SUPREME COURT

A

ANGILA WATI

v.

KHATMUN NISHA

B [SUPREME COURT (Williams, J.) Lautoka 12 October 1979]

Civil Jurisdiction

Damages for assault—provocation may take away aggravated damages.

S. Prasad for Plaintiff
M. Tappoo for Defendant

C Claim for damages for Personal Injury sustained by plaintiff when defendant assaulted her with a knife.

The facts are set out in the judgment. The observations of the trial judge based on authorities to an allegation that defendant acted in self defence were:—

1. Provocation (if any) cannot be used to reduce damages in a case of this kind.

D 2. Provocation may be used to bar recovery of exemplary damages.

Judgment for plaintiff for $7010.

Cases referred to:

Lane v. Holloway (1968) 1 Q.B. 379
Murphy v. Culhane (1976) 3 All E.R. 533

E

WILLIAMS, J:

Judgment

The female plaintiff Angila Wati who is 29 years of age claims damages from the female defendant, Khatmun Nisha who assaulted her with a cane knife severing nerve lesions just at the wrist. According to P.W. 2, Dr. MacNamara, the Consultant F surgeon at Lautoka hospital, there is severe motor and sensory loss of function and the plaintiff has lost the use of her right hand. He estimates the total permanent disability at 60% using the scale in the Workmen's Compensation Ordinance and states that there will be no improvement.

She claims special damages of $20,000 for loss of earnings; $200 medical expenses and general damages.

G The assault took place on 23rd October 1977 and the defendant was convicted in the magistrate's court Lautoka on 23rd February, 1978 following a plea of guilty. There is an admission to that effect in the defence nevertheless in her written statement of defence the defendant pleaded self-defence and that she used no more force than was necessary in the circumstances. One wonders why that line of defence, if true, was not adopted in the magistrate's court. Mr Tappoo for the defendant submitted that a conviction for criminal offence causing severe personal injury does not H prevent a denial of liability coupled with evidence showing an absence of civil liability and on that ground argued that the written statement of defence was not inconsistent. In the instant case the defendant had not been convicted following a trial but upon her own plea of guilty. She cannot now deny guilt in her pleadings. Of course she can still give evidence contesting the claim for and quantum of damages. A man convicted on his own plea of careless driving may not be liable in damages

for injuring a pedestrian who haphazardly walked immediately into the path of the car without looking or taking any precaution to see that the road was clear. The pedestrian in such a case could just as easily have been injured by a car which was not being driven carelessly. But this would not permit the motorist to deny that he was convicted of careless driving, or to plead that he was not driving carelessly. A

The plaintiff admits that she began associating with the defendant's husband in Tavua about 1972 and had two children by him. She lived with him at Waiyavi, Lautoka, until 1977 by which time he was occupied as a taxi-driver. In 1977 he returned to his legal wife, the defendant, and took up residence in one room of a house in Calcutta Street owned by Vidya Wati. Needless to say there were frequent quarrels between the women folk which culminated in the assault and injury in question. The plaintiff agrees that at the material time she called the defendant a prostitute and told her to come out and fight. She denied that she entered the defendant's room with the intention of assaulting the defendant. B

The latter alleges that she was cutting meat in her room, that she chastened a child playing outside and the plaintiff thinking the comments were directed at her entered the defendant's room to assault her. I do not believe that picture of the incident. C

I find that the defendant during an altercation received the plaintiff's abusive challenge to come out and fight and that she came out armed with a cane knife. I do not think that the plaintiff being unarmed would be likely to attack the defendant in those circumstances. In my view the blow with the cane knife was struck by the defendant in a spirit of aggression and that she did not require a cane knife to defend herself. D

One thing is apparent from the evidence and it is that there was never any need for the defendant to use a cane knife. It is a most deadly weapon and it could only be in circumstances of extreme danger to life or of suffering severe bodily injury that one would use such a weapon. In this case there were two women one of whom was not armed. There could not be the slightest excuse for such a violent attack on the plaintiff. I was not impressed by the defendant's evidence that the plaintiff received the injury by grabbing the blade when she thought she was going to be struck. E

The defendant submits that the plaintiff's conduct in the past and immediately prior to the assault should be taken into account for the purpose of reducing damages. Mr Tappoo argues that the plaintiff was guilty of extreme provocation in coming to live in the same house as the defendant and her husband after they had reunited. He suggests that it indicates the plaintiff's intention of enticing the defendant's husband to rejoin the plaintiff. F

I do not think that provocation of that nature can be urged to reduce damages in a case of this kind. Clear support for that view appears in *Lane v. Holloway* (1968) 1 Q.B.D. 379. In that case a man of 64 years who was not in good health was involved in an altercation with a young man of 23 years. The elder man thought he was about to be assaulted and aimed a blow at the young man's shoulder. In retaliation the young man struck the older in the eye causing very severe injuries indeed. In his judgement, Denning, M. R. said at p. 378, G, G

> "Provocation by the plaintiff can be used to take away any element of aggravation. But not to reduce the real damages." H

A Salmon L. J. said at p. 390, C,

> "I entirely reject the contention that because a plaintiff who has suffered a civil wrong has behaved badly, this is a matter which the court may take into account when awarding him damages for physical injuries which he has sustained as the result of the wrong which has been unlawfully inflicted upon him."

