Johnson v. Gibbons, 11 ROP 271 (Tr. Div. 2004)

MATTHEW JOHNSON and MEREDITH ALLEN,
Plaintiffs,

v.

YUTAKA M. GIBBONS,
Defendant.

CIVIL ACTION NO. 03-386

Supreme Court, Trial Division
Republic of Palau

Decided: August 20, 2004
⊥272
LARRY W. MILLER, Associate Justice:

This matter is before the Court following a trial on plaintiffs' claims against defendant. This opinion constitutes the Court's findings of fact and conclusions of law.

FACTUAL OVERVIEW

Notwithstanding the strong feelings engendered by this case, both among the parties and the public generally, what actually happened is not in much dispute. Plaintiffs Matthew Johnson and Meredith Allen arrived in Palau in August 2002. Mr. Johnson had been hired as counsel for the Palau Public Lands Authority. Ms. Allen became the Public Defender.

On January 7, 2003, following a discussion between Johnson and his supervisor, Grace Yano, the Executive Director of PPLA, it was decided that both would attend a meeting of the Board of Directors of the Koror State Public Lands Authority that was scheduled to be held that afternoon. Defendant Yutaka M. Gibbons bears the paramount chief title Ibedul of Koror State and was, at the time,[1] the Chairman of the KSPLA Board.

Johnson arrived at the Koror State Office building sometime after lunch.[2] He was directed to a conference room by a secretary, Leonora Bates, spoke briefly with Carita Asanuma, then KSPLA's Executive Director, and then was introduced to Gibbons, whom Ms. Asanuma identified as Ibedul and as Chairman of KSPLA. There followed a discussion lasting somewhere between ten and thirty minutes,[3] in which Gibbons repeatedly attempted to persuade Johnson to leave and attend a subsequent KSPLA Board meeting and in which Johnson repeatedly stated his

[1]To the Court's understanding, there is an ongoing dispute as to whether Mr. Gibbons remains in that position. The Court does not mean to offer any view on that dispute, which is in no way pertinent here, but simply focuses on his status at the time.

[2]Ms. Yano did not appear, though the record is silent as to why not.

[3]Various time estimates were offered at trial. The Court tends to believe the lower estimate is probably more accurate, given the testimony about what was said, and given the general tendency of witnesses–in the Court's experience–to overestimate how long things take to happen.

intention to stay for the meeting that day. Among the points mentioned by Gibbons ⊥273 were the facts that Johnson was not on the agenda for that day's meeting and that the meeting would be conducted in Palauan. Among the things said by Johnson was that the meeting was a public meeting and that the building was a public building. Although it seems clear that tensions began to rise as the impasse developed, there is no evidence that either party raised his voice and, to the Court's understanding, both remained seated as the discussion progressed.

Eventually, Gibbons became angry, and got up from his seat; he left the room and left the building followed by Edobo Temengil, who had been seated near him and who had overheard much of the discussion.[4] Gibbons went to his car and got a baseball bat from the trunk. When Mr. Temengil said words to the effect of "Pity him, he's just an American who doesn't know anything," Gibbons responded that he intended only to scare Johnson, but not to strike him, and he testified that that was indeed his intention.

The parties differed as to the details of what happened next, but the key facts are not in question. After feinting at Johnson with the baseball bat and eliciting no response or movement, Gibbons swung the bat forcefully and struck Johnson at least three times, once shattering the ulna bone of Johnson's left forearm,[5] another leaving bruises on his right arm and then, after Johnson had finally leapt from his seat and headed toward the door, striking him from behind with sufficient force to leave a large welt across his back. While the Court is skeptical of Gibbons' assertion that he intended the first hard blow to strike Johnson only on his left shoulder, it also does not have enough evidence to conclude–as Johnson contended but Gibbons denied–that Gibbons intended to kill him. Clearly, though, the blows were struck in extreme anger, with the intention of injuring Johnson, and the potential, if the initial blows had struck him in the head instead of his upraised arms, to cause grievous injury.

The incident ended with Johnson running toward a set of double doors, first running into the door on the right side, which turned out to be locked, then escaping through the door on the left side and running from the Koror State Office back to the PPLA office from which, after briefly meeting with the police, he was taken to the emergency room and there met by his wife.

