

CANADA / JUDGMENT

Vassilaki v. Vassilakakis

2023 BCSC 1487

COURT

Supreme Court of British Columbia

DECIDED

25 August 2023

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

2023 BCSC 1487 Vassilaki v. Vassilakakis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vassilaki v. Vassilakakis,

2023 BCSC 1487

Date: 20230825

Docket: S132206

Registry: Kelowna

Between:

John Vassilaki

Plaintiff

And

Florio Vassilakakis, Nicholas Vassilakakis and The Cellar Wine Bar Ltd.

Defendants

And

John Vassilaki

Defendant by way of Counterclaim

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Plaintiff:

G. Douvelos

Counsel for the Defendants,

Florio Vassilakakis and Nicholas Vassilakakis:

J.D. Shields

Counsel for the Defendant,

The Cellar Wine Bar Ltd.:

J. Dawson

Place and Date of Trial/Hearing:

Kelowna, B.C.

July 31 and August 1, 2023

Place and Date of Judgment:

Kelowna, B.C.

August 25, 2023

- [1] This litigation represents another chapter in the unfortunate conflict that has arisen within the Vassilakakis family.
- [2] Consistent with the submissions of counsel and with no disrespect to the parties, I shall outline the parties and then refer to them by their chosen names to avoid confusion.
- [3] Paraskevi Vassilakakis ("Paraskevi") was the mother of four children. Two are parties to this litigation.
- [4] John Vassilaki ("John") is currently the manager of a liquor store. He has historically been a businessman and a politician. Specifically, John served three terms as a city counsellor for the city of Penticton and one term as mayor of the city of Penticton. John was the mayor of Penticton at the relevant time material to this litigation. John is currently 76 years of age.
- [5] Nicholas Vassilakakis ("Nicholas") is 74 years of age. He has also historically been a businessperson, although the evidence, albeit somewhat vague, indicates he has reduced activities in this regard in recent years.
- [6] John and Nicholas have been engaged in business ventures together for many years.
- [7] John and Nicholas' sister, Athena Demosten, has also been involved in the family business ventures, primarily it would seem, on the limited evidence I heard on this point, in a bookkeeping and administrative capacity.

- [8] Paraskevi's other daughter has not been involved in the family businesses, at least not recently, and the evidence, which was not contradicted, is that she was estranged from Paraskevi and the remainder of the family at the material time. She thus played no part in this litigation.

Litigation History

- [9] On August 26, 2021, John filed a notice of civil claim ("NOCC") against four defendants, Florio Michael Vassilakakis ("Michael"), George Ioannis Vassilakakis ("George"), Nicholas and The Cellar Wine Bar Ltd.
- [10] The core property at issue in the NOCC are two real properties with the municipal addresses of 412 and 414 Main Street in Penticton, BC. It is colloquially referred to as the "Greer Block".
- [11] In particular, the NOCC made claims with respect to what are defined as the "trust agreement" and the "lease agreement" as between the parties. The relief sought included declaratory relief, general damages, an accounting, punitive damages and court order interest.
- [12] The NOCC was amended twice. The second amended notice of civil claim was allowed pursuant to the order of Madam Justice D. MacDonald pronounced May 10, 2022, and filed on June 7, 2022 (the "Second Amended NOCC"). The amendments contained in the Second Amended NOCC included removing the defendant George from the proceedings and striking out the claims for damages for conspiracy and punitive damages. There were also other amendments that were made, but this effectively summarizes in a general way the state of the pleadings as they existed at the commencement of the trial before me on July 31, 2023.
- [13] This claim was defended by the personal defendants and the corporate defendants through separate counsel. The original response to civil claim by the personal defendants was filed on October 4, 2021. The original response to civil claim filed by the corporate defendant was filed September 29, 2021.
- [14] On October 4, 2021, Nicholas filed a counterclaim against John. The counterclaim alleges that in June 2020, John wrongfully and intentionally assaulted and battered Nicholas. It further claims that Nicholas suffered as a result:
- a) shock;
 - b) injury to the shoulders;
 - c) difficulty concentrating; and
 - d) difficulty sleeping.
- [15] As I will return to, Nicholas sought, on the basis of these allegations, general damages, punitive damages, aggravated damages, court order interest and costs.

