a loss of face that Mr. Kim claims to have suffered within the Korean community and humiliation in the aftermath of the fight. In my view, the connection of these effects with Mr. Kwak's conduct was not substantiated. Mr. Kim's only evidence of it was his testimony of his and his wife's feelings of being shunned, for instance when attending Korean social events, but he said nothing of any words or deeds of others suggesting actual disapproval. It proved how he felt, but no more. He called no witness but himself.
- [37] Reasonable people would not likely think the less of Mr. Kim for having been the victim of violence, or for having to defend himself. People of all nationalities in the community, however, are apt to disapprove of fighting in a public restaurant, even if the fight was provoked. If some criticism has come Mr. Kim's way, it would be due to his own voluntary participation in the fight, and not likely due to Mr. Kwak's conduct. For his part, Mr. Kwak will have his own reputation to contend with.
- [38] There seems to be some loss of enjoyment of life, but the extent of the claim in that respect is exaggerated. Mr. Kim said that he has some trouble writing and typing. He gave practically no further detail of how it affects his life, but some consideration is due for that. He hasn't enjoyed his recreation as much or as often as before and his grip on the golf club is less sure. Part of that is due to his injuries, but part also is due to the reduced opportunities in Wass.
- [39] Transporting himself to Wass, British Columbia, which Mr. Kim said was at his wife's insistence, was an extreme reaction, and there was no objective evidence that it was a necessary or reasonable choice, or causally connected to Mr. Kwak's misdeed.
- [40] Counsel provided me with several cases involving victims of scarring, including *Springett v. Shanklin*, *supra*; *Verigin v. Regnier* (1996), 66 A.C.W.S. (3d) 787, [1996] B.C.J. No. 2130 (QL) (S.C.); *H. v. H.*, [1998] B.C.J. No. 1 (QL) (S.C.) ; and *Logan v. Smetaniuk*, [2003] B.C.J. No. 3101 (QL), 2003 BCSC 2002. However, most of these cases are distinguishable from the present

case in that they involved facial scarring and lasting psychological damage caused by the scars themselves or by an unprovoked and humiliating public attack. Of these cases, perhaps the most similar is *Springett v. Shanklin*, in which the plaintiff was awarded \$20,000.00 in general damages for injuries, including facial scarring, that he sustained when he was hit in the face with a beer glass during an altercation in a bar.

- [41] In addition to the cases provided by counsel, I have also considered the following cases, which, though not all are assault cases, suggest an extremely wide range of general damages from \$2,000.00 to \$70,000.00 depending on the severity and number of the wounds; the treatment required; the visibility, length, and width of the resulting scars; the amount of continuing discomfort or numbness surrounding the scar tissue; whether corrective surgery might improve the sensation or appearance of the scar; and any psychological effects suffered by the plaintiff: *Sam v. British Columbia (Ministry of Public Safety and Solicitor General)* (2005), 35 C.C.L.T. (3d) 124, 2005 BCSC 331; *A.H. v. Ho* (2005), 136 A.C.W.S. (3d) 1140, 2005 BCSC 175; *Whitney v. University College of the Cariboo* (2004), 134 A.C.W.S. (3d) 185, 2004 BCSC 1110; *Kler v. Dardano*, [2001] B.C.J. No. 2786 (QL), 2001 BCPC 382; *Rosario v. Canada (Royal Canadian Mounted Police)* (2000), 94 A.C.W.S. (3d) 813, 2000 BCSC 214; *Bertrand v. Bertrand* (1999), 90 A.C.W.S. (3d) 882, [1999] B.C.J. No. 2040 (QL) (S.C.); *Wu (Guardian ad litem of) v. Hai Yonge Enterprises Ltd.* (1997), 69 A.C.W.S. (3d) 1066, [1997] B.C.J. No. 767 (QL) (S.C.); *Rudachyk v. Spilchen* (1992), 102 Sask.R. 115, 33 A.C.W.S. (3d) 894 (Q.B.); and *Thibeault v. Bissonette*, 2000 CarswellQue 3240.
- [42] Applying those factors to Mr. Kim's circumstances, I assess non-pecuniary damages at \$25,000.00.

AGGRAVATED DAMAGES

- [43] Aggravated damages are available to increase the general damage award in cases where the actions of the defendant have caused intangible injury such as undue humiliation: *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193. The claim for aggravated damages in this case is not well-founded as has been explained earlier. The humiliation that his scars may cause has been taken into consideration in my assessment of the non-pecuniary damages. Beyond that, it was not proved that the degree of humiliation was reasonable, or that Mr. Kwak's conduct caused the humiliation. The lowering of Mr. Kim's reputation was not proved.

LOSS OF FUTURE EARNING CAPACITY

- [44] The Court of Appeal in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, [1995] 3 W.W.R. 728 at ¶ 24 (C.A.), held that the considerations to be taken into account for loss of future earning capacity are 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.
- [45] Mr. Kim provided no detail on the extent that his ongoing symptoms have lessened his abilities. He is running a gas station and convenience store, which involves mostly the same tasks that he normally performed in the grocery store that he owned before the incident. There is no evidence that he has lost any income. He said he had to sell his grocery store at a loss in late 2001, but it was not made out that that loss was attributable to this incident. No claim was made for any loss in respect of that business.
- [46] There is no evidence of any work that Mr. Kim was once capable of doing but cannot do now because of the injury. His writing and typing are impaired, but how and to what extent that affects his work is unknown. There is no job mentioned that he wished to take but was denied. I find that the claim for loss of capacity to earn income has not been proved, and it is dismissed.

PUNITIVE DAMAGES

- [47] Unlike general and aggravated damages, punitive damages are awarded not to compensate the plaintiff but to punish the defendant and express society's outrage for extreme conduct, such as conduct that is harsh, reprehensible, vicious, high-handed, or malicious. Such damages are warranted when the defendant's conduct, by any reasonable standard, is deserving of full condemnation and punishment. See *Vorvis*, supra, at ¶27; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at p. 1208, 126 D.L.R. (4th) 129.
- [48] As in criminal law, the punishment must be proportional to the offensive conduct. Consequently, punitive damages should only be awarded in circumstances where the award for compensatory damages coupled with any other punishment related to the same misconduct, would be insufficient to achieve the goal of punishment and deterrence: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18.
- [49] Mr. Kwak's deliberate smashing of a beer bottle to use as a weapon, and then using it to cut Mr. Kim, was a malicious escalation of the violence from merely dangerous to deadly. The drinking and the fact of Mr. Kim's participation and partial responsibility for his injuries do not excuse Mr. Kwak in any way. Mr. Kwak's subsequent actions suggest also that he was barely remorseful. At trial, he minimized the number of times he slashed Mr. Kim, and he maintained that the fight was mainly Mr. Kim's fault.

[50] There was no excuse. Mr. Kwak's resort to the broken bottle was reprehensible, and it calls for punitive damages to express society's outrage and condemnation, and to deter Mr. Kwak and others in the future. I award the plaintiff \$5000.00 for punitive damages. It will be payable in full without deduction for any apportionment of fault to Mr. Kim.

CONCLUSION

[51] The plaintiff will have judgment for 90% of \$25,000.00 for non-pecuniary damages, that is \$22,500.00 plus \$5,000.00 for punitive damages. The total is \$27,500.00. The counterclaim is dismissed. The plaintiff will also have 90% of his costs at scale 3.

"E. Rice, J."

The Honourable Mr. Justice E. Rice

May 4, 2006 - Revised Judgment

On the front page of the Reasons for Judgment, the Registry should read:

"New Westminster"

Instead of:

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