Within days, and on the advice of doctors here, both plaintiffs traveled to Manila where Johnson underwent surgery and a metal plate was implanted in his left forearm. The plate was removed in a second surgery, also in Manila, nearly a year later. In the interim, there were several months of recuperation, with the most severe pain subsiding after several weeks and Johnson being able to resume physical activity within the next four to five months.

Both plaintiffs also testified that in the aftermath of the incident they were fearful of further violence, their anxiety arising both out of threats from unknown persons, delivered both in person and over the phone, and from warnings given them by friends and acquaintances. This

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[4]Johnson testified that, before leaving, Gibbons had told him to "Get the hell out of here." Gibbons denied having said that but agreed that he had left in anger.

[5]In medical terms, Johnson suffered a "comminuted" fracture. According to the medical dictionary in the Court's library, "comminuted" means "[b]roken into a number of fragments; denoting especially a fractured bone." *Stedman's Medical Dictionary* 348 (1966)

fear also subsided as time ⊥274 passed, but was revived in the days following Gibbons' sentencing in the criminal case during which first one and then all of their car's tires were slashed.

LIABILITY

On these facts, there is little or no question concerning Mr. Gibbons' liability. This Court's Decision and Order of May 28, 2004, found that he was liable to Mr. Johnson for the intentional tort of battery,[6] and he has not disputed that he is also liable to pay loss of consortium damages to Ms. Allen.[7]

Johnson also made a claim for intentional infliction of emotional distress, but the Court believes it is unnecessary to address that issue. Since the finding of liability for battery already allows recovery for mental suffering,[8] the Court believes there is no need to determine liability for intentional infliction–which requires a demonstration of *severe* emotional distress, *see* Restatement § 46–and thus would require Johnson to meet a higher burden of proof to recover damages to which he is already entitled.

DAMAGES

Four categories of damages are at issue: plaintiffs' out-of-pocket costs, general damages for Mr. Johnson's pain and suffering, damages for Ms. Allen's loss of consortium, and punitive damages.

1. The bulk of plaintiffs' out-of-pocket costs, which totaled more than $13,000, have already been reimbursed through the criminal restitution process. Contrary to plaintiffs' contention at closing argument, Section 920A(1) of the Restatement makes clear that payments

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[6]This may be as good a place as any to note that, as a legal matter, the presidential pardon received by Gibbons is a non-issue in this case. This Court's grant of partial summary judgment as to liability was based on the largely undisputed material facts presented in Johnson's motion–i.e., that Gibbons struck him in the circumstances described above–and not on the collateral effects of Gibbons' plea of guilty to Assault and Battery with a Dangerous Weapon. Thus, the nullification of that conviction by the pardon does not affect the Court's prior ruling. As a factual matter, the proceedings of the criminal case–guilty plea, sentencing, payment of restitution, etc.–are matters to which both sides have alluded both in testimony and in argument.

[7]*See generally* Restatement (Second) of Torts § 693(1) ("One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse . . . ."). All subsequent references to the Restatement are to the Restatement (Second) of Torts, published by the American Law Institute in 1965 and applicable here–in the absence of any governing statute or any evidence of custom–pursuant to 1 PNC § 303.

[8]*See* Restatement § 924 ("One whose interests of personality have been tortiously invaded is entitled to recover damages for past or prospective . . . bodily harm and emotional distress . . . ."); *see generally* 6 Am. Jur. 2d *Assault and Battery* § 149 (1999) ("The rule is well settled in a civil action for assault and battery, where it is shown that physical injury was inflicted upon the plaintiff, he may recover damages for his mental suffering caused by the tortious act.").

made directly by a tortfeasor to an injured party are not subject to the "collateral source" rule, but are "credited against his tort liability." *See id.* cmt. a ("If a tort defendant makes a payment toward his tort liability, it of course has the effect of reducing that liability."). Although the Court ⊥275 has not come across any discussion of this principle in the context of restitution payments, it can think of no good reason, as a matter of either criminal law or tort law, to require a defendant to pay the same costs twice.

On the other hand, although Mr. Gibbons is probably correct that out-of-pocket costs incurred by Allen in caring for her husband are not recoverable on *her* claim for loss of consortium,[9] they are recoverable as an element of Johnson's damages. An injured party is generally entitled to recover the reasonable value of medical and nursing services required by his injury, even when those services are provided by a family member. 22 Am. Jur. 2d *Damages* § 175 (2003) (hereinafter *Damages*). Both lost income, *see id.*, and reasonable travel expenses, *see id.* § 176, are recoverable as damages.