- [16] One week prior to the trial of the action, counsel for John gave written notice of the intention to seek leave to file a notice of discontinuance of the claims set forth against all remaining parties in the Second Amended NOCC pursuant to R. 9-8(2) of the Supreme Court Civil Rules ("Rules").
- [17] That Rule provides as follows:
- (2) After a notice of trial is filed in an action, a plaintiff may discontinue the action in whole or in part against a defendant with the consent of all parties of record or by leave of the court.
- [18] Rule 9-8(8) of the Rules further provides as follows:
- (8) Unless the court otherwise orders, the discontinuance of an action in whole or in part is not a defence to a subsequent proceeding for the same or substantially the same cause of action.
- [19] This was opposed by the personal defendants and the corporate defendant. I chose to address the issue at the outset of the trial. In my brief oral reasons for judgment, I allowed the application and made an order that leave be granted to file a notice of discontinuance pursuant to R. 9-8(2) of the Second Amended NOCC on the basis that:
- a) the discontinuance is a defence to further proceedings for the same or substantially the same cause of action commenced by the plaintiff (John) as against any of the defendants up until the present date and that this defence shall have the same force and effect as if there was a trial on the merits. I did so on the basis, amongst other authorities, of *Rayner v. The British Columbia Coast Pilots Ltd.*, 2023 BCSC 373; and
- b) Counsel for the remaining defendants are at liberty to make submissions as to the imposition of special costs. I will deal with the procedure for costs at the conclusion of these reasons. Pursuant to R. 9-8(4), it is conceded by counsel for John that ordinary costs pursuant to Appendix B of the Rules are payable on the basis that the matter is one of ordinary difficulty.
- [20] The final point with respect to the litigation history of this family generally is that I recently presided over the hearing of a petition involving John, William, Michael, George and two family corporations, JPN Holdings Ltd. and Vassilaki & Sons Investments Ltd.
- [21] On May 10, 2023, in my reasons for judgment which are indexed as 2023 BCSC 960, I dismissed the relief sought by the petitioners, John and William. Apart from setting forth some of the context of the familial issues, I made no findings of fact in those reasons for judgment which have any bearing on the issues before me in this trial. It is simply somewhat coincidental that I presided over both the petition and the trial in such a short period of time.

The "Incident"

- [22] In May 2020, Paraskevi went to live with Athena. She was in failing health and required significant care. Athena was primarily providing that care along with some assistance.

- [23] On June 14, 2020, Nicholas and his wife Helene Vassilakakis ("Helene") were visiting Paraskevi at Athena's residence.
- [24] During the course of this visit, Nicholas placed a telephone call to John. It was brief. I accept that in the call Nicholas made some allegation that John had removed items belonging to Paraskevi from Athena's residence. These items included jewelry and certain gold coins which John, in his evidence, asserts belong to him in any event.
- [25] John took extreme offence to this call.
- [26] It was and remains John's evidence that he did not remove or steal or otherwise misappropriate these items. Frankly, the evidence at trial does not establish who took these items or where they might be currently. What is important for the purposes of this trial is that they apparently went missing and this resulted in significant escalation of familial conflict.
- [27] John's evidence is that he tried to phone Nicholas back after this call but got no response. John then tried to telephone Athena when his call to Nicholas was not answered. Athena agrees that she received a call from John that afternoon of June 14, 2020 but intentionally declined to answer it.
- [28] After not receiving a response from either Nicholas or Athena to his calls, John left a voicemail message on Athena's cellular telephone (the "Voicemail"). I heard a playback of the recording of the Voicemail at the trial and have the benefit, at Exhibit 2, of a certified transcript of the Voicemail.

[29] In the Voicemail John states, I am satisfied, as follows:

JOHN VASSILAKIS: Athena, you better phone that fucking brother of yours and tell him what happened with mom's money and what happened to my coins. He just called accusing me of taking them and for me to take them back. You fuckin' better do something about it. You shouldn't stole them. You better bring back my coins, or help me I'll fuckin' put you in the hospital for six months; do you understand?

And you better tell that fucking mother of yours if she told the other bitch where the money was and she gave it to them, to bring back my fuckin' coins. You don't know how, how badly I feel right now. I'm gonna kill all of you. Do you fucking understand me?

You fucking whore, 'cause you caused the whole thing. You told her about bringing the money out of the bank, (indiscernible) the vault, and you talk her into putting your name on her account because I know what you're like. You're a fuckin' crook, and you did this whole thing.

Now you are getting me mixed up into it, and you better fucking fix it 'cause I'm going to kill you. Do you understand? I'm not like your brother. I'm - - I worked hard for everything I own. I worked my fuckin' ass off.

I never got anything from everybody. I gave you guys everything I had, and now you guys are accusing me of taking her stuff. You better fucking do something about it now. So help me God I'll kill both of them; do you understand.

You don't know how bad I feel right now. You better do something about it and do it right now and bring back my coins. I was saving those fucking' coins for my grand kids so I can give it to them when they graduate, and you guys took them.

Do you fuckin' understand me? You better take care of it. You better take care of it, 'cause you don't know what I'm like and what I'm capable of doing.

