

TOMEI MECHOL, Plaintiff
v.
NAORU KYOS, Defendant
Civil Action No. 415
Trial Division of the High Court
Palau District
August 18, 1970

Action for damages sustained as a result of defendant's assault upon plaintiff. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that defendant was liable to plaintiff for civil damages for injuries caused by his criminal act, but where plaintiff had not sought to mitigate the damages his recovery would be reduced.

1. Torts—Generally

An individual may be punished criminally and made to respond in civil damages for the same act.

2. Aggravated Assault—Generally

Trust Territory Code Section 377-A provides a criminal penalty for unlawful assault and battery and commission of such an offense is negligence per se. (T.T.C., Sec. 377-A)

3. Torts—Generally

When conduct which results in harm to another is defined by statute as a criminal act it is negligence per se.

4. Civil Procedure—Damages

Civil liability may arise from mutual combat which may or may not include a criminal offense.

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5. Assault and Battery—Generally

An actor is subject to liability to another for battery if he acts intending to cause a harmful or offensive contact with the person of the other or a third person.

6. Assault and Battery—Liability to Third Person

Where defendant expressed an intent to harm one person but instead while fighting with a third person inflicted harm on him, he was liable even though his original intent was not to harm such third person.

7. Assault and Battery—Self-Defense

To justify resistance with a deadly weapon in a manner likely to cause death or serious injury to the opposing party, the defendant must have had a reasonable fear of loss of life or of great or serious bodily injury.

8. Assault and Battery—Self-Defense—Evidence

There was no evidence that an unarmed old man, even though he may have been the aggressor, could have reasonably caused fear of serious bodily injury in the mind of the defendant to justify defendant's use of a knife upon the plaintiff.

9. Torts—Damages—Generally

Having determined liability, the amount of recovery must depend upon the evidence of loss for special damages and upon reasonable compensation for pain and suffering.

10. Torts—Damages—Generally

While there must be some speculative determination to avoid an injustice in awarding damages, nevertheless, there also must be some evidence upon which to speculate.

11. Torts—Damages—Pain and Suffering

Compensation for pain and suffering may not be precisely calculated because money is not the equivalent of pain and suffering.

12. Torts—Damages—Pain and Suffering

In order to establish damages in compensation for pain and suffering there must be a showing that money is being paid for the pain that could not otherwise be avoided.

13. Torts—Damages—Mitigation

Failure to follow "doctor's orders" mitigates against entitlement for money damages for all past and future pain and in such case the court will allow only what it deems to be reasonable under the circumstances.

Assessor:

PABLO RINGANG, *Presiding District Court Judge*

Interpreter:

PETER NGIRAIBIOCHEL

Reporter:

SAM K. SASLAW

Counsel for Plaintiff:

JOHN O. NGIRAKED

Counsel for Defendant:

F. ARMALUUK

TURNER, Associate Justice

This is a claim for damages by the plaintiff for injuries sustained when he was assaulted by the defendant during a drunken altercation on Angaur Island, Palau District. Defendant plead guilty to assault with a dangerous weapon and was sentenced to a term in the district prison.

[1] An individual may be punished criminally and made to respond in civil damages for the same act. *Konick v. Champneys*, 183 P. 75, 6 A.L.R. 459.

[2] The Trust Territory statute in question, Sec. 377-A, of the Code, provides a criminal penalty for unlawful assault and battery. Commission of the offense is negligence *per se*. Both civil and criminal liability for the same act is discussed in *Moolang v. Figir*, 3 T.T.R. 455 at 458.

[3] When conduct which results in harm to another is defined by statute as a criminal act it is negligence *per se*. In *Pratt v. Daly* (Ariz.), 104 P. 2, 147, 148, negligence is described:—

“Actionable negligence is of two kinds, statutory and common law. Whenever a valid statute or regulation provides that a certain thing must or must not be done, if a failure to comply with such regulation is a proximate cause of injury to another, such failure is actionable negligence *per se*.”

[4] Civil liability may arise from mutual combat which may or may not include a criminal offense. 6 Am. Jur. 2d, Assault & Battery, § 157, 6 A.L.R. 388, 30 A.L.R. 199, 47 A.L.R. 1092.

The testimony of the parties in this case was in direct conflict as to the altercation between them. Plaintiff claimed defendant, being drunk, attacked him with a knife without provocation.

Defendant asserted that he and the plaintiff and others engaged in a drinking bout; that plaintiff attempted to

attack him; that another person, Kelengok, who was a member of the drinking party, struck him with a club and knocked him unconscious. When defendant came to—he admitted being drunk also—at his home, he obtained a knife and went in search of Kelengok at Masao's store, where the drinking party had resumed. Plaintiff and defendant then had their altercation. Plaintiff suffered a severe cut of his left wrist which required 49 days hospitalization in Koror.