With these considerations in mind, plaintiffs' unreimbursed expenses, comprised principally of lost wages for both plaintiffs during their two medical trips to Manila and totaling $2754.89, are recoverable and will be included in the judgment amount.

2. In addition to out-of-pocket costs, "the law is clear that an award for pain and suffering is a proper element in a plaintiff's recovery for personal physical injuries tortiously inflicted." *Damages* § 200. It is said that "[a]wards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury." *Id.* § 221. There being no juries in Palau, however, the Court is on its own.

Here, it is undisputed that in the immediate aftermath of the incident and again following the surgery on his arm, Johnson endured a great deal of pain. Although that pain lessened over time, it is also clear that for a several-month period, Johnson was unable to participate in various athletic activities. On the other hand, Johnson has long since resumed his participation in these activities and has suffered no permanent injury other than a slight loss of sensation in the area where the surgery was performed.

As far as mental or emotional injury is concerned, there is no doubt that the incident itself, which ended with Johnson severely injured and running in fear for his life, was deeply disturbing and should be factored into an award of general damages. The great bulk of both plaintiffs' testimony concerning their fears and anxieties, however, although clearly sincere, stemmed from the communications and actions of others–both well- and ill-intended–that are not properly attributable to Gibbons. *See generally Damages* § 324 ("A tortfeasor is liable only for the damages caused by his or her negligent or intentional act, and not for damages by separate or intervening causes. . . . [T]he damages must be directly traceable to the actions of the defendant, rather than being the result of intervening causes."). While plaintiffs expressed their belief that

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[9]The Restatement is somewhat confusing on this point. *Compare* § 693 (allowing recovery "for reasonable expense incurred by the second spouse in providing medical treatment") *with id.*, cmt. f (stating that "the deprived spouse can recover expenses for medical treatment of the impaired spouse only for those expenses that have been incurred solely by the deprived spouse").

Gibbons could have done more to defuse the high emotions engendered by the incident and the controversy that followed, and while some of the threats were made in his name (*e.g.*, "Ibedul wants you out of Palau"), they both conceded that they had no information that ⊥276 Gibbons, by himself or directing others, took any further action to injure or disturb them.

With these observations, and at the risk of repeating itself, the Court again stresses that pain and suffering "are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured." *Bailey v. Fish & Fins, Ltd.*, Civil Action No. 335-90, Decision at 7 (Tr. Div. Mar. 22, 1994). Considering the evidence presented, taking into account the small universe of damages awards in prior personal injury cases in Palau, but also cognizant that each case must be decided on its own, the Court will include in the judgment an award of general damages in the amount of $30,000.

3. Like general damages, the damages recoverable for loss of consortium "are not matters of economic loss susceptible of pecuniary proof." Restatement § 693 cmt. f. The evidence showed that the physical and emotional effects of the incident placed a great strain on plaintiffs' marriage. The Court finds that an award of $10,000 is appropriate.

4. The final element of plaintiffs' damages claims is Johnson's request for punitive damages. Under Section 908(1) of the Restatement, punitive damages are defined as "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." Johnson's claim in this regard raises two questions: Is an award of punitive damages appropriate and, if so, should the amount of damages be reduced as a result of Johnson's actions?

The answer to the first question is yes. The Court believes there should be no doubt that what Gibbons did–striking and injuring an unarmed person with a baseball bat in a public place and in the absence of any threat of injury to himself or any other persons–is properly classed as "outrageous conduct," that it was and is deserving of punishment, and that it is conduct that he–and all persons in Palau–should be deterred from repeating in the future. Gibbons readily admitted at trial that he has trouble controlling his anger and it is to his credit that he did not seek to argue that he had done the right thing, but rather apologized for his actions.

The second question posed by the Court arises out of Section 921 of the Restatement, which explains that while "[c]ompensatory damages are not diminished by the fact that the injured person provoked the tortfeasor . . . the provocation is considered in determining the allowance and amount of punitive damages." In its earlier decision, the Court concluded that Johnson had done nothing to suggest that he wanted to start a fight with Gibbons. It left open the question whether Johnson could be said to have provoked Gibbons into striking him such as to reduce Gibbons' responsibility to pay punitive damages.

