

writing April 23, 1969, that unless action was taken on or before May 9, 1969, in accordance with Appellate procedural Rule 32f(1) the appeal would be dismissed; and it appearing appellant has failed to prosecute his appeal in accordance with Rule 32, it is

Ordered that the above-entitled appeal from the Trial Division to the Appellate Division of the High Court be and hereby is dismissed.

FALEWAATH, Appellant

v.

RUBELUKAN, Appellee

Civil Appeal No. 33

Appellate Division of the High Court

July 14, 1969

Trial Court Opinion-3 T.T.R. 410

Appeal from judgment of liability for damages resulting from a motor vehicle collision. The Appellate Division of the High Court, Per Curiam, affirmed the Trial Court's judgment holding that plaintiff in action was not barred from recovery by his contributory negligence where appellant was found to have acted in reckless disregard for the safety of others but that the amount of damages caused by plaintiff's contributory negligence should be deducted from the amount recoverable and that amount of damages awarded for pain and suffering is within the discretion of the Trial Court and should not be disturbed unless clearly unreasonable or plainly excessive. Judgment affirmed.

1. Torts--Negligence-Contributory Negligence

A person whose reckless disregard caused an injury is liable regardless of contributory negligence on the part of the injured party.

2. Torts--Negligence-Contributory Negligence

Amount recoverable by plaintiff who was contributorily negligent should be the amount of damage suffered less that amount which is found attributable to his neglect.

3. Torts--Damages-Pain and Suffering

Compensation for pain and suffering is an element of damage which is not capable of precise calculation.

4. Torts--Damages--Pain and Suffering

The fact that the amount of damages for pain and suffering which the court found to be reasonable is the same amount for which a plaintiff made claim is not in itself grounds for holding the determination erroneous.

5. Torts--Damages--Pain and Suffering

A determination of damages for pain and suffering is within the province of the trial court and cannot be disturbed on appeal unless clearly unreasonable or plainly excessive.

Counsel for Appellant:

RAPHAEL DUBUCHUREN

Counsel for Appellee:

LINUS RUUAMAU

Before BURNETT, *Associate Justice*, CLIFTON, *Temporary Judge*

PER CURIAM

By interlocutory judgment order entered December 15, 1966, defendant-appellant was found liable for property damage in the amount of \$25.00 and for damages for plaintiff-appellee's personal injuries resulting from a motor vehicle collision, the amount of such personal injuries to be determined upon subsequent reopening of the trial. Thereafter the court found damages for personal injuries to be in the amount of \$3,691, which included an allowance of \$1,000 for pain and suffering.

Defendant contends on this appeal that there was error in finding him liable in view of plaintiff's contributory negligence, that the amount of damage is excessive because of the plaintiff's obligation to avoid aggravation of his injuries, and that the court erred in accepting the plaintiff's suggestion as to the amount to be allowed for pain and suffering.

[1] Appellant is correct in his contention that the plaintiff was guilty of contributory negligence and the trial court in its interlocutory judgment order specifically so

found. The court also found, however, that appellant had acted in reckless disregard of the safety of the plaintiff, whose contributory negligence consequently did not bar recovery, citing Sec. 482, Restatement of the Law of Torts, Vol. 2, and Am. Jur. 2d, Automobiles and Highway Traffic, § 362. Appellant has taken no issue with the court's finding with respect to his reckless disregard. There is therefore no error in the court's application of the almost universal rule of law that he is liable, regardless of contributory negligence on the part of the plaintiff.

[2] Appellant is also correct in his contention that plaintiff has an obligation to prevent aggravation of the injuries and cannot recover for any loss which is attributable to his own failure in this regard. The difficulty, insofar as appellant's position is concerned, however, is that the trial court very carefully applied that very rule of law, and excluded from its calculation of the amount recoverable by the plaintiff that amount which it found attributable to the plaintiff's neglect.

[3-5] Appellant's contention of error as to the allowance for pain and suffering is likewise without substance. As the trial court said in its opinion, compensation for pain and suffering is an element of damage which is not capable of precise calculation. The fact that the amount which the court found to be reasonable is the same amount for which the plaintiff made claim, is not in itself grounds for holding the determination erroneous. It is clear from the court's opinion that it took into consideration the periods of plaintiff's hospitalization, necessity of surgical operations and medical treatment, and the probability that further surgery would be required. Having done so, we cannot say that the amount of \$1,000 is excessive. Such a determination is within the province of the trial court and cannot be disturbed on appeal unless clearly unreasonable or plainly

excessive. See *Davis v. Gambardella & Son*, 82 A.L.R.2d 673, 161 A.2d 583.

We find no error and the judgment of the trial court is affirmed.

FREDRIECH HELGENBERGER, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 27

Appellate Division of the High Court

September 24, 1969

Appeal from conviction of first degree murder. The Appellate Division of the High Court, H. W. Burnett, Associate Justice, reversed the conviction holding that it was error to allow prosecution to substitute a previously given statement for a witness's testimony under the guise of "refreshing recollection", and also that it was improper to introduce into evidence the entire transcript of testimony taken at a prior proceeding without requiring that a proper foundation be laid for its admission by proof as to its correctness and accuracy in reproduction and by identification of the contents of such transcript as the evidence given at the former proceeding.

Conviction reversed.

Robert Clifton, Temporary Judge, dissented.

1. Criminal Law-Corpus Delicti

The corpus delicti in a homicide consists of two elements, the first of which, the fact of death, is to be shown as a result of the second, that is, the criminal agency of another, and it must be shown beyond a reasonable doubt.

2. Criminal Law-Corpus Delicti

In proving the fact and manner of death, it is not necessary that a witness state with absolute certainty that death did result in the manner alleged by the Government, rather it is sufficient if the medical testimony establishes that a condition existed which could have resulted in death as alleged.

3. Criminal Law-Trial Procedure-Triers of Fact

Both the corpus delicti and the ultimate fact of the liability of the accused are for the triers of fact.

4. Criminal Law-Trial Procedure-Triers of Fact

In the Trust Territory in a prosecution for murder the triers of fact are the presiding judge together with two special judges provided for under Section 125 of the Trust Territory Code. (T.T.C., Sec. 125)