- [30] Of significance, and as I will return to, Athena did not listen to the Voicemail until later that same day.
- [31] Upon leaving the above very agitated voicemail, John made the further impulsive and improvident decision to get in his vehicle and drive to Athena's house. His home is only some approximately seven kilometres away from Athena's residence and he arrived within approximately ten minutes of leaving the Voicemail.
- [32] Considerable time was spent during the course of this brief trial on the issue of whether John was invited to Athena's residence. I ultimately find that while it might have been somewhat customary family practice for John to be able to attend Athena's residence without a specific invitation, he was not invited on this occasion. In this regard, I make specific note of the fact that Athena intentionally declined to accept John's call made shortly before he attended at her residence.
- [33] The parties were also questioned as to whether or not John knocked before entering Athena's residence. In my view, this is not a probative line of questioning. I have already concluded that John was not invited to Athena's residence on this occasion. It is possible that he knocked once and that it was not heard. In any event, it is conceded by all parties that the door was unlocked and he entered on his own initiative.
- [34] Upon entering, John came up the staircase to Athena's residence at a brisk pace. Athena described it as him barging in. John's evidence on this point is largely consistent with Athena's and Helene's.
- [35] The staircase John came up leads into the kitchen. Athena and Helene were in the kitchen. Nicholas, I accept, was seated on the couch in the adjacent family room area and Paraskevi was sitting somewhat supine on that same couch. Beside her was a TV tray which had on it a glass of water.
- [36] When John entered the kitchen area of Athena's home, I accept that he pushed Athena out of the way in order to reach Nicholas. Athena fell back onto the kitchen countertop.
- [37] The kitchen area was in clear view of where Nicholas was seated based on the layout of Athena's residence.

- [38] Nicholas said words to the effect of, "what are you doing to our sister" or, "why are you hitting our sister". There were slight variations in the evidence about the exact language used, but I am satisfied these variations are not material. The evidence of all parties is that Nicholas stood up and questioned John about pushing Athena.
- [39] Importantly, Nicholas did not advance towards John. He merely stood up. John approached Nicholas and pushed him on his shoulders which caused him to fall back down on the couch. John then placed his hands around Nicholas' neck. Based upon the evidence, I accept that he did so briefly with two hands at first instance but then removed one hand to fend off Athena who came from the kitchen to grab at the back of John's shirt in an effort to stop the altercation between her brothers.
- [40] Ultimately, Athena's efforts to address the situation had the desired effect. The physical altercation between John and Nicholas ceased very shortly after it started.
- [41] John then approached Paraskevi who, as noted, was laying mostly supine on the same couch and was in very poor health. I accept he said, in Greek, words that can be appropriately translated as "May you not die unless I step on your chest 40 times". Of notable significance, John did not give any evidence wherein he denied making this statement or provided a different translation of meaning even though he was on clear notice from the direct examination of Nicholas, Athena and Helene that this was their evidence as to what they maintain he stated to Paraskevi after the altercation with Nicholas.
- [42] John then, on his own admission, knocked over the TV tray which was situated near Paraskevi. I accept in so doing the glass of water on the tray was knocked over and may have sprayed the adjacent wall. I make no express finding on the latter point as the evidence of all parties was somewhat inconsistent and, in any event, it matters not whether the water glass spilled on the floor entirely or partially on the floor and partially on the wall. The TV tray was pushed by John in the opposite direction of any of the individuals present and so no person was either harmed or in the apprehension of imminent harm as a result of this conduct.
- [43] Within this same brief period of time, which I accept was approximately a minute or two and so the chronology of events is somewhat overlapping, Athena placed a 9-1-1 call but then allowed the call to drop without making a report. I further accept she knew that 9-1-1 would follow up, but that she had immediate reservations about involving the police given that John was, at that point, the mayor of Penticton. When the 9-1-1 dispatcher did call back, Athena reported that it was a family matter that had been resolved. As such, the police did not attend.

- [44] It was suggested at trial that John "fled" Athena's residence to avoid the police. I do not accept this to be the case. John promptly left, I find, after stating the above words to Paraskevi and knocking over the TV tray. However, given his political position and prominence in the community, the police surely would have been able to locate him almost immediately had they been required to attend. He was not a masked intruder whose identity or place of residence was unknown.
- [45] As a final point on my findings of fact, Paraskevi unfortunately passed away in August 2020, some approximately two months after the Incident. The Court thus does not have the benefit of any evidence from her as to the events of June 14, 2020.

Credibility - The Law

- [46] As with the recent decision I rendered in *Habib v. Wilson*, 2023 BCSC 585, credibility plays a role in assessing this case. I shall thus adopt my summary of the law on credibility set out at paras. 56 to 61, as follows, as they accurately set out the law in this regard:
- [56] The assessment of credibility by the trial judge is a nuanced analysis. It is also, ultimately, fact specific. However, various justices of this Court have outlined certain factors to be considered when addressing this issue that are very helpful. Having regard to the significance of this issue to the trial, I am going refer to four decisions of the Court that I consider to be relevant and applicable.
- [57] The first is the seminal decision in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. In *Bradshaw*, Justice Dillon wrote the following oft-quoted passage on credibility:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) ; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).
- [58] There are three recent decisions which follow *Bradshaw* that are also instructive.
- [59] In *M.L. v. R.H.*, 2022 BCSC 1580 at para. 25, Justice Wilkinson helpfully summarized *Bradshaw* as the following list of factors:

1. Is the witness able to resist the influence of interest in modifying their recollection?
2. Does the witness' evidence harmonize with independent evidence that has been accepted?
3. Does the witness change their evidence during examination for discovery, direct examination and cross-examination, or is it otherwise inconsistent in their recollections?
4. Does the witness' evidence seem generally unreasonable, impossible, or unlikely?
5. What demeanour did the witness exhibit when testifying?