The answer to this question, the Court finds, is no. As summarized above, there is no evidence that Johnson raised his voice or said anything that would ordinarily be considered insulting. The most "provocative" thing Johnson is claimed to have said (although he denied it

and the evidence is in conflict) was "If you want me to leave, you'll have to make me leave."[10] But those words,⊥277 assertedly delivered not with fists raised but while still seated, could not be considered an invitation to fight, *see* Decision and Order at 3 & n.6 (May 28, 2004), nor were they taken that way by Gibbons. Instead, it is clear that what set Gibbons off was not anything in particular that Johnson had said,[11] but the simple fact that he refused to leave, or to react in any way, even when confronted and threatened by Gibbons with the baseball bat.[12] The Court would be hard-pressed to conclude, and Gibbons doesn't really argue, that this mere refusal to budge would constitute provocation in the ordinary legal sense of the term.[13]

Rather, it is Gibbons' argument (or rather his counsel's) that provocation should be judged on a subjective basis from Gibbons' unique perspective as paramount chief. Gibbons has offered no authority for this proposition, and the Court is inclined to disagree. In tort law generally, and other areas of the law, objective standards–of what the "reasonable man" would or should do, *see*, *e.g.*, Restatement § 283 (applying the reasonable man standard for negligence)–are typically applied. Putting aside the unusual case, as this one is, where Gibbons' distinctiveness is his role as traditional leader,[14] we would ordinarily not be inclined to find a person less culpable for bad behavior because he is unusually quick to take offense. Thus, in the law relating to homicide, where the question arises whether there was adequate provocation to reduce a charge of ⊥278 murder to manslaughter, it is clear that

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[10]Although Nora Bates testified that Johnson had spoken these words, her statements to police investigators back in January 2003–at least as transcribed by them–attributed them (or something like them) to Gibbons, i.e., "Are you going to leave or do you want me to make you leave?"

[11]The only statement that Gibbons singled out as inappropriate or rude was Johnson's suggestion that Gibbons ask his lawyer about certain regulations or procedures. But those are hardly fighting words, and what Gibbons perceived as impertinent may only have been an attorney's reluctance to give anything that might be construed as legal advice to a non-lawyer who is not his client.

[12]It is obvious that this incident arose in part out of cultural differences. But it is at this crucial moment that the cultural divide, and the utter lack of understanding between the two parties, was at its most extreme. Where Gibbons was clearly stunned at the idea that his threatening Johnson with a baseball bat evoked no fear in him, much less succeeded in getting him to leave, Johnson testified that he sat there, unmoved, because it was unimaginable to him that Gibbons would actually strike him in the presence of witnesses.

[13]It bears noting in this regard that although the legal issue is not otherwise germane to this case, Gibbons has not argued that Johnson was mistaken in his insistence that he had a right to attend the meeting. But even if he had been mistaken, there is obviously a vast difference in terms of the appropriate reaction to a person who refuses to leave a public building in the middle of the day and one, say, who refuses to leave your home in the middle of the night.

[14]Indeed, even focusing on Gibbons' traditional role, the Court is frankly not sure how it should impact this case. The Court appreciates, and hopes that Johnson would as well, that greater sensitivity is called for in dealing with a person of Gibbons' position in Palauan society and that there are circumstances where deference should outweigh legal niceties. But if a subjective test is to be applied, the question is not how Johnson should have behaved, but rather how a person in Gibbons' position should be expected to react to someone who, as Mr. Temengil put it, just "doesn't know" about Palauan culture. Should a person with the prestige and power of a paramount chief be expected to be more sensitive to perceived insults and quicker to resort to violence than an ordinary person, or should he be expected to exercise greater magnanimity and forbearance?

> [t]he test of the sufficiency of the provocation required for voluntary manslaughter is objective, not subjective . . . . The question is whether the defendant acted out of passion resulting from provocation sufficient to excite such passion in a reasonable person; it is of no moment whether the provocation was sufficient to excite deadly passion in the particular defendant.

40 Am. Jur. 2d *Homicide* § 53 (1999). The Court can see no justification for applying a different standard in the context of punitive damages.

In sum, therefore, the Court concludes that Gibbons is liable to pay punitive damages, and that such damages should not be reduced by reason of any provocation on Johnson's part. Punitive damages in the amount of $50,000 will therefore be included in the judgment.

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An appropriate judgment is entered herewith. In accordance with ROP R. Civ. P. 54(d), plaintiffs may move for an award of costs within the next fourteen days.