GILBERT U. DEMEI, Plaintiff

v.

FRANCISCO SUNGINO, Defendant

Civil Action No. 586

Trial Division of the High Court

Palau District

March 18, 1974

Auto negligence action in which defendant raised last clear chance doctrine issue. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held defendant had last clear chance where plaintiff passed auto in plaintiff's

lane and defendant continued to drive down the center of the road to the point of head-on collision.

1. **Negligent Driving—Evidence—Criminal Acquittal**

   Criminal and civil liability require different measures of proof, and acquittal of reckless driving charge in connection with head-on collision did not preclude a finding of liability for negligence in a civil action in which defendant's testimony was contradicted by plaintiff's and by police findings.

2. **Torts—Damages—Before and After Value**

   Generally, measure of damages arising from tortious damage to an automobile is the difference between the automobile's value immediately before and immediately after the accident.

3. **Torts—Negligence—Last Clear Chance**

   Though plaintiff driver may have been negligent in passing auto parked in his lane when defendant's oncoming auto was approaching, there would have been no accident if defendant had stopped driving down the center of the road, so that defendant's continuing negligence to the moment of the collision was the proximate cause of the collision and defendant could not successfully claim last clear chance doctrine barred recovery by plaintiff.

Assessor:	FRANCISCO MOREI, *Acting Presiding Judge, District Court*
Interpreter:	AMADOR D. NGIRKELAU
Reporter:	SAM K. SASLAW
Counsel for Plaintiff:	JONAS W. OLKERIIL
Counsel for Defendant:	JOHN O. NGIRAKED

TURNER, *Associate Justice*

Plaintiff and defendant, while driving their respective automobiles, collided on the Malakal causeway a short distance on the Koror, or northeastern side, from the entrance to the Peleliu Club.

Plaintiff stopped behind a passenger vehicle parked on the right side of the road. The occupants of the parked car were changing a right-rear tire. Plaintiff stopped to help by shining light on the work. However, the parked car occupants told him they had finished the tire change and did not need help from plaintiff's headlights.

Plaintiff then proceeded to his left to drive around the parked car. As he did so he saw the lights of an approaching car, which was driven by defendant. Plaintiff said he could not judge how fast the approaching car was being driven but that it was far enough away, he believed, to permit him to clear the parked car and return to the right lane of the causeway.

The maneuver was not successful. Before plaintiff could entirely clear the parked car his vehicle was struck on the left front side by the defendant's vehicle. The impact drove plaintiff's car off the road into the lagoon. It was low tide at the time and plaintiff's car therefore was not submerged in water.

The principle dispute between the parties concerned the location on the road of the collision. The defendant testified the plaintiff pulled from behind the parked car and "hit my car," when the front of the parked car was parallel to the front seat of the plaintiff's car. Defendant also testified he was in his own right-side lane when plaintiff's car hit him.

The defendant's account of the accident was not only contrary to plaintiff's account but also contradicted the findings of the police who investigated the accident. The police ascertained the point of impact to have been in the right lane of the road. (Plaintiff's Exhibit 1.) The point of impact was indicated by broken glass from the left-front headlights of both cars in the right lane, two feet from the center of the road.

The impact occurred in front of the parked car, not when plaintiff's car was parallel with the parked car as defendant insisted. If the collision occurred as described by defendant, the plaintiff's car could not have ended up in the lagoon. It would have hit the parked car.

Neither the plaintiff nor his two passengers were injured. The defendant, however, lay down in the front seat

of his car and "went to sleep." He was taken to the hospital by police and released the next day. It almost has become traditional in the United States when there is a civil action for tort in which drinking is involved for the defendant to claim he was not drunk and had only one drink. This traditional answer was given in the present case by the defendant who declared he had been playing pool at the Boom Boom Room and had drunk only one can of beer before starting out for the Peleliu Club. The Court takes judicial notice that both establishments are heavily patronized bars.