[60] In *S.B.F. v. D.G.F.*, 2022 BCSC 2231, Justice Murray cited Bradshaw and adopted a helpful statement on the distinction between credibility and reliability from the Ontario Court of Appeal:

[29] The distinction between reliable evidence and credible evidence was discussed by Doherty J.A. in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.) at p. 526:

Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[61] In *L.M. v. K.M.*, 2022 BCSC 689 at paras. 275-82, Justice Fleming sets out a comprehensive review of the credibility issue with reference to Bradshaw. Recognizing that the overall review is instructive, albeit done in a factually distinguishable case, I will note in particular the following paras.:

[275] Credibility or truthfulness and reliability or accuracy are related but distinct concepts. A truthful witness, for example, may be mistaken about what they recall.

[276] Credibility and reliability are not all or nothing concepts. The trier of fact may believe some, all, or none of a witness's evidence and attach different weights to different part of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.

[277] The proper approach to assessing the truthfulness of any interested witness was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.) at 357, with these words:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the

real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Assessment of Credibility

- [47] By way of overview, I note that I have already applied the above principles with respect to the assessment of credibility in making my findings of fact regarding the Incident. I elected to do so given there was a number of essentially non-contested material facts which rendered a detailed analysis of the credibility of all witnesses on each point unnecessary.
- [48] I will, however, make the following additional findings regarding credibility for context as to those findings of fact:
- a) Nicholas' version of the Incident was generally consistent with all of the witnesses, including John, with the exception of whether John continued to have two hands on his neck when Athena intervened or whether he removed one hand to fend off Athena's attempt to stop the Incident by pulling on his shirt. Given this took place over a matter of seconds, I do not find this inconsistency material to my assessment of the overall reliability of Nicholas' evidence. Where I take issue with Nicholas' credibility is that he suffered any actual physical injury from the Incident. He did not seek medical treatment at any juncture. He testified that he took some Tylenol 3 medication for pain and discomfort, but given that he did not seek medical attention this must have been prescription medication already available to him. He also took no steps to seek redress for the Incident either civilly or criminally until October 2021. This was not only some approximately 15 months after the Incident, it was also after John commenced these proceedings which, although related to the overall conflict in the Vassilakakis family, were not specifically related to the Incident;
 - b) Athena and Helene's evidence about the Incident were very similar. They were also clearly well prepared as witnesses. However, the consistency in their evidence was not such that I consider it undermines the reliability of their evidence. This Incident was brief and it was notable for the family. It was something they both had a clear recollection of. Helene in particular, I find, made certain concessions under cross-examination which, while not contradicting her version of the Incident generally, demonstrated a willingness to make admissions which might be contrary to Nicholas' interests in an effort to be truthful; and
 - c) John was, in contrast to Athena and Helene, not a particularly prepared witness. Specifically, despite having been disclosed in the course of the litigation, John had not listened to the recording of the Voicemail until the first day of trial. As I will return to below, John initially also denied making certain admissions about the Incident which he then readily conceded were accurate in his evidence at trial. Ultimately, I accept that John placed the Voicemail, attended at Athena's residence without a specific invitation, may have knocked once but then promptly entered Athena's residence in an agitated state, pushed Athena in the kitchen and then engaged in the Incident with Nicholas. I also find his failure to deny the allegation

of the words he said to Paraskevi amounts to an admission that this allegation is true. I do, however, accept his evidence that when Athena intervened he removed one hand from Nicholas and used it to stop her interference. There is a genuine air of reality to this evidence when put into context of the overall evidence of all witnesses.

The Notice to Admit

[49] On or about October 29, 2021, the personal defendants delivered a notice to admit. It sought certain admissions material to the counterclaim.

[50] Rule 7-7 of the Rules states, in part:

Notice to admit

(1) In an action in which a response to civil claim has been filed, a party of record may, by service of a notice to admit in Form 26, request any party of record to admit, for the purposes of the action only, the truth of a fact or the authenticity of a document specified in the notice.

Effect of notice to admit

- (2) Unless the court otherwise orders, the truth of a fact or the authenticity of a document specified in a notice to admit is deemed to be admitted, for the purposes of the action only, unless, within 14 days after service of the notice to admit, the party receiving the notice to admit serves on the party serving the notice to admit a written statement that
- (a) specifically denies the truth of the fact or the authenticity of the document,
 - (b) sets out in detail the reasons why the party cannot make the admission, or
 - (c) states that the refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and sets out in detail the reasons for the refusal.

Copy of document to be attached

- (3) Unless the court otherwise orders or the demanding party and the responding party consent, a copy of a document specified in a notice to admit must be attached to the notice to admit when it is served.