Neither plaintiff nor defendant saw fit to substantiate their conflicting stories with corroborating witnesses. The defendant's account of the events is more believable than that given by plaintiff. But by accepting defendant's account the court cannot, as a matter of law, relieve the defendant from liability.

[5] The rule for civil liability for battery is set forth in Restatement of the Law of Torts, 2d, Sec. 13:—

“An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person . . .”

[6] The defendant expressed an intent to harm a third person—Kelengok—but instead while fighting with the plaintiff inflicted harm on him. He is liable even though his original intent was not to harm the plaintiff.

Section 16 of the Restatement adds to the rule stated in Sec. 13:—

“(2) If an act is done with the intention of affecting a third person in the manner stated in Subsection 1, but causes a harmful bodily contact to another the actor is liable to such other as fully as though he intended so to affect him.”

[7] Sometimes when parties engage in a fight, liability for injury may be avoided by proof that the accused used the dangerous weapon in self-defense. The rule of law is:—

“To justify resistance with a deadly weapon in a manner likely to cause death or serious injury to the opposing party, the defendant

must have had a reasonable fear of loss of life or of great or serious bodily injury." 6 Am. Jur. 2d, Assault & Battery, see 158, 159, 25 A.L.R.2d, 1217.

[8] There was no evidence that an unarmed old man, even though he may have been the aggressor, could have reasonably caused fear of serious bodily injury in the mind of the defendant to justify defendant's use of the knife upon the plaintiff.

[9] Having determined liability, the amount of recovery must depend upon the evidence of loss for special damages and upon reasonable compensation for pain and suffering. *Rubelukan v. Falewaath*, 3 T.T.R. 410 and on appeal 4 T.T.R. 527.

It is not only difficult but almost impossible in the Trust Territory to establish special damages in connection with a tort claim. Hospitalization and medical expenses are not collected from Micronesians unable to pay for them. Loss of earnings is scarcely provable for a person existing in a subsistence economy.

In *Ngiraingas v. Jose*, Palau Civil Action No. 416, the court said:—

"Counsel for plaintiff acknowledged the problem in his summation, when he declared it to be impossible to show the loss with certainty, and asserted that there must be a degree of speculation if justice is to be done. Counsel is correct, if it is recognized that any speculation must be within bounds prescribed by the evidence; the result must inevitably be an award which is smaller than the amount of real, but unascertainable, loss."

[10] Granted there must be some speculative determination to avoid an injustice, nevertheless, there also must be some evidence upon which to speculate. For instance, in this case the plaintiff claimed he was unable to continue raising pigs because of his injury. But there was no evidence plaintiff ever sold a pig. All the court was told was that plaintiff had two pigs—the family ate one and the other was contributed to a clan feast.

Plaintiff also claimed to be a commercial fisherman and that if he "kept fishing" in a month he could earn \$6.00. There was no testimony plaintiff ever earned that amount or if he did that he couldn't continue to earn that amount with the help of his grandson to paddle the canoe. The evidence shows he continued to fish with his grandson after his injury. There is nothing here upon which to fix even a speculative loss of earnings.

[11, 12] All that we have left upon which to establish damages is compensation for pain and suffering. This may not be precisely calculated because money is not the equivalent of pain and suffering. But here there must be a showing that money is being paid for the pain that could not otherwise be avoided.

[13] *Rubelukan v. Falewaath*, 3 T.T.R. at 413, recites the doctrine of avoidable consequences. In the present case the plaintiff, two years after the injury, continues to suffer pain, he says. But he also admits that, "because of the pain," he has not followed the therapeutic exercises which would have improved the condition of his hand. Failure to follow "doctor's orders" mitigates against entitlement for money damages for all past and future pain. The court will allow only what it deems to be reasonable under the circumstances. Since neither counsel made any suggestions as to a reasonable amount under the circumstances found here, the court will allow an amount reduced from the sum the plaintiff might reasonably have expected to receive.

In a maiming case (loss of part of an ear) this court was compelled to arrive at a "reasonable" amount for pain and suffering in *Ngeruangl v. Ramangesawul*, 3 T.T.R. 403. An allowance of \$250 was made. Under the circumstances of the present case we deem that sum to be a reasonable amount.

JUDGMENT

It is therefore,

Ordered, adjudged, and decreed:—

That plaintiff have and is hereby granted judgment against the defendant for the sum of \$250.00 with interest thereon at the rate of 6% per annum from date of judgment until paid, together with costs as provided by law upon filing an itemized claim.