B It was submitted by Mr Tappoo that *Lane v. Holloway* (supra) has been over-ruled by the decision in *Murphy v. Culhane* (1976), 3 All E.R. 533. Culhane struck Murphy on the head with a plank and killed him. He pleaded guilty to manslaughter. Murphy's widow brought an action for damages. Culhane's defence included a plea that Murphy was guilty of contributory negligence in that he initiated the affray in which he was killed. A motion for judgment based on the defendant's admissions succeeded and the defendant appealed. The Court of Appeal did not over-rule *Lane* C *v. Holloway* but explained that it did not apply. At p. 536 f/g Lord Denning M.R. said of *Lane v. Halloway*—

> "Provocation it was said can be used to wipe out the element of exemplary damages but not to reduce the actual figure of pecuniary damages."

He went out to explain that where the conduct of the plaintiff was trivial and that of the defendant savage and entirely out of proportion to the occasion the defendant D can fairly be regarded as solely responsible for the damage done.

In *Murphy v. Culhane*, the deceased had set out with a gang for the express purpose of beating up Culhane. There was an affray in the course of which Culhane killed Murphy. Lord Denning said at p. 535 h that the deceased could in those circumstances be fairly regarded as partly responsible for the damage he suffered. He indicated that the deceased's conduct was such that he might have been sued in E tort.

In the instant case I find that the plaintiff's conduct was not such as would have given rise to an action in tort.

I turn now to the issue of damages. The plaintiff gave no particulars of employment, profession, or earnings in her pleadings. Her claim for $20,000 as special F damages is obviously a misconception by her advocate as to what constitutes special damages.

She says that she used to work for Vidya Ram, owner of the house where the assault occurred as a kind of domestic, in return for food and accommodation. In addition she earned $6.60 per week approximately taking in work as a needlewoman. The plaintiff seems to be one of those persons who had never been in the position of seeking paid employment. Her father managed the Tavua Hotel and she used G to help him occasionaly.

In 1967 she was married at which time she would be 17 years of age. She had little opportunity of testing herself on the employment market because she left school at the age of 17 years which must have been shortly before her marriage. She is now a divorcee but has a child of 12 years by her husband which is cared for by her parents. Being parted from her husband in 1971 there was no need for her to seek a job H because she was very soon living with the defendant's husband in a de facto relationship until he left her in 1977. It was October 1977 when the assault too took place and she cannot have had much chance to find work by that time, apart from what seems to be a semi-charitable employment provided by Vidya Ram.

She says that shortly before the assault she had obtained employment of a temporary character as a demonstrator for Cope All Ltd. in Lautoka connected with sales of their biscuits. She says that the salary was to be $25.00 per week but a day or two before she was due to take on the job she received this very serious injury. It is not apparent how long the job would have lasted and the salary may be on the high side because of its temporary nature. However, it shows that although she had just been on the labour market for a short time she nevertheless succeeded in getting some employment. A

Probably she could if she pressed hard have got a job as a shop assistant. Having attended school until the age of 17 years she could perhaps have taken on shop work or simple clerical work. She may have managed to gain employment as a housegirl. B

At present, in addition to acting as a kind of caretaker for Vidya Ram's house whilst Vidya Ram is overseas she is acting as a kind of companion to a relative's sick mother and gets some meals for that. C

It is improbable now that she could be employed as a demonstrator, shop assistant or full time housegirl and she certainly cannot sew, having virtually lost the use of her right hand.

I do not accept the contentions of the defendant and her husband that the plaintiff can lift fairly heavy objects. However, the plaintiff explained that if she can manipulate something to a point above her wrist she can make some use of her arm. Being right-handed she is particularly handicapped by the loss of her right hand. D

The defendant earns $13.00 per week as a tailoress for Amdigo Co. Ltd. Whether she is employed part-time or full time was not revealed. I have little doubt that the plaintiff would have been capable of earning that much had she had the opportunity and the need to look around for employment prior to the injury. She is a reasonably slim and attractive female and that could scarcely be a disadvantage in the quest for employment. E

In addition to any regular employment she also had the capacity to earn about $6.00 per week by sewing.

The time has arrived when she has to have a job, that she has been deprived of the greater part of her earning powers. F

I would estimate that her earning capacity was between $20.00 per week and that is something lower than the wage of a demonstrator and the $13 which the defendant earns, say $16 per week. It is apparent that she can make herself sufficiently useful domestically to earn food and accommodation, which seems to extend to the two children aged 5 years and 8 years which she bore the defendant's husband. Her present earning capacity represents the value of such accommodation and food which I assess at $10.00 per week. Accordingly I assess her loss of earning capacity at about $6.00 per week. G

She is 29 years of age and taking a multiplier of 13 the amount would come to $5,056 and in the event of a lump sum payment I would reduce it to $4,500. This sum if invested at 6% would provide an income just below $6.00 per week. With present rates of inflation the value of that income is bound to depreciate. H

A With regard to special damages, that is to say the actual loss of earnings to date I accept that the plaintiff was earning $6.00 per week as a needlewoman. She did not lose her accommodation and food as a result of the injury and so I estimate that part of her loss at $6.00 per week as from 23.10.77 to the date herof, a period of say 100 weeks, which amounts to $600.00. After the wound had healed there would be no need for taxi which seems to be the basis for her medical expenses claim. Walking or bus riding would not affect the injury to her right-hand. The claim of $200.00 for B taxis is ridiculous. I allow $10.00.

There is the question of loss of amenities. The loss of use of a right hand will no doubt render difficult and time taking such ordinary tasks as dressing, bathing, attending to one's toilet, domestic chores, writing and so forth. In addition there is the loss of an attribute which in a woman detracts from her attrativeness. For pain, suffering loss of amenities and the cosmetic damage due to the discomforting C uselessness of the right hand I award $2,500.00.

The total amount awarded is $(4,500 + 600 + 10 + 2,500) = $7,610 for which amount I give judgment for the plaintiff.

The defendant will pay the plaintiff's taxed costs.

Judgment for the Plaintiff.