Unreasonable refusal to admit

- (4) If a responding party unreasonably denies or refuses to admit the truth of a fact or the authenticity of a document specified in a notice to admit, the court may order the party to pay the costs of proving the truth of the fact or the authenticity of the document and may award as a penalty additional costs, or deprive a party of costs, as the court considers appropriate.

...

- [51] In the notice to admit John formally acknowledged being siblings with Nicholas and Athena, which truly should never have been controversial. John denied substantively all of the allegations in the notice to admit and put Nicholas to the "strict proof thereof" as to the admissions sought.
- [52] With the exception of the allegations that Athena injured her back from being pushed against the kitchen counter, that Nicholas suffered injuries from the Incident and that John "fled" in order to avoid the police, the remainder of the facts sought to be admitted were indeed admitted by John at trial. The only other admission which was arguably disputed was whether John's conduct amounted to "choking" Nicholas as was sought. I make this finding on the basis that I am not satisfied that John's conduct resulted in a severe difficulty in breathing because of a constricted throat or a lack of air or such other similar definition of "choking".
- [53] In accordance with R. 7-7(4), I specifically note that I have not taken this into consideration with respect to my assessment of credibility and reliability of the viva voce evidence at trial. I shall instead address it with respect to the issue of costs in due course.

Battery and Assault - The Law

- [54] In *Saether v. Irvine*, 2011 BCSC 1497 at paras. 49-51, Mr. Justice Williams very succinctly sets out the distinction between the torts of assault and battery in the civil context:
- [49] Assault is the intentional creation of the apprehension of imminent harmful or offensive contact (Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham, ON: LexisNexis Canada Inc., 2011) at p. 46). Battery is the intentional application of force constituting a harmful or offensive contact with another, without the other's consent.
- [50] In my view, the appropriate focus of the analysis in the present case is upon the allegation of battery.
- [51] Once the plaintiff has established that there was a battery, and that injuries were caused by it, the defendant has the onus of establishing any defence he may have and, in addition, that the force used was reasonable in the circumstances.

- [55] The aforementioned summary of the essential elements of the intentional torts of assault and battery is adopted almost verbatim by our Court of Appeal in *N.E.T. v. British Columbia (Attorney General)*, 2018 BCCA 380 at para. 27.
- [56] In the somewhat more recent case of *Siegerist v. Tilton*, 2020 BCSC 549, Mr. Justice Walker addressed the elements of the tort of battery in the context of a ruling on a no evidence motion. I find his commentary at paras. 6 and 7 instructive:
- [6] Battery is the intentional bringing about of harmful or offensive contact with another person. The cases are clear that Mr. Tilton's liability for battery is not predicated solely on physical contact. He will be liable in battery if Mr. Siegerist establishes that he was injured by the direct act or acts of Mr. Tilton: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at paras. 3-8. In her reasons in that case, Madam Justice McLachlin (as she then was), cited with approval several cases discussing the tort of battery and said this at para. 8:

Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant.

- [7] The same point is made in subsequent cases such as *Bettel v. Yim* (1978), 29 O.R. (2d) 617 at 5:

To approach this issue one must first examine what interests the law seeks to protect. A thorough discussion of the history of the old actions of trespass and case is found in Prosser, *Law of Torts*, 4th ed. (1971), p. 28 et seq. Terms such as battery, assault and false imprisonment, which were varieties of trespass, have come to be associated with intent. The old action on the case has emerged as the separate tort of negligence. Today it is recognized that there should be no liability for pure accident, and that for there to be liability the defendant must be found at fault, in the sense of being chargeable with a wrongful intent, or with negligence. Thus, "with rare exceptions, actions for injuries to the person, or to tangible property, now require proof of an intent to inflict them, or of failure to exercise proper care": Prosser, *supra*, p. 30.

In discussing battery Fleming writes, *supra*, pp. 23-4:

Of the various forms of trespass to the person the most common is the tort known as battery, which is committed by intentionally bringing about a harmful or offensive contact with the person of another. The action, therefore, serves the dual purpose of affording protection to the individual not only against bodily harm but also against any interference with his person which is offensive to a reasonable sense of honour and dignity. The insult involved in being touched without consent has been traditionally regarded as sufficient to warrant redress, even though the interference is only trivial and not attended with actual physical harm. "The least touching of another in anger is a battery", and so is such offensive and insulting behaviour as spitting in another man's face, cutting his hair or kissing a woman. The element of personal indignity is given additional recognition in the award of aggravated damages to compensate for any outrage to the plaintiff's feelings ...

.....

Battery is an intentional wrong: the offensive contact must have been intended or known to be substantially certain to result. On the other hand, it is not necessary that the actor intended to inflict bodily harm, since we have seen that the legal injury is complete without it. Indeed it may be sufficient that he intended only to frighten but in a manner fraught with serious risk of bodily contact or harm. [Footnotes omitted]

Fleming, in the use of "intent" accepts the definition set out in the Second Restatement of the Law of Torts (1965):

8A. Intent

The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it.