[1] Despite the foregoing compelling circumstances the defendant was tried and found not guilty of reckless driving by the District Court. The acquittal of the criminal offense does not preclude, however, a finding by this Court of civil liability for negligence. Criminal and civil liability require different measures of proof. In this civil action the Court is convinced by the evidence that defendant was negligent and that it was the proximate cause of harm to plaintiff's property.

Measurement of damages to property due to the negligence of another is subject to recognized and reasonably standardized rules of law. This court has decided questions of damage resulting in automobile accident cases many times.

[2] The measure of damages was considered in *Neton v. Ywelelong*, 5 T.T.R. 300, in which the general rule is stated:—

> "The measure of damages arising from a tort under the common law is basically the value of the automobile immediately before and immediately after the accident."

That the common law for tort liability, rather than local custom, is applicable was decided in *Etpison v. Indalecio*, 2 T.T.R. 186, and *Ychitaro v. Lotius*, 3 T.T.R. 3.

The *Neton* case also was decided upon the rule of law

that the measure of loss is "the cost of repairs when they can be reasonably made." Although plaintiff submitted evidence as to the new value of his car together with its 3-month age such information was not necessary because the amount of the repair bill of $985.00 was not challenged by the defendant.

In his closing argument defendant's counsel urged the proposition that plaintiff should have avoided the accident and since he failed to do so defendant was not liable under the doctrine of "last clear chance." He cited in support the Palau case of *Etpison v. Indalecio*, 2 T.T.R. 186. Since the opinion in that case does not recite the circumstances of the controversy all that it can be said to stand for is that the doctrine of "last clear chance" under the common law is applicable in a proper case in the Trust Territory. The doctrine is one to be applied with caution and all of its elements must be present before it becomes applicable. The normal application of the doctrine is because of a defendant's failure to avoid injury to a plaintiff even though the plaintiff also was negligent when the defendant had the "last" opportunity to avoid harm to the plaintiff.

The Restatement of the Law of Torts, Sec. 480, applies the doctrine to a "negligently inattentive plaintiff." This is defendant's theory. The rule is stated:—

> "A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant
>
> (a) knew of the plaintiff's situation, and
>
> (b) realized or had reason to realize that the plaintiff was inattentive and therefor unlikely to discover his peril in time to avoid harm, and
>
> (c) thereafter is negligent in failing to utilize his then existing ability to avoid harming the plaintiff."

When a defendant fails under appropriate circumstances to avoid injury to the plaintiff, even though the plaintiff also was negligent in placing himself in a position of peril, the defendant is liable for failing to avoid the harm. The doctrine applies to the proximate cause of the injury when both parties were negligent.

[3] Under the rule of proximate cause the liability of the defendant is clear. Had he not been negligent, that is, had he driven on his half of the road instead of down the center there would have been no damage, regardless of plaintiff's negligence of passing the parked vehicle in the face of defendant's oncoming automobile. In other words, the proximate cause in this case was not plaintiff's original negligence but was the continuing negligence of the defendant to the moment of the accident. It was the defendant, not the plaintiff, who had the "last clear chance" to avoid the injury. His failure to do so gives rise to his liability.

The text writer in 65A C.J.S., Negligence, Sec. 136 et seq. says:—

"The doctrine of last clear chance relates to a person having charge of an instrumentality who can, but fails to, bring it under control and so avoid inflicting injury."

As to application of the doctrine when the proximate cause is attributable to the defendant, or conversely its non-applicability when the proximate cause is that of the plaintiff, Corpus Juris says in part at 65A C.J.S., Negligence, Sec. 139:—

"The rule, stated somewhat differently, is that the doctrine of the last clear chance is applicable only where defendant's failure to avoid the consequences of the injured person's negligence was the last negligent act and hence the proximate cause of the injury...."

Under the facts of the present case the doctrine is not applicable to the plaintiff to relieve the defendant of liability.

Ordered, adjudged and decreed:—

Plaintiff shall have and recover from the defendant, because of defendant's negligence which was the proximate cause of plaintiff's damage, the sum of $985.00, being the cost of repair of plaintiff's vehicle, together with interest at the rate of 6% per annum from date of Judgment until paid, and such costs as may be claimed in accordance with law.