[*Italic emphasis in original; underline emphasis added.*]

Determination on Liability for Assault

- [57] As I have set forth above, the tort of assault is predicated on a finding of an intentional creation of the apprehension of imminent harmful or offensive contact.
- [58] In my view, timing is critical in applying the elements of the tort against my findings of fact in this case.
- [59] Had the Voicemail been transmitted to or heard by Nicholas prior to John attending at Athena's residence, I am satisfied that the essential elements of the tort would have been established. The Voicemail constitutes an intentional creation of the apprehension of imminent harmful or offensive contact. That is patently and obviously clear from a review of the transcript and the recording as I have detailed above.
- [60] However, Athena did not listen to the Voicemail until after the Incident between John and Nicholas had occurred and John had left her residence. Nicholas only listened to it after that when it was forwarded to him by Athena after he and Helene had already also left Athena's residence.
- [61] This, I conclude, is fatal to Nicholas' claim for damages pursuant to the tort of assault. Specifically, I conclude that at the time that Nicholas received the forwarded Voicemail from Athena, there was no longer any possible threat of imminent harmful or offensive contact. The Incident had already occurred.
- [62] I thus dismiss the claim for any relief pursuant to the tort of assault as claimed in paragraph 1 of the counterclaim.

Determination on Liability for Battery

- [63] As stated above, the elements of the tort of battery require a finding of the intentional application of force constituting a harmful or offensive contact with another, without the other's consent.
- [64] The elements of this tort are clearly established in this case.
- [65] As set out above in my findings of fact, John attended Athena's residence in an agitated state. Upon entering her residence, he pushed her and caused her to fall backwards into the kitchen countertops. Nicholas stood up from the couch and questioned John about his behaviour but did not advance towards John or make any aggressive physical gestures. John, however, advanced towards Nicholas and pushed him down on the couch and, at least briefly, had two hands on Nicholas' throat before Athena intervened and he used one hand to push her away.
- [66] John's conduct thus clearly constituted an intentional application of force without Nicholas's consent. These findings satisfy all of the elements of the tort of battery on the applicable standard of proof.
- [67] There is further no basis to find that there is any available defence or that the force was reasonable. John was not at risk of harm from any of the individuals present in Athena's residence on the day of the Incident.

Summary of Damages Sought

- [68] Nicholas seeks damages as follows based upon the closing submissions of his counsel:
- a) \$20,000 in general/non-pecuniary damages;
 - b) \$5,000 in aggravated damages; and
 - c) \$10,000 in punitive damages.
- [69] There is no claim for recovery pursuant to the Health Care Costs Recovery Act, S.B.C. 2008, c. 27, as Nicholas did not seek any medical treatment.

Non-Pecuniary Damages

- [70] The factors to be considered in assessing an award for non-pecuniary damages are set out by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45 to 47 as follows:
- [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

[Emphasis [in Stapley].]

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[47] The cases cited to us by the appellant and the respondent are summarized below. I have approximated the awards in those cases to 2004 dollars to correspond to the award granted in the case at bar at the time the jury made the award.

[71] Upon my assessment of the evidence, the above factors require a modest award for non-pecuniary damages.

- [72] Most significantly, there is no evidence of Nicholas suffering anything but minor injury and upset. He sought no medical attention. The medication he deposed he used for pain relief was, I find, already available to him for other issues. On his own evidence, he recovered from any injuries in short order and there was no suggestion he was unable to carry out his day-to-day functioning without assistance during the material time. There is thus no disability or loss or impairment of life.
- [73] I further do not conclude that Nicholas' age is material in this factual matrix. The injuries were minor. John and Nicholas, as indicated in my conclusion regarding the facts, are both in their 70s. John is indeed slightly older than Nicholas. Nicholas, by my observation, also appears in generally good health for his age and was not in a vulnerable or compromised state.
- [74] There is an element of impairment of familial relationships as addressed in para. 47 of Stapley here. However, that must be put into context of the fact that the family dynamic was already clearly reaching a level of clear dysfunction by the time of the Incident. That is unchallenged on the facts. There was obviously more than one straw that helped to break the proverbial camel's back in this particular scenario.
- [75] Thus, upon a consideration of the above factors, and further referring to *Thompson v. Friedmann*, 2008 BCSC 703, which was cited by counsel for Nicholas but involved a much more significant altercation resulting in an award of \$20,000 (acknowledged to be without specific adjustment for inflation), I have concluded that an award of non-pecuniary damages in the amount of \$9,000.00 is appropriate.

Aggravated Damages

- [76] As noted, Nicholas seeks aggravated damages in addition to non-pecuniary damages.
- [77] In *McRae*, 2022 BCSC 2200, Justice Hori helpfully summarizes the governing principles regarding aggravated damages awards:
- [81] The basis for an award of aggravated damages is set out in *Yeh v. Whittle*, 2005 BCSC 1798. Quoting from para. 70 of *Glover v. Fell*, [1999] B.C.J. No. 1333 (S.C.), Justice Silverman describes the purpose of aggravated damages at para. 24 as follows:

Aggravated damages are an augmentation of compensatory damages for such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence, that are caused by the conduct of the defendant that reasonably ought to have been foreseen. This part of the damage award is for the aggravation of the injury by the defendant's high-handed conduct.

- [78] In *Henderson v. McGregor*, 2019 BCSC 1964, at paras. 46 and 47, Justice Walker provides a similar but more detailed analysis which addresses the difference between aggravated and punitive damages:

- [46] Aggravated damages are compensatory in nature, designed to compensate for distress and humiliation suffered as a result of the defendant's conduct (often described as insulting behaviour) or high-handed conduct: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085; *Thomson v. Friedmann*, 2008 BCSC 703, aff'd 2010 BCCA 277; Azak at para. 77.
- [47] In *Thomson*, Madam Justice Gerow discussed the difference between aggravated and punitive damages:
- [29] Ms. Thomson is seeking both aggravated and punitive damages. Aggravated damages are a compensatory award that takes account of the intangible injuries such as distress and humiliation caused by a defendant's insulting behaviour. Aggravated damages are often claimed as compensation for mental distress caused by a defendant's behaviour. Aggravated damages will frequently cover conduct which would also be subject to punitive damages, but their role is compensatory. They are designed to compensate a plaintiff and are measured by the plaintiff's suffering such as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, and similar matters caused by the conduct of a defendant: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085.
- [30] There is a close relationship between aggravated and punitive damages. The harshness of a defendant's conduct may give rise to both types of damages. However, it is important that a plaintiff not be compensated twice for the same harm or a defendant punished twice for the same type of moral culpability: *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.).
- [79] In this case, I do not accept that the plaintiff has wounded pride and damaged self confidence as a result of the Incident. It was a relatively minor event in the course of some complex family dynamics. I do, however, consider the conduct of the John to be "high-handed". John reacted emotionally to the call from Nicholas by leaving the Voicemail. He then promptly drove to Athena's residence. While at Athena's residence, he pushed Athena, battered Nicholas and made an extremely inappropriate statement to Paraskevi, his elderly frail mother, in a matter of mere minutes.
- [80] Relying on *McRae, Henderson, Habib, and Reimer v. Rooster's Country Cabaret Ltd.*, 2013 BCSC 2211, I conclude that an award of aggravated damages in the amount of \$5,000.00 is appropriate. I reach this conclusion on the basis that while the actual physical harm suffered by Nicholas was less significant than in these cases, there was a greater degree of pre-mediation in John's conduct. He clearly had the opportunity to consider his conduct during the drive to Athena's residence and still made the decision to attend at her home in a highly agitated state notwithstanding his position as mayor of the City of Penticton. Further, while Nicholas is the only party making a claim for damages, his conduct to Athena and Paraskevi are, in my view, relevant to the assessment of aggravated damages.

Punitive Damages

- [81] Nicholas further seeks punitive damages.

[82] In *Reddemann v. McEachnie*, 2005 BCSC 915, this Court helpfully summarized the law on punitive damages. As set out in *Habib*, I accept that *Reddemann* is still good law. Specifically, at para. 41 of *Reddemann*, the Court stated as follows:

[41] In *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, the Court affirmed the definition of punitive damages set out in *Hill*, *supra*, and set out the following 10 principles to be considered in deciding an award of punitive damages is merited:

First, the attempt to limit punitive damages by "categories" does not work and was rightly rejected in Canada in *Vorvis*, *supra*, at pp. 1104-6. The control mechanism lies not in restricting the category of case but in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action. It is in the nature of the remedy that punitive damages will largely be restricted to intentional torts, as in *Hill*, *supra*, or breach of fiduciary duty as in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, but *Vorvis* itself affirmed the availability of punitive damages in the exceptional case in contract. In *Denison v. Fawcett*, [1958] O.R. 312, the Ontario Court of Appeal asserted in obiter that on proper facts punitive damages would be available in negligence and nuisance as well. In *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228, the British Columbia Court of Appeal awarded punitive damages in a negligence case on the principle that they ought to be available whenever "the conduct of the defendant [was] such as to merit condemnation by the [c]ourt" (p. 250). This broader approach seems to be in line with most common law jurisdictions apart from England.

Second, there is a substantial consensus that coincides with Lord Pratt C.J.'s view in 1763 that the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it in *Hill*, *supra*, at para. 196, they are "the means by which the jury or judge expresses its outrage at the egregious conduct").

Third, there is recognition that the primary vehicle of punishment is the criminal law (and regulatory offences) and that punitive damages should be resorted to only in exceptional cases and with restraint. Where punishment has actually been imposed by a criminal court for an offence arising out of substantially the same facts, some jurisdictions, such as Australia and New Zealand, bar punitive damages in certain contexts (*Gray*, *supra*; *Daniels*, *supra*), but the dominant approach in other jurisdictions, including Canada, is to treat it as another factor, albeit a factor of potentially great importance. (*Buxbaum (Litigation guardian of) v. Buxbaum*, [1997] O.J. No. 5166 (Q.L.) (C.A.); *Glendale v. Drozdzik* (1993), 77 B.C.L.R. (2d) 106 (C.A.); *Pollard v. Gibson* (1986), 1 Y.R. 167 (S.C.); *Joanisse v. Y. (D.)* (1995), 15 B.C.L.R. (3d) 224 (S.C.); *Canada v. Lukasik* (1985), 18 D.L.R. (4th) 245 (Alta. Q.B.); *Wittig v. Wittig* (1986), 53 Sask. R. 138 (Q.B.)) The Ontario Law Reform Commission, *supra*, recommended that the "court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant" (p. 46).

Fourth, the incantation of the time-honoured pejoratives ("high-handed", "oppressive", "vindictive", etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount. Lord Diplock in *Cassell*, supra, at p. 1129, called these the "whole gamut of dyslogistic judicial epithets". A more principled and less exhortatory approach is desirable.

Fifth, all jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational.

Sixth, it is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others.

Seventh, none of the common law jurisdictions has adopted (except by statute) a formulaic approach, as advocated by the intervener the Insurance Council of Canada in this appeal, such as a fixed cap or fixed ratio between compensatory and punitive damages. The proper focus is not on the plaintiff's loss but on the defendant's misconduct. A mechanical or formulaic approach does not allow sufficiently for the many variables that ought to be taken into account in arriving at a just award.

Eighth, the governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus there is broad support for the "if, but only if" test formulated, as mentioned, in *Rookes*, supra, and affirmed here in *Hill*, supra.

Ninth, it has become evident that juries can and should receive more guidance and help from the judges in terms of their mandate. They should be told in some detail about the function of punitive damages and the factors that govern both the award and the assessment of a proper amount. Juries should not be thrown into their assignment without any help, then afterwards be criticized for the result.

Tenth, and finally, there is substantial consensus (even the United States is moving in this direction) that punitive damages are not at large (as pointed out by Cory J. in *Hill*, supra, at para. 197) and that an appellate court is entitled to intervene if the award exceeds the outer boundaries of a rational and measured response to the facts of the case. (at paras. 67-76)

[83] In my view, upon a consideration of these factors, punitive damages are not appropriate in this case. I have already awarded non-pecuniary damages and aggravated damages. Those damage awards both compensate Nicholas for his mild injuries and provide a measure of deterrence. A punitive damages award would unduly punish John for his conduct and, I conclude, would violate the proportionality principle.

Summary

[84] In summary, with respect to Nicholas' claims, I thus order:

- a) relief for the alleged tort of assault is hereby dismissed;
- b) relief for the alleged tort of battery is allowed. I make the following awards for damages:
 - i. general/non-pecuniary: \$9,000.00;
 - ii. aggravated: \$5,000.00
 - iii. punitive: \$0.00.
- c) Interest shall be payable pursuant to the Court Order Interest Act, R.S.B.C. 1979, c. 79, at the pre-judgment interest rate to August 25, 2023, and post-judgment interest rate thereafter.

Costs

[85] As discussed with counsel at the conclusion of this trial, I concluded that it was most efficient to deal with the costs pursuant to my order granting leave to file the notice of discontinuance and the costs arising from the trial at the same time. The law is similar and this will avoid further expense for the parties and promote judicial efficiency in accordance with the principles of the Rules.

[86] Counsel will also have to address the implications arising pursuant to R. 14-8(10) of the Rules in light of the fact that the assessment of damages falls within the jurisdiction of the Provincial Court. In raising this issue, I am cognizant of the fact that Nicholas brought a counterclaim in a proceeding which had to be within the jurisdiction of this Court and that said proceeding was discontinued, as set forth above, with my leave. I am simply raising this issue to ensure counsel please address it in their submissions.

[87] The orders that I thus pronounce with respect to costs are that within two weeks of the release of these reasons for judgment to the parties, counsel for the remaining personal defendants and the corporate defendant shall file and serve written submissions with respect to costs. John shall have two weeks from the receipt of the submissions of the defendants to file and serve written submissions on costs. Reply submissions are not required but if any of the remaining defendants wish to do so, reply submissions of costs must be filed and served within one week of the receipt of John's submissions.

[88] The written submissions shall be provided to me through Supreme Court Scheduling.

- [89] In the event circumstances arise and counsel are able to reach agreement on a somewhat modified schedule for the exchange of submissions, they have leave to do so. However, they must notify Supreme Court Scheduling before the date upon which any reply submissions are due based on these reasons for judgment. Failing notification of a consent extension, I shall proceed on the basis that no further written submissions on costs are forthcoming after the expiry of the above timetable.
- [90] Finally, upon receipt of any written submissions with respect to costs, and as I advised counsel at the conclusion of the trial, I do retain my jurisdiction to require the parties to make oral submissions. Those submissions, should they be required, can be done through MS Teams at a date to be arranged with Supreme Court Scheduling.

"Hardwick J."

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/23/14/2023BCSC1487.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/vassilaki-v-vassilakakis-2023-bcsc-1487>

Prepared on 27 October 2026 · Esheria